AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 8: The New Deal/Great Society Era – Democratic Rights/Free Speech

**Curtis Publishing Co. v. Butts, 388 U.S. 130** (1967)

*The* Saturday Evening Post *published an article accusing Wally Butts, the athletic director of the University of Georgia, of fixing a football game between Georgia and the University of Alabama by passing Georgia’s plays to Alabama coach, Paul Bryant. Butts was forced to resign his position. Butts sued the parent company of the* Post *for libel in federal district court. A jury found that the overheard phone call that was the basis of the article did not in fact demonstrate that Butts had revealed meaningful secrets to Bryant and that the* Post *had not followed good journalistic practices.*

*In light of the Court’s decision in* New York Times v. Sullivan *(1964), Curtis Publishing moved for a new trial, but the district judge held that Butts was not a public official subject to the* New York Times *standard. On appeal, a divided circuit court affirmed that decision. The U.S. Supreme Court affirmed in a 5-4 decision. The Court thought that Butts was a public figure, which necessitated the application of the same libel standard as public officials. The justices disagreed over whether the jury instruction was adequate, given that standard.*

JUSTICE HARLAN delivered the opinion of the Court.

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In *Time, Inc. v. Hill* (1967), we held that "[t]he guarantees for speech and press are not the preserve of political expression or comment upon public affairs . . ." and affirmed that freedom of discussion "must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." This carries out the intent of the Founders who felt that a free press would advance "truth, science, morality, and arts in general" as well as responsible government. From the point of view of deciding whether a constitutional interest of free speech and press is properly involved in the resolution of a libel question a rational distinction "cannot be founded on the assumption that criticism of private citizens who seek to lead in the determination of . . . policy will be less important to the public interest than will criticism of government officials."

On the other hand, to take the rule found appropriate in *New York Times* to resolve the "tension" between the particular constitutional interest there involved and the interests of personal reputation and press responsibility, as being applicable throughout the realm of the broader constitutional interest, would be to attribute to this aspect of *New York Times* an unintended inexorability at the threshold of this new constitutional development. . . .

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. . . . The dissemination of the individual's opinions on matters of public interest is for us, in the historic words of the Declaration of Independence, an "unalienable right" that "governments are instituted among men to secure." History shows us that the Founders were not always convinced that unlimited discussion of public issues would be "for the benefit of all of us" but that they firmly adhered to the proposition that the "true liberty of the press" permitted "every man to publish his opinion."

The fact that dissemination of information and opinion on questions of public concern is ordinarily a legitimate, protected and indeed cherished activity does not mean, however, that one may in all respects carry on that activity exempt from sanctions designed to safeguard the legitimate interests of others. . . . The guarantees of freedom of speech and press were not designed to prevent "the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential . . . ." Our touchstones are that acceptable limitations must neither affect "the impartial distribution of news" and ideas, nor because of their history or impact constitute a special burden on the press, nor deprive our free society of the stimulating benefit of varied ideas because their purveyors fear physical or economic retribution solely because of what they choose to think and publish.

The history of libel law leaves little doubt that it originated in soil entirely different from that which nurtured these constitutional values. Early libel was primarily a criminal remedy, the function of which was to make punishable any writing which tended to bring into disrepute the state, established religion, or any individual likely to be provoked to a breach of the peace because of the words. Truth was no defense in such actions and while a proof of truth might prevent recovery in a civil action, this limitation is more readily explained as a manifestation of judicial reluctance to enrich an undeserving plaintiff than by the supposition that the defendant was protected by the truth of the publication. . . .

The law of libel has, of course, changed substantially since the early days of the Republic, and this change is "the direct consequence of the friction between it . . . and the highly cherished right of free speech." . . .

While the truth of the underlying facts might be said to mark the line between publications which are of significant social value and those which might be suppressed without serious social harm and thus resolve the antithesis on a neutral ground, we have rejected, in prior cases involving materials and persons commanding justified and important public interest, the argument that a finding of falsity alone should strip protections from the publisher. We have recognized "the inevitability of some error in the situation presented in free debate," and that "putting to the pre-existing prejudices of a jury the determination of what is `true' may effectively institute a system of censorship."

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In *New York Times* we were adjudicating in an area which lay close to seditious libel, and history dictated extreme caution in imposing liability. The plaintiff in that case was an official whose position in government was such "that the public [had] an independent interest in the qualifications and performance of the person who [held] it." . . .

In the cases we decide today none of the particular considerations involved in *New York Times* is present. These actions cannot be analogized to prosecutions for seditious libel. Neither plaintiff has any position in government which would permit a recovery by him to be viewed as a vindication of governmental policy. Neither was entitled to a special privilege protecting his utterances against accountability in libel. We are prompted, therefore, to seek guidance from the rules of liability which prevail in our society with respect to compensation of persons injured by the improper performance of a legitimate activity by another. Under these rules, a departure from the kind of care society may expect from a reasonable man performing such activity leaves the actor open to a judicial shifting of loss.

. . . . We consider and would hold that a "public figure" who is not a public official may also recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.

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The *Butts* jury was instructed, in considering punitive damages, to assess "the reliability, the nature of the sources of the defendant's information, its acceptance or rejection of the sources, and its care in checking upon assertions." These considerations were said to be relevant to a determination whether defendant had proceeded with "wanton and reckless indifference." In this light we consider that the jury must have decided that the investigation undertaken by the *Saturday Evening Post*, upon which much evidence and argument was centered, was grossly inadequate in the circumstances. . . .

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*Affirmed*.

CHIEF JUSTICE WARREN, concurring.

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. . . . The present cases involve not "public officials," but "public figures" whose views and actions with respect to public issues and events are often of as much concern to the citizen as the attitudes and behavior of "public officials" with respect to the same issues and events.

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To me, differentiation between "public figures" and "public officials" and adoption of separate standards of proof for each have no basis in law, logic, or First Amendment policy. Increasingly in this country, the distinctions between governmental and private sectors are blurred. Since the depression of the 1930's and World War II there has been a rapid fusion of economic and political power, a merging of science, industry, and government, and a high degree of interaction between the intellectual, governmental, and business worlds. . . .

Viewed in this context, then, it is plain that although they are not subject to the restraints of the political process, "public figures," like "public officials," often play an influential role in ordering society. And surely as a class these "public figures" have as ready access as "public officials" to mass media of communication, both to influence policy and to counter criticism of their views and activities. Our citizenry has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of "public officials." The fact that they are not amenable to the restraints of the political process only underscores the legitimate and substantial nature of the interest, since it means that public opinion may be the only instrument by which society can attempt to influence their conduct.

I therefore adhere to the *New York Times* standard in the case of "public figures" as well as "public officials." It is a manageable standard, readily stated and understood, which also balances to a proper degree the legitimate interests traditionally protected by the law of defamation. . . .

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I am satisfied that the evidence here discloses that degree of reckless disregard for the truth of which we spoke in *New York Times*. . . *.* Freedom of the press under the First Amendment does not include absolute license to destroy lives or careers.

JUSTICE BLACK, with whom JUSTICE DOUGLAS joins, dissenting.

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These cases illustrate, I think, the accuracy of my prior predictions that the *New York Times* constitutional rule concerning libel is wholly inadequate to save the press from being destroyed by libel judgments. . . . If this precedent is followed, it means that we must in all libel cases hereafter weigh the facts and hold that all papers and magazines guilty of gross writing or reporting are constitutionally liable, while they are not if the quality of the reporting is approved by a majority of us. In the final analysis, what we do in these circumstances is to review the factual questions in cases decided by juries— a review which is a flat violation of the Seventh Amendment.

It strikes me that the Court is getting itself in the same quagmire in the field of libel in which it is now helplessly struggling in the field of obscenity. No one, including this Court, can know what is and what is not constitutionally obscene or libelous under this Court's rulings. Today the Court will not give the First Amendment its natural and obvious meaning by holding that a law which seriously menaces the very life of press freedom violates the First Amendment. . . .

I think it is time for this Court to abandon *New York Times Co.* v. *Sullivan* and adopt the rule to the effect that the First Amendment was intended to leave the press free from the harassment of libel judgments.

JUSTICE BRENNAN, with whom JUSTICE WHITE joins, dissenting.

. . . . THE CHIEF JUSTICE'S opinion demonstrates that the evidence unmistakably would support a judgment for Butts under the *New York Times* standard, I agree. I would, however, remand for a new trial since the charge to the jury did not comport with that standard. . . .

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That the evidence might support a verdict under *New York Times* cannot justify our taking from the jury the function of determining, under proper instructions, whether the *New York Times* standard has been met. . . . When, as in this case, such evidence appears, the proper disposition in this federal case is to reverse and remand with direction for a new trial.