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Institutional Actors in *New York Times v. Sullivan*

PAUL HORWITZ*

* Gordon Rosen Professor, University of Alabama School of Law. Thank you to Matthew Bailey for research assistance. This Article is dedicated to the late David Kohler, a superb media lawyer and scholar and a generous friend and colleague of mine at Southwestern Law School. For an obituary tribute, see Lon Sobel *et al.*, *Remembering David Kohler*, 3 J. Media & Ent. L. 1 (2010). For David's own take on *New York Times v. Sullivan* on the occasion of its fortieth anniversary, see David Kohler, *Forty Years After* New York Times v. Sullivan: *The Good, the Bad, and the Ugly*, 83 Or. L. Rev. 1203 (2004).

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INTRODUCTION

Like all major cases, *New York Times v. Sullivan*,[1] which has now reached its fiftieth anniversary, is capable of multiple readings. This is less true of *Sullivan* than of some other epochal cases, especially those cases that continue to have a strong political valence. *Brown v. Board of Education*, in particular, which will mark its sixtieth anniversary this year, has provoked even more fundamental questions about its meaning and, in a deeper sense, its ownership.[2] *Sullivan* is unquestionably one of the most important decisions in First Amendment jurisprudence.[3] But debates over the case have focused more on its application and its rightness[4] than over its basic meaning. But debates there have been.

One such debate is over whether *Sullivan* is in any substantial measure a *press* case—one whose primary importance is the contribution it makes to the ability of the news media to report on public officials and events—or whether it is centrally about public commentary by *any* individual, regardless of whether that person is a journalist or not. Another is whether *Sullivan* should be read entirely as a speech (or press) case without regard to its immediate historical context, or whether it needs to be understood in light of its close connection to the events of the civil rights movement.[5] A third concerns how much *Sullivan* should be understood as involving speech on matters of public importance in general, and

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[1] 376 U.S. 254 (1964).

[2] *See, e.g., Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *compare id.* at 746-47 (plurality op.), with *id.* at 799 (Stevens, J., dissenting), 867 (Breyer, J., dissenting). *See also* Jack M. Balkin, *The New Originalism and the Uses of History*, 82 Fordham L. Rev. 641, 685-87 (2013).

[3] Henry Monaghan, voicing a widely shared sentiment, calls it "the most important First Amendment decision of the last century, and, I believe, in all of this country's First Amendment jurisprudence." Henry Paul Monaghan, *A Legal Giant is Dead*, 100 Colum. L. Rev. 1370, 1375 (2000).

[4] *See, e.g.*, Richard A. Epstein, *Was* New York Times v. Sullivan *Wrong?*, 53 U. Chi. L. Rev. 782 (1986).

[5] For treatments focusing on the relationship between *Sullivan* and the civil rights movement, see, *e.g.*, Harry Kalven, Jr., *The Negro and the First Amendment* (1965); Burt Neuborne, *The Gravitational Pull of Race on the Warren Court*, 2010 Sup. Ct. Rev. 59.

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how much it should be viewed as a means of counterbalancing *government* officials in particular.

On the whole, it seems to me, the movement in our understanding of *New York Times v. Sullivan*—and, indeed, of constitutional rights in general—has been away from contextual or institutional readings, and towards more general, universally applicable, and abstract readings.[6] There are several aspects of this view, and several reasons for it. At the level of free speech theory, *Sullivan* was fated for generalization because of the breadth and grandeur—and vagueness—of its pronouncements, such as its identification of citizen sovereignty as the "central meaning of the First Amendment."[7] At a doctrinal level, *Sullivan*, both at the time it was issued and as it came to be understood, exemplified a general trend in First Amendment law towards treating all individual speakers and their speech as similarly situated and entitled to equal status.[8] Although it was in large part a case about

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[6] On this general point, see, *e.g.*, Paul Horwitz, *First Amendment Institutions* (2013); Frederick Schauer, *Institutions as Legal and Constitutional Categories*, 54 UCLA L. Rev. 1747 (2007); Frederick Schauer, *Towards an Institutional First Amendment*, 89 Minn. L. Rev. 1256 (2005); Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 Harv. L. Rev. 84 (1998); Frederick Schauer, *Harry Kalven and the Perils of Particularism*, 56 U. Chi. L. Rev. 397 (1989).

[7] *Sullivan*, 376 U.S. at 273; *see id.* at 273-75.

[8] So described, this tendency cuts across other tendencies in First Amendment law as others have identified them. Kathleen Sullivan, for example, has identified two visions of free speech law in First Amendment jurisprudence: an "egalitarian" vision of "free speech as serving equality," and a "libertarian" vision of "free speech as serving liberty." Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 Harv. L. Rev. 143, 145-46 (2010). According to this taxonomy, an egalitarian vision of free speech is willing to countenance regulatory distinctions between speakers that do not disfavor minority speakers, *see id.* at 146-47, while a libertarian approach "treats with skepticism *all* government efforts at speech suppression that might skew the private ordering of ideas." *Id.* at 145. But even the egalitarian model, at least as applied in the world by the courts and not as it exists in the imagination of legal scholars, tends to treat all speakers alike and ask of all speech regulations whether they discriminate "on the basis of viewpoint or

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the important role played by the press in society, *Sullivan* treated individual and press speakers as existing on equal footing and enjoying equal freedoms, and that is where the emphasis has remained.[9]

More subtly, on a third level, *Sullivan* and its progeny have undergone an interesting bifurcation of sorts. *Sullivan* constitutionalized defamation law but did not simplify it. To the contrary, defamation law has become "an intricate complex of substantive, procedural, and evidentiary rules" whose "arcane" are "stock-in-trade to the libel bar but little known to others."[10] In short, notwithstanding its colonization by the First Amendment, libel law has become a preserve for specialists once again.

In that sense, *Sullivan* has undergone a separation between its broader theoretical importance and its day-to-day existence in legal doctrine.[11] It continues to enjoy influence as a repository of grand statements about freedom of speech or the press; but defamation law has once again become a complex special field whose niceties are beyond the reach of most First Amendment generalists. In the process, *Sullivan* has been diminished and domesticated—its broad statements taken for granted, and its specific details "subsumed" into an "intricate complex" of subsequent rules.[12] It is hard not to wonder whether *New York Times v. Sullivan*, which in my relative youth as a journalism and law student was viewed as one of the landmark decisions of the Warren Court,[13] is losing its place in the constitutional canon.[14]

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ideas," whoever the affected speaker may be. *Id*. at 146.

[9] *See, e.g., Citizens United v. FEC*, 558 U.S. 310, 326-27, 340-43, 351-54 (2010).

[10] David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. Pa. L. Rev. 487, 492 (1991). *See also, e.g.,* Nat Stern, *The Certainty Principle as Justification for the Group Defamation Rule*, 40 Ariz. St. L.J. 951, 970 n.114 (2008) (collecting criticisms of modern defamation law as "confusing and even incoherent"); Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation and Discourse in Cyberspace*, 49 Duke L.J. 855, 905 n.261 (2000) ("Defamation law . . . is so complex that it is almost impossible to state even the most basic proposition with certainty.").

[11] For a similar point, see Elena Kagan, *A Libel Story:* Sullivan *Then and Now*, 18 L. & Soc. Inquiry 197, 198-99 (1993).

[12] Anderson, *supra* note __, at 492.

[13] Lee Bollinger captures that sense when he writes, "For the modern era,

In this short Article, I do not seek to rehabilitate *New York Times v. Sullivan*, exactly. Nor do I canvass the many developments in defamation law that have occurred in the last fifty years. My goal here is to examine the institutional actors that play a prominent role in the decision. I focus on three key institutional players in *New York Times v. Sullivan*: the press, social movements, and the courts themselves.[15] Despite the generally individualist orientation of free speech law, I do not focus on individual speakers; although *Sullivan* clearly covers their speech as well, they do not play a prominent role in the case. It is ultimately a case about institutions.

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the fullest, richest articulation of the central image of freedom of the press is to be found in the Supreme Court's 1964 decision in *New York Times Co. v. Sullivan*. No Supreme Court case of this century is more important to our notion of what press freedom means. It was one of those rare decisions that provided a conceptual framework and an idiom for its time." Lee C. Bollinger, *Images of a Free Press* 2 (1991).

[14] On the constitutional law canon, see generally J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 Harv. L. Rev. 963 (1998). A list of "truly canonical" constitutional cases ranks *Sullivan* among them. *See id.* at 974 n.43 (citing Jerry Goldman, *Is There a Canon of Constitutional Law?*, Am. Pol. Sci. Ass'n Newsl. (Law and Courts Section of the Am. Political Science Ass'n), Spring 1993, at 2-4). A more recent study lists *Sullivan* as one of the most-cited Supreme Court decisions. *See* Frank B. Cross & James F. Spriggs II, *The Most Important (and Best) Supreme Court Opinions and Justices*, 60 Emory L.J. 407, 432 (2010). Anecdotally, however, my recent casual survey of friends and colleagues in constitutional law found that many respondents questioned whether *Sullivan* retains the celebrity status it once enjoyed.

[15] Happily, symposium pieces are not usually subject to the exaggerated claims of novelty that have become endemic in American law reviews, and I make no such claims here. Although I have certainly made broader, and hopefully slightly novel, claims about First Amendment institutionalism elsewhere, *see* Horwitz, *supra* note __, many others have also seen *New York Times v. Sullivan* as having structural and institutional components. *See, e.g.*, Bollinger, *supra* note __, at 7 (describing the case as having "built a theory of the political system and a psychological theory of its members—the state, the press, and the people. In doing so it also defined a role for [the Supreme Court].").

In my view, *Sullivan was* a press case—*and* a case about the civil rights movement, *and* about the sometimes frankly strategic role of courts in maintaining the constitutional order. *New York Times v. Sullivan* may have become more domesticated and less dramatically significant in the decades since the decision was handed down. It may occupy a lesser role in the constitutional imagination than it once did. But it is still a major decision, and every fresh reading underscores its importance, its breadth, and its sheer boldness. That is especially true when we focus on it neither as an individual speech case nor as an abstract free speech theory case, but as a site of contestation between and among some of the major institutional actors in our social, political, and legal firmament.

I. THE PRESS

In 1964, American journalism was approaching the height of its powers as an institution. Media institutions would reach their peak level of influence and public respect in the mid-1970s, not long after reporting by the *Washington Post* and others had helped force the resignation of President Richard Nixon.[16] But they were already well on their way toward that level of trust and influence by the mid-1960s. This was the era captured in David Halberstam's dynamic if breathless book, *The Powers That Be*: the era of better-educated, more sophisticated and professionalized journalists, who had lost their *Front Page*-era raffishness and become serious monitors and critics of government, society, and other institutions.[17] It was an era in which the news media had not yet become fractured by the development of Internet technology and buffeted by economic change. But neither were press organs perceived as having become so concentrated and consolidated that they had become just another untrustworthy, profit-seeking special interest.[18]

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[16] *See, e.g.,* RonNell Anderson Jones, *Media Subpoenas: Impact, Perception, and Legal Protection in the Changing World of American Journalism*, 84 Wash. L. Rev. 317, 328-29, 334-35 (2009) (collecting data and resources).

[17] *See* David Halberstam, *The Powers That Be* (1979); Anthony Lewis, *Make No Law: The Sullivan Case and the First Amendment* 207 (1991).

[18] For such criticisms, see, *e.g.,* Ben H. Bagdikian, *The Media Monopoly* (1983). *See also* Lee C. Bollinger, *Uninhibited, Robust, and Wide-Open: A Free Press for a New Century* 1-2 (2010) (describing the American press in

It is no coincidence that Halberstam himself got his start reporting on the civil rights movement in the Deep South.[19] The civil rights movement was a launching point for many of the period's greatest reporters.[20] The established press, like other major institutions, played an active role in covering segregation, racism, and racial violence in the South, and contributing to the effort to impose a "strong national consensus" on racial justice issues on the "relatively isolated outliers" in the Southern states.[21]

In sum, the press in this era was institutionally equipped to perform a vital "checking" function.[22] It supplied a legion of "well-organized, well-financed, professional [observers and] critics . . . to serve as a counterforce to government—critics capable of acquiring enough information to pass judgment on the actions of government, and also capable of disseminating their information and judgments to the general public."[23]

The Supreme Court recognized this. It did not hurt that

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its twentieth century heyday as being characterized by four virtues: 1) "journalism was suffused with a strong sense of mission to serve the public interest"; 2) "the press was largely able to maintain editorial independence, despite pressures from the state or the commercial interests of their own publications"; 3) the relative level of legal protection it enjoyed; and 4) that "much of the media enjoyed the advantages of strong—even monopolistic economic position in their markets.").

[19] *See, e.g.,* Clyde Haberman, *David Halberstam, 73, Reporter and Author, Dies*, N.Y. Times, Apr. 24, 2007, at __ (noting that Halberstam's reporting career began when he wrote about the civil rights movement for newspapers in Mississippi and Tennessee).

[20] *See generally Reporting Civil Rights: The Library of America Edition* (Clayborne Carson et al. eds., 2 vols., 2013).

[21] Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 Va. L. Rev. 1, 6 (1996); *see generally* Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (2006).

[22] *See generally* Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 Am. Bar Found. Res. J. 521 (emphasizing the importance of checking government abuse as a justification for free speech and press guarantees).

[23] *Id.* at 541.

Professor Herbert Wechsler, who argued the *Sullivan* case on behalf of the *New York Times*, began his oral argument by stating that the newspaper's appeal from the decision of the Alabama Supreme Court upholding the libel award against it "summons for review a judgment of that court which poses, in our submission, hazards to the freedom of the press of a dimension not confronted since the early days of the Republic."[24] But the reminder was unnecessary. The Court understood the stakes of the case and the risks it posed to the well-being of a "vigorous free press."[25] And it acted accordingly, carving out a broad protection for press and other speakers on matters of public concern. It understood that the press might abuse this liberty, but believed the risks of abuse were far outweighed by the benefits of a strong and free press.[26]

Other readings are possible, of course. It is certainly true that the Court extended the protections of its constitutionalization of libel law to individual as well as institutional speakers, to "citizen-critics" as well as reporters and editors.[27] It is also true that the speech in question involved an advertisement, not reporting, and that the Court treated this distinction as immaterial.[28] Most

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[24] Anthony Lewis, *Make No Law: The Sullivan Case and the First Amendment* 129 (1991); *see also id.* at 107-08 (quoting the *Times*'s petition for *certiorari*, which similarly emphasized the press implications of the case).

[25] *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 51 (1971).

[26] *See, e.g., Sullivan*, 376 U.S. at 271 ("'Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press.'") (quoting James Madison, 4 *Eliot's Debates on the Federal Constitution* 571 (1876)).

[27] *See, e.g., id.* at 282 (stating that any "citizen-critic of government" is entitled to constitutional protection for his or her statements); *see also* Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. Rev. 1025, 1036-37 (2011) (arguing that although the "primary beneficiaries" of rulings like *Sullivan* "were journalists," *Sullivan* and other cases were grounded on "the Speech Clause or the freedom of expression [in general] and awarded rights or protections to everyone").

[28] *See Sullivan*, 376 U.S. at 265-66 (rejecting the respondents' argument that "the constitutional guarantees of freedom of speech and of the press are inapplicable here, at least so far as the *Times* is concerned, because the allegedly libelous statements were published as part of a paid, 'commercial' advertisement," in part because such a ruling "would

important, the *Sullivan* Court repeatedly referred to the freedoms of "speech *and* press," not freedom of the press alone.[29] It thus "provided no occasion to tease out the differences, if any, between the [speech and press] rights."[30]

Nevertheless, it would take a singular lack of awareness to miss the fact that *New York Times v. Sullivan* was centrally a press case,[31] both as a matter of law and, perhaps more importantly, as a matter of fact. It is true that the Court's justification for the constitutionalization of defamation law places the citizen and not the press at its center. It proceeds from the Madisonian premise that "the Constitution created a form of government under which

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discourage newspapers from carrying 'editorial advertisements' of this type, and so might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—*who wish to exercise their freedom of speech even though they are not members of the press*.") (emphasis added). Even this language is mixed. It lends credence to the view that the case was centrally a speech case, and that the "press" here was important as a medium through which any speaker might communicate rather than as a specific form of journalistic enterprise. *See generally* Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology?: From the Framing to Today*, 160 U. Pa. L. Rev. 459 (2012). At the same time, this language recognizes the important role played by "members of the press," and shows some awareness of and solicitude for the actual functioning of newspapers, including their ability to disseminate information and public debate through advertisements as well as editorial content.

[29] *See, e.g., Sullivan*, 376 U.S. at 256 ("We are required in this case to determine for the first time the extent to which the constitutional protections for speech and press limit a State's power to award damages in a libel action brought by a public official against critics of his official conduct.").

[30] Michael W. McConnell, *Reconsidering* Citizens United *as a Press Clause Case*, 123 Yale L.J. 412, 434 (2013).

[31] *Accord, e.g.,* Bollinger, *supra* note __, at 20 ("[T]hough the Court's analysis in *New York Times v. Sullivan* never emphasized the fact that the case involved the press, any alert reader of the Court's opinion will sense how significant that fact was to how the law was ultimately fashioned.").

'The people, not the government, possess the absolute sovereignty,'"[32] and thus allows—indeed, requires[33]—"uninhibited, robust, and wide-open" debate on public issues, which "may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[34]

But the people alone cannot fulfill this function adequately. The *Sullivan* Court thus envisioned a key structural role for the press in investigating, reporting on, and criticizing public officials on behalf of the people.[35] It saw this role as one that was built into the constitutional structure from the outset, quoting Madison for the proposition that the press has always played a key role in "'canvassing the merits and measures of public men.'"[36]

That role, in the Court's view, was more important now than ever, as government had grown more complex and powerful[37] and

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[32] *Sullivan*, 376 U.S. at 274 (quoting James Madison).

[33] *See, e.g., Sullivan*, 376 U.S. at 270 ("'Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government.'") (quoting *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)). *See also, e.g.,* Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in* Whitney v. California, 29 Wm. & Mary L. Rev. 653 (1988); Paul Horwitz, *Citizenship and Speech*, 43 McGill L.J. 445 (1998).

[34] *Sullivan*, 376 U.S. at 270.

[35] This is the view famously championed by Potter Stewart in his article, *"Or of the Press,"* 26 Hastings L.J. 631 (1975). *See also, e.g.,* Randall P. Bezanson, *Whither Freedom of the Press?*, 97 Iowa L. Rev. 1259, 1272 (2012) (arguing that the press serves a structural role "as an avowedly independent source of news and opinion for the public's benefit, governed by a truth-seeking and public-oriented process of journalism"); Randall P. Bezanson, *The Developing Law of Editorial Judgment*, 78 Neb. L. Rev. 754, 757 (1999).

[36] *Sullivan*, 376 U.S. at 275 (quoting James Madison).

[37] *See, e.g.,* Blasi, *supra* note __, at 541. *See also Near v. Minnesota*, 283 U.S. 697, 719 (1931) ("Meanwhile, the administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions," and such dangers "emphasize[ ] the primary need of a vigilant and courageous press").

the nation itself had grown more interconnected.[38] Modern democratic conditions required "a professional press" that would be able to "provide a powerful check against the misuse of government power."[39] That the press was not uniquely or specially privileged in this regard—that the protections laid out by the *Sullivan* Court applied to citizen-critics as well as professional journalists—does not mean that the Court was blind to the vital structural role the press played in ensuring successful democratic discourse and effective self-government. That concept might have been incompletely articulated in *Sullivan*, but it was emphatically present in the case.[40]

This was true not only in terms of the justifications offered by Justice Brennan for the Court's decision to bring defamation within the fold of the First Amendment, but also in terms of the shape that decision took. To be sure, the decision applied to *any* speaker who criticized public officials. But the rule of "actual malice" that it laid down[41] was crafted with the press fully,

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[38] *See, e.g.,* Lee C. Bollinger, *Baum Lecture 2010*, 2011 U. Ill. L. Rev. 1011, 1014-15 ("As the issues faced by the nation became more national in reach, . . . the power of local communities to set the balance between a free press and other societal interests . . . became intolerable. Censorship anywhere effectively became censorship everywhere. This was one of the great insights of the Supreme Court in *New York Times Co. v. Sullivan*, which nationalized the rules with respect to defamation laws throughout the country.").

[39] Blasi, *supra* note __, at 577.

[40] *See, e.g., id.* at 567-91 (discussing roughly the first decade of defamation decisions including and following from *New York Times v. Sullivan* and concluding that the role of the press in checking potential government abuses, although not fully articulated in *Sullivan* and its progeny, "appears to have influenced the Court's responses in the area of defamation").

[41] *See Sullivan*, 376 U.S. at 279-80 ("The constitutional guarantees [of speech and press] require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.").

although not solely, in mind.[42] The leading case it drew upon for the language of actual malice, *Coleman v. MacLennan*,[43] involved a newspaper defendant. The *Times*'s brief in the Supreme Court strongly emphasized the case's importance for the press's ability to function—and the importance to the nation of press freedom.[44] And both the actual malice rule[45] and the Court's insistence on rigorous independent appellate review of the facts[46] were clearly intended to ensure that the press in particular enjoyed a full measure of "'breathing space'" in which to do its work.[47]

But it was the broader facts of *New York Times v. Sullivan* that were perhaps most significant to it as a press case, and they were surely present in the justices' thoughts. Subsequent examinations of *Sullivan*, and of the proper scope of First Amendment protections for libel more generally, have quite questioned

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[42] I do not mean to suggest that the Court's effort to do so was entirely successful or salutary for the press. For criticisms of *Sullivan* and its progeny for failing to fully consider the institutional nature of the press or to fully protect it, see, *e.g.,* Randall P. Bezanson & Gilbert Cranberg, *Institutional Reckless Disregard for Truth in Public Defamation Actions Against the Press*, 90 Iowa L. Rev. 887 (2005); Bezanson, *supra* note __; Brian C. Murchison *et al.*, Sullivan*'s Paradox: The Emergence of Judicial Standards of Journalism*, 73 N.C. L. Rev. 7 (1994).

[43] 78 Kan. 711 (1908). *See Sullivan*, 376 U.S. at 280 (citing *Coleman*).

[44] *See, e.g.,* Brief for Petitioner, *New York Times Co. v. Sullivan*, No. 39, 1963 WL 66441, at *68 (Sept. 6, 1963) ("This is not a time—there never is a time—when it would serve the values enshrined in the Constitution to force the press to curtail its attention to the tensest issues that confront the country or to forego the dissemination of its publications in the areas where tension is extreme."). The *Times*'s cert petition was even stronger in tone, stressing the close connection between the press's ability to function and the ability of citizens to monitor and seek redress from government. *See* Lewis, *supra* note __, at 108 ("'If the [Alabama Supreme Court's] judgment [in *Sullivan*] stands, its impact will be grave—not only upon the press but also upon those whose welfare may depend on the ability and willingness of publications to give voice to grievances against the agencies of governmental power.'") (quoting the *Times*'s petition for certiorari).

[45] Subject to the caveats registered in note __, *supra.*

[46] *See Sullivan*, 376 U.S. at 283-86.

[47] *Id.* at 272 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

whether the Court's decision was unnecessarily broad,[48] failed to give adequate protection to individuals' reputations,[49] discouraged people from entering into public life,[50] took too little consideration of the role of libel insurance,[51] and so on. But it is worth remembering that the suit against the *Times* represented an obvious effort by the leadership of the state of Alabama to declare war on the national press and its reporting on civil rights issues.

Both of the principal book-length legal histories of *New York Times v. Sullivan* agree on this point.[52] The jury's award of $500,000 to L.B. Sullivan, the plaintiff, "was the largest libel judgment in Alabama history, and enormous by the standard of verdicts anywhere in the country at the time."[53] And it was only one of *five* lawsuits concerning the advertisement in the *Sullivan* case alone.[54] These suits, in turn, were only a small number of the larger number of defamation actions brought against newspapers and other press organs across the Deep South.[55]

The goal was plain, and it was summarized candidly in a headline in the *Montgomery Advertiser* discussing the *Sullivan* verdict: "State Finds Formidable Legal Club to Swing at Out-of-State Press."[56] Another local paper, the *Alabama Journal*, opined

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[48] *See, e.g.,* Epstein, *supra* note __.

[49] *See, e.g., id.* at 797-98.

[50] *See, e.g.,* Norman L. Rosenberg, *Protecting the Best Men: An Interpretive History of the Law of Libel* 251 (1986).

[51] *See, e.g.,* Frederick Schauer, *On the Relationship Between Press Law and Press Content*, in *Freeing the Presses: The First Amendment in Action* 51 (Timothy E. Cook ed., 2005); Frederick Schauer, *Uncoupling Free Speech*, 92 Colum. L. Rev. 1321 (1992).

[52] *See* Lewis, *supra* note __; Kermit L. Hall & Melvin I. Urofsky, *New York Times v. Sullivan: Civil Rights, Libel Law, and the Free Press* (2011).

[53] Lewis, *supra* note __, at 35.

[54] *See id.*

[55] *See* Hall & Urofsky, *supra* note __, at 83-86. A *Times* reporter whose work included reporting on the civil rights movement, Harrison Salisbury, estimated that the press faced a total of some $300 million in libel suits brought across the South. *See* Harison E. Salisbury, *Without Fear or Favor* 388 (1980) (cited in Lewis, *supra* note __, at 36, 330).

[56] Hall & Urofsky, *supra* note __, at 84. The headline's identification between the state and its officials has a faintly ironic ring, given that a major question in the Sullivan case was whether the allegedly

that the verdict for Sullivan "could have the effect of causing reckless publishers of the North. . . to make a re-survey of their habit of permitting anything detrimental to the South and its people to appear in their columns."[57] One of the *Times*'s lawyers and later its general counsel, James Goodale, recalled: "Without a reversal of those verdicts [in the cases related to the advertisement] there was a reasonable question of whether the *Times*, then wracked by strikes and small profits, could survive."[58] The litigation *did* affect the *Times*'s conduct—it did have a "chilling effect,"[59] in the words of *Sullivan*'s author, Justice William Brennan. It convinced the *Times* to keep its reporters out of the state of Alabama for a year in an attempt to avoid the jurisdiction of the state's courts.[60] Other media outlets were similarly leery of exposing themselves to the wrath of the state and its officials.[61]

All this "certainly sent a signal to the Supreme Court."[62] The Court's decision in *New York Times v. Sullivan* represented a forceful response. It may be that "cases make bad law," as Frederick Schauer has written.[63] It is certainly possible to criticize *Sullivan* and its progeny on the level of individual suits involving individual defendants, media defendants or otherwise. But it is also important, in looking back on the case, to appreciate that there were good reasons for the breadth and strength of the decision. And from an institutional point of view, it is especially important to recognize the extent to which *New York Times v. Sullivan* was genuinely, if only partially, a case about the crucial structural role played by the press as an institution in our system of government and public discourse.[64]

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defamatory statements in the *Times* ad were "of and concerning" the plaintiffs. *See Sullivan*, 376 U.S. at 261-62, 288-92.

[57] Hall & Urofsky, *supra* note __, at 84.

[58] Lewis, *supra* note __, at 35 (quoting James Goodale).

[59] *Sullivan*, 376 U.S. at 300.

[60] *See* Lewis, *supra* note __, at 41.

[61] *See* Hall & Urofsky, *supra* note __, at 84; Lewis, *supra* note __, at 245.

[62] Lewis, *supra* note __, at 161.

[63] Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. Chi. L. Rev. 883 (2006); *see id.* at 901-02 (offering *Sullivan* as an example).

[64] *See generally* Blasi, *supra* note __; Horwitz, *supra* note __, ch. 6. *See also* Robert Post, *Understanding the First Amendment*, 87 Wash. L. Rev. 549, 550-51 (2012); Joseph Blocher, *Public Discourse, Expert Knowledge, and the*

II. SOCIAL MOVEMENTS

The press was not the only major institution involved in *New York Times v. Sullivan*. The other prime target of Sullivan and the other plaintiffs was the civil rights movement itself. The "Heed Their Rising Voices" advertisement that provoked Sullivan's lawsuit concerned the harsh treatment of the movement by "Southern violators of the Constitution."[65] A group set up to raise funds for the civil rights movement, the Committee to Defend Martin Luther King and the Struggle for Freedom in the South, was responsible for the advertisement.[66] The signatories and supporters listed in the ad constituted a Who's Who of members and champions of the civil rights movement. The other defendants in the *Sullivan* case, four black ministers from Alabama (whose names were listed in the advertisement without their express approval), were all associated with the Southern Christian Leadership Conference, one of the principal civil rights groups at the time and one closely associated with the Rev. Martin Luther King, Jr.[67] The trial judge in the case, Walter Jones, "had been an implacable foe of the civil rights movement."[68] Sullivan's lawsuit, and the many other libel suits filed across the South, were clearly aimed at the civil rights movement as well as the press.

Again, the justices understood this and acted accordingly. The individual defendants in the case warned the Court that "Alabama officials" were using libel actions to "silence people from criticizing and speaking out against [Alabama's] wrongful segregation activities," and that if they succeeded, "the struggles of Southern Negroes toward civil rights [will] be impeded, [and] Alabama will have been given permission to place a curtain of silence over its wrongful activities."[69] The defendants suffered the loss of real and personal property to satisfy the judgment; one of

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Press, 87 Wash. L. Rev. 409, 426-27, 439-42 (2012).

[65] Lewis, *supra* note __, at 7. The ad was reprinted by the *Sullivan* Court as an appendix to its decision. *See Sullivan*, 376 U.S. at 740.

[66] *See* Lewis, *supra* note __, at 5-6.

[67] *See, e.g., id.* at 11-12. As Lewis notes, the ministers were added to the case in large measure to destroy complete diversity and prevent the case from being removed to federal court. *See id.* at 13-14.

[68] Hall & Urofsky, *supra* note __, at 49.

[69] Lewis, *supra* note __, at 110.

them, Rev. Fred Shuttlesworth, left Alabama for Ohio in part because of "[f]ear of further harassment in the lawsuit."[70] The "racial issue in the South" was "the immediate context of the *Sullivan* case."[71] The justices—and everyone else—were well aware of that fact.[72]

This is not a novel observation. The link between *Sullivan* and the civil rights movement, and the "gravitational pull"[73] that race and civil rights had on this and other Warren Court decisions, has long been noted. The most famous champion of the *Sullivan* decision, Harry Kalven,[74] made this point shortly after the opinion was issued,[75] and it has been made ever since.[76]

But it is still important to call this insight to mind, for two reasons. First, as I argued above, *New York Times v. Sullivan* has experienced a sort of bifurcation and loss of reputation, in which its grand generalities about free speech have floated up into the empyrean while its technical doctrinal details have sunk back down into the mire of defamation law. In either direction, the decision has become unmoored from its historical setting, and there is some value in restoring it to its place and time. Second, focusing on this point allows us to reflect on the civil rights movement as a crucial institutional actor in *Sullivan*.

Viewing the case in this way suggests a couple of observations. First, as is perhaps tautologically true in "gravitational pull" cases, the gravitational force is mostly if not entirely invisible in the opinion issued by the deciding court.[77] Race and the civil rights movement were not altogether missing from Justice Brennan's opinion in *Sullivan*, to be sure. The statement of facts certainly

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[70] *Id.* at 162.

[71] *Id.* at 245.

[72] *Id.* at 245.

[73] *See* Neuborne, *supra* note __.

[74] *See especially* Harry Kalven, Jr., *The New York Times Case: A Note on the "Central Meaning of the First Amendment,"* 1964 Sup. Ct. Rev. 191.

[75] *See* Kalven, *supra* note __.

[76] *See, e.g.,* Lillian R. BeVier, *Intersection and Divergence: Some Reflections on the Warren Court, Civil Rights, and the First Amendment*, 59 Wash. & Lee L. Rev. 1075, 1080-81 (2002).

[77] *See, e.g.,* Neuborne, *supra* note __, at 97 (observing that many of the Warren Court's opinions in various areas were "completely silent about the racial context of [the] case, even when the briefs must have made the racial implications clear").

made note of them.[78] More importantly, the Court's discussion of the "central meaning of the First Amendment"—that "debate on public issues should be uninhibited, robust, and wide-open"[79]—underscored the relationship between this broad principle and the specific context of the case by adding, "The present advertisement, as an expression of grievance and protest on one of the major public issues of our time, would seem clearly to qualify for the constitutional protection" for robust public debate.[80]

For the most part, however, race and the civil rights movement were barely discussed in Justice Brennan's opinion. This is especially clear when the majority opinion is contrasted with the concurring opinions filed in the case by Justices Hugo Black and Arthur Goldberg, both of whom took pains to underscore the relevance of the civil rights movement to the case.[81] A naïve reader of the majority opinion in *Sullivan* would learn far more about the controversy surrounding the Alien and Sedition Acts[82] than she would about the civil rights movement.

That the protection of the civil rights movement as an institutional actor was a significant motivation for the decision in *New York Times v. Sullivan* cannot be doubted. Whether this was entirely a good thing in the long run—or, more particularly, whether it is good that the majority opinion said so little about that fact—is a different question. The Court's desire to offer strong protection to the movement led it to issue a broad decision; that decision was susceptible to valid criticism, particularly as the doctrine was developed and applied in a host of very different factual contexts.[83] And it ultimately led to a falling-off in

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[78] *See Sullivan*, 376 U.S. at 256-65.

[79] *Id.* at 270, 273.

[80] *Id.* at 271.

[81] *See Sullivan*, 376 U.S. at 294 (Black, J., concurring) (noting the importance to the case's First Amendment holding of the "factual background of this case," involving the "acute and highly emotional issue[ ]" of desegregation and the "hostility" often shown to "so-called 'outside agitators,' a term which can be made to fit papers like the *Times*"), 300-01 (Goldberg, J., concurring in result) ("The opinion of the Court conclusively demonstrates the chilling effect of the Alabama libel laws on First Amendment freedoms in the area of race relations.").

[82] *See id.* at 273-77.

[83] *See supra* notes __-__ and accompanying text (collecting standard

defamation doctrine, and in the energy and style with which the Court approached these cases, as defamation law descended from the heights of the civil rights context into the humdrum of common libel actions involving less sympathetic defendants.[84] When the wellspring for a decision becomes less important to subsequent cases, there is some question whether that decision will thrive, or even survive.[85] Even if it does, the doctrine built on that case may lose much of its clarity and sense of importance.[86] And there is a broader concern that as long as the Court is motivated by some policy concern that dare not speak its name, every doctrine that touches on that concern will be warped or distorted by the invisible gravitational force.[87]

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criticisms of *New York Times v. Sullivan*); *see also* Lewis, *supra* note __, at 197-98 (discussing examples of later libel cases that seem very far afield from the weighty matters involved in the *Sullivan* case).

[84] *See, e.g.,* BeVier, *supra* note __, at 1090-92; Frederick Schauer, *The Wily Agitator and the American Free Speech Tradition*, 57 Stan. L. Rev. 2157 (2005) (noting the potential doctrinal slippage involved when canonical First Amendment cases such as *Sullivan* are decided, and doctrine is built, on the backs of highly sympathetic parties); Frederick Schauer, *The Heroes of the First Amendment*, 101 Mich. L. Rev. 2118 (2003) (to same effect).

[85] Neuborne believes that many of the Warren Court's race-driven decisions, including *Sullivan*, survived quite handily. *Sullivan* lasted as a key decision, he suggests, because it "resonated with our constitutional traditions and advanced the First Amendment's basic purpose." Neuborne, *supra* note __, at 99-100. My take is slightly different: *Sullivan* lived on in its broad statement of principles, but lost much of its driving force and canonical status once the defamation field, now ostensibly constitutionalized, returned to more routine cases and developed more complex doctrinal rules.

[86] *See, e.g.,* BeVier, *supra* note __, at 1084-85 (arguing that although "Justice Brennan's opinion [in *Sullivan*] has exerted a profound influence on the Court's general approach to First Amendment questions," for the most part the post-*Sullivan* defamation cases are "an undistinguished lot of surprisingly trivial cases clothed in ill-fitting but by now wholly conventional-seeming First Amendment garb").

[87] *See, e.g.,* Michael S. Greve, *Why* Roe *Won't Go*, 51 St. Louis U.L.J. 701, 705 (2007) (arguing that abortion rights exerted a distorting force on doctrinal areas such as free speech, jurisdiction, and choice of law);

I reach no strong conclusions on the merits of those questions here. My interest is in a more descriptive observation about social movements as institutional actors, and a fairly narrow one at that. It is simply that important and sympathetic social movements, viewed as independent institutions, *are* relevant actors in cases like *New York Times v. Sullivan*, even when the Court is not especially explicit about the role those institutions play in its decisions. Some of this lack of clarity or specificity is understandable. The Supreme Court decides legal questions, and does so at least ostensibly in a way that is supposed to allow for

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Gregory C. Sisk, *The Willful Judging of Harry Blackmun*, 70 Mo. L. Rev. 1049, 1057 (2005) ("As a jurisprudential black hole that drew in and deformed everything that came near its wandering path through spacetime, *Roe*'s gravitational pull collapsed Justice Blackmun's approach to every area of law into a pro-abortion singularity, including questions of standing to sue, standards of appellate review, and freedom of expression."); Robert F. Nagel, *Six Opinions by Mr. Justice Stevens: A New Methodology for Constitutional Cases?*, 78 Chi.-Kent L. Rev. 509, 511 (2003) (noting that Justice Stevens's opinion in the abortion-protest-related First Amendment case *Hill v. Colorado*, 530 U.S. 703 (2000), has been "criticized as an instance of specialized jurisprudence reserved for abortion issues"); Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 Cal. L. Rev. 673, 704 (2002) (arguing, in a less negative vein, that "the gravitational pull of race," along with "the theoretical power of political-process arguments," pushed Establishment Clause doctrine from a liberty-based to an equality-focused approach); Michael Stokes Paulsen, *Scouts, Families, and Schools*, 85 Minn. L. Rev. 1917, 1934-35 (2001) (arguing that concerns over race affected and may have distorted the Court's freedom of association jurisprudence). In my view, similar distortions are discernible in the Court's recent decision in *Christian Legal Society v. Hastings*, 130 S. Ct. 2971 (2010). *See* Horwitz, *supra* note __, at __; *see also* John D. Inazu, *Justice Ginsburg and Religious Liberty*, 63 Hastings L.J. 1213, 1216, 1241 (2012) (arguing that Justice Ginsburg's decision in that case involved tensions between various prior commitments, including her strong commitment to gay rights, resulting in an opinion that "skirted the preceding tensions, relying instead on doctrinal intricacies that detracted from the core issues raised in this case" and that "falls short in both scope and execution").

application of its doctrines to *any* party in a future case. But this observation carries with it a more problematic potential corollary point. It may be that the Court, then and now, lacks the vocabulary or resources to acknowledge the role of social movements as institutional actors within our legal and social structure, and the importance they play in shaping its constitutional decisions. The Court may be reticent about acknowledging those movements in cases like *Sullivan* not just for strategic reasons, but because it simply does not know how to talk about them.

The second observation about social movements, and specifically the civil rights movement, as institutional actors in *New York Times v. Sullivan* brings us back to the discussion of *Sullivan* as a press case. There is considerable overlap between the two discussions. That overlap may say something about the perennial debate about whether the Press Clause requires us to accord any "privileged" status to the press[88] or whether, conversely, any special status would be inconsistent with an egalitarian approach to the First Amendment in which the identity of the speaker is irrelevant.[89]

Social movements exist in a symbiotic relationship with the press. They use it and depend upon it. This was obviously true of the civil rights movement before, during, and after the 1960s.[90]

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[88] *See, e.g.,* Paul Horwitz, "*Or of the [Blog],*" 11 NEXUS 45 (2006), and the sources collected there; Nathan Murphy, *Context, Not Content: Medium-Based Press Clause Restrictions on Government Speech in the Internet Age*, 2009 Denver U. Sports & Ent. L.J. 26, 38 n.86 (2009) (collecting sources).

[89] *See, e.g.,* Frederick Schauer, *Towards an Institutional First Amendment*, 89 Minn. L. Rev. 1256, 1256 (2005) (observing that under current doctrine, First Amendment speech doctrine operates "with relatively little regard for the identity of the speaker or the institutional environment in which the speech occurs"); Horwitz, *supra* note __, at __.

[90] *See, e.g.*, Gene Roberts & Hank Klibanoff, *The Race Beat: The Press, the Civil Rights Struggle, and the Awakening of a Nation* (2006); David J. Garrow, *Bearing the Cross: Martin Luther King, Jr., and the Southern Christian Leadership Conference* 172 (Perennial Classics paperback ed., 2004) (1987) (quoting a letter from Martin Luther King, Jr., in which King writes, "Public relations is a very necessary part of civil disobedience. . . . In effect, in the absence of justice in the established courts of the region, nonviolent protestors are [using the press to demand] a hearing in the court of world opinion."). *See also* Anders Walker, "*Neutral" Principles:*

Media coverage, as much or more than litigation, was a central part of the strategy of the civil rights movement. Sit-ins, marches, and other instances of visible direct action publicized the injustices of racial segregation and subjugation and the violence of those public and private individuals and bodies that fought to maintain it. It galvanized public opinion; forced the issue onto the public agenda; enraged citizens and lawmakers in the North; and helped embarrass the South—and Northern politicians too, who might otherwise have moved too little and too slowly—into acting.[91]

New York Times v. Sullivan was thus a profoundly important case for the civil rights movement.[92] Obviously, it affected the movement directly: the Court's emphasis on citizens as sovereigns and the rights and immunities of the "citizen-critic" allowed movement leaders and members, such as those who signed or had their names added to the "Heed Their Rising Voices" advertisement, to publicly criticize the state.[93] But it was just as important that the protesters have access to the press than that they be able to speak individually. The movement's leaders knew that without the press's ability to serve as a megaphone on their behalf, the movement would be stranded in the South and vulnerable to the actions of the Southern states and their officials.[94] The Court

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Rethinking the Legal History of Civil Rights, 1934-1964, 40 Loy. U. Chi. L.J. 385, 434-35 (2009).

[91] *See, e.g.,* Lewis, *supra* note __, at 40-41; Christopher W. Schmidt, *The Sit-Ins and the State Action Doctrine*, 18 Wm. & Mary Bill Rts. J. 767, 809-10 (2010) (discussing the role played by media coverage of sit-ins and other public actions by the civil rights movement in forcing the administration of President John F. Kennedy to push for civil rights legislation).

[92] *See, e.g.,* Anders Walker, *Shotguns, Weddings, and Lunch Counters: Why Cultural Frames Matter to Constitutional Law*, 38 Fla. St. U.L. Rev. 345, 348-49, 360-61 (2011); Walker, *supra* note __, at 426-32; Susan Dente Ross & R. Kenton Bird, *The Ad That Changed Libel Law: Judicial Realism and Social Activism in* New York Times Co. v. Sullivan, 9 Comm. L. & Pol'y 489, 494-95 (2004).

[93] *See, e.g.,* Lewis, *supra* note __, at 110 (quoting the cert petition of the defendant ministers in *Sullivan*, who warned that if the judgment below was upheld, "For fear of libel and defamation actions in [the Southern] States, people will fear to speak out against oppression").

[94] *See id.* (recounting that the ministers' petition warned that upholding

understood this too, although little hint of that understanding appeared in Justice Brennan's opinion.[95]

None of this proves that the press ought to be singled out for constitutional protection for reporting and commenting on public issues or officials. But it reminds us that giving broad protection to the press—giving it "breathing space"[96] in which to publish and sometimes err—is not necessarily something we do for its own sake,[97] any more than we safeguard the states or the federal

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the Alabama Supreme Court's ruling would also deter "national newspapers" from "report[ing] the activities in the South," and predicting that a "curtain of silence" would descend on the South).

[95] The closest Brennan comes to openly acknowledging this point is his statement that rejecting First Amendment protection for the ad because it constituted commercial speech "might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing activities—who wish to exercise their freedom of speech even though they are not members of the press," and the decision's acknowledgment that the *Times* ad involved communication "on behalf of a movement whose existence and objectives are matters of the highest public interest and concern." *Sullivan*, 376 U.S. at 266. The concurring justices, especially Justice Goldberg, were more explicit on these questions. *See id.* at 294 (Black, J., concurring) (noting the racial aspects of the case while stressing the importance of "an American press virile enough to publish unpopular views on public affairs"); *id.* at 300 (Goldberg, J., concurring in the result) ("[I]f newspapers, publishing advertisements dealing with public issues, thereby risk liability, there can [ ] be little doubt that the ability of minority groups to secure publication of their views on public affairs and to seek support for their causes will be greatly diminished.").

[96] *Sullivan*, 376 U.S. at 272 (quotation and citation omitted).

[97] Although with respect to some institutions, such as religious institutions, I have come close at times to suggesting that they do have an intrinsic worth of their own. *See generally* Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 Harv. C.R.-C.L. L. Rev. 79 (2009); Paul Horwitz, *Defending (Religious) Institutionalism*, 99 Va. L. Rev. 1049 (2013). Nothing turns on that question here, and the degree to which these institutions seem intrinsically valuable, or are treated as such by the Constitution, may simply reflect how deeply embedded in our social framework these institutions are. *See id.* at 1053 ("[Churches and other First Amendment]

political branches for their own sake. We do so in large measure for the sake of the structural benefits they provide.[98] We protect the press because it is an "instrument that [ ] inform[s] the sovereign public in a democracy of what its governors [are] doing."[99] We also protect it because the press turns out to be a vital to the flourishing of another non-state institutional actor: groups, associations, and social movements. It is no coincidence that both the press and social movements are institutional branches of the same non-state sphere, one generally labeled "civil society."[100] They are separate and distinct branches, to be sure. Ideally, the courts would treat them distinctly, in light of the nature and purpose of each separate civil society institution.[101] But they are also closely connected. Both form part of an interlocking web of non-state actors that add life and substance to civil society and public discourse. It is thus unsurprising that a decision like *New York Times v. Sullivan* ends up protecting *both* institutional actors, however implicitly or clumsily.[102]

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institutions developed alongside, and in some cases preexisted, the liberal state itself, and have long been coordinate parts of our broader social structure. The state—and its limits—formed with these institutions in mind. No mysticism is required to suggest that this might be constitutionally relevant.").

[98] *See, e.g.*, Stewart, *supra* note __, at 631 (discussing "the role of the organized press—of the daily newspapers and other established news media—in the system of government created by our Constitution," 634 (arguing that the "primary purpose of the constitutional guarantee of a free press" was "to create a fourth institution outside the Government as an additional check on the three official branches").

[99] Anthony Lewis, *The Press: Its Sins and Grace*, 73 Wash. L. Rev. 609, 616 (1998)

[100] *See, e.g.*, Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 Geo. L.J. 1, 2-3 nn.12-13 (2000) (collecting definitions of civil society, which include a variety of non-governmental groups, including both the mass media and social movements).

[101] *See generally* Horwitz, *supra* note __.

[102] *Cf.* H.W. Arthurs, *The Administrative State Goes to Market (And Cries 'Wee, Wee, Wee' All the Way Home)*, 55 U. Toronto L.J. 797, 831 (2005) (arguing that administrative lawyers need "to find new strategies to mediate the relations between and among national and transnational

III. THE COURTS

Discussions of *New York Times v. Sullivan* often focus on three key institutional subjects in the case: "the state, the press, and the people."[103] The focus on the state as one of the key institutions is entirely reasonable. Popular sovereignty and self-government provide the central justification for the Court's decision to constitutionalize defamation law, so that the sovereign "citizen-critics" can monitor and criticize those to whom they lend political power[104] and to ensure that government cannot entrench itself in office by insulating itself from criticism.[105]

That ground has been well covered elsewhere, however, and I will mostly set it to one side here.[106] I want to focus instead on another state actor: the courts themselves. A discussion of the court as institutional actor in *New York Times v. Sullivan* provides a useful means of considering various backward- and forward-looking aspects of the case. It helps show why the decision was necessary, how it functioned, and what role the Supreme Court carved out for itself and other federal courts.[107] It may also tell us something about why *Sullivan*'s luster seems to have faded over time.

First, consider why the Supreme Court's forceful intervention was arguably necessary in *Sullivan*. The answer to this question involves different institutional considerations than those involved in the remainder of this Part. The first consideration has to do with the libel law regime itself. The problem with the verdict against

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courts, agencies, and civil society actors," and "a new vocabulary to describe the complex universe of functional, normative, and discursive pluralism").

[103] Bollinger, *supra* note __, at 7.

[104] *See generally* Blasi, *supra* note __.

[105] *See, e.g.*, John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 73-104 (1980).

[106] *But see infra* notes __-__ and accompanying text (suggesting that modern treatments of First Amendment law, including contemporary uses of *New York Times v. Sullivan*, pay too much attention to the state and not enough attention to the other institutional actors in that case, and in public discourse generally).

[107] *See, e.g.*, Bollinger, *supra* note __, at 7 (suggesting that in the course of "buil[ding] a theory of the political system" and its stakeholders, the *Sullivan* Court "also defined a role for itself").

the *Times* in the Alabama courts was not that it was legally outrageous,[108] but that it wasn't.[109] The burdens and presumptions in libel law heavily favored the plaintiffs. Defamatory statements were presumed to be false, thus placing the burden on the defendant to establish that the entirety of the allegedly false statements were true. An intention to defame was likewise presumed upon publication of the questioned statement. Little if any distinction was made between major and minor factual errors, and a broad set of statements were treated as libelous *per se*. Injury itself was presumed, and plaintiffs were not required to provide detailed evidence of actual damages. Under this regime, it was reasonable for a jury to conclude that "the *Times* had violated Alabama's libel law."[110] Nor, with a few exceptions,[111] was Alabama law unusual in this respect.[112]

There was thus some reason to believe that federal judicial intervention was required to ensure that libel law conformed to the strictures of the First Amendment, whether the courts that enforced it were acting in good or bad faith. Still, intervention would have been unusual in such circumstances. The longstanding assumption was that defamation law fell outside the scope of the First Amendment.[113] Moreover, federalism values counseled against the federal courts interfering with this state private-law regime.

Here is where the kinds of concerns discussed earlier in this Article come back in. The problem facing the Justices in 1964 was not simply that state courts, acting in good faith, were properly enforcing a legal regime that happened to be unfriendly to speech

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[108] Although Lewis argues that "[t]he law had been stretched very far to reach the facts of Sullivan's case," especially on the question of whether the allegedly libelous statements were "of and concerning" the plaintiff. Lewis, *supra* note __, at 106.

[109] For this statement and the rest of this paragraph, see Hall & Urofsky, *supra* note __, at 40-43, 69.

[110] *Id.* at 69.

[111] *See, e.g., Coleman v. MacLennan*, 78 Kan. 711 (1908).

[112] *See* Lewis, *supra* note __, at 106.

[113] *See, e.g., Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) (naming libel as one of the "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem").

about public officials. It was that the Alabama courts were *bad* institutional actors. They were actively hostile toward the other institutional actors in the case—the "outside" press, and local and national civil rights activists. In the state's libel laws, plaintiffs and courts had what the *Montgomery Advertiser* correctly called a "formidable legal club."[114] Where the law was not sufficient to preserve "white man's justice,"[115] the law could be bent or ignored. In the *Sullivan* case itself, for example, Judge Jones ruled that the Alabama state courts had jurisdiction over the case in part because the *New York Times* had entered a general appearance and thus waived any jurisdictional objections. That ruling came despite the paper's counsel's careful compliance with the leading guide on the subject, *Alabama Pleading and Practice*—written by Judge Jones himself.[116]

Finally, of course, there was the fundamental fact of racial inequality in the state and its effect on the legal process. In the *Sullivan* case, it was present in the routine striking of black jurors to ensure an all-white jury. Inequality was so woven into the fabric of the law and custom of the state that the trial transcript could not even manage equality in the granting of honorifics: it referred to the newspaper's white lawyers as "Mr. Embry" and so on, and the ministers' black lawyers as "Lawyer Gray," for example.[117]

In sum, there were ample reasons for the Supreme Court to intervene firmly, notwithstanding the usual assumptions that the federal courts ought to respect states and state private law. The more the case recedes in time, the less salient those reasons are to many casual readers, and the more unusual or "activist" the Court's actions may seem. They *were* extraordinary actions. But so was the concatenation of circumstances: the use of libel law to prevent the press from reporting on governmental abuse of power, and to cripple individual citizens and groups' ability to fight for political change; the easy availability of libel law to fulfill those goals; the unlikelihood that local judges and juries would fairly apply even those already plaintiff-friendly laws; and the lack of any effective check on these abuses from the highest court of this and other Southern states.[118] From an institutional perspective, the

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[114] Hall & Urofsky, *supra* note __, at 84.

[115] *Id.* at 49 (quoting Judge Walter Jones).

[116] *See* Lewis, *supra* note __, at 26.

[117] *See id.* at 27.

[118] *See, e.g.,* Lewis, *supra* note __, at 44 (noting that the Alabama Supreme

systemic problems with the Alabama courts justified—indeed, demanded—strong behavior from the Supreme Court.

These institutional concerns also help to illuminate another unusual step taken by the Court in *Sullivan*: its decision to subject the state court judgment to stringent, independent appellate review of the evidence. This section of the opinion reads straightforwardly enough.[119] "Since respondents may seek a new trial," Justice Brennan wrote for the Court, "we deem that considerations of effective judicial administration require us to review the evidence in the present record to determine whether it could constitutionally support a judgment for respondent."[120] An "'independent examination of the whole record'" was needed "to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression."[121] But it was this section of the opinion that caused Justice Brennan difficulty in securing a firm majority.[122]

It was also perhaps the most necessary element of the opinion. As institutional actors, state courts judges and juries—especially those in the Deep South—could be expected to resist and evade any ruling that permitted the press or civil rights activists to report and protest freely. An equally strong institutional response was needed so that the Supreme Court could prevent this from happening in the *Sullivan* case,[123] and signal that it would not allow it to happen in any other such case.

As a doctrinal matter, the Court has not retreated from this stand; indeed, it has reaffirmed and extended it.[124] But the Court's

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Court "at this time was devoted to the maintenance of racial segregation"); Hall & Urofsky, *supra* note __, at 99 (calling the Alabama Supreme Court "a hostile court dead set against civil rights").

[119] *See, e.g.,* Hall & Urofsky, *supra* note __, at 177.

[120] *Sullivan*, 376 U.S. at 284-85.

[121] *Id.* at 285 (quoting *Edwards v. South Carolina*, 372 U.S. 22, 235 (1963)).

[122] *See, e.g.,* Lewis, *supra* note __, at 171-82; Hall & Urofsky, *supra* note __, at 167-71.

[123] *See, e.g.,* Lewis, *supra* note __, at 159 (quoting former Attorney General William Rogers, counsel for the ministers in *Sullivan*, as saying that the Court "took pains to make sure that the actual malice test was not then used further to harass those defendants").

[124] *See, e.g., Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984) (reaffirming the independent appellate review standard in libel cases);

approach, intrusive as it was into the affairs of state courts and juries' determinations of questions of fact, was more of a response to the "felt necessities of the time"[125] than a general statement about what "effective judicial administration" or First Amendment protections might require in any time and place. As Chief Justice Earl Warren wrote in a note to Brennan, returning the case to the Alabama courts would have reduced the whole decision to "a meaningless exercise."[126] Justice Hugo Black, an Alabama native who knew his compatriots well, put it nicely, if bluntly, in another note to Brennan: "Most inventions even of legal principles come out of urgent needs. The need to protect speech in this area is so great that it will be recognized and acted upon sooner or later. The rationalization for it is not important; the result is what counts."[127]

Justice Black's quote provides contemporary evidence of a sort in support of the necessity of the Court acting as forcefully as it did in *Sullivan*. From an institutional perspective, the Court's intervention, and insistence on independent appellate factual review, was necessary to safeguard two important speech institutions—the press and an important social movement—from

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Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) (holding that where a "clear and convincing evidence" standard applies, as in public-figure defamation actions, trial courts should apply that standard at the summary judgment stage before allowing such a case to advance before a jury); Laurence H. Tribe, *American Constitutional Law*, § 12-12, at 872 (2nd ed. 1988) ("*Bose* illustrates that, for all the twists libel doctrine has taken over the years, a majority of the Court still takes *New York Times* seriously—not merely trusting, as it usually does, the lower courts to apply the Court's decisions faithfully, but requiring that libel decisions receive special appellate scrutiny."). *But see Herbert v. Lando*, 441 U.S. 153 (1979) (refusing to limit discovery into the editorial process for the purpose of determining whether the defendants' conduct displayed actual malice). While finding the decision reasonable, Tribe concludes that the "understanding of the need for prompt resolution of libel cases" in cases like *Anderson* was not present in this case, in which "the Court refused to contain what may be the greatest threat to press freedom in the libel area: the monetary—and journalistic—costs of extended discovery into editorial processes." Tribe, *supra* note __, at 867, 869.

[125] Oliver Wendell Holmes, Jr., *The Common Law* 1 (1881).

[126] Lewis, *supra* note __, at 178.

[127] *Id.* at 175.

another institution: the state, whether embodied by public officials or by judges and juries. At least that is how the matter was viewed at the time—and rightly so, in my view.

Of course, Black's statement, which today would be viewed as unpardonably candid about judging, is susceptible to criticism as well as praise. That leads to the last set of observations about the courts, both local and national, as institutional actors in *New York Times v. Sullivan*. The judgment in that case, and the Supreme Court's insistence on ensuring that it would not be evaded by outlier courts, was an extraordinary institutional response to an extraordinary, but entrenched, institutional failure on the part of Southern states and their courts. It was a reasonable response to the "felt necessities of the time." But as times change, the "felt necessities" that compelled a decision at one moment can become less deeply felt and less apparent, even if they do not become altogether irrelevant. Meanwhile, the decision remains in place, free of its connection to the contemporary events that motivated it. As Gerald Torres puts the point, "Law contains the congealed imperatives of the past that live on as precedent or tradition."[128]

The changing doctrinal and reputational fortunes of *New York Times v. Sullivan* might be understood as an example of this phenomenon. It may not be the only reason that the case has become less admired over time, if I am right that that is the case. The decline in *Sullivan*'s canonical status could be the result of doctrinal problems with the decision itself.[129] It could be a product of all the inevitable doctrinal elaboration that has occurred in this area since *Sullivan*, which is widely viewed as having resulted in an unduly complex set of rules that manage to satisfy no one.[130] Or it might have to do with the understandable failure of the decision to predict changing extralegal facts, such as changes in the nature[131] and status[132] of journalism or the role played by libel

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[128] Gerald Torres, *The Evolution of Equality in American Law*, 31 Hastings Const. L.Q. 613, 614 (2003).

[129] *See, e.g.,* David Finkelson, Note, *The Status/Conduct Continuum: Injecting Rhyme and Reason into Contemporary Public Official Defamation Doctrine*, 84 Va. L. Rev. 871, 872 n.7 (1998) (collecting critical articles).

[130] *See, e.g.,* Anderson, *supra* note __, at 488-92; Tribe, *supra* note __, at 865.

[131] *See, e.g.,* Lidsky, *supra* note __, at 861-65.

[132] *See, e.g.,* Lewis, *supra* note __, at 207-08.

insurance.[133]

But I think much of the case's apparent decline has to do with the simple fact that, to borrow Torres's language, the imperatives that led to the decision congealed over time.[134] The decision's sweeping language about the "central meaning of the First Amendment," and its bold stroke of effectively ruling on the constitutionality of the Alien and Sedition Acts while expanding their scope to include any form of legal remedy for critical commentary on public officials, retain their power. But such broad statements, once they have been fully absorbed into the constitutional canon, can achieve a taken-for-granted status. So it is with *Sullivan*. Its broad principles have been fully absorbed into the general body of thinking about the First Amendment. The powerful language and "magisterial invocations"[135] of the opinion have become such standard citations that they now seem more decorative than influential.

The particulars of the decision, meanwhile, have become submerged in the increasingly complex body of now-constitutionalized defamation law that has re-emerged over time. And the institutional wellsprings of the case—the urgent need for the Supreme Court to support non-state actors like the press and the civil rights movement against a body of state actors that employed public and private law alike to resist change—have faded into history. Only a decade later, Justice Byron White would complain that the Court, starting with *Sullivan*, had managed to "federalize[ ] major aspects of libel law," thus working "radical changes in the law and severe invasions of the prerogatives of the States," in "just a few printed pages"[136]—as if those pages had not

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[133] *See, e.g.,* Frederick Schauer, *Legal Realism Untamed*, 91 Tex. L. Rev. 749, 770 (2013) (arguing that "the promise of *New York Times Co. v. Sullivan* in freeing the press from much of the risk of libel litigation is undercut by the way in which libel insurers tend to impose upon their insured publications requirements that would seem unnecessary under *Sullivan* alone," and describing this as an example of "paper rule-real rule divergence" in law.

[134] This is, perhaps, not so much a different reason from the ones offered in the text above as it is a different way of describing those reasons.

[135] Tribe, *supra* note __, at 865.

[136] *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 370, 376 (1974) (White, J., dissenting). *See also* Elaine W. Shoben, *Uncommon Law and the Bill of Rights: The Woes of Constitutionalizing State Common-Law Torts*, 1992 U. Ill.

been written in light of a substantial real-world experience of intrepid journalism, heroic and costly social activism, and massive state resistance.

My goals here are more descriptive than normative. Although I support broad First Amendment immunity in this area, my discussion here does not require a firm conclusion that the doubters are wrong. They certainly have grounds for doubt. Rather, the point of this Part is to consider what *Sullivan* says about the courts as institutional actors in this field, at the time and since. Whatever the faults in its judgment, there were good contemporary reasons for the Supreme Court to act as broadly, boldly, and firmly as it did in *Sullivan*. Its forceful intervention as an institutional actor was needed to counteract the problematic role of state courts as bad institutional actors, especially in the South, and especially because those courts were preventing other institutional actors—non-state actors such as the press and the civil rights movement—from "clearing the channels" of public discourse for social and political change.[137]

But perceptions of the relevant institutional factors have changed since then—not least the Court's own perceptions. The civil rights movement is no longer necessarily seen as a pressing contemporary force whose needs outweigh the values of federalism.[138] The press is no longer viewed as an institution deserving of "special solicitude."[139] And states, and state courts, are no longer treated as dangerous institutional actors that require a firm check by the federal courts.[140]

L. Rev. 173, 173, 185 (arguing that *Sullivan* "may have been socially and politically justified at the time," but that its incursion into state tort law "was a monumental step that the Court should not readily undertake again").

[137] Ely, *supra* note __, at 105.

[138] *See, e.g.*, Reva B. Siegel, *Foreword: Equality Divided*, 127 Harv. L. Rev. 1, 69 (2013) (discussing *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), and suggesting that the majority in that case "was more concerned about the 'disparate treatment' that civil rights law inflicts on states than the disparate treatment that discrimination inflicts on citizens").

[139] *Cf. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012) (declaring that the text of the First Amendment "gives special solicitude to the rights of religious organizations").

[140] *Cf.* Samuel Issacharoff, *Beyond the Discrimination Model on Voting*, 127

All that remains of that earlier institutional matrix is the Supreme Court itself. And the Court's own concerns in this area have changed. Its primary interest in the first decades after *New York Times v. Sullivan* was to come up with a body of clear and detailed law to guide itself and lower courts in the newly colonized field of defamation. And so it did, albeit with somewhat disappointing results. Over time, "an occasion for dancing in the streets"[141] became a plodding march, deprived of its "grandeur and vitality" as defamation law returned from the dramatic heights of national political conflict to the everyday stuff of law.[142] The substantial drop in volume of defamation cases in the Supreme Court[143] may signal that the Court is satisfied with the state of the doctrine, or no longer believes that close supervision of the lower courts is needed.[144] But one senses a broader spirit of withdrawal on the Court, a desire to leave the field of defamation to other judicial actors. Whether it is a matter of perception or of reality, it appears that the institutional considerations that drove the Court in *Sullivan* have changed.

Harv. L. Rev. 95, 97 (2013) (discussing changes in the legal treatment of one of the landmark pieces of federal civil rights legislation of the civil rights era, the Voting Rights Act, that result from "the increasing disjunction between section 5 [of the Act] and the realities of contemporary political life").

141 Kalven, *supra* note __, at 221 n.215 (quoting Alexander Meiklejhon).

142 Lewis, *supra* note __, at 243 ("If there is a doubt about the many Supreme Court decisions beginning with *Times v. Sullivan* that gave legal force to the First Amendment, it is a wariness about the amount of law and legalism in American society. The grandeur and vitality of the First Amendment can be obscured when it is turned over to lawyers[.]").

143 *See, e.g.*, Robert D. Sack, *Protection of Opinion Under the First Amendment: Reflections on Alfred Hill, "Defamation and Privacy Under the First Amendment,"* 100 Colum. L. Rev. 294, 295-96 (2000).

144 *Cf.* John Gruhl, *The Supreme Court's Impact on the Law of Libel: Compliance by Lower Federal Courts*, 33 W. Pol. Q. 502 (1980) (finding lower federal courts are obedient to the Supreme Court's decisions in this area); Lewis, *supra* note __, at 220 (finding an increase in damages and litigation costs for libel defendants but adding that "[m]ost of the jury awards against the press were reversed or substantially reduced by appellate courts").

CONCLUSION

I close with two bits of contemporary evidence of how far *New York Times v. Sullivan* has traveled in fifty years, and in which direction. First, in its recent decision in *Citizens United v. FEC*, the Supreme Court, in what Randall Bezanson has accurately called an "almost offhanded" way,[145] suggested that one necessary consequence of the general "premise that the First Amendment . . . prohibits the suppression of political speech based on the speaker's identity,"[146] is that there is no basis to distinguish media corporations from any other sort of corporation, including the plaintiff in that case. "'We have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers,'" Justice Kennedy said for the Court.[147]

Second, in an excellent recent article on *Citizens United*, professor and former judge Michael McConnell has suggested that *Citizens United* might actually have been better addressed as a Press Clause case rather than a Speech Clause case.[148] On McConnell's view of the Press Clause, however, the point is not that the institutional press receives any special protection. To the contrary, his point is that it receives *no* special protection. The Press Clause applies to anyone "who disseminate[s] information and opinion to the public through communications media," and not just the institutional press.[149] Any other conclusion would "require[ ] a legally enforceable line between 'press' and others, which is inherently unworkable."[150] Thus, the Press Clause does not single out the institutional press for protection; but it does provide a measure of protection for both the institutional press and any other speaker, such as the non-profit corporation Citizens

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145 Bezanson, *supra* note __, at 1263.

146 *Citizens United*, 558 U.S. at 350.

147 *Id.* at 352 (quoting *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 691 (1990) (Scalia, J., dissenting)).

148 *See generally* McConnell, *supra* note __.

149 *Id.* at 438.

150 *Id.* at 418; *see also id.* at 446 ("[T]here is no basis in history, precedent, or logic for distinguishing between the institutional press and other persons or groups who wish to publish their opinions about candidates for public office").

United. Both the decision and the article make prominent use of *New York Times v. Sullivan*.

Neither Justice Kennedy nor Professor McConnell are critical of the institutional press. Rather, in many respects, they are not especially *interested* in the press. For Justice Kennedy, the subject of the First Amendment is not the wealth of individual and institutional speakers that contribute to public discourse. It's all about the censor. The fundamental point of the First Amendment is "mistrust of governmental power."[151] How and why those institutions might be thought of as serving an important structural role in monitoring and preventing abuse of that power, and whether the law might enhance their ability to do so, is less important than limiting the state's power altogether. Although McConnell is a much more subtle and careful thinker than that, his article ultimately ends up in much the same place. For McConnell, the Press Clause is in part about a right to engage in an important activity—namely, the right to publish.[152] But it is, in even larger measure, a non-discrimination provision.[153] It is about the

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[151] *Citizens United*, 558 U.S. at 898.

[152] *See, e.g.,* McConnell, *supra* note __, at 418 (the Press Clause "protects an *activity*: publishing information and opinions to the general public").

[153] It is perhaps worth noting that Professor McConnell has looked more favorably on interpretations of another provision of the First Amendment, the Free Exercise Clause, that single out religion and religious institutions for differential treatment. In that area, he has rejected arguments that the difficulty of defining a "religious" institution with certainty, let alone letting the government do so, counsels in favor of interpreting the Clause primarily as an equality provision. *See, e.g.*, Michael W. McConnell, *Reflections on* Hosanna-Tabor, 35 Harv. J.L. & Pub. Pol'y 821, 835-36 (2012) (suggesting, with apparent approval, that the Court's decision in *Hosanna-Tabor* "suggest[s] a shift in Religion Clauses jurisprudence from a focus on individual believers to a focus on the autonomy of organized religious institutions"); Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DePaul L. Rev. 1 (2000) (arguing that the Religion Clauses properly "single out" religion for differential treatment and protection, rejecting Religion Clause theories that focus instead on "equal regard," and concluding that "as the most highly articulated constitutional doctrine insulating a sphere of life from governmental control," the Religion Clauses offer a model for dealing with other values and institutions). Of course, each clause of the

incompetence and impropriety of the government deciding who is "the press" and who isn't.

These are important concerns, and I do not mean to slight them. But both Kennedy and McConnell's treatments are perhaps indicative of what *New York Times v. Sullivan*, and the First Amendment with it, has become: what it has gained and lost in the last half-century. Its sweeping generalities about the importance of "uninhibited, robust, and wide-open" debate on public issues,[154] and about the dangers of state interference with those debates, have made the First Amendment a powerful tool against government intrusion into public discourse—indeed, into speech of almost any kind. They have made the *Supreme Court* a strong check on government punishment of speech.

But it is not clear that we have paid as much attention to the *particular* institutions, the particular participants in public discourse, that were so much a part of that landmark case. As central as mistrust of government was to *New York Times v. Sullivan*, it was not the whole story of the case. The press—the institutional press—was central to the outcome, as was the civil rights movement. Both institutions, working independently but sympathetically and symbiotically, were necessary for the struggle for civil rights in Alabama and across the nation. Both non-state institutions, buttressed by an aggressive Supreme Court, were important. *Sullivan* was not just about the Court serving as a check on government, through a non-discrimination rule or any other doctrinal safeguard. More fundamentally, it was about the check that particular non-state institutions provided on government, and still do.

Compared to the New York Times, other journalistic organizations, and the civil rights movement itself, L.B. Sullivan was merely a bit player. The goal of this Article has been to return some of the focus to those institutions and the role they played in *New York Times v. Sullivan*. We should not ascend so high into First Amendment generalities, or so deep into the weeds of

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First Amendment must be read and addressed on its own terms. But I believe there is more room for a serious, institutionally oriented reading of the Press Clause than McConnell's recent article suggests—for the same reasons that I share McConnell's much more favorable views regarding the constitutional protection of religious institutions.

[154] *Sullivan*, 376 U.S. at 270.

defamation law, that we forget them.