What Would Justice Brennan Say to Justice Thomas?

BY LEE LEVINE AND STEPHEN WERMIEL

Justice Clarence Thomas’s broadside against New York Times v. Sullivan would most likely not have fazed Justice William J. Brennan Jr., the author of that landmark decision. Indeed, because Thomas relies on arguments made and rejected decades earlier, Brennan would likely say he had heard it all before, both from the unsuccessful plaintiff in Sullivan itself and from his successors in the roughly 30 cases decided by the Supreme Court that collectively constitute Sullivan’s progeny.

On February 19, in a concurring opinion from the denial of a petition for a writ of certiorari, Thomas, who has served on the Supreme Court since replacing Justice Thurgood Marshall in 1991, released a 14-page attack on Sullivan that reads as if he had just now discovered that the Court had limited the reach of state defamation law in the name of the First Amendment.

Brennan, the author of Sullivan, served on the Court from 1956 to 1990 and died in 1997. Were he still alive, there are many points Brennan could make in response to Thomas's assertion that Sullivan ought to be reconsidered and overruled. These include the overwhelming academic consensus applauding the decision both at the time and thereafter; the impressive body of precedent it has spawned in the now 55 years since it was decided; the proper role of original intent in free speech analysis; the history of seditious libel in the United States and its dispositive significance in divining that intent in Sullivan; the case's role in defining “the central meaning of the First Amendment” that has guided the Court's First Amendment jurisprudence for more than half a century; and the limited nature of the past criticisms of Sullivan on which Thomas purports to rely, much of which he wrenches from the context in which they were actually made.

Let’s begin with the academic reaction to Sullivan, authored by arguably the most important First Amendment scholars of that or any era. Shortly after it was decided, the legendary Harry Kalven Jr. wrote the definitive analysis of Sullivan in the Supreme Court Law Review, an article that is still widely considered among the most important academic analyses of the First Amendment ever published. Kalven unequivocally pronounced Brennan’s opinion for the Court in Sullivan to be “the best and most important it has ever produced...” Continued on 22
Avoiding the Rush to Judgment

BY DAVE GILES

The weekend commemorating Dr. Martin Luther King was to be a busy one, even by Washington, DC, standards. While much of the buildup focused on turnout for the Women’s March, people were also in town for the March for Life and the Indigenous Peoples March.

But before the sun rose over the Capitol that Saturday morning, the national conversation was squarely on an unplanned and brief interaction among several groups whose paths had crossed the previous afternoon. With cellphone cameras rolling, a group of mostly white high school students, a group of Native Americans, and what some characterize as a “fringe” religious group all converged near the Lincoln Memorial.

The perceived standoff between a Covington (Kentucky) Catholic High School student and a Native American elder quickly became the headliner in our viral obsession with the 24-hour news cycle.

While the news cycle has since moved on to the lagging government shutdown and the threat of another, a Polar Vortex, and an endless stream of Democrats of another era rolling, a group of mostly white students, a group of Black Israelites intending to diffuse the situation. In the process, he ended up standing face to face with CovCath student Nick Sandmann, who was wearing a red “Make America Great Again” hat.

Video of the encounter between Mr. Phillips and Mr. Sandmann was on social media quickly. Twitter account @2020fight tweeted a one-minute version of the video with the comment: “This MAGA loser gleefully bothering a Native American protester at the Indigenous Peoples March.” As happens frequently these days, the video quickly went viral. Millions viewed the video, and Mr. Sandmann and his classmates were quickly and widely vilified.

News organizations and bloggers of all sizes, stripes, and persuasions offered up their interpretation of the encounter. Partisanship being the tone of contemporary politics, some originally had a critical opinion of the students’ behavior. Now that opinion has swung in the opposite direction.

As the criticism grew, so did the number of videos of the encounter. Soon it had become clear that the version and commentary posted by @2020fight lacked the context and nuance needed to fully assess the situation. Longer versions of the encounter—shown from a variety of angles—tell a different and more complete story. In the space of 24 hours, the mainstream news coverage went from maligning the students to judgment on breaking news and serve as voices of fairness and balance.

The MLK Day confrontation on the National Mall is a good place to push the Pause button and think about the lessons learned from that viral moment for a number of reasons. First, it hits close to home—literally, for me. As I write this, I am looking across the Ohio River into Northern Kentucky and the highway that leads to Covington Catholic High School. Second, despite the short attention span of most news consumers, this story has had some staying power. Third, the case has, as of March 1, already resulted in one defamation claim, with others threatened.

To reset the stage: on Friday, January 18, 2019, a group of more than 200 high school students from Covington Catholic High School (or CovCath as it’s known locally) were in Washington, DC, to attend the March for Life. That afternoon, following the march, the CovCath students were waiting on the steps of the Lincoln Memorial to take their buses back home. Close by was a group of Black Hebrew Israelites exercising their free speech rights in a manner that some characterized as extreme.

To combat the invective, the CovCath students began chanting their school cheer. Into this maelstrom stepped Nathan Phillips, a 64-year-old Omaha Tribe elder who was on the mall as part of the Indigenous Peoples March. Mr. Phillips stepped between the CovCath students and the self-described Black Hebrew Israelites intending to diffuse the situation. In the process, he ended up standing face to face with CovCath student Nick Sandmann, who was wearing a red “Make America Great Again” hat.

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to apologizing for being so quick to judge. A month later, the conversation had normalized, criticism of the students has been replaced with acknowledgment that they actually handled the situation pretty well, and we are left to wait and see whether Mr. Sandmann’s lawsuit against the Washington Post is just the tip of the iceberg, or the first in a series of similar claims against news organizations and others.

Many organizations—including the leading lights in print, broadcast, and radio journalism—have now received letters indicating that they may soon be embroiled (as either defendants or witnesses) in a test over whether the First Amendment provides adequate protection for news organizations, bloggers, and other social media gadflies to allow them the breathing space to report on or comment on viral events as they happen.

While that conversation is more appropriate for another day, the way events unfolded as the initial CovCath video made its way across the media highlights the ways that newsroom lawyers can provide valuable input to editors, producers, bloggers, and others trying to balance the desire for accuracy against the speed with which some news events escalate. Among the important reminders:

• **Avoid the urge to be first**—Breaking a story is the goal of every reporter, but the focus should be on being accurate rather than being first.

• **Focus on the facts**—That’s how most news organizations differentiate themselves. It’s old school, but if we get the facts right, everything else usually falls comfortably into place.

• **Remember who is involved**—As cameras have become ubiquitous, video is capturing all sorts of people doing unusual, illegal, and/or controversial things. Keep in mind that some of these people may not realize how publishing a video or photo may impact them in the future, especially kids. Most news organizations have procedures for reporting on or about minors. Just because something goes viral doesn’t mean a newsroom should abandon its normal processes.

• **Context is crucial**—Mic drop. As the CovCath incident emphasizes, context is a must. Depending on the angle or how much of a video or photo is accessible, the facts don’t always match up with the video or photo that is the subject of the reporting. Seek different perspectives and rely on secondary or tertiary sources to confirm the information in hand.

• **Be transparent**—Mistakes happen, and additional information changes the facts. When they do, make sure the newsroom is updating promptly and correcting factual errors.

• **Resist the temptation to pile on**—Sometimes, everything that needs to be said already has been posted, published, or aired. It never hurts to ask whether what your client is reporting or opining on moves the conversation forward or backward.

• **Keep validating**—Things change, and as they do, engage other sources to satisfy your concerns about fairness and accuracy.

• **Beware of digital “evidence”**—As we all know, things on the internet aren’t always what they appear to be. There is risk that photos or videos may not show the entire picture or could be manipulated to show things that aren’t really there.

• **Challenge your assumptions**—Put yourself in the news subject’s shoes. Assume you’re the person about to bear the brunt of the adverse publicity: Is the newsroom doing what you would expect the reporter to do to get at the truth?

Our clients work under constant pressure—internal deadlines, growing competition, financial constraints, and, often, vociferous criticism and threats. Despite these challenges, much of a newsroom lawyer’s job is to make sure they don’t get too caught up in the moment.

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“Catch and Kill”: Does the First Amendment Protect Buying Speech to Bury It?

BY LEN NIEHOFF

The news media usually chase stories in order to publish them—but sometimes not so much. In some instances, media entities vigorously pursue a story—and purchase the source’s right to tell it—for the specific purpose of ensuring that it does not see the light of day. This practice, commonly called “catch and kill,” has recently come under close scrutiny and raises a host of questions.

These include pragmatic questions: Does the practice work? Can the media entity (or a third-party beneficiary) really enforce the underlying contract? Doesn’t the source’s willingness to abide by the contract down to a simple economic calculation: He or she will honor the agreement until it becomes more profitable to breach it? If the source chooses to breach the contract, does the public disclosure of the effort to suppress the story do more harm than the story itself would have done? Oh, and there’s this question: Can someone go to prison for engaging in catch and kill if a specific use of it runs afoul of campaign finance regulations or other laws? That seems like something worth considering.

Other questions go to normative issues: Is catch and kill journalistically ethical? Indeed, does it have anything to do with “journalism” at all? If we think it ethically problematic, then why? Is it because the media entity pays for the story? Is it because the entity does so with no intent to publish the information? Or is it because the practice can too easily lead to extortionate and other malignant behaviors? All of the above? Do valid ethical arguments in support of the practice exist? Or do they all come down to this: “Ethics problem? No ethics, no problem.”

Still other questions associated with the practice—the ones explored in this article—go to the very foundations of constitutional doctrine: Does the First Amendment protect catch and kill? If so, then how is that consistent with the informative, instructive, and educative values that we think free speech serves and that our First Amendment doctrine seeks to advance? If not, then how do we distinguish this practice from other, more commonplace editorial decisions to withhold publication—which the First Amendment plainly does protect? Is catch and kill speech at all—or is it conduct in the form of thinly veiled influence peddling? Is it a muscular exercise of First Amendment rights—or a callous defiance of everything for which the First Amendment stands? We have a lot to ponder here.


Two phenomena have recently put a spotlight on “catch and kill”: the #MeToo movement and the election of Donald Trump. The practice certainly preceded both of these: For example, in 2005 it was reported that American Media, Inc. (AMI), which publishes The National Enquirer, had approached two women—who had information concerning the extramarital affairs of gubernatorial candidate Arnold Schwarzenegger—about entering into paid confidentiality agreements. Another decade passed before catch and kill took center stage in popular discourse, but then it did so spectacularly.

For many years, film mogul Harvey Weinstein had sexually harassed and assaulted women in the entertainment industry but had managed to keep word of it from leaking into the public sphere. In 2015, however, his “secrets began seeping out” after New York City police questioned him over allegations that he had groped Italian model Ambra Battilana. Earlier that year, Weinstein had entered into a business deal with AMI, which “scrambled to buy her story”—unsuccessfully because her “price was too high.”

Then, later in 2015 and in 2016, as the #MeToo movement took on increasing momentum, Ashley Judd and Rose McGowan came forward with allegations that an unnamed top studio executive had sexually harassed and assaulted them. Matters further escalated when, in October 2017, the New York Times published a story in which Ms. Judd identified Harvey Weinstein as the executive and described his conduct in detail. Allegations against dozens of celebrities, political figures, and other high-profile individuals followed: Olympic gymnastics team doctor Larry Nassar, actor Kevin Spacey, comedian Louis C.K., Today show host Matt Lauer, Senator Al Franken, chef and restaurateur Mario Batali, Metropolitan opera conductor James Levine, musician R. Kelly, CBS CEO Les Moonves, Fox chief Roger Ailes, Fox pundit Bill O’Reilly, and so on and so on.

The most notable name to emerge in the rogue’s gallery of those accused of sexual harassment and assault, however, belonged to one Donald Trump—at the time, candidate for the office of president of the United States. In October 2016, the Washington Post obtained a video recording of Trump bragging in vulgar terms about kissing and groping women and observing that “when you’re a star they let you do it.” The release of the tape prompted numerous women
(one article puts the number at 19) to come forward with accusations that Trump had harassed, groped, and/or assaulted them—all allegations that Trump or his spokespeople denied.12

With news of these accusations of sexual misconduct came correspondingly alarming reports about efforts to hush them up.13 In October 2017, the New Yorker published an expansive and groundbreaking piece by Ronan Farrow that detailed Weinstein’s decades of abuse and his use of threats, settlements, and non-disclosure agreements to keep his harassments and assaults quiet.14 Two months later, a long report followed in the New York Times that exposed the use of catch-and-kill strategies by Weinstein supporters (including AMI) to silence his accusers.15

Efforts by Trump allies (again, including AMI) to take stories about him out of circulation through the use of catch-and-kill strategies also came to light, with lots of journalistic and legal fanfare. Reports identified at least three instances of the practice being used on Trump’s behalf: Late in 2015, AMI paid former Trump Tower doorman Dino Sajudin $30,000 for exclusive rights to information he had been told about Trump fathering a child with a former employee; in August 2016, AMI paid Karen McDougal, a former Playboy model, $150,000 for rights to her story about her affair with Trump; and in October 2016, Trump’s personal attorney and “fixer” Michael Cohen paid Stephanie Clifford, an adult film actress who performs under the name Stormy Daniels, $130,000 to keep secret the story of her sexual liaisons with the candidate.16 (It was subsequently learned that AMI was involved in the payments to Clifford as well.)17 After the payments were publicly revealed, AMI took the position that it found neither Sajudin’s nor McDougal’s story credible and so did not publish them.18

The Clifford and McDougal payments resulted in litigation. The former remains pending. The latter was resolved by the parties agreeing that McDougal could publicly tell her story.19

The payments to suppress stories about Trump raised distinct legal issues because of his candidacy for president. Specifically, such payments could qualify under the law as campaign contributions that have to be reported. Indeed, in August 2018, Michael Cohen pleaded guilty to campaign finance law violations related to his role in brokering the deal with McDougal; and David Pecker—the CEO of AMI and publisher of the National Enquirer—entered into an immunity agreement with prosecutors looking into the payments.20

One set of questions received relatively little attention amid this flurry of legal activity: Does catch and kill implicate First Amendment protections and, if so, how and to what extent? In the McDougal case, AMI filed an anti-SLAPP motion to dismiss her complaint that raised a number of First Amendment arguments, but the case settled before the plaintiff filed an opposition to the motion or the court ruled.21 We turn to those questions now.

The Arguments for First Amendment Protection
In order to determine whether the First Amendment protects catch and kill, it may be useful to divide the practice into two discrete activities: first, contracting with the source of information and paying for the exclusive right to use it, and, second, electing to withhold the information from publication. Legally and logically distinct arguments inform our thinking about whether the First Amendment protects each of these activities.

Contracting with the Source
The Supreme Court has recognized on a number of occasions that collecting information from sources—newsgathering—is an activity protected by the First Amendment. Thus, in Branzburg v. Hayes,22 the Court declared that “without some protection for seeking out the news, freedom of the press could be eviscerated.”23 Similarly, in Houchins v. KQED,24 the Court announced that “there is an undoubted right to gather news ‘from any source by means within the law.’”25

The fact that money changes hands in the process of assembling information may raise issues of journalistic ethics, but it does not in and of itself place the activity outside of First Amendment protection.26 Indeed, the AMI Motion noted that paying for stories is a longstanding journalistic practice that has sometimes been engaged in and defended by the mainstream media.27 The AMI Motion pointed out, for example, that the New York Times paid Charles Lindbergh $5,000 for the story of his trans-Atlantic flight and that Esquire paid Lt. William Calley for a “confessional interview” about the My Lai massacre.28

With all of this said, it can be argued that catch and kill does not fit very well with these newsgathering cases, the principle animating them, or the historic examples of media entities paying for stories. After all, Branzburg and Houchins unambiguously involved the collecting of information for the purpose of considering it for publication—not to keep it out of circulation. Furthermore, a principle designed to protect newsgathering cannot extend so far as to embrace the assembling of every conceivable piece of information for all imaginable purposes. For example, the First Amendment might not protect the collecting of information by someone who has the specific intent of using it to commit blackmail or extortion; in those instances, gathering information may constitute a concrete act in furtherance of an attempt to engage in a crime. Finally, the examples cited in the AMI Motion seem only to underscore the point: The New York Times bought Lindbergh’s story in order to publish it; Esquire purchased Calley’s confessional in order to share it.

But we should not too hastily conclude that the newsgathering doctrine affords no protection to catch and kill. After all, Branzburg actually consisted of several cases that the Court consolidated for decision, and in one of them (Pappas) the journalist ultimately wrote no story at all. More to the point, in all of these cases, the journalist appears to have entered into the newsgathering process with the specific intent of not publishing at least some information—in particular, the identity of the source. The Branzburg Court nowhere implied—that alone expressly held—that the
collection of information loses its constitutional protection simply because a media entity decides not to publish or enters into the process with the specific intent to withhold at least some of what it learns.

Indeed, a principle that extended protection for newsgathering only to information that a media entity had the specific intent of publishing would be deeply problematic in both application and theory. At the newsgathering stage, media entities often do not know what they plan to do with information once they get it; they withhold judgment on that matter—precisely what we want responsible publishers to do. “Do you plan to publish that information?” we ask. “How should I know?” the journalist responds. “I’m still gathering information. That’s the point.”

Trying to fashion newsgathering protection around the specific intent to publish therefore seems fraught with difficulties. Such a doctrine would afford no immunity to media entities and journalists who do not decide this question until all the facts have come in and been considered. And it would leave no room for journalists to gather information that is critical to their reporting but that they never intend to publish, such as the identities of confidential sources or—more mundanely—information that is provided on the condition that it will be used for background only and without attribution.

Granted, the fit between the newsgathering doctrine and catch and kill is less than perfect. But trying to carve out an exception for catch and kill that does not put at risk other newsgathering practices that we want to protect presents serious—perhaps insurmountable—challenges. Newsgathering, like other activities protected by the First Amendment, needs breathing room, and it seems unlikely that we can provide it apart from a principle of sufficient scope that it will afford presumptive protection to the information-collection part of catch and kill.

Withholding Publication
Two distinct (but related) legal doctrines might support the conclusion that the First Amendment protects the second activity encompassed by catch and kill—the decision to withhold publication. First, at a general level, the Supreme Court has recognized that the First Amendment provides not only a positive right to speak (free from prohibitions and limitations imposed by state actors) but also a negative right to refrain from speaking (free from demands and compulsions imposed by state actors). I will refer to this as the “compelled speech doctrine.” Second, at a more specific level, the First Amendment provides “the press” with expansive editorial control over what it publishes—and chooses not to publish. I will call this the “editorial discretion doctrine.”

The Compelled Speech Doctrine. At a high level of abstraction, the compelled speech doctrine stands for the principle that the state cannot force someone to say things that he or she does not want to say. For example, in the seminal case of West Virginia State Board of Education v. Barnette, the Supreme Court upheld the right of objecting public school students to refuse to salute the flag. The Court noted that a right to speak entails a corresponding right not to speak: “To sustain the compulsory flag salute we [would be] required to say that a Bill of Rights which guards the individual’s right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind.”

Indeed, compelled speech cuts at the heart of First Amendment protections. It reflects a government effort to impose an orthodoxy on its citizens—a constitutional anathema. Justice Jackson famously summarized the principle this way: “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodoxy in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.”

In subsequent cases, the Supreme Court continued to endorse the compelled speech doctrine, while moderating the absolutist language of Barnette. For example, in Wooley v. Maynard, the Court struck down a New Hampshire law that rendered it a misdemeanor for objecting individuals to cover the state motto (“Live Free or Die”) on their license plates because they found it morally and religiously repugnant. Citing Barnette, the Court acknowledged that “the right to freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.” And, again citing Barnette, the Court stressed that “[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of ‘individual freedom of mind.’”

The Wooley Court observed, however, that this did not end the inquiry: It needed also to consider whether the state had any “sufficiently compelling” countervailing interests that justified the law. The state offered two. First, the state argued that display of the motto made it easier for police officers to tell whether vehicles bore New Hampshire plates. The Court dismissed this argument, pointing out that a plate’s configuration of letters and numbers readily conveyed its New Hampshire identity. Second, the state argued that the motto communicated a message of history, pride, and individualism. The Court made swift work of this argument as well, observing that this was not an ideologically neutral justification and that the state had no authority to turn the private property of the Maynard family into a “mobile billboard” to promote New Hampshire’s favored messages.

Along the way, the Wooley Court pointed to the editorial discretion doctrine, which the Court plainly viewed as reflecting a sensibility closely related to the compelled speech doctrine. I will turn to that doctrine shortly. Before doing so, however, I want to note some of the ways in which the compelled speech doctrine does not fit particularly well with catch and kill.

The compelled speech doctrine gets at a deep moral and psychological truth: There is something profoundly, personally, and perhaps even uniquely offensive about being forced by the state to express support for an ideological message with which one has grave objections of conscience.
Prohibitions against speech undermine a number of values that we deem personally important, including self-realization and self-expression. But the wrong imposed by forced speech goes even further: It requires hypocrisy and a breach of personal sincerity. In a compelled speech case, the government isn’t just keeping me from saying something I want to say; it’s making me say something I don’t believe.

Catch and kill seems disconnected from these concerns in a number of respects. The nonspeakers in the typical compelled speech case—a student who does not want to salute the flag, a citizen who objects to displaying on his personal property a slogan that he finds offensive—seem much more vulnerable to the coercive power of the state than does a media corporation engaged in a commercial transaction. Furthermore, the compelled speech cases implicate matters deeply personal to the nonspeaker—specifically, his or her own speech and a government command to use that speech in a way that he or she finds grossly offensive. In contrast, catch and kill involves someone else’s speech—the speech that the media entity purchased—and does not in any obvious way involve the sanctity of the individual conscience.

We can, of course, imagine hypothetical circumstances in which the fit between catch and kill and the compelled speech doctrine might seem tighter. Imagine, for example, a publisher who learns that a public figure whom he or she believes to be a person of great character is about to become the target of a false smear campaign. The public figure does not personally have the resources to fend off the attack. Outraged and morally indignant, the publisher agrees to buy the slanderer’s story in order to keep it out of circulation—but the miscreant later runs to court to get the contract nullified because he thinks he can make more money telling his tale on the talk-show circuit.

We have some elements here that resonate with the compelled speech doctrine: an act of conscience, a righteous silence, and even some state coercive power (in the form of a judge’s order, if the court grants the request for relief). Still, the fit remains rough at best. And it seems unlikely that these hypothetical facts align very closely with the average use of catch and kill.

**The Editorial Discretion Doctrine.**

The foundational case with respect to the editorial discretion doctrine is Miami Herald Publishing Co. v. Tornillo, which the Wooley Court cited with approval. In Tornillo, the Court considered the constitutionality of a state statute that granted political candidates a right to equal space to reply to criticism and attacks on their record by a newspaper. Failure to comply with the statute (which, for example, required that the reply be published in the same size print and given a place of equal prominence with the attack) constituted a first-degree misdemeanor. The Court had little difficulty in concluding that the statute ran afoul of the First Amendment.

The Court cited a number of precedents suggesting that “a compulsion exerted by government to print that which it would otherwise not print” is unconstitutional. Applying this principle, the Court ruled that the statute “intrudes into the function of editors.” The Court declared that “[t]he choice of material to go into a newspaper, and the decisions made as to the . . . content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment.”

“It has yet to be demonstrated,” the Court concluded, “how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.”

Of course, this ruling found additional support in the space limitations imposed by print: The compelled inclusion of some material necessarily required the exclusion of other material. But the Court—as if anticipating the infinitely greater latitude afforded by the Internet and online publication—held that the editorial discretion doctrine applied “[e]ven if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forgo publication of news or opinion by the inclusion of a reply.” The Court made clear that its decision turned on the intrusion into editorial decision making about what (and what not) to publish—not on the space limitations of particular media.

The media-focused editorial discretion doctrine, particularly as robustly described in Tornillo, fits much better with catch and kill than does the compelled speech doctrine. The editorial discretion doctrine easily embraces judgments about when to share (or not share) information secured from other sources. The doctrine does not depend (as the compelled speech doctrine seems to) on the refusal to speak being motivated by the sorts of religious beliefs and moral commitments that we tend to associate with the conscientious objections of individuals. And the doctrine unblinkingly extends protection despite the fact that the editorial judgment in question may be “unfair” and thus might skew or distort public dialogue about an issue or individual.

This last point seems particularly important. After all, the most influential philosophic explanation for the good served by freedom of expression—the “marketplace of ideas” model offered by Justice Holmes—assumes that (a) we allow all ideas to compete for our allegiance because (b) this helps us arrive at the truth. Catch and kill, in contrast, strives to keep information and ideas out of the marketplace and may do so precisely in order to keep the truth from being known. As First Amendment arguments go, this intuitively seems like a tough one.

But the Tornillo Court saw things differently. Perhaps it did so because it had a model in mind other than that of the marketplace of ideas. The Court may have seen self-expression as a value unto itself—regardless of its contribution to the search for truth—and viewed government efforts to dictate what must and must not be said as an inexcusable intrusion on that value. Some of the language in the Court’s opinion hints at this.

The Tornillo Court, however, may have thought it could square its ruling with the marketplace of ideas model. To explain how, we might consider an analogy to the difference between an act-based normative model and a rule-based normative
model. By way of example, in very general terms, the philosophy of utilitarianism holds that an action is ethically right if it yields the greatest good for the greatest number of people. Act utilitarianism focuses on the conduct of individual persons. Rule utilitarianism, in contrast, focuses on the good achieved by a given principle overall, regardless of the result in any individual instance. Rule utilitarianism shows up frequently in the law: The attorney-client privilege, for example, may lead to unjust results in particular cases, but we believe that it achieves the greatest good for the greatest number overall by promoting open discourse between lawyers and the people they represent (leading to better advocacy, more just results, and so on).

The Tornillo Court may have had a similar notion in mind. Certainly, in any individual case, the editorial discretion doctrine may result in corruption of the marketplace of ideas and in the loss of truth and information. In general, however, the doctrine fosters a better marketplace: It empowers individuals to fashion their voices and messages as they choose, which, on the whole, facilitates a livelier, better, and more rigorous testing of ideas.

Whatever Tornillo’s underlying philosophy, its editorial discretion doctrine does seem to lend strong support to the notion that catch and kill should receive First Amendment protection. The Court appears to see it in stark terms: If I have the information, then I can do any lawful thing I want with it. And that includes giving the information an unceremonious burial.

One final note should be made regarding the apparent tension between the marketplace of ideas model and the practice of catch and kill. Entities that buy the rights to a story may suppress that one so they can tell a different one. Assume, for example, that a professional athlete learns that a media entity has an interest in a story that might suppress that one so they can kill. Entities that buy the rights to a story may suppress that one so they can kill. Entities that buy the rights to a story may suppress that one so they can kill. Entities that buy the rights to a story may suppress that one so they can kill.

addiction. This sort of informational horse trading arguably does no disservice to the marketplace of ideas; to the contrary, it gets information into it that might otherwise be excluded.

Conclusion
Supreme Court case law provides support for the conclusion that both the “catching” and the “killing” parts of catch and kill fall within the presumptive protection of the First Amendment. Still, the Court has not expressly ruled on the practice, and, as we have seen, it takes a bit of doing to make it fit with some aspects of existing doctrine. If the Court has the occasion to decide a case involving catch and kill, then we may be reminded, yet again, of the adage that hard cases make bad law. We may learn a new adage, too: that bad actors make for hard cases. And, as for bad actors, well, catch and kill has some.

Endnotes
5. Id.
6. Id.
7. The #MeToo movement is generally understood to have begun in 2006 when Tarana Burke coined the phrase in an effort to help women and girls of color who, like her, were survivors of sexual assault. Actress Alyssa Milano is credited with reigniting and amplifying the movement when she encouraged survivors of assault to tweet out the #MeToo hashtag. For a list of significant moments in the history of the movement, see Christen A. Johnson & KT Hawbaker, #MeToo: A Timeline of Events, Chi. TRIB. (Nov. 7, 2018), https://www.chicagotribune.com/lifestyles/et-me-too-timeline-20171208-ht-xstory.html [hereinafter Timeline].
10. See Timeline, supra note 7.


18. Id. In interviews with Ronan Farrow, however, a number of AMI employees indicated that they believed that the company had purchased the stories for the specific purpose of suppressing them. Id.


20. Immunity Deal, supra note 17.


23. Id. at 681.


25. Id. at 11.

26. See, e.g., New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964) (holding that speech did not lose its constitutional protection simply because it came in the form of an editorializing advertisement). It should be noted that the commercial speech doctrine does not change the analysis here. Paradigmatic commercial speech cases involve the regulation of invitations into economic transactions, such as advertisements for goods or services. Catch and kill, in contrast, involves the purchase of information—not the use of speech to sell something. It would make no more sense to apply the commercial speech doctrine to catch and kill than it would to apply it to someone buying a book or a subscription to an online magazine.

27. See AMI Motion, supra note 21, at 10.

28. Id.

29. 319 U.S. 624 (1943).

30. School policy treated a refusal to salute the flag as “insubordination” to be dealt with by expulsion. Id. at 629.

31. Id. at 634.

32. Id. at 642.


34. Id. at 714.

35. Id.


38. The AMI Motion did not make much use of the compelled speech doctrine, perhaps for these reasons.


40. Id. at 256.

41. Id. at 258.

42. Id.

43. Id.

44. Id.

45. The AMI Motion relied heavily on this doctrine. See AMI Motion, supra note 21, at 8–9.


47. For a summary, see Act and Rule Utilitarianism, Internet Encyclopedia of Phil., https://www.iep.utm.edu/util-a-r/ (last visited Dec. 6, 2018).

BY CHUCK TOBIN, JOHN SCOTT, DANA NOLAN, AND DREW SHENKMAN

For more than two years, journalists who hold appropriate federal certification have been able to lawfully capture amazing video footage and still images with aerial cameras from unique points of view. The federal rule finalized at the end of summer 2016, which now permits the “commercial” use of unmanned aircraft systems (UAS, or, as they are commonly referred to, “drones”), launched an entire fleet of drone journalists.

But the federal government’s development of a nationwide regulatory framework, with the ultimate goal of promoting the integration of drone systems into our national airspace, has not grounded the entire public policy debate. Indeed, concerns about drones relating to issues of safety and privacy persist at all levels of government. As a result, many state and municipal governments have passed their own ordinances designed to restrict done operations within their local airspace.

In September 2017, the dogfight between federal and local regulatory authority yielded the first federal decision, in Massachusetts, holding that a local drone ordinance is preempted by the Federal Aviation Administration’s regulatory scheme. In the wake of Singer v. City of Newton, local ordinances across the country are now vulnerable. Almost none have faced court challenges—yet.

This article breaks down the federal and local laws governing drone operation in this country, explains how courts in the past have analyzed municipal attempts to regulate aspects of air travel, describes the holding in Singer, and articulates which local laws, in the wake of Singer, are in danger of conflicting with federal law.

Federal Regulation

In 2012, Congress passed the FAA Modernization and Reform Act. This legislation was aimed at spurring innovation in a diverse set of applications, including agricultural monitoring, surveillance, criminal investigations, search and rescue, disaster response, and military training. Among other things, Congress directed the Department of Transportation to “develop a comprehensive plan to safely accelerate the integration of civil unmanned aircraft systems in to the national airspace.” The DOT was instructed to publish rules that “will allow for civil operation of [UAS] in the national airspace.”

In August 2016, the Department of Transportation added Part 107 to Title 14 of the Code of Federal Regulations, to allow for the commercial operation of small unmanned aircraft systems in the national airspace and the certification of remote pilots. Part 107, the FAA’s Small Unmanned Aircraft Systems (sUAS) Rule, supplemented and replaced the FAA’s section 333 regulations—a special waiver process Congress made part of the 2012 law—on August 29, 2016. Part 107 focuses on three categories: (1) operational limitation, (2) remote pilot in command certification and responsibilities for the person flying the drone, and (3) aircraft requirements in the drone flight.

The operational limitations for drone flight provided in Part 107 leave much room for journalists to maneuver, but they are, for the most part, explicit and strict. Under the regulations, drones:

- Must weigh less than 55 pounds;
- Must fly within visual line-of-sight (VLOS);
- Must be visible to the operator unabated by any device other than corrective lenses;
- Cannot travel at more than 100 mph or 400 feet above ground level (AGL);
- May fly up to 400 feet AGL above a structure;
- May not operate from a moving aircraft;
- May only operate from a moving vehicle if over a sparsely populated area;
- Must have any external load securely attached in a manner that cannot adversely affect the flight characteristics or aircraft controllability;
- May fly only with minimum weather visibility of 3 miles from the control station;
- Must undergo a preflight inspection;
- May only fly without further federal permission in “Class G” airspace—one of many divisions the federal government has made to the national airspace.

Part 107 also establishes and includes the qualifications and responsibilities of the “remote pilot in command,” or the person operating the drone. This individual must either hold an FAA remote pilot airman certificate with a small drone rating or be under the direct supervision of a person who holds a certificate.

In January 2019, the FAA announced a proposed rulemaking that would expand the ability of drone pilots to operate in the national airspace. As adopted in 2016, Part 107 prohibited flights over persons not directly involved in the operation of the drone, as well as flights at night.
The January 2019 proposed rulemaking would relax both restrictions. Under the proposed rule, nighttime drone flight would be allowed, provided that the drone is equipped with anti-collision lighting visible from at least three miles and the pilot completes training specifically addressing nighttime operation.

The proposed rule would further allow flights over persons, provided that the operator and drone met certain performance-based requirements. These are pegged to three categories of risk.

Under Category 1, pilots would be permitted to operate drones weighing less than 0.55 lb. over groups of individuals without any restrictions, beyond those set out generally in Part 107.

Under Category 2, pilots would be permitted to operate drones heavier than 0.55 lb. over people if the manufacturer (or any subsequent modifier of the drone) demonstrates that the drone is designed to limit injury on impact with a person and does not have exposed rotating parts capable of lacerating human skin or any other defect or feature capable of injury above a certain threshold.

Category 3 is similar to Category 2 expect that it allows for a somewhat lower threshold for potential injury and limits operation to restricted access areas where those present have been notified of the drone flight.

Pilots would be further required to ensure that any small drone not in Category 1 is visibly marked as compliant with either Category 2 or 3. This requirement would be in addition to current obligations for pilots to conduct preflight checks. Pilots also would be responsible for following a manufacturer’s operation instructions specific to the small UAS in question.

In the proposed rulemaking, the FAA has not proposed to tell manufacturers how to demonstrate compliance with the above requirements. Manufacturers would be allowed to propose any means of compliance, subject to the FAA’s approval, for Category 2 or 3.

**Drones in News Coverage**

Since the FAA rule became final in 2016, drones have become an important tool for photojournalists, allowing them to secure previously unavailable footage and perspective. Major television networks such as CNN, ABC, and NBC, national newspapers including the New York Times, Washington Post, and USA TODAY; and local broadcasting companies such as Sinclair Broadcasting, TEGNA, and Capitol Broadcasting now incorporate drone footage into their coverage. Hundreds of journalists have passed the FAA tests to earn their remote pilot certificates.

Drones allow for the collection of images, video, and data that would otherwise be impossible, or at least extremely difficult. They can be particularly useful in the context of reporting on manmade or natural disasters by providing detailed coverage, while not putting the journalist in harm’s way. Likewise, drones can provide journalists the ability to report on ecological disasters, like oil spills or deforestation, even when private corporations or local authorities restrict access to the area.

CNN Air, the dedicated drone journalism unit of CNN, has been a trailblazer in this space. Since 2016, when the FAA implemented the new rule, CNN Air has completed more than 3300 flights, for a total of more than 450 hours in the air, supporting CNN’s newsgathering mission. Of note, CNN Air paved the way and successfully obtained the very first Part 107 waiver for operations over people. It also holds waivers for daylight operation, minimum flight visibility, and minimum distance from clouds. CNN Air has two full-time staff pilots and near three dozen trained and minimum distance from clouds.

CNN Air has deployed five “drone” teams to each of the storms. The news footage created showed the breadth, depth, and scope of the damage in a way not technically or budgetarily feasible before. In addition to providing CNN viewers with greater context and understanding of the impact, the drone provided news teams on the ground with situational awareness and allowed them to accomplish their mission without endangering themselves.

Beyond natural disasters, drones enable content creators to produce unique views of the world around them. Aerial imagery can enhance production value and allow for more creative and engaging storytelling. With this new “power” comes responsibility. CNN has created a culture of safety similar to that of manned aviation. The commitment to safe, professional, responsible operation of a drone is not a goal but a requirement for CNN Air.

In 2016, the New York Times compiled a list of additional news stories that relied on drone journalism. These stories included reporting on China’s expanding deserts, construction of a new Panama Canal, effects of climate change in Bolivia, and burial of New York City’s unclaimed dead on Hart Island in Long Island Sound.

Drones can also be highly informative when reporting on protests, for example, providing an accurate basis to document crowd sizes of protests or other events. They also have been used successfully in the past to bring to light police abuses—for example, during the Standing Rock Protests opposing the Dakota Access Pipeline in November 2016. The steps local authorities took to restrict drone flights is, in some way, a testament to the power of this new tool—both at Standing Rock, as well as during the 2014 protests in Ferguson, MI, local police requested that airspace be closed off from drones.

While federal law seeks to carry out Congress’s mandate and encourages greater use of drones in the national airspace, it seems likely that, if allowed, local authorities will continue to seek to restrict drone flight. That will further limit the expansion of drone journalism. The question,
therefore, is whether local authorities are permitted to unilaterally restrict drone flights.

Preemption

“The preemption doctrine is based on the Supremacy Clause, which provides that ‘the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.’”28 “Congress may consequently pre-empt, i.e., invalidate, a state law through federal legislation.”29 It may do so either expressly in the statute or implicitly, “either through ‘field’ pre-emption or ‘conflict’ pre-emption.”30

Congress engages in field preemption when it has intended to foreclose any state regulation in the area, regardless of any inconsistency between the state regulation and federal standards. Conflict preemption occurs when compliance with both federal and state regulations is a physical impossibility, or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.31

Courts have held that local and state laws, addressing a wide array of topics, are preempted under federal law. These include laws regulating pharmaceuticals,32 intellectual property,33 nuclear power,34 immigration,35 and, most relevant to the immediate issue, the national airspace.36

Preemption of Municipal Regulations Affecting Air Traffic

The application of the preemption doctrine to aircraft operations is not a new idea. For decades, various federal courts, including the U.S. Supreme Court, have evaluated whether local attempts to regulate aircraft operations are preempted under federal law. While federal courts have not held that the entire field of aviation, or that of air safety, is preempted by the Federal Aviation Act37 or other federal law, courts have held that attempts by local municipalities to regulate flights over local airspace do conflict with federal law.

The leading preemption case on this subject is the Supreme Court’s decision in City of Burbank v. Lockheed Air Terminal.38 The owner of the Hollywood-Burbank Airport brought suit asking for an injunction against the enforcement of a “curfew” ordinance adopted by the City Council of Burbank, prohibiting flights taking off or landing at the local airport between 11 pm and 7 am. The district court held that the ordinance was unconstitutional on the basis of the Supremacy Clause. The Supreme Court affirmed on this basis. The Court recognized:

Section 1108(a) of the Federal Aviation Act, 49 U.S.C. § 1508(a), provides in part, “The United States of America is declared to possess and exercise complete and exclusive national sovereignty in the airspace of the United States . . . .” By §§ 307(a), (c) of the Act, 49 U.S.C. §§ 1348(a), (c), the Administrator of the Federal Aviation Administration (FAA) has been given broad authority to regulate the use of the navigable airspace, “in order to insure the safety of aircraft and the efficient utilization of such airspace . . . .” and “for the protection of persons and property on the ground . . . .”39

The Court further considered the impact of the “curfew” ordinance on “airspace management,” which it explained is the exclusive province of the FAA. The Court recognized that noise control is a typical police power. But the Court reasoned that the impact of allowing the imposition of curfew ordinances on a nationwide basis would result in “bunching of flights” in the hours immediately before curfew, which would increase congestion and noise and reduce efficiency of the nationwide air traffic system. This “could create critically serious problems to all air transportation patterns.”40

Other federal courts, considering local regulations that impact flight operations, have held similarly.41

Recently, the Third Circuit Court of Appeals provided additional clarification to the scope of federal preemption in the area of aviation safety.42 In Sikkelle v. Precision Airmotive Corp., the plaintiff alleged manufacturing and design defects in a Cessna 172N aircraft that crashed while being piloted by the plaintiff’s husband. The plaintiff’s amended complaint asserted state law claims of defective design and failure to warn but incorporated federal standards of care, alleging violations of numerous FAA regulations.43 In denying a dispositive defense motion, the court concluded that the Federal Aviation Act did not indicate a clear and manifest intent to preempt state law products liability claims.44

In reaching this conclusion, the Third Circuit analyzed its prior holding in Abdullah v. American Airlines, Inc.45 There the court considered the preemptive effect of federal in-flight seatbelt regulations on state law negligence claims involving a flight crew’s failure to warn passengers of severe turbulence. The court concluded that the Federal Aviation Act and federal regulations “establish complete and thorough safety standards for interstate and international air transportation and that these standards are not subject to supplementation by, or variation among, jurisdictions.”46 The Third Circuit reviewed “several cases from the Supreme Court and our sister Circuits that had found federal preemption with regard to discrete matters of in-flight operations, including aircraft noise, pilot regulation, and control of flights through navigable airspace.”47

The court held that, by contrast, the regulation of product liability did not conflict with federal law. The court’s reasoning was based upon the distinction between the product liability claims and “regulations governing in-flight operations” or regulations that “on their face prescribe rules governing the operation of aircraft.”48 The federal regulations governing in-flight operations provide a “comprehensive standard of care,” analogous to common law tort, rendering existing state law standards of care “duplicitous (if not conflicting [] outright).”49

1. Singer v. City of Newton

To date, only one federal district court has addressed the preemption of a local drone ordinance.50 In a case closely watched by the entire drone community, the District of Massachusetts in Singer v. City of Newton held that four provisions of a city ordinance, restricting drone flights over the City of Newton, Massachusetts, were preempted by federal law. The city appealed, but the appeal was voluntarily dismissed by stipulation on December 7, 2017.

Judge William Young’s opinion in Singer analyzed the interaction between Part 107 and the municipal
ordinance, which sought to restrict drone operations in the airspace over the city. The court based its holding on conflict preemption, as opposed to field preemption. This has left open the possibility that a municipality may pass a law regulating local drone operations that does not conflict with federal law. Nevertheless, the court’s reasoning, applying principles of conflict preemption to the analysis of four separate provisions of the Newton ordinance, does support limitations on local municipalities’ ability to regulate drones and in-flight operations. It also provides useful guidance to other courts analyzing similar ordinances in the future.

The factual background of this case is as follows: In December 2016, the City of Newton passed an ordinance that sought to regulate the operation of drones within the city limits. The city council resolved that while the city government, however, likely anticipating a preemption challenge, also provided that it is “intended to be read and interpreted in harmony with all relevant rules and regulations of the Federal Aviation Administration, and any other federal state and local laws and regulations.”

In February 2017, Dr. Michael Singer, a resident of Newton, filed a complaint, seeking declaratory and injunctive relief against enforcement of the Newton ordinance. Dr. Singer alleged that he was “certified as a small unmanned aircraft pilot, pursuant to 14 C.F.R. Part 107.” He pled that he was the owner of “two commercial-grade sUAS rotorcraft weighting over .55 pounds,” and that he “has operated sUAS over public and private land in Newton and Needham, Massachusetts, in accordance with 14 C.F.R. § 101 or § 107.”

Dr. Singer challenged four separate provisions of the Newton ordinance:

- Section (c)(1)(a), which prohibited pilotless aircraft flight below an altitude of 400 feet over any private property without the express permission of the property owner.
- Section (c)(1)(e), which prohibited pilotless aircraft flight over public property without prior permission from Newton.
- Section (c)(1)(b), which states that no pilotless aircraft may be operated “at a distance beyond the visual line of sight of the Operator.”
- The court found that federal law preempted each of these restrictions in the Newton ordinance.

As to section (b), the registration requirement, the court held that the FAA has explicitly “indicated its intent to be the exclusive regulatory authority for regulation of pilotless aircraft,” and, consequently, “no state or local government may impose an additional registration requirement on the operation of UAS in navigable airspace without first obtaining FAA approval.”

As to sections (c)(1)(a) and (e), which require permission for flights over both public and private property, the court held that these sections “certainly reach[] into navigable airspace” and “this alone is grounds for preemption.”

The court went on to explain that these two provisions together operated as a complete “ban on drone use within the limits of Newton.” The court found this conflicted with the FAA’s general obligation to “use navigable airspace efficiently” as well as the specific directive from Congress to “develop a comprehensive plan to safely accelerate the integration of civil unmanned aircraft system into the national airspace system.”

Finally, the court reasoned that Newton’s “visual observer” rule seeks to regulate “the method of operating of drones, necessarily implicates the safe operation of aircraft. Courts have recognized that aviation safety is an area of exclusive federal control.”

Ultimately, Singer stands for the principle that even if a municipality may regulate certain aspects of drone operations, it cannot do so in such a way that affects operation in the national airspace. The national airspace remains the sole province of the federal regulatory system and Congress.

**Decisions Post-Singer**

No federal court since Singer has evaluated the district court’s analysis of how 14 C.F.R. § 101 or § 107 operates to preempt local drone regulating ordinances. A recent decision by a district court in Puerto Rico evaluated a San Juan drone regulation and cited Singer approvingly, but ultimately resolved the issue without reaching the issue of preemption.

In *Pan Am v. Municipality of San Juan*, the plaintiffs challenged a city ordinance that regulated the operations of businesses in Old San Juan during the 2018 San Sebastian Street Festivities. Among other things, this ordinance prohibited the “use of flying items, equipment or objects such as helicopters and drones during the Festivities, except those authorized by government agencies with authority in law, and those belonging to the Municipality, sponsors and parties responsible for production.” The court noted that the plaintiffs represented to the court that they were working with drone operators who had secured remote pilot certificates, under Part 107. For that reason, the court concluded the plaintiffs’ proposed flights would comply with the ordinance because they would be “authorized by government agencies with authority in law,” as the ordinance permits. The court therefore declined to enjoin the city from enforcing that aspect of the ordinance.

The court nevertheless noted in dicta that “there is authority to support” a preemption challenge to local drone laws, and cited *Singer v. City of Newton*.

**Potential Impact of Singer**

*Singer* expressly held that four categories of municipal regulation regarding drone flight conflicted with, and were therefore preempted by, federal law. While this is a single district court decision, Judge Young’s analysis is clear and compelling. It seems likely
that any future court grappling with a similar municipal regulation would find Singer persuasive.

That said, Singer also left open the possibility that state and local authorities may regulate some aspects of drone operation. The court expressly refused to find that the FAA occupies the entire “field” of drone regulation; Singer holds that “federal regulations explicitly grant local authorities the power to co-regulate unmanned aircraft.” Citing the FAA’s guidance, the court provides, as an example, that “State law or other legal protections for individual privacy may provide recourse for a person whose privacy may be affected through another person’s use of a UAS.”

Ultimately, what Singer provides is guidance for courts analyzing preemption of municipal drone laws in the future. The question of preemption as to specific local laws will be decided based upon the specific character of the local restrictions imposed.

Proposed Uniform Law
In July 2018, the Uniform Law Commission, which proposes uniform laws for individual state legislatures to consider, released a draft trespass law that would create a new tort targeted exclusively at drones and drone photography. This law, if passed in the states, would create a cause of action under a per se, strict liability standard, for unconsented drone entry into private airspace up to 200 feet above ground level. The draft uniform law also provides a separate cause of action where a drone-equipped camera (1) captures a “person depicting private facts or a trade secret”; (2) is “acquired in a manner that is highly offensive to a reasonable person”; and (3) “is not otherwise protected by the First Amendment.” The drone-photography section would provide for rebuttable presumptions against the drone operator if the images were “not capable of being acquired from ground level or structures where an observer has a legal right to be” or were acquired by a drone committing a per se physical trespass.

In October 2018, a group of news organizations submitted a letter in opposition to the current draft of the proposed uniform law. The group noted that this new drone-tort law, if adopted by states, would further complicate the patchwork of state and local laws that already have emerged and put journalists at greater risk of litigation. The news organizations further noted that the law has token references to the First Amendment; it does not adequately protect journalists from liability for capturing images that would be entirely lawful for ground-based photography. Finally, they explained that if this uniform law were adopted, it would be challenged on the basis of preemption by federal law.

Local Drone Laws
Bard College’s Center for the Study of the Drone tracks local and state drone laws. As of March 2017, the Center has found 131 localities in 31 states that have enacted drone rules. Many of these laws prohibit flying drones over public property and private property without the property owner’s consent.

Of these, we have identified several

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<td>East Goshen, PA</td>
<td>Ordinance No. 129-B-2015: “An Ordinance of East Goshen Township Regulating the Use and Operation of Model Aircraft and Amateur Rockets in the Township.”</td>
<td>As in Singer, the East Goshen Ordinance limits drone operation in navigable airspace above both private and public property in the town. In addition, collectively, this regulation prevents any drone operation without prior permission. These flight restrictions are analogous to the restrictions imposed by Newton, Massachusetts, in Singer.</td>
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<td>Willistown, PA</td>
<td>Ordinance No. 8 of 2016: “An Ordinance Amending the Code of Willistown Township by Adding a New Chapter to Part II, General Legislation, Regulating the Use and Operation of Model Aircraft, Amateur Rockets, Unmanned Aircraft Systems and Flying Objects of a Similar Nature in the Township.”</td>
<td>The language in the Willistown Ordinance tracks that used in East Goshen, and would be preempted, pursuant to the analysis presented in Singer. While this ordinance contains a savings clause, which provides that drone operation shall be in compliance with federal law, the court in Singer did not find a savings clause persuasive in light of the direct conflict between the ordinance’s prohibitive effects and federal law.</td>
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<td>Hempstead, NY</td>
<td>Chapter 77, Section 77-8: “Regulation of Use of Unmanned Aircraft in the Vicinity of Town Facilities.”</td>
<td>As in Singer, this ordinance restricts drone operation in airspace above the municipality. Unlike Singer, however, it only applies to flights over public property and does not propound restrictions of flights over private land. Nevertheless, the court in Singer noted that any local attempt to regulate drone operation in &quot;navigable airspace&quot; is alone grounds for preemption. Here the regulation necessarily regulates navigable airspace, as the regulation provides no limiting bounds.</td>
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<td>Narragansett, RI</td>
<td>Section 46-16: “Unmanned aircraft systems, commonly known as drones; public safety, personal privacy.”</td>
<td>This regulation prohibits the operation of drones in any airspace within 500 feet to the town beach during beach season. It further restricts operation over public events. Both seek to regulate navigable airspace, which, under Singer, would result in preemption. This regulation is more specific to certain events and appears intended to be an exercise of the municipalities’ police powers. Courts, however, have reasoned that, when evaluating preemption, the relevant inquiry is the effect of the local regulation, and not the intent. Here the effect is clearly the restriction of drone flights in navigable airspace. In addition to attempting to regulate flight above the town, this regulation also imposes a specific registration requirement upon drone pilots. In Singer, the Court stated that “The FAA [ ] explicitly has indicated its intent to be the exclusive regulatory authority for registration of pilotless aircraft.” Consequently, this provision appears susceptible to challenge.</td>
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<tr>
<td>Kennebunk, ME</td>
<td>Kennebunk Town Ordinances Section 20.19: “Drones”</td>
<td>This ordinance would have the effect of restricting drone operation in navigable airspace above the town, and therefore would be preempted, pursuant to Singer.</td>
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regulations that seem particularly analogous to the ordinance considered in *Singer*, and therefore run the risk of being found preempted by federal law. The table identifies these municipalities, excerpts the relevant statutory text, and provides a description of the basis, upon which this ordinance may be challenged.

Federal UAS Integration Pilot Program
A month after *Singer*, the Trump administration released a Presidential Memorandum that suggests the federal government is eager—in the minds of some, too eager—to find a clear path for state and local governments to navigate their drone ordinances through the turbulent issues of federal preemption.

The Presidential Memorandum calls for state, local, and tribal governments to partner with industry “to test within their jurisdictions the integration of civil and public UAS operations into the NAS below 200 feet,” or up to 400 feet if the Secretary of Transportation decides to adjust the parameters. The DOT and FAA are further directed to enter into agreements with “selected governments to establish the terms of their involvement in the UAS operations within their jurisdictions” and “to grant exception, authorizations and waivers from FAA drone regulation to conduct the testing.”

The FAA, following the memorandum, launched a website to permit proposals for experimental programs with private entities, and for private entities to register their interest in participating. Prior to its launch, some who have closely watched the federal government’s drone policy evolve over the past few years expressed concern that the program may lead to further freedom for local drone regulation.

To date the FAA has chosen ten lead municipal organizations to participate in the program. CNN Air is a partner in three of those. Each has submitted a proposal identifying certain goals for the program, including evaluating night operations, flights over people and beyond the pilot’s line of sight, package delivery, detect-and-avoid technologies, and the reliability and security of data links between pilot and aircraft.

Conclusion
While the issue has not been extensively litigated, the holding in *Singer*—and the prior decisions rejecting municipal attempts to legislate air traffic in other contexts—indicate that courts are predisposed to reject local attempts to encroach on the exclusive province of the federal government to regulate the national airspace. The proposal for a new uniform tort law raises continuing concerns regarding how state legislatures may seek to treat drone operators in the future. Nevertheless, local “drone-free” ordinances are not likely to appear on nearby horizons, if the evolving drone community stands willing to ask courts to enforce the preemption doctrine.

Endnotes
1. Drones were used extensively in the coverage of the 2017 Hurricanes Harvey, Irma, and Maria; the devastation caused by Hurricane Michael in Mexico Beach, FL, in 2018; continuing news coverage along the southern U.S. border; the migrant caravans traveling in Central America; the existence and expansion of I.C.E. detention facilities near the southern border; and catastrophic flooding in the Carolinas.

2. The FAA’s regulations apply to “commercial” drone operations, which the agency considers any use of a drone for remuneration. Of course, the U.S. Supreme Court long has recognized that the First Amendment fully protects the gathering and dissemination of news, even for money. See *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952) (the fact that “books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment”); *Murdock v. Commw. of Pennsylvania*, 319 U.S. 105, 111 (1943)
(“The right to use the press for expressing one’s views is not to be measured by the protection afforded commercial handbills. It should be remembered that the pamphlets of Thomas Paine were not distributed free of charge.”); Lovell v. Griffin, 303 U.S. 444 (1938) (statute requiring license for the distribution of printed matter violated First Amendment); Grosjean v. Am. Press Co., 297 U.S. 233 (1936) (tax designed to limit circulation of information was an unconstitutional abridgment of freedom of the press).


7. Id. § 332(b)(1).

8. 14 C.F.R. § 107 et seq.

9. Id. § 107.3.

10. Id. § 107.31.

11. Id. § 107.31(a).

12. Id. § 107.51.

13. Id. § 107.51(b)(1).

14. Id. § 107.25(a).

15. Id. § 107.25(b).

16. Id. § 107.51.

17. Id.

18. Id. § 107.49.

19. See id. § 107.41.

20. Id. § 107.12.

21. Id.


23. Id.


26. Id.


32. See Guilbeau v. Pfizer Inc., 880 F.3d 304, 318 (7th Cir. 2018).


39. Id. at 626–27.

40. Id. at 640.

41. See Am. Airlines v. Town of Hempstead, 398 F.2d 369, 376 (2d Cir. 1968) (holding that a municipal noise ordinance improperly regulated flight paths); Am. Airlines v. City of Audubon Park, 407 F.2d 1306 (6th Cir. 1969) (holding ordinance prohibiting flights over municipality below 750 feet was unconstitutionally preempted). Collectively, these decisions establish that a municipality cannot constitutionally regulate the operation of aircraft in the nation’s navigable airspace. See Sikkelee v. Precision Airmotive Corp., 822 F.3d 680, 688–89 (3d Cir. 2016) (noting federal preemption of municipal laws seeking to regulate “in-air operations”) (citing Abdullah v. Am. Airlines, Inc., 181 F.3d 363, 369–71 (3d Cir. 1999)). See also Goodspeed Airport LLC v. East Haddam Inland Wetlands & Watercourses Comm’n, 634 F.3d 206, 208 (2d Cir. 2011) (“Congress has established its intent to occupy the entire field of air safety, thereby preempting state regulation of that field.”); U.S. Airways, Inc. v. O’Donnell, 627 F.3d 1318, 1326 (10th Cir. 2010) (“Federal regulation occupies the field of aviation safety to the exclusion of state regulations.”); Montalvo v. Spirit Airlines, 508 F.3d 464, 470 (9th Cir. 2007) (“Congress has indicated its intent to occupy the field of aviation safety.”).

42. See Sikkelee, 822 F.3d at 688–89.

43. Id. at 686.

44. Id. at 696.

45. 181 F.3d 363.

46. Id. at 365.

47. Sikkelee, 822 F.3d at 689 (citing Abdullah, 181 F.3d at 369–71).

48. Id. at 695.

49. Id.


51. The question of preemption is one of congressional intent. Amgen Inc. v. Sandoz Inc., 877 F.3d 1315, 1326 (Fed. Cir. 2017); accord Singer, 2017 WL 4176477, at *3. Consequently, Congress may expressly state that it is preempting state law in a particular area. This is the easy case. More complex, however, is implied preemption, which can occur through either “field” preemption or “conflict” preemption. “Under field preemption, ‘state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively.’” Amgen, 877 F.3d at 1326 (citing English v. Gen. Elec. Co., 496 U.S. 72, 78–79 (1990)). To find field preemption, the court determines if the relevant “scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,’ or where an Act of Congress ‘touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.’” Id. (citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)). Conflict preemption, on the other hand, occurs “where it is impossible for a private
party to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” Id. (citing English, 496 U.S. at 79). “When these state and federal duties create an actual conflict between state and federal law such that it is impossible for a person to obey both, federal law controls and the state-law tort claims must be dismissed.” Guilbeau v. Pfizer Inc., 880 F.3d 304, 310 (7th Cir. 2018).

52. See Newton Ordinances § 20-64 (Dec. 19, 2016) [hereinafter Newton Ordinances].
54. Id.
56. Id.
57. Newton Ordinances § 20-64(b).
58. Id. § 20-64(c)(1)(a).
59. Id. § 20-64(c)(1)(e).
60. Id. § 20-64(c)(1)(b).
61. Singer v. City of Newton, 2017 WL 4176477, at *4–6 (D. Mass. Sept. 21, 2017). Although the court held that the Newton ordinance was preempted based upon its conflicts with federal law, the court also considered, and rejected, the plaintiff’s argument regarding “field preemption.” “Field preemption occurs where federal regulation is so pervasive and dominant that one can infer Congressional intent to occupy the field.” Id. at *3 (citing Mass. Ass’n of Health Maint. Orgs. v. Ruthardt, 194 F.3d 176, 179 (1st Cir. 1999). The court in Singer stated that “federal regulation explicitly grants local authorities the power to co-regulate unmanned aircraft.” Id.

Certain legal aspects concerning small UAS use may be best addressed at the State or local level. For example, State law and other legal protection for individual privacy may provide reoccurring for a person whose privacy maybe affected through another person’s use of a UAS. Id. (citing 81 Fed. Reg. 42063, 42194, § III(K)(6)).

62. Id. at *4.
63. Id. at *5 (citing 49 U.S.C. § 40102(a)(32) (defining “navigable airspace” as “airspace above the minimum altitudes of flight prescribed by regulations under this subpart and subpart III of this part, including airspace needed to ensure safety in the takeoff and landing of aircraft”). 64. Id.
65. Id. (citing 49 U.S.C. § 40103(b)(2)) (The FAA is charged with “prescribing air traffic regulation on the flight of aircraft for – (A) navigating, protecting and identifying aircraft; (B) protecting individuals and property on the ground; [and] (C) using the navigable airspace efficiently.”).
66. Id. (citing FAA Modernization and Reform Act, Pub. L. No. 112-95, § 332 (2012)).
67. Id. (collecting cases).
68. See id. at *3.
70. Id. at *69.
71. Id.
72. Id.
73. Id.
75. Id. at *4 (citing 81 Fed. Reg. 42063, 42194 § III(K)(6)).
79. Id.
83. Id.
Tom Kelley Presented the 2019 ABA Forum on Communications Law’s Champion of the First Amendment Award

BY ASHLEY KISSINGER AND NATALIE SPEARS

At the Forum’s Annual Conference in Miami, Tom Kelley, longtime ABA Forum member and former chair, was honored with the Champion of the First Amendment Award.

Introductory Remarks of Ashley Kissinger
Natalie and I are greatly honored to present to our friend and colleague, Tom Kelley, the ABA Forum’s Champion of the First Amendment Award.

It is not hard to figure out why the Forum would bestow this rare award, given only three times before, on Tom Kelley. He is one of the most tenacious, hard-working, and successful lawyers in modern times in advancing the causes of freedom of speech, freedom of the press, and government transparency.

Tom’s hard work in all of these arenas vaulted him to the pinnacles of our bar. He served as this Forum’s chair. He led the Defense Counsel Section of the Media Law Resource Center. As my colleague Lee Levine well put it last fall, he “literally invented the ‘Trial Tales’ program that has become a staple of [the MLRC’s biennial gatherings in Virginia].” And he was a founder of the Colorado Freedom of Information Coalition (CFOIC), an organization ably steered for the past several years by our colleague Steve Zansberg. Under Tom and Steve’s leadership, the CFOIC has done more to advance the cause of transparency in Colorado than anything since the promulgation of the state’s open records and meetings laws—laws that Tom, of course, helped to write.

But titles are not what make one a true champion of the First Amendment. Toiling in the vineyard of legal analysis, strategy, and preparation does. Throughout his career, Tom has defended and won countless cases on behalf of venerated media institutions from newspapers to the television networks to the digital press. He has fought for press access to some of the country’s most high-profile criminal cases, including the Jon Benet Ramsey murder investigation, the sexual assault case against basketball star Kobe Bryant, and the Oklahoma City bombing trials.

Tom’s creative advocacy has created breathing space for the press in Colorado that is virtually unmatched. Thanks to Tom, I have the great pleasure of advising defamation plaintiff’s lawyers in Colorado that even their private figure clients must prove actual malice where my client’s allegedly libelous statement is about a matter of public concern. In the tradition of John Adams, and like all truly great lawyers, Tom has also wielded the powers of his legal mastermind on behalf of those who suffer the opprobrium of others. In 1982, Tom won an important appeal on behalf of Penthouse Magazine after it published an outrageous, but plainly fictional, account of a former Miss Wyoming’s sexual feats. And when I met Tom in 1999, he was leading the charge in the Hit Man case. There he defended Paladin Press, the publisher of a book that lists tips for how to successfully carry out a “hit.” Tom was defending the publisher in a lawsuit alleging that it had aided and abetted murders committed by a real hit man—a lawsuit.

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that, had it gone to trial and plaintiffs succeeded, would have dealt a crushing blow to freedom of speech in the United States.

There are lesser-known aspects of Tom that help explain his remarkable success in this challenging profession. Tom is fiercely loyal, as evidenced by the fact that his legal assistant, Cindy Henning, faithfully worked alongside him for almost 25 years and his partner Steve Zansberg has done so for 23. Tom and Steve have worked so closely together that we sometimes speak of them in the same breath. When you put Tom’s name into Google, you also get photos of Steve, like this one! Tom is also very devoted to his family: His wife Linda and his sons Chris and Chandler treasure him.

Tom is also a loyal friend to media lawyers, as evidenced by the photos you see of him hanging out with some of those in this room. He knows how to fly planes, which might explain why he can immediately see the forest for the trees in a case. And he is both very well read and well spoken. He likes to say he “writes like a cowboy.” Or as he put it at the MLRC conference last year, he writes “in a Rocky Mountain style that drove my eastern colleagues crazy.” Now, having been trained by our eastern colleagues myself, I can vouch that Tom’s writing is, well, different! But here’s the enviable thing about it: It works, and it is fun to read. Tom’s prose, unformulaic though it may be, is richly evocative. He can convey a complex point in two sentences that it would take the rest of us several paragraphs to express. He is also humorous. Here’s an example from a May 3, 1983, article in The Denver Post reporting on a legislative bill to make negligence, not actual malice, the fault standard when private persons sue for libel. Supporters of the bill testified that they “were concerned that persons seeking damages in other kinds of civil cases—like traffic accidents—only have to prove simple negligence. Why, they asked, should libel cases be any different? Replied Kelley: ‘The First Amendment is a commitment to public debate on public issues. There is no similar commitment to auto traffic.’”

Perhaps most important of all, Tom listens far more than he speaks. Social science is revealing that we all suffer from implicit bias. The voices of white men like Tom have the power to minimize the voices of others. But Tom is the rare, wise owl who listens, carefully, to everything others say—no matter who is saying it. This is a particularly important skill in a profession seeking to achieve greater diversity in its ranks.

Remarks of Natalie Spears
I’m sure many of you read in the news that this past week the General Counsels of nearly 200 US companies signed an open letter to law firms imploring them to do better and to do more to achieve diversity in their ranks.

Fifteen years ago, when Tom chaired the Forum, he was a step ahead of the rest, as usual. Under Tom’s leadership, the Diversity Initiative of the Forum was launched in 2003. Working with members of the Forum and the then-Diversity Committee, who Tom described in his August 2003 Forum chair letter as “indefatigable”—people like Paulette Dodson, Andy Mar, Jon Avila, Mary Snapp, and Jeanette Melendez-Bead—the Forum

• created a scholarship for a diverse lawyer at our annual conference;
• dedicated a session of the 2003 conference to diversity issues for the first time;
• established a mentoring program; and
• wrote our in-house counsel membership seeking their help in encouraging diversity among outside counsel.

That same year, the Forum also presented a segment at the National Conference for the Minority Lawyer in Philadelphia. And the Women’s group—Women in Communications Law (WICL)—was elevated for the first time to a Committee on the Forum Governing Board. I remember those efforts vividly because I was the incoming co-chair of WICL that year and was invited as a result to attend the Forum Governing Board meetings—which has opened many doors over the years for WICL leaders to meet in-house counsel and the leaders in our bar at those meetings.

The following year, at the end of Tom’s tenure, the Forum also launched an initiative where law firm members of the Forum secunded a minority lawyer to the in-house department of a media company. Andy Mar did a stint at Tribune. Jennifer Daniels went to the Denver Post. And on.

Tom’s diversity efforts within the Forum are an important legacy—and we are proud to recognize him today for his many accomplishments, and his early leadership on making our bar stronger, more diverse, and ahead of our time.

We invite Tom to join us at the podium to receive the ABA Forum on Communications Law’s “Champion of the First Amendment” Award.
The award plaque reads:

“A fantastic trial lawyer, a fantastic intellect, and a fantastic person.

He is the complete package.”

– An anonymous peer (as told to Chambers & Partners 2017)

The ABA Forum on Communications Law celebrates more than four decades of providing wise advice and counsel to The Denver Post, the Colorado Press and Broadcasters Associations, and many other news organizations around the country; for passionately and zealously fighting to hold public officials and institutions accountable through transparency; for helping to organize and lead the Media Bar; for serving as Chair of the Forum; and for other countless and tireless efforts in support of Freedom of the Press.

The ABA Forum on Communications Law hereby honors

TOM KELLEY

as a true Champion of the First Amendment

Prepared Remarks of Tom Kelley

Accepting the Award

Thank you, Natalie and Ash. Thank you, David, the Governing Committee, and the various chairs.

Last year, on the occasion of this award, convened in the Napa Valley, John Borger delivered a brilliant motivational speech on how the cause of a free press needs us. Today I will not try to match that effort, but instead say a few words about another serious topic—cultural diversity and gender equity in the bar generally and in the media bar in particular. That topic rings more of equality than freedom, but I trust we agree neither can thrive without the other.

When I became chair in 2002 this was largely a group of white lawyers, with notable exceptions whom I admire both for their courage and true belief in a free press. I appointed a committee of four to launch a diversity initiative: Jon Avila of Disney; Andy Mar, then of DWT; Mary Snapp with Microsoft; and Paulette Dodson of Tribune as Chair.

At the end of my term in 2004 we received special recognition from the ABA for this diversity initiative. As I wrote in my final column, “I would not take credit for this award that happened on my watch any more than I would give Gerald Ford credit for the sexual revolution.” That belongs to the committee I just named and the many others who pitched in then and since. They organized sessions at this conference and presentations including role play panels (of credentialed judges and lawyers of color) at minority lawyer conferences, sponsored scholarships and internships, and implored our in-house members to demand their outside counsel staff their cases with lawyers of diverse backgrounds. They worked their asses off. Things started to change.

The effort continued after my term, as did the results, thanks to too many people for me to name. The program that perhaps propelled us most has been the First Amendment Diversity Moot Court Competition, organized and led by my former partner Jeanette Bead, followed by Carolyn Forrest and many others. I urge you to watch the finals that begin at 2:30 across the hall; you’ll see real judges and bright young lawyers. This program has led to notable minority recruitments to our bar.

I’ve not said much about gender equity. I’ve had even less to do with that. Our success has been the work of Barbara Wall and the many subsequent leaders of Women in Communications who have made it happen. But I need to repeat an old story of when I attended my first meeting of that group at this conference after I became chair. I was the only guy there and first ever to attend and found myself getting WTF looks from many around the room. The feathers unruffled when Co-Chairs Natalie Spears and Mary Ellen Roy introduced me and then my colleagues Susan Fall, Suzanna Lowey, and Liz McNama to present their inspirational stories. The energy in that room was exciting.

Here’s why I bring it up. I understand the reluctance to talk of all such things before a male audience, but please remember that these days more and more of us get it and are anxious to help. It’s not gratuitous, but out of self-interest. We realize that the perspectives of both genders are essential to our best work and most insightful counsel. We also realize that gender equity remains as much of an issue as ever, as was well demonstrated by last year’s panel on the subject that Natalie led so brilliantly. I’m not sucking up when I say this stuff. After all, I’m retired. Enrisoned in the “what can they do to me now” silo.

Of course, none of our gains will stay with us unless we keep at it. As the 2016 election reminded us, the struggle is not and may never be over.

In a sense this is good-bye. I may show at this Conference in the future to see old friends, but no longer as a dues-paying member of the ABA. You are great people and I’ve learned a lot from you over the years. Yet nothing makes me more proud to be among you than your persistent dedication to the cause of cultural diversity and gender equity in our bar.

I salute you all.
What Would Justice Brennan Say to Justice Thomas?

Continued from page 1

Public figure cannot recover damages for defamation without proving that the harmful statements at issue in the case were “calculated falsehood[s],” that is, that they were published despite the defendant’s actual knowledge that they were false or probably false. This, too, has become an important part of the fabric of First Amendment law, widely accepted in subsequent rulings.

The actual malice standard was not, as Thomas describes it, a “policy-driven approach to the Constitution.” It was, rather, a decidedly mainstream exercise in constitutional analysis, which honored both the Court's previous recognition that “libel” is not protected by the First Amendment and its concomitant obligation to determine the definitional contours of that category of unprotected speech. Indeed, the Court had previously engaged in analogous exercises in so-called definitional balancing to identify the boundaries of other unprotected categories, including everything from “obscene” to “fighting words.” Brennan's decision in Sullivan to define unprotected “libelous” speech about public officials as encompassing only calculated falsehoods injurious to their reputations, a decision endorsed by five other members of an otherwise unanimous Court, was actually a more speech-restrictive formulation than the approach favored by the three remaining justices, who, relying on a literal reading of the constitutional text (an approach that Thomas typically favors), would have declared all defamation actions brought by public figures to be precluded by the First Amendment.

Thomas issued his opinion while agreeing with the Court's decision to deny a petition for certiorari in a libel case against Bill Cosby, the comedian imprisoned for sexual assault. The petition was filed by Katherine McKee, who, after accusing Cosby of rape, filed a defamation action charging that Cosby’s attorney released a letter damaging her character and distorting her background. The U.S. Court of Appeals for the First Circuit affirmed a trial judge's decision that McKee was a limited-purpose public figure and was unable to carry her burden of proving actual malice.

Although the issue was not placed before the Court by McKee’s petition, and although he wrote that he agreed with the Court’s decision not to hear her case, Thomas used the Court’s denial of certiorari as a vehicle to announce his view that the Supreme Court should reconsider Sullivan, overrule it, eliminate the actual malice standard, and return full control over libel law to the states. “The States,” Thomas wrote, “are perfectly capable of striking an acceptable balance between encouraging robust public discourse and providing a meaningful remedy for reputational harm.”

Precisely the opposite was the case, however, when the Court decided Sullivan in 1964, and there is every reason to believe that, but for Sullivan and its progeny, an analogous effort by public officials and public figures to weaponize the law of defamation would be successful today. As Brennan’s opinion in Sullivan described, and as Anthony Lewis chronicles in great detail in Make No Law, the advertisement published by The New York Times that was the focus of the case never mentioned by the plaintiff, L.B. Sullivan, the Montgomery, Alabama, commissioner of public affairs. The Alabama courts imputed the advertisement’s criticism of the conduct of the Montgomery police force to Sullivan, who had ultimate supervisory authority for its operations. At the same time, as Brennan’s opinion also noted, the newspaper faced multiple other libel suits in the Alabama courts by other public officials concerning the same advertisement.

Alabama law at the time heavily favored the libel plaintiff, imposing a relatively modest burden of proof on the person suing and a heavy burden on the defendant to, among other things, prove that the challenged statements were true. The state courts found the ad to be libel per se because it contained a number of relatively minor errors, concluded that the ad was about Sullivan because some
of his witnesses testified at trial that they understood its criticisms to be a reflection on him, and therefore presumed damage to his reputation, all in accordance with the common law of Alabama. The only option for The Times was to prove the truth of the misstatements contained in the ad, which it could not do, both because there were errors and because the newspaper was not responsible for the content.

As Lewis documents, Sullivan’s suit, the others filed against The Times, and still others filed against other national media outlets then attempting to cover the civil rights movement in Alabama were not motivated by a desire to recover damages for actual reputational harm so much as to dissuade the press from reporting to the nation about a subject of palpable public concern. Simply put, the damage awards sought (and in many cases awarded) in multiple lawsuits aimed to make it too expensive for newspapers and television networks to continue reporting about civil rights. As Brennan wrote for the Court in Sullivan, “the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive.”

It is against this backdrop that, after more than a quarter century on the Court, Thomas chose this moment in our history to call for Sullivan to be overruled. He writes at a time when the president of the United States has dubbed critics of his official conduct “enemies of the people” and has called for the libel laws to be “opened up” in the manner Thomas has now endorsed. He writes at a time when an unprecedented number of public officials and powerful public figures, from Sarah Palin to Joe Arpaio to an assortment of Russian oligarchs, have brought defamation actions against The Times and other national media. Make no mistake, but for Sullivan and its progeny, such lawsuits would—as Brennan wrote in Sullivan—deter “critics of official conduct . . . from voicing their criticism, even though it is believed to be true and even though it is, in fact, true, because of doubt whether it can be proved in court or fear of the expense of having to do so.” What was true in 1964 remains true today: The libel law regime that Thomas apparently favors “dampens the vigor and limits the variety of public debate” and is demonstrably “inconsistent with the First and Fourteenth Amendments.”

Which brings us to Thomas’s curious and decidedly selective discussion of original intent. Neither Sullivan, nor any of its progeny, Thomas asserts, “made a sustained effort to ground their holdings in the Constitution’s original meaning.” These words simply cannot be squared with Brennan’s opinion in Sullivan itself, four full pages of which are devoted to the Framers’ intent as gleaned from the most analogous historical experience—the controversy surrounding the Sedition Act of 1798.

As Brennan explained, seditious libel was a concept under English common law that an individual could be punished for criticism that brought ridicule or disrepute on the king and his ministers, even if (indeed, as Thomas notes, including when) the criticism was true. There is substantial evidence—all recounted in Brennan’s opinion—indicating that the proponents of the First Amendment, Madison foremost among them, intended the free speech and press guarantees to prohibit punishment for seditious libel in the United States, i.e., to prohibit libel suits against public officials for criticism of their performance of their official duties. When Congress, despite this apparently clear intent, nevertheless passed the Sedition Act in 1798, which opened the door to numerous prosecutions for statements critical of President Adams and his administration, Madison and Thomas Jefferson led protests against the law in Virginia. When Jefferson became president in 1801, he put action behind his convictions and pardoned those who had been convicted of seditious libel.

Brennan not only traced this history at length in Sullivan, he canvassed the most authoritative assessments of its constitutional significance, all of which, including most especially the published views of Justices Holmes, Brandeis, and Jackson, reflected “a broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment.” This consensus—reflecting the considered judgment of “the court of history”—was and remains especially significant because, as Brennan also noted, “the Sedition Act was never tested” in the Supreme Court.

Thomas, in contrast, rejects the significance of both this consensus and the historical record on which it is based, largely on the grounds that (1) both the criminal and common law of libel continued to exist without constitutional challenge following the controversy surrounding the Sedition Act and (2) several justices noted, in the years before Sullivan, that “libel” was not protected by the First Amendment. None of this is surprising, or particularly persuasive, however, especially because the First Amendment was not held applicable to the states until 1925, Sullivan was the first case in which the Court undertook to assess the application of the common law in a manner analogous to the law of seditious libel and none of the judicial statements that Thomas quotes purported to speak to that issue. And, as noted, Brennan did recognize the need to tread carefully and deliberately, displacing only so much of the common law that could not be reconciled with the First Amendment’s documented antipathy to seditious libel.

Two other points are worth noting when assessing the significance of Thomas’s professed allegiance to original intent. First, notably missing from his own discussion of the relevant history is any discussion of the John Peter Zenger seditious libel trial in 1735. It is well accepted that the Zenger prosecution was a significant factor in solidifying the Colonies’ antipathy toward the Crown that ultimately led to the Revolution as well as the new nation’s insistence on a Bill of Rights that guaranteed its citizens the freedom of speech and of the press. One would have thought that the dramatic example of the Zenger trial, which had “set the colonies afire for its example of a jury refusing to convict a defendant of seditious libel against Crown authorities,” would be worth a mention in Thomas’s assessment of the historical record, especially because the quoted language in this sentence was written by him in his concurring opinion in McIntyre v. Ohio Elections.
Second, despite the fact that Brennan’s opinion in Sullivan relies on the best evidence of the Framers’ intent, it cannot be seriously questioned that Thomas's narrow focus on such an inquiry is of limited utility in interpreting the First Amendment. Although the First Amendment was ratified in 1791, the Supreme Court did not begin to decide cases requiring judicial consideration of its meaning for more than another 125 years. Almost nothing in our First Amendment precedent, including decisions Thomas has written and joined, has turned on what the freedom of speech meant to James Madison, who drafted it, or to the first Congress, which approved it. To cite just one recent example, it is difficult to imagine that the Framers believed the First Amendment was ratified in a unanimous Court (although White concurred only in the judgment), Chief Justice Rehnquist unmistakably reaffirmed Sullivan, going so far as to hold that public figures cannot circumvent either Sullivan or its actual malice standard by framing their cause of action as some other tort.

Throughout his long tenure on the Supreme Court, William J. Brennan Jr. understood the importance of, as he put it, “counting to five.” We suspect that, just as he both relied and gratified that, in Falwell, the entire Court explicitly repudiated White’s criticisms of Sullivan, he would be equally heartened that not a single justice (much less the required additional four) saw fit to join in Thomas’s opinion in McKee.

Endnotes
6. Id. at 194.
7. Id. at 221 n.125.
15. See id. (fighting words); Roth v. United States, 354 U.S. 476 (1957).
19. See Lewis, supra note 8.
20. Sullivan, 376 U.S. at 256.
21. Id. at 278, n.18.
22. Id. at 260–64, 267.
23. Id.
24. See Lewis, supra note 8, at 34–45.
25. 376 U.S. at 278.
28. 376 U.S. at 279.
29. Id.
32. McKee, No. 17-1542, slip op. at 7.
34. Id.
35. Id. at 276.
36. Id.
37. McKee, No. 17-1542, slip op. at 6–10 (citing cases).
44. Stern & Wermiel, supra note 4, at 196.
45. See The Progeny, supra note 2, at 307.
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