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Justice Clarence Thomas Calls for Reconsideration of Landmark Libel Ruling

By Adam Liptak

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WASHINGTON — Justice Clarence Thomas on Tuesday called for the Supreme Court to reconsider New York Times v. Sullivan, the landmark 1964 ruling interpreting the First Amendment to make it hard for public officials to prevail in libel suits.

He said the decision had no basis in the Constitution as it was understood by the people who drafted and ratified it.

“New York Times and the court’s decisions extending it were policy-driven decisions masquerading as constitutional law,” Justice Thomas wrote.

Justice Thomas, writing only for himself, made his statement in a concurring opinion agreeing that the court had correctly turned down an appeal from Kathrine McKee, who has accused Bill Cosby of sexual assault. She sued Mr. Cosby for libel after his lawyer said she had been dishonest.

An appeals court ruled against Ms. McKee, saying that her activities had made her a public figure and that she could not prove, as required by the Sullivan decision, that the lawyer had knowingly or recklessly said something false. Ms. McKee asked the Supreme Court to review the appeals court’s determination that she was a public figure.

Justice Thomas wrote that he agreed with the court’s decision not to take up that question. “I write to explain why, in an appropriate case, we should reconsider the precedents that require courts to ask it in the first place,” he wrote.

In Justice Thomas’s view, the First Amendment did nothing to limit the authority of states to protect the reputations of their citizens and leaders as they saw fit. When the First Amendment was ratified, he wrote, many states made it quite easy to sue for libel in civil actions and to prosecute libel as a crime. That was, he wrote, as it should be.

“We did not begin meddling in this area until 1964, nearly 175 years after the First Amendment was ratified,” Justice Thomas wrote of the Sullivan decision. “The states are perfectly capable of striking an acceptable balance between encouraging robust public discourse and providing a meaningful remedy for reputational harm.”

The events leading to the Sullivan decision test that assertion. The case arose from an advertisement in The Times seeking support for the civil rights movement. The ad contained minor errors.

L.B. Sullivan, a city commissioner in Montgomery, Ala., who was not mentioned in the ad, sued for libel. He won $500,000, which was at the time an enormous sum. It was one of many suits filed by Southern politicians eager to starve the civil rights movement of the oxygen of national attention. They used libel suits as a way to discourage coverage of the movement by national news organizations.

Against this background, and animated by an urge to protect the American public’s ability to assess the situation in the South for itself, the Supreme Court unanimously ruled for The Times and revolutionized American libel law.

Justice Thomas’s statement came in the wake of complaints from President Trump that libel laws make it too hard for public officials to win libel suits.

“I’m going to open up our libel laws so when they write purposely negative and horrible and false articles, we can sue them and win lots of money,” Mr. Trump said on the campaign trail. “We’re going to open up those libel laws. So when The New York Times writes a hit piece which is a total disgrace or when The Washington Post, which is there for other reasons, writes a hit piece, we can sue them and win money instead of having no chance of winning because they’re totally protected.”

Thanks to the Sullivan decision, it is indeed hard for public figures to win libel suits. They have to prove that something false was said about them, that it harmed their reputation and that the writer acted with “actual malice.” That last term is misleading, as it has nothing to do with the ordinary meaning of malice in the sense of spite or ill will.

To prove actual malice under the Sullivan decision, a libel plaintiff must show that the writer knew the disputed statement was false or had acted with "reckless disregard." That second phrase is also a term of art. The Supreme Court has said that it requires proof that the writer entertained serious doubts about the truth of the statement.

Justice Thomas questioned those standards.

"There appears to be little historical evidence suggesting that the New York Times actual-malice rule flows from the original understanding of the First or Fourteenth Amendment," he wrote.

Justice Antonin Scalia, who died in 2016, routinely made the same point in his speeches. But Mr. Trump's two Supreme Court appointees — Justices Neil M. Gorsuch and Brett M. Kavanaugh — have expressed support for broad libel protections in their opinions as appeals court judges.

At his Supreme Court confirmation hearings in March 2017, Justice Gorsuch was asked about the Sullivan decision by Senator Amy Klobuchar, Democrat of Minnesota. She wanted to know whether "the First Amendment would permit public officials to sue the media under any standard less demanding than actual malice."

Judge Gorsuch, reticent when asked about other precedents, seemed comfortable with preserving that one.

"New York Times v. Sullivan was, as you say, a landmark decision and it changed pretty dramatically the law of defamation and libel in this country," he said. "Rather than the common law of defamation and libel, applicable normally for a long time, the Supreme Court said the First Amendment has special meaning and protection when we're talking about the media, the press in covering public officials, public actions and indicated that a higher standard of proof was required in any defamation or libel claim. Proof of actual malice is required to state a claim."

"That's been the law of the land for, gosh, 50, 60 years," he said.

As an appeals court judge, Justice Gorsuch showed no hesitation in applying the line of cases that began with the Sullivan ruling.

Some plaintiffs, he wrote in a 2011 opinion, have reputations so poor that even serious accusations cannot damage them. Libel law, he said, is "about protecting a good reputation honestly earned."

He added that minor inaccuracies in a news report can never serve as the basis for a libel suit, calling that "a First Amendment imperative."

In 2015, Justice Kavanaugh, as an appeals court judge, wrote that posing provocative questions generally cannot be the basis for libel suits, choosing an interesting example.

"Of course," Judge Kavanaugh wrote, "some commentators and journalists use questions — such as the classic "Is the president a crook?" — as tools to raise doubts (sometimes unfairly) about a person's activities or character while simultaneously avoiding defamation liability."