A Dangerous Distinction: The Deconstitutionalization of Private Speech

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Abstract

In the mid-1960s the U.S. Supreme Court began applying a Meiklejohnian approach to certain First Amendment claims, using a self-government rationale to justify enhanced protection for freedom of expression on matters of public concern in cases involving defamation, false light invasion of privacy, government employees’ speech, and intentional infliction of emotional distress, as well as others. The Court, however, refrained from acknowledging the remainder of Meiklejohn’s argument — that private speech is outside the purview of the First Amendment and protected only by the Due Process Clause of the Fifth Amendment. In the wake of Supreme Court defamation rulings in the 1980s, some lower courts have begun deconstitutionalizing private defamatory speech, holding such speech is not entitled to constitutional protection. Further complicating matters is the question of whether the First Amendment applies differently to nonmedia defendants. This study explores these developments, finding that in defamation cases involving private plaintiffs and matters of private concern, some lower federal courts and state appellate courts have 1) refused to declare that the First Amendment prohibits liability for true defamatory speech, 2) held that the Constitution does not require any proof of fault, 3) ruled there is no constitutional protection for opinion, and 4) ruled bloggers and other nonmedia defendants do not qualify for First Amendment protection. The article concludes that removing First Amendment protection for private speech is normatively unjustified and practically dangerous and recommends a solution to halt the deconstitutionalization of private speech.
In the mid-1960s the U.S. Supreme Court began applying a decidedly Meiklejohnian approach to certain First Amendment claims, using a self-government rationale to justify enhanced protection for freedom of expression on matters of public concern.\footnote{ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT (1948). The Supreme Court, however, stopped short of accepting Meiklejohn’s contention that public speech was absolutely protected.} Thus, in 1964 in \textit{New York Times v. Sullivan}, the Court established the actual malice fault requirement for public officials suing for libel, recognizing “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”\footnote{376 U.S. 254, 270 (1964). \textit{See also} Garrison v. Louisiana, 379 U.S. 64 (1964)(holding the actual malice requirement also applied in criminal libel prosecutions based on defamatory statements about public officials) and Curtis Publ’g Co. v. Butts and Associated Press v. Walker, 388 U.S. 130 (1967)(holding public figure plaintiffs also needed to prove a heightened level of fault).} Three years later the Court extended the actual malice requirement to false light invasion of privacy lawsuits based on “reports of matters of public interest,”\footnote{Time, Inc. v. Hill, 385 U.S. 374, 388-89 (1967).} and the following year the justices ruled that public employees may not be penalized for speaking out on “issues of public importance.”\footnote{Pickering v. Bd. of Educ., 391 U.S. 563, 574 (1968).} More recently, in 2011, in \textit{Snyder v. Phelps},\footnote{131 S. Ct. 1207 (2011).} a highly publicized case involving protests at military funerals by the Westboro Baptist Church, the Court wrote the distinction between political and non-political speech was critical to the outcome of the case.

As the Supreme Court used Alexander Meiklejohn’s public speech rationale to support expansion of First Amendment free speech rights in the 1960s and 1970s, it refrained from ever acknowledging the remainder of Meiklejohn’s argument — that private speech is outside the purview of the First Amendment.\footnote{MEIKLEJOHN, supra note 1, at 37-39 (contending that private speech was unprotected by the First Amendment but covered only by the Due Process Clause of the Fifth Amendment).} Not until the mid-1980s did the Court directly confront the question of whether speech on non-public issues...
warrants First Amendment protection, but its pronouncements on the issue were less than clear: “In contrast, speech on matters of purely private concern is of less First Amendment concern. . . . While such speech is not totally unprotected by the First Amendment . . . its protections are less stringent.”

Despite the Court’s cautious language, some lower courts have chosen to drop the “not” from the quote above, interpreting speech about private people and matters of private concern to be totally without First Amendment protection. One of the best known of these cases occurred in 2009 when the U.S. Court of Appeals for the First Circuit refused to hold unconstitutional a Massachusetts law that allowed liability for true defamatory statements. Stating that the defendant did “not cite a case for the proposition that the First Amendment does not permit liability for true statements concerning matters of private concern,” the First Circuit permitted common law actual malice, which it defined as “actual malevolent intent or ill will” to overcome a truth defense. In other words, so long as a speaker was motivated by ill will, he or she could be held liable for damages for a completely true statement if the statement was about a private person and a matter of private concern.

In 2010, the Florida Supreme Court also recognized the potential for truthful statements made with bad motives to result in libel damages when it approved new standard jury instructions for civil cases in the state. In the section addressing defamation actions brought by private plaintiffs against nonmedia defendants, the jury instructions

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8 Noonan v. Staples, 561 F.3d 4, 7 (1st Cir. 2009).
9 Noonan v. Staples, 556 F.3d 20, 29, rehearing and rehearing en banc denied, 561 F.3d 4 (1st Cir. 2009).

recognize the defense “of truth and good motives.””\textsuperscript{10} Similarly, some courts have ruled that nonmedia defendants enjoy different constitutional rights than media defendants. In late 2011, for example, the U.S. District Court for the District of Oregon held that a blogger was not entitled to constitutional protections because she was not a member of the media.\textsuperscript{11}

Potential liability for truthful statements isn’t the only byproduct of the Supreme Court’s lack of clarity on the availability of First Amendment protection for defamatory statements about private persons and matters of private concern and lower courts’ confusion over whether the First Amendment applies equally to media and nonmedia defendants. Courts have ruled, or at least suggested, that in private person-private issue cases there might be no constitutional fault requirement\textsuperscript{12} and no constitutional protection for statements of opinion.\textsuperscript{13}

While the “deconstitutionalization” of private speech has been most apparent in defamation cases, the trickledown effect of adoption of a Meiklejohnian approach certainly isn’t limited to defamation. Although the Supreme Court has never explicitly stated that private speech is unprotected by the First Amendment, it has emphasized the constitutional importance of public speech in cases involving speech by government

\textsuperscript{10} In re Standard Jury Instructions In Civil Cases-Report No. 09-01, § 405.9(b), 35 So.3d 666, 730 (FL 2010).
\textsuperscript{12} See, e.g., Snead v. Redland Aggregates, 998 F.2d 1325, 1334 (5th Cir. 1993)(“We therefore conclude that the Constitution imposes no minimum standard of fault in private/private libel cases.”); Sleem v. Yale University, 843 F. Supp. 57, 62 (M.D.N.C. 1993)(“Dun & Bradstreet allows the states to choose whether to allow presumed damages and impose liability without fault in cases involving private person plaintiffs and non-public issues.”)
\textsuperscript{13} See, e.g., Roffman v. Trump, 754 F. Supp 411, 414 (E.D. Pa. 1990)(ruling that Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990), was inapplicable in a private-private libel action); Weissman v. Sri Lanka Curry House, 469 N.W.2d 471, 473 (Minn. Ct. App. 1991)(“Because the Supreme Court has not extended constitutional protections for public speech to speech of purely private concern, . . . private plaintiff/private issue defamation actions must be analyzed under state common law principles.”).
employees, intentional infliction of emotional distress, and false light invasion of privacy, as well as others. While this article focuses on defamation law, the implications of the Court’s embrace of a Meiklejohnian approach reach across numerous categories of communication law. In effect, lower courts are removing a wide range of speech from constitutional protections at the very time new communication technologies such as email, Facebook, Twitter and blogs are giving private individuals the power to reach wider and wider audiences. Thus, although it may be true that through the Internet “any person . . . can become a town crier with a voice that resonates farther than it could from any soapbox,” if a court decides the town crier’s speech did not involve a matter of public concern it might have no constitutional protection.

The purpose of this article is to identify the extent to which lower federal courts and state courts have deconstitutionalized private defamatory speech. Part II provides an overview of the development of constitutional protection for defamatory speech and the subsequent erosion of protection for private libel. Part III briefly reviews literature related to the public speech-private speech dichotomy. Part IV identifies and analyzes cases in which courts expressly adopted the view that the First Amendment does not protect private speech as well as cases in which courts took the lesser, more tentative step of questioning whether constitutional protections apply to private speech. Each section of

19 Cases for analysis were identified using the Westlaw search function. First, all state and federal cases in the Westlaw database decided after 1985 — the year in which Dun & Bradstreet v. Greenmoss Builders, 472 U.S. 749 (1985), was decided — were searched using the term “libel or defamation or slander and ‘private figure’ or ‘private person’ or ‘private individual.’” A secondary search of the cases identified using the primary search term was then conducted using the term “‘matter of private concern’ or ‘not matter of public concern’ or ‘private interest’ or ‘not public interest’ or ‘private issue’ or ‘not public issue’ or
the case analysis focuses on a separate element of defamation law affected by constitutional considerations. Section A addresses the falsity/truth element, Section B fault, Section C the First Amendment opinion defense, and Section D the question of whether constitutional protections apply to nonmedia defamation defendants. Part IV discusses why this approach is disconcerting and argues the Supreme Court should stop confusing lower courts with dangerous dicta\textsuperscript{20} that are leading to the deconstitutionalization of private speech.

II. Libel Law and the First Amendment

A. The constitutionalization of the law of libel

As noted above, the Supreme Court began the process of constitutionalizing the law of libel in 1964 in New York Times v. Sullivan, holding that the First Amendment requires a public official libel plaintiff to prove, with convincing clarity, that the defamatory statement was published with knowledge of its falsity or reckless disregard for the truth, a fault standard the Court labeled “actual malice.”\textsuperscript{21} A few months later, the Court continued the process by applying the actual malice fault requirement to criminal libel actions brought as the result of criticism of public officials.\textsuperscript{22} As it had in Sullivan, the Court relied on the Meiklejohnian theory without directly citing or quoting Alexander

\textsuperscript{20} As noted below and as discussed by other scholars, much of the Court’s discussion of political speech theories has occurred in dicta. See, e.g., C. Edwin Baker, Is Democracy a Sound Basis for a Free Speech Principle? 97 VA. L. REV. 515, 517 (2011).

\textsuperscript{21} 376 U.S. 254, 279-80, 284-85 (1964).

\textsuperscript{22} Garrison v. Louisiana, 379 U.S. 64 (1964).
Meiklejohn: “For speech concerning public affairs is more than self-expression; it is the
essence of self-government.”

During the following decade, the Court grappled with just how far the actual
malice requirement should reach. In 1967 the Court decided that in false light invasion of
privacy actions arising from “reports of matters of public interest,” plaintiffs would have
to prove actual malice to prevail. In a few months later in the companion cases *Curtis
Publishing Co. v. Butts* and *Associated Press v. Walker*, a four-member plurality of the
Court held that public figures would need to show “highly unreasonable conduct
constituting an extreme departure from the standards of investigation and reporting
ordinarily adhered to by responsible publishers” to win libel actions. In a concurring
opinion Chief Justice Earl Warren called for application of the same fault standard —
knowledge of falsity or reckless disregard for the truth — to both public figures and
public officials, reasoning that both categories of individuals “often play an influential
role in ordering society” and have “ready access” to the mass media “both to influence
policy and to counter criticism of their views and activities.” Furthermore, Warren
argued that citizens have “a legitimate and substantial interest in the conduct” of public
figures, and “freedom of the press to engage in uninhibited debate about their
involvement in public issues and events is as crucial as it is in the case of ‘public
officials.’”

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23 *Id.* at 74-75.
26 *Id.* at 164 (Warren, C.J., concurring).
27 *Id.*
In *Rosenbloom v. Metromedia, Inc.* in 1971, a plurality of the Court, led by Justice William Brennan, decided that the “matters of public interest” standard used four years earlier in the false light case was also the appropriate standard to use to determine when actual malice would be required in defamation cases. Quoting Justice Harlan’s opinion in *Curtis Publishing Co. v Butts*, Justice Brennan stated that the framers’ intention was that the First Amendment protect all information of interest to the public, not just statements about public officials and public figures.

Only two other justices concurred in Brennan’s *Rosenbloom* opinion, and just three years later the Court settled on plaintiff’s status as the determinant of the fault standard to be applied in defamation cases. In *Gertz v. Robert Welch, Inc.*, the Court ruled that public officials and public figures must prove actual malice to prevail in libel suits while private individuals must prove at least negligence, with the states free to establish a higher standard of fault for private persons if they chose. The lower fault standard for private individuals, however, applied only to the awarding of compensatory damages. All plaintiffs, public and private, would have to prove actual malice to recover presumed or punitive damages, the Court held. Justice Lewis Powell, writing for the majority, said that the doctrine of presumed damages “invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact” and referred to punitive damages as “private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence.”

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29 *Id.* at 42-43.
30 Chief Justice Earl Warren and Justice Harry Blackmun. *Id.* at 29.
32 *Id.* at 349.
33 *Id.*
34 *Id.* at 350.
It’s important to emphasize that the Gertz majority never conditioned the requirements that private plaintiffs prove some level of fault and that all plaintiffs prove actual malice to collect presumed or punitive damages on the subject matter of the defamatory statements. Indeed Justice Powell wrote that such an approach “would occasion the additional difficulty of forcing state and federal judges to decide on an ad hoc basis which publications address issues of ‘general or public interest’ and which do not. … We doubt the wisdom of committing this task to the conscience of judges.”  

While clarifying the rules about which plaintiffs would have to prove which level of fault to win their libel cases, the majority opinion in Gertz also introduced uncertainty as to whether the fault rules applied to all defendants. At the outset, Powell defined the issue in Gertz as “whether a newspaper or broadcaster that publishes defamatory falsehoods about an individual who is neither a public official nor a public figure may claim a constitutional privilege against liability for the injury inflicted by those statements.” Throughout the entire opinion, Powell repeatedly referred to the need to protect “publishers,” “broadcasters” and “the media” from juries, words that led some courts to conclude that constitutional limits did not apply in cases involving nonmedia defendants.

35 Id. at 346.
36 Id. at 332 (emphasis added).
37 See, e.g., id. at 340 (“Our decisions recognize that a rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship. Allowing the media to avoid liability only by proving the truth of all injurious statements does not accord adequate protection to First Amendment liberties.”)(emphasis added); id. at 341 (“The need to avoid self-censorship by the news media is, however, not the only societal value at issue. If it were, this Court would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and indefeasible immunity from liability for defamation.”)(emphasis added); id. at 350 (“Like the doctrine of presumed damages, jury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship.”)(emphasis added).
38 See, e.g., Rowe v. Metz, 579 P.2d 83, 84 (Colo. 1978)(“While it is true that our decision today means that media and nonmedia defendants may be treated differently in certain areas with respect to proof of
B. Chipping away at protection for private defamatory speech

It was the Vermont Supreme Court’s decision that *Gertz* did not apply to nonmedia defendants that brought *Dun & Bradstreet v. Greenmoss Builders*\(^{39}\) to the U.S. Supreme Court in 1985. A jury had awarded Greenmoss Builders $50,000 in compensatory or presumed damages and $300,000 in punitive damages in a case that resulted from an erroneous credit report to five subscribers stating the construction company had filed for bankruptcy.\(^{40}\) Dun & Bradstreet moved for a new trial on the ground that the trial judge’s instructions had allowed the jury to award presumed and punitive damages without proof of actual malice. Although the trial court indicated doubt that *Gertz* applied to nonmedia defendants, it granted a new trial.\(^{41}\) The Vermont Supreme Court reversed, holding that *Gertz*’s First Amendment requirements applied only to media defendants.\(^{42}\)

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\(^{40}\) *Id.* at 751-52. The error occurred when a 17-year-old employee of Dun & Bradstreet inadvertently attributed a bankruptcy petition filed by one of Greenmoss’s former employees to the firm. Although it was Dun & Bradstreet’s practice to check the accuracy of its reports with the businesses themselves, it did not verify the information about Greenmoss before it issued the report. *Id.* at 752.

\(^{41}\) *Id.* at 752.

\(^{42}\) *Greenmoss Builders v. Dun & Bradstreet*, 461 A.2d 414, 417-18 (Vt. 1983)(“There is a clear distinction between a publication which disseminates news for public consumption and one which provides specialized information to a selective, finite audience. We therefore reject, as have the majority of circuit courts, the assertion that credit agencies such as defendant are the type of media worthy of First Amendment protection as contemplated by *New York Times* and its progeny.”).
“Recognizing disagreement among the lower courts about when the protections of *Gertz* apply,” the U.S. Supreme Court granted certiorari. After acknowledging lower court confusion over the media-nonmedia issue and citing six state supreme court decisions to illustrate the disagreement, Justice Powell ignored that issue and instead concluded that the limitation on the recovery of presumed and punitive damages established in *Gertz* did not apply “when the defamatory statements do not involve matters of public concern.” Thus, despite the reservations he voiced in *Gertz* about the wisdom of judges determining what is and is not of public interest, that is exactly what Justice Powell required them to do in *Dun & Bradstreet*.

In the plurality opinion, Justice Powell characterized *Gertz* as an effort to balance the states’ interest in allowing individuals to be compensated for injury to their reputations with First Amendment interests in protecting speech on matters of public concern. “Nothing in our [*Gertz*] opinion, however, indicated that this same balance would be struck regardless of the type of speech involved,” he wrote. Although Justice Powell worked hard to convince readers that *Dun & Bradstreet* was faithful to and the natural extension of *Gertz*, some of his brethren on the Court were not convinced. Justice Byron White in a concurrence said that Powell “decline[d] to follow” *Gertz*. “I had thought that the decision in *Gertz* was intended to reach cases that involve any false statements of fact injurious to reputation, whether the statement is made privately or publicly and whether it implicates a matter of public importance,” White wrote. In a

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43 *Dun & Bradstreet*, 472 U.S. at 753 (footnote omitted).
44 *Id.* at 753 n.1.
45 *Id.* at 763.
47 472 U.S at 756-57.
48 *Id.* at 772 (White, J., concurring).
dissent joined by Justices Thurgood Marshall, Harry Blackmun and John Paul Stevens,
Justice Brennan pointed out:

One searches Gertz in vain for a single word to support the proposition that limits on presumed and punitive damages obtained only when speech involves matters of public concern. Gertz could not have been grounded in such a premise. Distrust of placing in the courts the power to decide what speech was of public concern was precisely the rationale Gertz offered for rejecting the Rosenbloom plurality approach.49

While Justice Powell was careful in his plurality opinion to characterize private speech as having “reduced constitutional value,”50 never saying that private defamatory speech was completely unprotected by the First Amendment, Chief Justice Burger’s and Justice White’s concurrences adopted that approach. Burger’s five-paragraph concurrence seemed to have one purpose only: to convince readers that none of Gertz’s constitutional rules applied to speech on private matters. While the plurality opinion carefully restricted itself to the issue at hand — the availability of presumed and punitive damages — Burger put his own spin on what Powell wrote:

The single question before the Court today is whether Gertz applies to this case. The plurality opinion holds that Gertz does not apply because, unlike the challenged expression in Gertz, the alleged defamatory expression in this case does not relate to a matter of public concern. I agree that Gertz is limited to circumstances in which the alleged defamatory expression concerns a matter of general public importance.51

Likewise, Justice White saw the plurality opinion as going beyond the fault level required for punitive and presumed damages: “[I]t must be that the Gertz requirement of some kind of fault on the part of the defendant is also inapplicable in cases such as this.”52

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49 Id. at 786 n.11 (Brennan, J., dissenting).
50 Id. at 761.
51 Id. at 764 (Burger, C.J., concurring).
52 Id. at 774 (White, J., concurring).
White himself would have gone even farther, expressly calling for a return to common
law rules whenever a libel plaintiff was neither a public official nor a public figure.\textsuperscript{53}

The following year, concerns about the wisdom of judges deciding what
constituted a matter of public concern were buried even deeper when a five-member
majority of the Court ruled that the subject matter of a defamatory report would govern
when the plaintiff had to prove falsity.\textsuperscript{54} Justice Sandra Day O’Connor said \textit{Sullivan} and
its progeny reflected “two forces” that had reshaped the common law: the plaintiff’s
status and “whether the speech at issue is of public concern.”\textsuperscript{55} Once again, though, the
Court stopped short of declaring private defamatory speech wholly unprotected by the
First Amendment:

When the speech is of public concern but the plaintiff is a private
figure, as in \textit{Gertz}, the Constitution still supplants the standards of the
common law, but the constitutional requirements are, in at least some of
their range, less forbidding than when the plaintiff is a public figure and
the speech is of public concern. When the speech is of exclusively private
concern and the plaintiff is a private figure, as in \textit{Dun & Bradstreet}, the
constitutional requirements do not necessarily force any change in at least
some of the features of the common-law landscape.\textsuperscript{56}

Although O’Connor cited only “two forces” determining constitutional
requirements in libel cases, her opinion served to further fuel confusion over whether
defendant’s status was a third force to be considered. In discussing issues the Court was
not required to address, O’Connor stated, “Nor need we consider what standards would
apply if the plaintiff sues a nonmedia defendant.”\textsuperscript{57}

\textsuperscript{53} \textit{Id.} at 772.
\textsuperscript{55} \textit{Id.} at 775.
\textsuperscript{56} \textit{Id.}
\textsuperscript{57} \textit{Id.} at 779 n.4. The Court then cited \textit{Hutchinson v. Proxmire}, 443 U.S. 111 (1979), in which the
defendants were a U.S. senator and his legislative assistant and in which the Court applied \textit{Gertz} to
determine that the plaintiff was not a public figure and, therefore, did not need to prove actual malice. 443
U.S. at 134-35.
Finally in 1990, in *Milkovich v. Lorain Journal Co.*, a seven-member majority hinged constitutional protection for opinion on the subject matter of the report: “*Hepps* ensures that a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection.”58 The Court continued to keep alive the possibility of a media-nonmedia distinction, however, by declaring that provable falsity was required “at least in situations, like the present, where a media defendant is involved.”59 That statement was followed by a footnote stating, “In *Hepps* the Court reserved judgment on cases involving nonmedia defendants, and accordingly we do the same.”60

While these cases all stand for the proposition that speech on matters of public concern should receive more protection than private speech, it is important to emphasize that a majority of the Supreme Court has never said the First Amendment is totally inapplicable in private person-private issue libel suits. Instead the Court has used cautious and sometimes convoluted language: “reduced constitutional value,”61 “of less First Amendment concern,”62 “not totally unprotected by the First Amendment,”63 and “not necessarily … any change in at least some of the features of the common-law landscape.”64 Nor has the Court declared that the identity or status of the defendant — media or nonmedia — governs the applicability of constitutional protections. In *Dun & Bradstreet* the Court had the perfect opportunity to rule on that question yet chose to ignore it. In *Hepps* and *Milkovich* the Court specifically stated it was not addressing that

59 Id. at 19-20.
60 Id. at 20 n.6 (citation omitted).
62 Id. at 759.
63 Id. at 760.
issue. The message some scholars and lower courts have taken away, however, is that private defamatory speech is — or should be — constitutionally unprotected.

III. The Public Speech-Private Speech Distinction in the Literature

The most famous First Amendment theorist to argue the First Amendment should not protect private speech was Professor Alexander Meiklejohn. To Meiklejohn, a philosopher, the primary purpose of the First Amendment was to ensure that all political speech relevant to democratic debate be heard. Meiklejohn famously concluded that the First Amendment “established an absolute, unqualified prohibition of the abridgement of the freedom of speech.” However, Meiklejohn extended this protection only to speech related to self-government. Meiklejohn wrote that the purpose of protecting political speech was to “give to every voting member of the body politic the fullest possible participation in the understanding of those problems with which the citizens of a self-governing society must deal.” He reasoned the Amendment did not protect an individual right “to speak.” Rather, it is concerned “with a public power, a governmental responsibility” and protected only “communication by which we

65 MEIKLEJOHN, supra note 1, at 21-27.
66 Id. at 20.
67 Meiklejohn argued “private” speech should be protected by a less rigorous standard under the Due Process Clause of the Fifth Amendment. See ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM 55 (1965).
68 MEIKLEJOHN, supra note 1, at 88-89. Meiklejohn argued that the absolute language of the First Amendment granted absolute protection solely to political speech. Id. at 1-27. See also Alexander Meiklejohn, The First Amendment is an Absolute, 1961 SUP. CT. REV. 245 (hereinafter Meiklejohn, Absolute). Meiklejohn contended that the First Amendment was best understood in relation to the overall function of the Constitution as a means to establish self-government. See MEIKLEJOHN, supra note 1, at 15 (arguing the opening sentence of the Constitution — “We, the People of the United States, in order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America” — should be viewed as the controlling words of the Constitution, and that all other provisions of the document should find their “legitimate scope and meaning only as they conform to the one basic purpose that the citizens of this nation shall make and shall obey their own laws”).
69 Meiklejohn, Absolute, supra note 68, at 255.
‘govern.’” The meaning of the First Amendment, he contended, was derived from the need for citizens to have access to all relevant ideas so that they could engage in effective self-government.

In the 1970s and ’80s, Meiklejohn’s focus on self-government was echoed in the works of other scholars. In 1971, in a lecture delivered at the Indiana University School of Law, then-Professor Robert H. Bork stated, “Constitutional protections should be accorded only to speech that is explicitly political.” According to Bork, because the text of the First Amendment could not be taken literally and the framers’ intent was unclear, the Amendment should be construed as protecting only speech that advanced the Constitution’s overall interest in representative democracy. Discussing First Amendment values, Bork argued that individual self-fulfillment and the safety-valve function, the values used to justify protecting private speech, were not valid reasons to protect speech. Unsurprisingly, in his lecture Bork quoted Meiklejohn approvingly although he felt Meiklejohn would protect too much speech.

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70 Id.
72 Id. at 21.
73 Id. at 22.
74 Id. at 23.
76 The safety-valve function suggests freedom of expression allows those who disagree with majority opinions the opportunity to work for change within the system. Free expression thus acts as a safety-valve, allowing critics to participate peacefully rather than to seek change through radical acts. For a discussion of the safety valve function of freedom of expression, see Bork, supra note 71, at 25-26; Emerson, supra note 75, at 879-81.
78 Id. at 26-27. Bork was critical of Meiklejohn’s later writings in which he argued for First Amendment protection for many different kinds of expression, such as novels, dramas, paintings and poems, because literary works informed a citizen’s ability to vote. See, e.g., Meiklejohn, Absolute, supra note 68, at 263 (“I believe as a teacher, that the people do need novels and dramas and paintings and poems.”).
Law professor Lillian BeVier, discussing what she called “the political speech principle,” wrote the First Amendment did not protect and was never meant to protect “nonpolitical speech.” BeVier wrote there were numerous reasons for extending First Amendment protection to only political speech. Extending protection to nonpolitical speech, she said, called into question the very notion that the First Amendment was designed primarily to protect political speech and was unwise “given the weakness of the case” for protecting expression based on “nonpolitical speech values.” According to BeVier, the only First Amendment value advanced by protecting nonpolitical speech was individual self-fulfillment, a principle that “on close analysis . . . lacks sound justification.”

Specifically examining defamation law, BeVier had no problem with the Court’s decisions in Sullivan, Curtis Publishing Co. and Walker because applying a constitutional standard to “speech about public figures involved in matters of public interest and . . . speech about public officials’ conduct of public business” did not “distort the political speech principle; it merely responds to the view that speech about public figures is an effective equivalent of political speech.” BeVier, however, argued that a majority of the Court should have embraced Justice Brennan’s opinion in Rosenbloom v. Metromedia, Inc., which extended constitutional protection to “all discussion and communication

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79 Lillian R. BeVier, The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of the Principle, 30 STAN. L. REV. 299, 311-322 (1978). Like Bork, BeVier went so far as to argue that a Meiklejohnian approach to the First Amendment protected too much speech. Id. at 317 n.70 (“I am unwilling to extend the ambit of first amendment protection as far as Meiklejohn”). This probably is also in reaction to Meiklejohn’s later writings in which he supported extending First Amendment protection to literary and artistic works. See supra note 78.

80 BeVier, supra note 79, at 311.

81 Id. at 318.

82 Id. at 348-49.
involving matters of public or general concern.”\textsuperscript{83} BeVier was highly critical of the \textit{Gertz} Court’s holding 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.”\textsuperscript{84} Even though BeVier admitted this level of protection was “essentially quite low,”\textsuperscript{85} she criticized the holding because granting all defamation constitutional protecting was unexplainable by the political speech principle.\textsuperscript{86} Writing seven years before the Court’s decision in \textit{Dun \& Bradstreet}, BeVier did not address what standard should apply in private figure-private issue cases although she later called all of the Court’s post-\textit{Sullivan} defamation decisions “for the most part an undistinguished lot of surprisingly trivial cases clothed in ill-fitting but now wholly conventional-seeming First Amendment garb.”\textsuperscript{87}

More recently, James Weinstein contended that a political speech approach best explained the Court’s freedom of expression doctrine and was the most “normatively attractive,”\textsuperscript{88} noting that as recently as 2011, in \textit{Snyder v. Phelps},\textsuperscript{89} the distinction between political and non-political speech “proved critical.”\textsuperscript{90} Weinstein would extend protection to speech that does not involve “a speaker’s right of democratic participation”

\textsuperscript{83} \textit{Id.} at 403 U.S. 29, 44 (1971). Although Brennan never explicitly so stated, BeVier argued that Brennan seemed “to indicate that he would \textit{limit} constitutional protection to ‘matters of public or general concern.’” BeVier, \textit{supra} note 79, at 349 n.229 (citing \textit{Gertz v. Robert Welch, Inc.}, 418 U.S. 323, 361 (1974) (Brennan, J., dissenting)).

\textsuperscript{84} \textit{Gertz}, 418 U.S. at 347.

\textsuperscript{85} BeVier, \textit{supra} note 79, at 351.

\textsuperscript{86} \textit{Id.} at 351-52.

\textsuperscript{87} Lillian R. BeVier, \textit{Intersection and Divergence: Some Reflections on the Warren Court, Civil Rights, and the First Amendment}, 59 \textit{WASH. \& LEE L. REV.} 1075, 1084 (2002). BeVier cited \textit{Dun \& Bradstreet} as an example of the Court’s unfortunate willingness to place constitutional constraints on common law.

\textsuperscript{88} James Weinstein, \textit{Participatory Democracy as the Central Value of American Free Speech Doctrine}, 97 \textit{VA. L. REV.} 491, 491 (2011). According to Weinstein, while the Court has paid “lip service” to the marketplace of ideas rationale, the Court’s actual decisions showed “the Court protects speech promoting the marketplace of ideas much less rigorously than it protects speech by which we govern ourselves.” \textit{Id.} at 502.

\textsuperscript{89} 131 S. Ct. 1207 (2011).

\textsuperscript{90} Weinstein, \textit{supra} note 88, at 495.
if regulation of such speech “unduly interferes with the audience’s interest in receiving information needed to develop informed views on public policy matters.”

He also supported a right of access to information if it contributed to a citizen’s right to engage in self-government. Weinstein, however, was unwilling to extend protection to other types of speech that had no connection to the political process. Although, as noted above, a majority of the Supreme Court has never declared private defamatory speech wholly unprotected by the First Amendment, Weinstein categorically declared, “[I]f the speech addresses a purely private concern, then no First Amendment limitations restrain the normal operation of defamation law.” To support this assertion, Weinstein cited the Dun & Bradstreet plurality opinion — which, in fact, said that “such speech is not totally unprotected by the First Amendment” — and Burger’s and White’s concurring opinions, in which they argued that constitutional protections should not apply to private speech.

Professor Robert Post adopted a more nuanced stance. Like Bork, BeVier and Weinstein, Post was critical of the “self-fulfillment” value of freedom of expression. Although Post acknowledge the value “has deep roots in American constitutionalism,” he wrote the value “was not especially helpful” in explaining the actual scope of the First Amendment protections.
Amendment nor in normatively explaining what that scope should be. In addition, Post felt that the discovery of truth—or the “marketplace of ideas” metaphor—was also unable to explain First Amendment doctrine. According to Post, “The best possible explanation of the shape of First Amendment doctrine is the value of self-governance.” Post, however, parted ways with Meiklejohn and Bork because they identified political speech with “collective decision making” while he identified it with “self-governance.”

Democracy involves far more than a method of decision making; at root democracy refers to the value of authorship. Democracy refers to a certain relationship between persons and their government. Democracy is achieved when those who are subject to law believe they are also potential authors of law. Elections and other mechanisms that we ordinarily associate with democratic decision making are simply institutions designed to maximize the likelihood that this relationship obtains.

Thus, Post advocated a Habermasian approach rather than a Meiklejohnian approach to First Amendment claims. Post contended the First Amendment should protect “public discourse” — or speech that contributes to the formation of public opinion — rather than “political speech.” Post wrote: “Public discourse includes all communicative processes deemed necessary for the formation of public opinion. Art and

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98 Robert Post, *Participatory Democracy and Free Speech*, 97 Va. L. Rev. 477, 479 (2011). Post argued that because “autonomy” applies to actions as well as speech, there “are many situations in which the autonomy of a speaker conflicts with the autonomy of an audience,” and there are many situations in which “the autonomy of the speaker and the harm done by the speech remain constant,” and yet First Amendment protections differ. Consequently, individual self-fulfillment could not explain free speech jurisprudence. See id. at 479-81.

99 *Id.* at 479. According to Post, because the First Amendment “recognizes no such thing as a false idea,” the First Amendment was unsuited to the discovery of truth or the creation of new knowledge. Post wrote, “The creation of knowledge . . . depends upon practices that continually separate the true from the false, the better from the worse.” *Id.*

100 *Id.* at 482.


102 Post, *supra* note 98, at 482.

103 Jürgen Habermas theorized democratic legitimation occurs specifically through a deliberative process of communication in the public sphere. *See generally* Jürgen Habermas, *Theories of Communicative Action* (1981); Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry Into a Category of Bourgeois Society* (1962).

104 Post, *supra* note 98, at 484.
other forms of noncognitive, nonpolitical speech fit comfortably within the scope of public discourse.”

Thus, although Post did not protest that standard First Amendment doctrine would grant “little or no protection” to a defendant who defamed a private person about a private matter, his definition of what constitutes a private matter would be much narrower than that of Bork, BeVier or Weinstein. Whereas Weinstein concentrates on the content of speech, Post concentrates on context.

In addition to these more general normative debates over the proper scope of the First Amendment, scholars have also specifically examined the public speech/private speech distinction in defamation law. In the wake of Dun & Bradstreet, several authors were critical of Powell’s attempt to reconcile the case with Gertz; some found fault with the use of subject matter tests or noted the case raised questions about “the reach of the its rationale.” However, most of the empirical work has focused on determining what constitutes a matter of public concern or who qualifies as a public figure. Some authors have questioned whether Dun & Bradstreet and Hepps signaled the Court’s willingness to return private-private libel cases to the common law and allow courts to

105 Id. at 486.
106 Id. at 480.
107 Weinstein, supra note 88, at 493 n.9. Weinstein placed more emphasis on the content of the speech, focusing on the classic definition of “matters of public concern.”
apply a strict liability standard in such cases. As Rodney Smolla noted in 1988, the fractured Dun & Bradstreet Court left it unclear “whether all the Gertz rules, including the no liability without fault rule, are completely outside of first amendment restrictions when the speech is not of ‘public concern.’”

In a previous article focusing on the impact of Dun & Bradstreet v. Greenmoss Builders, we found a number of courts, including eight U.S. courts of appeals, fourteen U.S. district courts, and appellate courts in twenty-two states, had addressed how the First Amendment applies to private-private defamation cases. Based on that analysis, we concluded courts have “run the gamut from assertions that Dun & Bradstreet swept away all First Amendment requirements in private-private suits to unequivocal declarations that the case affected nothing but the fault requirement for presumed and punitive damages.” Even after the First Circuit’s 2009 refusal to rule that under the First Amendment truth is an absolute defense in private-private defamation cases, few scholars examined the deconstitutionalization of private speech. Thus, this study updates this important development in First Amendment law, which has generated considerable normative debate but little recent empirical analysis.

IV. Deconstitutionalization of Private Speech in the Lower Courts

A. Falsity and truth in private person-private issue defamation cases

117 Id. at 16.
118 Noonan v. Staples, 561 F.3d 4, 7 (1st Cir. 2009).
A Dangerous Distinction

The most startling example of deconstitutionalizing the law of private libel came in 2009 when the First Circuit ruled that a private plaintiff could collect damages for the publication of true defamatory statements about a matter of private concern if those statements were published with ill will or malevolent intent. Noonan v. Staples began in 2006 when Alan S. Noonan was fired from his job as a Staples salesman for violating the company’s travel and expense policy and code of ethics. Anomalies in Noonan’s expense reports (including claiming $1,129 for an $11.29 meal at an airport McDonald’s) were uncovered through an audit of a sample of sixty-five employees’ expense reports undertaken after the company discovered another employee had embezzled money through fraudulent expense reports. The day after Noonan was fired, Executive Vice-President Jay Baitler sent an email to approximately 1,500 Staples employees stating: “It is with sincere regret that I must inform you of the termination of Alan Noonan’s employment with Staples. A thorough investigation determined that Alan was not in compliance with our T & E policies.” The email went on to emphasize the importance of understanding and complying with the company’s policies. Noonan sued for defamation based on the email, along with other claims related to his firing.

Noonan v. Staples has a long and complicated procedural history. In 2007, the U.S. District Court for the District of Massachusetts granted Staples’s motion for summary judgment on all claims, and Noonan appealed. On its first pass at the case in 2008, the First Circuit affirmed the trial court’s decision completely, but, on rehearing in 2009, the court reversed.

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120 Noonan v. Staples, 556 F.3d 20, 29, reh’g denied, 561 F.3d 4 (1st Cir. 2009).
122 Noonan, a Florida resident, initially filed suit in a Massachusetts state court against Staples, a Massachusetts corporation. Staples then removed the case to federal court because of diversity of citizenship. 556 F.3d at 24.
123 556 F.3d at 23.
124 2007 WL 6064454, at *1.
124 Id.
2009, the panel withdrew its first opinion and kept Noonan’s defamation claim alive, remanding that claim for trial.\(^\text{125}\) A month later the First Circuit denied Staples’s petition for rehearing en banc.\(^\text{126}\)

When the Massachusetts federal district court initially dismissed Noonan’s libel claim, it did so because it found the statements in the email were true.\(^\text{127}\) All three times the First Circuit reviewed the case it never disputed that the email was true: Noonan was fired for violating the company’s travel and expense policy.\(^\text{128}\) On rehearing, however, the First Circuit focused on a 1902 Massachusetts statute that provides truth is a defense to libel “unless actual malice is proved.”\(^\text{129}\) The First Circuit said the term “actual malice” in the statute could not possibly refer to constitutional actual malice because, first, the statute was enacted sixty-two years before the U.S. Supreme Court defined actual malice as knowledge of falsity or reckless disregard for the truth.\(^\text{130}\) Second, applying a knowing or reckless falsification standard to true statements makes no sense.\(^\text{131}\) So the federal appellate court turned to a 1903 Massachusetts Supreme Judicial Council opinion\(^\text{132}\) to determine that under state law a true statement published with “‘ill will’” or “‘malevolent intent’” was actionable in private figure-private issue libel cases.\(^\text{133}\) A jury, the First Circuit said, could find “ill will” because 1) “in Baitler’s twelve years with the company, he had never previously referred to a fired employee by name in an e-mail or other mass

\(^{125}\) 556 F.3d at 23, 36.
\(^{126}\) 561 F.3d 4, 5 (1st Cir. 2009). The court construed Staples’s petition as also a petition for panel rehearing and a request to certify to the Massachusetts Supreme Judicial Court the question of the constitutionality of the state law at issue in the case. Those were also denied. Id. at 7.
\(^{127}\) 2007 WL 6064454, at *2.
\(^{128}\) See 556 F.3d at 26; 561 F.3d at 7.
\(^{130}\) 556 F.3d at 29.
\(^{131}\) Id.
\(^{133}\) 556 F.3d at 29.
communication”; 2) Baitler did not send around an email about the employee who had been fired for embezzlement, which could lead a jury to conclude he had “singled out Noonan to detract attention away from the [earlier] scandal” because Baitler had been the supervisor of the embezzling employee; and 3) sending the email to about 1,500 employees, some of whom might not even travel for their jobs, could be deemed excessive publication.\textsuperscript{134}

Remarkably, the First Circuit never addressed the constitutionality of the 1902 Massachusetts statute in its opinion, apparently because Staples’s attorneys never raised the issue.\textsuperscript{135} Indeed, in the entire opinion the court cited only two U.S. Supreme Court libel cases, one of which was to identify the post-1964 definition of the term “actual malice.”\textsuperscript{136} The second citation came in the discussion of why it made no sense to use the modern definition of actual malice but could be viewed as an oblique reference to the question of whether the First Amendment applies to private libel. Citing \textit{Philadelphia Newspapers v. Hepps}, the First Circuit said, “[S]tatements of public concern [are] an area in which defamatory true statements are not actionable.”\textsuperscript{137} It did not take the next step of arguing or supporting the proposition that under \textit{Hepps} true statements of private concern are actionable, however.

When Staples petitioned the court for rehearing en banc, it sought to challenge the constitutionality of the Massachusetts statute that allowed liability for true but maliciously published defamatory statements.\textsuperscript{138} After saying it would not consider the

\begin{footnotesize}
\begin{enumerate}
\item Id. at 30-31.
\item See 561 F.3d at 5.
\item Id. at 29 (citing 475 U.S. 767, 768-69 (1986)).
\item 561 F.3d 4, 6.
\end{enumerate}
\end{footnotesize}
A Dangerous Distinction

constitutional challenge because Staples had not raised it in its initial brief, the First Circuit sitting en banc did address the issue briefly. The constitutional issue, the court said, was not “so clear that the panel should have acted *sua sponte* to strike down a state statute, without the required notice to the state attorney general. Staples still does not cite a case for the proposition that the First Amendment does not permit liability for true statements concerning matters of private concern.”\(^{139}\) The case Staples did cite—a 1975 ruling by the Massachusetts Supreme Judicial Court—“did not hold that truth is an absolute defense in private concern cases, but rather that a private figure may recover for a negligently made defamatory falsehood in a case of *public concern*.\(^ {140}\)

The court then went on to quote *Philadelphia Newspapers v. Hepps* — “[T]he Supreme Court has stated that as to matters of private concern, the First Amendment does ‘not necessarily force any change in at least some features of the common-law landscape’”—and *Dun & Bradstreet v. Greenmoss*’s statement on “‘the reduced constitutional value of speech involving no matters of public concern.’\(^ {141}\) Finally, the First Circuit said that when the Massachusetts Supreme Judicial Court ruled on the truth-with-malice statute in 1998, it held the law invalid only as applied to truthful defamatory statements concerning “matters of public concern.”\(^ {142}\) Staples’s petition for rehearing was denied, and the case remanded for trial. In October 2009, a Boston jury found in favor of

\(^{139}\) *Id.*

\(^{140}\) *Id.* at 7 (citing *Stone v. Essex County Newspapers, Inc.*, 330 N.E.2d 161, 164 (1975)) (emphasis in original).

\(^{141}\) *Id.* at (quoting 475 U.S. 767, 775 (1986) and 472 U.S. 749, 761 (1985).

\(^{142}\) *Id.* (citing *Shaari v. Harvard Student Agencies*, 691 N.E.2d 925, 929 (Mass. 1998).
Staples, but, of course, that jury verdict did nothing to disturb the First Circuit’s decision to permit potential liability for true, malicious, defamatory statements.

A little more than a year before the First Circuit’s surprising ruling in Noonan, a Massachusetts state trial court had ruled that even in a private figure-private issue defamation case the defendant bore the burden of proving the falsity of the allegedly defamatory statement. McNamara v. Costello resulted from a letter sent by Patrick Costello, special counsel for the treasurer/tax collector of the Town of Millville, to Susan McNamara’s attorney and to the Millville Tax Collector/Treasurer. McNamara, town clerk and assistant assessor for Millville, contended the letter accused her of criminal conduct in the acquisition of two parcels of land. The parties disagreed over whether the plaintiff was a public figure and the letter addressed a matter of public concern. Because the court was ruling on the defendant’s summary judgment motion, it construed all disputed facts in the light most favorable to the plaintiff and, consequently, treated “McNamara as a private figure and the statement a matter of private concern for purposes of deciding the motion for summary judgment.” Citing the same Massachusetts Supreme Judicial Court opinion the First Circuit later used to support the proposition that truth was not necessarily an absolute defense in a private issue libel case in Massachusetts, the trial court declared, “Even as a private figure, McNamara would still

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145 Id. at *1-*2.
146 Id. at *3 n.4. The court used the term “public figure” rather than “public official” even though McNamara was a town official.
147 Id.
bear the burden, at trial, of proving that Costello’s statement was a defamatory falsehood.”

So which court was correct in its interpretation of the Massachusetts high court’s ruling in *Stone v. Essex County Newspapers, Inc.*? That’s a difficult question to answer, primarily because of the timing of *Stone*—one year after the Supreme Court repudiated focus on the subject matter of the defamatory report in *Gertz v. Robert Welch, Inc.* and nine years before the Court resurrected subject matter consideration in *Philadelphia Newspapers v. Hepps.* In fact, it was the Supreme Court’s retreat from subject matter consideration in *Gertz* that brought the Stone case back to the Massachusetts high court for a rehearing. When the supreme judicial court first heard *Stone*, in May 1974, one month before *Gertz* was decided, it based its ruling on *Rosenbloom v. Metromedia* and held that plaintiff’s status was immaterial given that the subject of the report, “a public prosecution,” was “one of public interest under the Metromedia case.”

Acknowledging that *Gertz* prompted its decision to rehear the case, the Massachusetts Supreme Judicial Court first laid out the constitutional rules of libel post-*Gertz*. Because the trial court had not resolved whether Stone, who held a position in local government, was a public official or a private figure, the court listed the fault requirements for both before remanding the case for retrial, and here is where the disputed quotation occurred: “Accordingly, we hold that private persons, as

148 *Id.* (citing *Stone v. Essex County Newspapers, Inc.*, 367 Mass. 849, 858 (1975)).
152 403 U.S. 29 (1971).
153 330 N.E.2d at 167.
154 *Id.*
distinguished from public officials and public figures, may recover compensation on proof of negligent publication of a defamatory falsehood.”

This is the quote that Staples argued proved that truth is an absolute defense in defamation cases and that the McNamara court held required falsity in private-private cases, but it’s also the quote the First Circuit said proved no more than that falsity was required in cases involving matters of public concern. Because the First Circuit refused to certify to the state supreme court the question of the interpretation of the Massachusetts truth-with-malice statute, it is impossible to know how today’s state high court justices would have interpreted the words of their predecessors.

Adding to the concern generated by the First Circuit’s ruling in Noonan is the fact that at least eighteen other states have constitutional or statutory provisions that permit civil liability and/or criminal punishment for true defamatory statements. A few, like the Massachusetts law, are written in the negative, defining malicious motives as an exception to the truth defense, e.g., “and truth, unless published or uttered from malicious motives, shall be sufficient defense.” The majority, however, are affirmative declarations requiring truth “with good motives and for justifiable ends.”

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155 Id. at 168.
156 561 F.3d 4, 7.
157 Constitutional provisions: FLA. CONST. art. 1, § 4; ILL. CONST. art. 1, § 4; KAN. CONST. Bill of Rights § 11; MISS. CONST. art. 3, § 13; NEB. CONST. art. 1, § 5; NEV. CONST. art. 1, § 9; N.D. CONST. art. 1, § 4; OKLA. CONST. art. 2, § 22; R.I. CONST. art. 1, § 20; S.D. CONST. art. 6, § 5; W. VA. CONST. art. 3, § 8; WYO. CONST. art. 1, § 20.
159 E.g., R.I. GEN. LAWS ANN. § 9-6-9 (West, Westlaw through Jan. 2011 Sess.).
158 E.g., ILL. CONST. art. 1, § 4; WIS. STAT. ANN. § 942.01 (West, through Acts published Aug. 23, 2011).
This study did not discover any cases other than *Noonan* in which courts held that libel defendants could be liable for publishing the truth. However, revised jury instructions for use in civil cases in Florida, approved by the state supreme court in March 2010, clearly open the door for more such cases.\textsuperscript{160} The jury instructions recognize three categories of defamation cases: those in which the plaintiff is a public person and the defendant is “a member of the press or broadcast media publishing on a matter of public concern,” those in which the plaintiff is a private person and the defendant is “a member of the press or broadcast media publishing on a matter of public concern,” and “all other claims,” which would be those involving private figure plaintiffs, nonmedia defendants and matters of private concern.\textsuperscript{161}

In the last category of defamation cases — private plaintiff, private issue, and nonmedia defendant — the instructions say, “Florida’s truth and good motives defense” applies.\textsuperscript{162} The portion of the jury instructions dealing with the truth and good motives defense provides an explanation of what constitutes substantial truth but does not define “good motives.”\textsuperscript{163} However, a subsequent section dealing with qualified privilege for communications of mutual interest does define “improper motives”: “if one’s primary motive and purpose in making the statement is to gratify one’s ill will, hostility and intent

\textsuperscript{160} In *re* Standard Jury Instructions in Civil Cases, 35 So. 2d 666 (Fla. 2010).
\textsuperscript{161} § 405-Defamation, Note 1, *id.* at 725. The references to media defendants versus nonmedia defendants illustrate another major area of uncertainty in defamation law: the extent to which First Amendment protections announced by the Supreme Court apply to nonmedia defendants. As noted above, much of this uncertainty can be traced to Justice Powell’s majority opinion in *Gertz* and subsequent cases. See *supra* notes 36-38, 57, 59-60 and accompanying text. The Notes on Use on Defamation Instructions accompanying the Florida jury instructions recognize this uncertainty, but conclude that because neither the U.S. Supreme Court nor the Florida Supreme Court has ever ruled a media publication was not a matter of public concern, the distinction based on defendant’s status is warranted. Notes on Use on Defamation Instructions 1, 35 So. 2d at 733. For a discussion of the distinction between media and nonmedia defendants in lower courts, see *infra* notes 216-246 and accompanying text; Rebecca Phillips, *Constitutional Protections for Non-media Defendants: Should Their Be a Distinction Between Larry King and You?* 33 CAMPBELL L. REV. 173 (2010); Walden & Silver, *supra* note 116.
\textsuperscript{162} § 405-Defamation, Note 1, *id.* at 725.
\textsuperscript{163} § 405.9(b), *id.* at 730.
to harm the other."164 The Notes on Use on Defamation Instructions mention the uncertainty surrounding the constitutionality of punishing the publication of true statements. Citing Florida Star v. B.J.F.,165 the instructions state:

Note that the United States Supreme Court has reserved the question whether in a First Amendment context it can ever be actionable, whatever the motive, to speak the truth. . . . Pending a Florida decision explaining its meaning and effect, the committee assumes that “the truth and good motives” provision tolerates at least as wide a range for motives for speaking the truth as the common law tolerates for speaking untruthfully in a privileged situation.166

None of the post-1985 Florida cases identified for this study discussed the truth/falsity issue; thus, it is unknown what the Florida courts would do if faced with a case such as Noonan. Indeed, truth/falsity did not generate much discussion at all in the opinions reviewed, perhaps because it was seldom an issue in dispute. In the few cases in which courts did discuss truth/falsity, most simply followed the Hepps rule, sometimes citing only state precedents and not Hepps, and noted that defendants in private-private cases could raise truth as a defense.167 In a few cases, courts simply declared falsity was an element of the offense; therefore it was unclear whether the courts were saying all plaintiffs, regardless of subject matter, had to prove falsity.168 Nonetheless, the Supreme Court’s statements raising doubts about First Amendment protection for private speech,
coupled with a U.S. Court of Appeals ruling and laws in nineteen states allowing civil
and/or criminal liability for true defamatory statements, certainly keep alive the
possibility of defamation defendants being punished for speaking the truth.

B. Fault in private person-private issue defamation cases

Several courts, including one U.S. Court of Appeals and three state supreme
courts, have specifically stated that constitutional fault requirements are inapplicable to
private-private defamation cases or have more broadly stated that private-privates cases
trigger no constitutional scrutiny. In 1993, in Snead v. Redland Aggregates, the Fifth
Circuit concluded that Dun & Bradstreet returned private-private defamation cases to the
purview of the common law. Snead involved a press release about a lawsuit for
misappropriation of trade secrets and breach of a confidential relationship between a
Texas company and two British companies. Snead, chairman of Georgetown Railroad
Company, issued a press release accusing the two British companies of “international
theft,” “industrial espionage,” and “international piracy.”169 The court first determined
that Redlands and its co-defendant, Standard Railway Wagon, were not public figures
because they were little known in America; mining companies and railroad construction
companies were not typically “household names”; and the companies had received little
past publicity.170 Next, the court wrote that although international competition and
industrial espionage “may be” matters of public concern, Snead’s “speech does not
concern an ongoing public debate about international competition and industrial
espionage” and “was not aimed at enlightening the public.” Therefore, it was speech of

169 998 F.2d 1325, 1328 (5th Cir. 1993).
170 Id. at 1329-30.
private concern. In what would become an oft-cited and quoted statement, the court wrote: “[W]e believe that five Justices of the Dun & Bradstreet Court supported common law standards for private/private cases. We therefore conclude that the Constitution imposes no minimum standard of fault in private/private libel cases.”

Writing for a unanimous three-judge panel, Judge Jerry E. Smith, like Professor Weinstein, based his conclusion that private speech received no constitutional protection on Chief Justice Burger’s and Justice White’s separate concurrences in Dun & Bradstreet. According to Judge Smith, the two justices “stated that they would hold that the Constitution imposed no minimum standard of fault where the case involves a private figure.” Smith also wrote that Justice Powell’s plurality opinion contained “strong hints” that Dun & Bradstreet freed states to set their own rules in private plaintiff-private issue defamation cases. One such hint was a discussion of Powell’s “distaste” for the constitutionalization of private-private speech found in a single footnote. With no constitutional limitations applicable, the Fifth Circuit turned to Texas law, concluding that “presumed damages are available in cases of libel per se without any showing of fault on the part of the defendant,” but punitive damages required a showing of common law malice.

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171 Id. at 1330. Quoting Dun & Bradstreet, the court wrote that the “‘was speech solely in the individual interest of the speaker and its specific business audience.’” 472 U.S. 749, 762 (1985).
172 998 F.2d at 1134 (emphasis added).
173 Id. at 1333-34.
174 Id. at 1334.
175 The Dun & Bradstreet footnote reads in part: “The dissent, purporting to apply the same balancing test that we do today, concludes that even speech on purely private matters is entitled to the protections of Gertz. … The dissent’s ‘balance,’ moreover, would lead to the protection of all libels—no matter how attenuated their constitutional interest. … The dissent would, in effect, constitutionalize the entire common law of libel.” 472 U.S. at 761 n.7.
176 998 F.2d at 1334-35. In a footnote, the court noted that because the plaintiffs had not proven any actual damages, it need not address whether the First Amendment imposed any fault requirement on the recovery of actual damages in a private-private case, an approach that makes little sense given Gertz’s holding that
In an unreported opinion, the Minnesota federal district court needed only one sentence and a citation to a state court of appeals case, *Weissman v. Sri Lanka Curry House*, to decide that “[b]ecause the speech at issue involved a private plaintiff and a private issue, principles of Minnesota common law” applied in a slander case resulting from an allegation that plaintiff “had a severe cocaine problem.”*178* In another unreported opinion, the Northern Mariana Islands Supreme Court suggested in a footnote that the Supreme Court’s ruling in *Dun & Bradstreet* removed the fault requirements in private-private cases, “reviving the common law rule when private plaintiffs allege defamation on issues of private concern.”*179* However, it is unclear from the context whether the court was discussing all fault requirements or only those for presumed and punitive damages. In *Sleem v. Yale University*, decided by the U.S. District Court for the Middle District of North Carolina, a 1975 Yale alumnus sued the university for publishing a false “personal statement” about him in a class directory.*180* The statement, which Sleem had not submitted, read: “I have come to terms with my homosexuality and the reality of AIDS in my life. I am at peace.”*181* The court began its discussion, cautiously writing, “[T]he implication” of *Dun & Bradstreet* was that the plaintiff in a private figure-private issue libel case was “no longer constitutionally required to prove fault.”*182* However, the court quickly abandoned caution and by the end of the paragraph asserted

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*actual malice is required for presumed damages while only negligence is required for actual damages. *Id.* at 1331 n.8.*

*177 469 N.W.2d 471 (Minn. Ct. App. 1991). Weissman, which dealt with protection for opinion, will be discussed in the next section.*


*180 843 F. Supp. 57, 59 (M.D.N.C. 1993).*

*181 Id.* Yale was never able to determine who submitted the questionnaire.

*182 Id.* at 61.
unconditionally, “Dun & Bradstreet allows the states to choose whether to allow
presumed damages and impose liability without fault in cases involving private person
plaintiffs and non-public issues.”

In addition to federal courts, the Arizona, Kentucky and Colorado supreme courts
have all declared private-private defamation cases are exempt from constitutional
requirements. In 1986, just three months after the Supreme Court decided Hepps, the
Arizona Supreme Court cited Dun & Bradstreet and Hepps to support its categorical
conclusion that “when a plaintiff is a private figure and the speech is of private concern,
the states are free to retain common law principles.” Interestingly, like much of the
Supreme Court’s dangerous discussion of private-private standards, the statement was
dictum because the plaintiff was a public figure and the subject of the news story was a
matter of public concern. In a 2004 private-private case, the Kentucky Supreme Court
also announced that suits involving “statements of a purely private concern about private
persons, do not implicate . . . constitutional protections.” In a case similar to Noonan,
the court determined that statements related to the termination of two women for
“unauthorized removal of company property” and “violation of company policy” for
eating “claims candy”—candy from open or torn bags removed from the store’s shelves
that had been taken to the store’s “claims area”—was a private matter. Unlike its Arizona
counterpart, however, the Kentucky court failed to support its bold assertion with any
citations, quotations or discussion.

183 Id. at 62.
186 The opinion in the case contains only one citation to any U.S. Supreme Court decision—a parenthetical
in which the majority quotes an earlier Kentucky Supreme Court opinion that was quoting Sullivan’s
definition of actual malice. Id. at 799 n.66.
In *People v. Ryan*, a criminal libel case, the Colorado Supreme Court referred to private-private defamation as “constitutionally unprotected conduct.” In the case, which involved a man who mailed copies of a fictitious “Wanted” poster to several businesses, bars, and a local trailer park in Fort Collins, Colorado, the court declared, “In a purely private context, a less restrictive culpability standard may be used to meet the state’s legitimate interest in controlling constitutionally unprotected conduct injurious to its citizens.” According to the court, the criminal libel statute in question—which did not contain an actual malice standard—was only invalid “insofar as it reaches constitutionally protected statements about public officials or public figures on matters of public concern.” The statute, however, could be applied when “one private person has disparaged the reputation of another private individual.”

In addition to those courts that expressly declared private plaintiff-private issue defamation unprotected by the First Amendment, many others have foregone constitutional analysis and relied on state law without explicitly mentioning a Supreme

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187 Although the prevailing view of criminal libel among communication law scholars in the United States is that there are only a handful of criminal libel prosecutions per year, a recent empirical study of all Wisconsin criminal libel cases from 1991 through 2007 suggests that criminal libel might be prosecuted far more often than realized. *See* David Pritchard, *Rethinking Criminal Libel: An Empirical Study*, 14 COMM. L. POL’Y 303 (2009). The deconstitutionalization of private speech is especially troublesome in criminal libel cases in the light of Professor Pritchard’s conclusion that criminal libel is especially likely to be used when expression harms the reputations of private figures in cases that have nothing to do with public issues. Therefore, if the deconstitutionalization of private speech were to continue, defendants might have no constitutional protections from criminal charges resulting from speech.

188 806 P.2d 935, 939 (Colo. 1991) (en banc) (emphasis added). The court left it unclear why it was referring to the expression in question as “conduct,” a distinction that could conceivably remove the speech from First Amendment protection regardless of the identity of the plaintiff or the subject matter of the allegedly defamatory statement.

189 The poster stated that the woman was wanted for “‘fraud, conspiracy [sic] to commit fraud, various flimflam schemes, spouse abuse, child abuse-neglect, sex abuse, abuse of the elderly, prostitution, assault, larceny, theft of services, wage chiseling, [and] breach of contract.’” According to the court, the poster also stated the woman “‘has harbored various forms of VD,’ and is at ‘high risk for AIDS.’” In addition, the poster set forth the victim’s age, hair color, weight, height, eye color, birth date, and residence, and offered a $3,000 reward for ‘information leading to the criminal or civil prosecution’ of the victim.” *Id.* at 936.

190 *Id.*

191 *Id.* at 940-41.

192 *Id.* at 941.
Court decision dealing with private-private speech\(^{193}\) or have expressed uncertainty or confusion about whether constitutional limits apply.\(^{194}\) A recent example of a court relying solely on state precedent came in a 2010 Louisiana Court of Appeal decision. In *Jalou II, Inc. v. Liner*, the court stated, “In *Costello v. Hardy*, the Louisiana supreme court adopted a negligence standard of liability in defamation actions by private individuals involving matters of private concern.”\(^{195}\) Interestingly, the 2004 Louisiana Supreme Court case the appeals court cited was discussing the definition of “malice” as required by state law in cases in which the words were not defamatory per se. In such cases, the state supreme court said, the plaintiff must prove “in addition to defamatory meaning and publication, the elements of falsity, malice (or fault) and injury.”\(^{196}\) The court then defined malice as “a lack of reasonable belief in the truth of the statement giving rise to the defamation” and noted it was “in this sense is more akin to negligence with respect to the truth than to spite or improper motive.”\(^{197}\)

Two examples of a court expressing uncertainty about the constitutional status of private-private defamation come from the U.S. Court of Appeals for the First Circuit, the same court that a few years later refused to declare Massachusetts’ truth-unless-with-malice statute unconstitutional.\(^{198}\) In the first case in 1997, the First Circuit said it was

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\(^{193}\) See Walden & Silver, *supra* note 116, at 27-31, for a discussion of cases in which the courts applied common law fault requirements without explicitly stating they were doing so because the U.S. Supreme Court had removed the constitutional fault requirements of *Gertz* for private-private cases. More recent cases have continued this trend. See, e.g., Anaya v. CBS Broadcasting Inc., 626 F. Supp. 2d 1158 (D.N.M. 2009); Super Future Equities, Inc. v. Wells Fargo Bank Minnesota, N.A., 553 F. Supp. 2d 680 (N.D. Tex., 2008); Jalou II, Inc. v. Liner, 43 So. 3d 1023 (La. App. 1 Cir. 2010). Depending on the state, these courts required different levels of fault for private-private cases. This article only discusses cases that have explicitly stated that private-private defamatory speech does not receive First Amendment protection.

\(^{194}\) See Walden & Silver, *supra* note 116, at 21-25, for a discussion of cases in which courts voiced uncertainty or confusion about the impact of *Dun & Bradstreet* and subsequent cases.

\(^{195}\) 43 So. 3d 1023, 1039 (La. Ct. App. 2010) (citing 864 So. 2d 129, 143 (La. 2004)).

\(^{196}\) 864 So. 2d 129, 140 (La. 2004)

\(^{197}\) Id. at 143.

\(^{198}\) Noonan v. Staples, 561 F.3d 4 (1st Cir. 2009).
“unclear whether the First Amendment prohibits a state from imposing strict liability in a defamation case brought by a private plaintiff concerning statements that implicate a matter of private concern.” In the second case in 2003, the court labeled the issue “still formally unsettled.” While the First Circuit did not explicitly declare in Noonan v. Staples that the First Amendment did not apply in private-private libel cases, it seems likely that its earlier expressions of uncertainty paved the way for its willingness in that case to permit liability for publication of the truth.

C. Opinion in private person-private issue defamation cases

At least one federal court and one state appellate court have also ruled that private-private speech does not qualify as constitutionally protected opinion. In Roffman v. Trump the U.S. District Court for the Eastern District of Pennsylvania held that in a private-private case only state law determined the protection available for statements of opinion. Roffman began with an article in The Wall Street Journal in which casino analyst Marvin Roffman predicted Donald Trump’s Taj Mahal in Atlantic City “won’t make it. The market just isn’t there.” Trump responded by demanding Roffman be fired (which the investment company that employed him did) and with a barrage of attacks against Roffman in publications including the New York Post, The Philadelphia Inquirer, Barron’s, Fortune, and Vanity Fair. Among other things, Trump called Roffman “a very unprofessional guy,” “a man with little talent,” and “not a good man.” Although both parties assumed their case would be governed by the U.S. Supreme

199 Lewinsky’s, Inc. v. Wal-Mart, 127 F.3d 122, 128 n.4 (1st Cir. 1997).
200 Andresen v. Diorio 349 F.3d 8, 17 n.4 (1st Cir. 2003).
201 561 F.3d 4 (1st Cir. 2009).
203 Id. at 411.
204 Id.
205 Id.
Court’s decision in *Milkovich v. Lorain Journal Co.*, the court said that “the actionability of statements of opinion in the private plaintiff/private issue context must be determined by reference to state law.” In a detailed discussion of Supreme Court cases, Chief Judge Louis C. Bechtle cited *Dun & Bradstreet* for the proposition that “[w]hile it can be said that the Supreme Court has ‘federalized’ defamation law as it relates to public figures or issues of public concern, the Court has created few restrictions on state defamation law with respect to suits brought by private plaintiffs based on speech relating to issues of private concern.” Two years later, the district court cited *Roffman* to again conclude that only state law applied to private-private defamation cases.

In a good example of the potential power of minority opinions, a Minnesota Court of Appeals dissenter’s opinion that “in the absence of . . . a public context, a defamation action is not constitutionally significant, but rather is governed by state common law” became the holding of the court within weeks. In *Lund v. Chicago & Northwestern Transportation Co.*, Judge Gary Crippen disagreed with his two colleagues who ruled that a memo placed on a workplace bulletin board was constitutionally protected opinion. In his dissent, Judge Crippen quoted *Dun & Bradstreet* and *Hepps* and cited *Roffman v. Trump*, to support the assertion: “The internal business communication at issue in this appeal is of purely private concern. The plaintiff is a private figure. Thus, we

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207 754 F. Supp. at 415.
208 *Id.*
211 *Id.* at 369 n.1. The bulletin board in question read, “FAVORITISM, DICK LUND, SICK, MOVE-UPS, BROWN NOSE, SHIT HEADS.”
should determine the dispute according to state common law principles rather than constitutional law.”

Just six weeks later, in Weissman v. Sri Lanka Curry House, a case involving a former employer telling a prospective employer that plaintiff was “unreliable,” “dishonest,” and had “walked out,” Judge Crippen and two different colleagues boldly declared, “[T]he Supreme Court has not extended constitutional protections for public speech to speech of purely private concern.” Having dismissed the applicability of the First Amendment protection for opinion, the court declared: “Minnesota common law makes no distinction between ‘fact’ and ‘opinion.’ A communication is defamatory if it causes enough harm to a person’s reputation to lower the community’s estimation of the individual or to deter others from associating or dealing with the individual.” The Minnesota Court of Appeals reiterated this holding in cases dealing with opinion in 2000 and 2003, and, as mentioned above, the Minnesota federal district court also relied on Weissman to hold in 2002 that constitutional fault requirements did not apply in private-private cases.

Other courts have stated it is questionable or doubtful that First Amendment protection for opinion applies to private-private cases without directly answering the question, largely because they focused on state laws that would grant similar protections for opinion. For example, in 2011, in an unreported slander case, the New York Supreme

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212 Id. at 371 (Crippen, J., dissenting).
214 Id. at 473. In the excluded portion of the quotation, the majority also interpreted Milkovich v. Lorain Journal Co., 497 U.S. 1 (1991), as “reject[ing] a separate constitutional privilege for opinion,” but that was the only portion of the majority opinion with which Judge Crippen disagreed. Id. (Crippen, J., concurring specially).
215 Id.
Court wrote it was unsure if constitutional protection for opinion/rhetorical hyperbole applied to a private-private nonmedia speech. The court wrote, “As far as this Court is aware, neither the U.S. Supreme Court nor our Court of Appeals has expressly resolved whether some or all of the identified constitutional limits apply to an action, like this one, by a private person against a ‘nonmedia’ defendant that is not based upon a statement on a matter of public concern.”219 The court then went on to suggest it was the New York Constitution that protected this type of speech, not the U.S. Constitution.220

Similarly, in a dictum in a 2008 case involving a public figure and a matter of public concern, the Illinois Court of Appeals stated that it was “unsettled” whether a constitutional privilege for opinion extended to statements made by “a private party about another on a matter of purely private concern.”221 After a discussion of Supreme Court libel precedents from Sullivan through Hepps, the Maryland Court of Appeals also voiced uncertainty, stating, “[M]any of the protections afforded defendants in regard to speech concerning matters of public concern and public figures or public officials may not be applicable unless afforded by Maryland law.”222 The court then launched into a seven-page comparison of constitutional protection for opinion and the common law fair comment defense, concluding the two were essentially the same, and declared the statement in question was not defamatory because it was pure opinion as defined by the Restatement (Second) of Torts.223

D. The nature of the defendant: media vs nonmedia

220 Id. at *6 (noting the New York Court of Appeals’ analysis of such cases was based on the New York Constitution).
223 Id. at 1300.
In late 2011, the question of whether nonmedia libel defendants enjoy constitutional protection drew renewed attention — especially in the online world — when the U.S. District Court for the District of Oregon held that a blogger did not qualify as a media defendant and, therefore, was not entitled to the protections of *Gertz v. Robert Welch, Inc.* Judge Marco Hernandez’s ruling led to a jury verdict of $2.5 million against blogger Crystal Cox, who a jury found had libeled Obsidian Finance Group and its co-founder, Kevin Padrick, in one of her posts. Cox, representing herself, had sought both constitutional and statutory protections available to media and journalists, all of which Hernandez denied, saying, “[D]efendant is not media.” The federal court was applying Oregon law in this diversity action, and in 1977 the Oregon Supreme Court had become the second state high court to rule that the constitutional protections enunciated in *Gertz* did not apply to nonmedia defendants. That early case resulted from a false letter of complaint about a motorcycle dealership written by an employee of a competing dealership. Describing the dispute as one in which “there is no public official or figure as plaintiff, there is no issue of public concern, and there is no media defendant,” the court concluded, “[T]he interest in democratic dialogue is nonexistent.” The state high court relied on *Gertz*’s references to publishers, broadcasters

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227 The Wisconsin Supreme Court was the first. See Calero v. Del Chemical Corp., 228 N.W.2d 737 (Wis. 1975).
229 Id. at 1361.
230 Id. at 1362.
231 Id. at 1364.
and media, plus a 1975 Wisconsin Supreme Court case, *Calero v. Del Chemical Corp.*, to reach its decision that the First Amendment was inapplicable and uphold a jury verdict of $500 in general damages and $25,000 in punitive damages without proof of fault or actual injury.

The Wisconsin case that the Oregon Supreme Court cited to support its ruling had resulted from statements made by a former employer about an accountant to prospective employers. Ruling less than a year after the U.S. Supreme Court handed down its decision in *Gertz*, the Wisconsin Supreme Court said, “Neither Times’ nor Gertz’ [sic] protections apply to the case before us.” As the Oregon court did two years later, the Wisconsin high court based its decision on the fact that “[i]n the case before us there is no matter of general or public interest; there is no public official or public figure; there is no involvement of the media, either broadcast or print.”

While the key constitutional question in *Calero* was whether proof of actual malice, as opposed to common-law malice, was required to sustain an award of punitive damages, a few years later the *Calero* decision was used to strip a nonmedia libel defendant of all constitutional protections even though the case appeared to involve a matter of public interest. *Denny v. Mertz* resulted from an effort by dissident stockholders, including William Denny, a former Koehring Corp. employee, to change the management of Koehring, of which Orville Mertz was chairman and CEO. The shareholder dispute “was reported in the financial pages of the Milwaukee newspapers.

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232 228 N.W.2d 737 (Wis. 1975).
233 568 P.2d at 1363-65.
234 *Calero*, 228 N.W.2d at 739.
235 Id. at 747.
236 Id. at 748.
237 Id.
238 318 N.W.2d 141, 142 (Wis.), *cert. denied*, 559 U.S. 883 (1982).
and in The Wall Street Journal.

An article in Business Week magazine, published after Mertz resigned as chairman and CEO, ultimately resulted in the libel suit. The magazine article erroneously stated that Mertz had fired Denny, who, in fact, had quit to go into private law practice. Denny sued both Mertz and Business Week.

After finding Denny was not a public figure, the court held that “a negligence standard [applies] in defamation actions by private individuals against the news media,” and that actual malice would be required for Denny to be awarded punitive or presumed damages from Business Week. The court then moved on to the next question: “Does the defendant Mertz enjoy the same constitutional protection as the media publisher. [sic]” No was the court’s answer.

While we recognize that some courts in other jurisdictions have held that the Gertz protections apply to all defamations, regardless of whether published through the media or by private persons, we do not read Gertz as requiring that the protections provided therein apply to non-media defendants nor, as stated above, do we consider it good public policy to so decide. We reaffirm our holding in Calero that purely private defamations are not entitled to constitutional protection . . .

In separate opinions, Justices Shirley Abrahamson and Nathan Heffernan said they believed media and nonmedia libel defendants were entitled to the same constitutional protections.

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239 Id.
240 Id. at 143.
241 Id. at 151.
242 Id. at 152. It is important to recognize that Denny was decided before the Supreme Court created the “matter of public concern” standard for punitive and presumed damages in Dun & Bradstreet v. Greenmoss Builders, 472 U.S. 749 (1985). While the court recognized the Koehring stockholder dispute was “newsworthy,” it did not address whether the issue constituted a matter of public concern but simply held it was not a “public controversy” for determining limited public figure status because it “did not have an impact outside of those immediately interested in the Koehring corporation.” 318 N.W.2d at 148.
243 318 N.W.2d 141 at 152.
244 Id. (citations omitted).
245 Id. at 155 (Heffernan, J., concurring), 158 (Abrahamson, J., dissenting).
Although the Wisconsin Supreme Court never explicitly restricted its no-constitutional-protection-for-nonmedia-defendants holding to cases in which plaintiffs were private persons, the U.S. Court of Appeals for the Seventh Circuit put that spin on *Denny v. Mertz* twelve years later.\(^{246}\) Controversial psychologists Ralph Underwager and Hollida Wakefield, who wrote two books contending that “most accusations of child sexual abuse stem from memories implanted by faulty clinical techniques,” sued another psychologist and a former prosecutor, who was the director of the National Center for Prosecution of Child Abuse, after they publicly challenged Underwager’s and Wakefield’s conclusions and attacked their research.\(^{247}\) Plaintiffs, whom the court held were limited purpose public figures “when talk turns to child abuse,” argued they did not have to prove actual malice under Wisconsin law because neither defendant was a media defendant.\(^{248}\) Acknowledging that “[t]here is still doubt whether the Constitution applies the same standards to media and private defendants,” the Seventh Circuit said the question wasn’t how the U.S. Supreme Court would rule but “how Wisconsin understands its own law.”\(^{249}\) The court went on:

None of the cases we could find suggests that Wisconsin imposes a lesser burden on a public figure suing a psychologist or prosecutor than on one suing a reporter. Actually, we could not find cases either way on this subject; all of Wisconsin’s “public figure” cases were against media defendants.\(^{250}\)

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\(^{247}\) 22 F. 3d at 731-32.

\(^{248}\) *Id.* at 734.

\(^{249}\) *Id.*

\(^{250}\) *Id.*
After emphasizing it was just addressing Wisconsin law, however, the Seventh Circuit cited reasons not to treat media and nonmedia defendants differently that clearly apply nationwide.

Just as the public has a strong interest in providing reporters with a qualified privilege to report on current events without fear of liability for accidental misstatements, so the public has a strong interest in protecting scholars and prosecutors. We do not disparage the countervailing private interest in reputation; that is why even the *New York Times* privilege is qualified rather than absolute. The private interest at stake is not greater when the defendant is a psychologist rather than a reporter; the limited circulation of an unpublished monograph implies that any distinction would run the other way. And the private need for the privilege may well be greater in the case of scholars and prosecutors than in the case of newspapers and broadcasters. Newspapers, magazines, and broadcast stations reap considerable profits from their endeavors, and the obligation to pay damages to those they injure is unlikely to put them out of business or even substantially temper their reports. . . . Psychologists compiling monographs with the aid of research grants, and prosecutors seeking to augment one side’s arsenal for trial, do not receive comparable rewards. Exposing such persons to large awards of damages is more apt to lead to silence than are comparable awards against media defendants.251

In a slander per se case, the Colorado Supreme Court reversed a state appeals court ruling252 to become the third state high court to rule that *Gertz* did not apply to a “private plaintiff where his reputation has been injured by a nonmedia defendant in a purely private context.”253 The Colorado, Wisconsin and Oregon decisions were cited approvingly by the Vermont Supreme Court in 1983 when it ruled in *Greenmoss Builders v. Dun & Bradstreet* that *Gertz*’s constitutional protections were inapplicable in libel cases involving private plaintiffs and nonmedia defendants. “[W]e hold that as a matter of federal constitutional law, the media protections outlined in *Gertz* are inapplicable to

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251 *Id.* at 734-35.
252 *Rowe v. Metz*, 564 P.2d 425 (Colo. App. 1977). The appeals court wrote, “[W]e hold that Gertz applies in non-media defamation actions and that thus the imposition of liability without fault is impermissible in such cases.” *Id.* at 428.
253 *Rowe v. Metz*, 579 P.2d 83, 85 (Colo. 1978). Neither the appeals court nor supreme court reported the nature or content of the defamatory statements.
nonmedia defamation actions,” that court declared. After the U.S. Supreme Court’s decision in *Dun & Bradstreet*, the Vermont high court questioned the continued viability of its media-nonmedia distinction but did not explicitly abrogate that ruling.

V. Reasons to Avoid the Dangerous Distinction

During the past twenty-five years, lower courts have begun the process of deconstitutionalizing private figure-private issue defamation as part of a broader trend of granting greater protection to political speech across a variety of cases. So far only the First Circuit has refused to declare that the First Amendment prohibits liability for true defamatory private-private speech, but the prospect of more such rulings exist with some nineteen states having constitutional or statutory provisions allowing criminal or civil liability for truth unless it is published with “good motives.” At least six state and federal courts, including the U.S. Court of Appeals for the Fifth Circuit, have held that the Constitution does not require fault in private-private cases, and at least two courts have explicitly ruled there is no constitutional protection for opinion in such cases. Meanwhile, many more courts have voiced uncertainty and confusion over whether constitutional limits exist in private figure-private issue defamation cases.

Despite the fact that only two U.S. Supreme Court justices—Byron White and Warren Burger—have ever expressly said that private figure-private issue defamatory speech is wholly without First Amendment protection, scholars, federal judges and state appellate judges across the country have concluded that language used by the Court in

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255 Ryan v. Herald Ass’n, Inc., 556 A.2d 1316, 1319 n.1 (Vt. 1989). The Vermont court said, “The United States Supreme Court’s rejection of this Court’s rationale in *Dun & Bradstreet*, however, casts doubt on the vitality of the distinction for constitutional purposes.” Because the case at hand involved a newspaper defendant, the court simply went on to conclude that “*Gertz* is unequivocally controlling.” *Id.*
256 *See supra* notes 157-159 and accompanying text.
Dun & Bradstreet v. Greenmoss Builders\textsuperscript{257} and Philadelphia Newspapers v. Hepps\textsuperscript{258} justifies the deconstitutionalization of private speech. Because Dun & Bradstreet involved a private figure plaintiff and a matter not of public concern, in that case at least the plurality’s references to speech of “reduced constitutional value,”\textsuperscript{259} and “less First Amendment concern,”\textsuperscript{260} was part of the \textit{ratio decidendi}.\textsuperscript{261} Hepps, however, involved a matter of public concern; consequently Justice O’Connor’s reference to the First Amendment “not necessarily forc[ing] any change in at least some of the features of the common-law landscape” as it applies to private-private defamation was merely a dictum.\textsuperscript{262} Of course, lower courts using Supreme Court dicta as the bases for decisions is not uncommon. Indeed, a key purpose of the Court’s opinion in Milkovich v. Lorain Journal Co.\textsuperscript{263} seemed to be putting a halt to misuse of a dictum from Gertz v. Robert Welch, Inc.: “Under the First Amendment there is no such things as a false idea.”\textsuperscript{264} In Milkovich, the Court said, “[W]e do not think this passage from Gertz was intended to create a wholesale defamation exemption for anything that might be labeled ‘opinion.’”\textsuperscript{265}

It is time now for the Supreme Court to do the same thing regarding the misuse of its Hepps dictum and Dun & Bradstreet language about “reduced” and “less” constitutional protection for private speech. “We do not think these passages were intended to create a wholesale exemption from the First Amendment for anything that

\begin{itemize}
  \item \textsuperscript{257} 472 U.S. 749 (1985).
  \item \textsuperscript{258} 475 U.S. 767 (1986).
  \item \textsuperscript{259} 472 U.S. at 751.
  \item \textsuperscript{260} \textit{Id.} at 759.
  \item \textsuperscript{261} “The ground or reason of decision. The point in a case which determines judgment.” BLACK’S LAW DICTIONARY 872 (6th ed. abr. 1991).
  \item \textsuperscript{262} 475 U.S. at 775.
  \item \textsuperscript{263} 497 U.S. 1 (1990).
  \item \textsuperscript{264} 418 U.S. 323, 339 (1974).
  \item \textsuperscript{265} 497 U.S. at 18.
\end{itemize}
might be labeled ‘private speech’” has become a much-needed pronouncement by the Court.

There are compelling normative and practical reasons for continuing to recognize First Amendment limitations on defamation law as it applies to private speech. First, Meiklejohn, Bork and other theorists notwithstanding, the First Amendment does not say, “Congress shall make no law abridging political [or public] speech.” The contextual argument that the coupling of speech and press protection with the right to assemble and petition government implies the framers’ vision of an Amendment designed to promote self-governance and protect only the discussion of matters of public concern begs the question of why, then, those same framers would couple such purely public interest-based rights with protection for what is surely one of the most personal and individualistic decisions a person makes—whether and how to worship a deity.

Despite BeVier’s, Weinstein’s and other theorists’ critiques, values other than self-governance have a long and important history in the development of First Amendment theory and doctrine. Indeed, it’s hard to imagine justifying First Amendment protection for sexually explicit but non-obscene speech,266 nude dancing,267 crush videos,268 violent video games,269 and commercial advertising270 without recognition of freedom of expression’s role in promoting individual self-fulfillment and a robust marketplace of not just political but also social and commercial ideas and information. While it is possible to construct a definition of political speech that protects a broad range

of expression, as Post did in his “public discourse” concept\footnote{Post, supra note 99, at 486.} and Meiklejohn did in his later writings,\footnote{Meiklejohn, Absolute, supra note 68, at 263.} it is much easier to simply admit that the Court has extended protection to a great deal of speech that has little to do with self-governance, politics, or public debate. Obviously, the Court has embraced many First Amendment values over the years that have little to do with political speech or self-government. Normatively, it is hard to imagine a principled way of explaining why a Staples vice president’s true statement to employees that a co-worker was fired for violating the company’s travel and expense policy\footnote{Noonan v. Staples, 56 F.3d 20, 26 (1st Cir. 2009).} or Donald Trump’s assertion that an analyst who predicted failure for his Atlantic City casino was “a very unprofessional guy . . . with little talent”\footnote{Roffman v. Trump, 754 F. Supp. 411, 411 (E.D. Pa. 1990).} is not entitled to any First Amendment protection, but videos “depicting women slowly crushing animals to death ‘with their bare feet or while wearing high heeled shoes’”\footnote{United States v. Stevens, 130 S. Ct. 1577, 1583 (2010).} and video games in which “[v]ictims are dismembered, decapitated, disemboweled, set on fire, and chopped into little pieces” are.\footnote{Brown v. Entm’t Merchs. Assn., 131 S. Ct. 2729, 2749 (2011)(Alito, J., dissenting).} What some judges seem to forget or ignore is that removing private-private defamation from the purview of the First Amendment equates such speech with obscenity,\footnote{See Miller v. California, 413 U.S. 15 (1973).} incitement to imminent violence\footnote{See Brandenburg v. Ohio, 395 U.S. 444 (1969)(per curiam).} and true threats.\footnote{See Virginia v. Black, 538 U.S. 343 (2003).}

Furthermore, lower courts are removing protection from private speech at a time when, as the Court noted, new communication technologies are giving the average citizen
“a voice that resonates farther than it could from any soapbox.”

Removing constitutional protection for private defamatory speech threatens vast amounts of information and opinion in an Internet age. Millions of people each day check social networking sites, consumer review and evaluation sites, blogs, and tweets for both information and entertainment. Given courts’ rulings on what constitutes speech about non-public issues, it is highly likely that much of the information posted on such sites would fall into the category of private-private speech. But simply because the speech is about a private figure and involves what a court later decides is not of public concern doesn’t mean that speech was not of importance to the speaker and/or audience.

Consider, for example, the speech at issue in *Roffman v. Trump*. As noted above, Donald Trump’s attacks on Roffman’s professional abilities were published in major national and regional newspapers and magazines. Clearly Roffman’s competence as an analyst was of significant importance to the speaker and presumably to those who received his message as well—readers of respected business and general publications.

Of course, *Roffman v. Trump* illustrates another major issue with denying constitutional protection to speech a court deems not of public interest. The concept “public interest” or “public concern” is undefined and, perhaps, indefinable. Apparently reporters and editors at *Fortune*, the *New York Post* and the other publications felt there was sufficient public interest in the story to justify publishing Trump’s remarks. Yet the court decided to second-guess those news judgments, holding that “the statements that form the basis of Roffman’s defamation action relate to Roffman’s competence and integrity. Even if the question of the success or failure of the Taj presents a public issue,

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282 Id. at 413.
Trump’s statements all concern private matters pertinent to Roffman himself that are of no concern to the general public.”

Recall Justice Powell’s statement in *Gertz* about the “difficulty of forcing state and federal judges to decide on an ad hoc basis which publications address issues of ‘general or public interest’ and which do not”: “We doubt the wisdom of committing this task to the conscience of judges.”

In the decades following *Gertz*, numerous scholars have documented the difficulty of that task. As Stern concluded in 2000:

> The struggle by lower courts to interpret the Court’s terse pronouncements on the distinction between public and private concerns has not crystallized into a useful methodology. Rather, courts have generally proceeded by way of ad hoc analyses or ipse dixit conclusions. The inability of courts to translate this doctrine into a lucid framework . . . does not represent a failure of judicial imagination. Instead . . . the enterprise was destined to founder because of the inherent indeterminacy of the distinction between public and private concerns in defamatory expression.

Surely, if this was true in 2000, before the advent of Facebook, Twitter and other means of communication over the Internet, the task has become only more complex with the introduction and widespread adoption of these technologies by both the press and the public.

A similar definitional problem exists for scholars such as Post and Meiklejohn who took great pains to conceptualize political speech broadly. Post, for example, attempted to create a context-focused, content-neutral definition of political speech, which allowed him to extend protection to abstract art as long as the art contributes to the

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283 *Id.* at 418.
286 Stern, *supra* note 110, at 598.
“public discourse.” 287 His approach, however, became content-based when he turned to the specifics of defamation law. He was perfectly willing to focus on the content of speech when denying protection to private concern-private plaintiff defamatory speech.288 Yet if Post was interested in protecting the public sphere, it would seem expression found in newspapers and on the Internet should be protected regardless of its content. Haven’t newspapers long been considered institutions of the public sphere? Under this content-neutral analysis, as Professor C. Edwin Baker concluded, “Should not all newspaper content be as protected as it is when describing public officials’ performances of public duties?”289 It would also seem Post should be willing to protect much of what is expressed on the Internet, given the “utopian rhetoric”290 about the ability of new media technologies to further democratize post-industrial society and the ongoing efforts to keep the Internet free from burdensome overregulation by public and private entities in order to maintain its democratic nature.291 While efforts to keep the Internet “free” structurally through Net neutrality are extremely important, one wonders if the Internet can deliver on its promise to democratize the public sphere if much of the expression on

287 Post, supra note 98, at 486 (“Public discourse includes all communicative processes deemed necessary for the formation of public opinion. Art and other forms of noncognitive, nonpolitical speech fit comfortably within the scope of public discourse.”)
288 Id. at 480-81.
289 Baker, supra note 20, at 517..
290 Zizi Papacharissi, The Virtual Sphere: The Internet as a Public Sphere, 4 NEW MEDIA AND SOCIETY 9, 10 (2002). See also Zizi Papacharissi, A PRIVATE SPHERE: DEMOCRACY IN A DIGITAL AGE (2010) (discussing the democratizing potential of digital media and the Internet’s relationship to Habermas’ conceptualization of the public sphere).
blogs, Facebook, and Twitter could be deemed private speech unprotected by the First Amendment.

Other problems arise when courts consider audience size in determining whether speech is on a matter of public or private concern. Although the *Dun & Bradstreet* plurality opinion stated it was “‘content, form, and context’” that determine if speech is about a public matter—a formulation taken from *Connick v. Myers*—the opinion also suggested the size of the intended audience factored into its consideration, something later opinions have mentioned as well. In *Snyder v. Phelps*, for example, after admitting that the Court itself had recently stated that “‘the boundaries of the public concern test are not well defined,’” Chief Justice John Roberts nonetheless set out to “articulate some guiding principles” of the test. Roberts began his articulation by noting that speech on a matter of public concern can “‘be fairly considered as relating to any matter of political, social, or other concern to the community’ or when it ‘is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.’” Private speech, on the other hand, “‘concerns no public issue.’” Roberts said one factor that “confirmed” the credit report at issue in *Dun & Bradstreet* was private speech was that it “was sent to only five subscribers.” Roberts then contrasted that with the speech at issue in *Snyder v. Phelps*, which was “designed, unlike the private speech in *Dun & Bradstreet*, to reach as broad a public audience as possible.”

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293 461 U.S. 138, 147 (1983). Unfortunately, both *Connick* and *Dun & Bradstreet* were less than clear about how this formulation should be used, something the Court would later admit itself.
295 Id. (quoting *Connick*, 461 U.S. at 146; and *San Diego v. Roe*, 543 U.S. at 83-83).
296 Id. (quoting *Dun & Bradstreet*, 472 U.S. at 762).
297 Id.
298 Id. at 1217.
Adding audience size to the public interest calculus is especially problematic in today’s Internet environment as it would appear to require courts to take into account how large an audience or how many “followers” a speaker might have in a forum like Facebook or Twitter. Would, for example, a tweet by Lady Gaga, who currently has more than 20 million followers, be treated differently than a Twitter user with 400 followers? Would a blog post by an unknown writer be treated differently than a blog post on the widely read Volokh Conspiracy even if the topic of both posts was similar? Finally, what does this say of the email in question in Noonan v. Staples that was sent to approximately 1,500 Staples employees? Surely that is a fairly large “intended audience.” And what of expression that goes viral? In the age of the Internet, even the most private video, picture, or Facebook post can quickly have an audience of thousands, if not millions. Courts are already having difficulty applying the public concern test without having to ascertain if a speaker “intended” her message to reach a large audience.

Finally, the illogic of considering the media or nonmedia nature of a speaker in determining the availability of constitutional protection for speech is well illustrated by Denny v. Mertz, discussed above. The case began when William A. Denny, a dissident stockholder and former employee of Koehring Co., a publicly held corporation, sought to oust CEO Orville R. Mertz. When Mertz resigned, Business Week, deciding the story “would interest the general ‘business community’” published a story on Mertz’s resignation. The article stated, “Also about that time, William Denny, general counsel

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299 See https://twitter.com/#!/ladygaga (last visited Mar. 16, 2012).
302 Noonan v. Staples, 556 F.3d 20, 22 (1st Cir. 2009).
303 318 N.W.2d 141 (Wis. 1985).
304 Id. at 143.
305 Id.
of Koehring until Mertz fired him in 1969, began to question many of Koehring’s
management decision.” Denny, who had resigned from the company, sued both Mertz
and McGraw-Hill, Inc., publisher of Business Week, for defamation. Based on the
Supreme Court’s pre-Dun & Bradstreet opinions, the Wisconsin Supreme Court allowed
Business Week to claim First Amendment protections, but not Mertz, the source of the
story. Of course, it is quite possible the same result would have been reached if both
defendants had received constitutional protection. Business Week might not have been
negligent in quoting the former CEO of a company about the circumstances under which
the general counsel left, and Mertz might well have been negligent in his false
statement. But saying one was at fault and the other was not is a far cry from saying
one is not entitled to any constitutional protection.

VI. Conclusion

It is clear the Court’s defamation jurisprudence has generated uncertainly in the
lower courts. As current Supreme Court Justice Elena Kagan once wrote, libel law is
“subject to a bewildering variety of constitutional standards.” We do not dispute that
that the primary purpose of the First Amendment is to protect political speech. This does
not mean, however, that speech on matters deemed nonpolitical or nonpublic was
intended to be or should be wholly unprotected by the Amendment, particularly in an age
in which Internet communications are rapidly changing our ability to communicate with
each other. The solution to the uncertainty created by the Court’s statements regarding

306 Id.
307 See id. at 144-153 for the court’s discussion of First Amendment protections available to media
defendants.
308 See id. at 153-54 for the court’s discussion of the lack of First Amendment protections available to
nonmedia defendants.
309 The court found that Denny was not a public figure. Id. at 147.
310 Elena Kagan, Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment
A Dangerous Distinction

constitutional protection for speech on matters of private concern is really quite simple. First, the Court should remove the limitation it created in *Hepps* and require all plaintiffs, regardless of the subject matter of the report, to prove the falsity of the defamatory statements. Falsity is an element of the offense of defamation, and, as with other tort claims, the plaintiff should be required to prove all elements of the offense he or she is alleging. The natural and inevitable corollary of proof of falsity being required for all defamation plaintiffs is that the constitutional opinion defense also applies to all defamation cases, regardless of plaintiff’s status or subject matter. Opinion, by definition, is unverifiable; hence pure opinion should never be actionable.

Next, the Court should clearly state that the nature of the defendant—media or nonmedia—is irrelevant to the availability of constitutional protection in defamation cases. First Amendment protections are just as available to the individual speaker as to the global media corporation.311 Finally, the Court should return to the fault rules it established in *Gertz*: public plaintiffs must prove actual malice and private plaintiffs, regardless of subject matter, must prove negligence to collect compensatory damages, and all plaintiffs, regardless of subject matter, must prove actual malice for punitive or presumed damages. Obviously this last step requires the Court to repudiate its *Dun & Bradstreet* holding, an unlikely occurrence. At a minimum, therefore, the Court must make it clear that at least negligence is required in all private figure cases for any damages. Admittedly, a plaintiff’s status as a public or private figure is not always clear

311 See, e.g., *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972)(“[L]iberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods.”); *Lovell v. Griffin*, 303 U.S. 444, 450, 452 (1938)(contending that freedom of the press “is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets” and “comprehends every sort of publication which affords a vehicle of information and opinion”).
cut, but courts now have more than forty years of experience and precedents in addressing that issue, and a level of predictability and consistency has been attained. The same cannot be said of “matter of public concern.” That is too slippery of a concept to serve as the basis for determining when First Amendment rights apply.