

## The Case for a Federal Defamation Regime

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**ABSTRACT.** This Essay argues that Congress can and should replace the existing state-law defamation regime with a federal defamation law. Doctrinally, a federal regime would better fit the modern, boundaryless digital-communications paradigm. Practically, it would benefit press organizations by ensuring their access to the federal courts in defamation cases.

### INTRODUCTION

When President Trump was in office, he repeatedly expressed an interest in developing a punitive federal defamation regime.<sup>1</sup> Legal scholars dismissed his statements, pointing out that no federal libel law exists and claiming that Congress lacks the power to limit First Amendment protections.<sup>2</sup>

But perhaps there is something to the suggestion that Congress federalize defamation law. Rather than limit speech (as President Trump might have preferred), a federal libel law could benefit the press and the public discourse by creating a uniform set of rules, guaranteeing defamation claimants access to the federal courts, limiting opportunities for forum shopping, and reducing the risk of catastrophic judgments. This Essay explores the theoretical and practical justifications for replacing the existing state-oriented defamation regime and

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1. Michael M. Grynbaum, *Trump Renews Pledge to ‘Take a Strong Look’ at Libel Laws*, N.Y. TIMES (Jan. 10, 2018), <https://www.nytimes.com/2018/01/10/business/media/trump-libel-laws.html> [https://perma.cc/XTR8-SKEQ].

2. See Davis Richardson, *How Viable Are Trump’s Libel Threats? Experts Weigh in*, OBSERVER (Jan. 11, 2018, 11:30 AM EST), <https://observer.com/2018/01/first-amendment-watchdog-groups-dispute-trumps-libel-threats> [https://perma.cc/9LJA-ENGE].

establishing a single federal defamation law that better fits the modern digital-communications paradigm.

First, in Part I, I introduce defamation law and consider why *New York Times v. Sullivan*,<sup>3</sup> the seminal Supreme Court case that established the modern libel regime, is no longer sufficient to regulate the marketplace of ideas. In *Sullivan*, the Court constitutionalized the field of libel law, holding that the First Amendment provides a defense against defamation claims and that a public official must prove that an untrue statement was made with “actual malice.”<sup>4</sup> While *Sullivan*’s “actual malice” standard may have provided sufficient protection to the traditional press in a locally oriented media environment, it is wholly inadequate in a world where technology allows any publication to reach a global audience. Although diversity jurisdiction should help manage interstate value conflicts by allowing for resolutions in federal court, defendants’ ability to remove cases to these fora is limited by permissive procedural rules.<sup>5</sup> Moreover, states drastically vary in how their procedures address speech-suppressive “strategic lawsuits against public participation” (SLAPPs).<sup>6</sup> Because plaintiffs have wide latitude in selecting the fora for their claims, media organizations must be prepared to defend against litigation in nearly every state, no matter how unfriendly the rules – or the people applying them – are to outside journalists.

Part II of this Essay examines two recent high-profile cases that highlight this problem and show that the existence of a constitutional defense is no longer enough to protect the press. In *Bollea v. Gawker Media, LLC*, a wealthy third party, motivated by personal animus against a Manhattan media company, leveraged a comparatively under-resourced plaintiff and a highly sympathetic Florida court to bankrupt a popular publication.<sup>7</sup> Though *Gawker* involved a narrow privacy claim, it pioneered a model for wealthy individuals to use tort law and distant state juries to inflict serious harm upon media organizations that they dislike. The possibility that media organizations would continue to face massive claims brought in state courts far away from their headquarters was realized in *Beef Products, Inc. v. ABC*, where ABC settled a libel claim in excess of \$170

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3. 376 U.S. 254 (1964).

4. *Id.* at 279-80.

5. See *Calder v. Jones*, 465 U.S. 783, 789 (1984) (holding that California could exercise personal jurisdiction over Florida journalists where California was “the focal point both of the story and of the harm suffered”).

6. See Mary-Rose Papandrea, *Media Litigation in a Post-Gawker World*, 93 TUL. L. REV. 1105, 1134 (2019) (describing the consequences of forum shopping “both in terms of federal versus state court and the selection of a particular state”).

7. No. 12012447 CI-011, 2016 WL 4073660 (Fla. Cir. Ct. June 8, 2016).

million, even though the broadcaster maintained that its reporting was accurate.<sup>8</sup> *Gawker* and *Beef Products* are not anomalies. Since their filing, multiple media outlets have had to defend against multi-million- and billion-dollar lawsuits in outside state jurisdictions.<sup>9</sup>

Finally, in Part III, I argue that a federal defamation law could remedy the problem of devastating litigation against the press, and that enacting such a law is within Congress's Commerce Clause powers.<sup>10</sup> At minimum, a basic defamation-preemption scheme would give defendants federal-question jurisdiction to get out of remote state courts. Such a law would provide much-needed uniformity at a time when speech has become placeless, and it would limit forum shopping – the practice of plaintiffs choosing the friendliest forum based on substance, procedure, and cultural sensibilities.

Federalizing defamation law would be a radical change. It entails real risks, such as potentially overriding the anti-SLAPP protections that already exist in certain states. But it is becoming increasingly clear that the status quo, in which distant state juries can bankrupt national media companies, is untenable and threatens press freedom. And no other lasting help is on the way. While state-by-state efforts to enact press-protective laws offer model policies, their patchwork nature leaves media defendants vulnerable to suit in more hostile localities, and federal courts have been reluctant to recognize such protections in defamation cases. Ultimately, our ever-more-connected communications ecosystem has outgrown the existing defamation regime, and Congress is the actor best equipped to restore predictability and proportionality into this area of law.

## I. THE CONSTITUTIONALIZATION OF LIBEL LAW

Despite its muddled treatment in defamation jurisprudence, the concept of “community” is the linchpin of the defamation tort. When an individual seeks to protect or rehabilitate her reputation by bringing a defamation claim, a judge applying the law (who comes from her community) and a jury finding the facts (also composed of members of her community) determine what, if any, reputational interests to vindicate. When opposing parties come from communities that abide by different norms, irreconcilable conflicts can result.

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8. No. Civ. 12-292, 2014 WL 1245307 (S.D. Cir. Ct. Union Cnty. Mar. 27, 2014); *see also* Christine Hauser, *ABC's 'Pink Slime' Report Tied to \$177 Million in Settlement Costs*, N.Y. TIMES (Aug. 10, 2017), <https://www.nytimes.com/2017/08/10/business/pink-slime-disney-abc.html> [https://perma.cc/5PP8-TWF4].

9. *See infra* Section II.B.2.

10. U.S. CONST. art. I § 8 cl. 3.

*New York Times v. Sullivan*—the seminal Supreme Court case that established the modern libel regime—arose from one such conflict between local and national values.<sup>11</sup> While *Sullivan* broke ground by constitutionalizing the field of defamation law through the “actual malice” rule, a third of the Court nonetheless anticipated that it might not adequately protect outside press that criticized the values of local judges and juries.<sup>12</sup> *Sullivan* also recognized that different procedural rules should apply in defamation cases to encourage free speech.<sup>13</sup> However, the procedural changes that *Sullivan* implemented were designed for a locally oriented media paradigm, which has since given way to a boundaryless media sphere.

#### A. Defamation as a Local Wrong Grounded in Community Understanding

The tort of defamation is, on one level, intuitive. According to the *Restatement (Second) of Torts*, a statement is defamatory if it is false and “tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.”<sup>14</sup> Put simply, it is wrong to tell harmful lies, and those who do so should be punished. Anyone who has been the subject of false gossip recognizes that it can injure by causing alienation, identity destabilization, loss of social standing, or loss of livelihood.<sup>15</sup>

Yet as basic a concept as defamation is, it is difficult to circumscribe this injury in the law. Defamation’s constituent elements of “reputation,” “community,” and “harm” are abstract and subjective, and courts and state legislatures have done little to shape the tort of defamation itself, allowing “its inconsistencies [to] gr[o]w multifoliate in the variety of soils provided by federalism.”<sup>16</sup> Consequently, defamation doctrine is a “veritable ‘fog of fictions, inferences, and presumptions,’” organized around contingent and indeterminate concepts.<sup>17</sup> Critically, the courts “have not attempted to define ‘reputation’ as an abstract entity,”<sup>18</sup>

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11. 376 U.S. 254 (1964).

12. *Id.* at 293 (Black, J., concurring); *id.* at 297 (Goldberg, J., concurring in the judgment).

13. *Id.* at 284–86 (majority opinion).

14. RESTATEMENT (SECOND) OF TORTS § 559 (AM. L. INST. 1977).

15. See *Linn v. United Plant Guard Workers of Am. Loc. 114*, 383 U.S. 53, 65 (1966).

16. Joel D. Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1350 (1975).

17. RODNEY A. SMOLLA, 1 LAW OF DEFAMATION § 1:3 (2d ed. 2020) (quoting *Coleman v. MacLennan*, 98 P. 281, 291 (1908)).

18. Note, *Developments in the Law: Defamation*, 69 HARV. L. REV. 875, 877 (1956); see also Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CALIF. L. REV. 691, 691 (1986) (“The common law of defamation has long been viewed as an intellectual wasteland, ‘perplexed with minute and barren distinctions.’” (quoting SIR FREDERICK

disagreeing on whether “reputation” is a property interest or an interest in “honor” or “dignity”<sup>19</sup> and sidestepping the issue of differing definitions of “reputation.”<sup>20</sup>

To complicate matters further, “reputation” is “socially constructed” and “defined more by its effect on the others who make up the plaintiff’s community than by its effect on the individual plaintiff.”<sup>21</sup> Accordingly, reputation may be conceived of as a “public good,”<sup>22</sup> meaning that unfairly damaging a reputation is not just a harm against the individual, but a degradation of “the value and reliability” of the information upon which a community relies and thus potentially a “devalu[ation of] community identity” itself.<sup>23</sup>

And who forms a “community” anyway? As mentioned above, courts have failed to define the term with any rigor.<sup>24</sup> Instead of using geographic lines or objective indicia like population size, courts have generally and largely correctly intuited that culture is the defining feature; yet, courts have gone astray by articulating this idea in such general terms that it essentially amounts to a reasonable-norm-enforcer standard, allowing judges and juries to apply their own sensibilities as to who makes up a community and what that community thinks.<sup>25</sup>

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POLLOCK, *THE LAW OF TORTS* 243 (13th ed. 1929)); W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, *PROSSER AND KEETON ON THE LAW OF TORTS* § 111, at 771-72 (5th ed. 1984 & Supp. 1988) (“[T]here is a great deal of the law of defamation which makes no sense[.]”).

19. Post, *supra* note 18, at 693.
20. See, e.g., *Competitive Ent. v. Mann*, 150 A.3d 1213, 1243 (D.C. 2016) (academic reputation); *Albert v. Loksen*, 239 F.3d 256, 268 (2d Cir. 2001) (professional); *Stanton v. Metro Corp.*, 438 F.3d 119, 130 (1st Cir. 2006) (sexual); *Bentley v. Bunton*, 94 S.W.3d 561, 582 (Tex. 2002) (ethical); *Louka v. Park Ents., Inc.*, 1 N.E.2d 41, 42 (1936) (artistic).
21. Lyrissa Barnett Lidsky, *Defamation, Reputation, and the Myth of Community*, 71 WASH. L. REV. 1, 6 (1996) (internal quotation omitted).
22. David S. Ardia, *Reputation in a Networked World: Revisiting the Social Foundations of Defamation Law*, 45 HARV. C.R.-C.L. L. REV. 261, 262 (2010).
23. *Id.*
24. See Post, *supra* note 18, at 693.
25. See *Peck v. Trib. Co.*, 214 U.S. 185, 190 (1909) (determining that a plaintiff with particular moral standards may be harmed if her reputation is injured with a “considerable and respectable class in the community”); see also *Kimmerle v. N.Y. Evening J., Inc.*, 186 N.E. 217, 218 (N.Y. 1933) (applying a “right-thinking” person standard); *Wilson v. New York*, No. 15-CV-23, 2018 WL 1466770, at \*4 (E.D.N.Y. Mar. 26, 2018) (same); *Greenberg v. Spitzer*, 155 A.D.3d 27, 54-55 (N.Y. App. Div. 2017) (same). As Lyrissa Barnett Lidsky has written, the “determination of who constitutes a substantial and respectable minority” of the community often hinges on the judge’s presumptions as to what a community does or *should* value, allowing courts “to apply the dominant culture’s values” as they see or imagine them. Lidsky, *supra* note 21, at 10, 19.

Although geography and population have received scant consideration in defining “community” for the purposes of a defamation action, they inevitably inform the inquiry.<sup>26</sup> This is because the “American tradition of trial by jury . . . necessarily contemplates an impartial jury drawn from a cross-section of the [defendant’s] community.”<sup>27</sup> Thus, the idea of “community” already inheres in a defamation determination through its deciders, who are selected from a clearly demarcated political subdivision with its own unique culture and character.<sup>28</sup> Even in bench trials, a judge’s understanding of “community” is inevitably informed by her own sense of local identity.<sup>29</sup>

In many cases, this implicit judgment as to who forms the “community” is appropriate. For example, if a city comptroller brings a libel claim against his local newspaper, both of the parties will come from the same region as the judge or jury deciding the case. But when the parties come from different regions, one of them may lack a shared identity with their fact finder. Further, because the concept of reputation is actually derived from a community insofar as reputation is effectively a community judgment, and because community identity is “devalue[d]” by unflattering false statements,<sup>30</sup> there is a special risk to outsider defendants that the fact finder will not only feel kinship with the plaintiff, but also see the allegedly defamatory statement as personally harmful. As I discuss below, this kind of conflict was present in *Sullivan*, and it is only more likely to occur today because internet publication “makes it easier for content to cross cultural and geographical borders.”<sup>31</sup>

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26. The Supreme Court has specifically addressed the relevance of locality in the obscenity context, an area of First Amendment law similarly concerned with intersubjective and normative determinations. In *Miller v. California*, the Court stated that it was “neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City.” 413 U.S. 15, 31 (1973).

27. *Thiel v. S. Pac. Co.*, 328 U.S. 217, 220 (1946).

28. For federal trials, juries are selected from within the federal district or a division thereof. 28 U.S.C. § 1863 (2018). For trials in state courts, jurors are typically selected from within a county or from within a specified judicial district. See Alexander E. Preller, Note, *Jury Duty Is a Poll Tax: The Case for Severing the Link Between Voter Registration and Jury Service*, 46 COLUM. J.L. & SOC. PROBS. 1, 42-48 (2012) (collecting statutes).

29. See Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 614 (2000) (describing the effect of social influence on judges’ behavior).

30. See Ardia, *supra* note 22, at 262.

31. Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 7 (2004).

B. *New York Times v. Sullivan and the Emerging Conflict Between Local Norms and National Coverage*

Until 1964, the tort of defamation was a local creature that implicated no constitutional concerns, operating “as a vehicle through which communities [could] perpetually reexamine and communicate their values.”<sup>32</sup> That changed when the Supreme Court decided *New York Times v. Sullivan*, articulating a First Amendment defense to defamation claims that reflected national interest in such cases.<sup>33</sup>

*Sullivan* has been heralded as a victory for free speech.<sup>34</sup> This Essay argues that it is also a prime early example of an ongoing conflict that has since reached an untenable point for the press, illustrating how an aggrieved community can seek to enforce its norms by punishing national critics.<sup>35</sup> The case concerned an advertisement in the *New York Times* that was commissioned by a group of civil-rights advocates from across the country.<sup>36</sup> The advertisement described instances of police hostility toward activists, stating that “truckloads of [armed] police” had “ringed” Alabama State College and that officers had improperly arrested Dr. Martin Luther King Jr. seven times.<sup>37</sup> The advertisement named no specific perpetrators.<sup>38</sup>

Three weeks later, L.B. Sullivan, the white police commissioner of Montgomery, Alabama, brought a libel suit against the *Times*.<sup>39</sup> Claiming that the advertisement’s use of the term “police” could be assumed to “refer[] to him,” Sullivan asserted that the advertisement falsely maligned the integrity of a public official, which was libelous per se under Alabama law, and claimed \$500,000 in damages.<sup>40</sup> The state court established jurisdiction on the basis that approximately four hundred copies of the *Times* had circulated in Alabama and that the newspaper employed stringers in the state.<sup>41</sup>

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32. Cristina Carmody Tilley, *Tort Law Inside Out*, 126 YALE L.J. 1320, 1320 (2017).

33. 376 U.S. 254 (1964).

34. See, e.g., Harry Kalven Jr., “Uninhibited, Robust, and Wide-Open”: A Note on Free Speech and the Warren Court, 67 MICH. L. REV. 289 (1968).

35. See, e.g., Anthony Lewis, *The Sullivan Case*, NEW YORKER (Nov. 5, 1984), <https://www.newyorker.com/magazine/1984/11/05/the-sullivan> [https://perma.cc/69LN-JEJB]; Post, *supra* note 18 at 732.

36. *Sullivan*, 376 U.S. at 256, 305.

37. *Id.* at 257-58.

38. *Id.* at 258.

39. *Id.* at 256; Brief for Petitioner at 3, *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (No. 39).

40. *Sullivan*, 376 U.S. at 256, 258.

41. See *id.* at 260 n.3; *N.Y. Times Co. v. Sullivan*, 273 Ala. 656, 666 (1962), *rev'd*, 376 U.S. 254.

The trial environment was less than favorable to the *Times*. The paper struggled to find local counsel, and its lead attorney had to stay in a “motel room under an assumed name.”<sup>42</sup> The judge in the case had previously “issued orders forbidding the [NAACP] to do business in Alabama” and had personally participated in celebrations of the Confederacy.<sup>43</sup> The jury was all white,<sup>44</sup> and courtroom seating “was segregated.”<sup>45</sup> When witnesses were called, none testified to “actually believ[ing] the statements in their supposed reference to respondent,” and Sullivan otherwise “made no effort to prove that he suffered actual pecuniary loss as a result of the alleged libel.”<sup>46</sup> But the jury nonetheless awarded Sullivan full “presumed” and punitive damages.<sup>47</sup> The Alabama Supreme Court affirmed the judgment.<sup>48</sup> The *Times* appealed to the Supreme Court, arguing that the lower-court ruling “imposed a forbidden burden on interstate commerce and abridged the freedom of the press” in violation of the First Amendment.<sup>49</sup>

A unanimous Court agreed with the *Times*, holding that “neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct.”<sup>50</sup> It also established 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.”<sup>51</sup>

Justice Black, however, went further in his concurrence, explicitly recognizing a dangerous dynamic at play—one where members of one political subdivision could use litigation to stifle national debate.<sup>52</sup> He described state libel laws as an existential threat to a “press virile enough to publish unpopular views on

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42. Lewis, *supra* note 35, at 54.

43. *Id.*

44. Brief for Petitioner at 13, *Abernathy v. Sullivan*, 376 U.S. 254 (1964) (No. 40).

45. Lewis, *supra* note 35, at 54.

46. *Sullivan*, 376 U.S. at 260.

47. *Id.* at 256, 267.

48. *N.Y. Times Co. v. Sullivan*, 273 Ala. 656, 666 (1962), *rev'd*, 376 U.S. 254.

49. See Brief for Petitioner, *supra* note 39, at 34.

50. *Sullivan*, 376 U.S. at 273.

51. *Id.* at 279-80. In reaching this conclusion, the Court avoided any discussion of the *Times*'s interstate-commerce argument that the lawsuit impermissibly sought to suppress speech by the national press.

52. See Post, *supra* note 18, at 732 (“In *New York Times* a local plaintiff and a local jury used the law of defamation to punish those who dared to challenge ‘the ancient ways’ of the Alabama community.”).



public affairs and bold enough to criticize the conduct of public officials.”<sup>53</sup> He worried that this “technique for harassing and punishing a free press . . . [could] be used in other fields where public feelings may make local as well as out-of-state newspapers easy prey.”<sup>54</sup> According to Justice Black, *Sullivan’s* facts only “emphasize[d] the imminence and enormity of that threat.”<sup>55</sup> The *Times’s* connection to Alabama was tenuous, given its miniscule readership there.<sup>56</sup> Further, Montgomery’s white residents had demonstrated a “widespread hostility to desegregation,” which extended to “so-called ‘outside agitators,’ including papers like the *Times*.”<sup>57</sup> To Justice Black—a native Alabaman—*Sullivan’s* claim of reputational injury was risible: “Viewed realistically, this record lends support to an inference that . . . Commissioner Sullivan’s . . . prestige [was] likely . . . enhanced.”<sup>58</sup> The sizeable damages award seemed to be intended to punish the *Times* for carrying an antisegregation message, rather than to rectify reputational harm.<sup>59</sup> Justice Goldberg separately shared this sentiment, observing that the case “conclusively demonstrate[d] the chilling effect of the Alabama libel laws on First Amendment freedoms in the area of race relations.”<sup>60</sup>

With these concerns in mind, both of the Justices, along with Justice Douglas, would have adopted a rule of “absolute immunity for criticism of the way public officials do their public duty.”<sup>61</sup> They feared that anything less could lead to the weaponization of libel litigation whenever judges and juries themselves disagreed with a message’s content and believed that the message attacked their own identities. As Justice Goldberg put it, “vigorous criticism by press and citizen of [government] conduct . . . will soon yield to silence if officials in control of government agencies, instead of answering criticisms, can resort to friendly

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53. *Sullivan*, 376 U.S. at 294 (Black, J., concurring).

54. *Id.* at 295.

55. *Id.* at 294.

56. See Harry Kalven, Jr., *The New York Times Case: A Note on “The Central Meaning of the First Amendment,”* 1964 SUP. CT. REV. 191, 197 (“The publication, addressed primarily to a national audience, was all but invisible in the community in which plaintiff was claiming harm to his reputation.”).

57. *Sullivan*, 376 at 294 (Black, J., concurring).

58. *Id.*

59. See *id.* (“The scarcity of testimony showing that Commissioner Sullivan suffered any actual damages at all suggests that these feelings of hostility had at least as much to do with rendition of this half-million-dollar verdict as did an appraisal of damages.”).

60. *Id.* at 300-01 (Goldberg, J., concurring in the judgment).

61. *Id.* at 295 (Black, J., concurring); see also *id.* at 298 (Goldberg, J., concurring in the judgment) (supporting an “absolute, unconditional privilege to criticize official conduct”).

juries to forestall criticism of their official conduct.”<sup>62</sup> Indeed, the ultimate disposition of the case was a silent concession to this point. Rather than remand for application of the new “actual malice” rule, the Court took the unusual step of reviewing the evidentiary record “to determine whether it could constitutionally support a judgment” against the police commissioner for the purposes of “effective judicial administration.”<sup>63</sup> The Court’s message was clear: it did not trust Alabama courts to apply its new rule to the facts of the case.

### C. *Sullivan as a Procedural Fix Crafted for a Specific Techno-economic Paradigm*

While *Sullivan* transformed substantive defamation law by announcing the “actual malice” test, it also altered the procedure in libel cases in three consequential ways that fit its contemporary media environment.

Two of these changes were intentional. First, *Sullivan* placed a burden on plaintiffs to show actual malice with “convincing clarity.”<sup>64</sup> Second, it treated actual malice as a constitutional fact entitled to independent appellate review to avoid “forbidden intrusion on the field of free expression.”<sup>65</sup> These two procedural changes effectively acknowledged that the interests at stake in defamation cases were “‘particularly important’ and ‘more substantial than mere loss of money,’” and that juries might be predisposed against libel defendants.<sup>66</sup> Critically, these standards also offered recognition that procedure was especially important in speech cases and that defamation law may require its own unique form of “First Amendment ‘due process’” distinct from Fifth and Fourteenth Amendment due process.<sup>67</sup>

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62. *Id.* at 304 (Goldberg, J., concurring in judgment); *see also id.* at 295 (Black, J., concurring) (“This record certainly does not indicate that any different verdict would have been rendered here whatever the Court had charged the jury about ‘malice,’ ‘truth,’ ‘good motives,’ ‘justifiable ends,’ or any other legal formulas which in theory would protect the press.”).

63. *Id.* at 284-85 (majority opinion).

64. *Id.* at 285-86.

65. *Id.*

66. *Santosky v. Kramer*, 455 U.S. 745, 756 (1982) (quoting *Addington v. Texas*, 441 U.S. 418, 424 (1979)); *see also* David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487, 494-95 (1991) (observing that *Sullivan*’s procedural changes gave judges “power to overturn jury verdicts that under usual rules would have to be accepted”); Scott M. Matheson, Jr., *Procedure in Public Person Defamation Cases: The Impact of the First Amendment*, 66 TEX. L. REV. 215, 240 (1987) (noting that a heightened burden serves to enhance the substantive value of expression because a “mild preference for the status quo dictates that the defendant should win if the evidence is in equipoise”).

67. Henry P. Monaghan, *First Amendment “Due Process,”* 83 HARV. L. REV. 518, 518 (1970); *see also* Susan M. Gilles, *Taking First Amendment Procedure Seriously: An Analysis of Process in Libel*

*Sullivan*'s third change to the procedure of defamation litigation may have been inadvertent. By focusing on the defendant's state of mind, the actual-malice rule makes defendants the primary targets of discovery, exposing them to significant costs and intrusions.<sup>68</sup> The Court predicted these effects at the time, but the drawbacks of increased discovery seemed minor compared to the *Sullivan* rule's substantive protections, particularly given the existing media environment.<sup>69</sup> *Sullivan* came down in an analogue world where the local press thrived and mass media was still fairly new.<sup>70</sup> For much of the twentieth century, "small, family-owned dailies dominated the American newspaper industry."<sup>71</sup> In the early 1960s, the *New York Times*—a dominant national newspaper of the period—only published about one percent of newspaper copies in circulation because local consumers tended to consume their own local media.<sup>72</sup> Conflicts between publications like the *Times* and distant, hostile juries were thus the exception, not the rule.

The reporting process itself also differed back then. The primary objects of discovery would be physical notes, not vast caches of digital files like texts and emails.<sup>73</sup> The caution that a reporter should "[d]ance like nobody is watching,

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*Litigation*, 58 OHIO ST. L.J. 1753, 1765 (1998) ("[P]rocedural accommodations have existed since *New York Times*"). Although defamation law remains governed by certain distinct procedural rules, the Supreme Court later declined to grant additional "special procedural protections to defendants in libel and defamation actions in addition to the constitutional protections embodied in the substantive laws." *Calder v. United States*, 465 U.S. 783, 790-91 (1984).

68. See Matheson, *supra* note 66, at 245 ("[T]he *New York Times* substantive rule provided the need and opportunity for unprecedented discovery and judicial scrutiny of the editorial process").
69. Kalven, *supra* note 56, at 220 (avoiding "carping too much about the illiberality of so distinctively liberal an opinion").
70. See *Newspapers Fact Sheet*, PEW RSCH. CTR. (June 29, 2021), <https://www.journalism.org/fact-sheet/newspapers> [<https://perma.cc/7HAQ-XVBA>] (providing data on newspaper-circulation trends). Broadcasting also had a more local character. See ELI M. NOAM, *MEDIA OWNERSHIP AND CONCENTRATION IN AMERICA* 83 (2009) (describing broadcasting trends in the twentieth century).
71. Elizabeth M. Neiva, *Chain Building: The Consolidation of the American Newspaper Industry, 1955-1980*, 24 BUS. & ECON. HIST. 22, 22 (1995); see also KEITH R. STAMM, *NEWSPAPER USE AND COMMUNITY TIES: TOWARD A DYNAMIC THEORY* 8 (1985) (describing a "paradigm in which community ties both precede and follow from newspaper use").
72. See NOAM, *supra* note 70, at 140 (discussing the market share of national newspapers).
73. See D. Victoria Baranetsky & Alexandra Gutierrez, *What a Costly Lawsuit Against Investigative Reporting Looks Like*, COLUM. JOURNALISM REV. (Mar. 30, 2021), [https://www.cjr.org/tow\\_center/costly-lawsuit-against-investigative-reporting-looks-like.php](https://www.cjr.org/tow_center/costly-lawsuit-against-investigative-reporting-looks-like.php) [<https://perma.cc/YN7H-VJUG>].

but email like it may one day be subpoenaed and read aloud in a deposition” was yet unintelligible.<sup>74</sup>

## II. SULLIVAN’S PRACTICAL LIMITATIONS

While *Sullivan* has been celebrated, some have critiqued the decision for insufficiently protecting speech.<sup>75</sup> This Part considers whether *Sullivan* accomplished its goals, examining subsequent trends in defamation litigation and discussing the recently realized threat of weaponized defamation suits.

### A. Libel Litigation in Sullivan’s Wake

For two decades, the actual-malice constitutional rule counterbalanced the common law’s amorphous treatment of community and reputation. In the 1970s, the tort of defamation “appeared headed for obsolescence.”<sup>76</sup> By the early 1980s, the number of defamation suits had decreased, and they “frequently ended in defeat for the plaintiff” when they did go to trial.<sup>77</sup>

But then an “astonishing shift” occurred, where courts began to see a “dramatic proliferation of highly publicized libel actions brought by well-known figures who s[ought], and often receive[d], staggering sums of money.”<sup>78</sup> As media

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74. Corey Hutchins, *A Daily’s Loss in Court May Cause Journalists to Rethink How They Communicate*, COLUM. JOURNALISM REV. (Oct. 25, 2016), [https://www.cjr.org/united\\_states\\_project/libel\\_lawsuit\\_journalists\\_email\\_slack.php](https://www.cjr.org/united_states_project/libel_lawsuit_journalists_email_slack.php) [<https://perma.cc/3J43-Z8UU>].

75. See, e.g., Anderson, *supra* note 66, at 488. In addition to failing to adequately protect the First Amendment interest in robust debate, Anderson has also critiqued the current defamation regime for insufficiently protecting the common-law interest in reputation, because “most claims are judicially foreclosed” after costly discovery into a defendant’s state of mind. *Id.* at 489. In his view, what remains is a system with aberrational results that “gives plaintiffs delusions of large windfalls, defendants nightmares of intrusive and protracted litigation, and the public little assurance that the law favors truth over falsehood.” *Id.*

76. Rodney A. Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. PA. L. REV. 1, 1 (1983); see also Russell L. Weaver & Geoffrey Bennett, *Is the New York Times “Actual Malice” Standard Really Necessary? A Comparative Perspective*, 53 LA. L. REV. 1153, 1153-54 (1993) (finding “virtually no recoveries” in defamation suits following *Sullivan*, but observing a growth in the number of libel suits grew in later years (quoting Kalven, *supra* note 56, at 221 n.125)).

77. Emily Bazelon, *Billionaires vs. the Press in the Era of Trump*, N.Y. TIMES MAG. (Nov. 22, 2016), <https://www.nytimes.com/2016/11/22/magazine/billionaires-vs-the-press-in-the-era-of-trump.html> [<https://perma.cc/2L6G-725Y>].

78. Smolla, *supra* note 76, at 1.

became more nationalized, trends of defendant losses and ever-increasing damages emerged.<sup>79</sup> Losses were most pronounced in state courts.<sup>80</sup>

This trend has accelerated in the past decade.<sup>81</sup> The median award granted in defamation cases against media companies this decade is \$1.1 million, a five-fold increase since the 1980s.<sup>82</sup> When defendants lose, they are also less likely to fight back. In the 1980s, media defendants almost always appealed verdicts against them.<sup>83</sup> Now, they decline appeals in nearly a quarter of cases,<sup>84</sup> settling after trial instead.<sup>85</sup> This suggests that media defendants are less confident about their litigation prospects and that the costs of continued litigation may be too great amid this uncertainty.

These dynamics are especially evident in state courts, where the majority of defamation cases occur.<sup>86</sup> Procedures and substantive protections vary by state,<sup>87</sup>

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79. See Bazelon, *supra* note 77 (describing litigation trends).

80. See *MLRC 2018 Report on Trials and Damages*, MEDIA L. RES. CTR. BULL. 54-55 (April 2018), [https://www.medialaw.org/images/stories/MLRC\\_Bulletin/2018/damagesurvey2018.pdf](https://www.medialaw.org/images/stories/MLRC_Bulletin/2018/damagesurvey2018.pdf) [<https://perma.cc/C9HH-7A45>] (describing larger final damage awards in state court).

81. *Id.* at 6 (“[T]he percentage of awards of \$1,000,000 or more has been increasing from decade to decade: it was 24.2 percent in the 1980s, then 32.1 percent in the 1990s, and 38.6 percent in the first decade of the 2000s. In the 2010s, this has increased significantly, to 61.5 percent (16 of 26 awards) of a million dollars or more.” (internal citation omitted)). Since 2010, media defendants have won only forty-one percent of cases that have gone to trial, an eleven-percent drop from the previous decade. Meanwhile, plaintiffs in these cases have been seeking larger awards. *Id.*

82. See Bazelon, *supra* note 77 (describing litigation trends). The difference is significant even after adjusting for inflation. See *Federal Reserve Economic Data: Consumer Price Index for All Urban Consumers: All Items in U.S. City Average*, FED. RESRV. BANK ST. LOUIS, <https://research.stlouisfed.org/fred2/series/CPIAUCSL> [<https://perma.cc/4B8H-MXUF>] (showing a roughly two-fold increase in inflation since 1989).

83. See MEDIA L. RES. CTR. BULL., *supra* note 80, at 47 (“The drop in the proportion of awards modified on appeal over the decades can largely be found in the rise of percentages of cases settled prior to appeal, and to some extent, cases not appealed at all. There had been an increase in both of those outcomes from the 1980s to the 2000s.”).

84. *Id.*

85. See *id.* at 60 (“The share of trials eventually settled was 7.5 percent in the 1980s, and the percentages more than doubled to 17.7 percent in the 1990s and 18.5 percent in the 2000s. The percentage is much higher so far in the 2010s, 15 out of 47 cases (31.9 percent) have settled.”).

86. See *id.* at 6 (calculating that 78 % of claims against media defendants “are tried in state court”).

87. See Neil M. Rosenbaum, *Pick A Court, Any Court: Forum Shopping Defamation Claims in the Internet Age*, 14 J. INTERNET L. 18, 21 (2011) (“The substantive laws of various states for defamation differ significantly. For example, ‘New York law grants opinions greater protection from defamation actions than does California law’ . . . States also differ with respect to the requisite degree of fault a publisher must bear before a private individual may recover for defamation. Substantive issues aside, courts generally apply the forum state’s local rules on

making it difficult for reporters to bulletproof their stories in anticipation of far-away claims. States differ in the extent of permissible discovery, the admissibility of expert testimony, and the availability of interlocutory appeals and defensive early-termination proceedings.<sup>88</sup> Some states have codified privileges, like the “fair report privilege,” that protect publications covering official proceedings,<sup>89</sup> where others lack such protections. And as a practical matter, media defendants fare worse in state courts on average.<sup>90</sup> State courts have awarded all of the top ten final awards in history against media defendants.<sup>91</sup> And while initial awards are higher in federal court, the average final state-court award against a media

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procedural litigation matters even when another state’s law governs the merits.”) (footnotes and citation omitted)).

88. See Colin Quinlan, Note, *Erie and the First Amendment: State Anti-SLAPP Laws in Federal Court After Shady Grove*, 114 COLUM. L. REV. 367, 375-76 (2014) (collecting and surveying anti-SLAPP statutes enacted by the majority of states). Anti-SLAPP laws, which are meant to discourage vexatious and speech-suppressive lawsuits, have been adopted by many states and often include procedural safeguards, such as stays of discovery, that permit efficient resolution of defamation lawsuits. See *id.*
89. See, e.g., CAL. CIV. CODE § 47 (West 2021); GA. CODE ANN. § 51-5-7 (West 2016); N.Y. CIV. RIGHTS LAW § 74 (McKinney 2021).
90. It is true, as a general matter, that “institutional defendants” prefer to litigate in federal court. Diego A. Zambrano, *Federal Expansion and the Decay of State Courts*, 86 U. CHI. L. REV. 2101, 2162 (2019). The trends described above may also be true of defendants in cases involving other legal claims, but press defendants warrant unique protections in order to promote free speech and maintain a vibrant public sphere.
91. See MEDIA L. RES. CTR. BULL., *supra* note 80, at 77-90 (citing *Fezell v. A.H. Belo Corp.*, No. 86-22271 (Tex. Dist. Ct. Apr. 19, 1991) (awarding a final sum of \$58 million in a libel action); *Srivastava v. Harte-Hanks* (Tex. Dist. Ct. 1990) (featuring a jury award of \$29 million for libel and intrusion claims, with an adjustment to an \$8.5 million settlement before appeal); *Sprague v. Phila. Newspapers* (*Sprague v. Phila. Newspapers II*), No. 1973 3644 (Pa. C.P. 1990), *aff’d in part and rev’d in part*, 441 Pa. Super. 1 (Pa. Super. Ct. 1985) (awarding \$24 million for a libel claim with a later settlement of \$20 million); *Strange v. Entercom Sacramento LLC*, No. 07AS00377 (Cal. Super. Ct. Oct. 29, 2009) (final award of \$16.5 million); *Doe v. TCI Cablevision* (*Doe v. TCI Cablevision II*), No. 972-09415 (Mo. Cir. Ct. Oct. 31, 2000), *aff’d*, 207 S.W.3d 52 (Mo. App., E.D. June 20, 2006), *reh’g transfer denied*, No. ED85283 (Mo. App., E.D. July 26, 2006), *transfer denied*, No. SC87904 (Mo. Dec. 19, 2006) (final award of \$15 million); *Newcomb & Assoc. v. Plain Dealer Publ’g. Co.*, No. 93757 (Ohio Ct. C.P. 1990) (final award of \$13.5 million with a later settlement for an unknown amount); *Lee v. Duddy*, No. 540 585-9 (Cal. Super. Ct. 1985) (final award of \$11.9 million); *Prozeralik v. Capital Cities/ABC, Inc.* (II), (N.Y. Sup. Ct. 1994) *aff’d in part and rev’d in part*, 222 A.D.2d 1020 (N.Y. App. Div. 1995), *appeal dismissed*, 88 N.Y.2d 843, *leave to appeal denied*, 88 N.Y.2d 812 (1996) (final award of \$11 million with a later settlement for an unknown amount); *Green v. Alton Tel. Printing Co.*, (Ill. Cir. Ct. 1980) (final award of \$9.2 million with a later settlement of \$1.4 million); *Nguyen v. Nguyen*, No. 14-91-00443-CV (Cal. Super. Ct. 1991) (final award of \$5.1 million)).

defendant since 2010 was nearly twenty times the average federal-court award, at \$16.5 million in state court compared to \$830,000 in federal court.<sup>92</sup>

### B. *The Recent Use of Libel Actions as Catastrophic Weapons*

A \$1.1 million award is now starting to look cheap. Two recent cases – involving Gawker and ABC – have highlighted the risk of being an outsider media defendant in state court and demonstrated how media torts can be weaponized against the press with catastrophic consequences. Other similarly high-stakes cases have followed.<sup>93</sup>

#### 1. *Gawker’s Loss Against Hulk Hogan*

When a \$140 million verdict came down against Gawker in 2016, some legal scholars dismissed it as an aberration, largely irrelevant to the First Amendment and the legal status of the press, for two reasons.<sup>94</sup> First, the claims concerned privacy, not defamation.<sup>95</sup> And second, the case involved an unsympathetic defendant.

In 2012, Gawker published a sex tape featuring Hulk Hogan and a Florida woman named Heather Clem.<sup>96</sup> Hogan responded by suing Clem in Florida state court.<sup>97</sup> Hogan also filed a diversity action against Gawker in federal court

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92. MEDIA L. RES. CTR. BULL., *supra* note 80, at 55. Since the 1980s, the average “state court award was about three times the average federal court award.” *Id.* at 56.

93. See, e.g., Complaint, U.S. Dominion, Inc. v. Fox News Network, LLC, N21C-03-257 (Del. Sup. Ct. Mar. 26, 2021) (seeking \$2.9 billion in damages); Veronica Villafaña, *Juan Gabriel’s Son Files \$100M Defamation Suit Against Univision and Telemundo*, FORBES (May 22, 2017, 5:06 PM EST), <https://www.forbes.com/sites/veronicavillafane/2017/05/22/juan-gabriels-son-files-100m-defamation-suit-against-univision-and-telemundo/?sh=360ac79435fo> [https://perma.cc/MW6Y-AHTQ] (seeking \$100 million in damages); Complaint, Marshall Cnty. Coal Co. v. Oliver, 17-C-124 (W. Va. Cir. Ct. June 21, 2017) (filing a coal industry lawsuit seeking general, special, and punitive damages against HBO, Time Warner, and John Oliver).

94. See Erik Eckholm, *Legal Experts See Little Effect on News Media from Hulk Hogan Verdict*, N.Y. TIMES (March 19, 2016), <https://www.nytimes.com/2016/03/20/business/media/legal-experts-see-little-effect-on-news-media-from-hulk-hogan-verdict.html> [https://perma.cc/9M8C-XTWU] (describing *Gawker* case as anomalous and likely to be overturned on appeal).

95. See First Amended Complaint and Demand for Jury Trial at 1, *Bollea v. Clem*, No. 12012447 (Fla. Cir. Ct. Dec. 28, 2012).

96. See *Bollea v. Gawker Media, LLC (Bollea I)*, No. 8:12-cv-02348-T-27TBM, 2012 WL 5509624, at \*1 (M.D. Fla. Nov. 14, 2012).

97. See *Bollea v. Clem*, 937 F. Supp. 2d 1344, 1348 (M.D. Fla. 2013) (describing procedural history).

and twice moved for a preliminary injunction for the sex tape’s retraction.<sup>98</sup> The judge rejected both motions, holding that the video was of public concern, in part because of Hogan’s fame as a wrestler, and that such an order would be an “unconstitutional prior restraint.”<sup>99</sup> After these setbacks, Hogan dropped his federal claim and joined Gawker to the state-court proceeding.<sup>100</sup>

The case then turned around for Hogan. The federal district court accepted Hogan’s argument that a sufficient “logical relationship” existed between the Gawker and Clem claims for a Florida court to assert jurisdiction over the publication,<sup>101</sup> even though Hogan would ultimately settle with Clem before trial.<sup>102</sup>

The Florida state court was not a friendly forum for Gawker. Hogan was a “home-town hero” who starred in a four-season reality television show around his life in Tampa.<sup>103</sup> Gawker, which began as a Manhattan media blog, was unknown to the “vast majority” of the jury.<sup>104</sup> Gawker’s owner Nick Denton anticipated that Tampa locals would likely see its staff as “mean, bitchy . . . bloggers, run by someone who [would] probably be portrayed as a New York pornographer and foreigner.”<sup>105</sup> The judge also appeared ill-disposed toward Gawker,<sup>106</sup> accepting Hogan’s third preliminary-injunction motion without even “mak[ing] any findings at the hearing or in its written order to support its decision.”<sup>107</sup> With

98. *Bollea I*, 2012 WL 5509624, at \*2.

99. *Id.* at \*3; *Bollea v. Gawker Media, LLC (Bollea II)*, 913 F. Supp. 2d 1325, 1326-27 (M.D. Fla. 2012).

100. *See Gawker Media, LLC v. Bollea*, 129 So. 3d 1196, 1199 (Fla. Dist. Ct. App. 2014).

101. *Clem*, 937 F. Supp. at 1356.

102. Plaintiff’s Notice of Settlement, *Clem*, 937 F. Supp. 2d 1344 (No. 12012447).

103. Jeffrey Toobin, *Gawker’s Demise and the Trump-Era Threat to the First Amendment*, NEW YORKER (Dec. 11, 2016), <https://www.newyorker.com/magazine/2016/12/19/gawkers-demise-and-the-trump-era-threat-to-the-first-amendment> [https://perma.cc/9X9C-K63Z].

104. Peter Sterne, *Jury Awards Hulk Hogan \$115 Million as Gawker Looks to Appeal*, POLITICO (Mar. 18, 2016), <https://www.politico.com/media/story/2016/03/jury-awards-hulk-hogan-115-million-as-gawker-looks-to-appeal-004433> [https://perma.cc/D6H8-DMQG].

105. Peter Sterne, *Gawker in the Fight of its Life with Hulk Hogan Sex-Tape Suit*, POLITICO (June 12, 2015), <https://www.politico.com/media/story/2015/06/gawker-in-the-fight-of-its-life-with-hulk-hogan-sex-tape-suit-004004> [https://perma.cc/BYU5-48PZ].

106. *See* Jason Zengerle, *Charles Harder, the Lawyer Who Killed Gawker, Isn’t Done Yet*, GQ (Nov. 17, 2016), <https://www.gq.com/story/charles-harder-gawker-lawyer> [https://perma.cc/B2U8-5VGP] (“‘Favorable’ is the word other legal observers would choose [to describe the forum]. Judge Pamela Campbell—who . . . has reportedly had her decisions reversed more than any of her colleagues . . . repeatedly ruled in Hogan’s favor throughout the three-and-a-half-year case.”).

107. *See Gawker Media, LLC v. Bollea*, 129 So. 3d 1196, 1199 (Fla. Dist. Ct. App. 2014).



these dynamics in play, court watchers were prepared for a “surreal spectacle” that “represented a peculiar clash of worlds.”<sup>108</sup>

During the trial, Hogan’s attorneys pressed the narrative that Hogan was someone who had risen from an “impoverished childhood in Tampa” to “earn[] a place in the world, only to be humiliated by a sniggering group of urbanites.”<sup>109</sup> As many expected—including Gawker’s own legal team—the jury sided with Hogan.<sup>110</sup> The jury exceeded the damages requested and awarded Hogan \$140 million, of which \$25 million were punitive.<sup>111</sup>

At the trial’s conclusion, rumors swirled that more was driving the lawsuit than Hogan’s own desire for vindication.<sup>112</sup> Reporters later revealed that Silicon Valley venture capitalist and billionaire Peter Thiel was “secretly covering” Hogan’s legal expenses.<sup>113</sup> Thiel later admitted that he had paid \$10 million to cover Hogan’s legal expenses and that he “funded a team of lawyers to find and help ‘victims’ of the company’s coverage mount cases against Gawker” with the goal of debilitating the publication, which had outed him as gay in 2007.<sup>114</sup>

The suit’s ramifications went beyond a loss of tabloid coverage. Although Gawker often wrote voyeuristic stories, it also produced investigative and political journalism.<sup>115</sup> For instance, Gawker aggressively covered President Trump, reporting on “his racism, his draft-dodging, and the mainstream media’s failure

108. Nick Madigan & Ravi Somaiya, *Hulk Hogan Awarded \$115 Million in Privacy Suit Against Gawker*, N.Y. TIMES (Mar. 18, 2016), <https://www.nytimes.com/2016/03/19/business/media/gawker-hulk-hogan-verdict.html> [<https://perma.cc/BRX9-PD95>].

109. See Toobin, *supra* note 103.

110. See Sterne, *supra* note 104.

111. *Bollea v. Gawker Media, LLC*, No. 522012CA012447, 2016 WL 4073660 (Fla. Cir. Ct. June 8, 2016); see also Madigan & Somaiya, *supra* note 108 (describing damage awards against publication, owner, and editor).

112. See Dan Abrams, *Might a Gawker Hater be Covering Hulk Hogan’s Legal Bills?*, L. & CRIME (Mar. 9, 2018), <https://lawandcrime.com/high-profile/might-an-anti-gawker-benefactor-be-covering-hulk-hogans-legal-bills> [<https://perma.cc/Z3NV-SS8V>] (“[C]ertain Tampa lawyers believe a benefactor agreed to cover Hogan’s legal fees in some capacity.”).

113. Andrew Ross Sorkin, *Peter Thiel, Tech Billionaire, Reveals Secret War with Gawker*, N.Y. TIMES (May 25, 2016), <https://www.nytimes.com/2016/05/26/business/dealbook/peter-thiel-tech-billionaire-reveals-secret-war-with-gawker.html> [<https://perma.cc/KEB8-MM2H>] (“[Thiel] said that ‘even someone like Terry Bollea who is a millionaire and famous and a successful person didn’t quite have the resources to do this alone.’”).

114. *Id.*

115. See, e.g., John Cook, *For Sale: A Video of Toronto Mayor Rob Ford Smoking Crack Cocaine*, GAWKER (May 16, 2013), <https://gawker.com/for-sale-a-video-of-toronto-mayor-rob-ford-smoking-cra-507736569> [<https://perma.cc/HMJ7-CWEC>] (reporting on a video that later forced the mayor’s resignation).

to take his toxicity seriously” as early as 2011.<sup>116</sup> The Hogan case meant that this kind of reporting would disappear along with the celebrity gossip.

Some commentators also viewed the suit as having a political valence. Thiel was one of Trump’s “most prominent backers in the 2016 election campaign.”<sup>117</sup> Hogan’s attorney, Charles Harder, added former First Lady Melania Trump and the late Fox News founder Roger Ailes to his client roster around the time of the 2016 election,<sup>118</sup> and eventually Trump himself.<sup>119</sup> This all occurred alongside Trump’s “organized campaign to discredit the American press” by describing critical stories as “fake news.”<sup>120</sup> Trust in traditional media had split along ideological lines: in a 2016 poll, only fourteen percent of Republicans reported that they trusted the mass media, compared to fifty-one percent of Democrats.<sup>121</sup> With media approval so low, litigation against the press operated as a negative-feedback loop, where juries “reflect[ing] public sentiment” would punish outlets they disfavored, which would in turn further damage the public’s estimation of the press.<sup>122</sup> Commentators observed that for “superrich” plaintiffs who could afford the high cost of defamation litigation, suing a media outlet could serve as

116. Michael J. Socolow, *Gawker Has Been Gone for a Year. We’ve Never Needed It More than Now*, WASH. POST (Aug. 22, 2017), <https://www.washingtonpost.com/news/posteverything/wp/2017/08/22/gawker-has-been-gone-for-a-year-weve-never-needed-it-more-than-now> [https://perma.cc/W6GS-AKM4].

117. Brian Schwartz, *Trump Allies Worry Billionaire Investor Peter Thiel Could Be a No-Show During the 2018 Midterm Campaign*, CNBC (May 18, 2018, 7:14 PM EST), <https://www.cnbc.com/2018/05/18/trump-allies-worry-peter-thiel-could-be-a-no-show-in-2018-campaign.html> [https://perma.cc/J734-DXZZ].

118. See Alexander Nazaryan, *Meet Charles Harder, the Gawker Killer Now Working for Melania Trump and Roger Ailes*, NEWSWEEK (Oct. 14, 2016, 11:19 AM EST), <https://www.newsweek.com/charles-harder-gawker-melania-trump-roger-ailes-people-magazine-509926> [https://perma.cc/DQ5U-6SWK].

119. Joe Tacopino, *Trump Hires Hulk Hogan’s Lawyer for \$20M Suit Against Stormy Daniels*, N.Y. POST (Mar. 16, 2018, 10:35 PM EST), <https://nypost.com/2018/03/16/trump-hires-hulk-hogans-lawyer-for-20m-suit-against-stormy-daniels> [https://perma.cc/TSZ9-ACPB].

120. Jay Rosen, *Why Trump Is Winning and the Press Is Losing*, N.Y. REV. BOOKS (Apr. 25, 2018), <https://www.nybooks.com/daily/2018/04/25/why-trump-is-winning-and-the-press-is-losing> [https://perma.cc/4LRW-CAHM].

121. See Ken Miller, *As Hyper-Conservative Media Surged, Republicans’ Trust in News Cratered*, TECHCRUNCH (Mar. 19, 2017, 1:30 PM CST), <https://techcrunch.com/2017/03/19/as-hyper-conservative-media-surged-republicans-trust-in-news-cratered> [https://perma.cc/BYP5-LMD3] (analyzing poll results). Since the 2016 election, Democrats’ trust has recovered, with seventy-three percent reporting at least a “fair amount” of trust in news media as of 2020. Megan Brenan, *Americans Remain Distrustful of Mass Media*, GALLUP (Sept. 30, 2020), <https://news.gallup.com/poll/321116/americans-remain-distrustful-mass-media.aspx> [https://perma.cc/7KQM-Q5V8]. Trust among Republicans, however, has only eroded further, with just ten percent of Republicans in 2020 reporting the same. *Id.*

122. Bazelon, *supra* note 77.

“an investment, with the payoff being, at a minimum, the expense and time required for the other side to produce documents and sit for depositions.”<sup>123</sup>

The ultimate payoff for a plaintiff with ulterior motivations is, of course, the closure of an outlet. Thiel got that satisfaction with the *Gawker* verdict. To stay the judgment and undertake an appeal, Gawker needed to post a \$50 million appeal bond.<sup>124</sup> Lacking the funds to do so, the company declared bankruptcy two days after the verdict was finalized.<sup>125</sup>

## 2. ABC's Settlement over “Pink Slime”

The *Gawker* litigation turned out to be a bellwether, showing how the right combination of deep pockets and a favorable venue could be weaponized against the press. A year after the verdict against Gawker, the Walt Disney Company paid Beef Products, Inc. (BPI) more than \$177 million to drop a \$1.9 billion defamation suit<sup>126</sup> against its subsidiary ABC News for describing BPI's beef as “pink slime.”<sup>127</sup> Although ABC stood by its reporting to the very end,<sup>128</sup> the case illustrates that even a giant of the traditional media, reporting on a matter of public concern and protected by the actual-malice standard, can suffer a stratospheric loss when a committed plaintiff in the right venue sues.

The lawsuit concerned a 2012 ABC investigation that found meat trimmings “[o]nce only used in dog food and cooking oil” were being “sprayed with ammonia” and mixed in with supermarket ground beef.<sup>129</sup> The reporting was based in part on interviews with two food scientists, who had previously worked for the United States Department of Agriculture (USDA) and written an internal memo describing the trimmings as “pink slime.”<sup>130</sup> When the USDA declined to

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123. *Id.*

124. FLA. STAT. § 45.045(1) (2021) (capping the “amount of a supersedeas bond necessary to obtain an automatic stay of execution of a judgment” at \$50 million).

125. Peter Sterne, *Gawker Media Files for Bankruptcy*, POLITICO (June 10, 2016, 12:56 PM EST), <https://www.politico.com/media/story/2016/06/gawker-files-for-bankruptcy-to-protect-assets-from-hogan-004593> [<https://perma.cc/FSK9-P5S6>].

126. See Christine Hauser, *ABC's ‘Pink Slime’ Report Tied to \$177 Million in Settlement Costs*, N.Y. TIMES (Aug. 10, 2017), <https://www.nytimes.com/2017/08/10/business/pink-slime-disney-abc.html> [<https://perma.cc/U5AV-8GH6>].

127. Complaint and Jury Demand at 3, *Beef Prods., Inc. v. Am. Broad. Cos.*, No. 12-292 (S.D. Cir. Ct. Union Cnty. Sept. 13, 2012) [hereinafter BPI Complaint].

128. Daniel Victor, *ABC Settles with Meat Producer in ‘Pink Slime’ Defamation Case*, N.Y. TIMES (June 28, 2017), <https://www.nytimes.com/2017/06/28/business/media/pink-slime-abc-lawsuit-settlement.html> [<https://perma.cc/6R7V-UCUR>].

129. *Id.* at 76.

130. *Id.*

require consumer labels for the trimmings, the scientists publicly objected.<sup>131</sup> For its investigation, ABC also talked to professors, USDA press officers, supermarket representatives, consumers, and a former BPI employee.<sup>132</sup> ABC also contacted BPI itself and published reactions from meat industry representatives.<sup>133</sup>

The *Columbia Journalism Review* described ABC's reporting as "well sourced" and observed that the "most serious criticisms were presented as matters of opinion."<sup>134</sup> Moreover, ABC was not alone in its reporting on the processed meat trimmings: the *New York Times*<sup>135</sup> and *Mother Jones*<sup>136</sup> had previously engaged in similar reporting, and the phrase "pink slime" had appeared 3,800 times in media reports before ABC aired its stories.<sup>137</sup>

But ABC was the only media outlet that BPI sued over its "pink slime" coverage. BPI filed a 257-page complaint in South Dakota state court in 2012,<sup>138</sup> asserting twenty-seven counts from defamation to product disparagement.<sup>139</sup> That last claim exposed ABC to treble damages because South Dakota specifically penalizes disparagement, or knowingly making false statements that an "agricultural food product is not safe for consumption."<sup>140</sup> That "local protection statute" is understood to make it "extremely risky for the media . . . to go in and cover that industry."<sup>141</sup>

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131. *Id.* at 5.

132. Memorandum in Support of ABC Defendants' Motion to Dismiss All Claims of Plaintiff Beef Products, Inc. at 12, *Beef Prods. Inc. v. Am. Broad Cos.*, No. 12-4183 (S.D. Cir. Ct. Union Cnty. Oct. 21, 2012).

133. *Id.*

134. Curtis Brainard, *BPI's Beef with ABC News*, COLUM. JOURNALISM REV. (Oct. 3, 2012), [https://archives.cjr.org/the\\_observatory/bpi\\_abc\\_lawsuit\\_pink\\_slime\\_lft.php](https://archives.cjr.org/the_observatory/bpi_abc_lawsuit_pink_slime_lft.php) [<https://perma.cc/7MTR-2EFJ>].

135. Michael Moss, *Safety of Beef Processing Method Is Questioned*, N.Y. TIMES (Dec. 30, 2009), <https://www.nytimes.com/2009/12/31/us/31meat.html> [<https://perma.cc/A38N-7ASN>].

136. See Tom Philpott, *The "Pink Slime" in Your Kid's School Lunch*, MOTHER JONES (Mar. 7, 2012), <https://www.motherjones.com/food/2012/03/pink-slime-school-lunch> [<https://perma.cc/8YGX-DZKA>] (chronicling the history of the term "pink slime").

137. Timothy McLaughlin & P.J. Huffstutter, *Meat Packer Blames ABC's 'Pink Slime' for Nearly Killing Company*, REUTERS (June 5, 2017, 1:16 AM EST), <https://www.reuters.com/article/us-abc-pinkslime-idUSKBN18WoKJ> [<https://perma.cc/VVA5-BAMX>].

138. See BPI Complaint, *supra* note 127, at 138-255 (itemizing claims against ABC).

139. See *id.* (itemizing claims against ABC).

140. S.D. CODIFIED LAWS § 20-10A-1 (2021).

141. David Uberti, *Everything About Disney and ABC's 'Pink Slime' Settlement Should Scare the Hell Out of You*, SPLINTER (Aug. 17, 2017), <https://splinternews.com/everything-about-disney-and-abcs-pink-slime-settlement-1797827920> [<https://perma.cc/6WUX-PXRU>].

ABC immediately sought to remove the case to federal court on the grounds that the real parties in interest were diverse citizens.<sup>142</sup> ABC's headquarters were in New York, and it was incorporated in Delaware.<sup>143</sup> The sources named as codefendants were residents of Maryland, Virginia, and Arkansas.<sup>144</sup> BPI was incorporated in Nebraska and maintained its headquarters in South Dakota.<sup>145</sup>

On its face, the case was a prime candidate for removal. But BPI had joined two of its subsidiaries—incorporated in Delaware—as coplaintiffs, destroying diversity with ABC.<sup>146</sup> ABC argued that this amounted to fraudulent joinder because the BPI subsidiaries were not discussed in any of the reporting.<sup>147</sup> The District of South Dakota rejected this argument, reasoning that the “fact that a plaintiff’s claim may lack legal or factual merit does not necessarily mean that he lacks standing to assert the claim as a real party in interest”<sup>148</sup> and that “[a]ll doubts about federal jurisdiction should be resolved in favor of remand to state court.”<sup>149</sup> Even though ABC had no presence in South Dakota, the state’s own jurisdiction over the network was uncontroverted: the Supreme Court established in *Keeton v. Hustler* that publications may be sued in any state where their material is generally accessible.<sup>150</sup> And as extended through *Calder v. Jones*’s “effects test,” this principle applies to individual journalists regardless of whether they have ever been to the forum state.<sup>151</sup> By dint of broadcasting nationally and publishing its material online, ABC had satisfied these conditions.

If ABC had succeeded in removing the case to federal court, trial proceedings would have occurred eighty miles from BPI’s plant and the jury would have been drawn from a quarter of South Dakota’s 870,000-person population.<sup>152</sup> The jury might still be more predisposed to BPI than one in New York or Delaware, but it would not have been drawn from the meat-processing plant’s immediate neighborhood. As it was, the jury was selected from a 15,000-person county

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142. See Notice of Removal, *Beef Prods., Inc. v. Am. Broad. Cos.*, No. 12-4183 (D.S.D. 2012).

143. See *id.* at 5.

144. See *id.* at 6.

145. See *id.* at 5.

146. See *id.*

147. See *id.* at 6-7.

148. *Beef Prods., Inc. v. Am. Broad. Cos.*, 949 F. Supp. 2d 936, 938-39 (D.S.D. 2013).

149. *Id.* at 937 (quoting *In re Prempro Prods. Liab. Litig.*, 591 F.3d 613, 620 (8th Cir. 2010)).

150. *Keeton v. Hustler Mag., Inc.*, 465 U.S. 770, 780-81 (1984) (“The victim of a libel, like the victim of any other tort, may choose to bring suit in any forum with which the defendant has ‘certain minimum contacts.’”).

151. *Calder v. Jones*, 465 U.S. 783, 788-89 (1984) (articulating an “effects” test that considers the location of a story’s sources, of a story’s audience, and of the injury’s harm).

152. See *Jury Info*, U.S. DIST. COURT D.S.D., <https://www.sdd.uscourts.gov/jury-info> [<https://perma.cc/8PXQ-W9GQ>] (describing the jury-selection process and courthouse locations).

where BPI was a major employer.<sup>153</sup> In his opening statement, ABC’s lead attorney “acknowledged the broadcasting company has no local ties,” directly telling the jury “[n]o one that I will put on the stand is from here – we’re all outsiders.”<sup>154</sup>

Halfway through the eight-week trial, the parties abruptly announced a settlement.<sup>155</sup> ABC had not yet called its witnesses.<sup>156</sup> In a statement, ABC “maintained that [its] reports accurately presented the facts and views of knowledgeable people about this product,” but that “continued litigation” was “not in the company’s interests.”<sup>157</sup> A month later, ABC’s parent company Disney admitted to paying at least \$177 million to settle the case, a staggering figure that did not include the amount paid by Disney’s insurers.<sup>158</sup> Even with the total payout unknown, this was enough to “rank [the ‘pink slime’ agreement] as the largest settlement ever paid out in a media defamation lawsuit in U.S. history.”<sup>159</sup>

Press advocates viewed the outcome as disheartening, a “signal of vulnerability” that could invite future lawsuits and “crippling legal expenses,” as it telegraphed that “news organizations will cave under the pressure of litigation” if the damages claimed are astronomical, “even in cases in which they have good defenses.”<sup>160</sup> In theory, *Sullivan*’s standard should have protected ABC from such

153. P.J. Huffstutter & Timothy McLaughlin, *‘Pink Slime’ Case Against ABC a Challenge to Press in Era of ‘Fake News’*, REUTERS (June 5, 2017, 2:03 AM), <https://www.reuters.com/article/abc-pinkslime/pink-slime-case-against-abc-a-challenge-to-press-in-era-of-fake-news-idUSL3N1IX56A> [<https://perma.cc/BG94-LEV9>].

154. Timothy McLaughlin, *‘Trial of a Lifetime’ Plays Out in Tiny South Dakota Town*, REUTERS (June 9, 2017), <https://www.reuters.com/article/abc-pinkslime-town/trial-of-a-lifetime-plays-out-in-tiny-south-dakota-town-idUSL1N1J626T> [<https://perma.cc/BXN9-2MM6>].

155. See Patrick Fitzgerald & Jacob Gershman, *ABC News Settles ‘Pink Slime’ Food-Libel Lawsuit*, WALL ST. J. (June 28, 2017), <https://www.wsj.com/articles/abc-news-settles-pink-slime-food-libel-lawsuit-1498662340> [<https://perma.cc/T87S-RR4T>] (reporting on the settlement).

156. See Eriq Gardner, *Disney Discloses \$177 Million Settlement in Aftermath of ABC’s ‘Pink Slime’ Trial*, HOLLYWOOD REP. (Aug. 8, 2017), <https://www.hollywoodreporter.com/business/business-news/disney-reports-177-million-settlement-aftermath-abcs-pink-slime-trial-1027814> [<https://perma.cc/V2FM-YGGD>] (reporting on the settlement’s timing).

157. Victor, *supra* note 128.

158. See Joe Flint, *Disney Discloses \$177 Million Litigation Charge After ‘Pink Slime’ Food-Libel Settlement*, WALL ST. J. (Aug. 9, 2017, 4:03 AM EST), <https://www.wsj.com/articles/disney-discloses-177-litigation-charge-after-pink-slime-food-libel-settlement-1502265807> [<https://perma.cc/S92T-5XCZ>] (“Based on Disney’s disclosure . . . Disney is funding \$177 million of the settlement and its insurers are paying the rest.”).

159. Max Greenwood, *ABC News’s ‘Pink Slime’ Settlement Is Historically Large: Report*, HILL (Aug. 9, 2017), <https://thehill.com/homenews/media/345989-abc-news-pink-slime-settlement-is-historically-large-report> [<https://perma.cc/KSB2-78RS>].

160. Uberti, *supra* note 141.

a catastrophic settlement, but the risk was too great that it would be misapplied on BPI’s “home turf.”<sup>161</sup>

Since the “Pink Slime” lawsuit was brought, multiple New York-based media defendants have been haled into states like Delaware, Florida, and West Virginia to defend against high-stakes claims.<sup>162</sup> Another state – Virginia – has even developed a reputation as a popular forum for out-of-state litigants, attracting a “string of splashy defamation claims by politicians and the A-list star seeking nearly \$1 billion in damages in [its] courts [in 2019], even though many of the cases have only loose connections to the state.”<sup>163</sup> Indeed, the playbook used against Gawker is now being used against social-media platforms, individual news commentators, and anonymous Twitter users.<sup>164</sup> Not all of these lawsuits will succeed. But the simple cost of defending against them and potentially facing burdensome discovery has its own chilling effect.<sup>165</sup> The hope that the *Gawker* and “Pink Slime” cases would be outliers seems increasingly misplaced.

### III. A NATIONAL LIBEL LAW FITTED TO A NEW PARADIGM

As both a theoretical and practical matter, the existing state-law defamation regime needs correction.<sup>166</sup> This Part recommends that Congress enact a federal defamation law, and addresses possible objections to such a preemption scheme.

#### A. Congressional Reform

This Essay has established that the existing defamation regime is both doctrinally incoherent and unworkable in practice. The question remains: which actor is best equipped to fix it? The Supreme Court has generally shown disinterest in further developing defamation doctrine, and state legislatures can only change

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<sup>161</sup>. *Id.*

<sup>162</sup>. See, e.g., Complaint, U.S. Dominion, Inc. v. Fox News Network, LLC, No. N21C-03-257 (Del. Sup. Ct. Mar. 26, 2021) (seeking \$2.9 billion in damages); Villafaña, *supra* note 93; Complaint, Marshall Cnty. Coal Co. v. Oliver, No. 17-C-124 (W. Va. Cir. Ct. June 21, 2017).

<sup>163</sup>. Justin Jovenal, *Devin Nunes, Johnny Depp Lawsuits Seen as Threats to Free Speech and Press*, WASH. POST (Dec. 22, 2019), [https://www.washingtonpost.com/local/legal-issues/devin-nunes-johnny-depp-lawsuits-seen-as-threats-to-free-speech-and-press/2019/12/22/eef43bc8-1788-11ea-a659-7d69641c6ff7\\_story.html](https://www.washingtonpost.com/local/legal-issues/devin-nunes-johnny-depp-lawsuits-seen-as-threats-to-free-speech-and-press/2019/12/22/eef43bc8-1788-11ea-a659-7d69641c6ff7_story.html) [<https://perma.cc/3K86-UCGD>] (describing a lawsuit by a California politician against a California newspaper brought in Virginia state court and a lawsuit Johnny Depp filed against *The Washington Post* for defamation).

<sup>164</sup>. *Id.* (describing examples of “libel tourism” lawsuits).

<sup>165</sup>. See Baranetsky & Gutierrez, *supra* note 73 (describing a newsroom’s costs of defending against libel claims).

<sup>166</sup>. Anderson, *supra* note 66, at 547.

the rules for their respective state courts. Congress is thus the best actor to initiate reform.

In the past twenty years, the Supreme Court has heard only one defamation case, treating the doctrine as settled and preferring instead to address other First Amendment questions.<sup>167</sup> Not since the pre-internet era has the Supreme Court meaningfully addressed the effect that jurisdiction might have on this body of law, brusquely “reject[ing] the suggestion that First Amendment concerns enter into the jurisdictional analysis.”<sup>168</sup> Judge Matheson has argued that this “failure to consider [F]irst [A]mendment values relevant to a court’s personal jurisdiction over distant defamation defendants represents the greatest insensitivity in these cases to the relationship between substance and procedure.”<sup>169</sup> The problem has only intensified since Judge Matheson made this observation three decades ago because communities now frequently “exist across state boundaries, communities bleed into other communities, and communities may exist in new platforms” like the internet.<sup>170</sup>

State legislatures have been more eager to tackle the problem of reforming defamation law, with the majority of states enacting laws to penalize vexatious speech-suppressive litigation—otherwise known as “strategic lawsuits against public participation” (“SLAPPs”).<sup>171</sup> But by its very nature, disaggregated state anti-SLAPP reform offers only a piecemeal solution that fails to protect defendants when parties claim jurisdiction in states without these safeguards. Further, anti-SLAPP laws vary in strength. Some states have broadly written statutes that protect any “conduct in furtherance of the exercise of the constitutional right” of free speech concerning a public issue and provide for fee-shifting and special

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167. See *Air Wis. Airlines Corp. v. Hooper*, 571 U.S. 237 (2014) (concerning reporting liability under the Aviation and Transportation Security Act in the defamation context). However, Justices Thomas and Gorsuch have recently indicated that they would like to reconsider *Sullivan*’s actual-malice rule. See Adam Liptak, *Two Justices Say Supreme Court Should Reconsider Landmark Libel Decision*, N.Y. TIMES (July 2, 2021), <https://www.nytimes.com/2021/07/02/us/supreme-court-libel.html> [<https://perma.cc/3RLA-3RRF>]. Even though the rest of the Court has not shown the same eagerness, see *id.*, this, if anything, bolsters the case that press advocates should be looking to Congress for reform.

168. *Calder v. Jones*, 465 U.S. 783, 790 (1984). *Calder* did not engage with the observations regarding jurisdiction made by the concurring Justices in *Sullivan*, but rather reasoned that *Sullivan*’s actual-malice rule should be enough to protect First Amendment interests and that “[t]o reintroduce those concerns at the jurisdictional stage would be a form of double counting.” *Id.*

169. Matheson, *supra* note 66, at 233.

170. Rachel Davis Mersey, *Reevaluating Stamm’s Theory of Newspapers and Communities in a New Media Environment: Toward a New Theory Based on Identity and Interdependence*, 104 NW. U. L. REV. 517, 525 (2010).

171. See Quinlan, *supra* note 88, at 375–76, 375 n.52 (discussing and collection anti-SLAPP statutes).



early motions requiring a plaintiff to show a probability of winning a suit.<sup>172</sup> Others are limited to situations involving “permit[s], zoning change[s], lease[s], license[s], and certificate[s]”<sup>173</sup> and have no procedural levers for disincentivizing harassing claims.<sup>174</sup> Even though many media outlets are based in states with strong anti-SLAPP statutes, like New York and California, they remain vulnerable to horizontal forum shopping and may be haled into jurisdictions with less favorable defamation laws and courts.<sup>175</sup>

Reliance on state anti-SLAPP reform also poses a vertical forum-shopping problem related to favorable procedural rules (as distinct from the horizontal forum-shopping problem earlier described). That is because some federal courts have ruled that their provisions conflict with the Rules Enabling Act of 1934 — that is, that the protections they offer are more procedural than substantive, akin to discovery stays and special dismissal motions.<sup>176</sup> For example, the Ninth Circuit has concluded that California’s anti-SLAPP law cannot stay discovery in federal courts,<sup>177</sup> and the Second Circuit has rejected the application of California’s anti-SLAPP law entirely “because it increases a plaintiff’s burden to overcome pretrial dismissal, and thus conflicts with Federal Rules of Civil Procedure 12 and 56.”<sup>178</sup> These rulings have rendered anti-SLAPP provisions largely impotent in federal court. This effectively means that even if all fifty states adopted a uniform anti-SLAPP law, there would still be a significant disparity in how federal and state courts process defamation actions, even apart from the horizontal forum-shopping problems already described.<sup>179</sup>

Given the Supreme Court’s inaction and state legislatures’ inability to enact national reform, Congress is the best actor to intervene and address the general “lack of uniformity” in defamation law at a time where all digital speech is free

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172. CAL. CIV. PROC. CODE § 425.16 (West 2015).

173. DEL. CODE ANN. tit. 10, § 8136 (West 2021).

174. See Jouvenal, *supra* note 163 (“Virginia has an anti-SLAPP law, but there is no special motion provision and defendants are not guaranteed legal fees if a case is dismissed.”).

175. See Baranetsky & Gutierrez, *supra* note 73 (generally describing burdens of successfully defending against SLAPP actions).

176. See Quinlan, *supra* note 88, at 389 (“For example, the First Circuit determined that Maine’s anti-SLAPP law should apply in federal court, while a federal district court in the District of Columbia rejected application of D.C.’s recently enacted anti-SLAPP law.” (footnote omitted)). This can result in the inverse problem described in Part II, with plaintiffs filing diversity actions in federal court to avoid the application of strong anti-SLAPP laws.

177. See *Planned Parenthood Fed’n of Am. v. Ctr. for Med. Progress*, 890 F.3d 828, 834 (9th Cir. 2018).

178. *La Liberte v. Reid*, 966 F.3d 79, 83 (2d Cir. 2020).

179. In this scenario, a defamation plaintiff’s forum-selection choice would basically boil down to whether they care more about the procedural rules in place in a particular jurisdiction or the individuals applying them.

of jurisdictional bounds—including any journalism that is published on a website, along with any debate among private citizens conducted on social-media platforms.<sup>180</sup> Congress has the authority to do so and has already expressed some appetite for altering the procedures used in defamation cases.<sup>181</sup>

*B. The Authority: Interstate Speech as Interstate Commerce*

Congress has the authority to pass a federal defamation law through its Commerce Clause powers.<sup>182</sup> It may and should preempt state laws in this field through the Supremacy Clause.<sup>183</sup> Admittedly, there is some irony to the idea of creating a federal cause of action for defamation in order to vindicate the First Amendment values of limiting self-censorship and encouraging “vigor[ous] . . . public debate.”<sup>184</sup> After all, the Constitution explicitly provides that Congress “shall make no law . . . abridging the freedom of speech.”<sup>185</sup> But the Supreme Court has never suggested that defamation laws necessarily violate the Constitution, and it has left existing defamation laws intact despite incorporating the First Amendment against the states.<sup>186</sup> Surely, if state defamation laws are permissible under the Constitution, then a federal law must be as well.

For as long as mass media has existed in the United States, Congress has regulated it through its Commerce Clause power, which provides the “authority to regulate and protect the instrumentalities of interstate commerce.”<sup>187</sup> In 1910, Congress passed the Mann-Elkins Act and authorized the Interstate Commerce Commission to regulate the rates charged by telephone and cable companies.<sup>188</sup> The Communications Act of 1934 gave the Federal Communications Commission (FCC) “broad authority” over wire and radio communications that crossed state lines “to secure and protect the public interest and to insure uniformity of

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180. Nicole K. Chipi, Note, *Eat Your Vitamins and Say Your Prayers: Bollea v. Gawker, Revenge Litigation Funding, and the Fate of the Fourth Estate*, 72 U. MIA. L. REV. 269, 291 (2017).

181. See, e.g., *Securing the Protection of Our Enduring and Established Constitutional Heritage Act* (SPEECH Act), Pub. L. No. 111-223, 124 Stat. 2380 (2010) (barring enforcement of judgments obtained under “unduly restrictive” foreign libel laws); see also *SPEAK FREE Act* of 2015, H.R. 2304, 114th Cong. (2015) (bipartisan anti-SLAPP bill with thirty-two cosponsors).

182. U.S. CONST. art. I, § 8, cl. 3.

183. *Id.* art. VI, cl. 2.

184. *N.Y. Times v. Sullivan*, 376 U.S. 254, 279 (1964).

185. U.S. CONST. amend. I.

186. See *Gitlow v. New York*, 268 U.S. 652 (1925) (holding that the Fourteenth Amendment made the First Amendment applicable to states).

187. *Gonzales v. Raich*, 545 U.S. 1, 16 (2005) (discussing U.S. CONST. art. I, § 8).

188. Act of June 18, 1910, ch. 309, 36 Stat. 539.

regulation.”<sup>189</sup> Since 1992, the FCC has used this power to regulate false speech by forbidding the dissemination of hoaxes.<sup>190</sup> Congress has also used this power to pass legislation that regulates the internet in significant ways. For example, the Communications Decency Act of 1996 explicitly shields computer-service providers from liability when third parties use those services to publish defamatory statements.<sup>191</sup> And while the Court ruled that another portion of that same statute prohibiting obscene communications to minors violated the First Amendment, the Justices never questioned any part of the law on Commerce Clause grounds.<sup>192</sup>

Given Congress’s history of permissibly regulating interstate speech, it could easily constitutionally justify a federal defamation law with the purpose of fostering open communication and effective coverage of public issues on borderless platforms like the internet.<sup>193</sup> Given the sheer volume of speech that occurs online, and given that even small community newspapers maintain websites, a federal law applying only to interstate speech would almost certainly cover most publications and likely serve as the main source of defamation claims.

Because Congress can legislate in this space under the Commerce Clause, a federal defamation law could permissibly preempt state versions under the Supremacy Clause.<sup>194</sup> Indeed, the whole point of the Supremacy Clause is to ensure that Congress can “displace or preempt state laws regulating private activity affecting interstate commerce when these laws conflict with federal law.”<sup>195</sup> And to the extent that Congress may displace other forms of state tort law, there is no

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189. Elizabeth D. Lauzon, Annotation, *Construction and Application of Communications Act of 1934 and Telecommunications Act of 1996*, 32 A.L.R. Fed. 2d 125 (2008).

190. 47 C.F.R. § 73.1217 (1992) (prohibiting broadcast licensees and permittees from “broadcast[ing] false information concerning a crime or a catastrophe” where the licensee “knows this information is false,” and where the broadcast causes a “foreseeable . . . public harm”).

191. 47 U.S.C. § 230 (2018).

192. See *Reno v. ACLU*, 521 U.S. 844, 877-85 (1997) (holding that the Communications Decency Act was constitutionally overbroad without disturbing content-neutral provisions).

193. It is arguable that Congress has the authority to pass a defamation law regulating even intrastate speech. See Lauren Bergelson, *The Need for a Federal Anti-SLAPP Law in Today’s Digital Media Climate*, 42 COLUM. J.L. & ARTS 213, 239 (2019) (noting that an expansive federal anti-SLAPP law could be justified if the “‘total incidence’ of a practice poses a threat to a national market” (quoting *Gonzales v. Raich*, 545 U.S. 1, 17 (2005))). *But see* *United States v. Morrison*, 529 U.S. 598, 617 (2000) (rejecting the argument that “Congress may regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce”).

194. U.S. CONST. art. VI, cl. 2; see also *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372 (2000) (“A fundamental principle of the Constitution is that Congress has the power to preempt state law.”).

195. *Hodel v. Va. Surface Mining*, 452 U.S. 264, 290 (1981).

reason that defamation law should be different.<sup>196</sup> The Supreme Court has recognized “sound public policy supporting preemption of tort claims” and supported the idea that express preemption may attain uniformity “unencumbered by the potentially varying and inconsistent interpretations of juries across fifty states.”<sup>197</sup> Accordingly, satisfying a national goal of uniformity in libel litigation would justify a defamation law replacing a state cause of action with a federal one.<sup>198</sup>

Further, a federal defamation law would regulate private actors, rather than the states themselves. It would therefore avoid anticommandeering issues<sup>199</sup> — even if it includes procedural protections alongside a substantive right of action — because it is well-established that when state courts are confronted with a federal claim, they “must enforce federal procedural rules that are part and parcel of [that] adjudicated *federal* claim.”<sup>200</sup>

Additionally, the strong First Amendment interests at stake in protecting reporting and discussion of public issues justify the exercise of congressional authority over interstate communications — whether they are published on the internet, broadcast over airwaves, or mailed as magazines through the United State Postal Service. Federal courts have long been used to protect other constitutional rights, and yet they have not been automatically available to vindicate First Amendment rights because free speech is pressed as a defense in the defamation context.<sup>201</sup>

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196. See, e.g., *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 865–66 (2000) (holding that the National Traffic and Motor Vehicle Safety Act preempted common-law “no airbag” actions).

197. Victor E. Schwartz & Cary Silverman, *Preemption of State Common Law by Federal Agency Action: Striking the Appropriate Balance That Protects Public Safety*, 84 TUL. L. REV. 1203, 1212 (2010) (discussing *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008)).

198. An express defamation preemption scheme can be as simple as the Airline Deregulation Act of 1978, which provided that “a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law relating to a price, route, or service of an air carrier that may provide air transportation . . .” 49 U.S.C. app. § 1305(a)(1) (codified without substantive changes at 49 U.S.C. § 41713(b)(1) (2018)); see also *Morales v. Trans World Airlines*, 504 U.S. 374, 384 (1992) (rejecting the argument that the Airline Deregulation Act must be “comprehensive” for broad application).

199. See *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1481 (2018) (“[R]egardless of the language sometimes used by Congress and this Court, every form of preemption is based on a federal law that regulates the conduct of private actors, not the States.”).

200. Anthony J. Bellia Jr., *Federal Regulation of State Court Procedures*, 110 YALE L.J. 947, 951 (2001).

201. See *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152 (1908) (“[A] suit arises under the Constitution and laws of the United States only when the plaintiff’s statement of his own cause of action shows that it is based upon those laws or that Constitution.”). The Supreme Court has not shown interest in reexamining the bounds of this “well-pleaded” complaint rule, instead “extend[ing] the rule” further. Martin H. Redish, *Reassessing the Allocation of*

Congress has the power to expand upon the enumerated rights so long as doing so does not violate other constitutional provisions.<sup>202</sup> A federal law replacing the existing state-law regime would be in that spirit.

*C. The Substance: A Federal Preemption Scheme*

Under this Essay’s model, a federal defamation law would provide the exclusive cause of action to the aggrieved party. The plaintiff could file a federal claim under this uniform law in either a state or federal forum, and defendants could choose to remove the case to a federal forum under 28 U.S.C. § 1331.

To enact such a law in its simplest form, all that Congress would have to do is adopt a form of the defamation sections of the Restatement of Torts,<sup>203</sup> which have served as the foundation for states’ common-law doctrine, while including a clear provision preempting state libel litigation.<sup>204</sup> For example, Congress could use straightforward language that creates “an exclusive cause of action” and expressly “preempts and supersedes any Federal, State, or Tribal law, including statutes, regulations, rules, orders, proclamations, or standards that are enacted, promulgated, or established under common law, related to recovery” for false and defamatory statements made through interstate channels.<sup>205</sup> This provision would allow litigants to vindicate core First Amendment rights in federal court, recognizing the national interest in protecting a free press and, more broadly, robust national debate of public issues.

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*Judicial Business Between State and Federal Courts: Federal Jurisdiction and “The Martian Chronicles,”* 78 VA. L. REV. 1769, 1797 (1992).

202. See *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966) (treating the Fourteenth Amendment as a “positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment”). *But cf.* *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997) (holding that the passage of Religious Freedom Restoration Act exceeded congressional authority under the Fourteenth Amendment).
203. See RESTATEMENT (SECOND) OF TORTS §§ 552, 553, 559, 581 (AM. L. INST. 1977) (sections on Information Negligently Supplied for the Guidance of Others, Fraudulent Misrepresentations Inducing Gifts to Maker or Third Persons, Defamatory Communication Defined, and Transmission of Defamation Published by Third Person, respectively). By utilizing the same elements that have informed state common-law doctrine, this scheme would allow Congress to make procedural innovations to defamation law without substantively altering it.
204. A bill could contain a provision to the following effect: “This statute is enacted through Congress’s power under the Commerce Clause and supersedes state law.”
205. A COVID-19 bill that used just this language was introduced during the 116th Congress. See Delivering Immediate Relief to America’s Families, Schools and Small Businesses Act, S. 4775, 116th Cong. § 2121 (2020) (including language creating an exclusive federal cause of action for “coronavirus exposure actions”).

If Congress would prefer to leave some space for states to legislate or believes that a small-town dispute between a mayor and local newspaper should not be federalized, it could impose some jurisdictional parameters. For instance, Congress could add an amount-in-controversy requirement, which would limit jurisdiction to claims exceeding a certain amount. Alternatively, Congress could require partial, rather than complete, diversity of parties, which would allow purely local disputes to remain the province of state courts while limiting plaintiffs' ability to destroy diversity with media defendants through the addition of ancillary parties.

Congress could also choose to leave state anti-SLAPP laws in place by including a section announcing that more speech-protective state laws are *not* preempted. This section could state that nothing in the statute "preempts or supersedes any provision of State law that . . . otherwise affords a greater degree of protection from [defamation] liability," as has been used in other federal legislation.<sup>206</sup> Federal legislation of this kind would serve as a one-way ratchet, allowing states to continue to experiment with broader anti-SLAPP reforms while still blocking punitive speech laws, like the food libel law that would have allowed for treble damages in the Pink Slime case.<sup>207</sup>

Congress could also use the law as a vehicle for more ambitious substantive reform. For example, it could contain a definitions section establishing that federal defamation actions should be judged according to a "national community standard," given their interstate nature. The Supreme Court's logic in *Reno v. ACLU* already supports such a requirement: while striking down a federal anti-decency statute on First Amendment grounds, the Court expressed its concern that the traditional "community standards" criterion as applied to the internet means that any communication available to a nationwide audience will be judged by the standards of the community most likely to be offended by the message.<sup>208</sup> Additionally, Congress could codify certain common-law privileges that have been recognized in many states, such as the "fair report" privilege protecting statements that fairly are derived from official documents or proceedings.<sup>209</sup>

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206. Y2K Act, Pub. L. No. 106-37, § 6, 113 Stat. 185, 196 (1999) (limiting liability for Y2K computer failures). In applying this provision, courts could refer to the state statute and any applicable doctrine, and then analyze whether application of the state statute was outcome determinative. If so, courts would then be instructed by the federal statute to enforce the more defendant-protective of the two.

207. See S.D. CODIFIED LAWS § 20-10A-3 (2021); see also *supra* Section II.B.2 (discussing the Pink Slime case).

208. 521 U.S. 844, 877-78 (1997).

209. See, e.g., N.Y. CIV. RIGHTS LAW § 74 (McKinney 2021) ("A civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any . . . official proceeding . . ."). Codifying the fair-report privilege would have particular

Congress could also adopt some or all of the provisions of a previously introduced bipartisan federal anti-SLAPP bill, the SPEAK FREE Act, which lost momentum when President Trump took office.<sup>210</sup> The most significant of these provisions establishes a special motion to dismiss, which stays discovery and puts the burden on the plaintiff to “demonstrate[] that the claim is likely to succeed on the merits” when the defendant has engaged in speech on “a matter of public concern.”<sup>211</sup> As much scholarship and many prospeech organizations agree, such special motions “guarantee a speedy resolution of the anti-SLAPP dispute.”<sup>212</sup> A comprehensive defamation-reform bill could also adopt the SPEAK FREE Act’s fee-shifting provision, penalizing SLAPP plaintiffs and aligning the statute with other laws that seek to discourage the infringement of civil rights.<sup>213</sup>

Finally, Congress could consider providing a declaratory judgment remedy that confines the defamation inquiry to falsity.<sup>214</sup> In exchange for foregoing damages, plaintiffs who elect this remedy would be excused from showing a culpable mental state.<sup>215</sup> In effect, this would allow a plaintiff to restore her reputation by receiving formal judicial acknowledgment that a statement concerning her was false and injurious, without requiring expensive and intrusive discovery and without exposing defendants to potentially ruinous claims.<sup>216</sup> Providing this remedy would restore much-needed balance to the defamation lawsuits, while serving the interests of plaintiffs and defendants alike.

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First Amendment value, as this privilege enables the press to freely report on government actions without fear of liability.

210. SPEAK FREE Act of 2015, H.R. 2304, 114th Cong. (2015); see also Nancy Scola, *Online Speech Backers’ Newest Fear: Trump*, POLITICO (June 1, 2016, 5:18 AM EDT), <https://www.politico.com/story/2016/06/donald-trump-online-free-speech-223760> [https://perma.cc/6P XK-9LFD].

211. *Id.* § 4202.

212. Bergelson, *supra* note 193, at 233-34 (noting that “over 100 organizations and businesses support federal anti-SLAPP legislation in general, including tech platforms like Yelp”).

213. *Id.* at 233-34 (citing H.R. 2304); cf. 42 U.S.C. § 1988(b) (2018) (allowing fee-shifting in constitutional-rights cases against government actors); *id.* § 2000e (allowing fee-shifting in employment-discrimination cases).

214. Such a remedy had once been introduced by then-Representative Chuck Schumer and proposed by the late Professor Marc Franklin. See H.R. 2846, 99th Cong. (1985); Marc A. Franklin, *A Declaratory Judgment Alternative to Current Libel Law*, 74 CALIF. L. REV. 809, 812-19 (1986).

215. See Franklin, *supra* note 214, at 812-19.

216. *Id.* at 811.

*D. Objections and Obstacles*

As with any legislative proposal, there are some valid objections to congressional reform of defamation law. The most significant is that introducing a federal defamation law could open a Pandora's box. Certain lawmakers – including some who have brought defamation actions themselves<sup>217</sup> – may be inclined to include language that is more hostile to than protective of speech. However, the risk of hijack is inherent to any legislative proposal, and it will be incumbent on free-speech and free-press advocates, both inside and outside of Congress, to take proper stock of the political climate before attempting any major defamation reform.

Another objection is that many of the goals of the federal defamation-preemption scheme described could be accomplished by enacting a federal anti-SLAPP law, particularly one with a removal provision like the SPEAK FREE Act.<sup>218</sup> It is true that adopting a federal anti-SLAPP law would reduce litigation burdens on defendants by allowing earlier termination of vexatious lawsuits and guaranteeing those protections to defendants in all fifty states, in state and federal courts. But while a federal anti-SLAPP law would address many of the practical difficulties described, it would not resolve the doctrinal anachronism that allows states to decide what qualifies as harmful and actionable interstate speech.

Relatedly, some might object that a federal defamation preemption scheme would intrude on a traditional state domain. This is true. However, given the obvious federal interest in protecting and regulating interstate speech, this essentially amounts to an argument for maintaining the status quo for the sake of maintaining the status quo.<sup>219</sup> Additionally, as discussed earlier in Section III.C, the preemption scheme would be most constitutionally defensible if it left regulation of intrastate speech to the states themselves, ensuring that purely local actions would be left to state courts.<sup>220</sup>

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217. See Jouvenal, *supra* note 163 (reporting on Representative Devin Nunes's various defamation actions).

218. See SPEAK FREE Act of 2015, H.R. 2304, 114th Cong. § 4206 (allowing removal of SLAPP suits from state court to federal court).

219. To the extent that there are concerns that a preemption scheme would wipe out whole bodies of state common-law defamation doctrine, such concerns are misplaced, as the elements and standards – perhaps with the exception of the adoption of a national community standard – would largely remain the same. The most significant changes to the doctrine would be forward-looking, with federal interpretations of the federal law trumping state interpretations.

220. This aspect of the preemption scheme should also assuage possible concerns about federal courts being overrun with provincial actions. Additionally, and as described in Section III.C, the statute could include an amount-in-controversy requirement or a partial-diversity requirement to reduce the burden on federal courts.



Finally, some might be concerned that this proposal elevates the First Amendment interest in speech at the expense of the common-law interest in reputation. However, aspects of this proposal—such as the establishment of a declaratory-judgment remedy—could temper those concerns. Further, those concerns, which have been raised against anti-SLAPP reforms generally, articulate a fundamental disagreement over whether the harm of permitting some false speech is greater than the harm of inhibiting public debate.<sup>221</sup> To the extent that there has been legal consensus on this question since *Sullivan*, that consensus concludes that the harm of chilling speech is more dangerous.<sup>222</sup>

## CONCLUSION

In 1964, the Supreme Court made a revolutionary move: it constitutionalized an entire area of law that it had previously left to the states. *Sullivan* transformed a tort meant to serve local interests by enshrining a defense meant to serve national interests. At a time when most communication was local, the *Sullivan* Court's actual-malice standard fulfilled its intended purpose of providing defamation defendants with meaningful First Amendment protections. However, this framework has failed in a modern media environment where speech is more likely to occur across communities than within them.

Defamation law, as it currently exists, is unworkable and fails to meet its goals. On one hand, the significant costs of litigation and substantive hurdles that plaintiffs must clear mean that individuals lacking substantial resources are unlikely to bring defamation claims and obtain relief when they are subject to harmful falsehoods. On the other hand, the existing system enables superrich plaintiffs to bring massive claims that strong-arm defendants into colossal settlements, regardless of the legal merit. Defendants are particularly vulnerable from a jurisdictional perspective: the existing state-law defamation regime allows plaintiffs to shop for friendly and faraway forums, which makes litigation expensive and inconvenient, while increasing the likelihood of a plaintiff-friendly disposition. This current framework yields results that are both random and catastrophic, producing a chilling effect that protects those with power and money.

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221. See, e.g., Justin W. Aimonetti & M. Christian Talley, *How Two Rights Made a Wrong: Sullivan, Anti-SLAPP, and the Underenforcement of Public-Figure Defamation Torts*, 130 YALE L.J.F. 708, 721-22 (2021).

222. See *N.Y. Times v. Sullivan*, 376 U.S. 254, 279-80 (1964) (requiring a plaintiff to show that a false and defamatory statement was made with actual malice).

In his *Sullivan* concurrence, Justice Goldberg observed that the Court was creating “a clean slate” for defamation law.<sup>223</sup> It is past time to clean the slate once again. Half a century ago, the Court took the then-necessary step of constitutionalizing defamation law. Now, it is up to Congress to federalize it. Such a move is necessary in a world where speech knows no bounds.

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<sup>223</sup> *Id.* at 299 (Goldberg, J., concurring).