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Michael L. Smith

St. Mary's University School of Law, msmith66@stmarytx.edu

Alexander S. Hiland

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Using *Bruen* to Overturn *New York Times v. Sullivan*

Michael L. Smith¹

Alexander S. Hiland²

Abstract

While New York Times Co. v. Sullivan is a foundational, well-regarded First Amendment case, Justice Clarence Thomas has repeatedly called on the Court to revisit it. Sullivan, Thomas claims, is policy masquerading as constitutional law, and it makes almost no effort to ground itself in the original meaning of the First and Fourteenth Amendments. Thomas argues that at the time of the founding, libelous statements were routinely subject to criminal prosecution—including libel of public figures and public officials.

This Essay connects Justice Thomas’s calls to revisit Sullivan to his recent opinion for the Court in New York State Rifle & Pistol Ass’n, Inc. v. Bruen. While Bruen involved a Second Amendment challenge to a law restricting the concealed carry of handguns, the Court’s “historical tradition” approach to constitutional rights—which is premised on proof of historic restrictions on certain behavior—is readily adaptable to the First Amendment context. Justice Thomas’s arguments for the existence of historical restrictions and penalties for libeling public figures and officials are tailormade for the historical tradition approach he sets forth in Bruen.

While Sullivan is a longstanding precedent, the Court’s recent overruling of Roe v. Wade suggests that this does not guarantee its safety. But other Justices may balk at taking a truly originalist or historical approach to the First Amendment, as this could undo most existing First Amendment doctrine. Still, at least one federal appellate judge has already cited Bruen in support of restructuring First

1. Temporary Faculty Member, University of Idaho, College of Law. J.D. UCLA School of Law; B.S. and B.A., University of Iowa.

2. Senior Lecturer, Rensselaer Polytechnic Institute, PhD, MA, University of Minnesota; BA, University of Northern Iowa.

Amendment law. As time goes on and Bruen's historical tradition approach continues to be applied, Justice Thomas or others could use it to support the growing judicial campaign against New York Times Co. v. Sullivan.

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I. INTRODUCTION

*New York Times Co. v. Sullivan*³ is a foundational First Amendment case.⁴ It is also generally viewed with high regard and portrayed as a historic example of America's respect for freedom of speech and the press.⁵ In *Sullivan*, the Court overturned a lower court's ruling against the New York Times in a defamation case, finding that Alabama's legal requirements to prove defamation were Constitutionally deficient.⁶ The Court held that plaintiffs suing public officials for libel needed to meet a higher bar by proving that libel defendants made false statements with "actual malice"—meaning "with knowledge that [the statement] was false or with reckless disregard of whether it was false or not."⁷ *Sullivan* had a lasting impact, as the Court's subsequent decisions extended *Sullivan*'s protection of defamation suits brought by public officials to cases involving public figures—including those who thrust themselves into the public eye.⁸ The Court has also cited *Sullivan* favorably in other cases, including in support of establishing constitutional protections for defendants accused of false light invasion of privacy,⁹ finding that corporations are protected under the First Amendment,¹⁰ and in support of the proposition that private actions in non-defamation cases involve "state action" when those actions have the effect of restricting First Amendment freedoms.¹¹

Justice Clarence Thomas, however, thinks that it's well past time for the Court to revisit *Sullivan*. In a series of recent opinions accompanying denials of certiorari, Thomas argues that *Sullivan* is untethered from the original meaning of the First and Fourteenth Amendments, and that it and its progeny are based on little more than policy considerations.¹² Justice Gorsuch has also begun to express similar concerns—albeit in a more measured manner than

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

4. See Ashley Messenger, *Reflections on New York Times Co. v. Sullivan, 50 Years Later*, 12 FIRST AMEND. L. REV. 423, 432 (2014) (describing *Sullivan* as "widely praised for changing constitutional law and expanding free speech"); Dawn Carla Nunziato, *I'm Still Dancing: The Continued Efficacy of First Amendment Precedent and Values for New-School Regulation*, 127 HARV. L. REV. F. 367, 367 (2013–2014) (describing *Sullivan* as "foundational").

5. See David A. Anderson, *Wechsler's Triumph*, 66 ALA. L. REV. 229, 230 (2014).

6. *Sullivan*, 376 U.S. at 279–80.

7. *Id.*

8. See Bruce L. Ottley, John Bruce Lewis, & Younghee Jin Ottley, *New York Times v. Sullivan: A Retrospective Examination*, 33 DEPAUL L. REV. 741, 741 & n.2 (1983).

9. See *Time, Inc. v. Hill*, 385 U.S. 374, 387–88 (1967).

10. See *Citizens United v. Fed. Election Comm'n.*, 558 U.S. 310, 342 (2010).

11. See *Cohen v. Cowles Media Co.*, 501 U.S. 663, 668 (1991).

12. See *McKee v. Cosby*, 139 S. Ct. 675, 676 (2019) (Thomas, J., concurring); see also *Berisha v. Lawson*, 141 S. Ct. 2424, 2424–25 (2021) (Thomas, J., dissenting); *Coral Ridge Ministries Media Inc. v. S. Poverty L. Ctr.*, 142 S. Ct. 2453, 2454–55 (2022) (Thomas, J., dissenting).

Thomas.¹³

While some commentators have addressed Justice Thomas's opinions criticizing *Sullivan*, this Article adds to the discussion by connecting those opinions to Thomas's recent opinion for the Court in the Second Amendment case of *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*.¹⁴ While *Bruen* will no doubt receive its fair share of attention from Second Amendment scholars, its approach to constitutional rights and focus on historical traditions will likely be employed in other cases—including those in the First Amendment context. Indeed, the Court used a similar historical tradition approach the day after its opinion in *Bruen* to strike down *Roe v. Wade*¹⁵ on the basis that a historical tradition of abortion restrictions was fatal to claims of a right to abortion based in the Due Process Clause.¹⁶ *Bruen*'s focus on historical restrictions on constitutional rights, coupled with the fact that Justice Thomas wrote the *Bruen* opinion, suggests that Thomas will soon use *Bruen* to support his quest to overturn *Sullivan*. This Article describes how Justice Thomas will likely use *Bruen* to argue to overturn *Sullivan*, and whether these arguments stand to gain momentum after his recent *Bruen* opinion.

Part II of this Article summarizes *Sullivan* and its impact on the First Amendment law of defamation. *Sullivan* restricted plaintiffs' ability to recover for defamation and introduced a host of constitutional protections for defendants in these actions, including the requirement that plaintiffs demonstrate clear and convincing evidence of actual malice. In subsequent decisions, this protection was expanded to cover other plaintiffs, and was cited in support of First Amendment protections for speech and expression in other contexts.

Part III describes Justice Thomas's dissatisfaction with *Sullivan*, expressed over three opinions in defamation cases where the Court denied certiorari. In a concurring opinion and two dissents, Thomas contends that *Sullivan* and its progeny were "policy-driven decisions masquerading as constitutional law" that "made little effort to ground their holdings in the original meaning of the Constitution."¹⁷ On these grounds, Thomas urged the Court to reconsider *Sullivan*.

Part IV addresses the Supreme Court's recent opinion in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*.¹⁸ In *Bruen*, Thomas, writing for the Court, overturned a century-old New York law that required people to demonstrate

13. *See Berisha*, 141 S.Ct. at 2425–30 (Gorsuch, J., dissenting).

14. 142 S. Ct. 2111 (2022).

15. 410 U.S. 113 (1973).

16. *See Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242-43 (2022).

17. *See McKee*, 139 S. Ct. at 676 (2019).

18. 142 S. Ct. 2111 (2022).

“good cause” in order to obtain a license to carry a concealed handgun. The Court based its ruling on a historical tradition approach to constitutional interpretation—stating that the government could only restrict constitutional rights if it could demonstrate a historical tradition of analogous restrictions.¹⁹ While *Bruen* concerned the right to keep and bear arms, there’s little to stop the Court from applying the historical tradition approach in the First Amendment context as well. Indeed, Thomas cited First Amendment jurisprudence as one instance in which the Court took a historical approach to constitutional rights. When read in context of *Bruen*, Thomas’s opinions regarding *Sullivan* read as a brief in favor of overruling *Sullivan* based on this historical tradition approach, as Thomas goes to great lengths to demonstrate a historical tradition of criminalizing and restricting defamation of public figures and governmental officials.

Part V addresses whether the Court will, in fact, revisit *Sullivan*. While *Sullivan* is a longstanding precedent, the Court’s recent decision in *Dobbs* suggests that the Court is not afraid to overturn longstanding precedent—even if substantial political backlash may result. While an exhaustive analysis of the merits of Thomas’s arguments is beyond the scope of this Article (and has already been done elsewhere),²⁰ this Part notes that there may be something to Thomas’s arguments if one takes a truly historic approach to the First Amendment. Finally, this Article notes at least one instance of a lower court citing *Bruen* in the context of urging a return to first principles in First Amendment law—an occurrence that is likely to continue as the courts continue to implement *Bruen* and as Thomas continues to call on the Court to revisit *Sullivan*.

II. *NEW YORK TIMES CO. V. SULLIVAN* AND ITS PROGENY

A. *New York Times Co. v. Sullivan*

New York Times Co. v. Sullivan involved a defamation lawsuit by L.B. Sullivan, a Commissioner of the City of Montgomery, Alabama, arising from a full-page advertisement in the *New York Times*.²¹ The advertisement, titled “Heed Their Rising Voices,” described non-violent demonstrations by African American students in the Southern United States, and stated that their protests were met with “an unprecedented wave of terror.”²² Sullivan claimed that he was libeled by two paragraphs in the advertisement, the first of which

19. *Id.* at 2129–30.

20. See Matthew L. Schafer, *In Defense: New York Times v. Sullivan*, 82 *LA. L. REV.* 81 (2021).

21. 376 U.S. 254, 256 (1964).

22. *Id.* at 256.

stated that “truckloads of police armed with shotguns and tear-gas [surrounded] the Alabama State College Campus” in response to student protests, and the second of which stated that Martin Luther King Jr.’s house had been bombed and that he had been arrested seven times for speeding, loitering, and most recently for felony perjury.²³ Sullivan claimed that the word “police” in the first of these paragraphs identified him as the commissioner supervising the Police Department, which implicated him in the activities described in the advertisement.²⁴

Sullivan demonstrated that he had not participated in the activities described in these paragraphs and noted that the bombings of King’s house and most of King’s arrests occurred before Sullivan’s tenure as Commissioner.²⁵ Sullivan “made no effort to prove that he suffered actual pecuniary loss” as a result of the ad, as Alabama law permitted a presumption of legal injury “from the bare fact of publication itself.”²⁶ A jury awarded Sullivan \$500,000 in damages.²⁷

The United States Supreme Court weighed whether Alabama’s law of “per se” liability for libel violated the First and Fourteenth Amendments.²⁸ Alabama law provided that plaintiffs could sue defendants for libel if a defendant published words “of and concerning” a plaintiff that tended to injure the plaintiff or their reputation.²⁹ In such a case, the defendant’s only defense would be to persuade the jury that the statements were true.³⁰ Absent such a showing, Alabama law presumed general damages.³¹ To obtain punitive damages, a plaintiff would need to show actual malice.³² Further, under Alabama law, “[g]ood motives and belief in truth do not negate an inference of malice, but are relevant only in mitigation of punitive damages if the jury chooses to accord them weight.”³³

The Court acknowledged that defamation was not protected by the First Amendment.³⁴ But it noted that defining what defamation was in the first

23. *Id.* at 257–58.

24. *Id.* at 258.

25. *Id.* at 259.

26. *Id.* at 260, 262.

27. *Id.* at 256.

28. *Id.* at 267–68.

29. *Id.* at 267.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 268.

place needed to “satisfy the First Amendment.”³⁵ Drawing on its prior opinions, the Court stated that the purpose of the First Amendment’s protection of free expression, arguing that its purpose was to “assure unfettered interchange of ideas,” permit “free political discussion,” and that it was “a prized American privilege to speak one’s mind, although not always with perfect good taste, on all public institutions.”³⁶ The Court therefore evaluated the case “against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”³⁷

The Court then argued that erroneous statements would be inevitable in such an environment of free debate, and that some “breathing space” was necessary to permit freedom of expression to survive.³⁸ The Court went on to note that even speech that injures official reputation is still worthy of protection, even when the speech contains “half-truths” and “misinformation.”³⁹ The Court then discussed historical controversy over the Sedition Act of 1798 which criminalized utterances or publications against the United States government, Congress, or the President, with the intent to defame or bring the government into disrepute.⁴⁰ It surveyed criticism of the law, noting that James Madison and Thomas Jefferson attacked the law as unconstitutional.⁴¹ The Court noted that while a First Amendment challenge to the law never made it to the Supreme Court, the “attack upon [the Sedition Act’s] validity has carried the day in the court of history.”⁴² Fines levied under the law were repaid on the ground that the law was unconstitutional, and Thomas Jefferson, once President, “pardoned those who had been convicted . . . under the Act.”⁴³

Turning to state libel laws, the Court first noted that constitutional limits on libel applied equally to both civil and criminal laws.⁴⁴ The Court then concluded that Alabama’s defamation law did not pass constitutional muster, noting that its “allowance of the defense of truth” was insufficient to save the law, as the legal regime would lead to speakers engaging in self-censorship.⁴⁵

35. *Id.* at 269.

36. *Id.* at 269 (quoting, respectively, *Roth v. United States*, 354 U.S. 476, 484 (1957), *Stromberg v. California*, 283 U.S. 359, 369 (1931), and *Bridges v. California*, 314 U.S. 252, 270 (1941)).

37. *Id.* at 270.

38. *Id.* at 271–72.

39. *Id.* at 272–73.

40. *Id.* at 273–74.

41. *Id.* at 274–75.

42. *Id.* at 276.

43. *Id.*

44. *Id.* at 277.

45. *Id.* at 278–79.

Instead of Alabama's law, the Court stated:

The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.⁴⁶

The Court reasoned that such an approach was sensible as speech by public officials was often absolutely privileged, and that failing to provide enhanced protection to private speakers would result in the unjustified, asymmetric protection of government officials.⁴⁷ Applying this standard to the case before it, the Court concluded that the evidence of actual malice "lack[ed] the convincing clarity which the constitutional standard demands," and that the court below could not "constitutionally sustain the judgment for respondent under the proper rule of law."⁴⁸

B. The First Amendment Legacy of New York Times Co. v. Sullivan

Following its decision in *Sullivan*, the Court expanded its defamation jurisprudence and applied *Sullivan*'s protective approach to a wider range of cases. In *Curtis Publishing Co. v. Butts*,⁴⁹ Chief Justice Warren's concurrence stated that the *Sullivan* actual malice standard applied to defamation actions against public figures in addition to public officials—a conclusion with which a plurality of Justices agreed.⁵⁰

In *Gertz v. Robert Welch*,⁵¹ the Court clarified the extent of the actual malice requirement, noting that people with "roles of especial prominence in the affairs of society" and people who "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved" are public figures who must demonstrate actual malice in defamation actions.⁵² The *Gertz* Court concluded that states could "define for themselves the appropriate standard of liability for a publisher or broadcaster

46. *Id.* at 279–80.

47. *Id.* at 282–83.

48. *Id.* at 285–86.

49. 388 U.S. 130 (1967)

50. *Id.* at 155 ("Nothing in this opinion is meant to affect the holdings in *New York Times*"); *id.* at 162 (Warren, C.J., concurring).

51. 418 U.S. 323 (1974).

52. *Id.* at 345.

of defamatory falsehood injurious to a private individual.”⁵³ But the Court emphasized that even private plaintiffs “who do not prove knowledge of falsity or reckless disregard for the truth” were limited to recovering only damages for “actual injury.”⁵⁴

In *Philadelphia Newspapers, Inc. v. Hepps*,⁵⁵ the Court again recognized the continuing importance of its ruling in *Sullivan*.⁵⁶ In affirming that defamation plaintiffs bear the burden to show that statements about them are false, the Court recognized that the requirement would “insulate from liability some speech that is false,” but that this was consistent with the need to “protect some falsehood in order to protect speech that matters.”⁵⁷ The Court noted that “even demonstrably false speech” may be insulated from liability in order to provide breathing space “for true speech on matters of public concern.”⁵⁸

The Court also cited *Sullivan* favorably in other cases, including in support of establishing constitutional protections for defendants accused of false light invasion of privacy,⁵⁹ finding that corporations are protected under the First Amendment,⁶⁰ and in support of the proposition that private actions in non-defamation cases involve “state action” when those actions have the effect of restricting First Amendment freedoms.⁶¹ These cases demonstrate *Sullivan*’s wide-ranging and long lasting legacy. They also illustrate the depth and range of First Amendment doctrine that would be upended were the Court to overrule *Sullivan*—a prospect to which we now turn.

III. JUSTICE THOMAS’S ATTACKS AGAINST *NEW YORK TIMES CO. V. SULLIVAN*

In recent years, Justice Thomas has made no secret of his desire to revisit *Sullivan*. In *McKee v. Cosby*,⁶² a plaintiff appealed the dismissal of her defamation action against Bill Cosby and his attorney in which she alleged that Cosby and his attorney defamed her when she accused Cosby of rape.⁶³ Justice Thomas concurred with a denial of a grant of certiorari.⁶⁴ While he agreed

53. *Id.* at 347.

54. *Id.* at 349.

55. 475 U.S. 767 (1986).

56. *Id.* at 778.

57. *Id.* at 778 (quoting *Gertz*, 418 U.S. at 341).

58. *Id.* at 778.

59. *See Time, Inc. v. Hill*, 385 U.S. 374, 387–88 (1967).

60. *See Citizens United v. Fed. Election Comm’n.*, 558 U.S. 310, 342–43 (2010).

61. *See Cohen v. Cowles Media Co.*, 501 U.S. 663, 668 (1991).

62. 139 S. Ct. 675 (2019).

63. *Id.* at 675 (2019) (Thomas, J., concurring)

64. *Id.* (Thomas, J., concurring).

with the Court's decision not to review the lower court's determination that McKee was a limited-purpose public figure, he suggested that "in an appropriate case," the Court should reconsider the precedents that formed the basis for that determination.⁶⁵

Thomas' concurrence in *McKee* noted that until 1964, defamation was "almost exclusively the business of state courts and legislators."⁶⁶ Under the Court's ruling in *Sullivan*, public officials who sue for defamation must establish that the defendants made false statements with actual malice, or, "with knowledge that [the statement] was false or with reckless disregard of whether [the statement] was false or not."⁶⁷ Thomas argued that this requirement has no basis in common practices at the time of the founding, in which malice and damage to reputation were presumed and where libel against public figures was treated as more serious than ordinary libel.⁶⁸ This was part of a broader legal regime in which libel was a "common-law crime, and thus criminal in the colonies."⁶⁹ Thomas argued that truth "traditionally was not a defense to libel prosecutions," as libel laws operated to "punish provocations to a breach of the peace, not the falsity of the statement."⁷⁰ He further asserted that "[l]aws authorizing the criminal prosecution of libel were both widespread and well established at the time of the founding" and at the time the Fourteenth Amendment was adopted—with the caveat that, by then, "many States . . . allowed truth or good motives to serve as a defense to a libel prosecution."⁷¹

Justice Thomas went on to state that while comments on public questions and matters of public interest were privileged under common law, this privilege only applied when the facts stated were true.⁷² *Sullivan* "and its progeny broke sharply from the common law of libel," which, Thomas argues, the First Amendment did not displace.⁷³ And while defamation law evolved since the time of the founding, Thomas attributed this to changing "policy judgments" rather than a sense that earlier laws "violated the original meaning of the First or Fourteenth Amendment."⁷⁴ Accordingly, Thomas concluded, "there appears to be little historical evidence suggesting that the [*Sullivan*] actual-malice rule flows from the original understanding of the First or Fourteenth

65. *Id.* at 675–76 (Thomas, J., concurring).

66. *Id.* at 676 (Thomas, J., concurring) (quoting *Gertz v. Robert Welch*, 418 U.S. 323, 369–70 (1974)).

67. *New York Times Co. v. Sullivan*, 376 U.S. 254, 280, 284 (1964).

68. *McKee* 139 S. Ct. at 678–79.

69. *Id.* at 678 (quoting *Beauharnais v. Illinois*, 434 U.S. 250, 254 (1952)).

70. *Id.*

71. *Id.*

72. *Id.* at 679.

73. *Id.* at 678, 681.

74. *Id.* at 682.

Amendment.”⁷⁵ Thomas’s criticism was not limited to *Sullivan*. He identified other subsequent cases limiting defamation actions as failing to make “a sustained effort to ground their holdings in the Constitution’s original meaning.”⁷⁶ These cases included *Curtis Publishing Co. v. Butts*,⁷⁷ *Gertz v. Robert Welch, Inc.*,⁷⁸ *Garrison v. Louisiana*,⁷⁹ and *Philadelphia Newspapers, Inc. v. Hepps*.⁸⁰

Justice Thomas’s arguments in his *McKee* concurrence against *Sullivan* appear to have been entirely of his own making. Neither *McKee* nor *Cosby* mentioned the original meaning of the First Amendment and whether its original meaning was consistent with the decision in *Sullivan* in their briefing over whether the Supreme Court should take up the case.⁸¹ Indeed, none of their briefs cited *Sullivan* at all.⁸²

Thomas doubled down on this position in his dissent from the denial of a grant of certiorari in *Berisha v. Lawson*, a case in which the petitioner, Berisha, had sued an author, Lawson, for portraying him as being associated with the mafia.⁸³ The district court ruled that Berisha was a public figure and was therefore required to prove that Lawson had acted with actual malice—a standard that the court ruled Berisha had failed to meet.⁸⁴ Reiterating his arguments from *McKee*, Thomas argued that the actual malice requirement was disconnected from the text and history of the First Amendment.⁸⁵ Thomas did not engage in the same historic survey that he performed in *McKee*, and instead focused on modern instances in which lies resulted in harm.⁸⁶ *McKee* was one of these cases, and Thomas proclaimed that “surely this Court should not remove a woman’s right to defend her reputation in court simply because she accuses a powerful man of rape.”⁸⁷

Justice Gorsuch, another self-proclaimed originalist, also filed a dissent in *Berisha*, suggesting that, at the time of the founding, “the freedom of the

75. *Id.*

76. *Id.* at 677–78.

77. 388 U.S. 130 (1967).

78. 418 U.S. 323 (1974).

79. 379 U.S. 64 (1964).

80. 475 U.S. 767 (1986).

81. See Petition for Writ of Certiorari, *McKee*, 139 S. Ct. 675 (No. 17-1542), 2018 WL 2218820; Brief in Opposition, *McKee*, 139 S. Ct. 675 (No. 17-1542), 2018 WL 3629962; Reply Brief for Petitioner, *McKee*, 139 S. Ct. 675 (No. 17-1542), 2018 WL 5415681.

82. *Supra* note 81.

83. *Berisha v. Lawson*, 141 S. Ct. 2424, 2424 (2021) (Thomas, J., dissenting).

84. *Id.*

85. *Id.* at 2425.

86. *Id.*

87. *Id.* Recall, however, that Thomas concurred with the denial of certiorari in Ms. *McKee*’s case.

press generally meant the government could not impose prior restraints preventing individuals from publishing what they wished,” but that plaintiffs could still recover for damages caused by defamatory publications.⁸⁸ Gorsuch characterized *Sullivan* as a change to this scheme, adding a new requirement that public officials must demonstrate actual malice—a standard that Gorsuch noted has expanded to a wide range of cases.⁸⁹

Most recently, Justice Thomas again called for the Court to “revisit” *Sullivan* in a dissent from the denial of certiorari in *Coral Ridge Ministries Media, Inc. v. Southern Poverty Law Center*.⁹⁰ There, Coral Ridge Ministries Media sued the Southern Poverty Law Center for designating Coral Ridge as an “Anti-LGBT hate group.”⁹¹ While Coral Ridge “maintained that although it ‘opposes homosexual conduct’ based on its religious beliefs, it is in no sense a ‘hate group.’”⁹² Coral Ridge conceded that it was a public figure, and the district court concluded that because the meaning of “hate group” was debatable and ambiguous, it was not a provably false statement.⁹³ The court further concluded that there was no plausible allegation that the Southern Poverty Law Center acted with actual malice as defined in *Sullivan*.⁹⁴ The Eleventh Circuit “Court of Appeals affirmed but rested its decision exclusively on the ‘actual malice’ standard.”⁹⁵

Coral Ridge requested that the Court reconsider the actual malice standard, and Thomas again stated that they should do so.⁹⁶ Citing *McKee*, among his other opinions and a dissenting opinion in the D.C. Circuit case *Tah v. Global Witness Publishing, Inc.*,⁹⁷ Thomas reemphasized that “[*Sullivan*] and the Court’s decisions extending it were policy-driven decisions masquerading as Constitutional law” and that the Court had never demonstrated or inquired as to whether the First or Fourteenth Amendments’ original understanding required an actual malice standard.⁹⁸ As with his opinion in *Berisha*, Thomas did not go into any great detail on historic treatment of libel and defamation—leaving his citations to *McKee* to do that work. Thomas did include some

88. *Id.* at 2426 (Gorsuch, J., dissenting).

89. *Id.*

90. 142 S. Ct. 2453, 2455 (2022) (Thomas, J., dissenting).

91. *Id.* at 2454.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. 991 F.3d 231 (D.C. Cir. 2021).

98. *Coral Ridge Ministries Media, Inc.*, 142 S. Ct. at 2455 (Thomas, J., dissenting) (quoting *McKee v. Cosby*, 139 S. Ct. 675, 676 (2019)).

remarks about how “[*Sullivan*] and its progeny have allowed media organizations and interest groups ‘to cast false aspersions on public figures with near impunity’” and that labeling Coral Ridge a “hate group” lumped Coral Ridge in with groups like the Ku Klux Klan and Neo-Nazis.⁹⁹

These opinions demonstrate Justice Thomas’s strong desire to revisit *Sullivan*. Thomas does not explicitly state that such a reconsideration will lead to an overruling of *Sullivan*, but the historic evidence he gathers of his own volition in *McKee* strongly suggests that this is the conclusion he would reach in such a case.

IV. NEW YORK STATE RIFLE & PISTOL ASSOCIATION, INC. V. BRUEN: APPLYING THE COURT’S NEW SECOND AMENDMENT ANALYSIS TO SULLIVAN

It may not be immediately apparent that the Court’s recent Second Amendment jurisprudence has anything to do with Justice Thomas’s desire to revisit and overturn *New York Times Co. v. Sullivan*. But a review of Justice Thomas’s opinion for the Court in that case—particularly his approach to determining whether restrictions on enumerated constitutional rights are permissible—forms a likely basis for his continued attack on *Sullivan*.

A. *Bruen*’s Historical Tradition Approach to Restrictions on Constitutional Rights

In *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*,¹⁰⁰ the Court took up a challenge to a New York permitting scheme that required people applying for licenses to carry concealed handguns to show “proper cause.”¹⁰¹ Concerns about living in high crime areas or having a general need for self-defense were not sufficient bases to demonstrate proper cause.¹⁰²

The Court noted that after its prior Second Amendment decision in *District of Columbia v. Heller*,¹⁰³ lower courts had generally applied a two-step test to Second Amendment challenges.¹⁰⁴ The first step involved a determination of whether the restricted activity fell within the scope of the Second Amendment’s protection, with the government often arguing that the activity

99. *Id.*

100. 142 S. Ct. 2111 (2022).

101. *Id.* at 2123 (“New York courts have held that an applicant shows proper cause only if he can demonstrate a special need for self-protection distinguishable from that of the general community.”).

102. *Id.*

103. 554 U.S. 570 (2008).

104. *Bruen*, 142 S. Ct. at 2126.

was beyond the scope of the Amendment's protection altogether.¹⁰⁵ Where this was the case, courts deemed the restricted conduct "categorically unprotected."¹⁰⁶ If the conduct fell within the scope of the Second Amendment, courts then analyzed "how close the law comes to the core of the Second Amendment"—understood to be the right to keep arms for self-defense in the home.¹⁰⁷ Laws burdening this core Second Amendment right were subject to strict scrutiny—meaning they needed to be "narrowly tailored to achieve a compelling governmental interest" in order to be deemed constitutional.¹⁰⁸ Activities within the scope of the Second Amendment's protection, but beyond its core protection, were subject to intermediate scrutiny—an evaluation of whether the laws are substantially related to achieving an important governmental interest.¹⁰⁹

The *Bruen* Court rejected this two-step approach, replacing it with a method that it claimed contained only one step.¹¹⁰ In fact, the Court's historical tradition approach to the Second Amendment contains at least two steps. First, the Court evaluates whether the restricted activity falls within the scope of the Second Amendment's text.¹¹¹ Next, the Court evaluates whether the government's restriction is "consistent with the Nation's historical tradition of firearm regulation."¹¹² If the government can demonstrate that the law is analogous to historical restrictions on firearms, courts may conclude that the law does not violate the Second Amendment.¹¹³

The Court stated that determining the existence of a "historical tradition" would involve identifying analogous historical laws and regulations.¹¹⁴ Beyond a few paragraphs urging the identification and analysis of "relevantly similar" historical rules, the Court had little to say about how parties and courts should go about this analogical reasoning in the Second Amendment context or in constitutional analysis more generally.¹¹⁵ As for analogous historical restrictions in the Second Amendment context, the Court declined to "provide an exhaustive survey of the features that render regulations relevantly similar under the Second Amendment" and instead only identified two: (1) "whether modern and historical regulations impose a comparable burden

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 2127.

111. *Id.* at 2129–30.

112. *Id.* at 2130.

113. *Id.*

114. *Id.* at 2132–33.

115. *Id.* at 2132.

on the right of armed self-defense,” and (2) “whether that burden is comparably justified.”¹¹⁶

The *Bruen* Court went on to conclude that New York’s proper cause requirement for the issuance of concealed carry handgun permits was not consistent with a historical tradition of firearms restrictions.¹¹⁷ The precise details of the Court’s reasoning are not pertinent to this Article, but some attention to the Court’s handling of certain types of evidence is instructive. The Court gave lower weight to evidence of historical laws and regulations that did not fall close in time to the founding or the ratification of the Second and Fourteenth Amendments, arguing that the scope of constitutional rights extends as far as they were understood to have gone at the time of adoption.¹¹⁸

The Court went on to consider a host of historical laws, regulations, and other evidence presented in support of a claimed historical tradition of firearms regulation, ultimately concluding that the showing was insufficient to overcome the Second Amendment’s protection.¹¹⁹ Laws the Court rejected included colonial-era restrictions that the Court concluded were inapplicable because they only restricted carrying firearms in certain circumstances, such as carrying firearms for the purpose of causing terror.¹²⁰ The Court took a similar approach to gun restrictions in the Reconstruction era.¹²¹ The Court also gave little weight to England’s Statute of Northampton, noting that it had been enacted long before ratification of the Second Amendment.¹²² After surveying the founding and reconstruction eras, as well as restrictions dating to before and after these time periods, the Court concluded that there was no historical tradition of restricting the concealed carry of firearms and that New York’s restriction therefore violated the Second and Fourteenth Amendment’s protection of the right to keep and bear arms.¹²³

B. Applying the *Bruen* Historical Tradition Approach to *Sullivan*

A Supreme Court opinion on the scope of the right to carry concealed handguns may not appear to have any apparent relevance to *New York Times Co. v. Sullivan* or First Amendment rights to free speech and expression. But one must not forget that the *Bruen* opinion was not simply an opinion signed by six Justices of the Supreme Court. It was also an opinion authored by

116. *Id.* at 2132–33.

117. *Id.* at 2156.

118. *Id.* at 2136.

119. *Id.* at 2138–56.

120. *Id.* at 2142–44.

121. *Id.* at 2152–53.

122. *Id.* at 2139, 2142.

123. *Id.* at 2156.

Justice Thomas—who has repeatedly urged the Court to revisit *Sullivan*. And while *Bruen* may have addressed the right to carry firearms, the general nature of its historical approach suggests that it may be applied beyond the Second Amendment context.

Return to the Court’s specific language regarding its historical tradition approach to restrictions on behavior falling within the scope of the Second Amendment:

We reiterate that the standard for applying the Second Amendment is as follows: When the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation’s historical tradition of firearm regulation. Only then may a court conclude that the individual’s conduct falls outside the Second Amendment’s “unqualified command.”¹²⁴

There is reason to think that the Court may seek to apply this historical tradition approach beyond the Second Amendment context. While the Court states its historical tradition approach applies in Second Amendment cases, there is nothing about the nature of the test that precludes it from applying to constitutional rights more broadly. Indeed, the Court itself justifies its approach in *Bruen* by referring to other constitutional rights—including the First Amendment.¹²⁵ The Court states that First Amendment cases involving the freedom of speech involve an initial determination of “whether the expressive conduct falls outside of the category of protected speech.”¹²⁶ In doing so, “the government must generally point to *historical* evidence about the reach of the First Amendment’s protections.”¹²⁷

By referencing First Amendment jurisprudence as a basis for the *Bruen* historical tradition approach, the Court implied that the historical tradition approach has bearing on First Amendment jurisprudence. Indeed, *Bruen*’s historical tradition approach may be of particular relevance to *Sullivan* because *Sullivan* and its progeny involve the divide between protected and unprotected speech in defining the test to be used in determining whether speech at issue is unprotected libel or defamation.¹²⁸ In *Sullivan*, the Court recognized its prior holdings that the Constitution “does not protect libelous publications,”

124. *Id.* at 2129–30 (citing *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50, n. 10 (1961)).

125. *Id.* at 2130.

126. *Id.*

127. *Id.*

128. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 268–69 (1964).

but concluded that “libel can claim no talismanic immunity from constitutional limitations” and must instead “be measured by standards that satisfy the First Amendment.”¹²⁹ While the *Sullivan* Court ultimately defined defamation in a narrow manner—at least in cases involving public figures—the ultimate question was whether the speech at issue was protected or unprotected speech. This, the *Bruen* Court contends, is analogous to its historical tradition approach.

Looking to Justice Thomas’s opinions in certiorari denials, particularly *McKee*, it becomes apparent how he may apply the *Bruen* approach to *Sullivan*. In *McKee*, Justice Thomas repeatedly asserts that *Sullivan* is not based in the original meaning of the First or Fourteenth Amendments and urges that the Court revisit its earlier case law on defamation in light of this failure to consider historic meaning.¹³⁰ Thomas’s *McKee* concurrence takes the form of a brief that would be submitted in a case governed by *Bruen*’s historical tradition standard—it seeks to establish a historical tradition of restrictions on defamatory speech, particularly defamation of public figures and officials. Thomas begins with the common law background at the time of the founding, citing Blackstone and other historic sources in support of the claim that defamation, at the time of the founding, required nothing more than proof of “a false written publication that subjected [a person] to hatred, contempt, or ridicule.”¹³¹ Thomas emphasizes that the common law “deemed libels against public figures to be, if anything, *more* serious and injurious than ordinary libels,” again citing Blackstone for the proposition.¹³² Thomas also cites example of cases throughout the 19th century detailing libel suits by public officers and state criminalization of libel.¹³³ *Sullivan*, Justice Thomas argues, was “a fundamental change in the relationship between the First Amendment and state libel law.”¹³⁴

While Justice Thomas does not say outright in *McKee*, *Berisha*, or *Coral Ridge* that *Sullivan* should be overturned, the effort he puts forth in *McKee* and the one-sided nature of the arguments and evidence he presents suggests that overruling *Sullivan* and its progeny is Thomas’s overall goal. By authoring the opinion in *Bruen*, Thomas has set forth a historical tradition approach to enumerated constitutional rights that may be applied beyond Second Amendment cases. With a majority of the Court signing on, this approach to

129. *Id.*

130. See *McKee v. Cosby*, 139 S. Ct. 675, 676, 678, 682 (2019) (Thomas, J., concurring). It’s worth noting that the *Sullivan* Court did address historic tradition in its discussion of the long-term reception and abandonment of the Sedition Act. See *Sullivan*, 376 U.S. at 274–76 (1964).

131. *McKee*, 139 S. Ct. at 678.

132. *Id.* at 679.

133. *Id.* at 681.

134. *Id.* at 680.

determining the scope of constitutional rights is now the law. And Thomas's prior opinion in *McKee* sets forth a template to those who would seek to argue for overturning *Sullivan* under *Bruen*'s historical tradition approach.

V. THE PLAUSIBILITY OF THE SUPREME COURT OVERTURNING *NEW YORK TIMES CO. V. SULLIVAN*

While Justice Thomas may end up using *Bruen* to attempt to overrule *Sullivan*, further questions remain over whether the full Court will go along with Thomas's approach. *Sullivan* is a longstanding precedent and is generally viewed as one of the Court's better decisions. No other Justice has joined in any of Thomas's opinions suggesting that *Sullivan* should be overturned. And even if the case were to make its way before the Court, would the Court go along with Justice Thomas's version of history?

A. *The Uncertain Value of Longstanding Precedent*

In the wake of the Supreme Court's October 2021 term, any claims that constitutional rights are irreversible because they are based on longstanding precedent must be taken with a substantial pinch of salt. One day after deciding *Bruen*, the Court issued its opinion in *Dobbs*, in which the Court overturned the longstanding precedent of *Roe* and ruled there was no constitutional right to an abortion.¹³⁵ While Justice Roberts concurred in the judgment and expressed concern that the Court had failed to demonstrate judicial restraint and overturned *Roe* altogether, no other conservative Justices joined in his opinion.¹³⁶ In overruling *Roe*, the Court demonstrated that its conservative wing was not afraid to undo perceived mistakes made in prior decisions. Defamation law, hardly as much of a political lightning rod as abortion, may well be one of the next areas of law that the Court seeks to reform.

A ready response to this is that *Sullivan* is generally a well-liked opinion, unlike *Roe*, which drew a substantial amount of criticism over the decades it was in place.¹³⁷ But *Sullivan* is not without its critics. David McGowan argues that those on both the political right and left critique *Sullivan*—with those on the right arguing that the precedent benefits liberal media outlets and technology companies, and those on the left arguing that *Sullivan* protects disinformation about elections and vaccination.¹³⁸ Cass Sunstein asserts that Justice Thomas had a point in his *McKee* concurrence, and that the historical

135. See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2258–59 (2022).

136. See *id.* at 2311 (Roberts, C.J., concurring).

137. See Nunziato, *supra* note 4, at 367, 372 (2014).

138. David McGowan, *A Bipartisan Case Against New York Times v. Sullivan*, 1 J. FREE SPEECH

evidence Thomas presented was “considerable.”¹³⁹ Glenn Harlan Reynolds argues the concerns that overruling *Sullivan* will harm the freedom of the press are “basically nonsense,” as such arguments assume “that the press in America, prior to the *Sullivan* opinion, was unfree, which seems rather extreme.”¹⁴⁰

Others question whether *Sullivan* is a beneficial precedent in the first place. Justin Aimonetti and Christian Talley argue that *Sullivan* led to “questionable results” to the extent that later decisions expanded the *Sullivan* actual malice requirement.¹⁴¹ They go on to claim that *Sullivan*, when combined with various state anti-SLAPP regimes that provide avenues to seek the hasty dismissal of lawsuits arising from activities implicating free expression, creates a “super-standard unforeseen by the *Sullivan* Court” that “blocks access to evidence and uniquely disables public-figure defamation claims” and “creates a safe-harbor for defendants’ weaponized gossip.”¹⁴² Kristian Whitten argues that “[t]he effect of the *New York Times* ‘actual malice’ burden of proof is to deny any meaningful remedy to many persons who are libeled by the media,” and urges legislative reform removing the actual malice requirement, but limiting damages to profits obtained as a result of the defamatory statement.¹⁴³ David Logan notes that, in our present “post-truth” society, strong protection against defamation makes recourse against false statements difficult, and urges reforms including limiting the circumstances in which individuals are deemed public figures, or reversing procedural reforms that have removed factfinding questions from juries in defamation cases.¹⁴⁴

To be sure, *Sullivan* has not attracted anywhere near the level of scholarly and public criticism as *Roe*. But one should not leap to the conclusion that it is universally beloved. Additionally, while *Roe* may have attracted its fair share of criticism, we must not forget the commentators who gave assurances that the Court would not outright overrule it.¹⁴⁵ Even those who predicted that

L. 509, 517–26 (2022).

139. Cass R. Sunstein, *Clarence Thomas Has a Point About Free-Speech Law*, BLOOMBERG (Feb. 21, 2019, 9:38 AM), <https://www.bloomberg.com/opinion/articles/2019-02-21/clarence-thomas-has-a-point-about-free-speech#xj4y7vzkg>.

140. Glenn Harlan Reynolds, *Rethinking Libel for the Twenty-First Century*, 87 TENN. L. REV. 465, 479 (2020).

141. 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, 715 (2021).

142. *Id.* at 717.

143. Kristian D. Whitten, *The Economics of Actual Malice: A Proposal for Legislative Change to the Rule of New York Times v. Sullivan*, 32 CUMBERLAND L. REV. 519, 560–61 (2001).

144. See David A. Logan, *Rescuing our Democracy by Rethinking New York Times Co. v. Sullivan*, 81 OHIO ST. L.J. 759, 811–13 (2020).

145. See, e.g., Evan Gerstmann, *No, The Supreme Court Is Not About to Overrule Roe v. Wade*, FORBES (May 18, 2021, 2:38 p.m.), <https://www.forbes.com/sites/evangerstmann/2021/05/18/no-the->

the Court would scale back abortion rights in *Dobbs* did not think it was likely that the Court would outright overrule *Roe*.¹⁴⁶ And while *Roe* may have attracted skepticism from legal scholars and commentators, this minimizes the fact that a majority of the public did not want the Court to overturn *Roe* at the time *Dobbs* was decided, and in the decades leading up to *Dobbs*.¹⁴⁷ *Sullivan* may be a longstanding precedent, but *Dobbs* teaches us that this isn't enough to guarantee its survival.

B. *The Merits of the Historical Analysis*

The goal of this Article is to demonstrate Justice Thomas's likely future arguments in support of overturning *Sullivan* and how he will likely use *Bruen* to further these arguments. A thoroughgoing analysis of whether Justice Thomas's historical arguments against *Sullivan* are correct is therefore beyond the scope of this Article. Still, some discussion of the merits may shed light on whether the Court will take up Thomas's approach and overrule *Sullivan*.

Justice Thomas's opinion in *McKee* makes several assertions about the state of defamation law before and at the founding. But, as noted above, Thomas appears to have done the historical research of his own initiative, as

supreme-court-is-not-about-to-overrule-roe-v-wade/?sh=7031573c22b9 (asserting that it is "very unlikely" that the Court will overturn *Roe v. Wade* in *Dobbs*); Robert A. Sedler, *The Supreme Court Will Not Overrule Roe v. Wade*, 34 HOFSTRA L. REV. 1207, 1209, 1211–12 (2006) (asserting that the Supreme Court will not overrule *Roe v. Wade* because "the Court has never overruled a decision recognizing a constitutional liberty interest or for that matter any other constitutionally-protected interest" and arguing that overturning *Roe* would have a "cataclysmic effect on American society" and that "[a] woman's right to choose is part of the value acceptances of American society today"); Frank Boehm, *Why Roe v. Wade Will Not Be Overturned | Opinion*, THE TENNESSEAN (Sept. 6, 2018, 5:00 p.m.), <https://www.tennessean.com/story/opinion/2018/09/06/why-roe-v-wade-not-overturned/890219002/> (stating that *Roe* will not be overturned in light of its age and the fact that patients would still obtain abortions in illegal or unsafe ways were *Roe* to be overruled).

146. See, e.g., Erwin Chemerinsky, *The Abortion Case Before the Supreme Court May Take Away the Fundamental Right to Reproductive Freedom*, LOS ANGELES TIMES (Nov. 30, 2021, 12:22 p.m.), <https://www.latimes.com/opinion/story/2021-11-30/abortion-case-supreme-court-reproductive-freedom> ("I think the most likely outcome will be for the court to uphold the Mississippi law without explicitly stating that it is overturning *Roe*—even though that is exactly the effect.").

147. See Lydia Saad, *Americans Still Oppose Overturning Roe v. Wade*, GALLUP (June 9, 2021), <https://news.gallup.com/poll/350804/americans-opposed-overturning-roe-wade.aspx> ("Gallup's latest update on U.S. abortion attitudes finds 58% of Americans opposed to overturning the U.S. Supreme Court's 1973 *Roe v. Wade* decision, while 32% are in favor. Since 1989, between 52% and 66% of U.S. adults have wanted to maintain the landmark abortion decision. Today's support roughly matches the average over that three-decade period."); Craig Palosky, *Poll: Two-Thirds of Americans Don't Want the Supreme Court to Overturn Roe v. Wade*, KAISER FAMILY FOUNDATION (June 29, 2018), <https://www.kff.org/health-reform/press-release/poll-two-thirds-of-americans-dont-want-the-supreme-court-to-overturn-roe-v-wade/> (in a poll conducted in 2018, prior to Justice Anthony Kennedy's retirement, 67 percent of Americans responded that they do not want the Court to overturn *Roe*).

the parties seeking certiorari had not addressed the original meaning of the First Amendment and how it relates to defamation in their briefing.¹⁴⁸ Despite Thomas characterizing *Sullivan* as an ahistorical opinion, he fails to meaningfully engage with the historical analysis the *Sullivan* Court did conduct—analysis that included an in-depth discussion of the Sedition Act and a demonstration of how the critics of the bill ultimately prevailed, pardoning those convicted and repaying what fines were levied.¹⁴⁹ Rather than address this broader point, Thomas focuses on minutiae of how the *Sullivan* Court treated evidence of statements by James Madison.¹⁵⁰ As for Thomas’s own historical citations in support of his characterization of the history of libel law, these appear limited to secondary sources and prior (but modern) Supreme Court opinions.¹⁵¹ His references to English practices and the common law, for instance, leave out counterexamples supporting greater protection for defamatory speech, such as the trial of John Peter Zenger.¹⁵² While we do not suggest that missing this particular case renders Thomas’s opinion wanting, it is one omitted example that illustrates an apparent failure to engage in holistic historical analysis.

As for the few primary authorities that Thomas cites directly, his reliance on them misses important nuances. Take *Commonwealth v. Clap*, for example. Matthew Schafer notes that Thomas, in relying on *Clap*, “missed what is actually important about *Clap*: its concern about protecting a sphere of public debate from the common law of libel such that the People could criticize their public officials.”¹⁵³ Schafer recognizes that the Court in *Clap* “applied the tradition rules of the common law of libel [and found] that truth was irrelevant in criminal libel cases.”¹⁵⁴ But the Court also recognized that libel “defendant[s] should not be deprived of the right to prove truth in all cases.”¹⁵⁵ Schafer also notes that Thomas’s assertion that *Clap* deemed false statements

148. See *supra*, note 81.

149. *New York Times Co. v. Sullivan*, 376 U.S. 254, 274–76 (1964).

150. *McKee v. Cosby*, 139 S.Ct. 675, 682 (2019) (Thomas, J., concurring)

151. See, e.g., *id.* at 678 (citing, in support of the proposition that defamed individuals needed to prove only a false written publication that subjected them to hatred, contempt or ridicule: (1) Justice White’s concurrence in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 422 U.S. 749 (1985); (2) Blackstone’s Commentaries; and (3) Folkard’s *Starkie on Slander and Libel* (a 19th century treatise on libel law))

152. See generally, William R. Glendon, *The Trial of John Peter Zenger*, 68-Dec. NY ST. BAR J. 48 (1996) (describing the trial of John Peter Zenger for criminal libel, the fact that truth was not considered a defense to libel, and the verdict of acquittal following argument that the statements at issue were true); see also Elizabeth Samson, *The Burden to Prove Libel: A Comparative Analysis of Traditional English and U.S. Defamation Laws and the Dawn of England’s Modern Day*, 20 CARDOZO J. INT. & COMP. L. 771, 779-80 (2012).

153. Schafer, *supra* note 20, at 102.

154. *Id.* at 103–04.

155. *Id.* at 104.

about public officials to be “most dangerous” was misleading, and that *Clap* concluded that such false statements were “unprotected because of their tendency to undermine republican debate” rather than the fact that they concern public officials.¹⁵⁶ This is only one issue, among many others, that Schafer identifies in Thomas’s use of authority in his *McKee* concurrence.¹⁵⁷

Still, Thomas’s arguments about the state of early defamation law may not be without merit. Rodney Smolla warns of the implications of originalists’ reliance on founding-era practices and referring to common law at the time of the founding to determine acceptable restrictions on free speech, arguing that “[i]f Blackstone’s view of free speech was the real original meaning of the First Amendment, then arguably 90 percent of modern free speech jurisprudence—which goes well beyond Blackstone’s prohibition against prior restraints—is intellectually dishonest and historically illegitimate.”¹⁵⁸ And Genevieve Lakier notes that the Court’s discussion of longstanding restrictions against particular types of speech originate in opinions that undertook little historic analysis and instead “proclaimed a continuity with the past that did not in fact exist.”¹⁵⁹

Jud Campbell, in a thorough examination of founding-era attitudes and treatment of natural rights, free expression, and freedom of the press, concludes that modern assumptions on founding era restrictions are misguided—noting that the evidence does not bear out the notion that “the First Amendment empowered judges to determine whether particular restrictions of speech promoted the general welfare.”¹⁶⁰ Instead, judges were “confined to defending ‘marked and settled boundaries’ of governmental authority, disregarding legislation only where constitutional violations were clear.”¹⁶¹ Campbell notes that accepting a “wholesale” return to “a Founding Era perspective . . . would call for dismantling a huge swath of modern free-speech law,” including *Sullivan*, but also other cases such as *Texas v. Johnson*, 491 U.S. 397 (1989), *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), *Citizens United v. FEC*, 558 U.S. 310 (2010), and *Snyder v. Phelps*, 562 U.S. 443 (2011).¹⁶²

Still, even if an originalist approach to the First Amendment warrants

156. *Id.* at 105.

157. See generally *id.* at 87–92 (discussing Thomas’s *McKee* concurrence).

158. RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 32 (1992).

159. See Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2205–06 (2015) (“Indeed, as support for the paragraph in which he asserted the historical provenance of the exception for fighting words, obscene and profane speech, and libel, Justice Murphy cited no eighteenth- or nineteenth-century case law or treatises.”).

160. Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 259 (2017).

161. *Id.* at 311.

162. *Id.* at 263–64, 313; see also Jud Campbell, *The Invention of First Amendment Federalism*, 97 TEX. L. REV. 517, 570 (2019) (noting that the First Amendment “originally allowed the government to regulate harmful speech in promotion of the public good”).

overturning *Sullivan*, the potential that this could open the floodgates to revisiting other First Amendment cases may give the Court pause. Thomas himself recognizes that a fair number of cases will be overturned if he gets his way, naming *Curtis Publishing Co. v. Butts*,¹⁶³ *Gertz v. Robert Welch, Inc.*,¹⁶⁴ *Garrison v. Louisiana*,¹⁶⁵ and *Philadelphia Newspapers, Inc. v. Hepps*¹⁶⁶ as other First Amendment defamation cases that failed to engage in sufficient historical analysis.¹⁶⁷ To an extent, Thomas may approve of this. His opinions in cases involving restrictions on student speech, for example, are characterized by claims that schools enjoyed extensive historical control over students under the doctrine of *in loco parentis*.¹⁶⁸ While a discussion of student speech cases is beyond the scope of this Article, it would be of little surprise if Thomas were to apply the *Bruen* historical tradition approach in support of his quest to curtail student speech rights.

But Thomas may find that a truly consistent application of the historical tradition approach would disrupt First Amendment doctrine that he favors. Justice Scalia, for example, took issue with Thomas's arguments in favor of historic First Amendment protections for anonymous speech by political donors and against First Amendment protection of violent video games.¹⁶⁹ And Thomas does not always cite to history and tradition in First Amendment cases, meaning that a historical tradition approach could disrupt First Amendment jurisprudence that he has previously supported.¹⁷⁰

A truly originalist approach "would . . . require throwing out most of the Court's First Amendment jurisprudence."¹⁷¹ Overruling *Sullivan* based on the historical tradition approach in *Bruen* could lead to a sea change in First

163. 388 U.S. 130 (1967).

164. 418 U.S. 323 (1974).

165. 379 U.S. 64 (1964).

166. 475 U.S. 767 (1986).

167. *McKee v. Cosby*, 139 S. Ct. 675, 677–78 (2019) (Thomas, J., concurring).

168. See, e.g., *Morse v. Frederick*, 551 U.S. 393, 411–13 (2007) (Thomas, J., concurring) (criticizing the Court's prior recognition of student speech rights in *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969) and arguing that schools historically enjoyed broad latitude to discipline students under doctrine of *in loco parentis*); *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2059–62 (2021) (Thomas, J., dissenting) (criticizing the Court's prior recognition of student speech rights).

169. Compare *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 359–67 (Thomas, J., concurring) with *id.* at 371–74 (Scalia, J., dissenting); compare *Brown v. Ent. Merch. Ass'n*, 564 U.S. 786, 804 (2011) with *id.* at 822–35 (Thomas, J., dissenting).

170. See, e.g., *Citizens United v. Fed. Elec. Com'n.*, 558 U.S. 310, 480 (2010) (Thomas J. concurring) (arguing in support of First Amendment protections against disclaimer and reporting requirements for political donors without reference to the original meaning of the First Amendment); .

171. Schafer, *supra* note 20, at 99; see also Michael C. Dorf, *Justice Thomas's Faux-Originalist Critique of Overbreadth is Radically Underinclusive (and Wrongheaded in Other Ways Too)*, DORF ON LAW (May 11, 2020), <http://www.dorfonlaw.org/2020/05/justice-thomass-faux-originalist.html> ("First Amendment doctrine is pervasively nonoriginalist.").

Amendment jurisprudence. In the place of the intricate doctrine the Court has built up over the course of decades, the single-step approach of investigating historical traditions would take up the role of restructuring First Amendment law. This outcome, even if consistent with originalism and historical evidence, may be so disruptive that even a Court with originalist sympathies may wish to avoid it. The Court may therefore decline to overturn *Sullivan*, as doing so could be the first step towards destabilizing and replacing most First Amendment doctrine. While destabilization and replacement of doctrine may be a desirable goal for some justices (or, perhaps, only one), this sentiment may not be widespread enough on the Court to ameliorate this concern.

C. *The Probability of Certiorari and Lower Court Action*

The discussion thus far assumes that the Supreme Court will end up evaluating the merits of a particular case. To get to this point, however, four Justices must be willing to grant certiorari in a case that implicates *Sullivan*.¹⁷² Justice Thomas is a clear vote in favor of granting certiorari. Justice Gorsuch is a further likely vote in light of his dissent from the Court's decision against granting certiorari in *Berisha v. Lawson*.¹⁷³ It remains to be seen whether any other justices will sign onto a grant of certiorari in a case that may overturn *Sullivan*.

There is an argument to be made that Thomas is unlikely to convince three other justices to join him in voting to grant certiorari to a case challenging *Sullivan* in the wake of *Coral Ridge Ministries Media, Inc. v. Southern Poverty Law Center*.¹⁷⁴ There, while Justice Thomas dissented from the Court's denial of certiorari and again urged that the Court revisit its opinion in *Sullivan*, no other Justices joined in his dissent or issued a dissent of their own.¹⁷⁵ One may take this as a sign that no other Justices are willing to revisit *Sullivan*. Alternatively, while some Justices agree with Thomas's arguments, they may not have thought *Coral Ridge* an appropriate medium to revisit *Sullivan*. If four Justices wish to revisit *Sullivan* in a manner that appears politically neutral and motivated by historical considerations, a case involving the Southern Poverty Law Center deeming a particular entity a hate group for their positions on homosexuality may not be the ideal vehicle to do so. Additionally,

172. See *Ferguson v. Moore-McCormack Lines*, 352 U.S. 521, 559–561 (1957) (Harlan J., concurring in part) (adopted by a majority of the Court in *Rogers v. Missouri Pac. R. Co.*, 352 U.S. 500, 509 n.23 (1957)); see also Joan Maisel Leiman, *The Rule of Four*, 57 COLUM. L. REV. 975, 975–77 (1957) (explaining the rule that the agreement of four Justices is necessary to grant certiorari and disputes over bases for granting certiorari).

173. 141 S. Ct. 2424, 2426 (2021) (Gorsuch, J., dissenting).

174. 142 S. Ct. 2453, 2455 (2022).

175. *Id.*

if the historical tradition approach in *Bruen* is to be the basis for revisiting and overturning *Sullivan*, the *Coral Ridge* case may be a premature opportunity to do so, as *Bruen* was only decided four days before the denial of certiorari in *Coral Ridge*.

Whatever the Supreme Court may do, there is no doubt that the Court's opinion in *Bruen* will be applied in the First Amendment context. In the few months since *Bruen*, at least one judge has already cited *Bruen* as a potential basis for taking a historical tradition approach to the First Amendment rather than an approach based on existing doctrine. In *Club Madonna Inc. v. City of Miami Beach*,¹⁷⁶ the Eleventh Circuit Court of Appeals affirmed a trial court's ruling that, among other things, the First Amendment did not preclude the City of Miami Beach from enacting and enforcing an ordinance that required "all nude strip clubs to follow a record-keeping and identification-checking regime in order to ensure that each individual performer is at least eighteen years old."¹⁷⁷ The court concluded that while the ordinance implicated the First Amendment, it survived intermediate scrutiny because it was enacted to accomplish the government interest of preventing human trafficking in strip clubs, and because the law, while slightly overbroad, left clubs with "reasonable alternative avenues of communication."¹⁷⁸

In an opinion concurring in part and concurring in the judgment, Judge Kevin Newsom joined in the court's opinion concluding that the city's ordinance did not violate the First Amendment.¹⁷⁹ In doing so, though, Judge Newsom recounted an earlier concurrence in which he had "expressed the view that courts should assess Second Amendment challenges solely by reference to that provision's text and history, rather than through resort to amorphous means-ends balancing tests."¹⁸⁰ Judge Newsom noted that, in *Bruen*, the Court had taken up such an approach and referred to its approach in First Amendment cases as a basis for such historical analysis.¹⁸¹ Newsom took issue with this, stating that the First Amendment question before the court involved "a lot of doctrine to slog through," and "so many standards, so many tests, so many factors," and that the doctrine "can all begin to feel a little, well, made up" and that "judges shouldn't make stuff up."¹⁸² In place of this doctrine that, to Newsom, seemed "increasingly made up," Newsom

176. 42 F.4th 1231 (11th Cir. 2022).

177. *Id.* at 1238.

178. *Id.* at 1247.

179. *Id.* at 1261 (Newsom, J., concurring in part).

180. *Id.*

181. *Id.*

182. *Id.*

urged a “return to first principles.”¹⁸³

While lower court judges are bound by Supreme Court precedent, this has not stopped judges like Newsom from speaking out against First Amendment doctrine. Indeed, Judge Laurence Silberman dissented in part in *Tah v. Global Witness Publishing, Inc.*¹⁸⁴ to express his discontent with the majority’s employment of the *Sullivan* actual malice rule and to urge the overturning of *Sullivan* altogether.¹⁸⁵ Citing Thomas’s opinion in *McKee*, Silberman asserted that the *Sullivan* “holding has *no relation* to the text, history, or structure of the Constitution, and it baldly constitutionalized an area of law refined over centuries of common law adjudication.”¹⁸⁶ Silberman made little effort to address the original meaning of the First or Fourteenth Amendments, and set forth an alternate basis for revisiting *Sullivan*, criticizing various papers including the *New York Times* and the “news section” of the *Wall Street Journal* as “Democratic Party broadsheets,” and “[n]early all television” as “a Democratic Party trumpet” (with the exception of Fox News).¹⁸⁷ Ironically, a bit more historical analysis reveals that the founding-era press was indeed a collection of heavily biased broadsheets serving their political patrons.¹⁸⁸

Courts have had only a short time to react to the Court’s decision in *Bruen* and its announcement of the historical tradition approach to constitutional rights. As the decision takes hold and is interpreted by lower courts, additional judges may begin to speak out in a similar manner.

VI. CONCLUSION

Much will be written on the Court’s October 2021 term—particularly on the cases handed down in the term’s final week. *Bruen* will get its fair share of attention in Second Amendment circles. Indeed, *Bruen*’s historical tradition approach represents a departure from the Second Amendment analysis of most lower courts in the wake of *Heller*, meaning that many lower court opinions will need to be rewritten.¹⁸⁹

But *Bruen*’s impact on other constitutional rights should not be ignored. As this Article demonstrates, Justice Thomas’s opinion in *Bruen* tracks with his previous opinions urging the overturning of *Sullivan*. The historical tradi-

183. *Id.* at 1263.

184. 991 F.3d 231 (D.C. Cir. 2021).

185. *Id.* at 251 (Silberman, J., dissenting in part).

186. *Id.*

187. *Id.* at 254–55.

188. SI SHEPPARD, *THE PARTISAN PRESS* 22–23 (2008); HAZEL DICKEN-GARCIA, *JOURNALISTIC STANDARDS IN THE 19TH CENTURY* 30–31, 34–35 (1989);

189. *See New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111, 2126 (2022).

tion approach in *Bruen*—which permits laws and regulations that burden enumerated rights only where the government can demonstrate a historical tradition of such restrictions—is consistent with Thomas’s opinions calling for overturning *Sullivan*, in which Thomas sets forth examples of historic laws and traditions of permitting defamation lawsuits against public officials and public figures.

A lower court has already tied the *Bruen* historical tradition approach to the notion that First Amendment doctrine should be rewritten. As additional courts begin to apply *Bruen*’s historical tradition approach to constitutional rights, and as Justice Thomas continues to issue opinions calling for the overturning of *Sullivan*, further opinions like this are likely. Only time will tell if this will be enough to prompt the Court to take up a case and decide whether *Sullivan* should remain good law, or whether it should be overruled using *Bruen*’s historical tradition approach.