2013

A Jurisdictional Perspective on New York Times v. Sullivan

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Printed in U.S.A.
Vol. 107, No. 2

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ABSTRACT—*New York Times v. Sullivan*, arguably the Supreme Court's most significant First Amendment decision, marks its fiftieth anniversary next year. Often overlooked in discussions of the case's impact on the freedom of speech and freedom of the press is that it arose from a complex puzzle of constitutional, statutory, and judge-made jurisdictional and procedural rules. These kept the case in hostile Alabama state courts for four years and a half-million-dollar judgment before the *Times* and its civil-rights-leader co-defendants finally could avail themselves of the structural protections of federal court and Article III judges. The case's outcome and the particular First Amendment rules it established are a product of this jurisdictional and procedural background.

Martin H. Redish has produced a lengthy record of influential and cutting-edge scholarship on civil procedure, federal jurisdiction, and the First Amendment, and has been a sharp and unforgiving critic of many of the jurisdictional rules that kept the case out of federal court for so long. It is appropriate to recognize Redish's scholarly legacy by examining this landmark case, which sits at the intersection of his three scholarly pursuits and demonstrates why many of his arguments and criticisms are precisely correct.

AUTHOR—Professor of Law, FIU College of Law. J.D., Northwestern University School of Law, 1997. My thanks to Frederic Bloom and Mary-Rose Papandrea for their comments on this Essay. As a student at Northwestern from 1994 to 1997, I took three classes with Marty Redish, worked as his research assistant, and coauthored an article with him. My thanks to James Pfander and the editors of the *Northwestern University Law Review* for inviting me to participate in this celebration of Marty's career. And my special thanks to Marty for being a wonderful friend, mentor, and inspiration.

INTRODUCTION

New York Times v. Sullivan,[1] arguably the Supreme Court's most significant First Amendment case,[2] marks its fiftieth anniversary next year. *Sullivan* took an area of law—state libel law—that had not previously been recognized as subject to federal constitutional constraint and moved it "from far out frozen darkness to the sunny warmth of the first amendment."[3] The Court employed sweeping language about the importance of the freedom of speech; about the liberty of citizens and the press to criticize public officials in even the most caustic, vehement, and occasionally erroneous terms; and about the fundamental idea that speech on matters of public concern must be "uninhibited, robust, and wide-open."[4] It also resolved a 160-year-old historical debate by declaring that seditious libel or anything like it is inconsistent with fundamental notions of free expression.[5] These ideas launched the modern First Amendment and have informed free speech jurisprudence for half a century.[6] No wonder the

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

[2] Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 193–94.

[3] William W. Van Alstyne, *First Amendment Limitations on Recovery from the Press—An Extended Comment on "The Anderson Solution,"* 25 WM. & MARY L. REV. 793, 793 (1984) (footnote omitted).

[4] *Sullivan*, 376 U.S. at 270–71.

[5] *Id.* at 276; *see also* ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT 65–66 (1991) (discussing history of Sedition Act); Christina E. Wells, *Lies, Honor, and the Government's Good Name: Seditious Libel and the Stolen Valor Act*, 59 UCLA L. REV. DISC. 136, 138 (2012).

[6] Mary-Rose Papandrea, *The Story of* New York Times Co. v. Sullivan, *in* FIRST AMENDMENT STORIES 229, 262 (Richard W. Garnett & Andrew Koppelman eds., 2012); *see, e.g.*, United States v. Alvarez, 132 S. Ct. 2537, 2544 (2012); Snyder v. Phelps, 131 S. Ct. 1207, 1215 (2011); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 346 (1995); Texas v. Johnson, 491 U.S. 397, 415–16 (1989); Boos v. Barry, 485 U.S. 312, 318 (1988).

Court's unanimous decision was celebrated as "an occasion for dancing in the streets."[7]

Underlying the state law defamation action in which the Court made these pronouncements was a complex puzzle of federal jurisdiction and civil procedure. The speaker-defendants were unable to obtain a federal forum for their federal constitutional claims for four years, meaning they endured two layers of overwhelming and costly defeat in state court before finally getting to an Article III tribunal. Even then, they got to federal court only because the Justices, exercising unchecked discretion and to the surprise of many (including the lead media defendant), found the case worth hearing. This circuitous and uncertain route to federal court was dictated by jurisdictional and procedural rules—constitutional, statutory, and judge made—in effect at the time and still in effect today. The speech-protective outcome in *Sullivan* and the doctrine it spawned are a product of this jurisdictional and procedural background. At the same time, had things gone slightly differently, the case might never have reached the Supreme Court or any other federal forum, just as it remains conceivable that the next *Sullivan* might never do so. The substantive First Amendment consequences of that possibility are obvious and troubling.

This volume of the *Northwestern University Law Review* honors the work of Martin H. Redish, who in forty years in the academy has produced a record of influential and cutting-edge scholarship on civil procedure, federal jurisdiction, and the First Amendment. This is the ideal forum to consider the extent to which the First Amendment's greatest judicial victory was awash in procedure and federal jurisdiction. In fact, Redish has been a sharp and unforgiving critic of many of the jurisdictional and procedural doctrines at issue. *Sullivan* demonstrates why his arguments and criticisms are precisely right.

I. PRELUDE TO A WATERSHED CASE

New York Times v. Sullivan arose from an editorial advertisement published in the *New York Times* in March 1960, titled *Heed Their Rising Voices*. The ad described alleged police misconduct in responding to civil rights protests at Alabama State College in Montgomery; it sought contributions for a fund to defend Martin Luther King, Jr. against state tax perjury charges, as well as to support student protesters and the struggle for voting rights. The ad included a list of celebrity civil rights supporters and was signed by more than twenty leaders of the civil rights movement, including four—Ralph Abernathy, Fred Shuttlesworth, Joseph E. Lowery, and S.S. Seay, Sr.—who were citizens of Alabama.[8]

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[7] Kalven, *supra* note 2, at 221 n.125 (recalling the reaction of preeminent First Amendment scholar Alexander Meiklejohn to the decision).

[8] *Sullivan*, 376 U.S. at 256–57; LEWIS, *supra* note 5, at 5–8; *Heed Their Rising Voices*, N.Y. TIMES, Mar. 29, 1960, at 25, *reprinted in* LEWIS, *supra* note 5, at 2–3.

Five local and state officials filed separate defamation actions in Alabama state court in response to the ad, seeking a total of $3 million.[9] One of those suits was by L.B. Sullivan, a Montgomery city commissioner whose duties included supervising the police department (although not managing day-to-day operations); defendants were the *Times* and the four Alabaman signatories on the ad. Sullivan was not named or described in the ad, but he insisted that the ad's description of police misconduct necessarily implicated him as the department supervisor and leader.[10] Moreover, although he did not suffer any actual harm to his reputation—indeed, it is more likely his reputation was enhanced by a charge that he was hostile to civil rights protesters and the civil rights movement[11]—he sought $500,000 from the *Times* and the four Alabaman signatories.[12]

The defendants almost certainly would have preferred to litigate in federal court rather than state court. The case was tried before Judge Walter Burgwyn Jones, an avowed segregationist who some suspect actually helped the plaintiffs devise their litigation strategy,[13] and a jury of white Southerners whose photographs appeared in the local newspaper.[14] Unsurprisingly, the jury returned a verdict for Sullivan and awarded the full $500,000, a decision affirmed by the Alabama Supreme Court.[15] Sullivan immediately sought to collect on the judgment by attaching the automobiles, real property, and financial accounts of Abernathy and the other individual defendants.[16]

II. FEDERAL FORUM AT TRIAL: REMOVAL

All of this occurred in state court during the heart of the civil rights movement, when a northern newspaper and four African-American civil rights leaders might expect to face procedural and systemic disadvantages in asserting their First Amendment liberties. The question is why the case remained in state court for so long and how it ultimately reached federal court.

Sullivan unsurprisingly chose to file suit in Alabama state court. The first path into federal court thus would have been for the defendants to

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[9] LEWIS, *supra* note 5, at 12–14; Papandrea, *supra* note 6, at 237.

[10] *Sullivan*, 376 U.S. at 258; LEWIS, *supra* note 5, at 28–29; Papandrea, *supra* note 6, at 240–41.

[11] Frederick Schauer, *Harm(s) and the First Amendment*, 2011 SUP. CT. REV. 81, 94 (calling it "laughable" to believe that Sullivan's reputation was injured).

[12] *See Sullivan*, 376 U.S. at 256; LEWIS, *supra* note 5, at 12; Papandrea, *supra* note 6, at 236–37.

[13] LEWIS, *supra* note 5, at 25–26; Papandrea, *supra* note 6, at 238–39.

[14] LEWIS, *supra* note 5, at 27.

[15] *Id.* at 33, 44–45; Papandrea, *supra* note 6, at 242.

[16] LEWIS, *supra* note 5, at 43–44. There is a procedural story to this, as well. All five defendants moved for a new trial following the jury verdict, but the *Times* requested and was granted a one-month continuance. Judge Jones ruled that because the four ministers had not also asked for a continuance, they had waived their motions for a new trial. They thus were more immediately subject to enforcement than the newspaper, even though the paper was obviously better able to satisfy a $500,000 judgment. *Id.*

remove to federal district court. Removal accords defendants a limited right to select a federal forum in the face of the plaintiff's preference for state court. An action is removable only if the case could have been filed in federal district court in the first instance—that is, if the federal district court would have had original subject matter jurisdiction.[17]

But a combination of jurisdictional and procedural rules made removal to federal court impossible, so much so that the defendants made no effort to remove or even to argue that a federal district court would have had subject matter jurisdiction.[18]

A. Diversity Jurisdiction

The most obvious, and most discussed, basis for removal would have been diversity of citizenship; a federal district court has original jurisdiction over civil actions between citizens of different states where the amount in controversy exceeds some minimum amount.[19] At bottom, this action could have been seen as between citizens of different states—Sullivan, the plaintiff, was from Alabama and the *Times*, the primary defendant and the real moneyed target of the litigation, was from New York (where the publishing company was incorporated and had its principal place of business). And the suit sought $500,000, far in excess of the jurisdictional minimum.

But Sullivan also sued those four civil rights leaders who had signed the ad—the only four signatories who happened to be Alabama citizens. An action is "between citizens of different states" only when there is "complete diversity," meaning no adverse parties are citizens of the same state.[20] Minimal diversity—where at least one party is diverse from one adverse party—is not sufficient. The demand for complete diversity is not obviously compelled by constitutional text, statutory text, or diversity's underlying policies; nevertheless, Congress has accepted the requirement as a part of the diversity statute for so long that it can be said to reflect congressional intent.[21] Although there was minimal diversity between the *Times* and Sullivan, there was not complete diversity, given the presence of the four Alabamans; it thus was clear the case was not removable on diversity grounds. Indeed, it has always been beyond obvious that Sullivan's lawyers knew this and named those four signatories—and no

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[17] 28 U.S.C. § 1441(a) (2006).

[18] The *Times* did challenge personal jurisdiction over it in Alabama, arguing that the fewer than 400 copies of the paper sold there were not sufficient minimum contacts with the state, but the motion was denied. LEWIS, *supra* note 5, at 25–26.

[19] § 1332(a)(1).

[20] *See* Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267 (1806); Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and "The Martian Chronicles,"* 78 VA. L. REV. 1769, 1803 (1992).

[21] Redish, *supra* note 20, at 1803–05.

others—precisely to destroy complete diversity and keep the case in state court.[22]

Diversity jurisdiction exists to counter bias against outsider litigants facing favored local parties in state court, where judges are often elected or subject to reelection, judges and juries are drawn locally, and everyone is potentially subject to local popular pressures and passions.[23] Federal courts, with judges who enjoy life tenure and guaranteed salary, are insulated from those local biases and political passions and thus better able to provide an outsider with a fundamentally fair forum.[24] The argument for requiring complete, as opposed to minimal, diversity is that local bias concerns disappear when minimal diversity is present; when there are nondiverse adverse parties, any bias against the outsider party is mitigated by having locals on both sides.[25] In other words, the *Times* need not have worried about suffering local bias in Alabama state court because it had four Alabamans as co-parties whose presence would balance any local favoritism for the Alabaman plaintiff.

Redish has criticized the logic behind the complete diversity requirement, and *Sullivan* illustrates the point. This was a case in which the goals of diversity could be served only by allowing the case into federal court on minimal diversity. The presence of a nondiverse co-party does little to stop a state court bent on prejudicing an outsider.[26] At best, nondiverse parties may neutralize favoritism towards the adverse local; they do nothing to halt prejudice against the nonlocal party.[27] That is, if the four signatory defendants negated favoritism towards Sullivan, they did nothing to stop the desire of the court, the jury, or the local public to "get" the outsider Yankee newspaper that was stirring up trouble. In fact, a Montgomery newspaper applauded the trial court's judgment as successfully "causing reckless publishers of the North . . . to make a re-survey of their habit of permitting anything detrimental to the South and its people to appear in their columns."[28] From the local perspective, the *Times* was the "big bad" in the case and the target of popular antipathy. The *Times*

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[22] LEWIS, *supra* note 5, at 13–14; Papandrea, *supra* note 6, at 236.

[23] Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 553–54 (2005); Redish, *supra* note 20, at 1800–01.

[24] U.S. CONST. art. III, § 1; Redish, *supra* note 20, at 1801.

[25] *Exxon*, 545 U.S. at 554; Redish, *supra* note 20, at 1805 (discussing the argument in favor of demanding complete diversity). At the time Sullivan filed his state court lawsuit, the Supreme Court had not yet clarified whether complete diversity came from Article III or from the diversity statute, or whether Congress ever could give federal courts jurisdiction on less-than-complete diversity. Not until 1967 did the Supreme Court establish, again without explanation, that complete diversity was a statutory requirement, meaning Congress could grant jurisdiction on minimal diversity if it chose. State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 530–31 (1967); *see Exxon*, 545 U.S. at 553.

[26] Redish, *supra* note 20, at 1805.

[27] *Id.*

[28] LEWIS, *supra* note 5, at 34 (alteration in original).

needed the structural protections of a federal forum, a need that was not alleviated by having Alabaman co-defendants.

The problem was exacerbated in *Sullivan* because the purportedly local defendants were themselves functionally "outsiders." African-Americans were not truly part of the local community structure in racially segregated 1960 Montgomery. This was even truer for civil rights leaders who were urging fundamental change to Southern society. While they were from Alabama, they were not of Alabama or the power structure that influenced sociopolitical institutions such as the courts. They were unlikely to benefit from local favoritism, especially before that judge and jury, or to balance local favoritism towards Sullivan. Rather, they would have been the target of a different kind of popular prejudice, such that the *Times* arguably was worse off having them as co-defendants than it would have been alone.

Finally, lack of jurisdiction was not the only barrier to diversity removal; there was also a procedural hurdle. Under the forum-defendant rule, a case is not removable on the basis of diversity, even if federal jurisdiction is present, if any defendant is from the state in which litigation is brought.[29] This reflects the view that local defendants (and their nonlocal co-parties) do not need a federal forum for protection from local bias. Again, this seems highly dubious in a case where the local defendants are African-American civil rights leaders sued alongside an outsider newspaper in that time and place. The point is that even if federal jurisdiction could exist on minimal diversity (as diversity's underlying policies and purposes might suggest), it would not have helped the defendants here. This further explains Sullivan's strategic decision to sue the four Alabamans along with the *Times*.

B. Federal Question Jurisdiction

At the time Sullivan filed his lawsuit, it had not been established, and no one believed, that an ordinary state law defamation action implicated the First Amendment. The parties' trial arguments focused largely on state law issues—falsity, absence of harm to Sullivan (or even any mention of him in the publication), and, for the ministers, whether they were involved with, or even knew about, creating the ad.[30] The *Times* did raise freedom of the press as a defense in both the state trial court and the Alabama Supreme Court, but the argument was quickly swept aside.[31] Constitutional limits on civil defamation became the focal point only when Herbert Wechsler began working to get the case to the Supreme Court of the United States. Even then, Wechsler had to convince *Times* executives that First Amendment

[29] 28 U.S.C. § 1441(b)(2) (2006).

[30] LEWIS, *supra* note 5, at 28–32.

[31] *Id.* at 43–45.

doctrine had evolved in a sufficiently speech-protective direction by the early 1960s that these arguments were worth pursuing.[32]

If state defamation law has been somewhat constitutionalized, a second basis for removal emerges. Federal district courts have original jurisdiction over "civil actions arising under the Constitution, laws, or treaties of the United States."[33] Perhaps the presence of substantial First Amendment issues made Sullivan's defamation action one arising under the Constitution.

This argument fails, however, because of the "well-pleaded complaint" rule. This longstanding judicially created rule provides that a civil action arises under federal law only if the federal issue enters the case as part of the claim stated in the plaintiff's well-pleaded complaint; it is not enough that a federal issue arises as an anticipated part of any defenses or responses to the claim or that a federal issue is expected to arise later in the case.[34] As a result, even though *Sullivan* ultimately would be resolved entirely on construction and application of First Amendment principles, those constitutional issues appeared as a defensive response to the original state law claim. The case did not "arise under" federal law, placing it beyond the original jurisdiction of the federal district court and not subject to removal.

Redish argues that the well-pleaded complaint rule makes no sense, especially where it is obvious from the outset of a case that issues of federal law unquestionably will arise[35] and likely will determine the outcome of the case.[36] Federal question jurisdiction famously exists to ensure a judicial forum with the necessary expertise, respect, and solicitude for federal law, rights, and interests. Federal judges, again armed with Article III structural protections and with a federal institutional orientation, will better identify the appropriate level of enforcement of federal law and rights than state judges who lack those protections and who are more oriented to the local community.[37] If the purpose of general federal question jurisdiction is to provide an original judicial forum that will vigorously and

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[32] *Id.* at 106–07.

[33] § 1331.

[34] Vaden v. Discover Bank, 556 U.S. 49, 60 (2009) (citing Louisville & Nashville R.R. v. Mottley, 211 U.S. 149, 152 (1908)); MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 106 (2d ed. 1990); Redish, *supra* note 20, at 1794–95.

[35] REDISH, *supra* note 34, at 106–07; Redish, *supra* note 20, at 1796.

[36] REDISH, *supra* note 34, at 105, 108; *see also* Donald L. Doernberg, *There's No Reason for It; It's Just Our Policy: Why the Well-Pleaded Complaint Rule Sabotages the Purposes of Federal Question Jurisdiction*, 38 HASTINGS L.J. 597, 656 (1987) ("It is appropriate to require the party seeking federal jurisdiction to demonstrate the existence of a dispute based upon federal law that can, if adjudicated, determine the outcome of the case.").

[37] *See* REDISH, *supra* note 34, at 83, 153, 346; Matthew I. Hall, *Asymmetrical Jurisdiction*, 58 UCLA L. REV. 1257, 1264 (2011); Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1119–20, 1124–25 (1977); Redish, *supra* note 20, at 1825–26.

competently respect and enforce federal rights, the procedural posture in which the federal issue presents does not matter; these underlying policies are implicated as much when the federal issue arises in a defense or response to a claim as when it arises in the original claim itself. At the very least, Redish argues, no one has persuasively explained why other policies supporting the well-pleaded complaint rule (primarily related to docket control and limiting caseloads in federal trial courts by excluding claims involving only potential federal defenses) trump the value of having all federal issues resolved in federal court by federal judges.[38]

Federal judicial respect and solicitude for federal law would have been particularly salient in *Sullivan*. The trial occurred at the height of the civil rights movement, during the period of "massive resistance" to *Brown v. Board of Education* and counterattacks against efforts to undo Southern apartheid.[39] Judge Jones, himself an ardent segregationist, had already made rulings in several other cases thwarting the civil rights movement, the reach of federal law, and federal efforts to protect civil rights.[40]

Indeed, Sullivan's decision to sue for defamation was not an isolated move. Government officials throughout the South had devised a plan to utilize civil libel litigation specifically as a tool for silencing the civil rights movement and the national press that, in covering the movement, revealed to the nation the face of a racist society.[41] And the strategy was working. The *Times* policy long had been to refuse to settle defamation actions, insist that it published the truth, and risk the occasional adverse judgment in the event of error as "one of the vicissitudes of life."[42] By the early 1960s, however, the pile of potential Southern libel judgments approached $300 million and rendered that legal strategy unworkable.[43] The First Amendment implications of all this were obvious. State defamation lawsuits and crippling state civil judgments had become an official weapon for silencing criticism of government, the functional equivalent of seditious libel prosecutions.

The *Times* needed a federal forum to defend its First Amendment rights against this wave of lawsuits. There is, of course, always a strong reluctance to appear to insult state courts and state judges or to distrust their ability or willingness to understand and apply the First Amendment.[44] But *Sullivan* reveals that sometimes insults and distrust are (or at least once

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[38] REDISH, *supra* note 34, at 106–07, 108; Redish, *supra* note 20, at 1796–97.

[39] MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 330–34 (2004); LEWIS, *supra* note 5, at 19–22.

[40] LEWIS, *supra* note 5, at 26.

[41] *Id.* at 35–36.

[42] *Id.* at 107.

[43] Papandrea, *supra* note 6, at 237–38.

[44] Neuborne, *supra* note 37, at 1119; Redish, *supra* note 20, at 1827–28.

were) warranted.[45] Judge Jones began the case by insisting it would be tried under the laws of the State of Alabama and not the Fourteenth Amendment.[46] It is impossible to imagine him or a Southern jury accepting constitutional arguments for a broad liberty to criticize segregationist public officials. The freedom of speech could not survive if state judges and juries of that era had had the final word on the liberty of protesters, activists, and the press to criticize government officials, government policy, and the South's fundamental sociopolitical system.

Fred Bloom has suggested one other way the defendants might have established federal question jurisdiction. At the time of the *Sullivan* trial, a state law claim could arise under federal law when the claim depended on construction or application of some underlying issue of federal law.[47] The well-pleaded complaint rule remains in play; the difference is that the federal constitutional issue is not a defense responding to the state claim, but is an embedded part of the claim itself.[48]

The structure of defamation law after *Sullivan* perhaps supports Bloom's argument. The First Amendment functions less as an affirmative defense to a defamation claim (an external federal rule depriving the state claim rule of its ordinary effect) than as a constitutionally dictated internal limit on the elements of defamation. The First Amendment imposes federal requirements on what a plaintiff must prove to prevail on his state libel claim. State defamation law, and a civil judgment under that law, is constitutionally valid only if it requires the plaintiff to prove falsehood, actual malice, and that the claim was "of and concerning" the defendant, all by clear and convincing evidence.[49] The First Amendment thus was not responding to Sullivan's defamation claim, but redefining the state tort itself. Perhaps a state cause of action, substantially modified by federal constitutional elements, does arise under federal law for removal purposes.

The argument runs aground on the Court's emphasis on federal docket control as part of the arising-under analysis. The Court's recent statements

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[45] Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 451–52 (1985) (discussing the "pathology" of Southern counterattacks on civil rights); Neuborne, *supra* note 37, at 1119 & n.55 (discussing the unique breakdown of state judicial enforcement of federal rights during the civil rights movement).

[46] LEWIS, *supra* note 5, at 26.

[47] *See* Gully v. First Nat'l Bank in Meridian, 299 U.S 109, 112 (1936); Smith v. Kan. City Title & Trust Co., 255 U.S. 180, 191 (1921); Frederic M. Bloom, *Jurisdiction's Noble Lie*, 61 STAN. L. REV. 971, 1028 (2009). The most recent statement provides that a claim arises under federal law where "a state-law claim necessarily raise[s] a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 314 (2005); *see also* Gunn v. Minton, 133 S. Ct. 1059, 1065 (2013) (describing *Grable* as "condens[ing]" prior cases as a way "to bring some order to this unruly doctrine").

[48] Bloom, *supra* note 47.

[49] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 283–84, 289–91 (1964).

establish that a case with an embedded substantial federal issue still does not arise under federal law if it will bring a significant number of similar cases into federal court in a way contrary to a sound division of labor between federal and state courts.[50] If Sullivan's lawsuit arose under the First Amendment, so does every defamation action involving public officials, public figures, and speech on matters of public concern; moving that entire class of cases into federal court on federal question jurisdiction certainly would "materially affect . . . the normal currents of litigation."[51] The *Times* thus was (and still would be, under the new condensed analysis) unlikely to succeed on this federal question argument. But raising it would have at least presented another jurisdictional puzzle for the Court to solve before tackling the First Amendment merits.[52]

III. FEDERAL FORUM ON APPEAL

One could question the practical significance of the foregoing discussion of original jurisdiction (or lack thereof) in federal district court because the state courts and juries did not have the final word. The Supreme Court of the United States has appellate jurisdiction to review final judgments of the highest state court where, among other things, "any title, right, privilege, or immunity is specially set up or claimed under the Constitution."[53] And it exercised that appellate jurisdiction in *Sullivan*.

There is a jurisdictional and procedural component to this as well. "Arising under" means something different in Article III's jurisdictional parameters than in the congressional grant of original jurisdiction to the district courts.[54] The former has been given a broader scope, permitting Congress to vest jurisdiction somewhere in the federal judiciary in any case in which a federal issue does or could arise and form an ingredient of the action.[55] Congress granted this broader authority to the Supreme Court in its appellate jurisdiction, allowing it to review all cases from state courts implicating federal constitutional rights, even where, as in *Sullivan*, the federal issue appears as a defense or response to the claim and not as part of the original claim. By the time a case reaches the Supreme Court, it is

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[50] *Grable & Sons*, 545 U.S. at 313, 319.

[51] *Id.* at 319; *see also Gunn*, 133 S. Ct. at 1068 (rejecting the argument that Congress intended to move legal malpractice issues into federal court because of an underlying patent issue in the case).

[52] *See* Bloom, *supra* note 47 (arguing that if pushed, the Court could have reworked subject matter jurisdiction in *Sullivan*).

[53] 28 U.S.C. § 1257(a) (2006).

[54] REDISH, *supra* note 34, at 83–84. *Compare* U.S. CONST. art. III, § 2 ("The judicial Power shall extend to all Cases . . . arising under this Constitution . . . ."), *with* 28 U.S.C. § 1331 ("The district courts shall have original jurisdictional of all civil actions arising under the Constitution . . . of the United States.").

[55] REDISH, *supra* note 34, at 84–85; *see* Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738, 823 (1824).

clear that federal issues are present in the case and that the case is appropriate for a federal forum.

Thus, although unable to go to federal district court earlier, the *Times* and the four civil rights leaders got their federal forum when the Supreme Court of the United States reviewed, and soundly reversed, the Alabama Supreme Court's affirmance of the state trial judgment. Perhaps, then, it is not important that the defendants were unable to remove to federal district court. They did ultimately present their case to an Article III court, and they did ultimately prevail when federal judicial expertise, respect, and solicitude for First Amendment liberties produced a new, highly speech-protective vision of the freedom of speech and the freedom of the press.

Two points run against this argument.

First, there was no guarantee that the Supreme Court would hear the case. At the time of *Sullivan*, the Court had appellate (mandatory) jurisdiction over some final state court decisions, but the rest of its jurisdiction, including what brought *Sullivan* within its appellate authority as a case asserting a federal right, privilege, or immunity, was by certiorari (meaning the Court had unchecked discretion whether to hear the case).[56] And as amended in 1988, the Court's appellate jurisdiction over state court decisions is now entirely discretionary.[57] The Court thus heard *Sullivan* only because the Justices wanted to hear it.

Moreover, the *Times* may have gotten to the Supreme Court only because the case was so unique. It fit the Court's larger jurisprudential project of expanding First Amendment liberties in disputes over race and civil rights during an especially volatile period.[58] It involved an especially unsympathetic plaintiff, highly dubious harm, and a largely innocuous publication that did not reasonably warrant a half-million-dollar judgment.[59] Yet the Court might have been less willing to take a case lacking the same historical or factual context but similarly implicating important First Amendment interests. In fact, the Court has a somewhat spotty recent record in how it exercises its discretion to review speech-restrictive First Amendment rulings from state court.[60]

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[56] 28 U.S.C. § 1257 (1982) (amended 1988).

[57] § 1257 (1988).

[58] Burt Neuborne, *The Gravitational Pull of Race on the Warren Court*, 2010 SUP. CT. REV. 59, 79; *see also* Blasi, *supra* note 45, at 482 (citing *Sullivan* as an example of the Supreme Court establishing speech-protective First Amendment rules in response to state efforts to repress the civil rights movement).

[59] Papandrea, *supra* note 6, at 263; Schauer, *supra* note 11.

[60] *Cf.* Tory v. Cochran, 544 U.S. 734 (2005) (declining to consider the propriety of a permanent injunction as a defamation remedy following plaintiff's death during the pendency of the case, although vacating the state-court injunction); *id.* at 739 (Thomas, J., dissenting) (arguing that the writ of certiorari should have been dismissed as improvidently granted, leaving the injunction in place); Nike, Inc. v. Kasky, 539 U.S. 654 (2003) (per curiam) (dismissing the writ as improvidently granted in a state unfair competition claim that misread the line between commercial and noncommercial corporate

Second, appellate review in the Supreme Court, and thus a party's ability to vindicate constitutional liberties, depends on the posture of a case and what happened in the lower courts. It may be harder for a reviewing court to reverse a restrictive constitutional judgment when the lower court has engaged in fact-finding to which the reviewing court must defer. Fact-finding remains an important part of what federal judges do and an important justification for providing federal forums for federal claims.[61] Restricting federal fact-finding by keeping cases out of federal district court and providing a federal forum only at the final stage thus might deny parties the full benefits of federal judicial review.

This explains an oft-overlooked but vital procedural aspect of *Sullivan*: independent appellate review of constitutional facts such as falsehood, actual malice, and "of and concerning."[62] This mitigates some negative procedural effects of jurisdictional limitations delaying the federal forum until the court of last resort. The Supreme Court on review is not bound by, or even deferential to, the state courts' factual conclusions. Even at this final stage of litigation, speakers receive complete de novo federal judicial review of both legal and factual issues on which First Amendment liberties depend.

In fact, *Sullivan* carried this procedure to the extreme. The Supreme Court determined conclusively that there was not clear and convincing evidence either of actual malice or that the statements in the ad were "of and concerning" Sullivan, meaning the plaintiff could not prevail on his defamation claims.[63] Although it remanded the case, the Court conducted all necessary fact-finding itself and left the state trial court nothing to do on remand but enter judgment for the defendants.[64]

CONCLUSION

New York Times v. Sullivan is the cornerstone of modern First Amendment jurisprudence. It also is, albeit silently and unwittingly, an

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expression); Aguilar v. Avis Rent A Car Sys., Inc., 980 P.2d 846 (Cal. 1999) (affirming a broad state court injunction barring a business manager from ever using racial epithets or derogatory words), *cert. denied*, 529 U.S. 1138 (2000).

[61] *See* William Cohen, *The Broken Compass: The Requirement that a Case Arise "Directly" Under Federal Law*, 115 U. PA. L. REV. 890, 892–93 (1967); Paul J. Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 170 (1953).

[62] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 285–86 (1964); *see also* Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 510–11 (1984) (applying independent appellate review to all determinations of actual malice, whether by judge or jury); Scott M. Matheson, Jr., *Procedure in Public Person Defamation Cases: The Impact of the First Amendment*, 66 TEX. L. REV. 215, 271–73 (1987) ("[T]he Court's independent review extended beyond the actual malice issue, suggesting that fact-finding on traditional elements of common-law libel . . . may be subject to review for constitutional sufficiency.").

[63] *Sullivan*, 376 U.S. at 285–88.

[64] Thanks to Fred Bloom for emphasizing this point.

exemplar of modern federal jurisdiction and civil procedure doctrine and, perhaps, defects in that doctrine. The case demonstrates the interaction between substance and procedure and how problems in the latter affect the development of the former.

It is, in other words, a case made for a scholar such as Marty Redish.