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## A TALE OF TWO *GREENMOSS BUILDERS*

Robert M. O'Neil\*

If ever a pending Supreme Court case deserved the merciful disposition of “improvidently granted,” it would seem to be *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*<sup>1</sup> Many factors seem to warrant such interment for an elusive and wholly unsatisfying controversy. Arguably, by any objective standard, this case should never have gone beyond a routine and little noted denial of certiorari. Against this unhappy background, let me offer several countervailing and compelling factors that seem to warrant an alternative disposition.

First, this was an essentially trivial dispute between a credit-rating company and a small private and aggrieved subscriber. As Justice Powell noted in his despairing coda on the final day of the 1984 Term, “[this case] involves only a matter of private interest to the parties. In a word, this is a typical common law libel suit.”<sup>2</sup> After much wrangling among the Justices during nearly two years of the pendency of this case, it lacked any of the majesty of the *New York Times Co. v. Sullivan*<sup>3</sup> libel case, or even of the lesser but still highly visible struggles such as Richard Nixon’s epic argument on behalf of Time Magazine in the “Desperate Hours” case,<sup>4</sup> or the bizarre if memorable stand-off between Robert Welch and Elmer Gertz which produced a major sequel on libel law and politics.<sup>5</sup> *Greenmoss Builders*, in stark contrast, offered no such redeeming appraisal.

Moreover, the Vermont Supreme Court was a highly unlikely venue

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1. 472 U.S. 749 (1985).

2. Justice Powell, typewritten statement of bench announcement 2 (June 24, 1985) (with handwritten note, author unknown, stating “As handed down 6/26/85”) (on file with the Powell Papers, Washington and Lee Law Library), available at <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>.

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

4. *Time, Inc. v. Hill*, 385 U.S. 374 (1967).

5. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

in which to find a major First Amendment test case. Unlike even the New Hampshire Supreme Court, which had had a few encounters with these issues,<sup>6</sup> Vermont courts had little preparation or insight for such a dispute.

Third, and of even greater import, Justice Powell candidly announced at the close of his benediction that late June day, “[t]here is, however, no Court opinion.”<sup>7</sup> Thus, the protracted and painful course of litigation during the pendency of this case ultimately left the Justices bereft even of a single acceptable theory of the case. Fragmentation and division are one thing in constitutional jurisprudence; hopeless splintering of this sort is quite another, and creates consequence ranging from uncertainty to chaos.

There is more. It would not be unfair to observe that the *Greenmoss Builders* case brought out the very worst among an increasingly contentious group of Justices. As Professor Wermiel and Mr. Levine candidly note, “the deliberations in *Greenmoss Builders* revealed deep ‘hostility’ within the Court ‘to the *New York Times v. Sullivan* line of cases’ . . . . As a result, the case was ‘fiercely fought out’ in a manner largely unseen by the public . . . .”<sup>8</sup> While falling far short of the cataclysmic divisions that would eventually split the high Court in the 2000 presidential election case of *Bush v. Gore*,<sup>9</sup> such intense squabbling over an essentially trivial tort case (albeit with constitutional implications) seemed unnecessary and potentially quite damaging.

As a result of such deep internal divisions in *Greenmoss Builders*, one might fairly note that matters of First Amendment law that seemed to have been reasonably well resolved (if not by complete accord) between the Brennan and White factions following the *New York Times* decision had at least produced a tolerable modus vivendi during the 1970s. What *Greenmoss Builders* did a decade later was to reopen many old wounds and leave several groups of Justices essentially adrift. It would have seemed far better simply to have avoided granting the case at all, or after having taken that initial step to have taken the merciful measure of dismissing as “improvidently granted.”

Finally and perhaps most damaging of all elements within this

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6. See, e.g., *Rosenblatt v. Baer*, 383 U.S. 75 (1966).

7. Justice Powell, typewritten statement of bench announcement, *supra* note 2, at 2.

8. Lee Levine & Stephen Wermiel, *The Landmark that Wasn't: A First Amendment Play in Five Acts*, 88 WASH. L. REV. 1, 10–11 (2013) (quoting Justice Brennan, 1983 Term Histories LXXXII (on file with the Brennan Papers, Library of Congress Manuscript Division) (on file with the Washington Law Review)).

9. 531 U.S. 98 (2000).

critique, *Greenmoss Builders* essentially led the Court nowhere despite the many months of painful dissension. A satisfying outcome after interminable contest might at least have yielded ultimate satisfaction, but when the dust settled and the final decree emerged from the confusion, that was not to be the case. There, quite simply, I would rest my case for a barely visible docket order dismissing the case as “improvidently granted.”

The *Greenmoss Builders* judgment, however, invites a completely different and far more satisfying scenario. An incurable optimist may now step up to entertain and expound a far more hopeful posture. For starters, readers of the Levine and Wermiel Article<sup>10</sup> are the grateful beneficiaries of one of the most ambitious and accomplished case studies of constitutional litigation to be found anywhere. These consummate First Amendment experts have applied the precise tools and techniques of judicial surgery to a truly daunting task. Indeed, rather than urging dismissal of *Greenmoss Builders* as unwisely granted, an observer who was ready to take a second look in the face of an impossible task would appear somehow to have managed to assume and indeed complete an impossible task.

In taking on that daunting assignment, Professor Wermiel and Mr. Levine engaged in extensive original research with an uncanny capacity to find the single kernel in the haystack that would help reconcile insights despite severe odds. The degree of access to certain of the Justices’ personal papers—especially those of Justice Brennan, including his Term notebooks and comments—have already added immeasurably to our understanding, extending far beyond the immediate context of *Greenmoss Builders*. What readers have now gained is a genuine judicial treasure trove, which simply happens to focus on a single case but extends far more broadly in time and space. Thus, if nothing else, the revival—indeed essentially the discovery—of *Greenmoss Builders* has measurably enhanced First Amendment scholarship.

A couple of points might be added in extenuation. As Levine and Wermiel’s introductory Abstract enlightens even the casual reader, their Article most thoughtfully addresses a number of issues, albeit far more clearly than did the Justices themselves. Among those issues were the process by which the post-*New York Times* decisions like *Gertz v. Robert Welch, Inc.*,<sup>11</sup> and *Rosenbloom v. Metromedia, Inc.*,<sup>12</sup> were

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10. Levine & Wermiel, *supra* note 8.

11. 418 U.S. 323 (1975).

12. 403 U.S. 29 (1971).

reconsidered and placed in a still evolving context; how the Justices struggled to make sense out of the presumed and punitive damages issues in libel cases; and the perplexing, forever seemingly unresolved, issue of the contrasting treatment of media and non-media defendants.

By way of conclusion, let me offer my own two most persuasive and redeeming observations. As the co-authors themselves note near the very end of this timely article, “the Court now appears largely content with the shape of the constitutional law of defamation it crafted in *Sullivan and Gertz*.”<sup>13</sup> Incredibly, as the authors add with a sense of obvious relief, “[the Court] has not deemed it necessary to consider a defamation case on its merits in more than two decades.”<sup>14</sup> With some sense of satisfaction, they conclude by noting that “the import of *Greenmoss Builders* appears to be that, in the end, it preserved—albeit without fanfare—a fundamental tenet of First Amendment jurisprudence at a point in history when it very much remained vulnerable.”<sup>15</sup> Thus, the coda of the piece appropriately reflects a high degree of ultimate satisfaction despite the intervening turmoil of the mid-1980s.

Finally, of course, explicit recognition of Justice Brennan’s singular role merits close attention. Professor Wermiel and his co-author Seth Stern have noted fully in their classic Court biography the extent to which Justice Brennan shaped this branch of First Amendment law through his authorship of the *New York Times Co. v. Sullivan* opinion.<sup>16</sup> As the authors of the Brennan biography note in an extensive analysis of the antecedents and implications of the *New York Times* ruling, the case was a natural for this “Liberal Champion.”<sup>17</sup> In the year since Justice Frankfurter’s retirement—and thus the ultimate empowering of a Court which had lacked a solid majority for eight years—Brennan had already written a couple of seminal free speech and free press judgments. Such rulings as *NAACP v. Button*,<sup>18</sup> where he advanced First Amendment protection for litigation on behalf of civil rights and other public interests against state champerty, barratry, and other such laws, already gave clear evidence of his primacy in this field. Thus the Chief Justice’s assignment of the *New York Times* case to Justice Brennan could hardly have been faulted, and the ensuing task appeared wholly congenial. Yet, as Wermiel and Stern have aptly observed in their biography, “[t]his

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13. Levine & Wermiel, *supra* note 8, at 100.

14. *Id.*

15. *Id.*

16. SETH STERN & STEPHEN WERMIEL, JUSTICE BRENNAN: LIBERAL CHAMPION 220–28 (2010).

17. *See id.* at 223.

18. 371 U.S. 415 (1963).

case would prove to be another nail biter in which Brennan was not sure of the ultimate disposition of his allies until the very last minute. He and his clerks generated eight drafts in less than two months—an extraordinarily compressed and demanding schedule.”<sup>19</sup>

#### I. *GREENMOSS BUILDERS* ANTECEDENTS: STATE COMMON LAW PRIVILEGE

The roots of the *New York Times* libel ruling run far deeper than conventional wisdom might suggest. As early as 1908, the Kansas Supreme Court issued an opinion in the case of *Coleman v. MacLennan*,<sup>20</sup> which announced as state common law the doctrine of “actual malice” that Justice Brennan would effectively federalize many years later. An appreciable minority of other states adhered to that view in relevant cases, while a majority of those states rejected the “actual malice” standard. Thus, more than a half-century of state litigation had already occurred before the Supreme Court addressed constitutional issues in the *New York Times* case. And until that moment in 1964, the state common law of libel seemed to prevail. What seemed remarkable was the apparent absence of state court precedent—an oversight that led to lead counsel Herbert Wechsler’s discovery and eventual citation in his brief of the ancient Kansas case.<sup>21</sup> Of course, it was already well known, albeit in tort law rather than constitutional law circles.

#### II. *GREENMOSS BUILDERS* ANTECEDENTS: *CHAPLINSKY* AND “THE LIBELOUS”

Now enter the *Chaplinsky v. New Hampshire*<sup>22</sup> case of 1942, a clear harbinger of the stresses and pressures of World War II. After sustaining the conviction of an itinerant Jehovah’s Witness preacher for uttering “fighting words,” a quite surprisingly unanimous Supreme Court announced that there were other categories of unprotected speech potentially subject to criminal sanctions in the public forum.<sup>23</sup> Specifically, said Justice Murphy (ordinarily a strong liberal voice on such matters):

There are certain well-defined and narrowly limited classes of speech,

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19. STERN & WERMIEL, *supra* note 16, at 224.

20. 98 P. 281 (Kan. 1908).

21. STERN & WERMIEL, *supra* note 16, at 224.

22. 315 U.S. 568 (1942).

23. *Id.* at 569, 572–74.

the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or “fighting” words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.<sup>24</sup>

Such expressions, continued the Court, lest any doubt remain, “are no essential part of any exposition of ideas, are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”<sup>25</sup>

For current purposes, the focus of *Chaplinsky* falls clearly on the gratuitous inclusion of “the libelous” despite the absence elsewhere in the case on any relevant discussion. While the primary discussion addressed the “fighting words” exception that had been raised and drew the Court’s imprimatur,<sup>26</sup> we should recall that not only has this dubious precedent never been overruled or seriously qualified in three quarters of a century, but also that much later cases have in fact periodically cited the case with apparent approval.<sup>27</sup> Thus, despite the earlier antecedents cited by Kansas and several state courts under common law, “the libelous” seemed to remain as clearly beyond reach of criminal sanctions as did “the lewd and obscene” or “incitement to immediate violence.”

### III. *GREENMOSS BUILDERS* ANTECEDENTS: “GROUP LIBEL” AND *BEAUHARNAIS*

Even stranger in its immunity from judicial overruling was the 1952 case *Beauharnais v. Illinois*,<sup>28</sup> directed at an Illinois “group libel” statute. In the aftermath of World War II, largely at the urging of then law professor (later renowned sociologist) David Riesman, a number of states enacted laws that specifically criminalized racist, sexist, and anti-Semitic epithets and other expressions that might otherwise have been assumed to be constitutionally protected. In a case brought against the White Circle League for disseminating blatantly racist messages widely on the streets of Chicago, the Illinois courts ruled that the statute provided a defense only for publication with “good motives, and for justifiable ends,” but that sufficed in extenuation.<sup>29</sup> The state courts also

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24. *Id.* at 571–72.

25. *Id.* at 572.

26. *See id.* at 572–74.

27. *E.g.*, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383, 399 (1992).

28. 343 U.S. 250 (1952).

29. *People v. Beauharnais*, 97 N.E.2d 343, 346 (Ill. 1951).

rejected the defendants' plea that a "clear and present danger" must exist before such a sanction could be imposed on expression, however hateful it may be.<sup>30</sup>

A sharply divided U.S. Supreme Court immediately recognized the paradox that *Beauharnais* posed. Yet, with ample evidence of current racial violence in Chicago and elsewhere, Justice Frankfurter wrote for the majority that such forces gave validity to Illinois' effort to "curb false or malicious defamation of racial and religious groups, made in public places and by means calculated to have a powerful emotional impact on those to whom it was presented."<sup>31</sup> The dissenters were predictably dismayed by such a ruling. Justices Black and Douglas, who had mutely accepted *Chaplinsky* in 1942, now stood firm,<sup>32</sup> even perennially citing, though informally and unofficially, *Beauharnais* as the most egregious of the Court's First Amendment rulings during this period. Curiously, Justice Jackson, who had just returned from presiding at the Nuremberg War Crimes Tribunal, also dissented from the enforcement of what he perceived as an essentially immutable presumption of guilt.<sup>33</sup> Curiously, *Beauharnais* has not fared well over time, and today would be cited at an advocate's peril.

Yet, despite ample chance to give it a decent burial in the 1970s or 1980s, the Court never even seriously criticized the case. The simple fact is that for nearly three-quarters of a century, this ruling remains the major constitutional cloud over judicial efforts to undermine or invalidate efforts to blunt crude measures against racist, sexist, homophobic, and anti-Semitic expression. Unless "group libel laws" are somehow entitled to a constitutional pass from the Court on grounds that would set apart all other forms of "hate speech" regulation, this paradox persists as one of the most baffling in First Amendment law.

Meanwhile, courts have taken a strikingly different view of campus and other restrictive "speech codes." Each and every such ban on racially or ethnically hostile expression has been struck down, mostly by federal courts, and typically on both First Amendment and due process grounds. Indeed, the sheer unanimity of such judicial intervention is one of its most striking features, and one that sharply differentiates the treatment of defamatory speech from the disposition of hateful expression despite some obvious similarities.<sup>34</sup>

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30. *Beauharnais v. Illinois*, 343 U.S. at 253.

31. *Id.* at 261.

32. *See id.* at 267–87 (Black, J., dissenting, joined by Douglas, J.).

33. *See id.* at 287–305 (Jackson, J., dissenting).

34. *See* ROBERT M. O'NEIL, *FREE SPEECH IN THE COLLEGE COMMUNITY* 16–22 (1997).



IV. *GREENMOSS BUILDERS* ANTECEDENTS: *NEW YORK TIMES CO. V. SULLIVAN*

Given this necessarily abbreviated journey through the *Greenmoss Builders* saga, we now arrive at the *New York Times Co. v. Sullivan*<sup>35</sup> case. A few brief observations might be helpful in recalling the context. The Court's Term of 1962 would prove to be a watershed year like no other in recent history. What had been at most the Warren Court in name only would suddenly become the Warren Court de facto as well. During the summer, Court observers naturally expected that Justice Frankfurter would remain on the bench for some additional years, perhaps even for decades of continuing dominance. Few were prepared for the relatively mild stroke he experienced during that summer, and his merciful decision to leave the Court rather than continuing to sit with a patent disability.

On the one occasion that I personally encountered the recently retired Justice Frankfurter, I realized that he was now confined to a wheelchair during the Court's poignant memorial service for Washington Post publisher and former law clerk Philip Graham. As we awaited the service, I felt a tug on my sleeve, and realized it was Frankfurter, who asked (apparently believing I was someone else), "How is Gerry Gunther?" Happily, I could readily respond. "Mr. Justice," I assured him, "Gerry stopped by the Court just a few days ago and we had a delightful visit." That seemed to fill the bill, and we then turned to the unbearably sad task of recalling the life of a truly eminent journalist and lawyer.

A successor Justice was soon to be chosen, and was quite likely to be Jewish. Frankfurter was still sharp of tongue, even if now frail of limb, and quipped very publicly, "Well, I hope it's not that damned traffic cop from Connecticut," a disparaging reference to then-Governor Abraham Ribicoff, whose availability had been widely rumored, and whose penchant for relying on unmarked vehicles and plainclothes officers for aggressive law enforcement on the Merritt and Wilbur Cross Parkways was well known. If Frankfurter had more benign thoughts about his successor, he kept them quiet.

The eventual choice was hardly a surprise on either judicial or political grounds. When President Kennedy promptly nominated his Secretary of Labor, Arthur Goldberg, to the Court, few observers appreciated that a massive judicial revolution was imminent. One who

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35. 376 U.S. 254 (1964).

did anticipate that change was the President himself, who on the first day of the 1962 Term entered the Supreme Court chamber, strode confidently up the aisle without Secret Service protection and raised his hand to greet the new Justice, to whom Chief Justice Earl Warren had just administered the oath of office. What may have been obvious to some, however, proved far from obvious to the two law clerks that Frankfurter had chosen for the coming Term.

Both Peter Edelman (who had just clerked for the legendary Judge Henry Friendly) and David Filvaroff had been outstanding Harvard Law School students and were eminently qualified for such an honor. But they soon realized that they had been selected for a quite different role, so that a transition to the Goldberg Chambers might prove unexpectedly challenging. While it would have been highly inappropriate to suggest that either of them could have engaged in anything like lobbying, judicious and ultimately effective intervention eventually brought results on the eve of the new Court's new Term.<sup>36</sup> Happily, both Edelman and Filvaroff finally did receive Goldberg's imprimatur, and thus to this day they bear two seemingly incongruous designations: clerk to Justice Frankfurter, October Term 1962, and clerk to Justice Goldberg.

The ensuing Term that now opened with a full bench proved to be even more sharply different than any of us could have imagined. Few observers could have imagined how complete would be the instant ascendancy of the Warren-Brennan majority. To be sure, in the previous Term a tenuous majority of this divided Court had managed to establish the "one man/one vote" principle as the basis for equitable legislative reapportionment.<sup>37</sup> There were a few other major rulings in the very early 1960s despite the generally moderate to conservative tone of those Terms. For example, in 1958 Justice Brennan had already (miraculously, as any observer would attest) managed to cobble together a bare majority to strike down California's loyalty pledge required of veterans seeking a real property tax exemption in *Speiser v. Randall*.<sup>38</sup> And with Justice Frankfurter's blessing, at least two highly invasive loyalty oaths required of public employees from Washington State<sup>39</sup> and Florida<sup>40</sup> had been invalidated, albeit more on due process than free speech grounds.

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36. It is unwritten judicial common law that those law clerks who are appointed to serve the Chief Justice remain in office if the occupant changes; those who serve Associate Justices, however, are entirely on their own and may or may not be invited to continue.

37. See *Baker v. Carr*, 369 U.S. 186 (1962).

38. 357 U.S. 513, 514–15, 528–29 (1958).

39. See *Baggett v. Bullitt*, 377 U.S. 360 (1964).

40. See *Cramp v. Bd. of Pub. Instruction*, 368 U.S. 278 (1961).

Immediately after the new Court's initial conference in October, it became clear that Justice Brennan was in charge. For the first time since his elevation in 1956, he was now empowered to command a solid majority, including the Chief Justice, Justices Black and Douglas, and of course Justice Goldberg as his clear protégé. During a reflection and recollection at the end of this momentous Term, Justice Brennan asked Judge Richard Posner and me (as his 1962 Term clerks) how many times he had dissented. Each of us ventured our guess it would have been about ten or a dozen occasions on which he had parted company with Justices Black and Douglas. The Justice smiled broadly and held up three fingers, calling us to account for our inaccurate recollection of the actual count. It turned out that he had written two dissents, and joined Justice Clark in a third case, all involving criminal procedure issues where he knew Chief Justice Warren, the old California prosecutor, would be unlikely to concur.

Several major First Amendment and civil rights cases dominated the 1962 Term. For the first time, the Warren Court now had a working majority of votes to incorporate—or more accurately as Justice Brennan insisted, to “absorb”—the criminal procedure guarantees embodied in the Bill of Rights into the Fourteenth Amendment's Due Process Clause. The process began, of course, with absorption of the right to counsel,<sup>41</sup> followed by the Fourth Amendment's ban on unlawful search and seizure.<sup>42</sup> One after another of those specific safeguards were now ready to be added to free speech and press guarantees, which of course had been embraced in the 1920s.

The role of the First Amendment was hardly likely to be slighted in the process. Most notable among the cases that had been argued and were immediately assigned to Justice Brennan for the drafting of a majority opinion was the challenge by Virginia civil rights organizations to the Commonwealth's statutes regulating the conduct of attorneys—most notably those governing the curiously titled practices of “champerty,” “maintenance,” and “barratry.”<sup>43</sup> The Virginia courts had upheld the application of such ancient laws to the filing of public interest litigation by civil rights groups, including the NAACP Legal Defense Fund. The resulting judgment<sup>44</sup> established a profoundly important principle, which has not only never been overruled despite the vagaries

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41. *Gideon v. Wainwright*, 372 U.S. 335, 344–45 (1963).

42. *Malloy v. Hogan*, 378 U.S. 1, 3 (1964).

43. *See NAACP v. Harrison*, 115 S.E.2d 55 (Va. 1960), *cert. granted*, 365 U.S. 842 (1961).

44. *See NAACP v. Button*, 371 U.S. 415, 437, 444–45 (1963).

of First Amendment law, but also amazingly persists. To this day, the filing of litigation by public interest groups remains fully protected against state regulations of the kind that Virginia officials had vigorously sought to apply and enforce.

Although there were other major free speech and press cases before the Court that Term, the most notable ruling on the Term's final day turned out to involve not speech and press but religious liberty under the First Amendment. After a cursory ruling against the New York Regents' Prayer, the Justices—with Justice Brennan now fully in command—were ready to declare virtually all public school prayer and Bible reading in the classroom a clear violation of the Establishment Clause.<sup>45</sup>

Nonetheless, the law clerks of the 1962 Term (including one Stewart clerk who held over and thus served a two-year stint through planned rotation) were curiously unprepared for the docketing and eventual granting of the *New York Times* libel case. The Court had without fanfare or even much notice granted review in January 1963. The petition was filed on behalf of the Times by former Attorney General Herbert Brownell, Herbert Wechsler, and Marvin Frankel (along with Thomas Daly). Such early publicity as the case garnered seemed to have been focused more on the civil rights context than on defamation or media dimensions, though it would be difficult to avoid both facets. During the ensuing weeks, the principal supporting briefs were filed by the Times, the national ACLU and the national NAACP.

The oral argument, by bizarre coincidence, began exactly one year to the day from the granting of the case on January 6, 1963, and engaged Herbert Wechsler as lead counsel in a fascinating set of issues. An accompanying footnote in the opinion made clear that there were actually two closely linked cases, the other involving Ralph Abernathy and others who had taken out the advertisement that eventually appeared in the Times and resulted in the litigation.<sup>46</sup>

Of the many curious features of the case, perhaps none was more puzzling than the early March date of its announcement. In the previous Term, virtually all the major decisions came down late in the spring—if not on the very last day of the Term, within a day or two of the Court's rising for the summer. Only when the other major *New York Times* case<sup>47</sup> (involving the Pentagon Papers) was argued at a special Term after the close of the regular Term was that pattern varied substantially.

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45. See *Sch. Dist. of Abington Twp., v. Schempp*, 374 U.S. 203 (1963).

46. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 278 n.18 (1964).

47. *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971).

And since this was clearly a case of utmost importance to the mass media—which at that time of course meant all print or traditional radio and television channels with a handful of cable outlets—attention on the judgment would have been expected to have been even greater than might usually have been the case with a major civil rights controversy.

Much more could be said and written about the *New York Times* ruling as we approach its semi-centennial. Of the many pertinent observations one might offer, none is more striking than the narrowness of the ruling. The initial scope of the claimed privilege did not exceed the official acts of public officials, leaving to later resolution hard questions such as how far down in the public service the privilege might extend, or even whether it extended beyond the “official acts” or transgressions of a government officer to include private conduct. Indeed, within weeks of the judgment, I recall writing a brief comment confidently adding that “of course an accusation based on the mayor’s nightly trysts would not be covered.”

Perhaps most perplexing among the immediately unresolved issues was one that remains curiously unclear to this day: to what level within the public service does the scope of the privilege extend? On one hand, even the humblest kitchen worker employed by government to carry out defined tasks should be covered. On the other hand, early analysis of the *New York Times* case reinforced the fact that the privilege most clearly applies to members of the public service who have achieved at least mid-level positions. Thus, the governor’s kitchen staff should not logically be included in the scope of the privilege. Also awaiting later resolution were such obviously pertinent issues as how far back in time the scope of the privilege might extend. Those and a host of other issues were quite clearly reserved for a later day.

Even more clearly waiting in the wings were two other issues that would eventually resurface. First, of course, was the lurking question of what to do about libel plaintiffs who were not public officials though endowed with a degree or notoriety that would entitle them to comparable attention and arguably also to analogous legal status.<sup>48</sup> While the judgment in *Curtis Publishing Co. v. Butts*<sup>49</sup> was unanimous, it was apparent that several of the Justices would prefer to proceed further or in a different direction, and before long misgivings would emerge. Eventually the Justices would encounter perplexing questions about not only plaintiffs who were clearly public figures though not

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48. *E.g.*, *Curtis Publ'g Co. v. Butts*, 388 U.S. 130 (1967).

49. *Id.*

public officials, but also even more challenging questions about the status of persons who had inadvertently been implicated in such disputes and were thus “involuntary public figures.”<sup>50</sup>

For the most part, we should defer detailed analysis of such later libel litigation. But before we leave the stage entirely, it would be helpful to bridge very briefly the twenty-year gap between *New York Times Co. v. Sullivan* and several cases that followed *New York Times* but preceded *Greenmoss Builders*. Thus, it might be helpful to provide summary notes about these interim steps on a journey that began in such a promising fashion, only to be derailed or diverted by *Greenmoss Builders*, but that happily led to an eventual redemption at the close of Justice Brennan’s career and well beyond.

#### V. *GREENMOSS BUILDERS* ANTECEDENTS: TEMPORAL SCOPE OF THE PRIVILEGE, “PUBLIC FIGURES,” AND BEYOND

Barely two years followed before the Court would be obliged to begin refining the complex implications of the *New York Times* ruling. Curiously, the earliest such development, in *Monitor Patriot v. Roy*,<sup>51</sup> involved the issue of how far back in time the scope of the privilege should extend. Although such a ruling may have seemed unlikely, it was surely possible that the timing issue would be resolved by treating the privilege either prospectively, or if retrospective, of quite limited duration. But to the surprise of many observers, and despite the rather modest status of the particular plaintiff, the Court promptly extended the timeline back indefinitely.<sup>52</sup> Such a broad reach not only strongly reinforced the basic *New York Times* privilege ruling, but it also gave enhanced importance to temporal terms. Others might have argued that, given the failure of memories and even the passage from the scene of contemporary observers, a far more stringent time limit should have been imposed. This early ruling settled the first of the post-*New York Times* questions, but left many more open.

During the 1966 Term, the Court would tackle with comparable conviction the question of “public figures.” It seemed quite conceivable that the Justices would have drawn an early line between those who held public office, either elected or appointed, and everyone else. There was a quite plausible basis for that distinction: Justice Black in his *New York*

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

51. 401 U.S. 265 (1971).

52. *Id.* at 277.

*Times* concurrence<sup>53</sup> cited *Barr v. Matteo*,<sup>54</sup> in which the Court recognized a quasi-constitutional privilege that would shield public officials who uttered defamatory but not malicious statements against others.<sup>55</sup>

The putative pairing or juxtaposition of these two precepts not only seemed to offer an appropriate balance, but also strongly suggested that the *New York Times* privilege should be confined to those who held public office. Yet in the two pivotal key public figure cases, *Curtis Publishing Co. v. Butts*<sup>56</sup> and *Associated Press v. Walker*,<sup>57</sup> no such insistence upon parity or balance ever applied. The best that a now sharply split Court could manage to affirm was concurrence in principle (though not in detail) on the status of public figures and their rough equivalency to public officials. But within three years of the *New York Times* ruling, any semblance of complete accord had vanished. Moreover, to this day the Court has failed to draw a workable line not only within the public sector, but also far more problematically within the elusive category of “public figures.”

The even more challenging and elusive questions about the status of “involuntary” or “derivative” public figures created deeper doubts. There already existed a substantial group of persons who had not thrust themselves into the spotlight or actually sought publicity, but were close relatives or business or professional colleagues of clearly public figures. The pros and cons of treating such persons as public figures or not for libel privilege purposes can become bewilderingly challenging.

By the mid-1990s, for example, major media outlets as normally congruent as the Atlanta Journal-Constitution and Cable News Network had drawn editorial swords over the question of whether the Atlanta Centennial Olympic Park security guard who found and defused a planted bomb should or should not be termed a “public figure” on the basis of publicity he either actively sought or at least welcomed.<sup>58</sup> Other intriguing cases on the “involuntary” or “derivative” public figure issue created comparable quandaries.<sup>59</sup> Thus, very soon after the seemingly harmonious view engaged the Court in *New York Times*, dispersion and

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53. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 295 (1964) (Black, J. concurring).

54. 360 U.S. 564 (1959).

55. *See id.* at 568–74.

56. 388 U.S. 130 (1967).

57. *Id.* (consolidated with *Butts*).

58. *See Atlanta Journal-Constitution v. Jewell*, 555 S.E.2d 175 (Ga. Ct. App. 2001).

59. *See, e.g., Sipple v. Des Moines Register & Tribune Co.*, 147 Cal. Rptr. 59 (Cal. Ct. App. 1978).

confusion seemed inescapable.

#### VI. THE FINAL ANTECEDENTS: *ROSENBLOOM* AND *GERTZ*— ON THE PATH TO *GREENMOSS BUILDERS*

If the high Court was already uncertain about how to move gracefully from public officials to public figures, even greater complexity would soon follow. Although each of the two major pre-*Greenmoss Builders* rulings deserves ample treatment on its own, let me simply note them both in passing. For one thing, the composition of the Court changed dramatically during this period. Between the “public figure” saga and *Greenmoss Builders*, Chief Justice Burger replaced Chief Justice Warren, while Justices Marshall, Blackmun, Powell, Rehnquist, and Stevens replaced successors, leaving only Justices Brennan and White. Appropriately enough, they would eventually square off on opposing sides: Justice Brennan as the persistent champion of the *New York Times* libel privilege and Justice White as its most consistent critic.

The fragmentation of the erstwhile Warren (and now Burger) Court had now persisted apace, creating few opportunities to achieve consensus on any but the most rudimentary procedural matters. In *Rosenbloom v. Metromedia, Inc.*,<sup>60</sup> for example, Justice Brennan could still speak for a badly frayed bench, with the support of the new Chief Justice, the partial concurrence of Justices Black and White, and over the dissents of such strange bedfellows as Justices Harlan, Marshall, and Stewart. Mercifully, Justice Douglas was apparently indisposed, and thus took no part in the consideration or decision of the case. While Justice Brennan did manage to cobble together a plurality that broadly conveyed his commitment to the *New York Times* privilege, it was hardly a ringing endorsement. In the end, the Justices could agree only that the plaintiff, the outspoken distributor of sexually explicit magazines, had failed to meet the requisite standard of proof to create a jury issue, thus resolving the case by default in favor of the allegedly defamatory broadcaster.<sup>61</sup>

If things could possibly deteriorate further, that is precisely what occurred a few years later in *Gertz v. Robert Welch, Inc.*<sup>62</sup> In 1974, a prominent Chicago attorney had been the subject of an article in a right-wing publication in which the attorney was labeled a “Communist” and a member of an allegedly Marxist organization. Although the lower

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60. 403 U.S. 29 (1971).

61. *Id.* at 56–57.

62. 418 U.S. 323 (1975).



courts had applied a relatively conventional *New York Times* analysis, an even more sharply divided Supreme Court now announced on the Term's last day a plurality opinion. The core of the ruling—in clear rejection of *New York Times* teachings—was that the outspoken attorney was not a public figure, and that “[a]bsent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society,” the public-figure issue should be shaped on the basis of the individual’s participation in the particular controversy giving rise to the alleged defamation, following state law, though without imposing liability without fault.<sup>63</sup> The opinion made clear for the first time a premise of the Court’s more moderate majority: that the state interest in compensating injury to the reputation of private individuals is greater than for public officials and public figures.<sup>64</sup> Thus, the current majority categorically rejected Justice Brennan’s premise that the *New York Times* standard should be extended to media defamation of private individuals whenever an issue of general or public interest is involved because that would abridge to an unacceptable degree the legitimate state interest in compensating private individuals for injury to reputation.

## VII. *GREENMOSS BUILDERS*: A BRIEF RETROSPECTIVE

The *Greenmoss Builders* case<sup>65</sup> might be loosely analogized to Charles Dickens’ *Tale of Two Cities*. It was in one sense the best of cases, yet also the worst of cases. At a more than superficial level, it should never have been granted in the first place. It was essentially a trivial common law tort case, which Justice Powell in his concluding comment described as involving “only a matter of private interest to the parties.”<sup>66</sup> As the Court’s internal divisions became ever deeper, the only merciful disposition would have been to dismiss as “improvidently granted.” The likelihood of any coherent outcome seemed increasingly remote as the months progressed. The case seemed increasingly to bring out the worst among normally concordant Justices. And the steady, if sometimes uneven, evolution from *New York Times* would arguably have benefited from avoidance of the sort of fracturing that the merciful disposition of “improvidently granted” could have offered.

But that’s only half the story, and the lesser half at that. While *Greenmoss Builders* may not deserve to be heralded as “the best of

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63. *Id.* at 352.

64. *See id.* at 343–48.

65. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985).

66. Justice Powell, typewritten statement of bench announcement, *supra* note 2, at 2.

times,” it contained some important redeeming qualities. Professor Wermiel and Mr. Levine collaborated on a splendid study of a case that truly challenged their First Amendment expertise to the utmost, and which now offers a model of great value to scholars in this field. At least five or six major issues invited close observers to untangle critical dimensions of *New York Times* and other intervening cases such as *Gertz* and *Rosenbloom*: the perplexing media/non-media defendant distinction, the presumed and punitive damage issue, the contrasting analysis of public versus private speech, and the current status of the eternal tension between the interests of those who have been defamed and those who express defamatory thoughts. Each and every one of these cosmic issues merits a level of detail and analysis that we would never have enjoyed but for this seminal Article. And not least of all, the ultimate condition of the applicable constitutional precepts has fared surprisingly well over time despite the vagaries of this branch of First Amendment jurisprudence.