TORT, SPEECH, AND THE DUBIOUS ALCHEMY OF STATE ACTION

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ABSTRACT

Plaintiffs have historically used defamation, privacy, and intentional infliction of emotional distress to vindicate their dignitary interests. But fifty years ago in New York Times v. Sullivan*, the Supreme Court reimagined these private law torts as public law causes of action that explicitly privileged speech over dignity. This Article claims that* Sullivan *was a misguided attempt at alchemy, manipulating state action doctrine to create more of a precious commodity—speech—while preserving a tort channel for the most deserving plaintiffs. In* Sullivan *the Court departed from its usual practice of narrowly defining the relevant state action in constitutional challenges to private law matters. Instead, it defined state action to include not just the isolated verdict being appealed but the entirety of the private law that produced the questionable verdict. This approach aggrandized the Court's authority to "fix" private law in the dignitary tort arena, where it seemed to fear that insular communities could chill important news coverage by imposing parochial norms onto the national community. The Court used its enhanced remedial authority to design a national constitutional common law of dignitary tort. In the quasi-statutory scheme that emerged, the Court attempted to strike an ex ante balance between valuable speech and wrongful behavior by conditioning liability on different scienter requirements for different categories of plaintiff. But the* Sullivan *project is rapidly failing. Operationally, insignificant but injurious speech such as revenge porn has flourished under the Court's brittle categorization matrix. Conceptually, the private law message that speakers owe some duty to those they discuss has been supplanted with a public law message that they have no duty of care. And instrumentally, enhanced speech protections have resulted in more soft news about celebrities and less hard news about government. Nevertheless, the Court's original goal—barring the imposition of insular community norms onto the nation as a whole while preserving a legally protected interest in individual dignity—is important and achievable. The rulemaking of the* Sullivan *cases should be retired in favor of a general constitutional principle barring judicial enforcement of verdicts that impose local community norms onto the national community. This is precisely the kind of strong but flexible constitutional guidance the Court would have rendered in* Sullivan *if it had followed its usual state action approach.*

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INTRODUCTION

Fifty years ago, in *New York Times v. Sullivan*, the Supreme Court began to redistrict defamation, privacy, and intentional infliction of emotional distress from the realm of private law constructed by local juries and courts to the realm of public law promulgated by the Court itself. The Court essentially rewrote these torts to nullify their impact on democratically significant speech.

Sullivan was a remarkable act of alchemy, transforming what for centuries had been dignity-protective torts that signaled a duty of care towards plaintiffs into speech-protective torts that signaled the opposite. The Court managed this feat by taking an unprecedented approach to finding the state action necessary to justify constitutional scrutiny of these torts. The Court defined the relevant state action in *Sullivan* at a level of generality never before found in a case challenging the constitutionality of a state private law verdict. This generous definition of the relevant state action meant that the Court had more authority to remedy the eventual deficiencies it found in the state law with a tort scheme of its own making. Crucially, the Court's remaking of the common law turned on whether the plaintiff was categorized as "public" or "private." In the pre-Internet age, these categories were rough proxies for the civic importance of the speech involved. But in an age of social media speech designed to encourage the performance of private life on a public platform, the great majority of individuals have become "public" to some extent, putting tort remedies for speech injuries out of reach for many.

Popular sentiment in favor of the *Sullivan* outcome has obscured serious attention to the state action analysis in the case. But that analysis explains both the promise and the problems associated with the constitutionalization of dignitary tort law. By deploying a radically general definition of the state action under review in the case, the Court was able to block local communities from externalizing their values onto the national community, a dynamic that had the potential to silence important speech. However, the Court's quasi-statutory "correction" of this area of the law has disabled dignitary tort as a response to online injuries such as cyberbullying, revenge porn, and mugshot extortion. Legislators are now struggling to criminalize these behaviors ex ante via statute, despite First Amendment objections.[1]

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1 *See, e.g.*, Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 372–74 & nn.175–76 (2014) (discussing different states' attempts pass bills criminalizing the publishing of revenge porn and outlining parameters of the crime).

Freed from the Court's categorical scheme, tort has the potential to send ex post deterrent signals against injurious behavior. Such a private law approach would be less speech-inhibiting than criminalizing entire categories of communication and invoking the state's prosecutorial apparatus against those who violate these statutory prior restraints.[2]

Part I of this Article examines the Court's typical treatment of constitutional challenges to judicial actions involving private law rules. It demonstrates that in cases involving contract law, property law, trust law, and economic torts, the Court has consistently identified the relevant state action as the discrete enforcement action under review—that is, the specific verdict or injunction being challenged.[3] Because it labors to narrow the state action under consideration to the exercise of power that has infringed a specific litigant's constitutional right, it typically restricts itself to reversing just the state court injunction or verdict against that litigant.[4] In this respect, the Court's practice is akin to a prudential jurisdictional rule, and it provides similar separation-of-powers and federalism benefits. First, it prevents the Court from overreaching horizontally into the lawmaking function. When state action is defined narrowly, the most the Court can do is invalidate the discrete verdict or injunction at issue, rather than jettison a fully developed body of private law in favor of its own scheme. Second, it prevents the Court from overreaching vertically into the structural prerogative of the states and their subsidiary communities. When state action is defined narrowly, the Court's role is to approve or disprove the rules that states have developed in accord with their local preferences, rather than to infuse state rules with preferences that reflect the national ethos.

Part II of this Article contrasts the Court's prudential state action approach with its analysis in *Sullivan*, where a Montgomery, Alabama, official sued over his depiction in the pages of the *New York Times*. There, the Court identified as state action not just the specific verdict against the Times but the entirety of Alabama libel law as it was applied to litigants generally.[5] This Part demonstrates that if the Court had followed its usual approach and defined the relevant state action to include just the verdict against the Times, it could have protected the newspaper from liability by simply reversing the verdict as an un-

2 *See generally* Anne Bloom, *The Radiating Effects of Torts,* 62 DEPAUL L. REV. 229 (2013) (identifying how tort suits can influence public behavior).

3 *See infra* Part I.B.

4 *See infra* Part I.B.

5 *See infra* Part II.

constitutional application of existing state tort rules.[6] Instead, the Court defined the relevant state action to include all of Alabama libel law, found that body of law constitutionally deficient, and supplied a replacement set of federal tort rules.[7] This radical approach did not just correct the verdict in this case but redistricted the tort of libel from a purely private law matter under sole control of the states to a hybrid public-private law matter shared by the state and federal government. Further, in broadly defining and then drastically reimagining Alabama libel law, the Court essentially took for itself a power that the Constitution specifically denied to Congress and the states: generating centralized government norms for speech.[8]

Part III considers why the Court was so enthusiastic about broadening the scope of state action in *Sullivan* and reengineering dignitary torts in the cases that followed. It rejects the possibility that the Court is motivated by a special solicitude for speech, since it defines state action modestly in contract, property, and financial tort cases where private law is alleged to abridge speech.[9] It ultimately concludes that the Court's manipulation of the state action definition in these cases is an attempt to grapple with the multiplicity of communities within the United States in the context of torts that explicitly invoke "community" norms to determine wrongfulness.[10] At the founding, the United States was a collection of local communities, each of which was fairly homogenous, stable, and culturally compact. Dignitary torts inflicted via communication were generally restricted to the confines of these communities, meaning that the community norms governing the finding of a legal wrong were easily ascertained and shared. By the mid-twentieth century, the United States had added to these subsidiary communities a national tier of community, which was transient and heterogeneous. Further, faster communications and printing technologies had transformed the news business from an exclusively local concern to a national endeavor. Consequently, defamation cases were no longer exclusively local disputes, but had the potential to pit the values of local communities against each other, or against the values of a national community.[11] The Court's desire to

6 *See infra* Part II.B.
7 *See infra* Part II.B.
8 *See infra* Part II.B.
9 *See infra* Part III.A.
10 *See infra* Part III.B.
11 *See infra* Part III.B.1.

mediate this contest is the most persuasive explanation for its activist state action approach in *Sullivan*.[12]

Part IV analyzes the Court's use of *Sullivan* as a springboard for horizontal overreaching into the lawmaking function. The decision began the process of transforming defamation, privacy, and intentional infliction of emotional distress ("IIED") from private law stressing compensation for injury to public law stressing speakers' rights. This Part begins by describing the constitutional common law rules promulgated by the Court. These rules attempt to balance dignity and speech by creating a matrix of plaintiff categories and culpability categories and assigning different constitutional protections to each category.[13] The goal of the scheme was to protect democratically relevant speech while preserving a right to dignitary compensation for insignificant or exceptionally injurious speech.[14] But the inconsistency and imprecision of these categories has sent confusing signals about the Court's commitment to retaining a viable tort device for dignitary interests. Part IV concludes by suggesting that these defects in the Court's scheme are a direct result of the non-prudential state action analysis in *Sullivan*, which allowed the Court to step outside its institutional competence—deciding cases—and instead attempt to legislate, an endeavor for which it was ill-suited.

Part V examines how the Court's lawmaking scheme effectively accomplished a vertical overreach into the state prerogative to make private law that reflects its political sovereignty and respects the values of its subsidiary communities. This Part shows how the Court suppressed the values of state and subsidiary communities as it remade dignitary tort law. First, the Court wiped out individual state rules designed to distinguish message-oriented speech from injury-oriented speech, imposing instead a uniform federal scheme for doing so.[15] Second, the Court declined to defer to state rules that could have informed the content of its categorical scheme. Finally, the Court repeatedly overturned jury instructions and jury verdicts that delegated to members of local communities the responsibility to decide when speech was sufficiently injurious to warrant a tort verdict.[16] Throughout its dignitary tort cases, the Court consistently denigrated both states as a unit of civic organization and local communities as a

12 *See infra* Part III.B.1.
13 *See infra* Part IV.A.
14 *See infra* Part IV.A.
15 *See infra* Part V.
16 *See infra* Part V.

unit of social organization, designing rules that disempowered those entities by imposing central government speech rules.

Part VI documents how *Sullivan* has failed to deliver on its early promise to protect nationally significant speech while preserving a tort channel to vindicate insignificant or exceptionally injurious speech. While the Court's public-private categories have shielded unpopular national speech from expensive jury verdicts, they are growing irrelevant in the age of electronic speech and social media.[17] Speech conducted over Facebook, Twitter, and Instagram is not easily described as either public or private. In these exchanges, uncelebrated individuals may be communicating with each other while hundreds or thousands "follow," "like," or "retweet" their speech. This dynamic turns on their heads concepts such as "public figure," "private figure," and "issues of public concern." As more online speech seems to drift definitionally into these constitutionally protected "public" categories, tort causes of action have grown functionally unavailable to plaintiffs. This state of affairs means that tort's signaling power is sending the message that individuals do not have a legally protected interest in their dignity and that speakers do not have a duty of care to avoid doing dignitary harm.[18] This message appears inconsistent with the Court's design in *Sullivan*, which explicitly recognized the continuing relevance of the defamation tort despite carving out a protection for publicly relevant speech. Finally, these costs to individual dignity have not been offset by the benefit of more democratically relevant speech, at least in the context of news coverage.[19]

Part VII suggests that the dignitary tort law that would have followed from a prudential state action analysis would better achieve the central goal of *Sullivan* for today's era. When the Court has followed prudential state action analysis, it has restricted itself to announcing constitutional principles and invalidating or remanding verdicts that disobey those principles. This approach to dignitary tort is better suited for the modern age. The constitutional principle of *Sullivan* is that subsidiary communities may not externalize their behavioral norms onto other subsidiary communities or the national community.[20] The Court's obsolete categorical scheme should be retired in favor of a rule prohibiting court enforcement of verdicts that externalize subsidiary community norms. Thus, where both speech and

17 *See infra* Part VI.A.
18 *See infra* Part VI.B.
19 *See infra* Part VI.C.
20 *See infra* Part VII.A.

injury take place within a relatively homogenous subcommunity, private law treatment is warranted and constitutional rejection of resulting verdicts will be unnecessary.[21] In contrast, when speech is national in nature and injury is the product of a subcommunity's values (or when speech resides within an insular subcommunity but the national community agrees that the speech is harmful), public law oversight of the tort remedy is warranted.[22] This approach would retain both the private law and public law versions of dignitary tort but allow particular cases to be sifted into the different tiers of law more flexibly to permit nimble ex post responses to emerging technologies. Reanimating the private law of tort as an inexpensive signaling device may ultimately be more speech-protective than current efforts to criminalize revenge porn, mugshot extortion, and cyberbullying behavior.

I. STATE ACTION: THE CONSTITUTIONAL LINK BETWEEN PUBLIC AND PRIVATE

The Court cannot review the constitutionality of purely private action; its authority to review cases "arising under" the Constitution[23] depends on a finding that the behavior at issue in the case can be attributed to the state.[24] This state action requirement is crucial to the Court's power, and yet it has remained a highly indeterminate concept for more than a century. The Court has failed to develop a doctrinally coherent principle for distinguishing between state behavior and private behavior when the state and private individuals have jointly deprived an opponent of constitutional rights. More specifically, when the lower court action under review is the adjudication of a dispute between private parties based on private law principles, the Court has never explicitly stated how much of state private law should be swept within the "state action" definition. In practice, however, the Court has followed what appears to be a prudential rule that the relevant state action should be defined at the most granular level possible. As a result, the Court generally considers the actual verdict in the case as the state action, and does not examine the abstract private law rules that produced the verdict. This practice has been followed in contract, property, trust and estate, and economic tort cases over the years.

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21 *See infra* Part VII.B.1.

22 *See infra* Part VII.B.2.

23 U.S. CONST. art. III, § 2, cl. 1.

24 *See* U.S. CONST. art. III, § 2, cl. 2; U.S. CONST. amend. XIV, § 1; *see also* The Civil Rights Cases, 109 U.S. 3, 11 (1883).

This approach appears to share constitutional DNA with other prudential requirements applied in the "case or controversy" context, wherein the Court employs rules that prevent it from encroaching on coordinate branches of government or on the state prerogative to develop local law.[25] Like those prudential rules, the prudential practice of narrowly defining state action has generally prevented the Court from formulating rules of law broader than those necessary to resolve the case at hand.

A. The High Stakes of the State Action Requirement

The Fourteenth Amendment provided in 1868 that no "State [shall] deprive any person of life, liberty, or property, without due process of law . . . ."[26] The command means that action by government at any level—federal, state, or local—is now subject to the incorporated provisions of the Constitution.[27] Thus, determining whether the Constitution applies to behavior alleged to deprive an individual of a guaranteed right must begin with determining whether the complained-of behavior is state action. State action theory has been notoriously called a "conceptual disaster area."[28] Several distinct phenomena have contributed to this so-called disaster. Many disagree about the purpose of the state action requirement.[29] Further,

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25 *See, e.g.*, Robert J. Pushaw, Jr., *Bridging the Enforcement Gap in Constitutional Law: A Critique of the Supreme Court's Theory that Self-Restraint Promotes Federalism*, 46 WM. & MARY L. REV. 1289, 1294–95 (2005) (explaining that the Court's self-imposed limits on its federal question jurisdiction, including justiciability doctrines and abstention, were designed to prevent the Court from violating separation of powers principles and from encroaching upon state authority).

26 U.S. CONST. amend. XIV, § 1.

27 Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 507 n.15 (1985) (citation omitted).

28 Charles L. Black, Jr., *The Supreme Court, 1966 Term—Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 95 (1967).

29 The purpose of the requirement is not altogether clear. Some opine that immunizing non-state action from constitutional scrutiny maximizes individual autonomy; the typical examples of behavior that falls outside the realm of state action include selecting a spouse or hosting a dinner party. *See, e.g.*, Lillian BeVier & John Harrison, *The State Action Principle and Its Critics*, 96 VA. L. REV. 1767, 1769 (2010) (noting that individuals' decisions about whom to marry are not state action); *see also* Harv. L. Rev. Ass'n, *Developments in the Law—State Action and the Public/Private Distinction*, 123 HARV. L. REV. 1248, 1257 (2010) (noting that Justice Joseph P. Bradley, introducing the state action doctrine in the *Civil Rights Cases*, 109 U.S. 3, 17 (1883), suggested that treating relations between private individuals as immune from constitutional scrutiny "promote[d] the individualist goal of self-realization"). In contrast, others say that limiting federal constitutional review to state action rather than individual action is a way of allocating power between the state and federal governments. Jesse H. Choper, *Thoughts on State Action: The "Government Function" and "Power Theory" Approaches*, 1979 WASH. U. L.Q. 757, 757–58 (1979). That is, a chal-

evolving theories about state action reflect the movement in American legal thought from a formal to an instrumental view of the law's purpose and the judge's power.[30]

Attempts to theorize the appropriate line between state action and private action abound,[31] but the Court has not settled on a single co-

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lenge to the constitutionality of an individual act is really a challenge to how the state has played its role as an intermediary between individual desires and federal constitutional commands. If the state encouraged the act or failed to exercise its intermediary preventative power when it should have, state action exists and the federal government can intervene—either via judicial review or congressional legislation—to offset the state infringement of constitutional rights. *Id.* at 757–58. Identifying the existence of state action is complicated by the duality of purpose behind the requirement. If the requirement is designed to maximize individual autonomy, the benign neglect of a state may further that autonomy and the state action classification may be counterproductive. Conversely, if the requirement is designed to deputize the individual states as enforcers of constitutional values, state passivity that permits private unconstitutional behavior to flourish is problematic and warrants a state action classification.

30 State action theory has been said to have proceeded in three phases roughly concurrent with trends in American legal thought. The bedrock "state action" opinion in the Civil Rights Cases of 1883 is typical of classical legal thought with its "way of thinking about law as a system of spheres of autonomy for private and public actors . . . ." *Developments in the Law*, *supra* note 29, at 1256 (quoting Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850–2000*, *in* THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 19, 20 (David M. Trubek & Alvaro Santos eds., 2006)). Justice Bradley concluded that the guarantee to individuals of due process was not violated by private acts that lacked the imprimatur of the state. Harv. L. Rev. Ass'n, *supra* note 29, at 1256–58. Thus, although the Fourteenth Amendment authorized Congress to pass laws enforcing the due process guarantee, Congress did not have authority under the amendment to pass federal laws that aimed to regulate private acts. The second phase of state action thinking, taking place in the mid-twentieth century, was consistent with social instrumentalist thinking. State action analysis during that period tended to accept the need for a division between the public and private but moved away from formalism to allow application of the Constitution to address the social problem of racial discrimination, which seemed intractable to all but a federal public law response. *Id.* at 1258. It was during the heyday of these cases that Justice Jackson remarked in *Brown v. Allen*: "this Court has found [state action] a ready instrument, in one field or another, to magnify federal, and incidentally its own, authority over the states." 344 U.S. 443, 534 (1953) (Jackson, J., concurring). Contemporary state action theory is split to reflect what Kennedy calls "'the unsynthesized coexistence of transformed elements of [classical legal thought] with transformed elements of the social.'" Harv. L. Rev. Ass'n, *supra* note 29, at 1261 (alteration in original) (quoting Kennedy, *supra* note 30, at 63). Today, some advocate the elimination of the doctrine altogether to allow a full account of rights and interests, while others want to retain it in the name of protecting individual autonomy. *Developments in the Law*, *supra* note 29, at 1261.

31 *See* BeVier & Harrison, *supra* note 29, at 1773 (theorizing that state action exists when a public rather than private choice invokes the application of government power); Robert J. Glennon, Jr. & John E. Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 SUP. CT. REV. 221, 226–27 (1976) (observing that the "unitary" conceptualization of state action has given way to a functional view, under which "the Court decides state action cases by balancing the values which are advanced or limited by each of the conflicting private rights"); Harv. L. Rev. Ass'n, *supra* note 29, at 1261 n.45 (citing cases defending the state action doctrine).

herent principle to guide its analysis. The ad hoc approach to state action may be less significant in cases where the conduct under review is concrete and finite—if a privately run primary election is state action,[32] the election mechanism is subject to the Constitution, and private actors running the election can either run the election accordingly or stop running elections altogether. The Court's application of the Constitution to the action simply compels constitutional adherence or abstention, but neither response creates a legal vacuum for the Court to fill.

The ambiguity in state action theory has potentially greater consequences in fact patterns where state authority fortifies allegedly unconstitutional private action, for instance where a court adjudicates a contract, property, or tort dispute. Scholars such as Erwin Chemerinsky and Cass Sunstein contend that "state action is always present"[33] because all private relations are negotiated based on allocations of rights, powers, and interests conferred by law. That is, all private exercises of power are premised on the state's allocation of background rights and duties and are effective only because of the possibility of enforcement via a private law suit adjudicated in the public courts.[34] If all private behavior subject to challenge in court under private law rules is considered state action, dramatic consequences follow. Either the courts have unconstrained power to extend constitutional norms to private behavior, or Congress has the power under the Fourteenth Amendment itself to pass legislation replacing state action (or inaction) that has created an unconstitutional background private law rule with a federally preferred rule.

B. State Action in Private Law Cases

Because of the dramatic consequences of the state action determination in private law cases, the Supreme Court's first move—defining the relevant state action—may be its most significant one. If the Court defines the relevant state action as the specific verdict or injunction rendered in the case under review, a finding of unconstitutionality leaves nothing to do but reverse or remand the particular case before it. But if the Court defines the relevant state action to in-

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32 Smith v. Allwright, 321 U.S. 649, 663–64 (1944).

33 *See, e.g.*, Chemerinsky, *supra* note 27, at 506 (suggesting the elimination of the state action requirement as a precursor to constitutional scrutiny); Cass R. Sunstein, *State Action is Always Present*, 3 CHI. J. INT'L L. 465, 467 (2002) [hereinafter Sunstein, *State Action*] (noting that much discussion ignores the extent of state presence).

34 *See, e.g.*, Sunstein, *State Action*, *supra* note 33, at 466.

clude the underlying principles of private law that produced the verdict, a finding of unconstitutionality is far more significant. Delegitimizing foundational rules of contract, property, estates, or tort that common law courts have developed over decades leaves a vacuum and throws the ordering of private relations into disarray.[35] The Court has never articulated a prudential rule to govern this definitional exercise in private law cases, but its opinions reveal a consistent and modest practice: the Court generally defines the relevant state action at a very granular level, so that even if it finds the action unconstitutional, it has no more to do than affirm or reverse the specific verdict or injunction below.

1. Contract

The Court first considered whether litigation governed by private law principles was state action in *Shelley v. Kraemer*.[36] *Shelley* involved the enforcement of racially restrictive covenants pursuant to state contract law, one in Missouri and one in Michigan, among large groups of homeowners providing that no parcels were to be owned by non-Caucasians.[37] In the Missouri case, upon the sale of one parcel to an African-American family, the owners of neighboring properties sued for an injunction restraining the family from taking possession and revesting the title in the seller or some other person identified by the court.[38] The Missouri trial court denied the requested relief because the agreement did not comply with the requirements for making a contract under state law, but the Missouri Supreme Court reversed and ordered the trial court to grant the injunctive relief

35 Not all background rules of private law are the product of common-law lawmaking, and not all common-law lawmaking produces private law. For instance, some private law principles in the cases discussed below were provided for via statute. *See, e.g.*, Evans v. Abney, 396 U.S. 435, 439–40 (1970) (noting that Georgia law provided that Georgia cities and towns could accept property for the establishment of parks and hold the property in trust for the benefit of persons named by the testator); New York Times Co. v. Sullivan, 376 U.S. 254, 261 (1964) (noting that Alabama law denied a public officer recovery in a libel action). Further, some rules derived from state judge common law adjudication are decidedly public in nature, such as rules empowering the state to oversee picketing and to issue judicial contempt citations. *See, e.g.*, Shelley v. Kraemer, 334 U.S. 1, 17–18 (1948) (citing as examples of judicial state action enforcement of state policies developed by common-law adjudication against peaceful picketing, the common law crime of breach of the peace, and the common law rule allowing contempt citations for disrespect of judicial authority by publication).

36 334 U.S. at 4.

37 *Id.* at 6.

38 *Id.*

requested.[39] In the Michigan case, the African-American purchasers moved into the home and other owners brought suit.[40] The judge entered a decree directing the purchasers to vacate the house within ninety days; the Michigan Supreme Court affirmed.[41]

The Supreme Court emphasized that it was not reviewing the underlying abstract rules of contract that permitted the restrictive covenants:

> [R]estrictive agreements standing alone cannot be regarded as a violation of any rights guaranteed to [the] petitioners by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated.[42]

Instead, it described the relevant state action question in the cases: "whether *enforcement* by state courts of the restrictive agreements in these cases may be deemed to be the acts of those States . . . ."[43] When the state "made available to [the covenantors] the full coercive power of government to deny to [the buyers] . . . the enjoyment of property rights in [the] premises[,]" it engaged in state action.[44] Even though the enforcement actions were "directed pursuant to the common-law policy of the States as formulated by those courts in earlier decisions[,]"[45] the state action requiring constitutional review and reversal was the enforcement alone, not the common-law policy of the states.[46] The underlying contract principles of the states were neither reviewed nor revised. For instance, had the Court defined the state action more broadly to include the underlying rules of contract, it could have announced a constitutional rule that racially restrictive covenants were per se unconscionable.

Five years later, in *Barrows v. Jackson*, the Court found that a state court award of damages for breaching a restrictive covenant agreement would also have been state action (although every court to consider the plaintiff's request for contract damages had declined to award them):

> To compel respondent to respond in damages would be for the State to punish her for her failure to perform her covenant to continue to dis-

39 *Id.*
40 *Id.* at 7.
41 *Id.*
42 *Id.* at 13.
43 *Id.* at 18 (emphasis added).
44 *Id.* at 19.
45 *Id.*
46 *Id.* at 13.

> criminate against non-Caucasians in the use of her property. The result of that sanction by the State would be to encourage the use of restrictive covenants. To that extent, the State would act to put its sanction behind the covenants. If the State may thus punish respondent for her failure to carry out her covenant, she is coerced to continue to use her property in a discriminatory manner, which in essence is the purpose of the covenant. Thus, it becomes not respondent's voluntary choice but the State's choice that she observe her covenant or suffer damages. The action of a state court at law to sanction the validity of the restrictive covenant here involved would constitute state action as surely as it was state action to enforce such covenants in equity, as in Shelley . . . .[47]

The Court therefore affirmed the California lower court decision granting the demurrer to the complaint seeking damages and the state reviewing court's affirmance of that decision.[48] As in *Shelley*, although the Court was willing to apply public law principles to a private law matter, it restricted the scope of review to the specific enforcement action without examining the particulars of California's contract law for constitutional defects.[49]

In a more recent case analyzing the state action status of a state private law of promissory estoppel, *Cohen v. Cowles Media Co.*, the Court defined the state action more broadly but again deferred to the state's authority to develop private law.[50] In *Cohen*, the Court reviewed the decision of the Minnesota Supreme Court that where a newspaper that had promised anonymity to a source and later identified him in its pages, the source could not succeed in an action for damages relying on the principle of promissory estoppel.[51] The state court reasoned that applying its law of promissory estoppel, which was designed to prevent "injustice," necessarily required weight to be given to the media's First Amendment rights to determine the "justice" served by a damage award.[52] The Court stated that the first issue in the case was whether a private cause of action for promissory estoppel was state action that triggered the First Amendment.[53] The Court defined the relevant state action more broadly here, to include the background rules that gave rise to the obligation between the parties. But it coupled this more expansive state action definition

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47 346 U.S. 249, 254 (1953).

48 *Id.* at 249, 260.

49 Chief Justice Frederick M. Vinson, in dissent, suggested that even categorizing the enforcement of a damages award as state action was pressing the Constitution too far, barring California from developing and applying its own private law of contract. *Id.* at 263–64 (Vinson, C.J., dissenting).

50 501 U.S. 663, 665 (1991).

51 *Id.* at 665–67.

52 *Id.* at 667.

53 *Id.* at 668.

with a highly deferential review of the abstract promissory estoppel rules. The Court reasoned that because the Minnesota private law rules of promissory estoppel were neutral rules "applicable to the daily transactions of all the citizens of Minnesota," and did not "single out" the press, they were not an infringement on the newspaper's First Amendment rights.[54]

2. *Property*

The Court has demonstrated the same pattern of defining state action at a granular level in property cases. *Peterson v. City of Greenville*[55] involved a set of consolidated cases where participants in civil rights sit-ins were convicted of trespass in South Carolina, Louisiana, Alabama, and North Carolina. The Court found state action underlying the trespass convictions because the private store and restaurant owners who had asked the patrons to leave and eventually sought police enforcement of those requests were motivated by local laws, ordinances, and official statements either requiring or endorsing segregated facilities. Thus, in these cases, judicial enforcement of a state private law property right to exclude visitors from the establishment was more than a neutral application of property law principles, but was imbued with a state preference for segregation. The convictions, therefore, were reversed.[56] The Court did not examine the underlying principles of state trespass law in any of the cases, instead restricting itself to reversing the specific enforcement actions.

In *Bell v. Maryland*,[57] the Court addressed the convictions of student sit-in participants for criminal trespass charges brought by a local restaurateur who called the police after the students refused to leave his establishment. In a 3-3-3 split opinion, the Court remanded the case for reconsideration in light of changes in both Baltimore and Maryland segregation law.[58] However, one-third of the Court

54 *Id.* at 670.

55 373 U.S. 244 (1963); *see generally* Shuttlesworth v. City of Birmingham, 373 U.S. 262 (1963) (Alabama criminal trespass case); Lombard v. Louisiana, 373 U.S. 267 (1963) (Louisiana demonstration case); Gober v. City of Birmingham, 373 U.S. 374 (1963) (per curiam) (Alabama demonstration case); Avent v. North Carolina, 373 U.S. 375 (1963) (per curiam) (North Carolina demonstration case).

56 Notably, Justice John Marshall Harlan II examined the circumstances behind each individual protest and suggested that unless the protesters could prove that the private landowners brought the trespass actions solely because they felt compelled by state segregation law to do so, the trespass actions were private—not state—action. Peterson v. City of Greenville, 373 U.S. 244, 248–61 (1963) (Harlan, J., concurring).

57 378 U.S. 226, 227–28 (1964).

58 *Id.* at 241–42.

concurred only because it would have reversed the convictions after concluding that the criminal enforcement of the trespass law against the protesters was unconstitutional state action. That wing of the Court reasoned that the relevant question was "the degree to which a State has participated in depriving a person of a right."[59] Here, the criminal trespass statute was used by a private person to deny another private person access to property solely on the basis of race. But because "Maryland enforced that [race-based private] policy with her police, her prosecutors, and her courts[,]" it had deployed state action that triggered constitutional review.[60] In contrast, a dissenting wing of the Court concluded that Maryland's application of its trespass laws to the protesters was not state action. The dissenting Justices reasoned that the state trespass law was not promulgated to achieve a racially restrictive end, but merely established "every property-owner's . . . normal right to choose his business visitors or social guests . . . ."[61] That the property owner's choices were animated by segregationist goals did not mean that judicial enforcement of the longstanding Maryland property principles were an instance of state segregationist action.[62] Notably, no member of the Court suggested that Maryland's underlying private law allocating to property owners the right to decide who could enter their land was state action under constitutional review, or suggested any doctrinal changes to that underlying law. Even those who wished to define the convictions under the law as state action restricted the relevant judicial state action to the adjudication of the specific cases before the court and entry of the convictions—in short, to "enforcement" of the private law of trespass, not to the underlying development of those trespass principles.[63]

3. Trusts and Estates

The Court has followed the same approach in the context of state trust law. *Evans v. Abney* involved the construction by a Georgia trial court of a trust that conveyed property to the city of Macon for use as

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59 *Id.* at 257.

60 *Id.* (Douglas, J., concurring).

61 *Id.* at 332 (Black, J., dissenting).

62 *Id.*

63 Bell v. Maryland, 378 U.S. 226, 228 (1964) (referring to "convictions" as the action); *id.* at 245 (Douglas, J., concurring) (describing the action under consideration as the commercial consequence of the state's discrimination); *id.* at 318 (Black, J., dissenting) (describing the question as whether Maryland could "enforce its trespass laws to convict" the protesters).

a whites-only park.[64] In an earlier case, *Evans v. Newton*, the Court had held that city administration of a segregated park was unconstitutional state action.[65] In response, the trustees of the grantor's estate moved for a ruling that the specific intent of the grantor to create a park for the "sole, perpetual and unending, use, benefit and enjoyment of the white women, white girls, white boys and white children of the City of Macon," and "under no circumstances . . . to be . . . at any time for any reason devoted to any other purpose[,]" meant that requiring the city to integrate the park would defeat the purpose of the trust.[66] The Georgia court was urged to apply the state's statutory *cy pres* doctrine to read the racially restrictive terms out of the grantor's will so that the general purpose of creating a park could be realized.[67] The state court refused to apply *cy pres*, explaining that if a grantor's primary intent was not general charity, but a specific and impossible scheme, *cy pres* was not justified and the grantor is presumed to have preferred that the trust fail.[68] In this case, the state court concluded, that meant that the parkland should revert to the grantor's heirs.[69] On review, the Supreme Court found that the court's application of Georgia trust principles in the construction of the will was state action but was constitutionally permissible. It reasoned that "[t]he construction of wills is essentially a state law question," and this will was construed to prioritize the segregation of the parkland over the public donation of the parkland.[70] The Court was persuaded that the state action was constitutional in large part because both the underlying trust rules and the state courts' application of them appeared to be neutral and unmotivated by unconstitutional, race-conscious intent.

4. Torts

Finally, the Court has defined state action at a granular level in the private law of torts where the cause of action reflected a plaintiff's interest in business relations. In *NAACP v. Claiborne Hardware Co.*, the

64 396 U.S. 435, 436 (1970).

65 382 U.S. 296, 311–12 (1966) (White, J., concurring) (finding that the tract of land willed in trust by Senator Augustus O. Bacon to the city exclusively for use by white people could not continue to be operated on a discriminatory basis).

66 *Abney*, 396 U.S. at 439, 441–42 (first and second omission in original) (internal quotation marks omitted).

67 *Id.* at 439–40.

68 *Id.* at 441–42.

69 *Id.* at 436.

70 *Id.* at 444.

Mississippi Supreme Court affirmed a malicious interference with business relations verdict entered by an equity court imposing damages on civil rights protesters who organized a boycott against local businesses.[71] The Court noted that the state action under review in the case was the "*application*" of Mississippi tort law to adjudicate the private law dispute between the parties.[72] It then conducted an as-applied review of the analysis in the case, determining that the lower court had distorted the facts presented at trial to characterize the entirety of the months-long boycott as violent and therefore tortious.[73] Instead, performing its own review of the record, the Court concluded that the boycott featured some violent activity interspersed with a great deal of peaceful expressive activity.[74] The Court then reversed the tort judgment and damages verdict against all of the protesters and remanded for reconsideration in light of the Court's explanation that the weighty constitutional interest in speech required the court below to identify specific acts of concrete violence before imposing tort liability on any of the protesters.[75] The Court did not review, let alone replace, the abstract principles of Mississippi tortious interference law.[76]

C. The Prudential Benefits of the Court's Definitional Pattern

The state action doctrine is usually conceptualized as a matter of constitutional, and ultimately, political, theory. When the Court's job is to determine whether private behavior should be imputed to the government, that conceptualization is sound. But in the narrow category of cases involving the adjudication of private law claims, the weight of the question shifts from one grounded in political theory about the relationship between individual and state to one grounded in jurisdictional theory about the relationship of the Court to other institutional actors. After all, there is little doubt in these cases that state action exists—the state court has rendered a verdict or injunction, which in turn dictates how far the Court's remedial power will extend. Without explicitly describing the question as such, the Court seems to have deployed prudential considerations to answer it. This approach is, perhaps, unsurprising. The Court has historically em-

71 458 U.S. 886, 891, 894 (1982).
72 *Id.* at 916 n.51 (emphasis added).
73 *Id.* at 922–23.
74 *Id.* at 928.
75 *Id.*
76 *Id.*

ployed prudential doctrines to voluntarily limit the reach of its own power when it appears that the exercise of that power may impose on a competing institutional actor.[77] The Court is generally thought to have adopted existing prudential rules policing its own jurisdiction, such as justiciability doctrines, abstention doctrines, sovereign immunity, and the like, to prevent both horizontal overreaching into the lawmaking function and vertical overreaching into the prerogative of state governments to develop and apply their own law. For instance, prudential standing rules reinforce the separation of powers principle by limiting the Court to resolution of specific disputes rather than far-reaching abstract policy questions that have been allocated to the political branches.[78] These rules prevent horizontal encroachment upon the other branches of the federal government. Similarly, prudential rules have been said to "have a strong federalism component," preventing the Court from vertically invading the province of the states.[79]

Prudential concerns make sense of the Court's usual approach to defining state action when reviewing state court adjudication of a private law claim: although the Court almost certainly *can* define state action as broadly as it wishes, it generally *has* defined state action very narrowly. Throughout contract, property, trusts and estates, and tort, the Court has demonstrated a consistent approach to defining the "state action" involved in alleged constitutional harms arising from enforcement of private law principles. It defines the relevant state action at a granular level, to include just the rendering of a verdict or injunction in a specific case. If it finds the action unconstitutional, it

77 While many theorists praise the Court's self-restraint via prudential doctrines, *see, e.g.*, Alexander M. Bickel, *The Supreme Court 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 79 (1961), some feel the Court is constitutionally obliged to exercise its Article III jurisdiction, *see, e.g.*, Martin H. Redish, *The Passive Virtues, the Counter-Majoritarian Principle, and the "Judicial-Political" Model of Constitutional Adjudication*, 22 CONN. L. REV. 647, 647–48 (1990) (arguing that "the passive virtues are, to varying degrees, premised on a misconception of the judiciary's vital political role within our constitutional system"). This article does not take a position on whether the Court's voluntary passivity is good or bad as a matter of political theory. Instead, it observes that in the state action context (as in other contexts), the Court appears to have manipulated its prudential approach to achieve a policy goal and appears to attempt to demonstrate that it might have better achieved that goal by hewing to the same prudential approach it has followed throughout the rest of its cases defining the state action represented by private law adjudication.

78 *See, e.g.*, William Marks, Note, Bond, Buckley, *and the Boundaries of Separation of Powers Standing*, 67 VAND. L. REV. 505, 508–10 (2014) (discussing the "three basic prudential rules" required for standing: that a litigant may only assert her own interests, that the courts "will decline to entertain cases based only on 'generalized grievances,'" and that a suit must "fall within the 'zone of interests' protected by the relevant statute").

79 Henry P. Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277, 292 n.87 (1984).

reverses the entry of the injunction or the verdict. Occasionally, the Court defines the relevant state action at a slightly higher level of generality, to include the lower court's *application* of background private law rules to the record facts to produce the contested injunction or verdict. Only twice has the Court defined the relevant state action at a high enough level of generality to encompass abstract rule of private law, and in these cases the Court found those abstract rules constitutional.[80]

The Court's pattern of defining state action as modestly as possible serves both the horizontal and vertical purposes that drive other prudential doctrines. First, by confining its review to the precise verdict before it, the Court leaves in place the abstract rules of private law that have been developed by institutions with designated authority to make law, either elected legislators or common law courts. The modest definition of state action therefore prevents horizontal encroachment upon the function of lawmaking institutions. Second, by limiting the boundaries of the state action under review, the Court avoids imposing federal government values beyond the minimum degree necessary to satisfy constitutional requirements. The modest definition of state action prevents vertical encroachment upon the state prerogative to develop law in accordance with its own preferences, and those of its subsidiary communities.[81]

Thus, for example, *Shelley* defined the relevant state action as the entry of two specific injunctions premised on racially restrictive covenants, found those actions unconstitutional, and reversed them.[82] The Court emphasized that state courts could not enforce such cove-

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80 *See* case cited *supra* notes 50–54 (explaining that the Court defined state action to include background rules of state contract law in Cohen v. Cowles Media Co., 501 U.S. 663 (1991)); *see also* cases cited *supra* notes 64–70 (explaining that the Court defined state action to include background rules of trust law in Evans v. Abney, 396 U.S. 935 (1970)).

81 Although this Article is exclusively concerned with the Court's use of state action to justify constitutional constraints on defamation and other dignitary torts, the proper scope of state action has implications for other public-private law conflicts. For example, the incorporation of the Second Amendment against the states, at issue in *McDonald v. City of Chicago*, 561 U.S. 742, 762–63, 774–75 (2010), raises the possibility that tort verdicts requiring gun owners to internalize damages associated with gun storage or gun use may be construed as state action infringing the right to keep and bear arms. If so, the Court's definition of the state action represented by this area of the law would dictate the degree of Court authority to wipe out state tort principles to make way for unfettered enjoyment of gun ownership. So too with recent efforts to encourage chain restaurants to bar patrons from carrying guns—if the private law of property that gives restaurant owners the right to eject gun carriers from the premises is construed as state action, the Court would have the authority to wipe out property law principles that support such anti-gun measures.

82 334 U.S. at 19–20, 23.

nants but it did not attempt to recast state rules of contract to prevent the use of the covenants.[83] Instead, it left states and local communities to sort out the appropriate treatment of these instruments on their own.[84] Evidence suggests that the simple prohibition on enforcement of the covenants, even without a constitutional common law of contract explicating a racial unconscionability doctrine, was sufficient to thwart the practice.[85] In the years following *Shelley*, restrictive provisions in deeds were delegitimized[86] and Congress passed legislation prospectively barring them.[87] The prudential approach to defining state action in *Shelley* produced a clear constitutional signal but prevented the Court from trespassing on the lawmaking function or imposing its own values onto states and subsidiary communities.

II. STATE ACTION IN *SULLIVAN*

The Court took a markedly different approach to defining state action in *New York Times Co. v. Sullivan*, which challenged a state defamation verdict.[88] The prevailing view before *Sullivan* was that common law rules permitting individual plaintiffs to recover damages from defamatory speakers belonged entirely to private law, outside the sphere of federal constitutional concern.[89] *Sullivan*

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83 *Id.* at 22–23.

84 *Shelley*, 334 U.S. at 19 (isolating judicial enforcement of the covenants as the problematic state action and intimating that if judicial enforcement were unavailable, minorities were likely to achieve "full enjoyment" of property rights "available to other members of the community").

85 Motoko Rich, *Restrictive Covenants Stubbornly Stay on the Books*, N.Y. TIMES, Apr. 21, 2005, at F1 (explaining that though it was procedurally complex to strike covenants that ran with the land and also included uncontroversial provisions such as fence height restrictions, real estate lawyers and title search companies began to strike out such covenants of their own accord; further, several states, including Missouri, Virginia and California have initiated legislation to formally eliminate racially restrictive language from existing covenants).

86 *See id.*

87 42 U.S.C. § 3604(b) (2012) (making it unlawful to "discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling").

88 376 U.S. at 256.

89 *See, e.g.*, CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 36–37 (1995). Notably, given their autonomy at the time to develop their own tort rules, some states had introduced speech-protective principles into the private law. *See* CLIFTON O. LAWHORNE, DEFAMATION AND PUBLIC OFFICIALS: THE EVOLVING LAW OF LIBEL 128 (1971) (discussing the liberal rule of libel law). However, variation among the states was significant. *See id.* at 209. As of 1963, ten states applied the tort without limitations from any principles designed to honor speakers' rights. *See id.* at 209–10 (discussing the history of state treatment of freedom of discussion). Twenty-two states had judicially recognized a privilege from defamation liability for speakers engaging in fair comment and criticism of public officials based on actual facts. *Id.* at 128, 209. Nineteen states had judicially recognized a

reconceptualized the private law defamation rules enforceable via the coercive power of the state as a proper subject of public law scrutiny. This Part outlines the background rules of libel in Alabama. It then illustrates how the state jury and state courts applied them unconstitutionally in *Sullivan*. Finally, it examines how the Court departed from its usual prudential state action definition and practice to define the state action in *Sullivan* at a remarkably high level of generality, to include all of Alabama libel law. Following this move, the Court reached into those background rules and rewrote them to privilege speech and subordinate reputation in cases brought by public officials. In short, the Court's non-prudential state action definition produced the horizontal latitude to make law and the vertical latitude to impose its values onto local communities.

A. The Alabama Libel Tort and the Proceeding Below

In 1960, The *New York Times* published an issue advertisement submitted by the Committee to Defend Martin Luther King and the Struggle for Freedom in the South.[90] The text of the ad recounted several key events in the civil rights movement, with two paragraphs focusing on incidents in Montgomery, Alabama. L.B. Sullivan, the member of Montgomery's elected three-commissioner government responsible for public safety (including oversight of the police department)[91] sued the *Times* for libel, contending that his reputation was harmed by false statements in the ad regarding the conduct of Montgomery police.[92] Among the complained-of falsehoods were that the police had "ringed" a local college campus to quell protesters, when in fact they had come onto the campus but had not formed

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privilege from defamation liability for speakers who made misstatements of fact about public officials without malice. *Id.* Further, in states that conditioned privilege on an absence of malice, "malice" was defined in a variety of different ways—while Pennsylvania required a "studied and deliberate charge," South Dakota looked only for "intent to injure," and many states, including Minnesota, did not define malice at all, saying only that a plaintiff could prove malice by showing the speaker knew the words were "false, if there was ill will or feeling, or if there was exaggeration in presentation . . . ." *Id.* at 168–169. In short, there was no uniform agreement among the states that the tort had to account for speech imperatives, and even states that did try to balance reputation and speech struck that balance in very different ways.

90 Committee to Defend Martin Luther King and the Struggle for Freedom in the South, *Heed Their Rising Voices*, N.Y. TIMES, Mar. 29, 1960, at L25, *available in* ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT 2–3 (1991).

91 KERMIT L. HALL & MELVIN I. UROFSKY, *NEW YORK TIMES V. SULLIVAN*: CIVIL RIGHTS, LIBEL LAW, AND THE FREE PRESS 11–12 (2011) (discussing Sullivan's personal background and role as director of public safety).

92 New York Times Co. v. Sullivan, 376 U.S. 254, 256–58 (1964).

a ring around it, that they had "padlocked" the campus dining hall to "starve the students into submission," which had apparently not happened, that "police" had harassed King with frivolous arrests and that "Southern violators" had bombed his home.[93] An Alabama jury found against the *Times*, awarding Sullivan $500,000 in undifferentiated compensatory and punitive damages.[94] The trial court and the Alabama Supreme Court both affirmed the jury's verdict.[95]

The Alabama libel tort at the time of Sullivan's suit provided that a plaintiff could only recover for statements of fact that were "of and concerning" him.[96] If such statements were found, and if they would "tend to injure a person . . . in his reputation or to bring him into public contempt," for instance by "injur[ing] him in his public office, or imput[ing] misconduct to him in his office, or want of official integrity, or want of fidelity to a public trust," they were libel per se and presumed to be false.[97] Once libel per se had been established, "general damages [were] presumed," even if the plaintiff could not prove pecuniary injury resulted from the statement.[98] However, Alabama law did not permit the award of punitive damages based on a presumption of injury alone; instead, it required a showing that the defendant spoke with "actual malice."[99] Once a plaintiff had established all the elements of a libel per se, the defendant could prevail only by proving that the statements were true.[100]

B. The Supreme Court's Analysis

On review, the Supreme Court departed from its pattern of defining state action at a granular level. Instead, it defined the state action under review at an unprecedentedly high level of generality, to include both the actual verdict and all of the abstract state private law libel rules underlying the verdict. It declined to "insulate *the judgment* of the Alabama court from constitutional scrutiny" because it was the product of a private law allocation of rights and duties.[101] It went on to observe that the Alabama courts were wielding "a *state rule of law*"

93 LEWIS, *supra* note 90, at 12 (outlining the respondent, L.B. Sullivan's complaints and the newspaper's subsequent response).
94 *Sullivan*, 376 U.S. at 256.
95 *Id.*
96 *Id.* at 263 (internal quotation marks omitted).
97 *Id.* at 267 (outlining Alabama libel law).
98 *Id.*
99 *Id.* at 262.
100 *Id.* at 267.
101 *Id.* at 265 (emphasis added).

which was alleged to have infringed upon constitutional rights.[102] After determining that both the judgment and the abstract body of libel law were state action, it analyzed the constitutionality of both the enforcement action and the abstract rules. Ultimately, it both "reverse[d] the judgment" and "h[e]ld that the rule of law applied by the Alabama courts is constitutionally deficient."[103] The Court then supplied a new federal rule for libel cases and, rather than return the matter to the Alabama court for reexamination of the facts under the new scheme, disposed of the case itself, applying the scheme to the record facts to conclude that Sullivan could not prevail.[104]

In its constitutional analysis, the Court first purported to describe "Alabama law as applied in this case."[105] According to the Court, Alabama law provided that statements indicating a public official lacked integrity in carrying out his duties were libel per se: "[W]here the plaintiff is a public official his place in the governmental hierarchy is sufficient evidence to support a finding that his reputation has been affected by statements that reflect upon the agency of which he is in charge."[106] In other words, according to the Court, Alabama law provided that statements about municipal employees were considered to identify the officials who oversaw those municipal departments, and thus satisfied the crucial "of and concerning" element of defamation.[107] Notably, "this rule of liability" was not an accurate statement of the abstract defamation law in Alabama. While the state supreme court was willing to find that statements about the police were statements about Sullivan, there was no Alabama rule of law requiring that result. In essence, the Supreme Court recategorized the state judicial *application* of the "of and concerning rule" to these facts as an abstract rule of law.

Further, the Court said that in Alabama, once libel per se had been established, truth was the defendant's only recourse; general

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102 *Id.* (emphasis added).

103 *Id.* at 264. The Times's attorney, Herbert Wechsler, recognized that the Court would have to clear the state action hurdle in order to reach the First Amendment ground on which he preferred to contest the Alabama verdict, and Sullivan had explicitly argued in his brief to the Court that the Alabama rules of law were not state action. *See* David A. Anderson, *Wechsler's Triumph*, 66 ALA. L. REV. 229, 237 nn.54–56 (2014). Wechsler treated the argument "dismissively," by grouping the Sullivan verdict with other state judicial orders the Court had recently denominated state action. Wechsler glossed over the fact that those ostensibly comparable cases involved the courts' authority to issue contempt citations and to enforce verdicts and were therefore inapposite. *Id.* at 238 n.60.

104 *Sullivan*, 376 U.S. at 284–88.

105 *Id.* at 267.

106 *Id.*

107 *Id.* at 263.

damages were presumed even without evidence of injury; a showing of ill intent was required for the imposition of punitive damages; and a showing of good motives did not foreclose the imposition of punitive damages, but only mitigated them.[108] The Court then defined the question in the case as "whether this rule of liability"—essentially, the entire Alabama libel tort—was constitutional.[109]

The Court answered that question by articulating a set of defamation rules that would carve out of private law a safe harbor for speech on public issues, and worked backwards from that ideal rule to see if Alabama defamation law complied. Specifically, the Court announced that in libel actions brought by public officials, the Constitution required that "[the] public official [cannot] recover[] damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[110] In essence, the Court's holding in *Sullivan* devised a bright-line, speech-protective rule for finding actual malice, an element that was key to many state defamation schemes, but that was given widely different substantive and procedural meaning by each jurisdiction.[111] For instance, Alabama had required proof of "actual malice" in defamation actions, but only as a prerequisite to recovering punitive damages.[112] Further, Alabama's version of "actual malice" was designed to capture general ill will, and therefore juries were instructed that *any* intent to defame could satisfy the "actual malice" standard.[113] The Court determined that Alabama's flexible common-law standard for actual malice, restricted to the evaluation of plaintiff's entitlement to punitive damages, was inconsistent with the federal requirement. It was therefore unconstitutional, and was replaced by the new federal constitutional rule. The Court proceeded to apply that rule to the evidence contained in the record of the case and rendered a new verdict: "the proof presented to show actual

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108 *Id.* at 267.

109 *Id.* at 268.

110 *Id.* at 279–80. Notably, the practical effect of the Court's decision was to supply the standard of "actual malice." Alabama had in the past allowed juries to find intent and award punitive damages when the jury found that the speaker was more than negligent and circumstances suggested intent to defame, *id.* at 262, but the Court issued a rule dictating that "intent" to defame existed only where the speaker knew he was circulating a falsehood or recklessly disregarded that possibility. *Id.* at 279–80.

111 *See supra* note 89.

112 *Sullivan*, 376 U.S. at 283.

113 *See, e.g.*, Johnson Publ'g Co. v. Davis, 124 So. 2d 441, 450 (Ala. 1960).

malice lacks the convincing clarity which the constitutional standard demands . . ." and the judgment was reversed.[114]

The Court's state action definition was a subtle but crucial move that yielded the unprecedented degree of remedial authority on display in the remainder of the opinion. If the Court had approached *Sullivan* as it approached other constitutional challenges to private law verdicts, it would have done one of three things: (1) defined the relevant state action as the verdict alone and refused to enforce the verdict if it represented a message-oriented imposition on speech (without reaching into state private law principles and rewriting them to avoid future instances of speech inhibition) as in *Shelley* and *Peterson*; (2) defined the relevant state action as the jury's and courts' application of the Alabama defamation elements to the facts and remanded for a more constitutionally scrupulous application of those principles (again without reaching into state private law principles and rewriting them), as in *NAACP v. Claiborne Hardware Co.*;[115] or (3) defined the relevant state action as the entirety of the background private law of defamation and then asked whether it was designed to achieve a neutral state interest or was designed to achieve an impermissible speech abridgment (reaching into state private law but presuming constitutionality so long it was not designed specifically to achieve an impermissible end) as in *Evans v. Abney* and *Cohen v. Cowles Media Co.*[116]

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114 *Sullivan*, 376 U.S. at 285–86.

115 458 U.S. 886 (1982). Notably, after replacing Alabama's defamation scheme with its own, the Court indicated that the traditional and modest state action analysis would also have justified reversing the verdict. Following state action approach (2) above, the Court observed that the jury and judges had misapplied the existing Alabama rule of law that the statement must be "of and concerning" the plaintiff. The evidence on that element was "constitutionally defective" because it did not support the jury's finding that the statements in the ad were "of and concerning" Sullivan. *Sullivan*, 376 U.S. at 288. It noted that the Alabama Supreme Court had found the statements to satisfy that element because it is "common knowledge" that fire and police departments are under the control of officials, so that criticisms of the department employees amount to criticism of the officials. *Id.* at 263. The Court then directed that "such a proposition may not constitutionally be utilized to establish that an otherwise impersonal attack on governmental operations was a libel of an official responsible for those operations." *Id.* at 292.

116 *Abney* and *Cohen* suggest that rules of neutral design (those not calculated to infringe a constitutional right but to achieve some other legitimate state goal) are presumed constitutional absent a biased application. Cohen v. Cowles Media Co., 501 U.S. 663 (1991); Evans v. Abney, 396 U.S. 435 (1970). Although the jury in *Sullivan* undoubtedly applied the Alabama rules in bad faith to infringe a constitutional right, the rules themselves were arguably neutral because they did not "single out" the press or individual speakers to prevent publication of particular content; rather, they singled out injuries caused by circulation of falsehoods regardless of the specific content of the falsehood. The Alabama libel tort was not an ex ante law designed to foreclose select messages unlike, say "food libel"

The first two of those state action approaches had the capacity to yield the same result for the *New York Times* (operating on the untested assumption that the Alabama players would have acted in good faith on remand). But neither of these approaches would not have allowed the Court to reach into the abstract rules of private law and recast them to its own liking. Departing from the unarticulated prudential practice of conceptualizing state action narrowly, the Court deliberately defined state action in a way that aggrandized its remedial authority. This broad definition resulted in exactly the separation of powers and federalism excesses that prudential principles in the Article III context are designed to prevent. In *Sullivan* and dozens of cases that followed, the Court used its newly located authority over dignitary tort to displace the existing private law and to impose a radically different uniform national scheme.[117]

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laws, which were adopted explicitly to allow punishment of speech harmful to a specific constituency. *But see* Howard M. Wasserman, *Two Degrees of Speech Protection: Free Speech Through the Prism of Agricultural Disparagement Laws*, 8 WM. & MARY BILL RTS. J. 323, 345, 374–75 (2000) (suggesting that both food libel laws and general defamation causes of action are content-based restrictions). Dignitary tort law generally is agnostic as to what types of messages will attach liability or what kinds of plaintiffs are entitled to compensation for dignitary injury. The elements in these torts that evaluate the content of speech ("defamatoriness" in defamation, "outrageousness" in IIED, and "offensiveness" in publication of private facts) do not supply any rules about approved or disapproved messages. Instead, they indicate that for each tort, whether the content of the speech is sufficiently injurious to have invaded the plaintiff's legally protected interest in reputation, emotional well-being or privacy will be determined with reference to community norms. *See infra* note 127. As a result, they can plausibly be described as "neutral" in design, though some would disagree.

117 *See* David A. Anderson, *First Amendment Limitations on Tort Law*, 69 BROOK. L. REV. 755, 784 (2004) (discussing how "speech-tort conflicts become rules of constitutional law, not tort law"). As Anderson suggests, the progressive constitutionalization of dignitary tort law is reflected in many cases following *Sullivan*. *See, e.g.*, Curtis Publ'g Co. v. Butts, 388 U.S. 130 (1967) (applying *Sullivan* requirements to public figures in addition to public officials); Time, Inc. v. Hill, 385 U.S. 374 (1967) (applying the actual malice requirement to the false light invasion of privacy tort); St. Amant v. Thompson, 390 U.S. 727 (1968) (requiring plaintiff to prove actual malice by showing that the defendant knew or had serious doubts about the truth of his statement); Greenbelt Coop. Publ'g Ass'n v. Bresler, 398 U.S. 6 (1970) (barring recovery for rhetorical hyperbole); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (requiring private plaintiffs to show actual malice in order to recover presumed or punitive damages); Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986) (shifting from defendant to plaintiff the burden of proving a statement false); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988) (applying the actual malice requirement to the IIED tort); Masson v. New Yorker Magazine, Inc., 501 U.S. 496 (1991) (barring recovery for misquotations that do not materially alter the speaker's meaning).

III. *SULLIVAN* AND THE CLASH OF COMMUNITIES

Why did the Justices depart so drastically in *Sullivan* from their prudential state action pattern? The orthodox answer is that the Court considered speech (and the civil rights context of the case) sufficiently special that it justified the strong medicine of *Sullivan*. But on closer examination, it does not appear that a love of speech alone is a satisfactory explanation for the state action departure in *Sullivan*. A better explanation may be that *Sullivan* for the first time offered the Court a chance to provide a legal framework for weighing the relative priority of local communities and the national community when the two were in conflict and the Constitution offered no clear hierarchy between them.

A. Debunking the Intuitive Explanations for the Anomaly

The simplest and most obvious explanation for the Court's decision to define state action broadly and thus maximize its leverage to change those rules is that speech deserves special protection. This explanation is certainly plausible; many theorists consider uncontroversial the assertion that "speech is special."[118] However, this explanation is not entirely satisfactory if *Sullivan* and its progeny are synthesized with comparable cases involving constitutional challenges to private law actions.

In a number of those cases, private law interests have pressured speech and the Court has nevertheless defined state action at a granular level, limiting its remedial leverage. In *Peterson v. City of Greenville*, where private law property concepts undergirding the state law of trespass sat opposite the rights of civil rights protesters to stage sit-ins, the Court defined state action to include just the trespass convictions and left undisturbed the private law of property that allowed liability for speakers who brought their message onto private domains.[119] Too, in *NAACP v. Claiborne Hardware Co.*, where the right of a business owner to sue for malicious interference with his commerce sat opposite the rights of civil rights protesters to carry out a boycott, the Court defined the relevant state action as the application of tort principles to the specific facts of the case and remanded for reconsideration in light of a gentle reminder about the value of speech, without suggesting that the malicious interference tort itself was in

118 *See, e.g.*, C. Edwin Baker, *Harm, Liberty, and Free Speech*, 70 S. CAL. L. REV. 979, 991 (1997).
119 373 U.S. 244, 247–48 (1963).

need of revision.[120] Finally, in *Cohen v. Cowles Media Co.*, the Court permitted application of promissory estoppel principles even though that decision had the speech-abridging potential to punish a newspaper for revealing an anonymous source.[121] Nevertheless, the Court defined the relevant state action as the neutral application of promissory estoppel rules to the facts at hand and thus sacrificed the constitutional leverage to promulgate a constitutional rule shaping promissory estoppel analysis to protect the news media from liability.

The compelling civil rights background of *Sullivan* the case is a second intuitive explanation for the Court's singular state action analysis in the case. But it, too, falls short. In *Shelley* and *Barrows*, the Court addressed the ugly and not uncommon practice of private restrictive covenants designed to create all-white enclaves in local neighborhoods, and it restricted its state action analysis to the three contracts before it.[122] Consequently, when it found the injunctions and damage award enforcing those contracts unconstitutional, it simply reversed or affirmed them in a binary fashion.[123] But because it did not sweep within its review the entirety of the state private law of contract that gave rise to the covenants, it left those principles undisturbed. It could have declared as a matter of private contract law that such instruments were per se unconscionable, which would have been the contract result most analogous to the Court's holding in *Sullivan* that Alabama's libel scheme (and any others like it) was unconstitutional and thus displaced.[124] It did not.

The *Peterson* and *Bell* trespass cases were also outgrowths of the civil rights movement, both finding protesters to have trespassed on pri-

120 NAACP v. Claiborne Hardware Co., 458 U.S. 886, 933–34 (1982). *See also* Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 578–79 (1977) (holding that the tort protected a person's commercial interests in his act so that liability was warranted even if it was a speech abridgment, where a man sued a local television news station under the invasion of privacy tort for filming and broadcasting his "human cannonball" act).

121 501 U.S. 663, 668–69 (1991). The inconsistency in application of the First Amendment to contract-based challenges to speech and tort-based challenges to speech has been documented, with predictions that the two lines of authority must eventually collide and be resolved. *See* Daniel J. Solove & Neil M. Richards, *Rethinking Free Speech and Civil Liability*, 109 COLUM. L. REV. 1650, 1653 (2009) (noting the "dramatic difference" between the First Amendment's treatments of contract and of tort).

122 Shelley v. Kraemer, 334 U.S. 1, 12–13 (1948); Barrows v. Jackson, 346 U.S. 249, 251–54 (1953).

123 *Shelley*, 334 U.S. at 12–14; *Barrows*, 346 U.S. at 260.

124 New York Times Co. v. Sullivan, 376 U.S. 254, 292 (1964). Functionally, these holdings were sufficient to make the practice unappealing to parties. *Shelley* is often said to have "prohibited" racially restrictive covenants; however, *Shelley* explicitly did *not* prohibit them, but it did not have to encroach on state private law prerogatives to achieve the instrumental goal of discouraging the practice. *Shelley*, 334 U.S. at 20.

vate property. But the state action in *Peterson* was restricted to the individual trespass convictions, and the Court in *Bell* declined to even find the convictions to be state action.[125] Finally, in *NAACP v. Claiborne Hardware Co.*, the Court defined the relevant state action as the application of private law malicious interference principles to the specific facts of the civil rights boycott involved in the case, reversed the judgment insofar as it applied to respondents it found to have engaged in expression but not violence, and remanded for application of those rules to select respondents who appeared to have used or threatened violence in light of a gentle reminder about constitutional values.[126] It did not, however, define the state action to include the entirety of the malicious interference tort, and was therefore unable to employ any constitutional authority to displace that state tort rule.

In short, if enthusiasm for speech or for civil rights were the only factors influencing the Court's state action approach in mediating the clash between private law and public law, all cases where speech or civil rights sat opposite a private law interest would be expected to feature a highly generalized definition of the relevant state action and a rewrite of the private law to privilege speech and subordinate the private law interest. But that has not resulted. So the interests sitting on the public law side of the ledger—speech or civil rights—do not seem to be the crucial factor leading to the Court's anomalous treatment of state action in the *Sullivan* line of cases.

B. The Community-Centered Explanation for Sullivan

The private law system involved in the case best explains the Court's doctrinal departure. The dignitary torts are unique in their explicit invocation of community values to determine the defendant's liability.[127] Sociologists define community to include groups with a

125 *See* Peterson v. City of Greenville, 373 U.S. 244, 245 (1963); Bell v. Maryland, 378 U.S. 226, 241 (1964). Christopher Schmidt has observed that while the Court first started taking cases challenging the constitutionality of segregationists' various tactics in order to thwart the civil rights movement, the Court gradually adopted a more flexible approach to state action precisely to permit wider application of constitutional principles to actors other than elected officials. He describes *Bell* as the failure of this state action "revolution." Christopher W. Schmidt, *The Sit-ins and the Failed State Action Revolution* 19 (May 12, 2008) (Am. Bar Found. Working Paper).

126 458 U.S. at 915–16 & 916 n.51, 924–34.

127 Property and contract feature largely objective rules and other tort actions smuggle in subjective community values at most indirectly, for example via reference to "reasonableness" in negligence. The dignitary causes of action, in contrast, all delegate to the community the job of determining whether particular speech events have inflicted negative

common nucleus of practice as well as a common geographic circumstance.[128] While "community" had a fairly stable and unitary meaning throughout most of the history of the dignitary torts, by 1964 the term failed to adequately account for the complex network of social organizations in the United States. In addition to the paradigmatic homogenous agrarian community that had provided dignitary tort norms since the founding, by the mid-twentieth century, the United States was also home to diverse urban communities, professional and commercial communities, and—thanks to technological innovations such as telegraphs, telephones, televisions, automobiles, airplanes, and industrial printing presses—a national community had also coalesced. As a result, the unsupervised use of such an open-ended metric of wrongfulness empowered juries from discrete and insular communities to apply their values to punish speech that might be considered acceptable by other subsidiary communities or by the national community. So *Sullivan's* state action analysis and the attendant federalization of dignitary tort law may be best explained as an effort to constitutionally subordinate local communities to the national community in the private law context where they were most likely to conflict. This hypothesis is borne out both by history and by the Court's own language in this line of cases.

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externalities that trigger, under local norms, a compensatory obligation on the part of the speaker. For instance, the Restatement (Second) of Torts specifies, "To create liability for defamation there must be . . . a false and defamatory statement concerning another . . . ." Restatement (Second) of Torts § 558 (1977). The Restatement (Second) of Torts also defines "defamatory communication" as tending "to harm the reputation of another as to lower him *in the estimation of the community* or to deter third persons from associating or dealing with him." Restatement (Second) of Torts § 559 (1977) (emphasis added). The intentional infliction of emotional distress tort requires that the defendant exhibit "extreme and outrageous conduct," defined as behavior that, *when recounted "to an average member of the community* would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'" Restatement (Second) of Torts § 46 (1977) (emphasis added). The privacy tort of public disclosure of private facts specifies, "One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that . . . would be highly offensive to a reasonable person, and . . . is not of legitimate concern to the public." Restatement (Second) of Torts § 652D (1977). The Restatement specifically says that "The protection afforded to the plaintiff's interest in his privacy must be *relative to the customs of the time and place, to the occupation of the plaintiff and to the habits of his neighbors and fellow citizens*." Restatement (Second) of Torts § 652D cmt. c (1977) (emphasis added).

128 *See, e.g.*, ROBERT N. BELLAH ET AL., HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE 28 (1st ed. 1985); David B. Clark, The Concept of Community: A Re-Examination, 21 SOC. REV. 397–8 (1973).

1. The Two-Tiered Notion of Community in the United States

In the pre-industrial, agrarian, patriarchal, and religious era, one was more likely to find homogeneity among large groups of people, a state of being denoted as *Gemeinschaft*.[129] "In the pre-modern world, knowledge about how one should live—that is, ethical knowledge about what constitutes 'the good life'—was derived from the structures of tradition and, especially, religion that dominated communities."[130] Because these communities depended on social cohesion and because participation in the mercantile economy depended on one's personal reputation, defamation was a crucial device for vindicating reputational slights in a peaceful forum.

In contrast, the post-Industrial age saw the emergence of a *Gesellschaft* community, where social bonds are "impersonal and specialized."[131] "The fundamental source of knowledge about the physical and human world [in these communities is] reason—that is, the capacity of individual human beings to know truth through independent and critical thought."[132] Because rational thinking and the maximization of knowledge are valued in *Gesellschaft* communities, the freedom of individuals to express and receive ideas via free speech is prized.

During the late eighteenth century, the United States can be described as a collection of largely *Gemeinschaft* communities. Most states allowed common law causes of action for defamation during the early years of the Republic, and this tort scheme was not seen as inconsistent with either state or federal constitutional protections for free press or free speech.[133] Further, during this period, speech was either conducted face-to-face, via personal letters, or in newspapers that tended to circulate locally.[134] Thus, most dignitary tort causes of action during the early period of the Republic were inherently con-

129 *See* LAWRENCE MCNAMARA, REPUTATION AND DEFAMATION 24 (2007) (describing the theories of German sociologist Ferdinand Tönnies).

130 *Id.* at 23.

131 Michael L. Rustad, *Torts as Public Wrongs*, 38 PEPP. L. REV. 433, 501 (2011).

132 MCNAMARA, *supra* note 129, at 23.

133 *See* Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 43–46 (2008) (describing how a huge number of states explicitly contemplated libel suits in their state constitutions).

134 *See* Andrew J. King, *The Law of Slander in Early Antebellum America*, 35 AM. J. LEGAL HIST. 1, 7 (1991) (explaining that slander, which "regulated face-to-face interaction in small communities," was far more prevalent in the nineteenth century than libel, which typically involved conflicts between rival politicians).

tained within cohesive local communities with shared practices and shared norms.[135]

The emergence of the *Gesellschaft* community in the United States coincided with the introduction of industrialized printing presses, telegraphs, telephones, radios, and televisions.[136] Further, it coincided with the adoption of the Fourteenth Amendment, which reinforced the primacy of national values over local values in some contexts.[137] Thus, the emergence of a national, individualistic, liberal democratic ethos was symbiotic with the flourishing of mass-produced national speech.

This tension in the notion of "community" may go a long way in explaining the Court's radical state action analysis in *Sullivan* and the resulting constitutionalization of the dignitary torts.[138] Geographic

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135 *See, e.g.*, LAWHORNE, *supra* note 89, at 174 (noting that of those considered "public officials" with limited recourse to defamation in the pre-*Sullivan* years, most were state and local officials: grand juror, city inspector, city street superintendent, prison warden, policeman, mental institution superintendent, poorhouse manager, and state oil inspector. Only one listed was a federal official whose work would have an impact across state lines, an agency secretary).

136 *See generally* NORMAN L. ROSENBERG, PROTECTING THE BEST MEN: AN INTERPRETIVE HISTORY OF THE LAW OF LIBEL 141–42 (1986) (explaining the rise of fast communication devices).

137 In fact, one of the underlying purposes of the Fourteenth Amendment can be described as an imposition of privileged cultural values (those of the northern states, which were less agrarian and more impersonal) over disfavored values (those of the southern states, which were more agrarian and interconnected) through the structural privileging of the federal government over the state governments. Robert Post, *Law and Cultural Conflict*, 78 CHI.-KENT L. REV. 485, 499 (2003) ("The drafters of the Fourteenth Amendment . . . . realized that the right to the Equal Protection of the Laws would require courts to impose the cultural values of the North upon the South."). While this rebalancing allowed the central government to impose cultural norms of liberal egalitarian rights via constitutional adjudication of provisions like the Equal Protection Clause, the First Amendment does not allow for the law to resolve cultural conflicts in public discourse by enforcing "cultural norms." *Id.* Post seems to be suggesting that top-down imposition of nationalized norms entrenched in the Fourteenth Amendment is inconsistent with a liberal democratic reading of the First Amendment (not, of course, the only possible theory that can be used to interpret the Constitution). *See, e.g.*, Gary Lawson, *Classical Liberal Constitution or Classical Liberal Construction?* 8 N.Y.U. J.L. & LIBERTY 808, 824–25 (2014) (explaining Richard Epstein's view of the Constitution). But Post does not foreclose the possibility that bottom-up signaling of the norms of local, non-governmental communities via the common law is consistent with the First Amendment. *See id.* at 824 (discussing the norms surrounding the interpretation of the Constitution).

138 *See, e.g.*, Geoffrey R. Stone, *Justice Scalia, Originalism, and the First Amendment*, HUFFINGTON POST (OCT. 13, 2011, 7:25 PM), http://www.huffingtonpost.com/geoffrey-r-stone/justice-scalia-originalis_b_1009944.html (reporting Justice Scalia's contention, at an Aspen Institute conference, that the Court-legislated press protections in *Sullivan* were not compelled by the Constitution). Stone suggested the disconnect between national norms (ostensibly represented by the Times's approach to the story) and Alabama norms (represented by the jury verdict for Sullivan) was the key dynamic motivating the Court's

communities have long been assigned responsibility for determining norm-based wrongfulness in the dignitary torts because they share history, geography, weather, cultural and civic institutions, and educational and charitable endeavors. This common nucleus of experience and practice means that "community" members are positioned to understand what behavior is expected of participants based on what the community has jointly emphasized as important. For instance, calling a plaintiff a "scab" might be seen as defamatory in a locality like Detroit, which has a high concentration of union members, whereas it might not be defamatory in a right-to-work state where union membership has little social support.[139]

Dignitary tort law is premised on the legitimacy of the *Gemeinschaft* community, whereas the liberal democratic theory that drives much of modern First Amendment jurisprudence is premised on the legitimacy of the *Gesellschaft* community. In *Sullivan*, the tort explicitly invoked "community" norms to determine wrongfulness, revealing a fault line in tort between *Gemeinschaft* norms and *Gesellschaft* norms.

Where a plaintiff suing for dignitary tort asks a geographically local jury to apply its notions of wrongfulness to national speech, the imposition of "community" values may vault geographically and morally discrete (*Gemeinschaft*) communities over the national (*Gesellschaft*) community for purposes of constructing speech norms. The moralistic and often religious cohesion of subsidiary local communities raises the possibility that speech considered acceptable by a national majority or acceptable within some subsidiary communities

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decision. *Id.* ("This was a lawsuit in Alabama, decided under Alabama law by an Alabama jury. The New York legislature was completely powerless to affect the matter in any way. It was precisely this fact that made a constitutional decision necessary. It's bad enough that Alabama wants to censor what its own citizens can read, but what the situation in New York Times v. Sullivan demonstrated was that the nation cannot constitutionally allow each state to censor speech on its own, because in a national marketplace of ideas censorship in one state effectively precludes the press from distributing news to people nationally. Although only a few hundred copies of that issue of the *New York Times* actually found their way into Alabama, that gave Alabama sufficient leverage to impose a huge penalty on the *Times* that was designed to deter it from writing negative stories about the South generally.").

139 Absent a jury instruction to the contrary, dignitary torts will almost inevitably be decided with reference to local community norms because the vicinage requirement draws jurors from a geographically compact area within which the case is being litigated. Indeed, the basis for the vicinage requirement is that jurors discharge their duties in part by using the "assorted store of information [they] acquire[] about [their] neighborhood[s] by living there—local community customs, problems and affairs, local geography—and the jurors' contacts with other community members . . . ." Dale W. Broeder, *The Impact of the Vicinage Requirement: An Empirical Look*, 45 NEB. L. REV. 99, 101 (1966) (finding that "[j]uror knowledge of local conditions played a part in the decisions reached in ten of the fourteen civil cases" studied).

will be denominated as wrongful by the norms of the particular community within which the tort is adjudicated.[140] Thus, where the configuration of a plaintiff and a defendant results in a Gesellschaft v. Gemeinschaft community conflict, the Court seemed to fear that nothing in tort doctrine would prevent local juries from using their "community" discretion to override national speech values.[141]

This fear seems to be a plausible explanation for the Court's self-aggrandizing definition of the state action under review in *Sullivan*. By defining the relevant state action at a high level of generality, the Court was able to do two things: first, it clearly signaled that in a clash between national community values and subsidiary community values, national values should prevail; second, it operationalized that rule (in *Sullivan* and dozens of subsequent cases) by promulgating the quasi-legislative constitutional scheme that would divert to public law treatment most cases where subsidiary communities might punish

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140 *See, e.g.*, Lyrissa Barnett Lidsky, *Defamation, Reputation and the Myth of Community*, 71 WASH. L. REV. 1, 41 (1996) ("[The use of the 'community' concept to assess the wrongfulness of speech-inflicted injuries] fails to comport with the complex reality of modern community life. The vision of community underpinning defamation law is based on a very simple, traditional model of social life—a model that is contrary to the prevailing forms of social interaction in American society. It is possible to speak of widespread consensus only in small, closely knit, and relatively homogeneous communities (if they exist). In contrast, American society might be described as a community of subcommunities, undergoing a constant process of formation and reformation."). Thus, the call for civility via dignitary tort verdicts "may mask a desire to suppress dialogue that seems threatening to the established social order." *See id.* at 41 n.239.

141 If so, the Court's fears may have been overblown. Tort does feature internal limits that prevent it from becoming a wholesale tool of public policy (a feature that is seen as a blessing by some tort theorists and an obstacle to others). *See, e.g.*, Rustad, *supra* note 131, at 475–77 (summarizing internal tort limits such as the requirement of substantive standing, the refusal to recognize unrealized injuries, and reluctance to award damages for emotional and economic harm). Notably, Alabama tort doctrine already *did* include two elements that should have prevented local jury override of national values. First, the "of and concerning" element of Alabama law required the plaintiff to prove substantive standing to contest the national speech. *See supra* note 89 and accompanying text. Second, under Alabama law the jury was required to explicitly find that the Times had acted with "malice" in order to award punitive damages. *See supra* note 99 and accompanying text. Conceptualizing the relevant state action to include the verdict alone would have allowed the Court to police the jury's application of these elements and overturn the verdict for failure to abide by them. Interestingly, the civil recourse theory of torts has noted in response to complaints that tort has been manipulated as a tool for achieving public policy ends that internal limits within tort doctrine, if applied properly, prevent the use of tort as a species of public law. *See* John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 945–46 (2010). Specifically, Professors Goldberg and Zipursky have noted that tort has internal "standing" requirements that prevent its use by plaintiffs who have not sustained an actual injury. The "of and concerning" requirement is the internal standing limit that should have ensured the defamation tort could not be used by the Alabama jury as an at-large device for punishing the Times's speech.

significant speech. Thus, by ignoring the prudential practice of defining state action modestly, the Court reached horizontally into the legislative prerogative to devise rules that balance public welfare and speech rights, and reached vertically into the states' prerogative to develop tort law in accord with their unique cultures. The promise of *Sullivan* is found in the Court's signal that subsidiary communities may not dictate national speech norms. But the reason that promise has not been entirely fulfilled may be found in the imprudent state action analysis that authorized the Court's horizontal and vertical excesses.

IV. THE COURT'S DIGNITARY TORT LAWMAKING

In the two decades following *Sullivan*, the Court overreached horizontally into the legislative domain, fashioning an entirely new scheme to govern defamation, privacy,[142] and intentional infliction of emotional distress causes of action.[143] The Court's exertions were decidedly more legislative than adjudicatory in nature. The lawmaking endeavor is typically marked by the development of general rules by a body that has autonomy to identify problems it will address and to define the "breadth and severity"[144] of those problems as it wishes, after whatever investigation or factfinding it elects to conduct, subject only to eventual response by voters.[145] Adjudication, on the other hand, is marked by "particularized administration of justice in individual cases,"[146] in reaction to problems identified and bounded by the disputants.[147] In this instance, however, the Court's actions have all the earmarks of legislating: it developed general rules to govern future cases after having defined the breadth and the severity of the social problem generally, far beyond the boundaries that had been identified by the parties. Specifically, it designed a scheme that is quasi-

142 *See* Time, Inc. v. Hill, 385 U.S. 374, 380, 386 (1967) (addressing the right to privacy for a public figure).

143 *See* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56–57 (1988) (limiting the intentional infliction of emotional distress tort for public figures). While using "falsity" as a basis for distinguishing between intent to speak and intent to injure may be workable for the false light invasion of privacy tort, it is not a good fit for the intentional infliction of emotional distress tort, where even true speech may be deemed so outrageous for contextual reasons that it is intolerable and therefore subject to liability.

144 Thomas D. Barton, *Common Law and its Substitutes: The Allocation of Social Problems to Alternative Decisional Institutions*, 63 N.C. L. REV. 519, 521 (1985).

145 *See* Larry Kramer, *The Lawmaking Power of the Federal Courts*, 12 PACE L. REV. 263, 299–300 (1992).

146 *Id.* at 266.

147 Barton, *supra* note 144, at 521–22.

statutory in nature, establishing ex ante categories of plaintiffs and categories of wrongfulness that, when cross-referenced, dictate the appropriate rule of liability. This categorical scheme was designed to protect democratically important speech while preserving a plaintiff remedy for speech that is less significant or more injurious. However, the inconsistency and imprecision of the scheme it produced reflect the perils of straying outside its area of institutional competence.[148]

A. The Court's Categorical Scheme

The Court's dignitary tort rules are both substantive and procedural in nature. The most important substantive rule created one legal category for "public" plaintiffs and a separate category for "private" plaintiffs. Although falsehood is an element in all defamation claims, the Court added to the "falsehood" element for *public* plaintiffs a stringent scienter requirement. Specifically, to recover for any of these dignitary torts, public plaintiffs must show that speakers had "actual malice," defined as knowledge that their statements are false or reckless disregard of that possibility.[149] *Private* plaintiffs also must prove the defendants' scienter, but at the lower threshold of negligence[150] (unless seeking punitive damages, which require actual malice[151]).[152]

Further, to bolster the requirement that defendants in public plaintiff cases must have actual malice, and the requirement that the complained-of speech be false, the Court overhauled the procedural framework for defamation and the related torts. Specifically, plaintiffs must show the speaker's scienter by clear and convincing proof,[153] and the reviewing court must review the scienter finding de novo rather than for clear error.[154] Most important, defamation plaintiffs

148 Notably, unlike a legislature, the Court does not have the ability to undertake any factfinding to confirm its intuitions about the scope of a problem, and is not accountable to any other branch or constituency that may object to its efforts.

149 Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974).

150 *Id.* at 349–50.

151 *Id.*

152 In addition to from introducing a public-private distinction, the Court also changed the calculus for a "defamatory" statement. As a matter of law, rhetorical hyperbole, Greenbelt Coop. Publ'g Ass'n v. Bresler, 398 U.S. 6, 14 (1970), opinion, Milkovich v. Lorain Journal Co., 497 U.S. 1, 17–18 (1990), and immaterial misquotations, Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 524 (1991), cannot be the basis for a successful defamation claim.

153 New York Times Co. v. Sullivan, 376 U.S. 254, 285–286 (1964).

154 Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 492 (1984).

must now prove the statement to be false, rather than the defendant shouldering the burden to prove it true.[155]

These rules essentially establish a constitutional matrix.[156] The nature of the plaintiff operates as an objective proxy for the constitutional significance of the contested speech. Statements about a public official or public figure are thought to represent democratically or civically relevant speech, whereas statements about purely private figures are thought to represent speech of insignificant democratic or civic value and can expose the declarant to tort liability more freely.[157] Further, the scienter categories operate as objective proxies for the likelihood that the speaker's words were calculated primarily to circulate a message rather than to inflict injury. Statements that are knowingly or recklessly false are presumed to have been motivated by intent to injure whereas statements that are just negligently false reflect intent to circulate a message. These categories of plaintiff status and defendant scienter work in tandem so that plaintiffs suing for speech presumed to be of democratic or civic value must demonstrate a level of scienter on the defendant's part indicating the speech was more injury-oriented than message-oriented. This categorical scheme was meant to ensure that democratically important speech intended to enlighten rather than to injure could not be the basis for an award of money damages. In other words, the scheme is meant to create per se constitutional "breathing room" for certain favored kinds of speech.[158]

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155 Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 776 (1986).

156 Others have used this term. *See, e.g.*, Citron & Franks, *supra* note 1, at 375 n.189; Rodney A. Smolla, *Categories, Tiers of Review, and the Roiling Sea of Free Speech Doctrine and Principle: A Methodological Critique of* United States v. Alvarez, 76 ALB. L. REV. 499, 502 n.26 (2013).

157 *See, e.g.*, *Gertz*, 418 U.S. at 343–45 (explaining that *Sullivan* was designed to accommodate the press interest in protection from liability for circulating robust speech with the state interest in protecting the reputation of various individuals from injury, and that in order to avoid case-by-case review of specific verdicts, the Court laid down rules that would strike the appropriate balance by treating the category of public plaintiffs less protectively than the category of private plaintiffs in light of the different speech-reputation policies at play for the different plaintiff categories); *see also* Smolla, *supra* note 156, at 511–13.

158 Notably, the Court's detailed dignitary tort rules, designed as a national scheme to replace a variety of state defamation and dignitary tort rules, look suspiciously like the "federal general common law" ostensibly prohibited in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). To be sure, *Erie* reserved a power for the Court to supervise the judicial action of the states when authorized by the Constitution to do so. But the negative command of the First Amendment bars the promulgation of positive law shaping speech. By replacing problematic state rules of tort with its own rules of tort, one might say that the Court has used a constitutional prohibition on the development of speech law as a pretext for developing speech law. Of course, constitutional interpretation remains the clear province of the Court even after *Erie*. But scholars have acknowledged that "interpretation" can almost imperceptibly morph into "promulgation" of common law in constitutional cloth-

B. The Pitfalls of Constitutional Legislating

The Court's foremost goal in establishing constitutional categories for these torts was to distinguish neatly between speech entitled to public law protections and speech that should remain subject to private law. But the post-*Sullivan* dignitary tort cases are an object lesson in the Court's legislative inexperience. While the Court has elegantly articulated the need to balance speech and dignity, the rules it has promulgated are inconsistent and imprecise.

1. Inconsistency.

The Court's drawn-out effort to perfect a constitutional dignitary tort scheme has been plagued by indecision about how to distinguish between plaintiffs who must proceed under the public law protections and those who may remain within private law. The Court has also been unclear about whether different defendants are to be funneled into different parts of the constitutional matrix.

The Court's dignitary tort project began simply enough, with its *Sullivan* announcement that defamation actions by public officials would henceforth be subject to constitutional oversight. Just three years later, the Court expanded the category of plaintiffs subject to constitutional oversight to include public figures.[159] Four years later, it expanded the category of plaintiffs subject to constitutional requirements once more to include all those suing about speech on matters of public concern regardless of whether they personally were categorized as public figures.[160] But three years after that sweeping rule was announced, the Court backtracked.[161] It concluded that

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ing. Writing as the Court completed its first phase of constitutionalizing defamation in *Gertz*, Henry Monaghan asked, "Can the Court . . . create a sub-order of 'quasi-constitutional' law—of a remedial, substantive, and procedural character—to vindicate constitutional liberties?" Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 9 (1975). He suggested that once the Court has explicated general values, the burden shifts to the states to develop rules that realize those values; the Court can invalidate those rules on a case-by-case basis if the rules fall short of the constitutional goal, but the Court cannot "insist upon adherence to constitutionally inspired, but not compelled, rules without considering as decisive whether the state has provided minimally satisfactory alternatives . . . ." *Id.* Notably, Justice Byron White has been described as losing faith in *Sullivan* in large part because it spawned a "federal common law of defamation" that inserted the Court into the business of regulating speech. John C. P. Goldberg, *Judging Reputation: Realism and Common Law in Justice White's Defamation Jurisprudence*, 74 U. COLO. L. REV. 1471, 1476 (2003).

159 Curtis Publ'g Co. v. Butts, 388 U.S. 130, 160–61 (1967) (opinion of Harlan, J.)

160 Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 52 (1971).

161 Gertz v. Robert Welch, Inc., 418 U.S. 323, 346 (1974).

stretching the public law treatment of dignitary injuries to speech on all matters of public concern would leave many plaintiffs unable to vindicate their interests.[162] Therefore, in *Gertz v. Welch*, the Court settled on a rule requiring only public plaintiffs to show actual malice.[163]

Although it appeared to finalize the categorization of plaintiffs in *Gertz*, the Court destabilized the scheme ten years later, in *Dun & Bradstreet Inc. v. Greenmoss Builders, Inc.*[164] There, the Court was asked whether the heightened scienter requirement of *Gertz* and *Sullivan* applied to matters of purely private concern. The Court answered the question in the negative. The holding created a firm safe harbor from constitutional speech protection for matters of private concern. But this formulation left available by implication the possibility that in all matters of public concern, even involving only private figures, the heightened intent requirements applied.[165] For instance, in *Snyder v. Phelps*, the Court overturned an IIED verdict in large part because the defendant's speech was deemed to be on a matter of public concern, even though the plaintiff was a private figure.[166]

The Court's constitutional scheme has also been ambiguous on the question of whether to apply different scienter requirements based on the identity of the defendant. For instance, in drafting its opinion *Dun & Bradstreet*, the Court debated but did not resolve whether the heightened culpability requirements for defamation recovery should be reserved for cases brought only against media defendants.[167] Justice Sandra Day O'Connor raised the possibility of a

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162 *Id.* ("The extension of the *New York Times* test proposed by the *Rosenbloom* plurality would abridge this legitimate state interest to a degree that we find unacceptable.")

163 *Id.* at 334, 344–47, 352 ("We are persuaded that the trial court did not err in refusing to characterize petitioner as a public figure for the purpose of this litigation. We therefore conclude that the *New York Times* standard is inapplicable to this case . . . .").

164 Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761 (1985) ("In light of the reduced constitutional value of speech involving no matters of public concern, we hold that the state interest adequately supports awards of presumed and punitive damages—even absent a showing of 'actual malice.'").

165 *See, e.g.*, Lee Levine & Stephen Wermiel, *The Landmark That Wasn't: A First Amendment Play in Five Acts*, 88 WASH. L. REV. 1, 74 (2013) (noting that Rehnquist realized that he was drawing a distinction between matters of private concern and other matters—a distinction the Court rejected in *Gertz*, which focused on public verse private figures).

166 Snyder v. Phelps, 131 S. Ct. 1207, 1219 (2011) ("Given that Westboro's speech was at a public place on a matter of public concern, that speech is entitled to 'special protection' under the First Amendment. . . . [T]he jury verdict imposing tort liability on Westboro for intentional infliction of emotional distress must be set aside.").

167 *See e.g.*, Levine & Wermiel, *supra* note 165, at 48–52 (describing the debate in *Dun* over whether the *Sullivan* scheme had been or should be reserved for media defendants only in order to allow significant speech to flourish while permitting plaintiff recovery for harmful, but presumably less democratically important, non-media speech).

media/non-media distinction again in *Philadelphia Newspapers v. Hepps*, again without providing a clear resolution of the question.[168]

The Court's prudential state action analysis typically restricts the Justices to adjudication rather than lawmaking. Disregarding that prudential practice in the line of cases from *Sullivan* and *Snyder*, the Court has attempted to establish a categorical, quasi-legislative scheme of dignitary tort. The result demonstrates that the Court is not well-suited to legislative pronouncements. Devising this scheme via common-law decisionmaking techniques has meant that rules emerge by half-measure and change with the Court's composition, leaving both speakers and subjects of speech uncertain how to negotiate the inevitable clashes between their interests.

2. Imprecision

Aside from vacillating about which plaintiffs' cases should be diverted for heightened constitutional scrutiny, the Court has also failed to clearly denominate how plaintiffs are divided among the public and private categories. Over time, the Court has identified five distinct categories of plaintiffs, but it has left the boundaries between these categories vague and manipulable. Because this categorization is essential to determining whether the plaintiff's cause of action will be subject to enhanced constitutional oversight, imprecise boundaries send mixed signals about the reach of constitutional principles into the tort realm.

The Court in *Gertz* outlined five distinct categories of dignitary tort plaintiff: the public official, the all-purpose public figure, the limited-purpose public figure, the involuntary public figure, and the private figure.[169] At the same time, it rejected the notion that private figure defamation lawsuits could be subjected to enhanced constitutional scrutiny if the relevant speech covered a matter of public con-

168 Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 779 n.4 (1986) ("We also have no occasion to consider the quantity of proof of falsity that a private-figure plaintiff must present to recover damages. Nor need we consider what standards would apply if the plaintiff sues a nonmedia defendant . . . ."). This ambiguity continues to plague defamation law, particularly as hybrid speakers such as bloggers proliferate. If the heightened requirements apply only to press defendants, then courts hearing defamation cases must decide whether blogger-defendants fit within that category or should be sent to the more tort-friendly non-media category. *See, e.g.*, Obsidian Fin. Grp., LLC v. Cox, 740 F.3d 1284, 1292 (9th Cir. 2014) ("Because Cox's blog post addressed a matter of public concern, even assuming that *Gertz* is limited to such speech, the district court should have instructed the jury that it could not find Cox liable for defamation unless it found that she acted negligently.").

169 Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974).

cern. The Court has over time attempted to define the contours of each category. Public officials "at the very least . . . [are] those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs."[170] All-purpose public figures are those who "occupy positions of such persuasive power and influence that they are deemed public figures for all purposes."[171] These categories are fairly easy to apply and there has been little controversy about their application. However, the remaining three categories are a quagmire. The Court has defined limited purpose public figures as those who "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved"[172] and has stated that involuntary public figures are those who become public "through no purposeful action of [their] own," but will be "exceedingly rare."[173] *All* public figures, whether all-purpose or involuntary, are required to conduct their tort suits under enhanced constitutional scrutiny. Private figures are those who have "not accepted public office or assumed an 'influential role in ordering society.'"[174]

The definition of "involuntary" public figures[175] suggests that the plaintiff's proximity to a person or issue that is public—even if remote, tangential, or unwilling—may render that person a public figure. This definition in effect opens a back door through which speaker-defendants can rely on the public interest in their speech about private figures to seek constitutional protection, even though the Court explicitly disavowed the "public concern" test for the constitutionalization of dignitary tort in *Gertz*.[176] In fact, it took three cases on the heels of *Gertz* to illustrate the narrowness of the "limited"

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170 Rosenblatt v. Baer, 383 U.S. 75, 85 (1966).

171 *Gertz*, 418 U.S. at 345.

172 *Id.*

173 *Id.*

174 *Id.* (quoting Curtis Publ'g Co. v. Butts, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring in result)).

175 *Gertz*, 418 U.S. at 345.

176 *See, e.g.*, Gerard Magliocca, *Involuntary Public Figures*, CONCURRING OPINIONS (Nov. 13, 2013), http://concurringopinions.com/archives/2013/11/involuntary-public-figures.html (noting that although the Supreme Court in *Gertz* predicted that "'truly involuntary public figures must be exceedingly rare[,]' . . . [t]his statement is highly questionable. There are lots of involuntary public figures today. Children of celebrities. Folks who are exposed to scrutiny on social media. And so on. Yet the Court used this premise (few involuntary public figures) to support the point that involuntary public figures should be treated like voluntary public figures (government officials or celebrities). Things are too well settled, I suppose, to challenge this rule, but its foundation seems weaker.") (internal quotation marks omitted).

and "involuntary" public figure categories. It found in quick succession that the wife of the Firestone Tire heir,[177] a man with ties to Soviet spies,[178] and a scientist who had accepted public funds and been ridiculed by a U.S. Senator[179] were all private figures.

Despite these examples, lower courts applying the Court's definitions in recent years have given a far more capacious meaning to the "public" categories, categorizing as "public" plaintiffs nearly indistinguishable from the wife, criminal suspect, and scientist found private by the Court in the 1970s.[180] This tendency may be attributed to the difficulty in segregating public and private plaintiffs. Courts wishing to avoid reversal on constitutional grounds will default to a "public" categorization, meaning that the path of least resistance is to subject plaintiffs bringing dignitary tort claims with any public dimension to the constitutional tort requirements. Functionally, the "public concern" category rejected in *Gertz* has been subsumed into the "limited purpose" and "involuntary" public figure categories, in large part because the Court's categories were imprecise.[181]

By defining state action very broadly in *Sullivan*, the Court invited itself to legislate a speech-friendly dignitary tort scheme. This scheme established ex ante categories of dignitary tort cases that were to be diverted for constitutional protection. Unsurprisingly, this scheme was riddled with inconsistencies and imprecision. As discussed below,

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177 Time, Inc. v. Firestone, 424 U.S. 448, 455 (1976) ("We hold respondent was not a 'public figure' for the purpose of determining the constitutional protection afforded petitioner's report of the factual and legal basis of her divorce.").

178 Wolston v. Reader's Digest Ass'n, 443 U.S. 157 (1979).

179 Hutchinson v. Proxmire, 443 U.S. 111, 136 (1979) ("Finally, we cannot agree that Hutchinson had such access to the media that he should be classified as a public figure. Hutchinson's access was limited to responding to the announcement of the Golden Fleece Award.").

180 *See, e.g.*, Hatfill v. N.Y. Times Co., 532 F.3d 312, 315 (4th Cir. 2008) (finding anthrax specialist limited purpose public figure for purposes of media coverage on the search for the perpetrator of anthrax mailings to federal officeholders); Zupnik v. Assoc. Press, 31 F. Supp. 2d 70, 72 (D. Conn. 1998) (finding wife of a doctor who received a citation for medical incompetence a public figure "by virtue of her marriage to [the doctor]"); Atlanta Journal-Constitution v. Jewell, 555 S.E.2d 175, 184 (Ga. Ct. App. 2001) (finding a security guard a "media hero" public figure because he granted many interviews and photo shoots).

181 Distinguishing matters of "public concern" from those of "private concern" is no easier than labeling plaintiffs "public" or "private." The Court has acknowledged recently that although protection for speech on matters of "public concern" grows, "'the boundaries of the public concern test are not well defined.'" Snyder v. Phelps, 131 S. Ct. 1207, 1216 (2011) (quoting City of San Diego v. Roe, 543 U.S. 77, 83 (2004) (per curiam)). *See also* Mark Strasser, *What's It To You: The First Amendment and Matters of Public Concern*, 77 MO. L. REV. 1083 (2012) (describing the development of the "matters of public concern" doctrine and arguing that the Court's inconsistent jurisprudence must be clarified).

the horizontal overreach resulting from the state action analysis in *Sullivan* has diminished dignitary tort without noticeably enhancing democratically relevant speech.

V. THE SUPPRESSION OF SUBSIDIARY COMMUNITIES

In addition to using *Sullivan*'s imprudent state action approach to encroach horizontally on the legislative function, the Court used it to overreach vertically and suppress subfederal units of political and social organization. Specifically, the Court has disempowered states by imposing uniform federal tort rules and has disempowered local communities by confining jury authority to decide questions of fact with reference to local norms. Throughout this line of cases, the Court indicated repeatedly that its speech-friendly constitutionalization of dignitary tort was motivated by a fear of cultural norms developed by subsidiary communities and at the state level. While providing constitutional laws of substance and procedure for these torts, the Justices repeatedly expressed skepticism about the parochialism and emotionality of juries and of subsidiary communities generally. Notably, throughout these cases, the community-suppressing agenda has rarely commanded a majority of the Court. As discussed below, each time the Court has rendered a decision privileging the national community, a number of Justices have inevitably complained that the values of state autonomy and community responsiveness were being lost.

The decision in *Sullivan* to devise a constitutional dignitary tort rule and to invalidate any inconsistent state tort schemes was a direct suppression of state authority to develop its own private law. Historically, state defamation doctrines recognized some flexibility to allow for free discussion of public affairs, but each state struck the speech-reputation balance according to its own lights. For instance, pre-*Sullivan*, Massachusetts common law provided that speakers were immune from libel judgments when they engaged in comment and criticism about officeholders, but not when their speech involved false statements of fact.[182] In contrast, Oklahoma common law provided that speakers were privileged when engaging in fair comment and criticism *and* when discussing matters of public interest so long as they did so without malice and honestly believed their words to be true, *except* that statements imputing criminal behavior were not covered by privilege; further, public officials had the burden of proving

182 LAWHORNE, *supra* note 89, at 135.

the problematic statement false.[183] Before dignitary tort was constitutionalized, the right to set a locally appropriate speech-dignity balance was considered a state prerogative. In fact, state treatment of this issue tended to reflect some geographic preferences, with Western states and several states on the East Coast carving out more room for speech about public officials, and states in the Midwest and South following more reputation-friendly rules.[184]

Sullivan's "actual malice" categorical scheme replaced these flexible measures with a blunt tool dictating how juries were to distinguish between injury and message, with knowledge or recklessness acting as a proxy—and an unprecedentedly speech-protective proxy—for intent to injure.[185] This voiding of the fifty individual state schemes and replacement with a uniform federal scheme short-circuited the more typical dialogue between state and federal government, in which the Court articulates a principle and states are given leeway to develop their own rules that conform to the principle. For instance, in the punitive damages context, the Court has evolved over time from articulating general principles towards offering increasingly specific proscriptions. It has not, however, in the course of the cases, wiped out state law on punitive damages in favor of a single federal rule that sets forth the only due process-compliant way to assess punitive damages.[186]

Further, in developing the details of the categorical scheme, the Court declined to delegate to the states any authority. For instance, in *Rosenblatt v. Baer*, the Court considered how to decide who is a public official for purposes of determining when the *Sullivan* actual malice rule applies.[187] It refused to adopt a rule incorporating definitions of "public official" promulgated at the state level. The Court said that definitions devised for "local administrative purposes" were not sufficient to determine the scope of "national constitutional protection."[188] Concurring separately, Justice Potter Stewart urged more

183 *Id.* at 148–49.

184 *Id.* at 210.

185 *Id.* at 280.

186 Justice White pointed out in *Gertz* that external constitutional limits on damage awards deprived the states of "the opportunity to experiment with different methods for guarding against abuses." Gertz v. Robert Welch, Inc., 418 U.S. 323, 397 (1974) (White, J., dissenting). He added that "our constitutional scheme compels a proper respect for the role of the [s]tates in acquitting their duty to obey the Constitution" and absent a finding that the states were shirking that duty, the Court had no warrant to impose per se rules on the states. *Id.* at 404.

187 383 U.S. 75, 77 (1966).

188 *Id.* at 84.

respect for the state role in administering the defamation tort, noting, "The protection of private personality, like the protection of life itself, is left primarily to the individual [s]tates under the Ninth and Tenth Amendments."[189] Justice Abe Fortas agreed, describing the Supreme Court's imposition of a federal "public official" definition as a "Procrustean bed for state law."[190]

The Court's suppression of subfederal organizational units in the dignitary tort context was not limited to state sovereign units. Many of the Court's decisions appear designed to suppress cultural norms that are developed at the more subsidiary level of local social community, often by disallowing jury instructions or overturning jury factfinding. For example, in *Rosenbloom v. Metromedia, Inc.*[191] the Court explained that the "reasonable-man" rule used in most tort cases to represent standards in the relevant locality were "inconsistent with our national commitment under the First Amendment."[192] Justice John Marshall Harlan II complained that overriding state autonomy to set the standard distorted state-federal relations.[193]

In *Monitor Patriot Co. v. Roy*,[194] the Court disallowed an instruction that let the jury find for the plaintiff without proof of *Sullivan* malice for statements that dealt with the private area of a political candidate's life because the instruction "left the jury far more leeway to act as censors" than allowed by the First Amendment.[195] In *Rosenbloom*, the Court held that letting private citizens recover damages based on a "jury determination that a publisher probably failed to use reasonable care" was too speech-prohibitive because publishers would have to "guess[] how a jury might assess" the pre-publication steps they took to ensure accuracy.[196] Justice Thurgood Marshall added that allowing private citizens unlimited access to punitive damages in defamation cases "allows juries to penalize heavily the unorthodox and the un-

189 *Id.* at 92 (Stewart, J., concurring). *See also* Cristina Carmody Tilley, *Rescuing Dignitary Torts from the Constitution*, 78 BROOK. L. REV. 65 (2012) (arguing that the Ninth Amendment provides a rule of construction that requires interpreting the First Amendment to avoid gratuitous impairment of rights that are unenumerated, but nevertheless retained, including rights to seek compensation via tort for infringements of individual dignity).

190 *Rosenblatt*, 383 U.S. at 101 (Fortas, J., dissenting).

191 Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971).

192 *Id.* at 49–51. Note that the holding of *Rosenbloom* was later disavowed in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346 (1974).

193 *Rosenbloom*, 403 U.S. at 62–63 (Harlan, J., dissenting).

194 Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971).

195 *Id.* at 275.

196 *Rosenbloom*, 403 U.S. at 50.

popular [speech] and exact little [punishment] from other[, more uncontroversial, speakers]."[197]

Later, in *Greenbelt Cooperative Publishing Association. v. Bresler*, the Court again suppressed subsidiary community values when it overturned a jury finding that a newspaper article saying a local property owner was trying to "blackmail" the city in a land deal was a defamatory imputation of criminal behavior. [198] The Court held that no reasonable reader would have understood the word that way, despite the fact that each member of the jury had done just that.[199] Concurring, Justice Byron White wondered how the Court had "superior insight with respect to how the word 'blackmail' would be understood by the ordinary reader in Greenbelt, Maryland."[200]

In sum, the *Sullivan* line of cases reveals a steady vertical overreaching by the Court, replacing state tort law rules with uniform federal rules and reaching beyond state polities into subsidiary communities represented by juries to invalidate jury instructions that give them leeway to apply local norms and to reverse their findings of fact. If in *Sullivan* the Court had defined state action prudentially, to include just the verdict, it would have been restricted to overturning the verdict and warning state courts and juries against imposing local norms on national speech in the future. That path would have relegated the Court to a mere supervisory role while state courts and juries confronted the increasingly common local-versus-national fact pattern on an incremental basis. Instead it transformed the dignitary torts into a subcategory of constitutional law and supplied a set of

197 *Id.* at 84 (1971) (Marshall, J., dissenting).

198 Greenbelt Coop. Publ'g Ass'n v. Bresler, 398 U.S. 6, 7–10 (1970).

199 *Id.* at 8, 14.

200 *Id.* at 22 (White, J., concurring). This distrust of juries extended into the IIED sphere as well. The Court in *Hustler Magazine, Inc. v. Falwell* held that the "outrageousness" standard for the IIED tort was so subjective that jurors could "impose liability on the basis of [their] tastes or views, or perhaps on the basis of their dislike of a particular expression," thus justifying application of the actual malice guard rails to IIED suits brought by public figures. 485 U.S. 46, 55 (1988). Similarly, in *Snyder v. Phelps*, the Court predicted that in cases involving polarizing social issues, "a jury is 'unlikely to be neutral with respect to the content of [the] speech . . . .'" Snyder v. Phelps, 131 S. Ct. 1207, 1219 (2011) (alteration in original) (quoting Bose Corp. v. Consumers Union of the U.S., Inc., 466 U.S. 485, 510 (1984)). The risk of jury bias was not permissible, it reasoned, because "insulting, and even outrageous" speech must be "tolerate[d]" to provide sufficient First Amendment "breathing space" for speech. *Snyder*, 131 S. Ct. at 1219 (internal quotation marks omitted). This possibility justified overturning the jury verdict without applying the actual malice test to try to distill out intent to injure from intent to circulate a message. *Id.* (It has been pointed out elsewhere that an intent test turning on falsehood is not well-suited for IIED, which is an action for behavior that is outrageous whether it involves true or false statements.)

rules, flattening subsidiary community norms and indirectly delegitimizing subsidiary community as a legally relevant unit of social organization.[201] This scheme was celebrated in the short-term as a vindication of liberal democratic values that protected nationally significant speech while preserving some tort recourse for the most injurious or insignificant speech. But the early promise of *Sullivan* has withered. This failure can be traced back to the horizontal and vertical overreaching that stemmed from the Court's imprudent state action analysis in the case.

VI. THE UNINTENDED CONSEQUENCES OF *SULLIVAN*

The Court's categorical public law/private law tort scheme held great early promise—Alexander Meiklejohn famously declared *Sullivan* "an occasion for dancing in the streets."[202] But the *Sullivan* scheme has inadvertently weakened tort without galvanizing the kind of civically useful speech the Court seemed to anticipate.

First, speech the Court originally intended to divert for private law treatment has steadily been shifted into the public category because online speech is making the public-private divide obsolete. As a result, plaintiffs injured by democratically insignificant speech are functionally less protected than the Court intended when it overreached horizontally into the legislative function to devise its constitutional matrix for these causes of action. Second, because the vertical imposition of national values has reduced local courts' and juries' autonomy to respond to social media injuries such as revenge porn or mug shot extortion sites, the Court has drastically changed the concept of tort "duty" that individuals are understood to owe to others. The categorical scheme, and its ever-wider application, signals that behavior thought for centuries to be unacceptable is, in fact, unremarkable. Finally, it is not at all clear that the shrinking of tort has been paired with an expansion of the news coverage the Court intended to incentivize. Hard news and investigative journalism has dramatically declined in the half-century since *Sullivan*.

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201 In other areas of the law, doctrine has accommodated community-privileging principles and liberal democratic principles simultaneously. *See, e.g.*, Lea Brilmayer, *Liberalism, Community, and State Borders*, 41 DUKE L.J. 1, 26 (1991) (noting that general jurisdiction "reflects assumptions about the importance of community membership" while specific jurisdiction reflects liberal democratic assumptions that authority for state intervention is derived from the harm principle).

202 Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 221 n.125 (1964).

A. The Court's Constitutional Legislation has Grown Obsolete

State common-law lawmaking, particularly in the tort context, is marked by flexibility and incremental evolution over time in response to changed circumstances and changing community mores.[203] Historically, a robust private law of tort has provided an efficient ex post responsive signal about the proper use of innovations that are too new or too difficult to treat ex ante via statute (such as automobiles[204] or toxic torts[205]). The Court's horizontal overreaching to legislate a categorical scheme for defamation, privacy, and IIED has prevented tort from bringing its unique jurisprudential benefits to bear in the age of electronic speech and social media. By imposing fixed federalized categories to assign value to speech and dignity, the Court has thwarted the common law's ability to adapt to changed circumstances.

At the same time, electronic speech and social media have disrupted the traditional speech configurations that were the basis of the Court's "public," "private," "knowing," and "negligent" categories. Speech transmitted over Facebook, Twitter, YouTube, Instagram and on websites and blogs is performative. It is transmitted by or about public officials, institutional celebrities, and obscure individuals, and then forwarded, followed, retweeted, liked, and shared among these same constituencies.[206] These platforms render the public private and

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203 Jay Tidmarsh, *A Process Theory of Torts*, 51 WASH. & LEE L. REV. 1313, 1331 (1994) (describing tort as "being in perpetual process").

204 MacPherson v. Buick Motor Co., 111 N.E. 1050, 1053 (N.Y. 1916) (abolishing the requirement of privity as a basis for product liability causes of action); *see, e.g.*, Sally H. Clarke, *Unmanageable Risks:* MacPherson v. Buick *and the Emergence of a Mass Consumer Market*, 23 LAW & HIST. REV. 1, 4–5 (2005) (noting that *MacPherson* was a response to the emerging mass market in which automakers were selling vehicles before perfecting their technology in order to capitalize on growing demand).

205 *See, e.g.*, Rustad, *supra* note 131, at 475.

206 *See, e.g.*, Lior Jacob Strahilevitz, *A Social Networks Theory of Privacy*, 72 U. Chi. L. Rev. 919 (2005). Strahilevitz questions the soundness of a normative approach to determining whether information is private, because "individuals and communities will disagree substantially about what information is more private and what is more public" and because deputizing judges to make that normative assessment poses a "real danger that the standards of propriety that they introduce into the law will clash with attitudes that reflect changing cultural beliefs and varied preferences among the citizenry[,]" especially in response to "changes in technologies or social norms." *Id.* at 931 & n.30. He urges instead an empirical approach to distinguishing between the public and the private using social network theory to reach an objective conclusion about what extent of information sharing can be expected to follow particular disclosures. *Id.* at 919, 921. The scope of sharing within one's network can be considered "private" whereas sharing beyond that scope is considered "public." It is not necessary to weigh in on the relative benefits of a normative or empirical approach to distinguishing between public and private to appreciate that

the private public, dissolving the boundary lines that are the heart of the Court's categorical scheme.

Several examples illustrate the obsolescence of these "public" and "private" categories. In 2011, a class of Facebook users sued the social media service over its "Sponsored Story" program.[207] Prior to settlement of the suit and discontinuation of the program,[208] Facebook had used participant actions such as "liking" a product or event to generate faux news stories about the user's endorsement of the product or event.[209] The stories were actually considered advertising and were paid for by the entity that sold the product or sponsored the event, to be shared with any of the user's friends who were able to see the original "Like" or "Check In."[210] Defending against the class suit for misappropriation of their names and likenesses, Facebook invoked the constitutional protection for matters of "legitimate public interest," arguing that the relevant "public" in the Facebook configuration would be "the audience with whom the User chose to share the content in the first place[,]" meaning that the Sponsored Story is a matter of public interest and thus sufficiently newsworthy to fall within an exception to the relevant California misappropriation statute.[211]

The distortion of the "public interest" category is further illustrated by *Stayart v. Google, Inc.*, brought by Wisconsin woman Beverly Stayart after finding that her name had inexplicably become linked with erectile dysfunction products in the Yahoo and Google search engines.[212] Stayart's initial suit against Yahoo for violations of the Lanham Act was dismissed because the court found she had no commercial interest in her name.[213] She subsequently sued Google for misappropriation and was again denied relief, this time because her initial suit against Yahoo meant that her association with ED drugs was now considered a matter of "public interest[,] primarily because [she] has made it one" by suing first Yahoo and then Google.[214] In the context of electronic speech, it is plausible to argue

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identifying the boundary between the two is a task complicated by the continued growth of social media networks.

207 *See* Facebook Inc.'s Motion to Dismiss Second Amended Class Action Complaint at 2, Fraley v. Facebook, Inc., 830 F. Supp. 2d 785 (N.D. Cal. 2011) (No. 11-CV-01726 LHK).

208 Somini Sengupta, *To Settle Lawsuit, Facebook Alters Policy for Its Like Button*, N.Y. TIMES, June 22, 2012, at B2.

209 *See* Facebook Inc.'s Motion to Dismiss Second Amended Class Action Complaint, *supra* note 207.

210 *Id.*

211 *Id.* at 21.

212 710 F.3d 719, 721 (7th Cir. 2013).

213 Stayart v. Yahoo! Inc., 623 F.3d 436, 440 (7th Cir. 2010).

214 Stayart v. Google, 710 F.3d at 723.

today that these plaintiffs are involved in matters of public concern simply by virtue of speaking online, and thus given reduced entitlement to reputation, privacy, or emotional well-being.[215]

Notably, in both *Fraley* and *Stayart* the objectionable electronic content was generated not by any individual at Facebook, Yahoo, or Google, but by algorithms. The increasing use of algorithms to generate content on these platforms makes the task of sifting "knowing or reckless" language choices from merely "negligent" language choices complex if not impossible. Increasingly, media and social media actors use automation and coding to pull bits of information to generate so-called "click bait."[216] This reality calls into further question the current viability of the constitutional common law scheme, whereby First Amendment protection for allegedly tortious speech fluctuates with the scienter of the speaker. Knowing or reckless circulation of falsehoods (or privacy-invading or outrageous speech) is less protected while merely negligent circulation of problematic speech is more protected. Commentators have recently begun to consider whether algorithms should be considered speech, state regulation of which would be covered by the First Amendment.[217] They have not yet turned to the more complex question of how to determine the level of culpability represented by companies devising programs to generate automated content or by individual coders executing corporate content objectives. At any rate, the increasing use of algorithms to produce content is outpacing the Court's constitutional categories.

The Court could not have foreseen that the revolution in speech technology would uncouple its proxy categories from the underlying legal values they were designed to represent. Nevertheless, technology has evolved so that the public and private figure categories no

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215 *See, e.g.*, Hibdon v. Grabowski, 195 S.W.3d 48, 60–63 (Tenn. Ct. App. 2005) (holding that a jet ski hobbyist who posted to an internet news group about his jet ski customizing business, and who was later mentioned in jet ski magazines, was a public figure because his posts to the website were a voluntary entry into public controversy).

216 *See, e.g.*, Alex Halperin, *This Man Decides What You Read*, SALON (Oct. 27, 2013, 11:00 AM), http://www.salon.com/2013/10/27/this_man_decide_what_you_read (describing the media practice of generating provocative "click-bait headlines . . . unnecessary slideshows . . . [and] other chicanery to inflate page views" and entice advertisers, based on data from engagement services that track how specific words drive clicks and extend the time spent on page views).

217 *See* Stuart Minor Benjamin, *Algorithms and Speech*, 161 U. PA. L. REV. 1445, 1447 (2013) ("Instead, I will look to broadly accepted sources and forms of legal reasoning—which in the First Amendment context means primarily Supreme Court jurisprudence—and consider whether those sources lead to the conclusion that algorithm-based outputs are speech for First Amendment purposes.").

longer synchronize with the democratic relevance of speech. As a result, democratically irrelevant (and injurious) speech must increasingly be sifted into the "public" category,[218] where "dice are loaded" against plaintiffs.[219]

B. The Court's Suppression of Subsidiary Community Values has Changed the Notion of "Duty" in Dignitary Tort

One writer has said that "'defamation law's symbolic function is even more vital than its instrumental one' because it is a 'deliberate public expression and affirmation of social codes and values.'"[220]

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218 In this respect, the *Sullivan* line of cases is an example of what has been described as "interest creep," a phenomenon in which courts' previous acceptance of a category of government interests leads to the invocation of that interest in an increasingly vague and undocumented fashion to justify particular outcomes without diligent judicial review. Dov Fox, *Interest Creep*, 82 GEO. WASH. L. REV. 273, 273–276 (2014). Interest creep has been used to describe the incremental expansion of state interests such as national security or the protection of potential life that are proffered to justify legislation and the inverse contraction of judicial scrutiny when these state interests are invoked. In the context of dignitary injuries, however, the interest creep appears to have proceeded in the opposite direction, with courts invoking free speech interests in an increasingly sweeping fashion in order to avoid giving weight to the state interest in injury compensation for dignitary torts. For instance, in *Shulman v. Grp. W Prods.*, 955 P.2d 469, 488 (Cal. 1998), the California court held that airing secret camera footage of a woman talking to emergency responders during her rescue from a car accident was not actionable as a public disclosure of private facts tort because the footage was relevant to the public issue of highway safety. Contrast this result with the Court's grudging recognition of a constitutional protection for a news report of a deceased rape victim's name, which the Court said was required only because it was provided to the reporter by a court official during the course of a criminal trial against the perpetrator, but that otherwise would not have qualified as a matter of public concern. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 495–97 (1975).

219 Lidsky, *supra* note 140, at 46. The plaintiff's challenges (and the likelihood of speech-privileging interest creep) are amplified by the unique procedural posture of tort cases. Private individuals, rather than the state, are the real parties in interest in these cases. So unlike constitutional challenges to legislative burdens on speech, where the state is a litigant, in judicial review of tort results burdening speech, the state is not on hand to defend its common-law tort principles. The plaintiff is not well-positioned to defend the state's interest in a dignitary tort scheme, or in the specifics of that scheme. This ill fit is exacerbated by the common-law nature of tort, where state "law" has not been reduced to a single definitive text (like a statute) but is instead diffused over a series of court opinions addressing variable fact patterns. Further, these "laws" typically feature open-textured terms interpreted by juries that have left behind no record of the rationales for their verdicts. *See, e.g.*, Anderson, *supra* note 117, at 767–771; *id.* at 770 ("The point is only that a court's role is unusually complex when it is both the sole state actor and the decision-maker that is asked to decide whether the state action violates the First Amendment."). This is one reason the traditional strict scrutiny/compelling interest regime for reviewing speech laws has not been squarely applied to speech torts.

220 Haven Ward, *"I'm Not Gay, M'Kay?": Should Falsely Calling Someone a Homosexual Be Defamatory?*, 44 GA. L. REV. 739, 766 (2010) (quoting John C. Watson, *Defamation by Racial Misidentification: A Study of the Social Tort*, 4 RUTGERS RACE & L. REV. 77, 78 (2002)); Joseph R.

Consequently, providing private law recourse for the kind of "moral injuries" effected by dignitary torts reasserts subsidiary community behavioral norms. Conversely, formal legal rules limiting that recourse also shape norms, but in the other direction. The transformation of private dignitary torts tilted towards plaintiffs into public law causes of action tilted against plaintiffs has signaled, in effect, that speakers no longer owe a duty of care to the subjects of their speech. Ironically the informal, low-cost signal provided by dignitary tort law waned just as a new type of community—the virtual community—began to populate the internet. The absence of an ex post private law mechanism to allow for the development of values within these online communities has led to a widespread view that no holds are barred when it comes to internet speech.[221]

Defamation, IIED, and privacy torts carry messages quite apart from the actual speech articulated by the tortfeasor; "[t]hey are ways a wrongdoer has of saying to us, 'I count but you do not,' 'I can use you for my purposes,' or 'I am here up high and you are there down below.'"[222] The failure to correct that message and reassert relational equality between tortfeasor-speaker and plaintiff-victim "says, in effect, that [the victim] can be treated in this way, and that such treatment is acceptable."[223]

The *Sullivan* line of cases says that as a matter of constitutional law, dignitary tort victims who cannot prove themselves purely private figures may be treated this way, and that such treatment is acceptable. Pre-*Sullivan* norms that falsehoods about private individuals could be treated as per se injurious or a basis for punitive damages,[224] that

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Gusfield, *On Legislating Morals: The Symbolic Process of Designating Deviance*, 56 CAL. L. REV. 54, 57 (1968) ("A governmental agent's act may have symbolic import because it affects the designation of public norms. The courtroom decision or the legislative act often glorifies the values of one group and demeans those of another.").

221 *See, e.g.*, Cohen v. Google, Inc., 887 N.Y.S.2d 424 (N.Y. Sup. Ct. 2009) (describing an anonymous blogger who in light of a would-be defamation claim argued that the plaintiff would likely fail as a matter of law because "Internet blogs serve as a modern day forum for conveying personal opinions, including invective and ranting, [so that online statements] . . . when considered in that context, cannot be reasonably understood as factual assertions").

222 Scott Hershovitz, *Tort as a Substitute for Revenge*, *in* PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS 86, 93 (John Oberdiek ed., 2014) (quoting Jeffrie G. Murphy, *Forgiveness and Resentment*, *in* JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 25 (1988) (explaining the messages implicit in moral injury)).

223 Hershovitz, *supra* note 222, at 94 (quoting Pamela Hieronymi, *Articulating an Uncompromising Forgiveness*, LXII PHIL. AND PHENOMENOLOGICAL RES. 529, 530 (2001)).

224 Gertz v. Robert Welch, Inc., 306 F. Supp. 310, 311 (N.D. Ill. 1969) ("Because plaintiff's complaint sufficiently avers a libel per se, actual and punitive damages may be recovered without pleading special damages.").

speech even on matters of public concern could not be expressed so outrageously that severe emotional consequences were certain to follow,[225] and that fictionalized accounts of a person's private life were compensable,[226] have been muffled considerably by the imposition of constitutional rules that prevent juries from awarding damages for injuries that result when the norms are ignored.

The importation of these speech-privileging norms on electronic platforms has had a demonstrably corrosive effect in a number of settings. For instance, cyberbullying that is difficult to treat in tort—cybercitizens are now arguably "public" for legal purposes—has led to a well-publicized number of the teen and tween suicides.[227] The blasé attitude of some digital natives about the duty to exercise care when using these platforms was demonstrated in the aftermath of a 2013 tween cyberbullying suicide in Florida.[228] A fourteen-year-old girl admitted that she had been one of the instigators bullying a twelve-year-old who eventually killed herself. After the suicide, the instigator posted on Facebook that "Yes, [I know] I bullied Rebecca and she killed herself [but] IDGAF [I don't give a f***] . . . ."[229] Similarly, revenge porn magnate Hunter Moore responded to criticisms of his sites in an interview by asking, "Why should I care? It's not my life."[230] To the extent that tort indicates to the community what behavior is undesirable, disabling the dignitary torts indicates to the community that careless, injury-inflicting speech is no longer undesirable. The weakening of the tort-signaling mechanism has arguably contributed to the failure of virtual communities to develop strong norms against injurious speech.

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225 Falwell v. Flynt, 797 F.2d 1270, 1276 (4th Cir. 1986) ("We need not consider whether the statements in question constituted opinion, as the issue is whether their publication was sufficiently outrageous to constitute intentional infliction of emotional distress.").

226 Time, Inc. v. Hill, 385 U.S. 374, 384 (1967) ("[T]he statute gives him a right of action when his name, picture, or portrait is the subject of a 'fictitious' report or article.").

227 Hershovitz, *supra* note 222, at 94 (quoting Hieronymi, *supra* note 223, at 546); *see, e.g.*, Lizette Alvarez, *Felony Counts for 2 in Suicide of Bullied 12-Year-Old*, N.Y. TIMES, Oct. 16, 2013, at A20.

228 *She Killed Herself 'But IDGAF'; 'Bullies' Busted*, N.Y. POST (Oct. 15, 2013, 5:26 PM) http://nypost.com/2013/10/15/she-killed-herself-but-idgaf-i-dont-give-a-f-bully-teen-charged-in-girls-suicide/.

229 *Id.*

230 Carol Kuruvilla, *Revenge Porn Curators Defend Their X-Rated Websites*, N.Y. DAILY NEWS (Feb. 8, 2013, 3:53 PM), http://www.nydailynews.com/news/national/minds-revenge-porn-curators-aricle-1.1259114.

C. The Failure of Sullivan *to Incentivize a Vigorous Press*

Finally, it is far from clear that the dignitary costs following from the constitutionalization of these torts has been offset by the speech-enhancing benefits the Court envisioned. The *Sullivan* scheme emerged just as the business model for news organizations evolved. Families that had long run news organizations as private concerns began to take their companies public, assuming a fiduciary duty to maximize profits for shareholders. When this change in financial incentive structures was coupled with the Court's provision of a constitutional rule protecting careless reporting about public figures, one result was a noticeable shift in institutional emphasis from hard news reporting to soft reporting on celebrities and personalities.

In the early 1960s, just as the Court was remaking defamation law, the market was remaking the paradigmatic news organization. Historically, newspapers and local television and radio stations were organized as closely held corporations, often owned by local families for many generations.[231] These news institutions were as concerned with civic welfare as they were with news coverage.[232] "Beginning in the 1960's, in order to generate capital to finance acquisitions, to reduce indebtedness, and to fend off hostile takeover attempts, newspaper companies went public. Prominent among these were Dow Jones, Gannett, Gray Communication, Lee Enterprises, Media General, New York Times, and Times Mirror [and the Washington Post]."[233]

This ownership change shifted the organizations' foremost responsibility from serving as community institutions to maximizing shareholder wealth. The products that emerged from these business models "underproduce[d] news that enhance[d] citizens' political interest, knowledge, and sophistication, in large part because the commercial pressure on suppliers is to attract the largest audience possible. The average audience member does not seek complex, sophisticated information, and the mass media must target that average member."[234]

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231 GILBERT CRANBERG ET AL., TAKING STOCK: JOURNALISM AND THE PUBLICLY TRADED NEWSPAPER COMPANY 24–46 (2001).

232 *See, e.g.*, KATHARINE GRAHAM, PERSONAL HISTORY 185–86 (1997) (recounting an incident in which Washington Post publisher Philip Graham convened White House officials in his office to hear from a reporter about a race riot that had broken out at a local pool and he told the officials the story had been slated for front-page coverage, but offered to kill the piece if they would act to quell the violence and integrate the pool).

233 CRANBERG, *supra* note 231, at 27.

234 CRANBERG, *supra* note 231, at 132; GRAHAM, *supra* note 232, at 441–42.

The evolution in news product following *Sullivan* is reflected in a 1999 study comparing the content of leading U.S. daily newspapers in 1963–64 with their content in 1999. As a percentage of total newshole, sports and features have risen from 39% to 47%, and hard news has dropped from 35% to 24%.[235]

Further, the constitutional protections that *Sullivan* introduced for low-care reporting have been observed to work primarily in favor of low-care news organizations producing "soft" news, rather than as a shield for high-care news organizations focusing on envelope-pushing "hard" news. One economist has summarized that

> the principal beneficiaries . . . on balance may be those media enterprises that use relatively little care in reporting, succeeding more by virtue of their style and capacity to shock, titillate, or intrigue consumers. At first blush, this may seem odd: these enterprises are likely both to generate a substantially greater proportion of false statements and lose a substantially greater proportion of cases than will high-care defendants under a negligence or strict liability test . . . . But the actual malice rule and precedents implementing it should confer a substantial benefit on these media in aiding their escape from liability. As the proportion of judgments against low-care media enterprises declines, the incidence of suit against them should fall correspondingly . . . . Low-care media, thus, probably face lower total costs—award costs, non-award costs, and defense costs—after [*Sullivan*] and may respond by decreasing care or increasing the amount of speech activity. To the extent that these enterprises' coverage is skewed toward some group of public figures—for instance, entertainers—those individuals are likely to be subject to more, or less accurate, critical comment after [*Sullivan*].[236]

In sum, the Court's ambitious goal in *Sullivan* and its progeny—to incentivize fearless press coverage of democratically relevant issues while preserving a legally protected interest in reputation—has not come of age as intended. The Court deployed its alchemic state action analysis to produce more of a prized value—speech—while attempting to preserve a tort channel to vindicate individual dignity. Instead, the costs to dignity have been steep and the speech payoff has been slight. The Court's categorical scheme, when applied to an electronic speech environment, has funneled into the "public law" category a great deal of speech the Court originally meant to retain in the "private law" category. Moreover, the abrupt makeover of dignitary tort from a plaintiff-protective cause of action to a defendant-

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235 Carl Sessions Stepp, *State of the American Newspaper: Then and Now*, AM. JOURNALISM REV., Sept. 1999, http://www.ajrarchive.org/article.asp?id=3192.

236 Ronald A. Cass, *Principle and Interest in Libel Law after* New York Times: *An Incentive Analysis*, *in* THE COST OF LIBEL: ECONOMIC AND POLICY IMPLICATIONS, 101–02 (Everette E. Dennis & Eli M. Noam eds., 1989).

protective cause of action has signaled to speakers that they no longer owe a duty of care to the subjects of their speech. Meanwhile, the constitutional speech subsidy provided by *Sullivan* has combined with the profit-oriented model of newly public media companies to yield more low-care reporting on lucrative "soft news" topics and less constitutionally protected reporting on the kind of democratically relevant "hard news" the Court envisioned when crafting its *Sullivan* scheme.

VII. MODERNIZING DIGNITARY TORT

The Court's imprudent state action analysis in *Sullivan* set in motion a dysfunctional law of dignitary tort. In contrast, the Court's prudential approach to state action may point the way to recalibrating dignitary tort law without forfeiting the central message of the case: subsidiary communities may not impose their values on the national community.

The prudential approach to state action limits the Court's response to unconstitutional private law adjudication; either the Court can announce a rule prohibiting the enforcement of certain kinds of private law arrangements (as in *Shelley*)[237] or it can remand problematic cases one-by-one with directions to reapply the private law rules in keeping with constitutional values (as in *NAACP v. Claiborne Hardware*).[238] The former approach is not a practical way to constitutionally confine the private law of defamation—unlike contracts which may be entered into without court involvement, complaints of defamation require judicial adjudication. However, the latter approach to unconstitutional private law verdicts is promising. The promise of *Sullivan* could be redeemed by shifting away from the Court's categorical scheme and instead emphasizing a constitutional rule that externalizing subsidiary community values onto other communities is a speech abridgment. Failure to prevent verdicts that do externalize subsidiary norms would lead to reversal or remand *of those verdicts*—the relevant state actions—but would not occasion a federal judicial imposition on local norms.

Articulating this constitutional principle would allow states to adapt their private law rules or procedures to avoid such results. It would simultaneously prevent the Court from dictating the content of state law. Finally, it would relegitimize subsidiary communities as a

237 334 U.S. 1 (1948).

238 458 U.S. 886 (1982).

legally relevant unit of social organization. Recognizing that subsidiary communities have the authority to organize their own affairs could revive dignitary tort as a low-cost, ex post response to injurious speech. This revival could be especially helpful in addressing online behavior such as revenge porn, mugshot extortion, and cyberbullying. Online injuries inflicted within subsidiary virtual communities would be met with ex post tort verdicts signaling behavioral norms, which could preempt the need for broad ex ante criminal legislation requiring expensive and onerous state enforcement.

A. The Multiplicity of American Communities

Sociologically, "community" may be marked by either a common nucleus of practice or a common geographic circumstance. Using this definition, one can identify at least three distinct types of communities prevalent in the United States today: subsidiary geographic communities, subsidiary virtual communities, and a single national geographic community.

Subsidiary geographic communities, *Gemeinschaft* communities, have traditionally been the legally relevant unit for applying the tort standard that determines whether speech is injurious (whether it would deter third parties from association in the defamation tort, whether it is outrageous in the IIED tort, or whether it is highly offensive to a reasonable person in the public disclosure of private facts tort). For instance, in one well-known example, a jury drawn from a Jewish community found defamatory a mistaken listing of a kosher butcher shop in an advertisement for bacon purveyors.[239]

Virtual communities have the capacity to serve the same norm-giving role in today's dignitary tort context. Like geographic communities, which share common local circumstances, these groups share a common nucleus of practice. Community values for tort purposes have been defined as "the principles or standards of fairness and propriety with which the community operates. These values are not necessarily based on any normative theories of justice or morality; they are culturally determined through the community's practices and shared beliefs."[240] Participants in online platforms with recognized behavioral norms belong to a community, and typically invest time in developing and maintaining norms for communicating on

239 *See* Braun v. Armour & Co., 254 N.Y. 514 (1930).

240 Tidmarsh, *supra* note 203, at 1354.

the platform.[241] For instance, the speech and interpersonal behavioral norms that apply on Grindr, an application used primarily by gay, bisexual, and bi-curious men to locate other community members in close proximity, would likely be very different than those on Club Penguin, a multiplayer online game that involves a virtual world designed for children and tweens. The groups of people using these online communications devices each share common practices online, with a shared set of principles to govern interaction there. Thus, each can be defined as its own community.

Finally, as the Court intimated in *Sullivan*, the nation is now far more cohesive than it was at the founding.[242] Because of nationwide communications mechanisms and easy interstate travel, Americans share many more cultural reference points than they did two centuries ago. Further, the Reconstruction Amendments explicitly forged a shared legal baseline for purposes of several government endeavors, including voting, protection of the laws, and the provision of due process associated with deprivations of life, liberty or property. Thus, engaging in voting, seeking protection of the law, and the valuing of life, liberty, and property are nationally common practices. Further, the interconnectedness of daily life—via computer communication, national television news, national newspapers, interstate travel, and the like, means that the entire nation can be said to share a common geographic circumstance in a way that was not true at the Founding. In short, the entire nation comprises a single *Gesellschaft* community.

B. Applying an Anti-Externalization Rule to Twenty-First Century Communities

Constitutional dignitary tort law can move away from the Court's failed categorization scheme while obeying *Sullivan*'s admonition against externalizing subsidiary community norms onto other communities. If the concept of community were disambiguated to acknowledge the multiplicity of communities in the twenty-first century—geographically subsidiary communities, virtually subsidiary communities, and a single national community—the Court could mediate speech-tort conflicts without relying on complex and obsolete categories.[243] Instead, the constitutional rule would simply pro-

241 *See, e.g.*, Catalina Danis & Alison Lee, *The Negotiation of Norms in an Online Community* (IBM TJ Watson Research Ctr., Working Paper).

242 *See, e.g.*, RONALD D. BROWN, THE TRANSFORMATION OF AMERICAN LIFE 1600–1865, at 112–23 (1976).

243 Scholars have suggested in other contexts that sensitivity to differently "sized" communities could justify varying levels of constitutional intervention into private behavior. *See,*

hibit judicial enforcement of verdicts that externalize subsidiary community norms. When speech and injury take place entirely within a single subsidiary committee, private law tort treatment is warranted and the subsidiary community is free to develop and apply its own norms free from constitutional oversight. In contrast, when speech and injury take place within the national community, or involve a clash between subsidiary communities or between a subsidiary community and the national community, juries would employ traditional private law tort rules with the constitutional backstop that courts may not enforce judgments externalizing a subsidiary community's norms outside its own boundaries.[244] This rule would achieve the Court's primary goal of protecting nationally relevant speech, but not by delegitimizing the subsidiary community as a legally relevant unit of social organization, and not by signaling that dignitary interests are per se lesser than speech interests. Further, where the subsidiary community at issue is a virtual community that employs injurious speech norms—such as a revenge porn website or mugshot extortion site—the rule would require those minority norms to give way if the national consensus were that the practices were primarily injurious rather than primarily message-oriented. The current categorical scheme is apt to reach the opposite result because any plaintiff featured on such a site is likely to be categorized as a public figure required to clear a higher constitutional hurdle.

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e.g., Mark D. Rosen, *Establishment, Expressivism, and Federalism*, 78 CHI.-KENT L. REV. 669, 669–70 (2003) (proposing that application of the Establishment Clause should fluctuate in proportion to the level of government that is acting; be it federal, state or local). Tailoring Establishment Clause jurisprudence in this way would capitalize on the "underutilized flexibility" of federalism and would respect community choices about religion and morality at the most highly subsidiary, compact levels (such as Orthodox Jewish enclaves) while preserving the national constitutional right to be free of establishment. *See generally id.*

244 In practice, it might be challenging to operationalize the adjudication of dignitary tort cases pursuant to this principle. At some point, the court would have to determine the nature of the community or communities within which the allegedly defamatory speech circulated to identify whether a verdict would have the potential to externalize community norms. Further, as the case progressed, the parties might have to introduce evidence on the relevant community norms so that a jury would have some basis for determining defamatoriness, outrageousness, or offensiveness and so that the court would have some basis for determining the extent of any mismatch. Those challenges are likely surmountable; further, merely changing the relevant constitutional rule in these cases has the power to signal a revived role for tort concepts of duty and to sensitize speakers to the relational significance of their words.

1. Anti-Externalization in the Intracommunity Context

This "anti-externalization" rule would yield a more dignity-protective outcome than the Court has allowed in intracommunity cases to date. For instance, it would have led to a different result where a businessman in Greenbelt, Maryland sued the local paper for calling him a "blackmailer" in his dealings with the Greenbelt government.[245] The jury decided the word could be understood as an imputation of criminality, was therefore defamatory, and awarded damages.[246] The Court rejected the *Greenbelt* jury's decision about how the average local reader would understand the word, and imposed a national rule that blackmail *cannot* be understood to impute criminality.[247] Ironically, this outcome could actually be said to impose moral values top-down as one would expect from a *Gemeinschaft* community. A *Gesellschaft* community that is consistent with the Court's liberal democratic theory interpretation of the First Amendment would be expected to allow different interpretations of the word to flourish in subcommunities, without imposing a national interpretation when national speech is not involved.[248] The proposed rule, allowing private law treatment of intracommunity speech and injury, would yield that result.

The anti-externalization rule would apply equally well in the online context. It does not automatically denominate online speech as "public" just because it is theoretically accessible to a wide number of people. Instead, if speech takes place within an online community with agreed upon norms, it would be subject to private law treatment and the community would be allowed to apply its own norms. For instance, Instagram might be identified as a subsidiary virtual commu-

245 *See* Greenbelt Coop. Publ'g Ass'n v. Bresler, 398 U.S. 6, 7–8 (1970).

246 *Id.* at 8.

247 *Id.* at 14–15.

248 *See, e.g.*, Post, *supra* note 137, at 504 (explaining the view that the First Amendment is designed to create an antihegemonic domain, one result of which is to "prevent law from resolving cultural conflict within public discourse by enforcing cultural norms"). It is not implausible to contend that the Supreme Court's provision of the meaning of a word for all time, and for the whole nation, is more of a legal resolution of a cultural conflict than for a local jury to devise the meaning of the word for purposes of a single, non-binding tort case. In contrast, some might argue that leaving local communities entirely to their own devices in determining the significance of speech increases the possibility that homogeneous communities will punish dissenters for unpopular speech. While possible, the "falsehood" requirement of the tort is a backstop preventing vindictive juries from silencing adversaries at will. Further, the threat of a speech "chill" posed by public law prohibitions is qualitatively different than the threat posed by private law causes of action that require an injured plaintiff willing to sue and that results at most in an ex post money damage award (often covered by insurance).

nity because its users generally adhere to a common nucleus of shared practices. In one recent example, a rash of so-called "funeral selfies" on Instagram has occasioned some pushback, with many participants complaining that pictures trivializing funeral rites are out of keeping with the app's culture.[249] Consequently, a message appended to an Instagram post might be considered "outrageous" and the basis for an IIED claim by the injured Instagram user. Instagram's norms could be applied to treat the contested speech as a tort without imposing the site's norms on the national community or on other Internet communities.[250] In these intra-virtual community cases, the Constitution need not be invoked to prevent morally or geographically distinct communities from imposing their values on conflicting communities within the state or nation. Further, cohesive communities would have latitude to make normative judgments ex post about whether external injuries imposed via speech need to be reinternalized by the defendant community member through a tort verdict.

2. Anti-Externalization in the Intercommunity Context

Dignitary torts that take place across more than one community are more complex. In those cases, there is a legitimate fear that where the plaintiff belongs to an insular community, a tort suit is an attempt to impose that community's norms outside its own boundaries, thus inhibiting speakers who are contributing to a national dialog. Conversely, when the plaintiff belongs to the "national" community and sues for injuries inflicted by a defendant abiding by his insular community norms, there is a legitimate fear that the ostensibly "public" nature of the speech may prevent a tort verdict that would protect a nationally agreed upon dignitary value.

In these cases, the proposed constitutional rule would prohibit the imposition of insular norms onto the nation as a whole. Adopting this rule instead of the current constitutional matrix would let juries respond flexibly to behavior that defies public-private and knowing-negligent categorizations. Absent the categorical requirements of *Sullivan*, juries would exercise their common-sense familiarity with

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249 Karen James, *Selfies at Funerals? That's a No*, DELAWARE ONLINE (May 12, 2014, 3:53 PM), http://www.delawareonline.com/story/life/2014/05/12/selfies-funerals/9007293 (noting among other incidents the removal of a Wisconsin National Guard specialist for the Honor Guard after posting Instagram shots of the Guard mugging in front of a flag-draped casket).

250 Again, the jury would have to hear evidence regarding Instagram's norms in order to successfully apply those norms to the contested speech.

current speech norms. They could determine that a particular statement was designed primarily to circulate a significant message (with injury infliction a mere byproduct) that must be protected. Or they could determine that it was designed primarily to inflict injury (with message circulation a mere pretext) and may be punished. Liability would be assigned accordingly. The reviewing court, however, would retain constitutional discretion to reverse or remand if it determines that the verdict amounts to an externalization of the subsidiary community values onto the national community.

This rule would recalibrate the current balance between speech and dignity. For instance, a plaintiff would be prohibited from leveraging protective local speech norms when challenging the way he was portrayed in national press coverage of an issue that crossed multiple jurisdictions. Thus, the rule would have foreclosed the verdict in *Sullivan*. By the same token, members of insular online communities would not be able to leverage those communities' practices to defend against tort liability for injuries imposed outside the community. The most relevant current example of such an insular-national mismatch is revenge porn, the posting of prurient photos of women without their knowledge or approval.[251] This kind of speech is considered normatively acceptable among members of the insular virtual communities that use these sites, but is widely acknowledged to inflict dignitary injuries on non-members.[252] In the case of this community mismatch, the insular community would not be allowed to impose its norms onto the nation at large. If a jury taking account of national sentiment determined that a particular instance of revenge porn was "outrageous," for instance, the proposed constitutional rule would permit the imposition of IIED liability even though the insular community that hosted the speech did not consider it outrageous.

CONCLUSION

The Court's current constitutional common law of dignitary tort establishes a categorical preference for the community values of the nation over the community values of more subsidiary groups, even where the two are not in conflict. As more speech goes online and

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251 Citron & Franks, *supra* note 1, at 346.

252 *Id.* at 351 n.35 (citing Cyber Civil Rights Statistics on Revenge Porn, at 2 (Oct. 11, 2013), for the proposition that "more than 80% of revenge porn victims experience severe emotional distress and anxiety"); *id.* at 390 n.290 (noting that two major metropolitan daily newspapers, the *New York Times* and the *Chicago Tribune*, have taken editorial positions condemning revenge porn).

becomes publicly accessible, the use of "public" and "private" categories to distinguish between constitutional treatment and private law treatment for these torts is no longer effective. Moreover, the Court has touted the scheme as one that extracts from tort litigation impermissible value judgments about the content of speech.[253] This representation is disingenuous—prioritizing a community inevitably means prioritizing a set of values.

For instance, the Court has suggested that in the obscenity context, requiring local communities to tolerate material offensive to them is just as problematic as limiting national access to material based on a single community's disapproval.[254] The Court has explicitly allowed *local* communities to provide the standard for prurience in challenges to regulation of obscene material.[255] Those communities are generally thought to be less tolerant of obscenity. By selecting local communities as the structurally privileged unit of analysis, the Court was essentially picking sides in this cultural conflict. When the Court established a set of default rules that privilege the national community in the dignitary tort context, it was using the same tactic in reverse. Identifying the national community norms as the constitutional norms meant the Court was essentially picking sides in a cultural conflict. This use of ostensibly neutral principles to dictate speech preferences top-down is typified by the Court's decision in *Bresler* to replace a local jury interpretation of the ambiguous word "blackmail" with its own interpretation.[256]

This sharp dealing is a direct (if subtle) outgrowth of the Court's state action analysis in *Sullivan*. The First Amendment is designed to prohibit government preference for particular values, but the Court's scheme incorporates a vertical preference for "national" values over those of subsidiary communities. Ironically, the Equal Protection

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253 *See, e.g.*, Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55 (1988) (holding that without constitutional limits the IIED tort threatened to sanction speech based on jury disagreement with its content); *see also* Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 84 (1971) (Marshall, J., dissenting and noting that defamation liability without constitutional limits could lead to punishment of "unorthodox and unpopular" speech).

254 *See, e.g.*, Bret Boyce, *Obscenity and Community Standards*, 33 YALE J. INT'L L. 299, 320–21 (2008) (explaining that the three-part obscenity test announced in *Miller v. California*, 413 U.S. 15, 30 (1973) allows local communities to determine whether, by reference to their local norms, material is offensive).

255 *See id.* at 321 ("But it is perfectly permissible to apply a local standard, even in a federal obscenity prosecution. Indeed, the Court held, it is perfectly proper for a court to instruct a jury to apply community standards without ever specifying which community.") (footnotes omitted).

256 *See* Greenbelt Coop. Publ'g Ass'n v. Bresler, 398 U.S. 6, 22 (1970) (White, J., dissenting).

Clause arguably *does* adopt a set of preferred social values (those of the Reconstruction Era Northern States),[257] so that a broad definition of state action to impose those values in cases like *Shelley* or *Evans* would have had some constitutional basis. In contrast, neither the First Amendment nor the Due Process Clause through which it was incorporated against the states endorse any set of values; they are designed to establish a value-free zone.[258] So manipulating state action to allow a vertical imposition of "national" values (implicitly, the culturally elite values of the Court itself)[259] onto dignitary tort may be more constitutionally suspect than manipulating state action to remedy perceived violations of other constitutional provisions would have been.[260]

Further, the horizontal overreach into the legislative function to establish a categorical speech regime has functionally disabled tort, both as a private remedy and as a social signaling device. Moreover, it has not produced a marked increase in the quality or quantity of democratically relevant speech. Fifty years after *Sullivan*, it is time for the Court to consider backing away from its quasi-statutory tort scheme in favor of a more flexible rule that merely prohibits the imposition of insular values onto the nation. This flexible rule has the potential to reinvigorate dignitary tort as online speech continues to metastasize in unexpected ways. The second coming of these torts would encourage experiential, bottom-up development of behavioral norms in an incremental, ex post fashion.[261] Further, treating online behavior that inflicts individual injury as primarily a matter for tort law would foreclose the need for lawmakers to criminalize wide

257 *See* Post, *supra* note 137, at 499 ("The drafters of the Fourteenth Amendment . . . realized that the right to Equal Protection of the Laws would require courts to impose the cultural values of the North upon the South.").

258 *See id.*

259 *See, e.g.*, Michael J. Klarman, *What's So Great About Constitutionalism?*, 93 NW. U. L. REV. 145, 146 (1998).

260 *See* Post, *supra* note 137, at 499. Moreover, it is virtually impossible to administer a per se preference for a national or local community in the speech context, when online communication defies geographic boundaries. The circulation of would-be obscene materials on the internet has led some lower courts to find application of local standards impracticable, and a brewing circuit split on the question suggests that the Court may have to revisit the viability of the geographically local community test. *See, e.g.*, Noah Hertz-Bunze, *The Internet, Obscenity and Community Standards: The Emerging Kilbride and Little Circuit Split*, FORDHAM INTELL. PROP. MEDIA & ENT. L.J. (Feb. 14, 2011), http://iplj.net/blog/archives/1660.

261 *See, e.g.*, Rustad, *supra* note 131, at 478–79 (discussing history of tort as "continually evolving to address new social problems").

swaths of electronic speech ex ante from the top-down and may actually be the most speech-protective way to address these phenomena.[262]

262 Criminal treatment carries some costs that tort may not. First, criminal statutes would have to withstand a different, and potentially more difficult, level of constitutional scrutiny. *See* Citron & Franks, *supra* note 1, at 374–75. Further, the state machinery required to pass these statutes and to prosecute violations is more expensive than "private attorney general" tort treatment. To be sure, litigating revenge porn tort suits does cost individual plaintiffs (although most attorneys would likely take such cases on a contingency basis) and defendants may be judgment-proof or nearly so. *Id.* at 358. However, merely providing a robust cause of action for such cases has expressive value, and even a small number of high-profile plaintiff verdicts in such cases has the potential to recalibrate notions of what duty is owed within the intimate relationships that typically lead to the taking and sharing of materials likely to be found on such sites. *See* Bloom, *supra* note 2, at 229.