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The Supreme Court Creates New Hurdle For Libel Defendants: Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.

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COMMENTS

THE SUPREME COURT CREATES NEW HURDLE FOR LIBEL DEFENDANTS: DUN & BRADSTREET, INC. v. GREENMOSS BUILDERS, INC.

The Supreme Court's first amendment methodology in the law of defamation strikes a balance between the states' interest in compensating individuals for injury to their reputation,¹ and the


Defamation has been defined as the "unconsented and unprivileged communication to a third party of a false idea which tends to injure plaintiff's reputation by lowering the community's estimation of him, or by causing him to be shunned or avoided, or by exposing him to hatred, contempt or ridicule." A. Hanson, LIBEL AND RELATED TORTS: CASE & COMMENT 21-22 (1959). It is composed of the torts of libel and slander. See W. Prosser & W. Keeton, supra, § 112. Libel consists of written, defamatory statements and other defamatory communications, such as movies, which are embodied in a permanent physical form. See id. at 786-87; Restatement (Second) of Torts § 568A (1977). Slander consists of defamatory statements which are spoken. W. Prosser & W. Keeton, supra, § 112, at 786. A third category of defamation recognized by some courts is the "defamacast," which is defined as a communication by radio or television. See American Broadcasting-Paramount Theatres, Inc. v. Simpson, 106 Ga. App. 230, 235, 126 S.E.2d 873, 879 (1962); L. Eldredge, supra, § 13, at 81-86. Libel, because of its permanent form, is considered likely to cause injury, and, therefore, is actionable per se. W. Prosser & W. Keeton, supra, § 112, at 795. Damage to reputation is presumed from the defamatory statement, and the plaintiff is not required to offer proof of impairment to reputation. See id. Slander, on the other hand, is not actionable unless the plaintiff offers proof of actual damage. Id. at 788. Certain categories of speech, however, are actionable per se because of their deleterious nature. Id. Speech that is slanderous per se includes words which impute a criminal offense, a loathsome disease, unchastity to a woman, and words which tend to harm a person's business reputation. See id.; A. Hanson, supra, § 47, at 46.

At common law, one who intentionally published a defamatory statement was held strictly liable for resulting injury to reputation regardless of whether the defendant believed the statement to be true or whether the defendant exercised due care to ascertain the truth. See W. Prosser & W. Keeton, supra, § 113, at 802, 804. Although truth is a complete defense to an action in common law defamation, see L. Eldredge, supra, §§ 63-71, the burden of proving truth is on the defendant, id. § 63, at 322-23.
public's interest in freedom of speech and freedom of the press. In Gertz v. Robert Welch, Inc., the Court set forth the constitutional limitations on the ability of a private person to recover damages for defamation. Private individuals must prove that the defamatory statement was made with some degree of fault and may not recover presumed or punitive damages unless such speech was made with knowing or reckless falsity. While most defamation cases invoking first amendment protections have relied on the Supreme Court's decision in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), the Court extended protection to defamatory statements concerning the official conduct of public officials if the statements were made in good faith. Id. at 279-80. Constitutional protection was later extended by the Court to protect statements made about public figures, see Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), and eventually to defamatory speech concerning private citizens, see Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); see also infra notes 40-51 and accompanying text (general discussion of development of constitutional privilege). See generally Eaton, supra note 1, at 1364-1451 (tracing development of constitutional privilege); Del Russo, Freedom of the Press and Defamation: Attacking the Bastion of New York Times Co. v. Sullivan, 25 St. Louis U.L.J. 501, 505-11 (1981) (reviewing privilege up until Gertz); Broshnahan, From New York Times v. Sullivan to Gertz v. Robert Welch: Ten Years of Balancing Libel Law and the First Amendment, 26 Hastings L.J. 777 (1975) (general overview of constitution and libel).
ST. JOHN’S LAW REVIEW

Protection involved media defendants, it remained uncertain whether the Gertz privilege applied only to expressions made publicly by the media or whether it applied to nonmedia speech as well. Recently, in Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., the Supreme Court, in an attempt to further define the contours of the constitutional defamation privilege, held that the first amendment permits the recovery of presumed and punitive damages absent a showing of actual malice if a defamatory communication does not involve a matter of public concern.

In Dun & Bradstreet, the defendant, Dun & Bradstreet, Inc., a credit reporting agency, issued a credit report to five subscribers stating that the plaintiff, Greenmoss Builders, Inc. (Greenmoss), had filed a voluntary petition for bankruptcy. The report was false and greatly misrepresented Greenmoss’ financial status.


See generally Shiffrin, Defamatory Non-Media Speech and First Amendment Methodology, 25 UCLA L. Rev. 915 (1978) (constitutional protection should be granted to nonmedia defamatory speech); Note, Mediaocracy and Mistrust: Extending New York Times Defamation Protection to Nonmedia Defendants, 95 Harv. L. Rev. 1876 (1982) (protection should be extended to non-media speech to avoid content regulation by courts); Eaton, supra note 1, at 1405-08 (Gertz should extend to non-media speech). But see generally Note, First Amendment Protection Against Libel Actions: Distinguishing Media and Non-Media Defendants, 47 S. Cal. L. Rev. 902 (1974) (constitutional protection should not extend to nonmedia defendants) (hereinafter cited as Note, First Amendment Protection).


Id. at 2946.

10 Id. at 2941. Dun & Bradstreet, Inc., provides subscribers with reports about the financial status of businesses. Id. Subscribers, usually creditors of the businesses reported upon, may contract for “continuous service reports” which enable them to receive all updates about a particular business over a one-year period. Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc., 143 Vt. 66, 68, 461 A.2d 414, 416 (1983). Under the terms of the subscription agreement, subscribers may not reveal the information they receive to anyone else. Dun & Bradstreet, 105 S. Ct. at 2941.

11 105 S. Ct. at 2941. In Dun & Bradstreet, the error in the report was attributed to the negligence of one of the defendant’s employees and to the defendant’s failure to verify the report with Greenmoss. See id. at 2942. Dun & Bradstreet employed a seventeen-year old high school student to review bankruptcy pleadings and incorporate the information into its credit reports. Id. The employee inadvertently attributed to Greenmoss a bankruptcy petition filed by a former Greenmoss employee. Id. Dun & Bradstreet’s failure to verify the
Greenmoss was informed of the erroneous credit report while discussing the possibility of future financing with its bank, and it immediately requested both a corrective notice and a list of creditors who received the report. Dun & Bradstreet refused to divulge the names of the creditors but issued a corrective notice that Greenmoss found unsatisfactory.

Greenmoss then filed a defamation suit in Vermont state court and was awarded $50,000 in compensatory or presumed damages and $300,000 in punitive damages. Dun & Bradstreet moved for a new trial arguing that under the United States Supreme Court's holding in *Gertz v. Robert Welch, Inc.*, recovery of presumed and punitive damages was prohibited unless the plaintiff proved that the statement was made with knowledge of its falsity or reckless disregard for the truth—actual malice. Dun & Bradstreet further contended that the jury instructions permitted recovery of presumed and punitive damages on a lesser showing. A new trial was granted, but the Vermont Supreme Court reversed, holding that the actual malice requirement of *Gertz* does not apply to defamation actions brought against nonmedia defendants. Concluding
that the credit reporting agency was not a media defendant, the court upheld the recovery of presumed and punitive damages under the jury instructions, thus permitting recovery without a showing of actual malice.\textsuperscript{19}

On \textit{certiorari}, a divided Supreme Court affirmed, but employed a different rationale than that relied upon by the Vermont Supreme Court.\textsuperscript{20} While the Vermont Supreme Court focused on the status of Dun \& Bradstreet as a nonmedia defendant,\textsuperscript{21} the Supreme Court examined the type of speech involved to determine whether \textit{Gertz} applied.\textsuperscript{22} Justice Powell, writing for a plurality of three, distinguished \textit{Gertz} by noting that the constitutional limitation on the recovery of presumed and punitive damages established in that case applied only to defamatory speech involving a matter of public concern.\textsuperscript{23} Employing the same balancing ap-

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\item\textsuperscript{19} See Greenmoss Builders, Inc., 143 Vt. at 68, 461 A.2d at 417-18. While acknowledging that the distinction between media and nonmedia defendants is often difficult to draw, the Vermont Supreme Court found no such difficulty in classifying the credit reporting agency as a nonmedia defendant. The Court stated that “[t]here is a clear distinction between a publication which disseminates news for public consumption and one which provides specialized information to a selective, finite audience.” \textit{Id.} at 417.
\item\textsuperscript{20} 105 S. Ct. at 2948.
\item\textsuperscript{21} See Greenmoss Builders, Inc., 143 Vt. at 68, 461 A.2d at 417-18.
\item\textsuperscript{22} See 105 S. Ct. at 2943-48.
\item\textsuperscript{23} \textit{Id.} at 2944-46. Justice Powell’s opinion in \textit{Dun \& Bradstreet} was joined by Justice Rehnquist and Justice O’Connor. \textit{Id.} at 2941. A preliminary issue discussed by the plurality was the adequacy of the jury instructions. \textit{Id.} at 2942-43. Justice Powell determined that the jury instructions, taken as a whole, permitted recovery of presumed and punitive damages without a finding of actual malice as defined in \textit{Gertz}. \textit{Id.} at 2943. It was therefore necessary for the Court to decide whether, based on the merits, proof of actual malice was necessary. \textit{Id.}

Chief Justice Burger and Justice White wrote concurring opinions. \textit{Id.} at 2498 (Burger, C.J., and White, J., concurring). The Chief Justice agreed with the plurality opinion only upon the holding that \textit{Gertz} is limited to statements which involve matters of public concern, and that the credit report in issue relates to a matter of essentially private concern. \textit{Id.} (Burger, C.J., concurring). Justice White agreed that \textit{Gertz} only applies when the speech in issue involves a matter of public concern. \textit{Id.} at 2954 (White, J., concurring). Justice White further expressed the view that both \textit{New York Times} and \textit{Gertz} were erroneously decided and that the common law should apply in defamation actions brought by private citizens. \textit{Id.} at 2950 (White, J., concurring); see supra note 1 (discussing common law standard).

Justice White argued that first amendment value of free debate on public issues is not served by circulating false facts about public officials. 105 S. Ct. at 2950 (White, J., concurring). Justice White voiced concern over the high degree of proof necessary for public figures to recover in defamation suits, \textit{id.} (White, J., concurring), and asserted that a public official’s ability to counter a falsehood is inadequate to protect his reputation because “[d]enials, retractions, and corrections are not ‘hot’ news, and rarely receive the prominence
proach used by the Court in *Gertz*, Justice Powell determined that the state interest in awarding presumed and punitive damages for libelous speech outweighed the interest in protecting speech of private concern, therefore justifying the imposition of such damages even absent a showing of "actual malice." After examining the "content, form and context" of the speech in issue, the Court determined that the credit report was solely in the interest of the speaker and its specific business audience and,

of the original story," *id.* at 2950-51 (White, J., concurring) (quoting *Rosenbloom v. Metromedia*, Inc., 403 U.S. 29, 46-47 (1971)). Justice White maintained that protection of the press from intimidating damages liability could have been achieved by retaining the common law standard of liability but limiting the recoverable damages. 105 S. Ct. at 2952 (White, J., concurring). By taking this approach, it was argued, the plaintiff would be able to vindicate his reputation without unduly threatening the press. *Id.* (White, J., concurring).

Justice White further expressed doubt as to whether the Court's limitations on recovery of damages has protected the financial stability of the press due to the long and complicated discovery procedures necessary to prove actual malice. *Id.* at 2953 (White, J., concurring). With regard to the existence of a chilling effect on the media resulting from the imposition of libel awards, Justice White stated, "I cannot assume that the press, as successful and powerful as it is, will be intimidated into withholding news that by decent journalistic standards it believes to be true." *Id.* (White, J., concurring).

*See* *Dun & Bradstreet*, 105 S. Ct. at 2946. Balancing the state interest in protecting reputation against the constitutional value of speech of purely private concern, Justice Powell determined that the latter was outweighed by the "strong and legitimate" interest in compensating individuals who have been defamed. *Id.* at 2945.

The plurality asserted that not all speech is of equal first amendment importance. *Id.* Speech concerning public affairs, Justice Powell asserted, is the essence of self-government and receives heightened protection. *Id.* at 2945-46. Certain types of speech such as obscenity, fighting words, and commercial speech, however, have received less constitutional protection. *Id.* at 2945 n.5.

*See* *Connick v. Myers*, 461 U.S. at 147-48. The plurality in *Dun & Bradstreet* derived the "content, form and context" test from *Connick v. Myers*, 461 U.S. 138 (1983). *See* 105 S. Ct. at 2947 (quoting *Connick*, 461 U.S. at 147-48). In *Connick*, the plaintiff was dismissed from her position as assistant district attorney for refusing to accept a transfer and for insubordination in the form of distributing to other employees a questionnaire concerning office policies. *See* *id.* at 140-42. The plaintiff claimed she had been discharged in violation of her first amendment right of free speech. *See* *id.* at 141. The Court examined the content, form and context of the questionnaire and held that, for the most part, it was not a matter of public concern. *Id.* at 148-49. The Court determined that even though one question, whether assistant district attorneys felt pressure to work in political campaigns supported by the offices, touched on a matter of public concern, the state's interest as an employer in promoting the efficiency of public services outweighed the interest of the employee in commenting on matters of public interest. *See* *id.* at 150-54. The Court, therefore, concluded that the plaintiff's discharge did not offend the Constitution. *Id.* at 154.
therefore, did not involve a matter of public concern.\textsuperscript{27} Furthermore, the Court determined that there existed no "strong interest in the free flow of commercial information" because the report was disseminated to only five subscribers.\textsuperscript{28} Finally, the plurality examined the potential deterrent effect on truthful credit reporting which might result from the imposition of presumed and punitive damage awards and concluded that such an effect would be unlikely because credit reporting, like advertising, is solely motivated by a desire for profit and is objectively verifiable.\textsuperscript{29}

Justice Brennan, dissenting, argued that the Court, by requiring proof of actual malice to recover presumed and punitive damages only when speech involves a matter of public concern, cut away at the "protective mantle" accorded defamation defendants in \textit{Gertz}.\textsuperscript{30} Moreover, the dissent asserted that the credit report did involve a matter of public concern and noted that speech about economic or commercial matters is an important part of public discourse which consistently has received constitutional protection in the past.\textsuperscript{31} The dissent maintained that information about the bankruptcy of a company is of concern to the residents of the community where the company is located and may shape citizens' opinions about economic regulation.\textsuperscript{32} Applying an overbreadth analysis,\textsuperscript{33} Justice Brennan further posited that even if the credit

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\item \textsuperscript{27} 105 S. Ct. at 2947. The \textit{Dun & Bradstreet} plurality stated that speech of commercial interest does not warrant protection when "[t]he speech is wholly false and clearly damaging to the victim’s business reputation." \textit{Id.}
\item \textsuperscript{28} See \textit{id.}
\item \textsuperscript{29} \textit{Id.} Justice Powell mentioned an empirical study comparing credit transactions in Boise, Idaho, where there is no common law privilege for credit reporting agencies, with transactions in Spokane, Washington, where there is a common law privilege. \textit{Id.} The study concluded that, in states in which no privilege existed, credit transactions were not inhibited and the credit reporting business thrived. See \textit{id.} at 2947-48 n.9.
\item \textsuperscript{30} \textit{Id.} at 2957 (Brennan, J., dissenting). Justice Brennan argued that \textit{Gertz} applied to all defamatory statements, whether or not they implicated matters of public concern. \textit{Id.} at 2959 & n.11 (Brennan, J., dissenting).
\item \textsuperscript{31} \textit{Id.} at 2960-62 (Brennan, J., dissenting). Justice Brennan pointed to two areas in which the Court has rejected the notion that speech on economic matters is not of public concern: labor relations and advertising. \textit{Id.} at 2961 & n.13 (Brennan, J., dissenting). The dissent also rejected the plurality’s reliance on the fact that the credit report was sold for profit, noting that speech does not lose its constitutional protection merely because it is sold for profit. See \textit{id.} at 2961 (Brennan, J., dissenting).
\item \textsuperscript{32} See \textit{id.} at 2961-62 (Brennan, J., dissenting). Justice Brennan stated, "[i]t is difficult to suggest that a bankruptcy is not a subject matter of public concern when federal law requires invocation of judicial mechanisms to effectuate it and makes the fact of the bankruptcy a matter of public record." \textit{Id.} at 2962 (Brennan, J., dissenting).
\item \textsuperscript{33} See \textit{id.} at 2962-64 (Brennan, J., dissenting). Justice Brennan applied the requirement
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report were characterized as a matter of private concern, it would still deserve protection under the first amendment from the imposition of presumed and punitive damage awards. The Supreme Court in *Dun & Bradstreet* delineated two broad categories of expression: speech on matters of public concern and speech on purely private matters. Speech in the latter category receives no constitutional protection from the imposition of presumed and punitive damages. It is submitted that the Court, by employing this public concern-private concern distinction, completely reconstrued its holding in *Gertz* and reinstated a public interest standard that the *Gertz* Court expressly rejected. Moreover, it is suggested that the Court created a nebulous standard to determine whether speech is a matter of public concern which will offer little guidance to lower courts. This Comment will examine the factors used by the Court to determine whether the speech in issue was a matter of public concern and will suggest that the Court's reliance on the limited dissemination of the expression is inconsistent with the Court's first amendment precedent in the law of defamation.

**Development of Constitutional Privilege Through *Gertz***

State defamation law at one time was considered to be wholly outside the scope of the first amendment. However, in *New York*
*Times v. Sullivan*, the Supreme Court extended first amendment protection to defamatory falsehoods to protect truthful speech about public officials from the potential chill of common law defamation awards. 38 To recover in defamation, a public official must prove that the defamatory statement was made with actual malice, defined as knowledge that the statement was false or a reckless disregard for its truth. 39 The actual malice standard was later extended to defamation actions brought by public figures 40 and, at


38 See 376 U.S. 254, 279-80 (1964). In *New York Times*, the Montgomery, Alabama, police commissioner brought a defamation suit against the New York Times and several individuals who had signed an editorial advertisement published in the New York Times. See id. at 257-59. The advertisement, published during the civil rights movement, protested police action against black students who engaged in nonviolent demonstrations. Id. Although the police commissioner was not mentioned specifically in the advertisement, he alleged that many references to police activities would be imputed to him. See id. at 258. The Court, denying the plaintiff recovery, established a constitutional privilege for defamatory falsehoods concerning the official conduct of public officials. Id. at 279-80. The Court's holding was premised on the principle that the first amendment secures freedom of expression on public issues. See id. at 269. The Court acknowledged a "national commitment to the principle that debate on public issues should be uninhibited, robust and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on the government and public officials." Id. at 270. Having established that speech on public issues is constitutionally protected, the Court concluded that neither the falsity nor the defamatory nature of a statement criticizing a public official causes it to lose its constitutional protection. See id. at 273. Recognizing that error is inevitable in free debate, id. at 271, the Court extended protection to false statements, as long as they were honestly made, so that a chilling effect on speech concerning public officials could be avoided, id. at 277-80. The Court rejected the common law defense of truth as inadequate to protect the first amendment interest in free debate because a requirement that critics of official conduct guarantee the truth of their statements would promote self censorship. See id.

39 Id. at 254. The definition of "public official" was subsequently articulated by the Court in *Rosenblatt v. Baer*, 383 U.S. 75 (1966). Justice Brennan stated the test to be whether the "position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it. . . ." Id. at 86. The *New York Times* privilege was also extended to statements made about candidates for public office. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 271 (1971); *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 299 (1971). Lower courts defined "public official" in a broad fashion so that almost all government officials fall under the *New York Times* standard. See Eaton, supra note 1, 1376-77.

40 Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967). In *Curtis*, decided with *Associated Press v. Walker*, 388 U.S. 130 (1967), Justice Harlan, writing for a plurality of four, relied upon the rationale of *New York Times* to extend the constitutional privilege to public figures. See id. at 154-55. Defining a public figure as one who has thrust himself into the "[v]ortex of an important public controversy," Justice Harlan concluded that the first amendment interest in free speech on public issues justified a limitation on common law strict liability in defamation actions. See id. at 155. Unwilling, however, to hold public
one time, to actions involving any matter of public or general interest.\footnote{See Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 44-45 (1971). In Rosenbloom, the plaintiff, a distributor of nudist magazines, was arrested during a police operation aimed at obscene book distribution. \textit{Id.} at 32-33. The defendant, a local radio station, reported Rosenbloom's arrest and characterized Rosenbloom as a "smut distributor" and "girlie-book peddler." \textit{Id.} at 34, 36. The Supreme Court, in a plurality opinion written by Justice Brennan, denied Rosenbloom recovery in a defamation action brought against the radio station, holding that the \textit{New York Times} standard applies to statements that are a matter of public concern. \textit{Id.} at 44-45. Justice Brennan rejected a different standard of liability for private individuals because, he argued, the status of the plaintiff as private does not affect the legitimate public interest in the statement in question. \textit{See id} at 45-46. But see infra note 42 and accompanying text (\textit{Gertz} repudiates Rosenbloom standard).}

In \textit{Gertz v. Robert Welch, Inc.}, however, the Supreme Court repudiated the extension of the actual malice standard to any matter of public concern.\footnote{418 U.S. 323 (1974). In \textit{Gertz}, American Opinion, a magazine published by the John Birch Society, published an article on the murder trial of a Chicago police officer. \textit{See id.} at 325. The plaintiff, Gertz, a prominent attorney, was retained by the family of the youth who was killed to represent them in civil litigation against the officer. \textit{Id.} The article alleged the existence of a nationwide communist conspiracy against the Chicago police and portrayed Gertz as the architect of the "frame-up" of the officer. \textit{Id.} at 325-26. Gertz was referred to as a "Leninist" and a "Communist-fronter" who belonged to various communist organizations. \textit{Id.} at 326. In a defamation action brought against the publisher of the article in state court, Gertz won a jury verdict which was set aside by the Supreme Court because the statements pertained to issues of public interest. \textit{Id.} at 329-32. The trial court held that, under \textit{Rosenbloom}, recovery without a showing of actual malice was prohibited. \textit{Id.} at 329-32. The Supreme Court, however, reversed. \textit{See infra} note 43.} The Court distinguished defamation suits brought by \textit{private} citizens, stating that the burden imposed by the actual malice standard was too severe in light of the state interest in compensating private individuals for harm to their reputations.\footnote{\textit{Gertz}, 418 U.S. at 343-46. In his opinion for the majority in \textit{Gertz}, Justice Powell balanced the state interest in compensating private individuals for injury to their reputation and the interest in protecting free speech which was expressed in \textit{New York Times}. \textit{See id.} at 345-46. Justice Powell stated that it was necessary to afford private plaintiffs a greater degree of protection than public plaintiffs, because unlike public figures who have access to}
cause it would have forced judges to determine on an ad hoc basis which publications are of public concern and which are not. Instead, the Court enlarged the ambit of constitutional protection, at least where media liability was involved, to encompass all statements made about private individuals, regardless of the presence of public interest. Private individuals, however, were permitted recovery on a lesser showing than actual malice; the Court allowed the states to define for themselves the standard of liability for private figures as long as they did not impose strict liability.

The media to counteract false statements, private figures lack effective opportunities for rebuttal and are, therefore, more vulnerable to injury. Id. at 344. Furthermore, it was argued that both public officials and public figures have thrust themselves into the public eye, thereby assuming the increased risk of injury which results from public scrutiny. Id. On the other hand, the Court noted, a private individual "has relinquished no part of his interest in the protection of his own good name, and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood." Id. at 345.

See id. at 346. The Gertz Court expressed dissatisfaction with an ad hoc determination of public interest because it would lead to unpredictability in the lower courts. Id. at 343. Justice Marshall voiced similar disapproval of the public interest test in his dissenting opinion in Rosenbloom. See Rosenbloom v. Metromedia, Inc., 403 U.S. at 29, 79 (Marshall, J., dissenting). He stated that, assuming the determination of public interest is not merely a polling of the public's general interest in a subject, courts would have difficulty determining "what information is relevant to self-government." Id. at 79 (Marshall, J., dissenting).

See 418 U.S. at 347. The Court's holding in Gertz read as follows: "We hold that, 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." Id. Thus, the Constitution requires proof of at least negligence for a private plaintiff to recover in a defamation action against media defendants. Id. The Court carefully stated its holding in terms of media liability by employing the words "publisher or broadcaster." Id. Other Justices referred to the majority opinion as pertaining specifically to media liability. See id. at 353 (Blackmun, J., concurring); id. at 355 (Burger, C.J., dissenting); id. at 362 (Brennan, J., dissenting); see also Eaton, supra note 1, at 1417 (rules fashioned in Gertz were meant to apply only in defamation suits against press).

See 418 U.S. at 347 & n.10. In establishing a lesser degree of fault for private figures, the Gertz Court also elaborated on when a person becomes a public figure, thus triggering the actual malice standard. See id. at 345. The Court recognized three categories of public figures. Id. The first category, involuntary public figures, consists of persons who become public figures through no purposeful action of their own. See id. The Court noted that chances of becoming a public figure in this way are rare. Id. The second category, "all purpose" public figures, encompasses those who occupy positions of persuasive power and influence in society. See id. The third category consists of persons who "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." Id.

Subsequent decisions have interpreted the "public controversy" requirement for limited public figures narrowly. See, e.g., Hutchinson v. Proxmire, 443 U.S. 111, 144-46 (1979) (research scientist who is recipient of public grant not public figure); Wolston v. Reader's Digest Ass'n, 443 U.S. 157, 168-69 (1979) (engagement in criminal activity does not automatically trigger public figure status); Time Inc. v. Firestone, 424 U.S. 448, 453-55 (1976) (wealthy Palm Beach socialite involved in divorce suit not public figure).
Court retained the actual malice standard to govern the recovery of presumed and punitive damages by private plaintiffs.\textsuperscript{47}

**The Dun & Bradstreet Court's Reinterpretation of Gertz**

The Court in *Dun & Bradstreet*, without acknowledging that it was doing so, substantially reinterpreted its holding in *Gertz*.\textsuperscript{48} The Court erroneously stated that its holding in *Gertz* was premised on the fact that the defamatory statements made therein involved a matter of public concern.\textsuperscript{49} The Court's decision in *Gertz*, however, clearly applied to all defamatory statements whether or not they implicated a matter of public concern.\textsuperscript{50} In fact, the *Gertz* Court, as previously noted, explicitly rejected any inquiry into whether the subject matter of the statement in issue involved a matter of public interest.\textsuperscript{51} One possible reason for the Court's reinterpretation of *Gertz* is that it sought to avoid basing its holding on a distinction between media and nonmedia defendants.\textsuperscript{52} It is submitted that the result of the *Dun & Bradstreet*

\textsuperscript{47} See 418 U.S. at 350. The Court's holding in *Gertz* eliminated the common law doctrine of presumed damages, see supra note 1, unless the statement was made with actual malice, see 418 U.S. at 349-50. Presumed damages, according to the Court, allow the jury too much discretion and invite punishment of unpopular opinion. Id. The Court limited recovery to "actual injury" but defined the term broadly to include impairment of reputation and standing in the community, personal humiliation, mental anguish, and suffering and pecuniary loss. Id. at 350.

*Gertz* also prohibited recovery of punitive damages unless actual malice is established. Id. at 349-50. The Court determined punitive damage awards to be "wholly irrelevant" to the state interest in compensating actual injury. Id. at 350. Moreover, punitive damages were considered "private fines" imposed by juries to punish and deter wrongful conduct. Id. Since such fines exacerbate media self censorship, the Court concluded that the first amendment dictated their limitation. Id.

\textsuperscript{48} *Dun & Bradstreet*, 105 S. Ct. at 2941. Both Justice White, concurring, and Justice Brennan, dissenting, remarked on the plurality's reinterpretation of *Gertz*. Id. at 2952-53 (White, J., concurring); id. at 2959 & n.11 (Brennan, J., dissenting).

\textsuperscript{49} Id. at 2941. After having stated that *Gertz* applies only when the speech in issue involves a matter of public concern, the plurality stated the issue as whether "this rule of *Gertz* applies when the false and defamatory statements do not involve matters of public concern." Id. at 2941.

\textsuperscript{50} See supra note 45 and accompanying text.

\textsuperscript{51} See supra notes 42-45 and accompanying text.

\textsuperscript{52} The Vermont Supreme Court decision denying *Dun & Bradstreet* constitutional protection under *Gertz* was premised on the fact that *Gertz* applied only to media defendants and *Dun & Bradstreet* was a non-media defendant. See 143 Vt. 66, 70, 461 A.2d 414, 418 (1983); see supra notes 18-19. The United States Supreme Court in *Dun & Bradstreet* not only refused to decide the issue on the basis of the status of the defendant but expressly stated that its holding was grounded on reasoning different from that of the Vermont Supreme Court. See 105 S. Ct. at 2942.
decision is to reduce the constitutional protection afforded the media in *Gertz* for defamatory statements made about private individuals by requiring that the speech involve a matter of public concern.

**Speech on Matters of Public Concern: The Court's Development of a Nebulous Standard**

The *Dun & Bradstreet* Court, by holding that *Gertz* applies only when speech involves a matter of public concern, requires lower courts to decide on an ad hoc basis when speech involves matters of public importance. It is submitted that the plurality’s examination of the “content, form and context” of the expression offers little guidance to lower courts in making a case by case determination of whether the speech in question receives constitutional protection.

In examining the content of the credit report, Justice Powell determined that the speech involved no issue of public concern because it was solely in the interest of the speaker and its business audience. Although the content of speech may be of an economic

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53 See 105 S. Ct. at 2941. The *Dun & Bradstreet* Court explicitly stated that its holding did not apply to credit reporting as a class, and that each report must be examined on a case by case basis to determine if its “content, form and context” involves a matter of public concern. Id. at 2947 & n.8. Justice Powell’s commitment to an ad hoc approach is interesting in light of his opinion in *Gertz*. In that case his decision to vary the level of protection based on the status of the plaintiff rather than the presence of public concern was made primarily to avoid an ad hoc evaluation of content. See supra note 44 and accompanying text. *Dun & Bradstreet*’s public concern test is similar to the Court’s approach in *Rosenbloom*, see supra note 41, except that in *Dun & Bradstreet* the public concern test determines whether speech receives the less stringent protection of *Gertz*, while in *Rosenbloom* the public concern standard triggered the actual malice standard of protection, see *Dunn & Bradstreet*, 105 S. Ct. at 2960 n.11 (Brennan, J., dissenting).

54 See 105 S. Ct. at 2960 (Brennan, J., dissenting). One commentator suggests that the Court’s creation of an imprecise standard based upon the public or nonpublic nature of the speaker’s statements implicates questions of procedural due process. See Note, *The Supreme Court, 1984 Term—Leading Cases: Constitutional Law*, 99 HARV. L. REV. 120, 220-221 (1985) (Constitution requires that people be informed as to what state law forbids; after *Dun & Bradstreet*, no speaker can predict legal consequences of his speech).

55 105 S. Ct. at 2947. Based on the Court’s reference to commercial speech, it appears that the content of the speech in issue in *Dun & Bradstreet* was deemed private because it fell within the realm of economic or commercial matters. As the dissent noted, the plurality employed an analogy to advertising to conclude that the speech in question did not warrant constitutional protection under *Gertz*. Id. at 2960 (Brennan, J., dissenting). Commercial speech, or advertising, is defined as speech related solely to the economic interest of the speaker and its audience. See *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 561 (1980); *Friedman v. Rogers*, 440 U.S. 1, 10 (1979); *Bates v. State Bar*, 433 U.S. 350, 363-64 (1977).
necessarily a matter of concern to the public. It is therefore suggested that while an inquiry into the subject matter of speech is necessary to determine whether it constitutes a matter of public concern, a cursory finding that speech is not of public concern based upon its economic nature is improper.

Another factor considered by the plurality was the presence of a strong profit motive in the credit reporting industry which, Justice Powell concluded, makes it unlikely that such speech will be deterred by the imposition of presumed and punitive damages. It is submitted that the deterrent effect of damage awards should be irrelevant to the issue of whether speech constitutes a matter of public importance. Moreover, speech has not been denied constitutional protection simply because it is distributed for profit.

The final and most problematic factor examined by the plurality was the limited dissemination of the credit report. The plurality reasoned that because the speech was disseminated to a limited audience it did not require “special protection to ensure that ‘debate on public issues [will] be uninhibited, robust, and wide-open.’” It is submitted that the Court’s reliance on the degree of

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56 See, e.g., Virginia Pharmacy Bd. v. Virginia Citizens Consumer Counsel, 425 U.S. 748, 764 (1976) (advertisements, although commercial, may be of general public interest); Thornhill v. Alabama, 310 U.S. 88, 101-03 (1940) (anti-picketing statute unconstitutional; labor relations not merely of local or private concern but may affect whole region and marketing system).

57 As the Dun & Bradstreet dissent noted, the subject matter of the credit report, bankruptcy, may be of public concern in some circumstances. 105 S. Ct. at 2961-62 (Brennan, J., dissenting). For instance, the bankruptcy of a manufacturing plant that employs a large percentage of the population of a community is certainly of public concern to the residents of the community. Id. at 2961 (Brennan, J., dissenting). The report may also be of potential concern to surrounding areas, where former employees of the bankrupt company must turn for employment. See id. at 2961-62 (Brennan, J., dissenting).

58 Id. at 2947. The argument that speech motivated by profit is less likely to be chilled by state regulation surfaced in Virginia Pharmacy Bd. v. Virginia Citizens Consumer Counsel, 425 U.S. 748, 771-72 n.24 (1976). The Court conceded that there are “commonsense differences” between commercial speech and other types of speech. Id. at 771 n.24. Advertisements, the Court stated, are more easily verifiable than speech on political issues. Id. at 772. In addition, advertising was considered more “durable,” since it is the “sine qua non” of commercial profits. Id. In light of these characteristics, the Court concluded that commercial speech was less likely to be deterred by state regulation. Id.


60 105 S. Ct. at 2947.

61 Id. The plurality’s reliance on limited dissemination to deny first amendment protec-
dissemination of speech to determine whether it is a matter of public concern should be rejected for a number of reasons. First, by focusing on dissemination, the Court in effect grants greater protection to one who defames before a wider audience, and, consequently, has a greater capacity to cause injury to reputation.62

Second, the Court’s emphasis on dissemination frustrates the rationale for limiting state libel awards as established in New York Times v. Sullivan and its progeny.63 The Court in New York Times recognized that, for a democracy to function properly, society must be well informed about public issues.64 The actual malice standard was developed to protect defamatory speech criticizing

tion to the speech in issue is inconsistent with its holding in Givhan v. Western Line Consol. School Dist., 439 U.S. 410 (1979). In Givhan, a public school teacher was fired after privately expressing to the school principal her disapproval of certain school policies which she perceived to be racially discriminatory. Id. at 411-13. She filed suit against the school district claiming that her right of free speech had been violated. Id. at 411-12. The Court of Appeals for the Fifth Circuit refused to reinstate Givhan on the ground that her speech was not protected under the first amendment because she privately expressed her complaints. Ayers v. Western Line Consol. School Dist., 555 F.2d 1309, 1318 (5th Cir. 1977). In a brief opinion, the Supreme Court reversed, holding that the speech in issue did not lose its constitutional protection merely because it was spoken privately. Givhan, 439 U.S. at 415-17. The Court stated, “[n]either the [First] Amendment itself nor our decisions indicate that . . . freedom [of speech] is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public.” Id. at 415-16.

62 See Garcia v. Board of Educ. of the Socorro Consol. School Dist., 777 F.2d 1403, 1410 (10th Cir. 1985); Shiffrin, supra note 7, at 933, 935. In addition to its increased capacity to injure, the media most often has a greater ability to compensate for injury because it can pass along the cost of successful defamation suits to consumers. See Shiffrin, supra note 7, at 935.

63 See supra note 38 and accompanying text.

64 New York Times, 376 U.S. at 269; see also Mills v. Alabama, 384 U.S. 214, 218 (1966) (first amendment protects free discussion of governmental affairs); Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964) (free speech concerning public affairs is essence of self-government); Thornhill v. Alabama, 310 U.S. 88, 102 (1940) (freedom of speech must embrace all issues to enable society to cope with exigencies of their times).

The Supreme Court in New York Times made it clear that the central purpose of the first amendment is to provide a core of protection to political speech without which a democracy cannot function. See Buckley v. Valeo, 424 U.S. 1, 14-15 (1976); Monitor Patriot Co. v. Roy, 401 U.S. 265, 271-72 (1971); Kalven, The New York Times Case: A Note on the “Central Meaning of the First Amendment”, 1964 SUR. CT. REV. 191, 208. Justice Brennan’s opinion in New York Times was influenced by the first amendment theory of Professor Alexander Meiklejohn. See Brennan, The Supreme Court and the Meiklejohn Interpretation of the First Amendment, 79 HARV. L. REV. 1, 11-14 (1965). Professor Meiklejohn argued that the foremost rationale under the first amendment for extending protection to speech was to preserve its role in a representative government. See Meiklejohn, Political Freedom 78-79 (1960). This theory has been criticized for its failure to define adequately what speech is encompassed by the term “political.” See Shiffrin, supra note 7, at 936-38.
both public officials\(^6\) and public figures\(^6\) to ensure that debate on public issues is “uninhibited, robust, and wide open.”\(^7\) Although media speech significantly contributes to the goal of a well-informed electorate,\(^6\) daily private communications are also essential to the proper functioning of the democratic dialogue.\(^6\) Indeed, the courts have applied the actual malice standard to speech widely disseminated by the media and to speech made by private individuals.\(^7\) In light of the value of private speech in the discussion of political issues, it is submitted that the degree to which speech is disseminated should not be a consideration in determining whether it constitutes a matter of public concern.

Finally, it is suggested that the plurality, in relying upon the limited dissemination of the credit report, inadvertently created a media/non-media dichotomy. By considering the extent of dissemination of an expression to determine whether it is a matter of public concern under the Court’s interpretation of *Gertz*, it is contended that media speech is necessarily granted greater protection than non-media speech.\(^7\) Not only has the Court carefully avoided interpreting *Gertz* as a special privilege for the media,\(^7\) it has re-

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\(^6\) See *supra* notes 38-39 and accompanying text.

\(^7\) See *New York Times*, 376 U.S. at 270.


\(^7\) The media has been defined by its functional role in the widespread dissemination of information on a regular basis. See Note, *First Amendment Protection, supra* note 7, at 925-26.

\(^7\) While Justice Powell did not address the issue, five members of the Court expressly
fused to allow the media in defamation actions to create its own
defense by arguing that any matter it prints is necessarily of public
interest. It has also refused, in other contexts, to grant the media
greater first amendment protection than that of ordinary citizens.

It is submitted, therefore, that the plurality’s analysis places the
media in a preferred position contrary to Supreme Court
precedent.

**CONCLUSION**

The Supreme Court’s decision in *Dun & Bradstreet* marks a
significant departure from its approach in *Gertz* and further nar-
rows the constitutional limitation on the states’ power to award
damages in defamation suits. In addition to determining the status
of a plaintiff as public or private, courts must now decide on a case
by case basis whether an expression is a matter of public concern
before it will receive the limited constitutional protection afforded
in *Gertz*. The *Dun & Bradstreet* holding also does little to resolve
the issue of whether *Gertz* applies to non-media speakers. The
Court’s consideration of the degree of dissemination of an expres-
sion indicates that some private, non-media speech will not be pro-
tected. An examination of the degree of dissemination not only
creates many practical difficulties, but is inconsistent with both
first amendment theory and the rationale for limiting the power of

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refused to afford the media greater first amendment protection in defamation actions. See
105 S. Ct. at 2953 (White, J., concurring); id. at 2957 (Brennan, J., dissenting, joined by
Justices Marshall, Blackmun and Stevens). Furthermore, a distinction drawn on the media
or non-media status of the defendant would generate difficulties in defining what constitutes
the “media.” See *Dun & Bradstreet*, 105 S. Ct. at 2957 & n.6 (Brennan, J., dissenting);
Garcia v. Board of Educ. of the Socorro Consol. School Dist., 777 F.2d 1403, 1411 (10th Cir.
1985).


*See, e.g.*, Herbert v. Lando, 441 U.S. 153, 169, 175 (1979) (media is not entitled to
special protection during civil discovery process); Pell v. Procunier, 417 U.S. 817, 834 (1974)
(press has no constitutional right to access to information not afforded public in general);
Branzburg v. Hayes, 408 U.S. 665, 702 (1972) (first amendment does not grant newspaperer
privilege from grand jury testimony).

Although the first amendment prohibits the abridgement of freedom of the press, the
Framers of the Constitution did not intend to grant the media greater protection than that
granted to all citizens. See *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 798 (1978) (Burger,
C.J., concurring). Most eighteenth century writers used the terms “freedom of speech” and
“freedom of the press” interchangeably. See Christie, *Injury to Reputation and the Consti-
tution: Confusion Amid Conflicting Approaches*, 75 Mich. L. Rev. 43, 57-58 (1976); Lange,*
The Speech and Press Clauses*, 23 UCLA L. Rev. 77, 80 (1975); Nimmer, *supra* note 68, at
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a state to redress injury to reputation. It is submitted, therefore, that reliance on the content of an expression to determine whether it constitutes a matter of public concern would be a more prudent approach.

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