

The Death of the Public Figure Doctrine: How the Internet and the Westboro Baptist Church Spawned a Killer

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This Article suggests that the U.S. Supreme Court's public figure/private figure dichotomy announced in Gertz v. Robert Welch, Inc. should be abandoned in light of the Internet and Supreme Court jurisprudence that predates and postdates Gertz. This Article begins by examining the Supreme Court's decision to bring defamatory speech into the realm of First Amendment protection, the creation of different burdens of proof for defamation cases, and the struggle to create sensible doctrine. To that end, this Article explores not only Gertz, but the Court's pre-Gertz majority and plurality opinions that articulated the contours of the First Amendment and defamation.

This Article demonstrates that, while Gertz created a distinction between "public figures" and "private figures" for the purposes of determining the burden of proof in a defamation lawsuit, the reasoning behind these distinctions is no longer persuasive. I argue that, because of the Internet, public figures no longer have exclusive or considerably greater access to the channels of effective communication. I also argue that the Gertz public figure/private figure dichotomy is destined to be abrogated because of the Roberts Court's recent First Amendment jurisprudence regarding speech on matters of public concern. I argue that the Roberts Court's vigorous defense of speech on matters of public concern foreshadows a rejection of the Gertz Court's view that the First Amendment analysis to apportion burdens of proof should focus on whether a plaintiff is a "public figure" or "private figure." Instead, I argue the Roberts Court's holdings demonstrate that the more constitutionally appropriate question, in the first instance, is whether the defendant in a defamation lawsuit was speaking on a matter of public concern.

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INTRODUCTION

Have you ever tried to nail a jellyfish to a wall?¹ It would be a useless exercise; it would lead to “unpredictable results and uncertain expectations,”² and ad hoc decisions as to whether and how the jellyfish would stay put. Indeed, it might lead you to wonder: Was it all worth it? This is the dilemma courts face when forced to determine whether a defamation plaintiff is a public figure, limited-purpose public figure,³ or private individual for the purposes of the “actual malice” burden the Supreme Court imposed in *Gertz v. Robert Welch, Inc.* In *Gertz*, the Supreme Court determined that when balancing the First Amendment interest in open, public discourse against the individual’s interest in protecting his or her reputation against injury arising out of speech, the appropriate analysis lies in determining the plaintiff’s identity.⁴ If the plaintiff is a private individual, states are free to impose their own

1. Trotter v. Jack Anderson Enters., Inc., 818 F.2d 431, 433–34 (5th Cir. 1987) (noting that attempting to define a public figure is like to trying to nail a jellyfish to the wall).

2. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343 (1974).

3. *Id.* at 351 (defining a limited-purpose public figure as “an individual [who] voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues”).

4. *Id.* at 343–44.

standards for defamation liability.⁵ If the plaintiff is a public figure or a limited-purpose public figure, then another, more speech protective analysis is applicable.⁶ In an effort to accommodate the First Amendment in cases where the plaintiff is a public figure or limited-purpose public figure, the question is whether the defendant's statements were made with "actual malice."⁷ It is only after a court determines the plaintiff's identity to be of a "public" nature, however, that it incorporates the First Amendment's concomitant interests into the analysis.

The Court created this public/private figure dichotomy for two reasons. First, the Court recognized that the primary way to rebut defamatory speech is self-help: accessing the means of communication and rebutting the alleged lies.⁸ Public figures, the Court reasoned, "usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy."⁹ Secondly, like public officials, public figures have freely and often intentionally "exposed themselves to increased risk of injury from defamatory falsehood concerning them."¹⁰ Their influential role in society sets them apart from the private individual, and thus, "they invite attention and comment."¹¹ At first blush, this dichotomy and the reasoning upon which it relies seem commonsensical and convincing. Determining on which side of the dichotomy any particular plaintiff falls, however, is like nailing a jellyfish to a wall. It has led to "unpredictable results," "uncertain expectations," and "ad hoc resolution[s]"—precisely the result the Supreme Court sought to avoid.¹²

To the likely delight of courts throughout the country, the death of *Gertz* and its judicially created dichotomy has arrived. First, the fundamental premises upon which *Gertz* rested have been eroded. Unlike in 1974, when *Gertz* was decided, today every citizen has virtually equal and ubiquitous access to what has become the modern channel of effective communication: the Internet. Because of the Internet and all its platforms for communication—such as email, blogs, and social networking sites—citizens need not rely solely on newspapers, radio, and television for access to information. In addition, and more importantly, the citizen who has access to information on the Internet can also contribute to the

5. *Id.* at 345–47.

6. *Id.*

7. *Id.* at 334.

8. *Id.* at 344.

9. *Id.*

10. *Id.* at 345.

11. *Id.*

12. *Id.* at 343.

composition of information and of debate.¹³ The Internet user can become not only the leafleter, protestor, picketer, and boycotter, but also the reporter, radio host, and television host of the twenty-first century.

Second, the Roberts Court's unwavering commitment to protecting speech on matters of public concern demonstrates a rejection of *Gertz's* accommodation for private individuals. The Court's recent decisions have rightly portended a "return" to pre-*Gertz* thinking about the focus of the initial and only constitutionally appropriate inquiry in a defamation case: whether the content of the speech was a matter of public concern. The Court has all but staked its flag on absolute First Amendment protection for this sort of speech. To be sure, the Court's exalting language and unqualified protection of this sort of speech heralds a rebuke of any analysis that does not begin and end with its content and whether it is a matter of public concern.

Ironically, the ghost of what some justices forty years ago believed was the appropriate analysis¹⁴ resurfaces and haunts us First Amendment mortals. *Gertz's* public figure/private figure dichotomy should be jettisoned. In its stead, when determining whether a defamation plaintiff is subject to the "actual malice" standard for the purposes of the First Amendment, courts should simply examine "whether the [alleged defamatory] utterance involved concerns an issue of public or general concern."¹⁵ This standard recognizes the revolutionary changes in access to communication that have occurred in the past thirty years. It also more appropriately accommodates the First Amendment by facilitating the robust discussion of issues important to society without regard to the identity of those the debate allegedly harmed. Indeed, it is modernity—the growth in new technology coupled with the recent thrust of the Supreme Court's jurisprudence—that foretells a jurisprudential resurrection of the ghost.

This Article has two parts. Part I recounts the Supreme Court's jurisprudence that preceded the *Gertz* decision. It discusses the Court's first forays into the intersection between defamation and the First Amendment and examines the groundbreaking *New York Times v. Sullivan* case. Part I then discusses the plurality decisions that followed *New York Times* and how those decisions struggled with questions it left unanswered. Part I ends with a discussion of the *Gertz* decision and its creation of a public/private figure analysis for defamation cases. Part II

13. With society's increased use, access, and reliance on the Internet—and, more specifically, email, blogs, and social networking sites—what we think of as the tort of defamation is also changing. See, e.g., David S. Ardia, *Reputation in a Networked World: Revisiting the Social Foundations of Defamation Law*, 45 HARV. C.R.-C.L. L. REV. 261, 271–72 (2010).

14. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 43–44 (1971), abrogated by *Gertz*, 418 U.S. 323.

15. *Id.*

discusses the Internet and the Roberts Court's free speech jurisprudence. First, Part II argues that the Internet, as a modern, effective means of communication, mollifies the social concerns the *Gertz* Court tried to address in creating a private/public figure dichotomy. Second, Part II argues that the Roberts Court's recent decisions demonstrate a disagreement with the *Gertz* Court's focus on the plaintiff's status as a constitutionally appropriate place for the First Amendment to fit into defamation law. The Roberts Court instead reaches back to earlier decisions that held the appropriate analysis in the first instance is whether the content of defamatory speech is a matter of public concern.

I. BACKGROUND

A. THE CONSTITUTIONALIZATION OF DEFAMATION

Before 1964, defamation, whether directed at a public or private figure, was almost without question presumptively considered unprotected speech because of its content.¹⁶ For example, in *Chaplinsky v. New Hampshire*, the Supreme Court declared defamatory speech to be part of a group of "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."¹⁷ The Court reasoned that defamatory speech, like some of its equally worthless cousins,¹⁸ was a sort of speech that was "no essential part of any exposition of ideas, and [was] of such slight social value as a step to truth that any benefit . . . [was] clearly outweighed by the social interest in order and morality."¹⁹ Ten years later, in *Beauharnais v. Illinois*, the Court again declared that defamatory speech was not constitutionally protected and reaffirmed its *Chaplinsky* reasoning.²⁰

Only twelve years later, however, the Court rocked the constitutional world when it shepherded defamatory speech into the fold of the Constitution. In *New York Times Co. v. Sullivan*, the Court was asked to consider whether the tort of defamation, and more particularly libelous publications directed at a public official, implicated the First Amendment.²¹ The case required the Court to wrestle with a question that

16. See *Beauharnais v. Illinois*, 343 U.S. 250, 255–57 (1952); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942).

17. *Chaplinsky*, 315 U.S. at 571–72.

18. *Id.* at 572. The Court also listed lewd and obscene speech, profane speech, and insulting speech or fighting words as speech that had, without question, always been considered constitutionally unprotected speech. *Id.*

19. *Id.*

20. *Beauharnais*, 343 U.S. at 255–57.

21. *New York Times Co. v. Sullivan*, 376 U.S. 254, 263–65 (1964). The Court framed the issue this way: "We are required in this case to determine for the first time the extent to which the constitutional

had, as discussed above, been presumptively considered unnecessary. In *New York Times*, the respondent-plaintiff, who alleged defamation, was one of the elected commissioners of Montgomery, Alabama.²² The commissioner alleged that four individuals who were involved in the civil rights movement, along with *The New York Times* newspaper, were liable for damages he incurred due to libelous speech.²³ The individually named defendants had paid for a full-page advertisement alleging, among other things, that southern civil rights demonstrators were being met with violence and terror as a means to deny them their constitutional rights.²⁴ The advertisement specifically mentioned Montgomery, Alabama, as a city where students demonstrating in favor of the civil rights movement had been expelled from school.²⁵ The advertisement went on to allege that the police used intimidation tactics to retaliate against the students for their activism.²⁶

In another part of the advertisement, the authors alleged that southern officials targeted Dr. Martin Luther King and his family for assault, assassination, and intimidation.²⁷ The commissioner alleged that while the advertisement never referred to him by name, its allegations and references to “the police” and other general, unspecific references to abstract actors could be imputed to him as the Montgomery elected official who supervised the police department.²⁸ In addition, the parties stipulated that some of the minutiae found in the advertisement were untrue.²⁹ At trial, the judge instructed the jury that the statements were libelous per se and damages were presumed.³⁰ The Alabama Supreme Court affirmed.³¹

In defending the judgments of the Alabama courts, the commissioner relied on previous Supreme Court precedent that had indicated an unwillingness to include defamatory speech in the First Amendment conversation.³² The Court, however, noted a difference between those cases and this case: The previous cases had not considered defamation in

protections for speech and press limit a State’s power to award damages in a libel action brought by a public official against critics of his official conduct.” *Id.* at 256.

22. *Id.*

23. *Id.*

24. *Id.* at 256–57.

25. *Id.* at 257.

26. *Id.*

27. *Id.* at 257–58.

28. *Id.* at 258.

29. *Id.* at 258–59.

30. *Id.* at 262.

31. *Id.* at 263.

32. *Id.* at 268 n.6 (citing *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

the context of criticism of public officials based on official conduct.³³ Indeed, the Court began its discussion of the First Amendment's effect on defamation by seemingly rejecting the *Chaplinsky* Court's implication that libelous or defamatory speech is, ab initio, beyond the protection of the Constitution.³⁴ The Court buttressed this by asserting that it had been a long-settled proposition that "freedom of expression upon public questions is secured by the First Amendment" to "assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."³⁵ The Court discussed at length the benefits of an uninhibited debate on matters of public concern.³⁶

While initially framing its discussion in the context of a presumed protection of speech on matters of public concern, the Court shifted its focus to the more specific question of what protection the First Amendment provided for criticism of a public official.³⁷ The Court noted its previous refusal to recognize criminal contempt charges based on the criticism of a judge or the judge's decisions.³⁸ It also reviewed the Sedition Act of 1798, the Act's punishment for criticism of public officials, the resulting blight on the principles of the First Amendment and the nation's history, and the eventual repudiation of the Act.³⁹ In light of that history, the Court held that the First Amendment "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."⁴⁰ With one sentence, the Court forever changed the tort of defamation by bringing it within the gamut of the First Amendment.

B. THE TWILIGHT YEARS OF PLURALITIES

Three years later, after reshaping and expanding the First Amendment's reach, the Court in *Curtis Publishing v. Butts* and its companion case, *Associated Press v. Walker*, extended the *New York Times* "actual malice" standard to public figures. In *Curtis Publishing*, a newspaper article alleged that Butts, the athletic director of the University of Georgia, conspired with the coach of the University of

33. *Id.* at 269, 273.

34. Compare *Chaplinsky*, 315 U.S. at 572 ("[Punishing libelous speech has] never been thought to raise any Constitutional problem."), with *New York Times*, 376 U.S. at 269 ("[L]ibel can claim no talismanic immunity from constitutional limitations.").

35. *New York Times*, 376 U.S. at 269 (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

36. *Id.* at 269–70.

37. *Id.* at 269–74.

38. *Id.* at 272–73 (citing *Bridges v. California*, 314 U.S. 252, 270–71 (1941)).

39. *Id.* at 273–76.

40. *Id.* at 279–80.

Alabama to fix a football game between the schools.⁴¹ Butts had enjoyed significant influence at the University of Georgia athletic department in the past and was well known for his previous role as the school's head football coach.⁴² At the time the newspaper's article was published, however, Butts was not a state employee but instead was employed by the Georgia Athletic Association, a private corporation.⁴³ Butts filed a libel lawsuit against the newspaper publisher based on the allegations contained in the article and received a jury award for over \$3 million.⁴⁴

In *Associated Press, Walker*, a former general in the U.S. Army, also filed a libel lawsuit and was awarded \$800,000.⁴⁵ Like Butts', Walker's successful lawsuit was directed at a newspaper that published an article about his actions as a private individual.⁴⁶ The article reported that during a massive riot, Walker took command of a violent crowd that was resisting a federal court order to admit a black student to the University of Mississippi.⁴⁷ The article went on to report that Walker led a charge against federal marshals, encouraged rioters to use violence, and gave them advice on combating the effects of tear gas.⁴⁸ Although Walker was no longer a general in the military, he was well known and publicized for his criticism of federal intervention in the segregation conflicts of the 1960s and had a notable following.⁴⁹

Justice Harlan wrote a plurality opinion for the combined cases that held that both Butts and Walker were public figures.⁵⁰ Justice Harlan posited that, whether by dint of employment or purposeful activity, Butts and Walker "commanded sufficient continuing public interest and had sufficient access to the means of counterargument to be able to expose through discussion the falsehood and fallacies of the defamatory statements."⁵¹ Justice Harlan refused to apply the *New York Times* actual malice standard because the considerations, rationale, and normative policies that supported the application of that burden in cases dealing with public officials were not present in cases dealing with public figures.⁵² Justice Harlan did, however, believe a higher standard was applicable because the public interest in the circulation of the articles was no less

41. *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 135-37 (1967).

42. *Id.* at 135-36.

43. *Id.* at 135.

44. *Id.* at 138.

45. *Id.* at 140-41.

46. *Id.* at 140.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 154.

51. *Id.* at 155 (internal quotation marks omitted).

52. *Id.* at 153-55.

than that involved in *New York Times*.⁵³ Therefore, Justice Harlan held that public figures would have to prove the newspapers' conduct was "highly unreasonable . . . [and] an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."⁵⁴

In their separate concurrences, Chief Justice Warren and Justice Brennan, with whom Justice White joined, agreed with Justice Harlan that Butts and Walker were "public figures" but believed that the applicable standard was actual malice.⁵⁵ Justice Warren's opinion agreed with Justice Harlan as to the reasoning behind subjecting public figures to a higher standard in defamation cases. His opinion noted that, like public officials, public figures have a disproportionate influence over the social discourse.⁵⁶ In addition, Justice Warren believed public figures have easier access to the means of communication to both exert their influence and rebut criticism.⁵⁷ Because of this influence and access, coupled with their not being subject to the political process, Justice Warren believed citizens have a legitimate interest in an uninhibited debate about public figures.⁵⁸ Justice Black, with whose dissent Justice Douglas joined, articulated his belief that the First Amendment is a complete shield for the press against libel law.⁵⁹

Only four years after Justice Harlan's plurality opinion in *Curtis Publishing*, the Supreme Court again granted certiorari in an attempt to calm the waters stirred by *New York Times*. In *Rosenbloom v. Metromedia, Inc.*, Rosenbloom, a pornography distributor, was arrested and charged with possession and distribution of obscene material.⁶⁰ Metromedia's radio station broadcasted news of both Rosenbloom's arrest and his lawsuit against city officials, the police, and other media outlets.⁶¹ After being acquitted of the charges, Rosenbloom sued Metromedia, alleging that its radio broadcasts were libelous under Pennsylvania law.⁶² Rosenbloom alleged that Metromedia's characterization of his products as "obscene," its description of his arrest and lawsuit, and its description of him and his business associates as "smut distributors" and "girlie-book peddlers" were defamatory.⁶³ Rosenbloom

53. *Id.* at 154.

54. *Id.* at 155.

55. *Id.* at 163-64 (Warren, C.J., concurring); *id.* at 172-74 (Brennan, J., concurring).

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

57. *Id.*

58. *Id.*

59. *Id.* at 170-72 (Black, J., dissenting).

60. 403 U.S. 29, 32-33 (1971), *abrogated by* *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

61. *Id.* at 33-34.

62. *Id.* at 36.

63. *Id.*

succeeded at trial, but the Third Circuit Court of Appeals reversed.⁶⁴ In reversing, the court of appeals emphasized that the broadcasts concerned matters of public interest and that they involved “hot news” prepared under deadline pressure.⁶⁵ The Court of Appeals held the *New York Times* standard applied under the circumstances and Rosenbloom’s status as a private figure was irrelevant.⁶⁶ The Court of Appeals reasoned that a focus on Rosenbloom’s status as a private figure should be rejected “if the recognized important guarantees of the First Amendment are to be adequately implemented.”⁶⁷ In yet another plurality opinion, this time written by Justice Brennan, the Supreme Court affirmed.⁶⁸

On appeal to the Supreme Court, Rosenbloom argued that, to the extent the First Amendment applies to defamation claims, his status as a private figure necessitated a lesser legal burden—that of only proving “that the publisher failed to exercise ‘reasonable care’ in publishing defamatory falsehoods.”⁶⁹ Rosenbloom advanced two arguments to support his position.⁷⁰ First, he argued that while public figures have access to the media to counter defamatory material, private figures have no such control over the media.⁷¹ Along those lines, public figures have voluntarily entered the public arena and therefore assumed the risk of being subjected to investigation and publicity, and, as a result, public comment and perhaps defamation.⁷² Rosenbloom also argued that defamation is an important social and legal bulwark against attacks on one’s reputation.⁷³

Justice Brennan, with whom Chief Justice Warren and Justice Blackmun joined, began his analysis of Rosenbloom’s public figure/private figure dichotomy by examining it in light of the First Amendment’s protection of freedom of expression.⁷⁴ The First Amendment, Justice Brennan wrote, was more than simply a license to criticize government officials.⁷⁵ Indeed, living in a society where the government is not the only actor in our lives, and perhaps not the main actor, necessarily requires a commitment to free expression beyond that of protecting

64. *Id.* at 40.

65. *Id.* at 40.

66. *Id.*

67. *Id.*

68. *Id.* at 57.

69. *Id.* at 45.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 41.

75. *Id.* at 42.

debate about political issues and politicians.⁷⁶ Instead, freedom of expression “must embrace all issues about which information is needed or appropriate” to live in a free society.⁷⁷ Citing Chief Justice Warren’s concurrence in *Curtis Publishing*, Justice Brennan recognized the artificial creation of a distinction between public life and private life, public institutions and private institutions, and public individuals and private individuals as they concern issues that are a matter of public concern.⁷⁸ Issues that are “of public or general interest,” do not lose that quality simply because “a private individual is involved, or because in some sense the individual did not ‘voluntarily’ choose to become involved.”⁷⁹ First Amendment protection was not intended to protect speech on the basis of the status of the speaker; instead, it was intended to protect speech based on its content: “truth, science, morality, and arts in general as well as responsible government.”⁸⁰

Against that backdrop, the Court found Rosenbloom’s argument unpersuasive regarding a higher burden for public figures because of their increased access to media and voluntary entrance into the public sphere. While a limited number of well-known people may have access to the media to rebut defamatory allegations, the persuasiveness of the argument ends there.⁸¹ Still many more people who would otherwise be subjected to the higher defamation burden because of their status as a lower-tier public official or a lower-tier public figure do not have the access preserved for the select few.⁸² Furthermore, “[d]enials, retractions, . . . corrections,” rebuttals, and refutations are simply not as newsworthy as the original defamatory allegation.⁸³

In addition, the Court recognized that the nature of our society requires the individual, in varying degrees, to expose himself or herself to the public sphere.⁸⁴ “Voluntarily or not, we are all ‘public’ men to some degree,” and, at the same time, even the most public men and women have aspects of their lives that “fall outside the area of matters of public or general concern.”⁸⁵ A focus on the status of the individuals involved in a defamation dispute results in 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

76. *Id.*

77. *Id.* at 41.

78. *Id.* at 41–42.

79. *Id.* at 43.

80. *Id.* at 43 (internal quotation marks omitted).

81. *Id.* at 46.

82. *Id.* at 46–47.

83. *Id.*

84. *Id.* at 47.

85. *Id.* at 48.

discussion of aspects of the lives of 'public figures' that are not in the area of public or general concern."⁸⁶ As a result, defamation laws and lawsuits, like *Rosenbloom's*, must yield to these "important social goals," and by lowering the burden on private individuals simply because of their status as such, freedom of expression is "not provide[d] adequate 'breathing space'" to flourish.⁸⁷

In his dissent, Justice Marshall, with whom Justice Stewart joined, recognized the conflicting values of protecting reputational harm while at the same time protecting freedoms the First Amendment guarantees.⁸⁸ Justice Marshall, however, recognized the concern that courts may play an inherently perilous role in deciding what constitutes a matter of public concern.⁸⁹ Arguably, Justice Marshall wrote, all human events fall within the realm of "public or general concern."⁹⁰ Therefore, court opinions attempting to distinguish the public concern from the private concern will simply result in an ad hoc balancing of the two social interests defamation cases inherently raise; as a result, predictability and consistency will be lost and litigation will grow.⁹¹ Instead, Justice Marshall believed the proper approach was to keep the public figure/private figure dichotomy and instead eliminate punitive damage awards and restrict damages to actual loss, which would alleviate the concern about self-censorship due to large jury awards.⁹²

C. THE CREATION OF THE PUBLIC/PRIVATE FIGURE DICHOTOMY

After the decade-long struggle,⁹³ the plurality logjam was breached when the Court abrogated *Rosenbloom*, holding that the private figure/public figure dichotomy would indeed carry the day and the *New York Times* burden would not be a constitutional requisite where alleged defamatory speech arose out of a matter of public concern.⁹⁴ In *Gertz*, the defamation plaintiff, Elmer Gertz, represented the family of a young man killed by a Chicago police officer.⁹⁵ The defendant was the publisher of a magazine that espoused the views of the John Birch Society.⁹⁶ The publisher's editor commissioned an article examining the Chicago police

86. *Id.*

87. *Id.* 49–50.

88. *Id.* at 78.

89. *Id.* at 79.

90. *Id.*

91. *Id.* at 81.

92. *Id.* at 84–86.

93. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 325 (1974).

94. *Id.* at 346–47.

95. *Id.* at 325–26.

96. *Id.*

officer's criminal trial.⁹⁷ The resulting article examined the testimony against the police officer and deduced that his prosecution was part of a Communist plot.⁹⁸ The article further claimed that Gertz was the leader of the plot to frame the officer and served as an official in numerous Communist political circles.⁹⁹ While Gertz had attended the coroner's inquest into the killing and represented the family in civil litigation, he neither spoke to the press about the case nor played any role in the criminal proceedings.¹⁰⁰ Indeed, the Court described Gertz's connection to the criminal proceedings as "remote" and the publisher's article as containing "serious inaccuracies" and "false."¹⁰¹

Gertz filed a libel lawsuit and, after succeeding at trial, the publisher filed a motion for judgment notwithstanding the verdict, which the court granted.¹⁰² The court held that the *New York Times* standard and concomitant privilege extended to speech on any matter of public concern, regardless of the status of the person defamed.¹⁰³ The court of appeals was inclined to find that Gertz was a public figure; however, relying on *Rosenbloom*, it did not need to reach that question. Instead, it affirmed the district court and held that the *New York Times* burden applied to "any publication or broadcast about an issue of significant public interest, without regard to the position, fame, or anonymity of the person defamed."¹⁰⁴ Because the publisher's statements concerned an issue of public concern, and Gertz failed to prove "actual malice," the court of appeals affirmed.¹⁰⁵

In reviewing the court of appeals' decision, the Supreme Court began its analysis by recapping the preceding ten years of jurisprudence and reducing it to three separate philosophical approaches to the issue: (1) "extend the *New York Times* test to an expanding variety of situations"¹⁰⁶—*Rosenbloom*'s plurality opinion;¹⁰⁷ (2) "vary the level of constitutional privilege for defamatory falsehood with the status of the person defamed"¹⁰⁸—the implicit thrust of *Curtis Publishing*¹⁰⁹ and what would become the *Gertz* decision;¹¹⁰ and (3) "grant to the press and

97. *Id.*

98. *Id.*

99. *Id.* at 326.

100. *Id.*

101. *Id.*

102. *Id.* at 328–29.

103. *Id.*

104. *Id.* at 330.

105. *Id.* at 331–32.

106. *Id.* at 333.

107. See 403 U.S. 29, 29 (1971), abrogated by *Gertz*, 418 U.S. 323.

108. *Gertz*, 418 U.S. at 333.

109. See 388 U.S. 130, 130 (1967).

110. 418 U.S. at 347.

broadcast media absolute immunity from liability for defamation”¹¹¹ — Justice Black’s dissenting opinion in *Curtis Publishing*.¹¹² Then, before choosing from among the three, the Court laid out the generally accepted “common ground.”¹¹³ While the Court noted the constitutional commitment to a robust social discourse being the arbiter of successful ideas, it nonetheless reaffirmed *Chaplinsky*’s dictate that libelous speech is “no essential part of any exposition of ideas, and [is] of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality.”¹¹⁴ Nevertheless, the Court recognized that while the First Amendment does not protect untrue statements of fact, the very commitment to a robust social discourse invites the likelihood of the evil occurring.¹¹⁵ Indeed, the Court posited that the scales of the First Amendment are tipped in favor of permitting falsehood so that “speech that matters” will be protected.¹¹⁶ The Court then placed its finger on the scale and added the right of the individual to protect his or her name, which tipped the balance in favor of reputational protection at the expense of “speech that matters.”¹¹⁷

The Court posited that *New York Times* struck the right balance between reputational protection of public persons, whether public officials or public figures, and the First Amendment.¹¹⁸ Those who seek public attention or whose achievements propel them into the public sphere and people who hold public office face the high burden created in *New York Times*, whereas the private individual should not be subjected to the same burden.¹¹⁹ The Court pointed to two reasons to support this dichotomy.¹²⁰ First, as a victim of defamation, one must engage in conduct that would rebut or correct the falsehoods.¹²¹ This sort of self-help, the Court reasoned, is more readily accessible to public official or public figures, as they “usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy.”¹²² Conversely, the Court implied that private individuals do not have the

111. *Id.* at 333.

112. 388 U.S. at 171–72 (Black, J., dissenting).

113. *Gertz*, 418 U.S. at 339.

114. *Id.* at 340 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

115. *Id.*

116. *Id.* at 341. What the Court meant by “speech that matters” is debatable, but one can only surmise that it included speech dealing with issues of public concern.

117. *Id.* at 340, 348.

118. *Id.* at 340–41, 348–49.

119. *Id.*

120. *Id.* at 344–45.

121. *Id.*

122. *Id.*

same sort of access to effective means of communication and “are therefore more vulnerable to injury.”¹²³

Second, those who have become public officials or public figures have, in most cases, voluntarily sought their positions of notoriety.¹²⁴ Public officials, by sheer dint of their positions of authority over public affairs, open themselves to public scrutiny.¹²⁵ Indeed, the public’s interest in a public official goes beyond simply her discharge of official duties; the public’s interest extends to the public official’s character.¹²⁶ Similarly, public figures invite public scrutiny because of their own actions.¹²⁷ Some public figures enter the social consciousness simply because of their fame, while others gain notoriety because of their influence over social issues.¹²⁸ Still others “thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.”¹²⁹ Therefore, whether a public official or public figure, those individuals characterized as such have left the private sphere, shed most of its attendant rights and privileges, and entered into a different relationship with society. Private individuals, however, have made no such conscious decision, remain shrouded in the protections of private life, and are therefore more deserving of reputational protection.¹³⁰

As a result, the Court created the public figure/private figure dichotomy. Defamation plaintiffs who are public figures and public officials are subject to the federal *New York Times* burden, while private figures are subject to the standards of liability the states impose.¹³¹ While the Court posited that it would “have no difficulty in distinguishing among defamation plaintiffs,” the alternative of simply focusing on whether the matter was an issue of general or public concern could only lead to ad hoc decisions.¹³²

After *Gertz*, the public figure/private figure dichotomy took on a jurisprudential life of its own. For example, in *Time, Inc. v. Firestone*, despite the plaintiff being a well-known socialite, subscribing to her own press-clipping service, and having the ability to call press conferences,¹³³ the Court held she was not a public figure.¹³⁴ In *Dun & Bradstreet, Inc. v.*

123. *Id.*

124. *Id.*

125. *Id.* at 344.

126. *Id.* at 344–45.

127. *Id.* at 345.

128. *Id.* at 344–45.

129. *Id.* at 345.

130. *Id.*

131. *Id.* at 345–49.

132. *Id.* at 344, 346.

133. *Time, Inc. v. Firestone*, 424 U.S. 448, 484–87 (1976) (Marshall, J., dissenting).

134. *Id.* at 455 (majority opinion).

Greenmoss Builders, Inc., a plurality of justices determined that when the concerns of *New York Times* and *Gertz* are not present in a case, a plaintiff is a private figure, and the speech in question deals with a matter of private concern, states have great latitude to determine the burden of proof in defamation cases.¹³⁵ The plurality reasoned that the First Amendment's guarantees are concerned more about "speech on matters of public concern" than "matters of purely private concern."¹³⁶ In *Philadelphia Newspapers, Inc. v. Hepps*, the Court held that when the plaintiff is a private figure, but the speech is on a matter of public concern, plaintiffs must prove that the statements were false to succeed in their defamation claims.¹³⁷ The Court reasoned that "true" speech on matters of public concern deserves protection even when the plaintiff is a private figure.¹³⁸ Presumably, unlike the Court in *Gertz*, the plurality in *Dun & Bradstreet* and the Court in *Philadelphia Newspapers* were not concerned about the judiciary's ability to determine what constitutes a matter of public concern, as the Courts in both cases, by way of their decisions, charge lower courts to engage in just such an analysis.

II. THE THRUST OF SOCIAL AND JURISPRUDENTIAL MODERNITY HAS KILLED BOTH *GERTZ* AND THE PUBLIC FIGURE/PRIVATE FIGURE DICHOTOMY

A. THE INTERNET AS ACCESS TO AN EFFECTIVE MEANS OF COMMUNICATION

I. *Where We Came from*

The public figure/private figure dichotomy took approximately ten years to culminate in the *Gertz* decision. Beginning in 1964 with *New York Times* and ending in 1974 with *Gertz*, the Court struggled to strike the right balance between First Amendment principles and protecting the individual's interests from reputational harm. One of the recurring themes and guiding principles that informed the Court's decisions was the mid-20th century perception and reality regarding the owners and controllers of the means of communication. Chief Justice Warren buttressed his concurrence in *Curtis Publishing* with the presumption that public figures can easily access socially significant communication.¹³⁹ Similarly, in *Gertz*, the Court proffered the argument that public figures should be treated in a constitutionally different way than private individuals because of the former's access to "the channels of effective

135. 472 U.S. 749, 759–61 (1985).

136. *Id.* at 758–59 (internal quotation marks omitted).

137. 475 U.S. 767, 776 (1986).

138. *Id.*

139. 388 U.S. 130, 164 (1967) (Warren, C.J., concurring).

communication.”¹⁴⁰ Chief Justice Warren understood the significance of a greater access to communication lay in both the disproportionate ability to exert influence over public discourse and rebut criticism.¹⁴¹ Along those lines, the Court in *Gertz* framed its significance in the context of the ability to confute and correct falsehoods.¹⁴² The necessary corollary is that private individuals lack access to the effective means of communication. That lack of access seemingly results in an inability to participate as fully or effectively in social discourse and, more specifically, an inability to effectively rebut erroneous disparagement and falsehoods. Times, however, have changed. The Supreme Court’s creation of a public figure/private figure dichotomy was based not only on a now-outdated perception of the relationship between producers and consumers of information,¹⁴³ but also on a now-outdated concept of defamation.¹⁴⁴

In 1974, a population of approximately 213 million¹⁴⁵ had access to only three television networks with 862 local affiliates¹⁴⁶ and 7,501 radio stations.¹⁴⁷ Congress passed the Newspaper Preservation Act in an attempt to halt the decline of competing newspapers in large cities.¹⁴⁸ Mass communication was distributed in a “one-to-many” format,¹⁴⁹ where information was unilaterally delivered by a single source for consumption by numerous people often within a specific geographical area. The average person did not have access to this centralized model for delivery of information, was ineffective in delivering his or her message to society at large, and was inconsequential in the larger public discourse. Private individuals, with little or no notoriety and little or no funding were unable to access the means to efficiently, effectively, and instantaneously deliver their message to their local community or the wider society. If so motivated, private individuals were forced to resort to time-consuming and physically restrictive communication formats like leafleting, picketing, or door-to-door pamphleting. More specifically, this lack of access to the means of mass communication inhibited defamation

140. 418 U.S. 323, 344 (1974).

141. *Curtis Publ'g Co.*, 388 U.S. at 164 (Warren, C.J., concurring).

142. 418 U.S. at 344.

143. Aaron Perzanowski, *Relative Access to Corrective Speech: A New Test for Requiring Actual Malice*, 94 CALIF. L. REV. 833, 850–51 (2006).

144. See generally Ardia, *supra* note 13.

145. U.S. Census Bureau, *Historical National Population Estimates: July 1, 1900 to July 1, 1999*, <http://www.census.gov/popest/data/national/totals/pre-1980/tables/popclockest.txt> (last updated June 28, 2000).

146. DAVID DEMERS, CENTRE D'ÉTUDES SUR LES MÉDIAS, MEDIA CONCENTRATION IN THE UNITED STATES 12–13 (2001).

147. Inquiry into Section 73.1910 of the Comm'n's Rules and Regulations Concerning the Gen. Fairness Doctrine Obligations of Broad. Licensees, 102 F.C.C.2d 145, 202–05 (1985).

148. DEMERS, *supra* note 146, at 6.

149. Perzanowski, *supra* note 143, at 849–51.

plaintiffs' ability to engage in self-help. The average person had virtually no way to rebut defamatory speech with the same force and effect as a public figure or public official.

Indeed, the tort of defamation itself, having grown out of pre-industrialized common law,¹⁵⁰ would have informed the *Gertz* Court's decision in light of the reality discussed above. Before the 20th century, information, including reputation-related information, moved as quickly as the physical world could allow it. Whether by word of mouth, town crier, or Pony Express, information dissemination was limited and often confined to small geographic communities.¹⁵¹ It was not until the use of railroads and telegraphs that information dissemination began to "transcend physical space" and leave the local community.¹⁵² By the 1970s, radio, television, and national newspapers had changed the information dissemination paradigm, and information became mobile.¹⁵³ The tort of defamation, however, was—and is—wedded to a pre-mobile information era, when information and reputation were physically limited to a recognizable and definable community. Indeed, in determining whether a statement is defamatory, courts attempt to determine "the appropriate and proper community in whose esteem [a] plaintiff has been harmed."¹⁵⁴ This search for "community" assumes, as was the case at the inception of common law defamation, that communities are a homogeneous, static, Norman Rockwell painting where an individual's connectedness is limited to a specific geographic location.¹⁵⁵

2. *Where We Are Now*

With the inception of the Internet, information transmission has radically changed. Since the *Gertz* era, our society has "seen an explosion of media sources" and the 1970s versions of effective means of communications have "become only one voice in the chorus."¹⁵⁶ One form of communication, however, has surpassed the others. The Internet has become the "new marketplace of ideas."¹⁵⁷ It "has become omnipresent, offering access to" all manner of sharing information, opinions, and viewpoints through email, blogs, social media, and chat rooms.¹⁵⁸ Indeed, due to the Internet, the contemporary, effective means of

150. *Ardia*, *supra* note 13, at 262.

151. *Id.* at 270–71.

152. *Id.* at 271.

153. *Id.*

154. *Id.* at 282.

155. *Id.* at 302.

156. *Fox Television Stations, Inc. v. FCC*, 613 F.3d 317, 326 (2d Cir. 2010), *cert. granted*, 131 S. Ct. 3065 (2011).

157. *Reno v. ACLU*, 521 U.S. 844, 885 (1997).

158. *Fox Television Stations*, 613 F.3d at 326.

communication are not limited to an oligarchy of print, radio, and television producers. As the First Circuit noted, “[t]he number of suppliers of online video and audio is almost limitless.”¹⁵⁹ As a result, virtually any person with access to the Internet can share his or her ideas not only in text, but through the spoken word and video—any person with an Internet connection has virtually equal access to the most effective means of mass communications the world has ever known.¹⁶⁰

The Internet has revolutionized and synthesized the most effective features of other modes of communication. For example, whereas face-to-face and telephonic communication is “easy, convenient, and instantaneous,” they have their limitations.¹⁶¹ The very nature of face-to-face and telephonic communication limits their audience and requires simultaneity.¹⁶² Newspapers, radio, and television likewise have their benefits and drawbacks.¹⁶³ While they can reach a multitude of people, they are non-deliberative, one-way forms of communication that are prohibitively expensive for most people to use for communication purposes.¹⁶⁴ Moreover, the structural design of print, radio, and television create a scarcity of information and viewpoints.¹⁶⁵ The Internet, however, embodies all the benefits listed above, with few, if any, of the shortcomings.¹⁶⁶ It is convenient, is easy to use, is relatively affordable, has a global reach, encourages diversity of information, and has an interactive capacity unattainable for even the most effective means of communication from the *Gertz* era.¹⁶⁷

The Internet provides a virtually limitless mechanism for pooling ideas, opinions, and knowledge.¹⁶⁸ The mechanism, unlike its media predecessors from the *Gertz* era, is less susceptible to regulation and monopolization, and thus more capable of empowering individuals.¹⁶⁹ Access to the Internet provides the user immediate access to a vast platform for the exposition of his or her ideas, as well as the opportunity to review and interact with others’ ideas in a way never before imagined.

159. *Id.* (citing *In re* Implementation of the Child Safe Viewing Act; Examination of Parental Control Techs. for Video or Audio Programming, 24 FCC Rcd. 11413, ¶ 126 (2009)).

160. THE CIVIC WEB: ONLINE POLITICS AND DEMOCRATIC VALUES 10 (David M. Anderson & Michael Cornfield eds., 2003) [hereinafter THE CIVIC WEB].

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at 78.

166. *Id.* at 11.

167. *Id.* at 11, 78.

168. Gary Becker & Richard Posner, *Introduction to the Becker-Posner Blog*, BECKER-POSNER BLOG (Dec. 4, 2004, 11:23 PM), <http://www.becker-posner-blog.com/2004/12/introduction-to-the-becker-posner-blog.html>.

169. JAVIER CORRALES ET AL., DEMOCRACY AND THE INTERNET: ALLIES OR ADVERSARIES? 10 (2002).

This characteristic of the Internet permits the user to express himself or herself freely on “all issues about which information is needed or appropriate”¹⁷⁰ to live in a free society that includes not only politicians, but also “truth, science, morality, and arts in general as well as responsible government.”¹⁷¹ In turn, it creates the opportunity for a more open, less controlled exchange of information and a potentially better-informed society.

In addition, the Internet eliminates the need for geographic closeness to form groups and communities.¹⁷² This threatens a local, geographically defined community’s sense of, and control over, culture, customs, and connectedness.¹⁷³ At the same time it creates the possibility for more disparate communities to form that are not geographically limited.¹⁷⁴ This dispersed, voluntary connectedness then allows groups to flourish that coalesce around special interests or self-identification. Entry to and exit from the group is by choice, and the relationships formed in the group are created through shared modification, not authoritatively imposed.¹⁷⁵ “[C]onnection, not affection, [becomes] the defining characteristic of [the] community” and the communities themselves create their own dispute resolution systems for reputational protection.¹⁷⁶

Indeed, in light of its effectiveness as a communication tool, the Internet provides the fastest, cheapest, most efficient, and most far-reaching platform to rebut an allegedly defamatory statement.¹⁷⁷ The capacity for self-help the *Gertz* Court recognized as residing in the “channels of effective communication”¹⁷⁸ in the 1970s now resides in the Internet.¹⁷⁹ To be sure, rebuttals and self-help may “be more effective on the Internet than [they are] in the corporeal world”¹⁸⁰ as the Internet, unlike media in the corporeal world, is like “a self-cleaning oven [that could grow] more accurate as time goes by.”¹⁸¹ It is the instantaneous,

170. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 41 (1971), *abrogated by Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

171. *Id.* at 41 (internal quotation marks omitted).

172. *THE CIVIC WEB*, *supra* note 160, at 13.

173. *Id.*

174. *Id.*

175. *Id.* at 37.

176. *Ardia*, *supra* note 13, at 319.

177. *Id.* at 318.

178. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974).

179. The Internet has itself created a web-based industry for reputation protection. Websites such as *Reputation.com* monitor the Internet and remove unwanted publication of private data. These websites also tout an ability to “build a positive online presence [and] . . . push down or suppress any negative content that shows up high in your search results.” *REPUTATION.COM*, <http://www.reputation.com> (last visited Dec. 7, 2012).

180. *Ardia*, *supra* note 13, at 319.

181. *David Carr: The News Diet of a Media Omnivore*, NPR: FRESH AIR (Oct. 27, 2011), *transcript available at* <http://www.npr.org/templates/transcript/transcript.php?storyId=141658047>.

interactive, limitless-repository nature of the Internet that facilitates “correction [and] refinement . . . [of] ideas and opinions, facts and images, [and] reportage.”¹⁸²

Merely having equal access to the most effective means of communication, however, does not ensure the efficacy, popularity, or notoriety of one’s message. Most websites, blogs, individual social network home pages, podcasts, and web videos are lost in a sea of information, resulting in what have been called “nanoaudiences.”¹⁸³ In addition, many simply fail.¹⁸⁴ However, the Supreme Court’s jurisprudence regarding a robust social dialogue has not sought to equalize the efficacy of the speakers’ messages. Instead, the Court has sought to ensure the widest possible dissemination of information from the most diverse sources,¹⁸⁵ allowing each speaker’s message to succeed or fail on its own. Therefore, while the Internet does not ensure the effectiveness of each user’s message, neither does the Constitution require the exercise of First Amendment rights be equally effective. It was unequal *access* that the *Gertz* Court was concerned with, and equal *access* is what the Internet provides.

Some have argued that the rise of the Internet requires a retooling of the *Gertz* analysis while essentially keeping the private figure/public figure dichotomy and attendant burdens. For example, it has been suggested that when alleged defamation occurs online, courts should impose an actual malice standard where the plaintiff has thrust himself or herself into a controversy online and has continuing access to that media.¹⁸⁶ Others have argued for an actual malice standard “when plaintiffs enjoy access to some means of communication that, when compared to the defendant’s publication, are likely to provide an adequate means of response.”¹⁸⁷ Changing the *Gertz* test, however, while still beginning the analysis with an examination of the status or influence of the plaintiff only tinkers with an outdated assumption about access to the effective means of communication and requires a constitutionally dubious inquiry in the first instance. Any attempt to preserve *Gertz* and the requirement that the analysis begin with the plaintiff’s status disregards the mollifying nature of the Internet regarding the *Gertz* Court’s concern about access to an effective means of communication.

182. Becker & Posner, *supra* note 168.

183. RICHARD KAHN & DOUGLAS KELLNER, *RADICAL DEMOCRACY AND THE INTERNET: INTERROGATING THEORY AND PRACTICE* 31–32 (Lincoln Dahlberg & Eugenia Siapara eds., 2007).

184. *Id.* at 32.

185. *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976).

186. Ann E. O’Connor, *Access to Media All A-Twitter: Revisiting Gertz and the Access to Media Test in the Age of Social Networking*, 63 *FED. COMM. L.J.* 507, 532 (2011).

187. Perzanowski, *supra* note 143, at 861.

Arguably, *Gertz* was an appropriate Band-Aid for a social problem that existed in the 1970s, but that wound is healing. Retooling the examination of a defamation plaintiff simply adjusts the *Gertz* test to accommodate those who do not yet have access to the Internet. That group grows smaller by the year.¹⁸⁸ As our society is moving toward near-universal equal access to the most effective means of communication via the Internet, it is time to remove the Band-Aid. What remains will be the only analysis that fully embraces a commitment to free and open public discourse on matters of public concern and will stand the test of time regardless of technological advances.

In the past, the Court has cautioned that while new, more powerful and unpredictable means of communication may be invented, whatever the challenges of applying the Constitution may be, “the basic principles of freedom of speech and the press, like the First Amendment’s command, do not vary.”¹⁸⁹ Here a new medium of communication has appeared that offers more, not less, access to the effective means of communication. Instead of presenting a chance that a balance will be struck in favor of regulation over liberty, we are presented with the opportunity to expand the freedom of speech, scuttle the *Gertz* Court’s public/private figure analysis, and return to the basic principles of protecting the right to speak on matters of public concern.

B. THE ROBERTS COURT AND ITS ZEALOUS PROTECTION OF SPEECH ON MATTERS OF PUBLIC CONCERN

I. *The Roberts Court’s Decisions*

The thrust of technology and the equalization of access to the most effective means of communication are not the sole heralds of the death of the public figure/private figure dichotomy. Indeed, the Supreme Court itself has recently signaled a strong commitment to favoring a First Amendment protection of speech on matters of public concern in the face of arguably equally valued public interests. The Roberts Court, while generally considered more conservative on social issues than the modern Courts immediately preceding it, has repeatedly created a

188. In 2009, more than 98% of public libraries in the United States offered Internet access. FLORIDA STATE UNIV. INFO. INST., PUBLIC LIBRARIES AND THE INTERNET 2009: STUDY RESULTS AND FINDINGS 16 (2009). In 2010, 71.1% of Americans used the Internet at some location and, currently, more than 68% of households have high-speed broadband Internet access. U.S. DEP’T OF COMMERCE: NAT’L TELECOMM. & INFO. ADMIN., DIGITAL NATION: EXPANDING INTERNET USAGE (2011). President Obama’s National Wireless Initiative seeks to ensure that over 98% of Americans have access to high-speed wireless services by 2016. *Id.* In light of these statistics, along with the federal and state assistance programs and regulatory initiatives to either offer discounted or subsidized Internet service or service through libraries, schools, and local technology centers, nearly universal access is at hand.

189. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952).

bulwark against the government's attempt to regulate speech on matters of public concern. The reasoning and commitment to robust debate on matters of public concern in the Court's recent cases spells the end of the thirty-year-old, antiquated rule from *Gertz* that failed to protect those values in the first place.

One of the first forays into the thicket of government regulation of speech on matters of public concern came with the Roberts Court's jurisprudential reshaping of *Chaplinsky*. As discussed above, this approach forms the basis of libel's special recognition in constitutional law. In *United States v. Stevens*, the defendant, a purveyor of videos depicting animal fighting, was convicted of violating 18 U.S.C. § 48, which criminalized commercial depictions of animal cruelty.¹⁹⁰ The defendant argued that statute was facially invalid pursuant to the First Amendment.¹⁹¹ While the district court rejected the defendant's argument, the Third Circuit found that the statute was facially invalid and the Supreme Court affirmed.¹⁹²

Arguing in favor of the statute's validity, the government posited that depictions of animal cruelty should be added to the list of speech that may be regulated based solely on its content.¹⁹³ Relying on *Chaplinsky*'s oft-quoted standard for unprotected speech, the government argued that the "slight social value as a step to truth" that that may be derived from animal cruelty "is clearly outweighed by the social interest in order and morality."¹⁹⁴ While the Court recognized the genesis of the government's argument in *Chaplinsky*, it nonetheless rejected the idea that speech could be regulated or deemed unprotected after balancing its social value against the degree to which the speech undermines social order and morality.¹⁹⁵ Instead, the Court explained that the "balancing" in *Chaplinsky* was not a test, but was instead a description of the unprotected speech listed therein.¹⁹⁶

Almost one year later, the Court issued two opinions that more directly addressed speech on matters of public concern and its vaunted status within the First Amendment. In *Brown v. Entertainment Merchants*

190. 130 S. Ct. 1577, 1582 (2010). The legislative background of 18 U.S.C. § 48 focused primarily on the interstate market for "crush videos" which often depict women slowly crushing animals to death "with their bare feet or while wearing high heeled shoes," sometimes while "talking to the animals in a kind of dominatrix patter" over "[t]he cries and squeals of the animals, obviously in great pain." *Id.* at 1583 (quoting H.R. REP. NO. 106-397, at 2 (1999)).

191. *Id.* at 1583.

192. *Id.*

193. *Id.* at 1584–85. Included in the list of examples of unprotected speech were obscenity, defamation, fraud, and incitement. *Id.*

194. *Id.* at 1585 (quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 383 (1992) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942))).

195. *Id.* at 1586.

196. *Id.*

Ass'n, the Court considered a California statute prohibiting the sale of violent video games to minors and requiring that the games contain special labels that designated them as such.¹⁹⁷ Video games that were subject to the law were those that included “killing, maiming, dismembering, or sexually assaulting an image of a human being . . . in a manner that . . . [was] patently offensive to prevailing standards in the community as to what is suitable for minors,” and that “causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors.”¹⁹⁸ The legislation was meant to protect minors and contained a “saving clause” similar to what the Court had approved in the context of obscene speech.¹⁹⁹ Like in *Stevens*, however, the Court interpreted California’s attempt to regulate violent speech as a concomitant attempt to create a new category of unprotected speech based on its content—a concept the Court had rejected in *Stevens* and which it continued to do so here.²⁰⁰

The Court began its rejection of California’s attempt to regulate violent video games by stating that “[t]he Free Speech Clause *exists principally to protect discourse on public matters.*”²⁰¹ Public matters, the Court reasoned, are discussed and debated not only within the political realm, but also within the entertainment realm in the form of books, plays, movies, and now video games.²⁰² Because these media communicate not only ideas, but in many instances social messages, the First Amendment’s protection applies to the government’s attempt to regulate them.²⁰³ Indeed, the very reason the video games were being regulated—the ideas expressed therein, “whether [they] be violence, or gore, or racism”—may have been the true reason for the regulation, and thus what led the Court to analyze and reject the regulation under a strict scrutiny standard.²⁰⁴

In *Snyder v. Phelps*,²⁰⁵ the Court went further to single out speech on matters of public concern as the touchstone of the First Amendment. In *Snyder*, a plaintiff whose son was killed while serving in the military sued the Westborough Baptist Church and its directors for, among other things, intentional infliction of emotional distress.²⁰⁶ At trial, the plaintiff established that the church’s congregants picketed his son’s funeral and used the opportunity, as they had in the past, to espouse their belief that

197. 131 S. Ct. 2729, 2732 (2011).

198. *Id.* at 2732–33 (internal quotation marks omitted).

199. *Id.* at 2734–35.

200. *Id.*

201. *Id.* at 2733 (emphasis added).

202. *Id.*

203. *Id.*

204. *Id.* at 2738, 2742.

205. 131 S. Ct. 1207 (2011).

206. *Id.* at 1214.

God hates and punishes the United States.²⁰⁷ The congregants picketed on public land adjacent to public streets near the plaintiff's son's funeral.²⁰⁸ The congregants carried signs that stated: "'God Hates the USA/Thank God for 9/11,' 'America is Doomed,' 'Don't Pray for the USA,' 'Thank God for IEDs,' 'Thank God for Dead Soldiers,' 'Pope in Hell,' 'Priests Rape Boys,' 'God Hates Fags,' 'You're Going to Hell,' and 'God Hates You.'"²⁰⁹ The picketing congregants were approximately 1,000 feet from where the funeral was held, "[never] entered church property or went to the cemetery," never yelled or used profanity, and did not commit any acts of violence.²¹⁰ While the plaintiff saw the tops of the signs on his way to the funeral, he did not see what was written on the picketers' signs until after the funeral while watching a news broadcast about the event.²¹¹ At trial and on appeal, the church and its directors raised the First Amendment as a defense to the intentional infliction of emotional distress claim and the damages for which they were found liable at trial.²¹²

The Court, as in *Brown*, began its analysis of the First Amendment's impact on the case by elevating speech on matters of public concern and distinguishing it as being "at the heart of the First Amendment's protection."²¹³ Indeed, the Court went on to lavishly praise speech on matters of public concern, characterizing it as "occup[ying] the highest rung of the hierarchy of First Amendment values";²¹⁴ "entitled to special protection"; and being more than simply "self-expression [but also] the essence of self-government."²¹⁵ In contrast, the Court noted, where speech on matters of purely private concern is at issue, First Amendment principles are less threatened, because the ideas contained therein rarely contribute to the "meaningful dialogue of ideas" that help shape society.²¹⁶

The Court admitted that when determining whether speech is a matter of public concern, the analysis is no exact science.²¹⁷ The guiding principles, which the Court implied should be construed broadly so that "courts themselves do not become inadvertent censors,"²¹⁸ included a review of whether the speech related "to any matter of political, social,

207. *Id.* at 1213.

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.* at 1213–14.

212. *Id.* at 1214.

213. *Id.* at 1215 (quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758–59 (1985)).

214. *Id.* (quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983)).

215. *Id.* (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964)).

216. *Id.* (quoting *Dun & Bradstreet*, 472 U.S. at 760).

217. *Id.* at 1216.

218. *Id.*

or other concern to the community”²¹⁹ or whether the speech “is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.”²²⁰ Where speech is “solely in the individual interest of the speaker and [his] specific . . . audience”²²¹ or does “nothing to inform the public about any aspect of” the subject of a public concern, it is afforded less protection as falling within the realm of speech on a matter of private concern.²²² These principles, the Court instructed, should be considered after a review of the “content, form, and context of [the] speech, as revealed by the whole record.”²²³ After articulating its reverence for speech on matters of public concern and the guiding principles that separate matters of public concern from matters of private concern, the Court easily found that the content of the picketing congregants’ speech in *Snyder* was a matter of public concern “entitled to ‘special protection’ under the First Amendment” and therefore could not give rise to or support liability for this speech-related tort.²²⁴

2. *Resurrection of the Rosenbloom Ghost*

With the Roberts Court’s renewed emphasis on and elevation of speech on matters of public concern, *Gertz* and its public/private figure analysis are rightfully doomed. Where the *Gertz* Court strayed from its constitutional moorings was in shifting the focus of the First Amendment’s impact on libel from the content of the speech to the status of the speaker. As discussed above, the *Gertz* Court was faced with what appeared to be a choice: protecting a robust social debate versus limiting speech based on the *Chaplinsky* rationale.²²⁵ The *Gertz* Court chose the latter. The Roberts Court has, however, reclassified the *Chaplinsky* quote as a description of certain unprotected speech based on its content. With that move away from *Chaplinsky* as a test and move toward *Chaplinsky* as a description of particular unprotected speech, it becomes clear that an analysis of the contours of libel as it relates to the First Amendment must begin with the content of the speech, not the status of the speaker. One cannot assess the application of the *Chaplinsky* description without reviewing the substance of the speech.

219. *Id.* (quoting *Connick*, 461 U.S. at 146).

220. *Id.* (quoting *San Diego v. Roe*, 543 U.S. 77, 83–84 (2004)).

221. *Id.* (quoting *Dun & Bradstreet*, 472 U.S. at 762).

222. *Id.* (quoting *Roe*, 543 U.S. at 84).

223. *Id.* (quoting *Dun & Bradstreet*, 472 U.S. at 761) (internal quotation marks omitted).

224. *Id.* at 1219.

225. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

While libel of a private person on matters of private concern may have little social value, when the speech is a matter of public concern, the search for value in the equation shifts from the micro-analysis of the specific message itself to the macro-value of encouraging more participation in public discourse. A lower burden for libel based solely on the status of the plaintiff brings with it an attendant risk that one may not speak on a matter of public concern if a private figure is involved for fear of an increased likelihood of liability. The question of value then lies not in the falsity of the libelous speech itself, but in the effects regulating libelous speech may have on uninhibited debate of public issues. To be sure, the value of an uninhibited debate on matters of public concern is without question²²⁶—and indeed the principal purpose of the First Amendment²²⁷—therefore, the interest in an orderly society certainly cannot overshadow it.

On the contrary, the marketplace for a robust debate on matters of social significance is only strengthened by tolerating false, libelous speech when the topic is a matter of public concern. In contrast to the Court's conclusion in *Gertz*,²²⁸ the social importance of tolerating that speech eclipses the individual's interest in protecting his or her name. Certainly, with the Roberts Court's reverence for speech on matters of public concern and the application of that reverence, a private individual's sacrosanct interest in protecting his or her reputation and the related intolerance of libel is as questionable now as it was when the Court unexpectedly pronounced in *New York Times* that "libel can claim no talismanic immunity from constitutional limitations."²²⁹

As discussed above, the *Gertz* Court recognized that when striking a balance between forbidding falsehoods and protecting "speech that matters," the scales of the First Amendment are tipped in favor of permitting falsehoods so that "speech that matters" will be protected.²³⁰ The Court, however, then attributed great weight to an individual's right to protect his or her name, which tipped the balance back in favor of reputational protection at the expense of "speech that matters."²³¹ The Roberts Court and its decisions have revisited and reaffirmed the weight of "speech that matters"—that is to say, speech on matters of public concern—and have christened it the weightiest speech of all. While early interpretations of the First Amendment focused on its intended

226. *New York Times Co. v. Sullivan*, 376 U.S. 254, 269–70 (1964).

227. *Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2733 (2011).

228. *Gertz*, 418 U.S. at 340, 348.

229. *New York Times*, 376 U.S. at 269.

230. *Gertz*, 418 U.S. at 340.

231. *Id.* at 340, 348.

prohibition of “previous restraints [on speech],”²³² the Roberts Court’s reverence for speech on matters of public concern is not a new phenomenon²³³ and, indeed, the *Gertz* Court’s rigging of the First Amendment scale is the true outlier.

There are numerous Court references to the high value of speech on matters of public concern. In particular, before *Gertz*, the Court had already recognized the intersection of the First Amendment and libel laws in *New York Times* when it framed its analysis of that intersection within the context of the “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”²³⁴ Soon thereafter, while failing to form a majority opinion, the Court in *Rosenbloom* recognized that that commitment required courts, when apportioning burdens of proof, to disregard the status of the plaintiff in a libel action and instead analyze the content of the speech.²³⁵ The *Rosenbloom* Court recognized that the First Amendment was not simply a license to criticize government officials, as the result in the *Gertz* Court would have us believe,²³⁶ but instead was intended primarily to set up a bulwark for debate on matters of public concern, as the Roberts Court has reaffirmed.²³⁷

Certainly, the Roberts Court and its avowed commitment to that bulwark would agree with the *Rosenbloom* Court that issues that are “of public or general interest,” are not stripped of that trait simply because “a private individual is involved, or because in some sense the individual did not ‘voluntarily’ choose to become involved.”²³⁸ Additionally, the Roberts Court would undoubtedly agree that examining the status of the individuals and apportioning liability burdens based thereon results in 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 or general concern.”²³⁹ The Roberts Court’s characterization of speech on matters of public concern as “occup[ying] the highest rung of the hierarchy of First Amendment values,”²⁴⁰ being “at the heart of the First Amendment’s

232. *Schenck v. United States*, 249 U.S. 47, 51–52 (1919); see 5 ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES 151–52 (1803).

233. See, e.g., *Roth v. United States*, 354 U.S. 476, 484 (1957).

234. *New York Times*, 376 U.S. at 270.

235. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 41 (1971), abrogated by *Gertz*, 418 U.S. 323.

236. *Id.*

237. *Brown v. Entm’t Merchants Ass’n*, 131 S. Ct. 2733 (2011).

238. *Rosenbloom*, 403 U.S. at 43.

239. *Id.* at 48.

240. *Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011) (quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983)).

protection[.]”²⁴¹ and being “entitled to special protection”²⁴²—along with its sweeping application of these sentiments to the cases which have come before it—comports with the *Rosenbloom* Court’s more constitutionally supported elevation of that speech over the individual’s right to absolute security of reputation.

However, the seeds sown by the Roberts Court that will result in *Gertz*’s demise are not only found in the discussion of speech on matters of public concern and its utter rejection of government regulation of that speech. The Roberts Court’s discussion of speech on matters of private concern and its place within the hierarchy of First Amendment likewise foretell the inevitable. In *Snyder*, the Roberts Court noted that regulation of such speech is less offensive to First Amendment principles because it does not threaten the “robust debate of public issues.”²⁴³ If one engages in self-censorship on a matter of private concern simply for fear of liability, that self-censorship is less a threat to the principles of the First Amendment because, presumably, that speech by its very definition does not contribute to the “meaningful dialogue of ideas”²⁴⁴ needed in a democracy. While *Snyder* did not couch its analysis of speech on matters of private concern within the context of libel, its analysis contemplated private concern within the context of a tort that arose out of speech, and its description of such speech could have been written by the *Rosenbloom* Court. Perhaps it was, and the Roberts Court’s language is the séance that will resurrect the dead.

CONCLUSION

With the Internet and speech on matters of public concern, there is an intersection of communication and content that calls for the highest form of First Amendment protection. To that end, previous concerns about private defamation embodied in the *Gertz* decision must give way to modern technological and jurisprudential realities. Taken together, the Internet and the Roberts Court’s decisions establish fertile ground for a rejection of the *Gertz* Court’s anachronistic and constitutionally suspect concerns. The defamation plaintiff’s status as a private or public figure should no longer be the first step in understanding a defamation case in light of the First Amendment. Instead, the first question should be whether the content of the speech was a matter of public concern. With ubiquitous access to a modern, effective means of communication and the Roberts Court’s passionate safeguarding of speech on matters of

241. *Id.* (quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758–59 (1985) (opinion of Powell, J.)).

242. *Id.* (quoting *Connick*, 461 U.S. at 145).

243. *Id.* (quoting *Dun & Bradstreet*, 472 U.S. at 760).

244. *Id.* (quoting *Dun & Bradstreet*, 472 U.S. at 760).

public concern, *Gertz*'s obituary has been written: "Though born of misguided concerns, it lived a long life of over thirty years and all things must come to an end."
