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DEFAMATION AND THE FIRST AMENDMENT: PROTECTING SPEECH ON PUBLIC ISSUES

The common law of defamation collided with the United States Constitution in *New York Times Co. v. Sullivan,*[1] and aftershocks from that collision have been rumbling for sixteen years. Ever since the *New York Times* Court asserted that the first and fourteenth amendments impose restraints on a state's power to afford a civil remedy for wrongful injury to reputation,[2] the Supreme Court has been torn between its concern for personal reputation and its competing concern for free expression.[3] The difficulty of resolving the conflict between these two concerns has forced the Court to decide a long line of cases[4] in an attempt to define precisely how the Constitution limits defamation actions.

After discussing the leading cases in that line, this comment proposes an analytical method for deciding when balancing—a frequently used and controversial technique in free speech cases[5]—is an inappropriate means for formulating a constitutional rule. Speech on public issues, being necessary for a self-governing democracy, is at the core of the first amendment. When such speech is at issue, the Court should not balance the value of speech against competing social values. In *Gertz v. Robert*

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

2. *Id.* at 283. The question whether defamatory speech could be within the scope of first amendment protection had not been decided by the Court prior to *New York Times*. Dicta in earlier cases stated that defamatory speech was outside first amendment protection. *See* notes 11 & 12 *infra*.

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

4. Wolston v. Reader's Digest Ass'n, 443 U.S. 157 (1979); Hutchinson v. Proxmire, 443 U.S. 111 (1979); Herbert v. Lando, 441 U.S. 153 (1979); Time, Inc. v. Firestone, 424 U.S. 448 (1976); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971); Ocala Star-Banner Co. v. Damron, 401 U.S. 295 (1971); Time, Inc. v. Pape, 401 U.S. 279 (1971); Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971); Greenbelt Coop. Publ. Ass'n v. Bresler, 398 U.S. 6 (1970); St. Amant v. Thompson, 390 U.S. 757 (1968); Beckley Newspapers Corp. v. Hanks, 389 U.S. 81 (1967); Associated Press v. Walker, 388 U.S. 130 (1967); Curtis Publ. Co. v. Butts, 388 U.S. 130 (1967); Time, Inc. v. Hill, 385 U.S. 374 (1967); Rosenblatt v. Baer, 383 U.S. 75 (1966); Garrison v. Louisiana, 379 U.S. 64 (1964); New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

5. Among the law review articles discussing the use of balancing methodology in first amendment cases are: Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis,* 88 HARV. L. REV. 1482, 1500–02 (1975); Emerson, *First Amendment Doctrine and the Burger Court,* 68 CALIF. L. REV. 442, 447–58 (1980); Frantz, *The First Amendment in the Balance,* 71 YALE L.J. 1424 (1962); Gunther, *In Search of Judicial Quality on a Changing Court: The Case of Justice Powell,* 24 STAN. L. REV. 1001 (1972); Kalven, *Upon Rereading Mr. Justice Black on the First Amendment,* 14 U.C.L.A. L. REV. 428 (1967); Meiklejohn, *The Balancing of Self-Preservation Against Political Freedom,* 49 CALIF. L. REV. 4 (1961); Nimmer, *The Right to Speak from* Times *to* Time: *First Amendment Theory Applied to Libel and Misapplied to Privacy,* 56 CALIF. L. REV. 935 (1968).

Welch, Inc.,[6] for example, the Court should not have balanced the private individual's interest in recovering compensation for injury to his reputation against the public's interest in free political discussion. As a result of this balancing, the *Gertz* Court formulated rules which unduly limit the right to speak and to hear about public issues. Specifically, the *Gertz* rules make substantial constitutional protection dependent on whether the plaintiff in a subsequent defamation suit is a public official or a private figure. Thus, the rules fail to protect a speaker from defamation liability for speech on public issues that implicates a private individual. This failure is exemplified in *Hutchinson v. Proxmire*,[7] in which Senator Proxmire's criticism of wasteful government spending subjected him to defamation liability. This comment concludes that the Constitution should provide absolute protection for speech at the core of the first amendment, speech necessary for self-government, and that the *New York Times* privilege[8] should extend to such speech.

I. A PURPOSIVE ANALYSIS[9] OF THE FREE SPEECH CLAUSE—THE *NEW YORK TIMES* CASE

In *New York Times Co. v. Sullivan*,[10] the Supreme Court interpreted the first amendment to include a libelous publication within the protective shelter of the free speech and free press clauses.[11] It was the first time the Court had addressed the question whether the Constitution limits a state's

6. 418 U.S. 323 (1974).

7. 443 U.S. 111 (1979). *See* notes 75–92 and accompanying text *infra*.

8. The *New York Times* privilege protects a speaker from tort or criminal liability. If applicable, it requires the plaintiff or prosecutor to prove by clear and convincing evidence that the defendant knew the alleged defamatory statement was false or that he recklessly disregarded its falsity—"actual malice." *See* Time, Inc. v. Hill, 385 U.S. 374 (1967)(invasion of privacy); Garrison v. Louisiana, 379 U.S. 64 (1964)(criminal libel); New York Times Co. v. Sullivan, 376 U.S. 254, 279–80, 285–86 (1964)(libel).

"Actual malice" is an unfortunate misnomer, because "malice" in the ordinary sense of ill will or intent to injure is not sufficient to defeat the privilege. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 821 (4th ed. 1971).

9. A purposive analysis is one which looks primarily to the purpose of the constitutional provision, statute, or common law rule as the guide to interpretation and application.

10. 376 U.S. 254 (1964). The Court reversed a half million dollar libel judgment obtained against the Times and four civil rights leaders in an Alabama court. The civil rights leaders had placed an advertisement in the Times which both protested anti-civil-rights actions of Southern officials and solicited financial support. To protect public debate from the chill of defamation liability, the Court extended the scope of the free speech clause and recognized a privilege to criticize public officials.

11. Libel had been listed with obscenity and "fighting" words as examples of speech outside the scope of first amendment protection on the ground that such speech inflicts injury and is not essential to the exposition of ideas. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)(dictum). *Accord*, Beauharnais v. Illinois, 343 U.S. 250, 266 (1952)(dictum).

power to compensate individuals injured by defamatory falsehoods.[12] The decision was prompted by the Court's perception that the threat of defamation liability can constrict the free flow of fact and opinion[13] which the free expression clauses were "fashioned to assure."[14] The Court's thesis was that a central meaning of the first amendment is to restrain government from exercising its power in a way that hinders political discussion.[15] As authority for its interpretation of the first amendment, the Court looked not just to the text but also to the history and the purpose of the free speech and free press guarantees.[16] The *New York Times* Court followed a school of thought that views free speech as an interest inhering in the public acting as a political community.[17]

12. New York Times Co. v. Sullivan, 376 U.S. at 256. Two reasons may explain why the Court had never before considered the question whether the first amendment limits a state cause of action for defamation. First, it has only been since 1925 that the Supreme Court has said that the first amendment is binding on the states through the fourteenth amendment. Gitlow v. New York, 268 U.S. 652, 666 (1925). Second, strong dicta in *Chaplinsky* and *Beauharnais* probably discouraged counsel from appealing libel actions on first amendment grounds. *See* note 11 *supra*.

13. 376 U.S. at 277–78.

14. *Id.* at 269 (quoting Roth v. United States, 354 U.S. 476, 484 (1957)).

15. *Id.* at 269–77. Although by its terms the first amendment restricts only Congress from abridging free expression, the *New York Times* Court made explicit that, since the first amendment has been applied to the states through the fourteenth amendment, the states are also restricted from abridging free expression. The constitutional prohibition applies without regard to whether the law was enacted by the legislature or merely enforced as part of the common law by the judiciary. *Id.* at 278.

16. Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 15 (1965)("[T]he Court examined history to discern the central meaning of the first amendment.").

Interpretation that strays from the text is often quite proper in constitutional cases. Justice Holmes said that the significance of constitutional provisions "is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth." Gompers v. United States, 233 U.S. 604, 610 (1914). This is especially true of the first amendment. "The language of the First Amendment is to be read not as barren words found in a dictionary but as symbols of historic experience illumined by the presuppositions of those who employed them." Dennis v. United States, 341 U.S. 494, 523 (1951) (Frankfurter, J., concurring).

17. Bloustein, *The First Amendment and Privacy: The Supreme Court Justice and the Philosopher*, 28 RUTGERS L. REV. 41, 42 (1974).

The first amendment protects more than just political speech; it not only serves to ensure that government will not restrict information and opinion of political value to the public, but also serves to protect self-expression as a desirable end in itself. *See, e.g.*, Whitney v. California, 274 U.S. 357, 375–76 (1927)(Brandeis, J., concurring)(free expression is necessary for both self-fulfillment and good government); T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6–7 (1970)(free expression provides: (1) "a means of assuring individual self-fulfillment," (2) "an essential process for advancing knowledge and discovering truth," (3) a means of public decision making, and (4) "a method of achieving a more adaptable and hence a more stable community"); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 576–79 (1978)(free expression is an end in itself as well as a public right "central to the workings of a tolerably responsive and responsible democracy").

Under the analysis proposed in this comment, the non-political purposes, while important, are classified as "peripheral," as distinguished from the "core" purpose—ensuring the means of a self-governing democracy.

John Milton was an early proponent of the view that a free press is beneficial to the public, not just to the publisher. Opposing government regulation of the press in an influential address to Parliament in 1644, Milton stressed that no one is a proper arbiter of truth and falsity, but rather each person is deemed capable of using reason to discern truth for himself.[18] Democracy rests on this principle, but such a principle requires for its fulfillment free access to information and opinion from all sources.[19] Similarly, James Madison considered the right of the people to express themselves freely on public issues to be the mainspring of successful popular government: "the right of freely examining public characters and measures, and of free communication among the people thereon, . . . has ever been justly deemed the only effectual guardian of every other right."[20]

The *New York Times* Court also quoted Justice Brandeis' "classic formulation"[21] of the role of free debate on public issues in the government established by the framers of the Constitution:

> Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.[22]

Three major principles of democratic government are summed up in the Brandeis opinion:

(1) Open discussion of public issues is essential to a vital democratic republic.

(2) Although abuses of free speech and free press are inevitable, suppression is the wrong remedy.

18. J. MILTON, *Areopagitica*, in 4 WORKS 293, 309–10 (1931).

19. *Id.* at 343–46.

20. New York Times Co. v. Sullivan, 376 U.S. at 274 (quoting Madison, *Report on the Virginia Resolutions*, in 4 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 554 (2d ed. J. Elliot 1836)).

21. 376 U.S. at 270.

22. Whitney v. California, 274 U.S. 357, 375–76 (1927)(Brandeis, J., joined by Holmes, J., concurring).

(3) The proper remedy for wrongful speech is more speech. We rely on the power of reason to sort true from false. "Sunlight is the most powerful of all disinfectants."[23]

Thus, it is primarily for the benefit of the public that the first amendment attempts to secure "the widest possible dissemination of information from diverse and antagonistic sources."[24] The theory that the first amendment protects a public interest in free debate is consistent with the view of Professor Alexander Meiklejohn,[25] whose influence is apparent throughout the *New York Times* opinion.[26]

Meiklejohn observed that the language of the Constitution's protection for the first amendment freedoms of speech, press, and assembly is absolute, as contrasted with its protection for life, liberty, and property under the fifth and fourteenth amendments.[27] Neither Congress nor the states[28] can abridge first amendment freedoms even by "due process of law." This prohibition limits the power not only of the legislature but also of the judiciary.[29] The reason for this absolute protection, Meiklejohn asserted, can be deduced from the central meaning of the Constitution itself: "All constitutional authority to govern the people of the United States belongs to the people themselves, acting as members of a corporate body politic."[30] The people are the governors as well as the governed.[31] By refusing to government the power to abridge the freedoms of speech, press, and assembly, the Constitution protects the means by which citizens may exercise their power, right, and duty of self-government.[32] The principle

23. Statement of Justice Brandeis, *quoted in* New York Times Co. v. Sullivan, 376 U.S. at 305 (Goldberg, J., concurring).

24. New York Times Co. v. Sullivan, 376 U.S. at 266 (quoting Associated Press v. United States, 326 U.S. 1, 20 (1945)).

25. Meiklejohn, though not a lawyer, was an influential writer on first amendment issues. *See, e.g.*, A. MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE (1960); Meiklejohn, *The First Amendment Is An Absolute*, 1961 SUP. CT. REV. 245.

26. *See* Brennan, *supra* note 16, at 10–20; Bloustein, *supra* note 17.

27. A. MEIKLEJOHN, *supra* note 25, at 8–9, 52–53.

28. The first amendment binds the states through the fourteenth amendment. Stromberg v. California, 283 U.S. 359, 368 (1931); Whitney v. California, 274 U.S. 357, 371 (1927); Gitlow v. New York, 268 U.S. 652, 666 (1925).

29. "What a state may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel." New York Times Co. v. Sullivan, 376 U.S. 254, 277 (1964)(footnote omitted).

30. Meiklejohn, *The First Amendment Is An Absolute*, 1961 SUP. CT. REV. 245, 253.

The proposition that constitutional authority to govern the people derived from the people themselves is a central theme of *The Federalist Papers*. *See, e.g.*, THE FEDERALIST NO. 22 (A. Hamilton) 152 (Mentor ed. 1961). Chief Justice Marshall relied on this proposition in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 403–05 (1819).

31. Meiklejohn, *supra* note 30, at 253–54.

32. *See* A. MEIKLEJOHN, *supra* note 25, at 35–38.

that government should not inhibit the flow of information and opinion on matters relating to public policy is axiomatic in a self-governing polity.[33]

To summarize, the first amendment's core purpose is to protect the public's right to hear what others have to say on matters of public interest. By prohibiting government from interfering with the dissemination of politically relevant information and opinion, the free speech and free press clauses provide for open "political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means. . . ."[34] An informed citizenry collectively reasoning its way to public policy is at the head of the body politic envisioned by the framers, and they amended the Constitution to safeguard democracy's life-blood—freely circulating fact and opinion concerning public issues.

II. FROM *NEW YORK TIMES* TO *GERTZ*

Fearing that the specter of large libel judgments would induce a timid self-censorship in those who might otherwise "give voice to public criticism,"[35] the *New York Times* Court employed a purposive analysis and fashioned a privilege to protect speech concerning the official conduct of public officials.

Three years later, concurring in *Curtis Publishing Co. v. Butts*,[36] Chief Justice Warren built on the *New York Times* view that the free speech clause limits defamation actions when they inhibit discussion of subjects in which the public has a substantial interest.[37] He refused to limit the *New York Times* privilege to the official conduct of public officials because political power is exercised in both the private and governmental sectors: "Many who do not hold public office at the moment are nevertheless intimately involved in the resolution of important public questions

33. *Id.* at 42. *See also* T. EMERSON, *supra* note 17, at 7.

34. New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964)(quoting Stromberg v. California, 283 U.S. 359 (1931)).

35. *Id.* at 278.

36. 388 U.S. 130 (1967). *Butts* and its companion case, *Associated Press v. Walker*, involved plaintiffs who were not public officials but public figures. Butts, a football coach, alleged he had been defamed by a magazine article stating he had fixed a game with the University of Alabama. Walker, a former general who had been a prominent opponent of the civil rights movement, challenged a news report stating that he had led a violent crowd in opposition to the enrollment of a black student at the University of Mississippi. The Court unanimously reversed the judgment for Walker and by a 5–4 vote affirmed the judgment for Butts. *Id.* at 162. The Court was split three ways as to the proper rule to govern public figure cases. *See* note 39 *infra*.

37. 388 U.S. at 162–70 (Warren, C.J., concurring). Although Chief Justice Warren's was only a concurring opinion, I focus on it because subsequent cases have made his proposed rule—public figures must prove "actual malice"—settled doctrine. *E.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974).

or, by reason of their fame, shape events in areas of concern to society at large."[38] Because the opinions and actions of public figures with respect to public issues affect us all, Chief Justice Warren thought it appropriate to expand the *New York Times* privilege to cover discussion of public figures as well as public officials.[39] He did not attempt a precise definition of a public figure, but he characterized one generally as a person who plays "an influential role in ordering society"[40] and who, in most cases, will have access to the media, which enables him "both to influence policy and to counter criticism. . . ."[41]

The expansion of the *New York Times* privilege to cover discussion of matters in which the public has a substantial interest regardless of the plaintiff's status could have been completed in *Rosenbloom v. Metromedia, Inc.*[42] In *Rosenbloom,* the Court squarely addressed the question whether a private plaintiff must prove "actual malice" if he was defamed while the defendant was discussing a matter of public interest. Justice Brennan, however, could muster only a plurality[43] to agree that the *New York Times* privilege should not depend on the plaintiff's status in a subsequent suit for defamation, but rather should extend to discussion of matters of public or general interest.

Justice Brennan did not want to freeze the growth of the law by defining matters of public interest narrowly or precisely.[44] The matter at issue

38. 388 U.S. at 164.

39. *Id.* at 163–65. Only Justices Brennan and White agreed with the Chief Justice that the *New York Times* privilege should apply equally to public figures and public officials. *Id.* at 172. Justice Harlan—joined by Justices Clark, Stewart, and Fortas—suggested a standard of fault less rigorous than "actual malice": "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." *Id.* at 155. In formulating a standard of fault that would accommodate both freedom of expression and protection of reputation, Justice Harlan employed a balancing analysis. *Id.* at 147–55.

Justice Black, joined by Justice Douglas, maintained that the *New York Times* privilege was insufficient to protect "the press from being destroyed by libel judgments." *Id.* at 171. Only an absolute privilege would suffice. *Id.*

40. *Id.* at 164 (Warren, C.J., concurring).

41. *Id.*

42. 403 U.S. 29 (1971). During a police campaign to enforce obscenity laws, a Philadelphia radio station broadcast news that the police seized 3000 "obscene" books from Rosenbloom. Following Rosenbloom's acquittal on criminal obscenity charges, he filed a libel suit. The jury returned a verdict for plaintiff and awarded $25,000 general damages and $725,000 punitive damages. The trial court reduced the punitive damages to $250,000 on remittitur. *Id.* at 32–40.

43. Chief Justice Burger and Justice Blackmun joined Justice Brennan's plurality opinion. *Id.* at 30. Justices White and Black wrote separate opinions concurring in the judgment but disagreeing with Justice Brennan's rationale. Justice White urged a narrower rationale limited to the facts of the case. *Id.* at 57–62. Justice Black reiterated his absolutist view that the first amendment does not permit libel judgments against the media even if the plaintiff can prove actual malice. *Id.* at 57. Justices Marshall, Stewart, and Harlan dissented. Their objections are discussed in notes 53–58 and accompanying text *infra*. Justice Douglas took no part in the consideration of the case.

44. 403 U.S. at 44–45.

in *Rosenbloom,* a discussion of a police campaign to enforce Philadelphia's obscenity laws, was perforce decided to be within the public interest.[45] Beyond that, Justice Brennan suggested that "matters bearing broadly on issues of responsible government"[46] would be within the scope of the public issue standard. While he would leave "delineation of the reach of that term to future cases,"[47] Justice Brennan left no doubt that he would define "matters of public or general interest" expansively.[48]

Justice Brennan maintained that the free speech and free press clauses protect uninhibited debate on public issues and that the protection should not be vitiated as soon as a private individual becomes involved.[49] He concluded: "We honor the commitment to robust debate on public issues, which is embodied in the First Amendment, by extending constitutional protection to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous."[50]

Extension of the *New York Times* privilege to cover discussion of public issues has been called "logical and inevitable."[51] Such extension is indeed inevitable, if one assumes that, under *New York Times* and its progeny, first amendment restrictions on defamation actions are determined by "the functions of the constitutional guarantees for freedom of expression"[52]—by purposive analysis.

The *Rosenbloom* dissenters, who did not employ a purposive analysis, raised two objections to extending the *New York Times* privilege to cover discussion of public issues. First, such an expansion frustrates the law's ability to provide redress for private individuals who have been injured by wrongful publication.[53] Second, the dissenters predicted that the public issue standard could lead to judicial censorship or press self-censorship.[54] Justice Marshall feared that the new test will require courts "to somehow pass on the legitimacy of interest in a particular event or subject; what information is relevant to self-government."[55] He concluded, "The dan-

45. *Id.* at 43.
46. *Id.* at 42.
47. *Id.* at 45.
48. *Id.* at 41–42.
49. *Id.* at 40–43.
50. *Id.* at 43–44.
51. Gertz v. Robert Welch, Inc., 418 U.S. 323, 353 (1974) (Blackmun, J., concurring).
52. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 41 (1971).
53. 403 U.S. at 66–70 (Harlan, J., dissenting), 79 (Marshall, J., joined by Stewart, J., dissenting).
54. *Id.* at 62–63 (Harlan, J., dissenting), 78–82 (Marshall, J., joined by Stewart, J., dissenting).
55. *Id.* at 79 (citation omitted).

ger such a doctrine portends for freedom of the press seems apparent."[56] Justice Harlan also forewarned of a possible threat to first amendment values. He preferred rules of general application which would "preserve a measure of order and predictability in the law . . . [and would] avoid subjecting the press to judicial second-guessing of the newsworthiness of each item they print."[57] Both dissents employed a balancing analysis.[58]

III. THE *GERTZ* RULES

Because Justice Brennan's was only a plurality opinion, the law remained unsettled.[59] Three years later, when the views of the *Rosenbloom* dissenters commanded a majority,[60] *Gertz v. Robert Welch, Inc.*[61] replaced the public issue standard with a set of "broad rules of general application."[62] The *Gertz* rules established the present accommodation between defamation law and the first amendment. *Gertz* divides defamation plaintiffs into categories—public officials and public figures on the one hand and private individuals on the other. Public figures and public officials must prove "actual malice" on the part of the defendant; that is, that the defendant knew the statement was false or recklessly disregarded its falsity. Private individuals need not prove "actual malice" unless required to do so as a matter of state law; they need only prove that the defendant was at "fault."[63] The rules derive from a balancing analysis and purport to accommodate conflicting values—the first amendment's policy of protecting free debate and "[t]he legitimate state interest . . . [in] the compensation of individuals for the harm inflicted on them by defamatory falsehood."[64] Although the rules employ a threshold

56. *Id.*

57. *Id.* at 63.

58. *Id.* at 63, 81.

59. *See* Davis & Reynolds, *Juridical Cripples: Plurality Opinions in the Supreme Court*, 1974 DUKE L.J. 59.

60. Although he had voted with the *Rosenbloom* plurality and sensed "some illogic" in the *Gertz* retrenchment, Justice Blackmun joined Justice Powell's opinion in order to create a majority. A definitive ruling, he believed, would eliminate the uncertainty that had plagued the law of defamation since *New York Times*. Gertz v. Robert Welch, Inc., 418 U.S. 323, 353–54 (1974) (Blackmun, J., concurring).

61. 418 U.S. 323 (1974).

62. *Id.* at 343–44.

63. *Id.* at 342–47. *Gertz* extended the first amendment on the flanks by affording some measure of constitutional protection from defamation liability to all speech, without regard to whether it involves public figures, public officials, or matters of public interest. It did this by ruling that strict liability in defamation is unconstitutional. In suits brought by private individuals, a state may define its own standard of liability, but it may not impose "liability without fault." *Id.* at 347.

In addition, the *Gertz* Court ruled that the Constitution prevents states from allowing recovery of punitive or presumed damages in the absence of proof of "actual malice." *Id.* at 349.

64. *Id.* at 341.

public issue test, the threshold is easily crossed and the status of the plaintiff is the determinative issue.[65]

A. *Public Officials and Public Figures*

Public officials and public figures have not yet been defined with precision, but the Court has provided some guidelines as to who fits within the categories. The category of public official does not include every public employee,[66] but it does include all persons "who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs."[67]

Public figures are those who have assumed prominence in public life. They may exercise such "power and influence that they are deemed public figures for all purposes,"[68] or they may have "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved"[69] and, so, are deemed public figures for a limited purpose. Except for the "exceedingly rare" involuntary public figure,[70] public figures have sought attention.[71]

B. *Private Individuals*

The *Gertz* Court considered fame to be a "compelling normative consideration" which should underlie a distinction between public and private individuals.[72] Because private individuals generally lack access to the media, through which they can counter defamations, and because they have not assumed the risk of injury caused by defamation, they are "not

65. Except in cases of the relatively rare public figure for all purposes, a threshold public issue test continues to be applicable. Statements about public officials must be related to their official conduct and statements about public figures for a limited purpose must be related to the activities that led to their classification as public figures. As applied by lower courts, this test is easily satisfied. *See, e.g.*, Chuy v. Philadelphia Eagles Football Club, 595 F.2d 1265 (3d Cir. 1979)(health of a football player); Cochran v. Indianapolis Newspapers, Inc., 372 N.E.2d 1211 (Ind. App. 1978)(former Playboy centerfold linked to bribery case involving local police and a brothel); Carson v. Allied News Co., 529 F.2d 206 (7th Cir. 1976)(tabloid newspaper stated that entertainer moved television show from New York to California to be with his new woman friend, who in fact resided in New York).

66. Hutchinson v. Proxmire, 443 U.S. 111, 119 n.8 (1979)(dictum). Washington courts have interpreted the public official category expansively. *E.g.*, Clawson v. Longview Publ. Co., 91 Wn. 2d 408, 589 P.2d 1223 (1979)(administrator of county motor pool); Martonick v. Durkan, 23 Wn. App. 47, 596 P.2d 1054 (1979)(clerk of the Washington State Senate). *See generally* Note, *Libel—Public Officials*, 15 GONZ. L. REV. 575 (1980).

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

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

69. *Id.*

70. *Id.*

71. *Id.* at 342.

72. *Id.* at 344.

only more vulnerable to injury than public officials and public figures, they are also more deserving of recovery."[73] Therefore, the rigorous requirements of the *New York Times* privilege are inappropriate in cases brought by private individuals. Concluding that the states can better balance the competing concerns of free expression and compensation for defamation of private individuals, the Court held: "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."[74]

IV. THE FLAW IN THE *GERTZ* RULES—*HUTCHINSON v. PROXMIRE*

Hutchinson v. Proxmire[75] illustrates the inadequacy of the *Gertz* rules, which allow, for cases brought by private individuals, an exception to the rule that neither criminal nor civil sanctions may be imposed on a person for good faith comment[76] on a matter of public interest.[77]

The case arose out of Senator William Proxmire's campaign to reduce wasteful government spending. In order to publicize what he considered to be egregious instances of such spending, Proxmire would periodically announce that he had given a "Golden Fleece Award" to the culpable department. In April 1975, the award went to three federal agencies[78] for

73. *Id.* at 345.

74. *Id.* at 347. The Court left open the proper resolution of a case involving defamation liability arising out of a statement "whose content did not warn a reasonably prudent editor or broadcaster of its defamatory potential." *Id.* at 348.

Although some states have retained the *Rosenbloom* public issue standard, most have accepted the opportunity offered by the *Gertz* Court and have made negligence the degree of fault necessary for defamation liability. Collins & Drushal, *The Reaction of the State Courts to* Gertz v. Robert Welch, Inc., 28 CASE W. RES. L. REV. 306, 312–14 (1978).

Washington decided to adopt negligence as the test for liability. Taskett v. King Broadcasting Co., 86 Wn. 2d 439, 546 P.2d 81 (1976). Justice Horowitz wrote a strong dissent urging retention of the actual malice test when the statement concerned a matter of public interest. *Id.* at 456, 546 P.2d at 92. For a discussion of *Taskett*, see Note, *Libel—New Standard of Liability for Media Defendants*, 52 WASH. L. REV. 975 (1977).

75. 443 U.S. 111 (1979).

76. A good faith comment is one made by a speaker who believes it to be true and has no reason to believe it to be false. In other words, a good faith comment is made without "actual malice."

77. The case was eventually settled. Senator Proxmire agreed to pay $10,000 in addition to making an apology on the Senate floor. Wall St. J., Mar. 25, 1980, at 2, col. 3.

For additional commentary on the effect of *Proxmire* on the public figure category, see Rosen, *Media Lament—The Rise and Fall of Involuntary Public Figures*, 54 ST. JOHN'S L. REV. 487, 502–18 (1980); Note, Wolston & Hutchinson, *Changing Contours of the Public Figure Test*, 13 LOY. L.A.L. REV. 179 (1979); Note, *Libel Becomes Viable: The Narrow Application of Limited Public Figure Status In Current Defamation Law*, 7 OHIO N. L. REV. 125 (1980).

78. The National Science Foundation, the National Aeronautics and Space Administration, and the Office of Naval Research. Hutchinson v. Proxmire, 443 U.S. at 114.

their funding of Dr. Hutchinson's studies of the behavior patterns in animals aggravated by stressful stimuli.

In defense to Hutchinson's suit for defamation[79] and intentional interference in contractual relations, Proxmire moved for summary judgment on two grounds: (1) he was immune to suit under the speech or debate clause, and (2) his speech was privileged under the first amendment because Hutchinson was both a public official and a public figure.[80] The trial court, agreeing with Proxmire on both grounds, granted his motion,[81] and the Court of Appeals for the Seventh Circuit affirmed.[82]

The Supreme Court reversed on the grounds that (1) the "informing function"—sending press releases and newsletters—is not essential to the legislative process and is, therefore, not within the limited scope of the speech or debate clause[83] and (2) plaintiff is not a public figure.[84]

Both lower courts had found Hutchinson to be a public figure for the limited purpose of comment on his receipt of public funds, because he voluntarily applied for those funds and because he had access to the media.[85] The Supreme Court rejected both reasons. Being a recipient of government funds, the Court asserted, does not make one a public figure for purposes of comment on public expenditures. To be a public figure, Hutchinson would have had to assume a prominent role in the controversy about government spending.[86] Hutchinson's access to the media prior to the alleged libel was limited to journals for professionals concerned with research in human behavior.[87] The media reported Hutchinson's response

79. The text of Proxmire's speech announcing the award constituted the basis of the action. It was incorporated into a press release and a newsletter to his constituents. It said in part:

> Dr. Hutchinson's studies should make the taxpayers as well as his monkeys grind their teeth. In fact, the good doctor has made a fortune from his monkeys and in the process made a monkey out of the American taxpayer.
>
> It is time for the Federal Government to get out of this "monkey business." In view of the transparent worthlessness of Hutchinson's study of jaw-grinding and biting by angry or hard-drinking monkeys, it is time we put a stop to the bite Hutchinson and the bureaucrats who fund him have been taking of the taxpayer.

121 CONG. REC. 10803 (1975), *quoted in* Hutchinson v. Proxmire, 443 U.S. at 116.

80. 443 U.S. at 118.

81. 431 F. Supp. 1311 (W.D. Wis. 1977).

82. 579 F.2d 1027 (7th Cir. 1978). The appellate court did not decide whether Hutchinson was a public official. *Id.* at 1035 n.14. The Supreme Court, therefore, did not address the question. 443 U.S. at 119 n.8.

83. The Court's construction of the speech or debate clause is outside the focus of this comment. For a discussion of this aspect of the *Proxmire* case, see *Supreme Court Review: 1978–79 Term*, 7 HASTINGS CONST. L.Q. 316, 324–38 (1980); Case Comment, *Legislative Immunity and Congressional Necessity*, 68 GEO. L.J. 783 (1980); *The Supreme Court, 1978 Term*, 93 HARV. L. REV. 60, 161–71 (1979).

84. 443 U.S. at 136.

85. *Id.* at 134.

86. *Id.* at 135.

87. *Id.*

to the award, but this kind of after-the-fact access to the press was held to be insufficient evidence on which to find that a plaintiff is a public figure.[88]

In *Gertz,* access to the media for purposes of countering the defamation by means of self-help was a justification for distinguishing between private and public figures.[89] In *Proxmire,* the Court narrows the category of public figure by requiring the defendant to show that the plaintiff had "regular and continuing access to the media"[90]—not merely sufficient access to rebut the defamation by presenting his view of the controversy.

The *Gertz* rules, as applied in *Proxmire*, frustrate the first amendment's central purpose: assuring the free discussion of political affairs.[91] *Proxmire* demonstrated how criticism of government may subject a speaker to liability when the criticism implicates a person who is neither a public official nor a public figure. To be sure, Proxmire's speech was intemperate, but the free speech clause does not limit its protection to speech that is moderate and in good taste. Flamboyant speech, invective, even speech that causes injury to reputation may be sheltered by the free speech clause and may be necessary to effective communication of ideas concerning government.[92] Had first amendment protection been measured by the public issue standard, Proxmire's newsletter and the public's ability to read subsequent newsletters of the same sort would have been safeguarded.

V. THE PUBLIC ISSUE STANDARD RECONSIDERED

Because Senator Proxmire had little difficulty persuading the trial and appellate courts that he was entitled to the *New York Times* privilege under the *Gertz* rules, he had no reason to ask the Court to reconsider *Gertz*. Even if he had adopted this dubious strategy, the Court was in no mood to adopt the *Rosenbloom* public issue standard.[93] Nonetheless, the public issue standard and the *Gertz* rules that replaced it deserve reexamination.

88. "[T]hose charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." *Id.*

89. Gertz v. Robert Welch, Inc., 418 U.S. at 344.

90. Hutchinson v. Proxmire, 443 U.S. at 136.

91. The post-*Gertz* Court continues to acknowledge that safeguarding discussion of public issues is an essential purpose of the first amendment. "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 838 (1978)(quoting Mills v. Alabama, 384 U.S. 214, 218 (1966)). *See also* T. EMERSON, *supra* note 17, at 531–33.

92. *See* New York Times Co. v. Sullivan, 376 U.S. at 270.

93. Consider this expression of the current Court's view of *Rosenbloom* from a case argued and decided on the same days as *Proxmire—Wolston v. Reader's Digest Ass'n:*

A private individual is not automatically transformed into a public figure just by becoming in-

A. *Balancing Reputation Against Free Speech: A Proposed Analysis*

Those who object to the public issue standard argue that it ignores the reputational interest served by the law of defamation.[94] The *Gertz* Court took the defamed party's interest into account, balancing the values protected by the free speech clause against the values protected by defamation law. The *Gertz* majority reached a compromise between those competing values.[95] But is it proper to compromise free speech? Does the first amendment afford absolute or merely relative protection to the freedom which is the foundation of our political system? Should the Court consider interests that might be harmed by a person's exercise of his right of free speech?

The appropriateness of a balancing analysis to decide first amendment cases has been a subject of heated controversy.[96] The text of the first amendment—"Congress shall make no law . . . abridging the freedom of speech, or of the press"[97]—suggests that balancing is not permissible. Justice Black, a literalist who rejected balancing, relied on the text and stated forthrightly, " 'no law' means no law."[98] Justice Douglas, although not a literalist in matters of constitutional interpretation, also read the command of the first amendment to be absolute. Objecting to the *Gertz* accommodation of reputation and free speech, he declared: "no 'accommodation' of its freedoms can be 'proper' . . . ."[99] The absolutist position has been a minority one, however, and the Court has often

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volved in or associated with a matter that attracts public attention. To accept such reasoning would in effect re-establish the doctrine advanced by the plurality opinion in *Rosenbloom v. Metromedia, Inc.* [citation omitted], which concluded that the *New York Times* standard should extend to defamatory falsehoods relating to private persons if the statements involved matters of public or general concern. We repudiated this proposition in *Gertz* and in *Firestone*, however, and we reject it again today.

443 U.S. 157, 167 (1979).

94. The *Gertz* Court stated:

The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood. We would not lightly require the State to abandon this purpose, for, as MR. JUSTICE STEWART has reminded us, the individual's right to the protection of his own good name

"reflects no more than our basic concept of the essential dignity of every human being—a concept at the root of any decent system of ordered liberty."

Gertz v. Robert Welch, Inc., 418 U.S. at 341 (quoting Rosenblatt v. Baer, 383 U.S. 75, 92 (1966)(concurring opinion)).

95. Gertz v. Robert Welch, Inc., 418 U.S. at 341–48.

96. To get a feeling for the absolute-balancing controversy, see the law review articles cited in note 5 *supra*.

97. U.S. CONST. amend. I.

98. H. BLACK, ONE MAN'S STAND FOR FREEDOM 472 (1968).

99. Gertz v. Robert Welch, Inc., 418 U.S. at 356 (Douglas, J., dissenting).

used a balancing analysis in first amendment cases.[100] By suggesting when an absolute approach is proper and when balancing is proper, the following section will try to resolve the conflict between the absolute language of the first amendment and the Court's evident need in some cases to weigh important competing interests against first amendment interests.

The proposed analysis distinguishes between the degree of protection to be afforded speech within the core of the guarantee and speech on its periphery.[101] At its core, the free speech clause protects speech necessary for self-government, speech about matters of public interest.

> [T]he central meaning of the free expression guarantee is that the body politic of this Nation shall be entitled to the communications necessary for self-governance, and that to place restraints on the exercise of expression is to deny the instrumental means required in order that the citizenry exercise that ultimate sovereignty reposed in its collective judgment by the Constitution.[102]

The protection afforded speech within this core should be absolute. Outside the core, the free speech clause affords a lesser degree of protection. In this peripheral area it is proper for the Court to balance the values promoted by the free speech clause—self-fulfillment through self-expression,[103] scientific inquiry,[104] academic freedom,[105] the "market place of

100. *E.g.*, Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 834–42 (1978)(balancing the need for confidentiality of judicial disciplinary proceedings against the truthful reporting of a matter of public interest); Konigsberg v. State Bar, 366 U.S. 36, 49–51 (1961) (balancing freedom of speech and association against the state's interest in requiring disclosure of Communist Party membership in bar admission proceedings); Martin v. City of Struthers, 319 U.S. 141, 143–49 (1943) (balancing the community's interest in preserving repose against the right to knock on doors in order to distribute literature). For a rejection of the balancing approach, see United States v. Robel, 389 U.S. 258, 268 n.20 (1967).

101. The concept that a legal rule has a "core" or "central meaning" and a "penumbra" comes from H.L.A. Hart's article, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 615 (1958). I have preferred the word "periphery" to "penumbra" because a penumbra is a place of mixed light and shadow surrounding a darker umbra. In legal analysis, the core would be a center of illumination—not a center of darkness.

102. Time, Inc. v. Firestone, 424 U.S. 448, 471 (1976) (Brennan, J., dissenting).

103. *See, e.g.*, Police Dep't v. Mosley, 408 U.S. 92, 95–96 (1972) ("To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship."); Whitney v. California, 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring); L. TRIBE, *supra* note 17, at 576–79; T. EMERSON, *supra* note 17, at 6.

104. *See* Delgado & Millen, *God, Galileo, and Government: Toward Constitutional Protection for Scientific Inquiry*, 55 WASH. L. REV. 349 (1978). *Cf.* Epperson v. Arkansas, 393 U.S. 97 (1968) (statute prohibiting the teaching of evolutionary theory violates the freedom of religion provisions of the first amendment).

105. *See, e.g.*, Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) ("Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom"); Sweezy v.

ideas"[106]—against other important social values. Speech about private matters, deliberate lies, and speech made with reckless disregard of falsity, since they are not within the core of speech necessary for self-governance, need be given only relative protection. This core/periphery analysis has the advantage of being faithful to the absolute language of the text while at the same time providing the Court with the flexibility necessary to protect peripheral first amendment values when those values are not outweighed by other legitimate state interests.

This method of deciding whether to balance was suggested by a recent opinion dealing, not with free expression, but with the fifth amendment privilege against compulsory self-incrimination, *New Jersey v. Portash.*[107] In *Portash,* the Court explicitly refused to balance the privilege against any other interest because the testimony at issue was at the center of the fifth amendment's protection against compulsory self-incrimination. The Court located the activity within the core of the constitutional guarantee and then applied the amendment's absolute language rigorously.[108] Having decided the activity was at the center, the Court stated that a balancing methodology would be improper. The *Portash* Court distinguished the absolute approach from the balancing approach it employed in cases involving violations of *Miranda* rights. *Miranda* warnings are peripheral rights granted in order to protect the core privilege.[109] Analogizing from *Portash,* we can conclude that balancing is permissible in cases involving peripheral rights, but not permissible if the right at issue is at the core of an absolute guarantee.

The *Gertz* opinion did not distinguish between core and peripheral speech and did not afford absolute protection to core speech. It afforded

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New Hampshire, 354 U.S. 234, 250 (1957) ("Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die"). *See also* Meyer v. Nebraska, 262 U.S. 390 (1923) (statute forbidding teaching in schools in a foreign language violates the due process clause of the fourteenth amendment).

106. That free competition of ideas leads to the triumph of truth is a proposition that goes back at least as far as Milton's *Areopagitica.* J. MILTON, *supra* note 18, at 347 ("And though all the windes of doctrin were let loose to play upon the earth, so Truth be in the field, we do injuriously by licencing and prohibiting to misdoubt her strength. Let her and Falshood grapple; who ever knew Truth put to the wors, in a free and open encounter").

Justice Holmes transported the locale of the competition from the battlefield to the marketplace in one of his most famous dissents. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market. . . .").

The "marketplace of ideas" concept has moved from the dissenter's side in Milton's and Holmes' time to the majority's side in our own. *See, e.g.,* Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) (academic freedom).

107. 440 U.S. 450 (1979).

108. *Id.* at 459.

109. *See id.* at 458–59.

relative protection and balanced the value of providing a civil remedy for wrongful injury to reputation against the value of speech about public issues. Because they focus on the status of the plaintiff and not the subject matter of the speech, the rules derived from the *Gertz* balancing lead to the curious result that sanctions may be imposed on core speech while intensive protection is afforded speech that does not further a central first amendment purpose.[110]

Proxmire exemplifies how the *Gertz* rules allow liability to be imposed on core speech when a public issue involves a private individual.[111] *Carson v. Allied News Co.*,[112] in which a report of an entertainer's sex life was held to be protected by the *New York Times* privilege, illustrates how the *Gertz* rules can afford inordinate protection to some speech that is peripheral to the first amendment's central purpose. Similarly in *Chuy v. Philadelphia Eagles Football Club*,[113] the court, finding Don Chuy, a professional football player, to be a public figure, held that a statement by the team doctor that Mr. Chuy was suffering from an incurable blood disease was protected by the *New York Times* privilege.

Johnny Carson's sexual proclivities and Don Chuy's health are not public issues; private scandal and gossip are not necessary for self-governance and do not deserve the intensive protection of the *New York Times* privilege. On the other hand, wasteful government spending is a public issue, and Senator Proxmire's speech does deserve such protection. Core/periphery analysis would relegate publications like those at issue in *Carson* and *Chuy* to the periphery of first amendment protection, where a court could properly balance the public's interest in access to such information against the plaintiff's interest in remedying a wrongful injury to his reputation. And, core/periphery analysis would elevate a publication like that at issue in *Proxmire,* one that makes a statement about a public issue, to the protection afforded by the *New York Times* privilege.

An additional objection to the accommodation of reputational concerns, one not directly related to core/periphery analysis, is that the first amendment's preferred remedy for false speech is not the suppression of

110. Justice Brennan anticipated this result. He warned that elevating the private-person/public-person distinction to constitutional status "could easily produce the paradoxical result of dampening discussion of issues of public or general concern because they happen to involve private citizens while extending constitutional encouragement to discussion of aspects of the lives of 'public figures' that are not in the area of public concern." Gertz v. Robert Welch, Inc., 418 U.S. at 364 (Brennan, J., dissenting) (quoting Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 48 (1971)).

111. *See* notes 75–92 and accompanying text *supra*.

112. 529 F.2d 206 (7th Cir. 1976).

113. 595 F.2d 1265 (3rd Cir. 1979).

speech but "more speech."[114] The *Gertz* Court bowed to this principle when it stated: "The first remedy of any victim of defamation is self-help—using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation."[115] But the Court went on to speculate that private individuals, unlike public persons, are likely to lack effective opportunities for rebuttal.[116] This may or may not be true depending on the individual case, but it is beside the point. The first amendment does not guarantee effective remedies for defamation—it guarantees free speech and a free press.[117] The framers of the Constitution envisioned that there would be abuses of free expression.[118] An inadequate remedy for defamatory speech is a price paid for living under a Constitution that refuses both federal and state governments the power to abridge the freedom to speak about public issues.

B. Protection for False Statements of Fact

Although the Supreme Court has never explicitly employed this core/periphery analysis in first amendment cases, an essential difference between *New York Times* and *Gertz* can be highlighted by looking at those cases from a core/periphery perspective.

Having located the speech at issue within "the central meaning of the First Amendment"[119] (in the terms of this comment, the "core"), the *New York Times* Court did not balance free speech against any other competing interest. The Court expressly stated that neither defamatory content nor the presence of factual error supports the repression of speech that would otherwise be free.[120] In contrast, the *Gertz* Court, prior to balancing, excluded false statements of fact from core constitutional protection.

> [T]here is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest

114. Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

115. Gertz v. Robert Welch, Inc., 418 U.S. at 344.

116. *Id.* It is doubtful whether Commissioner Sullivan thought he had an effective remedy against The New York Times, New York Times Co. v. Sullivan, 376 U.S. 254 (1964), or that Johnny Carson's friend (later his wife) thought that she had an effective remedy against the National Insider, Carson v. Allied News Co., 529 F.2d 206 (7th Cir. 1976).

117. *See* Miami Herald Publ. Co. v. Tornillo, 418 U.S. 241 (1974) (holding a state's right of reply statute violates the free press clause).

118. "Some degree of abuse is inseparable from the proper use of everything; and in no instance is this more true than in that of the press." Madison, *Report on the Virginia Resolutions*, in 4 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 571 (2d ed. J. Elliot 1836), *cited in* New York Times Co. v. Sullivan, 376 U.S. at 271.

119. 376 U.S. at 273.

120. *Id.* at 271–73.

> in "uninhibited, robust, and wide-open" debate on public issues. *New York Times Co. v. Sullivan,* 376 U.S., at 270. They belong to that category of utterances which "are no essential part of any exposition of ideas, and 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." *Chaplinsky v. New Hampshire,* 315 U.S. 568, 572 (1942).[121]

In fact, the *Gertz* holding is less stringent than this dictum would lead one to believe. Rather than affording *no* constitutional protection to false statements, *Gertz* balanced competing values and afforded false statements peripheral protection.

The *Gertz* Court's citation of *New York Times* should not obscure the essential difference between the two cases on this point. *New York Times* did not strip speech of core constitutional protection merely because the speech was false. To the contrary, *New York Times* expressed the belief that if public debate is to flourish, erroneous statements, which are inevitable in free debate, must be protected.[122] The *New York Times* Court expressly refused to make constitutional protection dependent on a "test of truth—whether administered by judges, juries, or administrative officials. . . ."[123]

The *New York Times* Court was not unmindful of the probability that in the realm of political debate free expression would be abused, reputations harmed, and facts exaggerated; but the Court opined that free expression on public issues is such an essential liberty that it should not be limited by tests for truth or worries about reputation.[124]

The *Gertz* Court focused on providing a remedy for injury to reputation and ignored the question whether courts are the proper arbiters of the truth or falsity of political speech. After the Court asserted that "there is no constitutional value in false statements of fact,"[125] it proceeded to bal-

121. Gertz v. Robert Welch, Inc., 418 U.S. at 340.

122. 376 U.S. at 271–72. *Accord,* Curtis Publ. Co. v. Butts, 388 U.S. 130, 152 (1967);

> [W]e have rejected, in prior cases involving materials and persons commanding justified and important public interest, the argument that a finding of falsity alone should strip protections from the publisher. [citation omitted] We have recognized "the inevitability of some error in the situation presented in free debate," [citation omitted] and that "putting to the pre-existing prejudices of a jury the determination of what is 'true' may effectively institute a system of censorship."

Professor Nimmer agrees that the content of dialogue on issues of public interest should not be limited by a test of truth. Such a test, he believes, would effectively limit content of potentially defamatory material to what an editor decides a jury would surely regard to be truth. If there is any likelihood that a jury would find the statement to be untrue, only a courageous publisher would risk defamation liability. Nimmer, *supra* note 5, at 950–51.

123. New York Times Co. v. Sullivan, 376 U.S. at 271.

124. *Id.*

125. 418 U.S. at 340.

ance the free expression values served by false statements against the reputational interests of varying classes of defamation plaintiffs. In the terms of core/periphery analysis, *Gertz* relegated all false speech to the periphery.

Because *Gertz* excludes false factual statements from core first amendment protection,[126] it imposes, in effect, a test of truth which *New York Times* considered so unwise. The question, then, becomes whether to make core protection hinge on a test of truth as *Gertz* does or to adhere to the *New York Times* position that determining the truth or falsity of a statement about public issues is a question for the public at large and not for judges or juries.

The *Gertz* Court's imposition of a test of truth poses dangers to free debate. A single misstatement of fact can subject a speaker who can be shown to be at fault to defamation liability.[127] Because erroneous statements are "inevitable in free debate," such statements ought to be protected so that vigorous discussion of public issues will not be chilled by circumspection.[128] Statements about public issues, unless made with "actual malice,"[129] are at the core of the free speech and free press clauses, and deserve protection without regard to whether a judge or jury subsequently finds a fact in the statement to be erroneous.

C. *The Problem of Unpredictability: The* Gertz *Rules Versus the Public Issue Standard*

Justice Marshall's dissent to Justice Brennan's public issue standard began with the observations that the standard was ill-defined and that unpredictable application might lead to self-censorship.[130] Justice Brennan admitted the indefiniteness of the standard, but he was willing to leave its

126. *Id.* at 339–40. *See also* Time, Inc. v. Firestone, 424 U.S. 448, 457 (1976), where the Court once again expressly excluded inaccurate and defamatory reports of facts from first amendment protection.

127. In some jurisdictions the defendant must prove that the truth was nearly identical to the statement in order to sustain a successful affirmative defense of truth. "[I]f the accusation is one of particular misconduct, such as stealing a watch from A, it is not enough to show a different offense, even though it be a more serious one, such as stealing a clock from A, or six watches from B." W. PROSSER, *supra* note 8, at 798 (footnotes omitted).

128. New York Times Co. v. Sullivan, 376 U.S. at 271–72.

129. Because statements made with "actual malice" are not inevitable in public debate and do not further a central purpose of the first amendment, they need not be included within the core of first amendment protection. On the other hand, fear of subsequent discovery and the burdens of litigating the issue of "actual malice" may indeed chill the exercise of free speech. See Herbert v. Lando, 441 U.S. 153 (1979). It may therefore be wise to afford absolute protection to all speech about public issues without regard to whether it was made with "actual malice." *See* New York Times Co. v. Sullivan, 376 U.S. at 293–305 (Black, J., and Goldberg, J., concurring).

130. Rosenbloom v. Metromedia, Inc., 403 U.S. at 78–81 (Marshall, J., dissenting).

delineation to future cases.[131] At its center, he made clear, the standard embraces those matters necessary for the public to exercise its democratic function of self-government,[132] what this comment has called core speech. Justice Brennan's tentative characterization of what other types of speech might be sheltered within the phrase "matters of public or general interest" was so inclusive, however, that Justice Marshall was moved to object, "all human events are arguably within the area of 'public or general concern.' "[133] In retrospect, it is unfortunate that Justice Brennan was inclined to be so exceedingly generous with first amendment protection.

Core/periphery analysis suggests a compromise between Justice Brennan's proposal and Justice Marshall's objection. If the public issue standard limited absolute protection to core speech, that is, speech necessary for self-government, lower courts would have sufficient guidance so that unpredictability could be minimized. Regrettably, Justice Brennan did not so limit the public issue standard, and the *Gertz* majority, in an effort to provide clearer guidance to lower courts, agreed with Justice Marshall's *Rosenbloom* opinion that the better way to provide protection for free expression was by means of "rules of general application."[134] Implicit in the *Gertz* opinion is the belief that the rules could be easily and uniformly applied, reducing the necessity for continuing Supreme Court supervision of defamation litigation.[135]

The persuasiveness of the *Gertz* view wilts under the light of the judiciary's experience with the *Gertz* rules. Distinguishing private from public

131. *Id.* at 44–45. Justice Brennan found the phrase "matter of public or general interest" in Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 214 (1890). In defining the limits of the right to privacy, the authors stated: "The right to privacy does not prohibit any publication of matter which is of public or general interest." *Id.* Warren and Brandeis, like Justice Brennan, recognized that the scope of this standard is indefinite, but indefinite standards are not unusual in the common law tradition.

> There are of course difficulties in applying such a rule; but they are inherent in the subject matter, and are certainly no greater than those which exist in many other branches of the law,—for instance, in that large class of cases in which the reasonableness or unreasonableness of an act is made the test of liability.

Id.

132. Rosenbloom v. Metromedia, Inc., 403 U.S. at 41–43.

133. *Id.* at 79 (Marshall, J., dissenting).

134. Gertz v. Robert Welch, Inc., 418 U.S. at 343–44. For a discussion of the advantages and disadvantages of formal decision-making based on rules, see Powers, *Formalism and Nonformalism in Choice of Law Methodology*, 52 WASH. L. REV. 27, 28–32 (1976).

135. Gertz v. Robert Welch, Inc., 418 U.S. at 343–44.

persons has not yielded predictable results.[136] As one beleaguered trial judge complained, "'[d]efining public figures is much like trying to nail a jellyfish to the wall.'"[137] Hence, the *Gertz* rules have not relieved the Supreme Court of the responsibility of supervising the constitutionality of defamation litigation.[138]

Admittedly, determining what speech is necessary to self-government will not be a mechanical task that always yields predictable results. As the common law process does its work of defining the standard on a case by case basis, editorial caution will inevitably produce some press self-censorship, but less and less as the standard becomes clearer. Press self-censorship is a serious problem and will continue to be one as long as libel actions are constitutional.[139] Nevertheless, under the public issue standard editors should have fewer fears that newsworthy stories will subject them to defamation liability. Furthermore, on a theoretical ground, the public issue standard is preferable to the *Gertz* rules because its scope is coextensive with the speech the first amendment regards as most important, speech necessary to self-government.

136. Hutchinson v. Proxmire, 443 U.S. 111 (1979) (researcher on government contract) is far from the only case in which lower courts have had difficulty in deciding whether a particular plaintiff was a private individual or a public official or a public figure. *E.g.*, Wolston v. Reader's Digest Ass'n, 443 U.S. 157 (1979) (Supreme Court reversed lower courts' finding that nephew of convicted Soviet agents who had himself been convicted of contempt in connection with espionage prosecutions was a public figure); Johnston v. Corinthian Television Corp., 583 P.2d 1101 (Okla. 1978) (trial court found physical education teacher to be both a public figure and a public official; appellate court found him to be a private individual; state supreme court found him to be a public official). For a case holding that a public high school teacher who selected a controversial book for class use is not a public figure or public official, see Franklin v. Lodge 1108, Benevolent Protective Order of Elks, 97 Cal. App. 3d 915, 159 Cal. Rptr. 131 (1979).

Especially troubling are cases involving relatives or associates of public figures or public officials. *E.g.*, Carson v. Allied News Co., 529 F.2d 206 (7th Cir. 1976) (girl friend, later wife, of television celebrity held to be a public figure); Meeropol v. Nizer, 381 F. Supp. 29 (S.D.N.Y. 1974) (children of executed spies are public figures despite attempting to preserve their privacy by changing their name). It is somewhat difficult to reconcile such cases with either the assumption of the risk rationale of *Gertz*, 418 U.S. at 344–45, or the purposive rationale expressed in *New York Times*, 376 U.S. at 269–71. *See generally* Note, *An Analysis of the Distinction Between Public Figures and Private Defamation Plaintiffs Applied to Relatives of Public Figures*, 49 S. CAL. L. REV. 1131 (1976).

137. Rosanova v. Playboy Enterprises, Inc., 411 F. Supp. 440, 443 (S.D. Ga. 1976). *See generally* Bamberger, *Public Figures and the Law of Libel: A Concept in Search of a Definition*, 33 BUS. LAW. 709, 711 (1978); Nat'l L.J., April 21, 1980, at 26, col 1.

138. *See* Wolston v. Reader's Digest Ass'n, 443 U.S. 157 (1979); Hutchinson v. Proxmire, 443 U.S. 111 (1979); Time, Inc. v. Firestone, 424 U.S. 448 (1976).

139. *See* Gertz v. Robert Welch, Inc., 418 U.S. at 360 (Douglas, J., dissenting); Curtis Publ. Co. v. Butts, 388 U.S. at 171–72 (Black, J., concurring and dissenting); Anderson, *Libel and Press Censorship*, 53 TEX. L. REV. 422 (1975).

VI. CONCLUSION

Limited to providing absolute protection to core speech, the public issue standard would serve the first amendment better than do the *Gertz* rules. By directing judicial inquiry to the subject matter of the speech rather than to the status of the plaintiff, the public issue standard ensures that no matter who is involved in the controversy, discussion of public issues will enjoy the substantial constitutional protection of the *New York Times* privilege.

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