AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 11: The Contemporary Era – Free Speech: Advocacy

**McKee v. Cosby**, \_\_\_ U.S. \_\_\_ (2019)

*Katherine McKee claimed that lawyers for William Cosby, a well known television actor, had leaked defamatory information about her to the press and internet after she accused Cosby of raping her in the past. A federal district court dismissed her libel suit on the grounds that McKee was a limited public figure who could not meet the libel standard announced by the Supreme Court in* New York Times v. Sullivan *(1964). That standard requires plaintiffs to prove the statement false and that the defendant either knew the statement was false or that the statement was made in reckless disregard of the truth. The Court of Appeals affirmed the dismissal. McKee appealed to the Supreme Court of the United States.*

*The Supreme Court refused to grant a writ of certiorari. Justice Clarence Thomas concurred in the dismissal. He nevertheless insisted that the Court in a proper case should reconsider the decision in* New York Times. *What reasons did Thomas give for thinking* New York Times *inconsistent with the original understanding of the First (and Fourteenth) Amendment? Are those reasons sound? Might* New York Times *be justified on other grounds? Why did Thomas pick 2019 to first claim that* New York Times *was wrongly decided? Was his opinion a consequence of new insights, or a result of the increased conservatism of the court and increased attacks on press freedoms by the Trump Administration?*

Justice [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=Ida80e4d9127311e9a5b3e3d9e23d7429&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ida80e4d9127311e9a5b3e3d9e23d7429), concurring in the denial of certiorari.

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[*New York Times*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1964124777&pubNum=0000780&originatingDoc=Ida80e4d9127311e9a5b3e3d9e23d7429&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) *Co. v. Sullivan* (1964) and the Court’s decisions extending it were policy-driven decisions masquerading as constitutional law. Instead of simply applying the First Amendment as it was understood by the people who ratified it, the Court fashioned its own “ ‘federal rule[s]’ ” by balancing the “competing values at stake in defamation suits.” We should not continue to reflexively apply this policy-driven approach to the Constitution. Instead, we should carefully examine the original meaning of the First and Fourteenth Amendments. If the Constitution does not require public figures to satisfy an actual-malice standard in state-law defamation suits, then neither should we.

From the founding of the Nation until 1964, the law of defamation was “almost exclusively the business of state courts and legislatures.” But beginning with [*New York Times*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1964124777&pubNum=0000780&originatingDoc=Ida80e4d9127311e9a5b3e3d9e23d7429&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), the Court “federalized major aspects of libel law by declaring unconstitutional in important respects the prevailing defamation law in all or most of the 50 States. These decisions made little effort to ground their holdings in the original meaning of the Constitution.

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The common law of libel at the time the First and Fourteenth Amendments were ratified did not require public figures to satisfy any kind of heightened liability standard as a condition of recovering damages. Typically, a defamed individual needed only to prove “a false written publication that subjected him to hatred, contempt, or ridicule. Malice was presumed in the absence of an applicable privilege, right, or duty. General injury to reputation was also presumed, special damages could be recovered, and punitive damages were available if actual malice was established. Truth was a defense to a civil libel claim. But where the publication was false, even if the defendant could show that no reputational injury occurred, the prevailing rule was that at least nominal damages were to be awarded.

Libel was also a “common-law crime, and thus criminal in the colonies.” The same principles generally applied, except that truth traditionally was not a defense to libel prosecutions—the crime was intended to punish provocations to a breach of the peace, not the falsity of the statement. . . .

Far from increasing a public figure’s burden in a defamation action, the common law deemed libels against public figures to be, if anything, more serious and injurious than ordinary libels. Libel of a public official was deemed an offense “ ‘most dangerous to the people, and deserv[ing of] punishment, because the people may be deceived and reject the best citizens to their great injury, and it may be to the loss of their liberties.’ ”

The common law did afford defendants a privilege to comment on public questions and matters of public interest. This privilege extended to the “public conduct of a public man,” which was a “matter of public interest” that could “be discussed with the fullest freedom” and “made the subject of hostile criticism.” Under this privilege, “criticism may reasonably be applied to a public man in a public capacity which might not be applied to a private individual.” Ibid. And the privilege extended to the man’s character “ ‘so far as it may respect his fitness and qualifications for the office,’ ” which was in the interest of the people to know. But the purposes underlying this privilege also defined its limits. Thus, the privilege applied only when the facts stated were true. And the privilege did not afford the publisher an opportunity to defame the officer’s private character.

. . . . Before our decision in [New York Times](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1964124777&pubNum=0000780&originatingDoc=Ida80e4d9127311e9a5b3e3d9e23d7429&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), we consistently recognized that the First Amendment did not displace the common law of libel. . . . The Court consistently listed libel among the “well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.”

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There are sound reasons to question whether either the First or Fourteenth Amendment, as originally understood, encompasses an actual-malice standard for public figures or otherwise displaces vast swaths of state defamation law.

The First Amendment provides that “Congress shall make no law ... abridging the freedom of speech, or of the press.” Justice White’s . . . provides a helpful starting point in interpreting these terms. Justice White had joined the majority opinion in [*New York Times*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1964124777&pubNum=0000780&originatingDoc=Ida80e4d9127311e9a5b3e3d9e23d7429&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). But after canvassing historical practice under similar state constitutions, treatises, scholarly commentary, the ratification debates, and our precedent, he concluded that “[s]cant, if any, evidence exists that the First Amendment was intended to abolish the common law of libel, at least to the extent of depriving ordinary citizens of meaningful redress against their defamers.”

Historical practice further suggests that protections for free speech and a free press—whether embodied in state constitutions, the First Amendment, or the Fourteenth Amendment—did not abrogate the common law of libel. Public officers and public figures continued to be able to bring civil libel suits for unprivileged statements without showing proof of actual malice as a condition for liability. The States continued to criminalize libel, including of public figures. And “Congresses, during the period while [the Fourteenth] Amendment was being considered or was but freshly adopted, approved Constitutions of ‘Reconstructed’ States that expressly mentioned state libel laws, and also approved similar Constitutions for States erected out of the federal domain.” Criticism of the public actions of public figures remained privileged, allowing latitude for public discourse and disagreement on matters of public concern.

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. . . [C]onstitutional opposition to the Sedition Act—a federal law directly criminalizing criticism of the Government—does not necessarily support a constitutional actual-malice rule in all civil libel actions brought by public figures. Madison did not contend that the Constitution abrogated the common law applicable to these private actions. Instead, he seemed to contemplate that “those who administer [the Federal Government]” retain “a remedy, for their injured reputations, under the same laws, and in the same tribunals, which protect their lives, their liberties, and their properties.” Moreover, a central assumption of Madison’s view was the historical absence of a national common law “pervading and operating through” each colony “as one society.” Yet the Court elevated just such a rule to constitutional status in [New York Times](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1964124777&pubNum=0000780&originatingDoc=Ida80e4d9127311e9a5b3e3d9e23d7429&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).

It is certainly true that defamation law did not remain static after the founding. For example, many States acted “by judicial decision, statute or constitution” during the early 19th century to allow truth or good motives to serve as a defense to a libel prosecution. Eventually, changing views led to the “virtual disappearance” of criminal libel prosecutions involving individuals. But these changes appear to have reflected changing policy judgments, not a sense that existing law violated the original meaning of the First or Fourteenth Amendment.

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We did not begin meddling in this area until 1964, nearly 175 years after the First Amendment was ratified. The States are perfectly capable of striking an acceptable balance between encouraging robust public discourse and providing a meaningful remedy for reputational harm. We should reconsider our jurisprudence in this area.