10-1984

Dun & Bradstreet v. Greenmoss

Lewis F. Powell Jr.

~~Cammie Falk~~ form

Sept. 26, 1983

Court .... *Voted on*................, *19*...
Argued ...., *19*... *Assigned* ...., *19*... **No.** 83-18
Submitted ...., *19*... *Announced* ...., *19*...

DUN & BRADSTREET

vs.

GREENMOSS BUILDERS

Gertz (?)

Relisted for me.
Still Deny
Case does not present issue squarely, as State Court held that even if Gertz applies negligence is conceded & instructions are OK

Relisted for LFP.

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.			✓										
Brennan, J.				Relist									
White, J.		(✓)											
Marshall, J.					Relist								
Blackmun, J.			✓										
Powell, J.					Relisted for me								
Rehnquist, J.			✓										
Stevens, J.			✓										
O'Connor, J.			✓										

Q - whether to extend Gertz to non-media Δs.

Deny - not a good case to address Q

Gertz as written applied only to private defamation suits vs media defendants - a 1st amend. related decision.

This case raises Q whether Gertz principles (no recovery w/o proof of fault by media Δ & no punative damages w/o malice) may be extended to suit vs non-media Δs ?

PRELIMINARY MEMORANDUM

September 26, 1983 Conference
Summer List 17, Sheet 2

No. 83-18-CSX

DUN & BRADSTREET, INC. OK
v.
GREENMOSS BUILDERS, INC. OK

Cert to Vermont Sup. Ct.

State/Civil Timely

1. SUMMARY: In a defamation suit brought by a private plaintiff against a media defendant, the Court in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), held that the states constitutionally can apply their own common law defamation rules so long as they do not allow recovery without fault. (i.e. must at least be negligence) The Court also held that under common law liability rules, the private plaintiff can recover only actual damages. He can not recover

Deny As noted on p.5 of the memo, the question whether to extend Gertz is not really before the court: the State Sup-

presumed or punitive damages absent a showing of actual malice. The issue here is whether the Court should grant cert in this case to determine whether to extend the Gertz standards to a suit by a private plaintiff against a non-media defendant?

2. FACTS AND PROCEEDINGS BELOW: Petr D&B publishes financial information concerning businesses for its subscribers, including Special Notices for some subscribers about businesses of particular interest to them. In one such Special Notice sent to 5 subscribers, petr erroneously reported that resp Greenmoss Builders, Inc. had filed a voluntary petition in bankruptcy. Resp first learned of the report from a banker from whom resp was seeking additional financing for its expanding business. The bank delayed considering resp's credit request until after the controversy was cleared up, and then the bank cancelled resp's credit allegedly for unrelated reasons. Resp contacted D&B, requested an immediate correction, and requested a list of subscribers who had received the report in order to assure them of its solvency. Petr did print a correction (which resp found insufficient) but refused to divulge the names of the recipient subscribers.

Resp brought a defamation action in state court alleging that the Special Notice was published with reckless disregard for the truth and that resp suffered damage to its business reputation, lost profits, and loss of money because of efforts to correct the error. Petr claimed a constitutional and common law privilege against defamation actions because of its status as a credit reporting agency, and it also claimed that it published

at least, negligent

the Notice in good faith. At trial the jury learned that the basis of the error was the fact that a 17-year old employee of petr misread a bankruptcy petition filed by a former employee of Greenmoss and erroneously reported that it had been filed by Greenmoss. D&B then failed to follow its routine practice of verifying such reports before publishing them.

sloppy

After all the evidence was in, the TJ instructed the jury on liability. First, he told the jury that the admitted error constitutes libel per se as a matter of law unless the jury finds that it was privileged. He next instructed the jury that petr had a qualified privilege because it was a commercial credit rating agency. Thus the jury could find for resp only if resp met its burden of proving that petr's admitted false statement was made with knowledge of its falsity or with reckless disregard for its truth or falsity. Next the TC instucted the jury on damages. On the subject of "compensatory damages", the TJ told the jury that because this case involves libel per se, the law presumes damages in some amount. He then stated, however, that the law did not compel an award of substantial damages unless the jury is persuaded by a preponderance of the evidence that substantial damages have actually occurred. He told the jury that it would be proper under the law to award only nominal damages of one dollar, but that in considering what amount to award, the jury should consider any evidence of lost profits and expenditures proximately caused by any wrong doing on the part of petr. The TJ then instructed on "punitive damages". He stated that if the jury found by clear and convincing evidence that petr

NYT standard

acted with actual malice (as defined), then the jury could award resp punitive damages in addition to actual damages.

The jury returned a verdict for resp in the amount of $50,000 in compensatory damages and $300,000 in punitive damages. !! Petr filed post-trial motions for a new trial, and the TC granted a new trial on all issues. The TJ stated that he thought that his charge could have "permitted the jury to believe that damages could be awarded to the Plaintiff for defamation absent proof of damages and absent a showing of knowledge of falsity or reckless disregard for the truth." He acknowledged disagreement over whether the Gertz standards apply to non-media defendants, but he stated that his own dissatisfaction with his jury charge and the interests of justice mandated a new trial. Later, however, the TJ granted resp's motion for an interlocutory appeal to the Vermont Supreme Court and certified several questions regarding his grant of a new trial.

On appeal, the Vermont Supreme Court characterized petr as a non-media defendant, and then held that the Gertz standards for recovery in private party defamation suits do not apply to non-media defendants as a matter of federal constitutional law. It also declined to extend Gertz to this case as a matter of state common law. The court next concluded that state law does not recognize a qualified privilege for credit reporting agencies either. Turning to the jury instructions in this case, the court first noted that in light of its decision about the non-applicability of Gertz to non-media defendants, the error was harmless. Then the court proceeded apparently to determine that there was no

error. The court stated that petr has "nothing to complain about" because it received two charges to which it was not entitled -- one affording it a qualified privilege and one affording it the constitutional privilege outlined in Gertz.

3. CONTENTIONS: Petr argues that this Court should grant cert to determine whether Gertz applies to non-media defendants, a question expressly reserved by the Court in prior cases. See Babbit v. United Farm Workers National Union, 442 U.S. 289, 309 (1979). It argues that the lower state and federal courts have reached conflicting results in attempting to interpret Gertz. Petr argues that the rationales for the refusal to extend Gertz to non-media defendants are unpersuasive. Some courts have characterized the content of such defamatory messages as purely private and undeserving of first amendment protections, but petr argues that the Court abandoned such content-based distinctions when it discarded the "newsworthiness" test of Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971). Furthermore, petr argues that speaker-based distinctions are constitutionally unsupportable and needlessly complex, given the difficulty of defining media versus non-media speakers.

Resp counters that the applicability of Gertz to non-media defendants is not squarely before the Court because the Vermont Supreme Court found that the jury instructions satisfied the Gertz standards. Unless the Court wishes to overturn that conclusion, the holding that Gertz does not apply is really only dicta. Read as a whole, the jury instructions went beyond Gertz and actually required the jury to find that the New York Times

"actual malice" standard had to be met before the jury could allow any recovery. Resp also argues that petr did not present the TC with sufficient opportunity to rule on the issue because petr merely presented Gertz as a sub-set of its common law qualified privilege argument, and never as an independent ground for protection. Finally, resp argues that the issues here are not important enough for review because the defamation action involves only private, commercial speech. It argues that petr exaggerates the disarray in the lower courts--unlike most of the cases cited by petr, this case involves a private plaintiff, a non-media defendant, and an issue of no public importance. Finally, resp notes that the Court recently denied cert in 2 other cases which presented the same issue. See Williams v. Pasma, _ Mont._, 656 P.2d 212, cert. denied, No. 82-1640 (1983); Mertz v. Denny, 106 Wisc. 2d 636, 318 N.W.2d 141, cert. denied, 103 S.Ct. 179 (1982).

4. DISCUSSION: On its face Gertz does not apply to a non-media defendant, and this Court has never so extended it. The Court has constitutionalized state defamation law when it affects media speech about public persons, see New York Times, and when it affects media speech about private persons, see Gertz. The Court has applied the New York Times standard in cases involving non-media speech about public persons, see, e.g., St. Amant v. Thompson, 390 U.S. 727 (1968), but it has never explicitly held that New York Times is applicable to all such cases. See Hutchinson v. Proxmire, 443 U.S. 111, 133 n.16 (indicating that the applicability of New York Times to public plaintiff/non-media

cases has not been decided). The issue presented here is whether the Court should further constitutionalize defamation law in cases involving non-media speech about private persons, or whether laws affecting those cases should be matters of state prerogative.

Gertz has created some confusion in the lower courts on that issue, but resp is correct in asserting that petr has exaggerated the confusion. Most of the cases petr cites as contrary to the Vermont Supreme Court decision are distinguishable from this case in that they involve a public figure plaintiff in addition to a non-media defendant. See, e.g., Avins v. White, 627 F.2d 637 (3rd Cir.), cert. denied, 449 U.S. 982 (1980); Davis v. Schuchat, 510 F.2d 731, 734 n.3 (D.C. Cir. 1975). Others are merely states' attempts to formulate common law rules to fill the gap left by Gertz. See Poorbaugh v. Mullen, 99 N.M. 11, 653 P.2d 511 (N.M. App.), cert. denied, 653 P.2d 878 (1982); Beneficial Management Corp. v. Evans, 421 So.2d 92 (Ala. 1982); Jacron Sales Co. v. Sindorf, 276 Md. 580, 350 A.2d 688 (1976) (all extending Gertz to non-media defendants as a matter of state common law). Unless the Court wishes to constitutionalize the private plaintiff/non-media defendant area of state defamation law, the fact that there are different state common law rules in that area is of no concern. This issue is not new, and apparently the Court has found common law rules tolerable in these kinds of cases. Although reasonable minds can differ on this point, private plaintiff/non-media defendant cases rarely involve issues

of public importance and thus do not implicate core first amendment concerns.

In any event, this case does not provide a good opportunity to address the issue should the Court ever wish to do so. The Vermont Supreme Court's pronouncement about Gertz is really just dicta in this case. The TJ's instructions clearly required the jury to find fault before imposing liability. His instruction about punitive damages was correct under Gertz. Although there is some possibility for jury confusion because of the TJ's presumed damages instruction, the jury's verdict on compensatory damages was reasonably related to the evidence of actual damage presented at trial by Greenmoss's president.

I recommend denial.

There is a response.

August 25, 1983 Martin Opn in petn

Gertz concerned w/ tension b/t "need for a vigorous & uninhibited press & the legitimate in redressing wrongful injury." 418 US at 342

must consider state interest in protecting/compensating private persons subj to defamation

uncontrolled discretion of juries to award damages where no actual loss unnecessarily inhibits 1st A freedoms.

doctrine of presumed damages had

only interfere w/ st law on damages where that law implicates 1st A concerns.

does commercial speech at issue here warrant intruding in state law?

October 7, 1983

Court .....
Argued ....., *19*...
Submitted ....., *19*...

Voted on....., *19*...
Assigned ....., *19*...
Announced ....., *19*...

No. 83-18

DUN & BRADSTREET, INC.

vs.

GREENMOSS BUILDERS, INC.

THIS WAS RELISTED FOR YOU.

WD

Relist
for
B R W
to write.

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.			✓										
Brennan, J.		✓											
White, J.		✓											
Marshall, J.			✓										
Blackmun, J.			✓										
Powell, J.			✓										
Rehnquist, J.			✓										
Stevens, J.			✓										
O'Connor, J.			✓										

reme Court's ~~dictum~~ statement that Gertz does not apply to ~~private/public~~ private-party/non-media cases was unnecessary to its decision ~~to~~ affirming the ~~trial ct's first~~ jury verdict, which was rendered under the extension of Gertz that Petr urges here.

CRR

N.Y. Times held that where a public official or public figure sues a media Δ for libel, the must prove recklessness or malice.

Gertz held N.Y.T. does not extend to private person suits vs media. May recover for negligence (but are ~~[illegible]~~ liable person.

Q here: ~~[illegible]~~ Does Gertz apply to private suits vs non-media Δs ~~[illegible]~~

10:40

The Vermont S/Ct found that the T.C.'s error was harmless because its instructions were favorable to Pltf. under any standard. Still Deny

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

Circulated: OCT 13 1983

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

DUN & BRADSTREET, INC. *v.*
GREENMOSS BUILDERS, INC.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

No. 83-18. Decided October ——, 1983

JUSTICE WHITE, dissenting.

This libel action raises the question whether the First Amendment actual malice standard applies in a defamation action brought by a private plaintiff against a nonmedia defendant. Because I think this is an important and unsettled issue that deserves our attention, I dissent from the denial of certiorari.

I

Petitioner is ~~is~~ a credit reporting agency, providing subscribers with financial information about corporations. On the basis of uncorroborated misinformation provided by a high school student who was paid $200 a year to review Vermont bankruptcy petitions, petitioner reported that resp had filed a voluntary petition in bankruptcy. There is no dispute that the report was false. Respondent first learned of it from a bank from which it was seeking financing for its expanding business. The bank delayed acting upon respondent's request and later terminated its credit, though allegedly for reasons unrelated to the false report. Upon respondent's request, petitioner did print a correction, but refused to divulge the names of subscribers who had been misinformed of respondent's status.

Respondent then brought this defamation action in state court, obtaining an award of $50,000 in compensatory and $300,000 in punitive damages. The trial judge had second thoughts about his instructions, however, because they "permitted the jury to believe that damages could be awarded to the Plaintiff for defamation absent proof of damages and ab-

} TJ's interpretation of his instructions

Still Deny – Justice White's statement on page 2 of his draft that the State common law privilege ~~present~~ prohibited only negligent falsehood. I believe that the jury instructions required more that negligence. CAR

this is how TJ interpreted his own instructions

sent a showing of knowledge of falsity or reckless disregard for the truth by the Defendant." He granted petitioner a new trial, but certified five questions to the Vermont Supreme Court.

issue before the Ct.

That Court reversed the award of a new trial. It concluded that the qualified protections enjoyed by a media defendant in a defamation action brought by a private party under *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974), do not extend to nonmedia defendants. Because *Gertz* was inapplicable, the fact that the instructions were not as stringent as *Gertz* requires did not necessitate a new trial.

II

The Vermont Supreme Court squarely held "that as a matter of federal constitutional law, the media protections outlined in *Gertz* are inapplicable to nonmedia defamation actions." Respondent nonetheless argues that the applicability of *Gertz* to nonmedia defendants is not properly before us because the jury instructions satisfied *Gertz* standards.

presumed damages

Gertz held that the traditional libel rule of presumed damages may be invoked only upon a finding of actual malice, as defined in *New York Times* v. *Sullivan*, 376 U. S. 254, 280 (1964) (statement made "with knowledge that it was false or with reckless disregard of whether it was false or not").

punitive damages

Likewise, punitive damages may not constitutionally be awarded absent actual malice. It is clear that the jury instructions in this case were inconsistent with these holdings. The trial court instructed that petitioner's statement was libelous *per se*, and that damages could be presumed, unless a qualified common law privilege enjoyed by commercial credit rating agencies applied. That privilege forbids liability for negligent falsehoods. Thus, damages could be presumed upon a showing of

NO - req's more than negligence

only compensatory damages

> "malice or lack of good faith on the part of the Defendant. If you find that the Defendant acted in a [sic] bad faith towards the plaintiff in publishing the Erroneous

> Report, *or* that Defendant intended to injure the Plaintiff in its business, *or* that it acted in a willful, wanton or reckless disregard of the rights and interests of the Plaintiff, the Defendant has acted maliciously and the privilege is destroyed. *Further*, if the Report was made with reckless disregard of the possible consequence, *or* if it was made with the knowledge that it was false or with reckless disregard of it's [sic] truth or falsity, it was made with malice." (Emphasis added.)

Although the instructions did include the *New York Times* standard, the definition of malice was not limited to that formulation. The trial judge's conclusion that his instructions were inadequate under *Gertz*, if that case controls, was correct. The state Supreme Court's finding that *Gertz* was inapplicable was therefore necessary to its finding that the trial court's instructions were acceptable and that the court erred in granting a new trial. The issue is properly raised here.

III

We have several times, without discussion, applied *New York Times* in cases involving public figure plaintiffs and nonmedia defendants. See *Garrison* v. *Louisiana*, 379 U. S. 64 (1967) (criminal defamation action against public official for statements at press conference); *Henry* v. *Collins*, 380 U. S. 356 (1965); *Saint Amant* v. *Thompson*, 390 U. S. 727 (1968) (defamatory statements made by defendant during television show). Indeed, *New York Times* was decided along with *Abernathy* v. *Sullivan*, which involved four individual petitioners to whom the same standards were applied as to the newspaper. See 376 U. S., at 254 n.*, 286. We later stated, however, that "the Court has never decided" whether *New York Times* extends to nonmedia defendants, thus indicating that the question remains open. *Hutchinson* v. *Proxmire*, 443 U. S. 111, 133, n. 16 (1979).*

*The Restatement takes the view that *New York Times* applies to nonmedia defendants. Restatement (Second) of Torts, § 580A, Comment

This case raises the related question whether *Gertz*, which involved a suit by a private party against a media defendant, applies as well in a case involving a private plaintiff and a nonmedia defendant. Although the opinion in *Gertz* focused on the status of the plaintiff, it stressed the need for a "vigorous and uninhibited press," 418 U. S. at 342, referred to the danger of "media self-censorship," *id.*, and noted that the constitutional privilege "shields the press and broadcast media from the rigors of strict liability for defamation," *id.* at 348. It thus does not provide an obvious answer to the question raised in this petition.

The lower courts are split. Among cases applying *Gertz* to nonmedia defendants are *Beneficial Management Corp.* v. *Evans*, 421 So. 2d 92 (Ala. 1982); *Jacron Sales Co.* v. *Sindorf*, 276 Md. 580, 350 A. 2d 688 (1976); *Millsaps* v. *Bankers Life Co.*, 35 Ill. App. 3d 735, 324 N. E. 2d 329 (1976); *Ryder Truck Rentals, Inc.* v. *Latham*, 593 S. W. 2d 334 (Tex. Civ. App. 1979). See also *DeCarvalho* v. *da Silva*, 414 A. 2d 806 (R. I. 1980) (involving public figure, but no distinction drawn between actions by public and private plaintiffs against nonmedia defendants). The Restatement agrees that *Gertz* is "broad enough" to cover this situation, and argues that it would be odd if the press enjoyed a privilege not shared by private individuals in this situation. See Restatement (Second) of Torts, § 580B, comment e (1977). On the other hand, the Vermont Supreme Court adopted what may be the majority position in finding that nonmedia defendants do not enjoy First Amendment protections as against private plaintiffs. See, *e. g.*, *Denny* v. *Mertz*, 106 Wis. 2d 636, 318 N. W. 2d 141 (1982), *cert. denied*, —— U. S. —— (1982); *Fleming* v. *Moore*, 221 Va. 884, 275 S. E. 2d 632 (1981) (though requiring, as a matter of state law, actual malice for punitive damages); *Rowe* v. *Metz*, 195 Colo. 424, 579 P. 2d 83

h (1977). The cases dealing with the issue are not uniform, although the majority of them seem to be consistent with the Restatement's view.

(1978); *Harley-Davidson Motorsports, Inc.* v. *Markley*, 279 Or. 361, 568 P. 2d 1359 (1977). Several federal courts of appeals have concluded, more narrowly, that First Amendment protections do not extend to credit reporting agencies. See, *e. g.*, *Millstone* v. *O'Hanlon Reports, Inc.*, 528 F. 2d 829, 833 (CA8 1976); *Hood* v. *Dun & Bradstreet, Inc.*, 486 F. 2d 25, 29 (CA5), *cert. denied*, 415 U. S. 95 (1973); *Oberman* v. *Dun & Bradstreet, Inc.*, 460 F. 2d 1381, 1383 (CA7 1972).

IV

The division among the lower courts and the recurring nature of the question should in themselves compel our attention. But this issue is especially appropriate for consideration by this Court because of its implications for First Amendment jurisprudence as a whole. In addition, this issue intersects with another difficult question: the extent to which the institutional press perhaps enjoys unique privileges. *Cf. First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 798 and n. 3 (1978) (BURGER, C. J., concurring); *Pell* v. *Procunier*, 417 U. S. 817, 834–835 (1974).

We have several times denied certiorari in cases raising the issue of application of actual malice standard to nonmedia defendants. See, *e. g.*, *Williams* v. *Pasma*, No. 82–1640, *cert. denied*, May 23, 1983; *Mertz* v. *Denny*, No. 81–2376, *cert. denied*, Oct. 4, 1982; *Anderson* v. *Low Rent Housing Commission*, No. 81–714, *cert. denied*, 454 U. S. 1086 (1981); *Avins* v. *White*, No. 80–369, *cert. denied*, 449 U. S. 982 (1980); *Dun & Bradstreet, Inc.* v. *Grove*, No. 71–206, *cert. denied*, 404 U. S. 898 (1971). The importance of the question, the frequency with which it arises, and the variety of results, require final resolution by this Court. By continuing to deny certiorari, the Court is only postponing the inevitable. I would grant this petition and set the case for oral argument.

October 14, 1983

Court ..... *Voted on*....., *19*...

Argued ....., *19*... *Assigned* ....., *19*... No. 83-18

Submitted ....., *19*... *Announced* ....., *19*...

DUN & BRADSTREET, INC.

vs.

GREENMOSS BUILDERS, INC.

[redacted].

Relist
for
BRW

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.													
Brennan, J.													
White, J.													
Marshall, J.													
Blackmun, J.													
Powell, J.			✓										
Rehnquist, J.													
Stevens, J.													
O'Connor, J.													

I'll inclined to Deny

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

October 21, 1983

Re: No. 83-18 - Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.

MEMORANDUM TO THE CONFERENCE:

The Court has denied cert in cases raising the precise issues that Byron now raises, on at least four previous occasions. Lower courts, however, are split on the issue, which appears to arise with more frequency than I had previously thought.

This leads me to give a reluctant "grant."

Regards,

WEB

Court .....
Argued ....., 19...
Submitted ....., 19...

Voted on ....., 19...
Assigned ....., 19...
Announced ....., 19...

October 28, 1983

No. 83-18

Grant (11/3/83)
I have again looked at this. We may have to rely on arguably dicta to reach Gerty issue, but probably we could. In view of importance of resolving Q whether Gerty applies to non-media Δs, I vote to Grant

DUN & BRADSTREET, INC.

vs.

GREENMOSS BUILDERS, INC.

[redacted]

TM will join 1 & 10

Relist
for
L. F. P.

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	JURISDICTIONAL STATEMENT POST	JURISDICTIONAL STATEMENT DIS	JURISDICTIONAL STATEMENT AFF	MERITS REV	MERITS AFF	MOTION G	MOTION D	ABSENT	NOT VOTING
Burger, Ch. J.		✓											
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White, J.		✓											
Marshall, J.													
Blackmun, J.													
Powell, J.													
Rehnquist, J.													
Stevens, J.													
O'Connor, J.													

Jenny - Flag for me attach this memo to the papers, but leave the docket sheet of 10/28 on top.

November 3, 1983

RE: Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc. No. 83-18

TO: Justice Powell

FROM: Cammie

This is not the best case to take to decide whether Gertz applies to non-media defendants/private plaintiffs. However, if the Court wants to reach the question now, the problems with the case are not insurmountable.

The state court squarely held that Gertz did not apply. The only question is whether this was dicta. Before the jury could presume any damages or award punitive damages, it had to find that defendant did not qualify for a state law immunity. The instructions told the jury what sort of fault must be attributed to defendant before the immunity was inapplicable. To the extent that the instructions allowed the jury to find the immunity inapplicable on less than the New York Times standard of actual malice, it could presume damages and award punitive damages in a manner that clearly presents the Gertz question.

The instructions included the New York Times standard of actual malice, but arguably allowed the jury to find the state law immunity inapplicable on something less. The state supreme court did not buy that argument and found that the instructions satisfied the New York Times standard of actual malice and thus that there was no violation of the Gertz rule even if applicable. However, the trial judge himself interpreted his instructions as

allowing the jury to presume damages and to award punitive damages on less than actual malice. This interpretation has some merit. Thus, this Court could agree with the trial judge and reach the Gertz question. However, I still believe that it would be better to wait for a cleaner case.

November 4, 1983

Court .....
Argued ....., 19...
Submitted ....., 19...

Voted on ....., 19...
Assigned ....., 19...
Announced ....., 19...

No. 83-18

DUN & BRADSTREET, INC.

vs.

GREENMOSS BUILDERS, INC.

THIS WAS RELISTED FOR YOU.

Grant

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
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Marshall, J.		✓											
Blackmun, J.			✓										
Powell, J.		✓											
Rehnquist, J.			✓										
Stevens, J.			✓										
O'Connor, J.			✓										

Renewed 3/20 Excellent

Cammie would extend Gertz requirement of a malice showing to allow recovery of "presumed" or "punative" damages in a libel suit by a private Π vs a private (non-media) Δ.

No malice required to recover actual damages.

Then result follows. Cammie thinks, what? BENCH MEMORANDUM wrote in Bellotto:

"Prem does No. 83-18 not have a monopoly on either the First Amend or the capacity to enlighten" - 6

This is true, but it doesn't necessarily follow that, absent malice, only "actual" damages may be recovered vs a non-media Δ.

(Argument Date March 21, 1984)

Cammie R. Robinson Dun & Bradstreet v. Greenmoss Builders March 17, 1984

Question Presented

Whether the rule announced in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), that private plaintiffs may not recover presumed compensatory damages or punitive damages from media defendants for defamation absent proof of "actual malice" should be extended to non-media defendants.

The facts and procedural history are set forth in Justice White's dissent from denial. (pp. 1-3). This Court granted cert. to review the state court's holding that Gertz does not apply to non-media defendants.

DISCUSSION

This issue presents two questions -- first, whether an award of defamation damages against non-media defendants implicates any 1st Amendment interests; and second, whether those interests outweigh the state's interest in awarding those damages. Gertz held that the 1st Amendment prohibits an award of "presumed compensatory damages" or "punitive damages" in defamation actions against media defendants absent proof of "actual malice."[1] The rationale was that defamation actions against the media implicate 1st Amendment interests because they may induce the media to engage in "intolerable self-censorship." 417 U.S., at 340. Although 1st Amendment interests generally must be balanced against legitimate state interests in compensating victims of libel, Gertz held that, absent actual malice, the states have no legitimate interest in providing damages in excess of "actual injury." 418 U.S., at 349. Thus, no balancing was

[1] Gertz adopted the definition of "actual malice" set forth in New York Times v. Sullivan, 376 U.S. 254, 280 (1964): the defamatory statement must be made "with knowledge that it was false or with reckless disregard for the truth." 418 U.S., at 342.

necessary. That determination of state interest simplifies the issue presented here. If the Court finds that defamation actions against non-media defendants implicate any 1st Amendment interests, presumed and punitive damages should be prohibited absent proof of "actual malice."

The only unresolved question, therefore, is whether the 1st Amendment protects non-media defendants from defamation damages to the same extent that it protects media defendants. Generally, this Court has refused to accord greater 1st Amendment rights to particular groups or individuals. See, e.g., Pell v. Procunier, 417 U.S. 817 (1974); Saxbe v. Washington Post Co., 417 U.S. 843 (1974); Branzburg v. Hayes, 408 U.S. 665.[2] Under this view, Gertz should extend to both media and non-media defendants. As you discussed in Saxbe, however, the issue is not that simple.

The 1st Amendment guarantee of free speech serves two interests -- (1) an individual interest in free expression and a (2) societal interest in preserving free public discussion of governmental affairs. Saxbe, 417 U.S., at 862 (JUSTICE POWELL dissenting) (citing Z. Chafee, Free Speech in the United States 33 (1954). See also First National Bank v. Bellotti, 435 U.S. 765, 777 n. 12 (1978). If presumed and punitive defamation damages impermissibly infringe on the individual interest in self-expression, Gertz should extend to all defendants who may

[2] In your Saxbe dissent you stated: "I agree, of course, that neither any news organization nor reporters as individuals have constitutional rights superior to those enjoyed by ordinary citizens." 417 U.S., at 857 (JUSTICE POWELL, dissenting).

claim that 1st Amendment right. If these damages impermissibly burden only the societal interest in promoting free, open, and robust debate, it may be that Gertz should not extend beyond media defendants: if the media is the only significant means of serving that societal interest, defamation suits against other defendants implicate no 1st Amendment interests and there is no reason to intrude in state law.

Often the individual interest in self-expression and society's interest in open and informed debate converge. See Bellotti, 435 U.S., at 777 n.12. That well may be the case in defamation damages. However, this case involves a corporate defendant, and it is not clear "whether corporations have the full measure of rights that individuals enjoy under the First Amendement." Bellotti, 435 U.S., at 777. If they do not, then the 1st Amendment's interest in protecting individual self-expression still may not entitle D&B to Gertz protection. The Court may avoid the question of a corporation's right to individual self-expression under the 1st Amendment if the "societal interest" entitles D&B to Gertz protection.

Gertz was concerned that allowing an award of presumed or punitive damages without a showing of "actual malice" would cause the media to engage in "intolerable self-censorship," thereby restricting open and informed discussion. 417 U.S., at 340. If speakers other than the media serve the 1st Amendment's "societal interest" by contributing to full and robust debate, and if they also might engage in "intolerable self-censorship" for fear of huge damage awards, Gertz probably should extend to

them as well.[3] Justice Harlan's dissent in Rosenbloom, on which your court opinion in Gertz seems to be modeled, indicates that defamation actions implicate 1st Amendment interests whomever the defendant may be.

Justice Harlan recognized that because defamation is a state tort that may infringe on protected speech, the state legitimately may be required to refine its regulatory tools to accommodate those free speech rights. He was concerned particularly that presumed and punitive damages posed an unjustifiable threat to 1st Amendment interests. Harlan argued that "to assure that it promotes purposes consistent with First Amendment values, the legitimate function of libel law must be understood as that of compensating individuals for actual, measurable harm caused by the conduct of others." 403 U.S., at 66 (emphasis added). This position was adopted by the majority in Gertz when the Court held that states have no legitimate interest in providing compensation for more than demonstrable and actual injury. What is important to note is that Justice Harlan's concern over presumed and punitive damages, which Gertz

[3]There are alternatives. The Court could go back to the "public interest" test of Rosenbloom v. Metromedia, 403 U.S. 29, 43 (1971) (Opinion of JUSTICE BRENNAN), and provide Gertz protection only where the defamatory statements concern matters of general or public interest. This seems unwise. Gertz correctly rejected that ad hoc approach as involving courts "in the dangerous business of deciding 'what information is relevant for self-government.'" 418 U.S., at 339, 346. Alternatively, the Court could determine that contributions of non-media defendants to the "societal interest" are so minor that Gertz protection is unwarranted. There seems to be no reason to make that assumption.

adopted, was not limited to the effect they might have on freedom of the press. It extended to the potential effect on free speech in general. Arguing that the Constitution prohibits an award of damages for falsehoods that have caused the plaintiff no harm, Justice Harlan wrote:

> "[S]uch a scheme would impose a burden on speaking not generally placed upon constitutionally unprotected conduct -- the payment of private fines for conduct which ... causes no harm in fact.
> ....
> ... While the First Amendment protects the press from the imposition of special liabilities upon it, '[t]o exempt a publisher, because of the nature of his calling, from an imposition generally exacted from other members of the community, would be to extend a protection not required by the constitutional gurantee.' [Cites omitted] A business 'is not immune from regulation because it is an agency of the press. The publisher of a newspaper has no special immunity from the application of general laws.
> ....
> ... In short, I think the First Amendment does protect generally against the possibility of self-censorship in order to avoid unwitting affronts to the frail and queasy. 403 U.S., at 66-68 (emphasis added).

Dissent

Although Justice Harlan's dissent suggests that defamation damages awarded against non-media defendants implicate 1st Amendment interests, it is merely a dissent, and the Court to date expressly has declined to extend Gertz beyond media defendants. [Cite]. Your court opinion in Bellotti, 435 U.S. 765 (1978), however, provides an analytical framework that also suggests that Gertz should extend to non-media defendants.

Bellotti acknowledged that the press has a "special and constitutionally recognized role ... in informing and educating the public, offering criticism, and providing a forum for discussion and debate." 435 U.S., at 781 (citing, e.g., your dissent in Saxbe, 417 U.S., at 863-864). "But the press does not

have a monopoly on either the First Amendment or the ability to enlighten." Id., at 782 (emphasis added). Corporations too have a recognized role "in affording the public access to discussion, debate, and the dissemination of information and ideas." Id., at 783. If, as Bellotti held, corporate speech may implicate the "societal interest" of the 1st Amendment, defamation law that chills such speech by encouraging self-censorship raises 1st Amendment interests. Because there is no state interest in awarding presumed or punitive damages absent a showing of "actual malice," it is unnecessary to determine the strength of these 1st Amendment interests before extending Gertz to non-media defendants.

CONCLUSION

Because speakers other than the media may serve the "societal interest" of the 1st Amendment, and may be deterred from doing so by the prospect of large defamation damages, Gertz should be extended to non-media defendants. This on occasion may provide defamation defendants with more protection than the 1st Amendment requires. The only alternatives, however, seem to be to revert to the "public interest" test of Rosenbloom, or to provide too little protection. Both alternatives are troublesome. The "overprotection" that an extension of Gertz occassionally may provide is, on the other hand, less troublesome. An extension of Gertz does not inhibit a private plaintiff's attempt to establish liability or to recover damages

for actual injury. It merely denies private plaintiffs an award of presumed or punitive damages absent a showing of "actual malice." Because Gertz already has held that there is no legitimate state interest in providing such an award, the intrustion on state law is relatively minor.

Cammie

83-18 DUNN & BRADSTREET v. GREEN-MOSS Argued 3/21/84

Garrett (Dun & Bradstreet)

In negligence cases, damages not presumed.

Dunn & Bradstreet disseminates commercial information.

In this case P was entitled to recover actual damages on proof of negligence.

Argues for a 1st amend right for ~~p~~ non-media speakers.

D & B's ~~no~~ credit information is not commercial speech.

(SOC asked whether, if D & B's position is accepted (that in all speakers have 1st amend rights) it would extend to Securities ~~the~~ Acts including § 10(b))

Hellman (Resp.)

Run in commercial speech
& first test in Central Hudson
re whether speech is true or false.

BRW said if Resp. is right about
commercial speech, Petr has conceded
falsity – flunking first test of
Central Hudson. ~~Petitioner~~

Resp. agreed & said this
should end case. [BRW seemed
to agree – of this was Commercial
Speech].

Resp. said D&B did not rely
~~to~~ on its present claim ~~to~~
~~media status~~ that it is like
a newspaper.

TC used "almost all of D&B
requests for instructions.

(JPS asked what about "commercial
speech" in a newspaper? E.g.
that a company had gone
bankruptcy?) (Counsel said
Run would be different – why?

83-18 Dun & Bradstreet v. Green-Morn

Gertz: Private Π (Gertz) sued a Media Δ.
We held; When Π is not a public figure, states may apply their own "common law" rules, except:

1. No recovery w/o fault.
2. No "presumed" or punitive damages w/out malice; actual damages may be recovered - including mental distress, embarrassment, & for loss of reputation.

Private person vs. media - no "presumed" or punitive damages w/o malice

Court declined to "constitutionalize" suits by private parties vs media Δ's.

Private party vs non-media Δ.
Gertz left this question open, but it did emphasize substantial state interest in protecting ordinary citizen from defamation.

Difficult to reason about damages in labor cases.

Commercial speech - Rehn says, at least Gertz should not be extended to protect "commercial speech" - as here. Put in "false"; Plunker just test of Central Hudson
I would not.
Constitutionalize all speech - public or private. (Pet's argument)

March 23, 1984

83-18 Dun & Bradstreet v. Green-Moss Builders

Not sent

Dear John and Sandra:

The discussion this afternoon of the above case suggests that the best solution is to DIG a case we should not have taken. The case is a sort of "sport" in the libel law, as Dun & Bradstreet - at least for me - is neither the typical media defendant nor that contemplated by the common law of libel that I believe still is to be found in most of the states.

You suggested, John, that if we do not DIG the case, we may be able to identify some subclass between the typical media defendant and the common law libel suit between private individuals. Sandra expressed, as I understood her, a similar view.

The rationale of New York Times, as WJB's opinion emphasized, was based on the special role of the media in a democracy. This justified a constitutional decision in that case. In each of our subsequent cases in which the New York Times standard has been applied, we have had a media defendant. Dun & Bradstreet has some of the characteristics of the financial page of newspapers, but it is essentially different - as I believe both of you noted. It can be argued quite reasonably that Dun & Bradstreet owes a higher duty than the press. It is in the business - not of serving the need in a democracy for a forum in which issues and ideas may be debated - but of making money by selling sensitive credit information. It would not be irrational at all to hold it to strict liability.

In sum, the more I think about this case the less willing I am to categorize it as within either of the traditional classifications of libel cases. Perhaps we could say that because of its business, and at least its implicit guarantee of a high degree of accuracy, that as a minimum the New York Times standard applies. I could agree cheer-

fully to this, but am not yet persuaded we should deprive the states altogether of their traditional right to apply their own libel laws in litigation between private parties.

If any purpose could be served by the three of us discussing this, I would be happy to join you at any time.

Sincerely,

Justice Stevens
Justice O'Connor

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 26, 1984

Re: 83-18 - Dun & Bradstreet v. Greenmoss

Dear Chief:

After further reflection, I have decided to vote to reverse.

Respectfully,

JPS

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 26, 1984

Re: 83-18 - Dun & Bradstreet v. Greenmoss

Dear Chief:

After further reflection, I have decided to vote to reverse.

Respectfully,

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 28, 1984

MEMORANDUM TO THE CONFERENCE:

83-18 - Dun & Bradstreet v. Greenmoss Builders

The above-mentioned case will be an agenda item on Friday's Conference.

Regards,

March 28, 1984

83-18 Dun & Bradstreet v. Greenmoss

Dear Chief:

Since this case will be decided, my vote is to affirm.

This case is a "sport" in the law of libel. Dun & Bradstreet (D&B) is not fairly comparable to a media defendant. As Sandra states in her letter of this date (with which I agree), its business is narrowly specialized. New York Times was based on the essential role of the media in a democracy. This justified its First Amendment rationale. In each of our subsequent cases in which the New York Times standard has been applied, we have had a media defendant.

To be sure, D&B has some of the characteristics of the financial page of newspapers, but it is essentially different. Its business, unlike that of the press, is to sell sensitive credit information to a specialized group of buyers. D&B serves none of the purposes identified in New York Times and its progeny. In view of the nature of D&B's business and its capability to destroy the credit of other businesses (particularly small businesses), it would not be irrational to hold D&B to strict liability.

It also would be unfortunate, I think, to choose this case as a vehicle for constitutionalizing the entire law of libel. I do not think the case has been viewed in this light. If it had been, amici briefs probably would have been filed by many of the states. Gertz emphasized the "legitimate state interest in compensating for wrongful injury to reputation." 418 U.S., at 348. Moreover, the Vermont Supreme Court cites a number of state court decisions that read Gertz as not constitutionalizing the law of libel.

In sum, I would affirm. This can be done by treating D&B as belonging to a specialized category of disseminators of information. This could be viewed as a type of commercial speech.

Sincerely,

The Chief Justice

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

March 28, 1984

No. 83-18 Dun & Bradstreet v. Greenmoss Builders

Dear Chief,

On further reflection about this case, I am not inclined to dismiss it as improvidently granted. The applicability of Gertz to non-media defendants is a question squarely posed in the case and one which we should answer. Although my position may be in the minority, I still feel we should probably try to resolve the question presented.

It does seem to me the actual malice standard should not apply to speech of the type involved here: a communication involving a purely commercial transfer of facts by a non-media defendant. The information was not broadly disseminated, and was not intended to be. It related to commercial credit and the marketplace of money, not the marketplace of ideas. This type of information transfer is routinely regulated under the federal securities laws, commercial credit reporting laws, and so on. Such information is marketed more as a commodity than as speech and deserves only the most modest First Amendment protection in my view. It is difficult to see why we should relieve Dun & Bradstreet of liability when its falsehood is merely "malicious" in the ordinary sense of the word, but not in the New York Times sense.

Accordingly, I think an affirmance is in order.

Sincerely,

Sandra

The Chief Justice

Copies to the Conference

crr 03/28/84

March 28, 1984

RE: No. 83-18, Dun & Bradstreet v. Greenmoss Builders

TO: Justice Powell

FROM: Cammie

I have reviewed the jury instructions in this case, and I do not believe that a DIG legitimately may be made on this basis. The jury instructions concerning the intent necessary to overcome the state qualified immunity do not give as much protection as the New York Times "actual malice" standard applied in Gertz. The relevant jury instructions appear on pages 18-19 of the Joint Appendix. I have marked them in red.

I notice that Justice O'Connor has abandonned any inclination to DIG.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 31, 1984

Re: No. 83-18 - Dun & Bradstreet, Inc. v. Green-Moss Builders, Inc.

Dear Lewis and Bill:

I write on the assumption neither of you will probably join Bill Brennan's position in this case. However, it is not feasible to assign a dissent until we see how far Bill goes. He will, I assume, want to push out some "new frontiers" on Sullivan. I'll discuss with you when we see Bill's opinion.

Regards,

WEB

Justice Powell
Justice Rehnquist

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 31, 1984

Re: No. 83-18 - Dun & Bradstreet, Inc. v. Green-Moss Builders, Inc.

Dear Lewis and Bill:

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Regards,

WEB

Justice Powell
Justice Rehnquist

April 6, 1984

83-18 Dun & Bradstreet v. Green-Moss Builders

Dear Chief:

In your note of March 31 to Bill Rehnquist and me, you suggest that assignment of the dissent await circulation of Bill Brennan's opinion for the Court. I agree.

I note that your letter went only to Bill and me. I believe Sandra also voted with us to affirm.

Sincerely,

The Chief Justice

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 30, 1984

Re: No.83-18-Dun & Bradstreet v. Greenmoss Builders

Dear Bill:

Please join me.

Sincerely,

T.M.

Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 1, 1984

No. 83-18 Dun & Bradstreet v. Green-Moss Bldrs.

Dear Bill,

I will await further writing before joining anything in this case.

Sincerely,

Sandra

Justice Brennan

Copies to the Conference

June 1, 1984

83-18 Dun & Bradstreet

Dear Bill:

In accordance with my Conference vote, I will try my hand on a dissent.

Sincerely,

Justice Brennan

Copies to the Conference

LFP/vde

lfp/ss 06/01/84 DB SALLY-POW

83-18 Dun & Bradstreet

The purpose of this memo is to help "sort out" possible approaches in light of Joe's helpful memo.

New York Times

Although the case may have involved only "presumed" and "punitive" damages, the language - including the holding - draws no distinction between "damages" of various kinds. The critical language reads as follows:

> "The constitutional guarantees require a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he can prove that the statement was made with 'actual malice' - that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S., at 279-280.

The emphasis throughout the opinion was on the "public" position of the plaintiff. There is nothing in the opinion suggesting an intention to constitutionalize the entire law of libel. Of course, subsequent decisions extended New York Times to "public figures", but we refused to adopt the Metromedia plurality that would have extended New York Times to any public question.

I note as a matter of interest that New York Times, in several places, indicates that truth or falsity is really irrelevant to any constitutional consideration, a position Gertz rejected.

Dun & Bradstreet

The holding of WJB's opinion is limited to presumed and punitive damages. It states, in the concluding paragraph:

> "As we explained in Gertz, however, the state interest in redressing the harm caused by false statements in the defamation context is fully served by damages that compensate for actual injury."

Moreover, WJB concludes by saying that "once the actual damages caused by false credit reports are recompensed, the state interest . . . can support no distinction between petitioner and the magazine in Gertz".

I agree with Joe, however, that much in WJB's opinion can be read - and perhaps will be - as limiting even actual damages to proof of malice when that issue is before the Court.

My options

Joe suggests two possible positions. First, I could concur in the result, and write separately. My opinion could say there is a difference between private speech and public speech (like that in Gertz), but that the state interest in both presumed and punitive damages is so minimal that states cannot impose them at all except under constitutional standards.

Or, as a second possibility, I could - as Joe puts it - "back away slightly from Gertz's statement that there is no state interest in presumed and punitive damages", and that Gertz must be read in its context.

A third course would be to make a distinction between presumed and punitive damages. This would appeal to me because I think a malice standard may well be justified before punitive damages are awarded even in a suit by a private person against private person.

I am not impressed by leaving punitive damages to juries. E.g., Silkwood. Presumed damages are rooted deeply in the common law where there has been a libel, and certainly there is some state interest in these because of the difficulty of proving actual damages. Yet, as Joe

observes, drawing this distinction - relying on the Constitution with respect to punitive damages and on the common law with respect to presumed damages - may not be defensible. I am not entirely sure of this, and want to discuss it with Joe.

I did try to make clear in Gertz that although we did not define "actual damage", we did say that proof of "actual injury is not limited to out-of-pocket loss" but could include "impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering". 418 U.S., at 350.

Gertz also "recognized the strength and legitimate state interest in compensating private individuals for wrongful injury to reputation" yet "shields the press and broadcast media from the rigors of strict liability for defamation."

We also said:

> "Our accommodation of the competing values at stake in defamation suits by individuals allows the states to impose liability on the publisher or broadcaster of defamatory falsehood on a less demanding showing than that required by New York Times." Id., at 348.

But my opinion went on to say that "this countervailing state interest extends no further than

compensation for actual injury. For the reasons stated below, we hold that the states may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity of reckless disregard for the truth."

I must say that the foregoing language as a "holding" may not be easy to reconcile in terms of drawing a distinction between presumed and punitive damages. The First Amendment interest in protecting private speech is less than in a public speech.

* * *

When the Conference is over today I would like to talk to Joe about all of this.

L.F.P., Jr.

ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 4, 1984

Re: 83-18 - Dun & Bradstreet v. Greenmoss Builders

Dear Bill:

Please join me.

Respectfully,

John

Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 5, 1984

Re: 83-18 - Dun & Bradstreet, Inc. v.
Greenmoss Builders, Inc.

Dear Bill,

I shall await Lewis's dissent.

Sincerely yours,

Justice Brennan

Copies to the Conference

cpm

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 5, 1984

No. 83-18 Dun & Bradstreet, Inc. v.
Greenmoss Builders, Inc.

Dear Bill,

I will wait to see what Lewis has to say in this case.

Sincerely,

Sandra

Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 15, 1984

Re: No. 83-18, Dun & Bradstreet, Inc.
v. Greenmoss Builders, Inc.

Dear Bill:

Please join me.

Sincerely,

Harry

Justice Brennan

cc: The Conference

lfp/ss 06/14/84

MEMORANDUM

TO: Joe DATE: June 14, 1984

FROM: Lewis F. Powell, Jr.

Dun & Bradstreet

I approve of all of your changes except possibly for note 13.

It is important to get this draft to a printer for a printed Chambers draft and hope this can be done this morning before the print shop gets too busy with cases that will come down next week.

As to note 13, I approve of omitting the third sentence as you have suggested, and changing the sentence that you have marked in red - though I may have some further thoughts about it later. And, for the time being, leave my language in that is repetitious but important.

The long sentence that carries over on page 18 that I edited, is not really satisfactory. It is too long and may try to say much in one sentence. It can go to the print shop as it is, and we can improve it in the Chambers draft.

L.F.P., Jr.

ss

June 18, 1984

83-18 Dun & Bradstreet v. Greenmoss Builders

Dear Byron,

My understanding of your concern about my opinion is that I would decide an issue not decided below or argued here, and therefore a reargument may be desirable.

The Vermont Supreme Court thought the question before it was whether "the qualified protections afforded the media" in Gertz should be "extended to actions involving nonmedia defendants." Petn App A7. The briefs addressed this question--as well as the commercial speech question. Bill's draft opinion for the Court also discusses both issues. The question of whether the entire law of defamation should be constitutionalized clearly is before us and needs to be decided.

As I say in footnote 12 of my draft, there will be hard cases. Your New York Times hypothetical is an example. If you are concerned about that case, I can make clearer that it would raise very different considerations. But this case is not one of the difficult ones. This is a case in which the constitutional interest clearly is tangential at best.

Nor do I think the lines between media and nonmedia, and between commercial speech and other speech, would be difficult to draw in most cases. These are not unfamiliar concepts, and there is no reason to think judges would be unable to apply them. It is entirely appropriate that we leave some part of this area of the law to case-by-case development.

If you have suggestions, I would welcome the opportunity to consider them.

Sincerely,

Justice White

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 18, 1984

Re: No. 83-18 Dun & Bradstreet v. Greenmoss Builders

Dear Lewis,

Please join me in your dissenting opinion.

Sincerely,

Sandra

Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 19, 1984

Re: 83-18 - Dun & Bradstreet, Inc. v. Greenmoss Builders

Dear Bill:

As of now, please show I would DIG.

Regards,

WEB

Justice Brennan

Copies to the Conference

June 20, 1984

83-18 Dun & Bradstreet v. Greenmoss

Dear Chief:

Your note indicating that "for now" your vote is to DIG, came as a surprise. I was glad to see the emphasis on "for now"!

It may be helpful if I reviewed the "bidding" in this extremely important case. We considered the case at two Conferences, March 23 and 30. At the first one it was clear that there was some confusion as to the issue before the Court and its importance. You voted to DIG. I passed, WHR voted to affirm, John Stevens voted to DIG or reverse, and Sandra was tentative.

Sandra wrote you on March 28 that after "further reflection" her vote was to affirm rather than DIG. Also on March 28, I wrote you advising that I would affirm. You may be interested in the reasons I outlined in my letter.

You thought the case should be reconsidered, and was discussed again at the March 30 Conference. At that time, you stated that you "may vote to affirm, but were not at rest".

Following the March 30 Conference, you advised Bill Brennan to take the case for assignment, and Bill assigned it to himself. I put a memo in my file that the vote was 5 to 4, with you joining WHR, SOC and me.

On March 31 you wrote Bill Rehnquist and me the attached letter. You suggested that it was not appropriate at that time to assign the writing of a dissent "until we see how far Bill Brennan goes". I note at this point that Bill could not have gone any farther than he has in his opinion for the Court.

Because I was the author of Gertz, I thought it best for me to draft a possible dissenting opinion - to avoid being caught in the June rush.

In view of this rather clear record, I wrote a full dissenting opinion on the assumption that there were four of us who could not go with Bill Brennan. His opinion overrules two centuries of the common law and the present defamation laws of most of the states. As a vote to DIG at this time would have no significance, I hope that in due time - when you have an opportunity to take another look - you will "stay with us".

Sincerely,

The Chief Justice

lfp/ss

cc: Justice Rehnquist
Justice O'Connor

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 20, 1984

Re: No. 83-13 Dun & Bradstreet, Inc. v. Greenmoss Builders

Dear Lewis:

Please join me in your dissenting opinion.

Sincerely,

WR

Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 20, 1984

Re: 83-18 - Dun & Bradstreet v. Greenmoss

Dear Lewis:

If you think it will help "institutionally," I will go along with you. I would want to see what, if anything, Byron does.

Regards,

WEB

Justice Powell

Copies to: Justice Rehnquist
Justice O'Connor

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 20

Re: Dun & Bradstreet

Dear Lewis —

Thanks for writing to the Chief to refresh recollections of the history of this important case.

Sincerely,

Sandra

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 25, 1984

Re: 83-18 -

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.

Dear Bill,

At this moment, I am up in the air about this case. As you might suspect, Lewis' opinion strikes a responsive chord in me; but because it appears to narrow Gertz v. Welch, or at least to withdraw somewhat from the rationale of that case, I am unprepared to take that step without a reargument. On the other hand, there is substance to his views, and I will not join your opinion with its reaffirmation of Gertz. If there is not a reargument, which I am prepared to move, I shall concur in the judgment with the following few words:

Justice White concurring in the judgment.

I am unprepared to join either Justice Brennan's or Justice Powell's opinion and believe that the case should be reargued. That view not having prevailed, I join the Court's judgment of reversal, which I think is more consistent with existing precedent than an affirmance would be.

Sincerely,

Byron

Justice Brennan

Copies to the Conference

June 25, 1984

83-18 Dun & Bradstreet v. Greenmost Builders

Dear Chief, Bill and Sandra:

This refers to Byron's letter of this date in which he states - for the reasons indicated - that he will move that this case be reargued. If this motion should fail, he will concur in the judgment with a "few words" added.

I also will vote for a reargument. While the issues were presented, the argument may not have focused adequately on the crucial question whether New York Times and Gertz which involved media defendants, necessarily require the constitutionalizing of the entire law of defamation.

I view this as an issue of first importance. I would certainly prefer reargument to having him concur in the judgment with his accompanying statement.

Sincerely,

The Chief Justice
Justice Rehnquist
Justice O'Connor

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 25, 1984

Re: 83-18 - Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.

Dear Byron:

I had voted to DIG but I will give you a "consolation vote" to join your vote to re-argue.

Regards,

WEB

Justice White

Copies to the Conference

June 26, 1984

83-18 Dun & Bradstreet v. Greenmoss Builders

Dear Bill:

I propose the following question for reargument:

> Whether the rule of New York Times v. Sullivan, 376 U.S. 254 (1964), and Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), should apply to a defamation action against a nonmedia defendant involving a report on the credit worthiness of a private plaintiff.

I think this would focus attention on the questions discussed in both of our opinions.

Sincerely,

Justice:

This is essentially the same question we discussed, except I have attempted to add some language that would focus the parties' attention not only on the nonmedia nature of the defendant, but also on the commercial nature of the speech--i.e., not only on the parties, but on the content of the speech at issue. Without this, the question would be essentially the same as was presented in the petn for cert. I would not use the term "commercial speech," because that presumes that this speech is "commercial," within the meaning of the Court's cases in that field. If you don't like "credit worthiness," another possibility is "financial condition."

Joe

June 27, 1984

83-18 Dun & Bradstreet v. Greenmoss

Dear Bill:

What would you think of two questions as follows:

1. Whether, in a defamation action, the constitutuional rule of New York Times and Gertz with respect to presumed and punitive damages should apply where the suit is against a non-media defendant?

2. Whether, in a defamation action, the constitutional rule of New York Times and Gertz with respect to presumed and punitive damages should apply where the speech is of a commercial or economic nature?

It seems to me both of these questions are at issue. The reasoning of your opinion applies to all defamation actions against media and non-media defendants, and without regard to the type of speech. Thus, a question along the lines of No. 1 above is desirable.

My opinion, however, would leave open the question whether the constitutional rule applies with equal force regardless of the nature of speech. As our cases have recognized, for example, the constitutional interest is at its height where matters of public or general interest in a democracy are at issue. There may be a different balance where the speech relates solely to an economic matter (as in this case) or to an accusation that a lady is sleeping with the wrong gentleman.

Unless we advance questions that require counsel to focus on these possible differences, the briefing and reargument may not be much more helpful than what we have experienced.

Sincerely,

Justice Brennan

lfp/ss

June 27, 1984

83-18 Dun & Bradstreet v. Greenmoss

MEMORANDUM TO THE CONFERENCE:

Bill Brennan and I have considered appropriate questions to be asked for the reargument of this case and we suggest these two:

1. Whether, in a defamation action, the constitutuional rule of New York Times and Gertz with respect to presumed and punitive damages should apply where the suit is against a non-media defendant?

2. Whether, in a defamation action, the constitutional rule of New York Times and Gertz with respect to presumed and punitive damages should apply where the speech is of a commercial or economic nature?

It seems to us both of these questions are at issue. The reasoning of Bill's opinion applies to all defamation actions against media and non-media defendants, and without regard to the type of speech. Thus, a question along the lines of No. 1 above seems desirable.

My opinion, however, would leave open the question whether the constitutional rule applies with equal force regardless of the nature of speech. As our cases have recognized, for example, the constitutional interest is at its height where matters of public or general interest in a democracy are at issue. There may be a different balance where the speech relates solely to an economic matter (as in this case) or to an accusation that a lady is sleeping with the wrong gentleman.

Unless we advance questions that require counsel to focus on these possible differences, the briefing and reargument may not be much more helpful than what we have experienced.

Absent dissent, the above questions will be submitted.

L.F.P., Jr.

ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 27, 1984

No. 83-18 Dun & Bradstreet v. Greenmoss

Dear Lewis,

I agree with your proposed formulation of the questions on reargument.

Sincerely,

Sandra

Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 28, 1984

Re: 83-18 -

Dun & Bradstreet v. Greenmoss

Dear Lewis,

I agree with your proposed questions.

Sincerely yours,

Justice Powell

Copies to the Conference

83-18 Dun& Bradstreet v. Green-Moss (Cammie)

WJB for the Court 3/30/84
1st draft 5/29/84
2nd draft 6/4/84
3rd draft 6/19/84
4th draft 6/22/84
Joined by TM 5/30/84
JPS 6/4/84
HAB 6/15/84

LFP dissent
1st draft 6/15/84
2nd draft 6/21/84
3rd draft 6/25/84
Joined by SOC 6/18/84
WHR 6/20/84

CJ would DIG 6/19/84
LFP will dissent 6/1/84
SOC awaiting dissent 6/1/84
BRW awaiting dissent 6/5/84
SOC awaiting LFP's writing 6/5/84

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

July 2, 1984

Re: 83-18 - Dun & Bradstreet v. Greenmoss

Dear Lewis:

I agree with the questions you propose.

Regards,

Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

November 1, 1984

Re: No. 83-18, Dun & Bradstreet, Inc.
v. Greenmoss Builders, Inc.

Dear Bill:

Please join me.

Sincerely,

Harry

Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

November 1, 1984

Re: No. 83-18-Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.

Dear Bill:

Please join me.

Sincerely,

T.M.

Justice Brennan

cc: The Conference

lfp/ss 11/17/84 DB SALLY-POW

Dun & Bradstreet

Reminder to LFP:

When I review D&B consider whether something along the following lines should be added:

Many libeled persons suffer losses of reputation that extend long into the future - even into the history books. The truth often never overtakes a published falsehood, and quantifying the extent of the injury and resulting damages presents a unique problem of proof. For the reasons I have stated, permitting a jury - in the absence of standards of any kind - to award punitive damages is an unprincipled answer to this question. But presumed compensatory damages are a necessary though an imperfect means of resolving this problem. A person injured by libel should not go remedyless anymore than one who suffers physical injury.

L.F.P., Jr.

ss

lfp/ss 11/19/84 DB4 LINDAS-POW

MEMORANDUM

TO: Dan DATE: Nov. 19, 1984

FROM: Lewis F. Powell, Jr.

83-18 Dun & Bradstreet

Three or four years ago there was a former Miss America who won a punitive damage award, as I recall, of $25 million. I believe this was in a libel suit but am not sure. Perhaps the Library could locate this case for us, and it might be worth a footnote as illustrative of what juries do.

L.F.P., Jr.

ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

November 29, 1984

Re: 83-18 - Dun & Bradstreet v. Greenmoss Builders

Dear Lewis:

I have some problems with this case, and I will await Byron's views which, I gather, he may write out.

Regards,

WEB

Justice Powell

Copies to the Conference

PPS: Under no circumstances would I go along with altering the punitive damage standard nor could I agree with anything along the lines of your note 14, page 16.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

November 29, 1984

Re: No. 83-18 Dun & Bradstreet v. Greenmoss Builders

Dear Lewis,

I agree more with your separate opinion in this case than I do with Bill Brennan's proposed opinion, but I have enough reservations about yours so I think that I will wait and see what Byron writes. I am not yet ready to prohibit punitive damages in defamation cases.

Sincerely,

Justice Powell

cc: The Chief Justice
Justice O'Connor

83-18 Dun & Bradstreet

Dear Chief:

I am circulating an opinion along the lines I indicated at Conference. I adhere to my view of last Term that the entire law of libel should not be constitutionalized. This would be an unprecedented extension of New York Times and Gertz.

After considerable thought, I have concluded that punitive damages should be abolished except where authorized by a statute that prescribes appropriate standards. The imposition of punishment is a function of the state, not of lay juries without standards or statutory limitations. I do not see how permitting a jury to impose private fines can be reconciled with the Fifth and Fourteenth Amendments. Also the purpose of tort recovery is to compensate - not to confer a windfall.

Accordingly, I would hold that in libel cases against non-media defendants punitive damages are improper. I would allow presumed damages that traditionally have been viewed as compensatory. As at common law, no showing of malice should be required.

In libel suits against a media defendant, on the other hand, I would adhere to New York Times and Gertz and allow presumed damages upon proof of actual malice. I would not allow punitive damages as they are not compensatory.

The opinion is divided into parts so that you may, if you wish, join it in part. You would be welcome.

Sincerely,

The Chief Justice

lfp/ss

cc: Justice Rehnquist
Justice O'Connor

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

December 20, 1984

Re: 83-18 - Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.

Dear Lewis:

I will await further writing. I have trouble about the "media, and non-media." Dun & Bradstreet is not like the New York Times, but it is a second cousin, at least, of the Wall Street Journal. Like Bill Rehnquist, I'm not ready to drop punitive damages.

Regards,

WEB

Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 26, 1984

Re: 83-18 - Dun & Bradstreet, Inc.
v. Greenmoss Builders, Inc.

Dear Bill,

It will be some time before I am ready in this case. Happy New Year.

Sincerely yours,

Byron

Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

December 27, 1984

Re: No. 83-18 - Dun & Bradstreet v. Greenmoss Builders

Dear Lewis,

I cannot accept either the media-nonmedia dichotomy or the abolition of punitive damages in libel cases, especially the latter. So, very likely I will agree with no one except myself.

Regards,

WEB

Justice Powell

December 29, 1984

PERSONAL

83-18 Dun & Bradstreet

Dear Chief:

Thank you for your note about this case. I write, on a personal basis, to suggest that you may wish to consider two rather major points that may not have come to your attention.

1. Your note suggests that you are having difficult making a distinction between nonmedia and media defendants, and you have mentioned the Wall Street Journal. The second draft of my opinion, circulated December 21, clarified what concerns you. Initially, I had drawn the distinction simply between media and nonmedia defendants. After a good deal of further research, I concluded that the relevant distinction turns on the nature of the speech rather than who the parties are. If the speech relates to public issues or public persons, my opinion now agrees that the New York Times standard is applicable (subject to my view of punitive damages).

The great majority of the cases cited by Bill Brennan in his reply to the first draft of my opinion, focus on whether the speech involved the type of public discussion that is essential in a democracy: i.e. public issues or criticism of public figures. This is the rationale of New York Times v. Sullivan and Gertz. The present case is a garden variety, old fashioned libel suit by one business company against another. No public issue or public figure is remotely involved. The second draft of my opinion adopts this rationale. I think it may well appeal to you.

2. In your personal note you also expressed a disinclination to abandon punitive damages in this case. I share your view as to the irresponsibility of what sometimes is reported in the press (for example, the recent disclosure to the Soviet Union of the purpose of our top secret military satellite).

I have thought for several years, however, that punitive damages are not compatible with due process. My view is not limited to the media. As my opinion states, England already has rejected punitive damages in all except limited situations such as where authorized by statute and with limited amounts. This is true of the antitrust laws in our country. My concern is with permitting juries, wholly without standards, to mete out punishment, and provide windfalls for plaintiffs who also have recovered compensatory damages, e.g., (see WJB's opinion in the §1983 Missouri case of Smith v. Wade). Punitive damages are awarded in the uncontrolled discretion of lay jurors who are free simply to vent their prejudices.

As a matter of principle, I do not believe a distinction can be made between allowing juries without standards to "punish" the media any more than I would allow this type of punishment in tort cases generally. In my view, punishment may not lawfully be imposed except by the state pursuant to due process. This view would still leave presumed damges that are allowed where no compensatory damages can be proved as in many libel cases.

I am not urging that you join my dissent - though you would be welcome. I do suggest that, in whatever you write, it may be prudent to leave yourself free to consider the punitive damage issue in nonlibel cases. In the typical product liability, personal injury and civil rights cases, compensatory damages normally are provable. Adding windfall punitive damages on top of these is unprincipled; and is without any of the due process protections guaranteed by the Constitution.

Sincerely,

The Chief Justice

lfp/ss

83-18 DUN & BRANSTREET v. GREENMOSS

Argued 10/3/84

Garrett (Petr)

Do not deny fault here. "Gerty holds no liability w/o fault; but where as here there is fault "actual damages" OK [damages]

→ See WHR question as to presumed.

Must be proof of actual damages

Heilman (Resp)

"Presumption" in libel law is

→ a presumption of "causation" as well as "damages".

D & B - unlike media Δs - don't foster public debate. It is wholly commercial

D & B is not an "unpopular" Δ. Gerty & N.Y.T. talked about need to protect "unpopular" ideas as well as unpopular speakers because of unpopular political views.

See T. M. opinion in Rosenbloom as to punative damages - "civil penalties"

Garnett (Reply)

"Proving damages is no different ~~from~~ in this case than in a contract case" ~~E~~ (I don't understand what Garnett ~~=~~ said, he makes no distinction bet. the common law of libel & the law of damages in ~~cet~~ delegation. ~~Libel~~ Libel is a special kind of tort)

check this

lfp/ss 09/17/84 STREET SALLY-POW

MEMORANDUM

TO: Dan DATE: Sept. 17, 1984

FROM: Lewis F. Powell, Jr.

83-18 Dun & Bradstreet

Having now reread the opinions last Term, and also in Gertz, I record these more or less random observations about punitive damages.

There is considerable language in WJB's opinion on the characteristics of punitive damages: he referred to the "oddity of tort law" that "confers on juries 'largely uncontrolled discretion' to award damages even in the absence of proof of harm or loss". P. 8.

Punitive damages are characterized as "disproportionate awards". P. 9.

In pursuing these thoughts, WJB stated that in Gertz we "followed its reasoning with respect to damages in excess of actual harm in analogous areas of the law", citing Electrical Workers v. Foust, 442 U.S. 42 (1979), a case in which the Court held that employees could not recover punitive damages for a union's breach of its duty of fair representation. This was said to undermine the "policies of the Railway Labor Act", and again WJB

explained that punitive damages "go beyond compensation for actual loss", and are "unpredictable and potentially substantial". P. 9.

Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981) also was cited by WJB as an "area of the law" "analogous" to defamation cases. P. 9. I note here that I do not see the analogy, but in Newport as well as in Electrial Workers, the Court relied on "policy" considerations. See Newport, p. 266-270, for a discussion of the relevancy of "history and policy" in determining the appropriateness of punitive damages. The Court in Newport also stated:

> "Punitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct." Newport, at 267.

WJB also has a good quote attributed to Justice O'Connor dissenting, apparently from WJB's opinion in Smith v. Wade. See last paragraph on p. 9. My dissentin Silkwood also is cited. See, e.g., fn. 3, on p. 3.

Again on p. 10 of his opinion, WJB characterized punitive damages as "unpredictable and disproportionate". In fn. 3, p. 10, WJB cites a number of state court cases

to the effect that punitive damages "in defamation suits" are barred "where the party injured by defamation recovers adequate compensation". One wonders what constitutes "adequate compensation" in a defamation suit.

Of course, WJB was focusing only on First Amendment cases. Yet, the essentially irrational characterization of punitive damages apply with greater force where compensatory damages have satisfied the "underlying aim of the law . . . to compensate for harm actually caused". See Harlan, J., dissenting in Rosenblum (cited by WJB at p. 7).

* * *

In thinking of my position on reargument of this case, possibly my alternatives may be stated generally as follows:

1. Assuming that WJB adheres substantially to last Term's Court opinion (and he will unless BRW compells some changes), I could stand on last Term's dissent. Probably Dan could make some of the arguments more strongly or suggest new ones.

2. I could retain the substance of my dissent, but add a separate Part that argues more fully the difference between allowing punitive damages in defamation

cases and in cases (particularly damage suits) in which fully compensatory damages are provable and recoverable. With respect to the latter, I would argue that the imposition of punitive damages is punishment without due process of law and should be held unconstitutional. There are persuasive reasons for such a view, despite the apparent antiquity of allowing juries to impose this form of punishment.

3. A third possible position, at the moment one that seems less attractive than either of the foregoing, would be to join the Court's judgment but argue that puntive damages in all types of cases - absent proof of malice (as defined) - violate the Constitution. New York Times would be extended as WJB proposes to all defamation actions. In addition to a violation of the First Amendment, it could be argued that the imposition of punishment in civil suits for damages violates the Fifth and Sixth Amendments. This would require me to ignore the basic policy and analytical differences between punitive damages in defamation cases (where compensatory damages rarely can be proved with any degree of certainty) and in other tort cases in which compensatory damages are provable and have become far more generous.

* * *

I hardly need say I am not at rest, but these possibilities are rather intriguing. I will be quite interested in the state of the law in Great Britain; and whether there is any authority, primary or secondary, for the view that imposition of punitive damages is punishment imposed without due process. One problem with this view is that its logic would require that punitive damages be invalidated even when malice is shown.

Silkwood can be read as approving punitive damages even in the absence of evidence of malice. The jury was instructed that punitive damages need not be proved by "direct evidence of fraud, malice or gross negligence". Rather, these could be "inferred". See BRW's opinion, p. 5 of slip opinion. Curiously, WHR and SOC joined Justice White, despite what I believe they wrote - but have not checked - dissenting in Smith v. Wade.

L.F.P., Jr.

ss

lfp/ss 09/13/84 DUN SALLY-POW

MEMORANDUM

TO: Dan DATE: Sept. 13, 1984

FROM: Lewis F. Powell, Jr.

Dun & Bradstreet

You will recall our brief conversation about punitive damages. A thought occurrs to me that I share with you as a question.

I have gradually become persuaded that at least in personal injury cases - or perhaps in any cases where compensatory damages are provable - punitive damages are an archaic carryover from a different age. The difference is that the proof of compensatory damages has become a specialized professional skill. There is less need for punitive damages.In the early years of my law practice I tried a number of suits, including common law and FELA damage suits, brought against the Southern Railroad. My law firm was state litigation counsel. Proof even of compensatory damages was rather primitive. Punitive damages were rarely even requested. Today, techniques of proof, developed by the American Trial Lawyers Association, enable injured plaintiffs to recover fully

for present and estimated future damges, including speculative damages for pain and suffering.

My reluctance last Term to join the majority view in Dun & Bradstreet was based primarily on two considerations: (i) particularly in defamation cases, it is difficult to prove compensatory damages, and injured persons would be without a remedy; and (ii) I am reluctant to have this Court constitutionalize the common law of a large number of states only in defamation cases.

The question is whether I could write a principled opinion holding that punitive damages - by definition a penalty - lawfully may be imposed only by the state in cases where compensatory damages can be proved? This, I suppose, would be a constitutional decision invalidating the imposition of a "fine" by a jury or a court without standards or any of the protections against arbitrary action that the criminal law provides. Our present system now is analogous to "peoples courts" in revolutionary countries.

This would be an unprecedented change, but the system as a whole would be fairer. In libel cases - under my Gertz formula - some damges could be awarded as compensatory.

L.F.P., Jr.

ss

No. 83-18, Dun & Bradstreet v. Green-Moss Conf. 3/23/84

The Chief Justice DIG

Gertz applied to media but there is no dif. between media & non media

X X X

At Conference on 3/30 C.J. said he may vote to ~~R~~ affirm - but not at rest.

Justice Brennan Rev. & Remand.

We must address commercially speech issue, & reject it. D&B is like WSt Journal reporting a bankruptcy

Instructions were error - didn't require malice.

Justice White Rev.

Vt. Ct decided Gertz did not apply & so issue in here.

Can't distinguish bet. media & ~~D~~ defendants.

Not commercial speech - is like all financial reporting.

Justice Marshall Rev.

Justice Blackmun Rev.

No media/non-media distinction

Justice Powell Pass

Justice Rehnquist Affirm

The choice here is unattractive.

Agree Gertz should not be extended to media Ds

Justice Stevens DIG or Rev.

Complicated case.

As a class, can't say there is no distinction ever.

Within non-media class of Ds, there can be sub-classes.

Johnson referred to a Fed Statute regulating credit agencies. D & B is in an economic market. There, at least some will should treat D & B like other media Ds. D & B hold themselves out as experts in credit.

Justice O'Connor Affirm? (DIG?)

Gertz standard applies to some non-media Ds. But states have a role. Gertz is not engaged in this kind of speech

Reverse

No. 83-18, Dun & Bradstreet v. Greenmoss Conf. 10/5/84

The Chief Justice Passed.

Media has been given special protection. D. & B., & Keplinger, & others who give advice are different from media. They inflict more damage (?).

Would not extend Gertz. Didn't agree then, & don't agree now, with Gertz.

Rationale of media cases does not apply to private ~~d~~dependent.

Will prefer to DIG. Will not, Reverse.

Justice Brennan Rev.

No distinction bet. media & non media Ds.

Certainly no real difference bet D. & B. & conventional media.

Every member of society entitled to "robust speech" (even falsehoods about one's bankruptcy).

Justice White Join only judgment to Rev (tentative)

Gertz is dead wrong, but have accepted it as a precedent. If we shall accept Gertz, it is not easy to avoid it here. N.Y.T. also was mistake. Might reject Gertz. Will probably write

(See BRW's op. last Term)

Justice Marshall Rev

Agree with WJB,

Justice Blackmun Rev

Joined WJB last spring.

Can't distinguish media & non media defendants.

Justice Powell Affirm in part & Rev in part (tentative)

See my notes. Not entirely at rest, but will not agree that a non-media D is entitled to same protection as media

Justice Rehnquist Affirm

Joined Gertz because he thought it was least objectionable view at the time.

If punative damages are OK in other types of litigation, they are OK in libel cases.

(Bill agrees with BRW that N.Y.T. was a mistake)

(Bill said to me privately (at a break) that as of now he would not abolish punative damages here unless we did in Gertz)

Justice Stevens Rev. unless we overrule Gertz.

Agree with some of what LFP said about punative damages.

D. & B. should get as much protection as media. Can't draw a media/non media distinction.

Clarify presumed damages to hold that ~~a presumed damage~~ a P can't rely on presumption alone. Must have some ev. - any ev. But this is not before us.

Justice O'Connor Aff'm

In view of discussion, not at rest.

We have distinguished different types of speech - ~~f~~ commercial, fire in crowded theatre, obscenity.

D. & B. is more akin to private speech than to media.

83-18 D & B (1015) (used at Conference as tentative thinking)

All prior cases applying 1st Amend in defamation cases have involved media Δs.

Gertz involved a private Π, & the same 1st Amend concerns identified in N.Y.T. for media Δs, existed. At risk was freedom of the Press to express views on public issues.

None of these concerns is present ~~[illegible]~~ when one private person is libeled by another private person.

We are talking about changing the ~~[illegible]~~ common law - centuries old.

~~Language in~~ Gertz ~~relied on by W & B but Texas~~, must be read in the context of a media defendant. (If it can be read otherwise - it is dicta)

1. My dissent Last Term
   - Adhered to common law: (libel per se):
     - Only falsity & publication need be shown to be entitled to presumed & punative damages.

2. Possible modification of the common law:
   There is a major difference bet. presumed & punative damages.
   Purpose of one - to compensate
   " " other - to punish
   (Instructions different)

   Criticism of punative damages
   WJB's op.
   - British (common law no longer followed)
   - 4 States

3. I would consider:
   Allow presumed damages against non-media Δ w/out proof of malice (the case)
   [Proof of actual damages is often impossible.]

   Allow punative only on proof of malice as defined in N.Y.T. (~~Sp~~)

Many private persons libel cases to protect reputation

October 30, 1984

83-18 Dun & Bradstreet v. Greenmoss Builders

Dear Bill:

As you would expect, my position remains basically in dissent. I may make some changes, however, in the draft I circulated last Term.

It may take me a while to get this done.

Sincerely,

Justice Brennan

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

October 31, 1984

Re: 83-18 - Dun & Bradstreet v. Greenmoss Builders

Dear Bill:

Please join me.

Respectfully,

Justice Brennan

Copies to the Conference

Tell Powell Chambers to just set this aside for Justice Powell to read once he is back + working again. It can wait until then.

SOC

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

January 22, 1985

PERSONAL & CONFIDENTIAL

Re: 83-18 Dun & Bradstreet v. Greenmoss Builders, Inc.

Dear Lewis,

Please do not read this until you are truly ready to go back to work. It can wait.

This case has been making its uncertain way through this Court for two terms now. I am not sure the Court will succeed in resolving it in any way which I regard as satisfactory. But during your illness something has occurred which offers the possibility that four, and perhaps five, of us can partially agree on one significant feature.

Byron has shown me a rough draft of his proposed opinion. He is not planning to join Bill Brennan, so there are potentially five votes in opposition to the circulating "majority" opinion. This is reason enough to make it worthwhile to pursue every avenue of agreement among those in dissent, who might thereby become a majority.

With that prospect in mind, there appears to be possible agreement by you, Byron, the Chief, Bill Rehnquist, and me that the Gertz standards apply at most to expression related to matters of public importance. Furthermore, I think that we all would agree that whatever the precise definition of "matters of public importance," it does not include a credit reporting service. If we were all to agree that the nature of the speech, rather than the nature of the speaker, determines whether Gertz applies, I believe we could then also agree this case should be affirmed, at least in part.

I appreciate that in order to solidify our votes on this point, certain language in Gertz will have to be explained and some other changes will be necessary in your circulating draft. The draft, however, by distinguishing between "public expression" and "private expression" already approaches the position that Gertz only applies to expression concerning matters of public importance. As your

draft explains, this Court already distinguishes between different categories of speech in terms of First Amendment protections and Gertz itself requires courts to distinguish between public figure plaintiffs and private citizen plaintiffs. It is certainly plausible to contend that the reasons for imposing constitutional limits on state libel laws as in New York Times v. Sullivan and in Gertz are not substantially implicated where the libelous expression does not concern a matter of public importance. Time, Inc. v. Firestone, 424 U.S. 448, also is consistent with this view in its reliance on a content-based categorization of speech to determine whether the plaintiff was a public figure.

This approach to Dun & Bradstreet would require a new standard for libel involving private plaintiffs and matters lacking in public importance or concern. One approach would be to allow states to adopt whatever standards they deem appropriate. I tend to favor this, as does Bill Rehnquist, I believe. An alternative approach would be to impose certain limits on punitive or presumed damages. You favor elimination of punitive damages altogether and I think Byron would agree to some limits on damages. Perhaps the differences on punitive damages limits are irreconcilable, but as I understand your circulating draft, you place primary reliance on Due Process to reach your result rather than the First Amendment.

In any event, with some fairly minor changes to parts I-III of your circulating draft, it would effectively hold that Gertz applies only to speech involving public issues and, therefore, does not require a showing of the New York Times type of actual malice in this case. I strongly suspect you could get the additional four votes for that approach, even if not all the same votes were available for the punitive damages aspect. I would certainly be able to join at least parts I-III, and I believe the others would as well.

In addition to some minor suggestions on pages 1, 3, and 5, I would think the first paragraph on page 8 could be revised more or less along the following lines:

> "In this case there is no need to define precisely the forms of expression on matters of public importance that qualify for the constitutional protections set forth in Gertz. Cf. Rosenbloom, supra, at 44-45. In accord with the state courts quoted supra, at 5, I think it is clear that the libelous speech at issue here implicates the First Amendment at most only tangentially. Petitioner's credit reporting is not directed at subjects

related to government or other matters of general public concern. There is no credible argument that this sort of speech requires special protection to assure that 'debate on public issues [will] be uninhibited, robust, and wide-open.' New York Times Co. v. Sullivan, 376 U.S., at 270. Indeed, petitioner's subscription agreement itself prevented clients from disseminating the credit information. This sort of credit reporting is speech solely in the economic interests of the speaker and its business audience, cf. Central Hudson Gas & Elec., 447 U.S., at 561, and this interest warrants no special protection when-- as in this case-- the speech is wholly false and clearly damaging to the victim's reputation. These factors clearly placed petitioner's credit reporting in 'a subordinate postition in the scale of First Amendment values.' Ohralik, 436 U.S., at 456."

Perhaps it is worth a try.

We will be very glad indeed to have you actively back among us.

Sincerely,

Sandra

Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

January 22, 1985

PERSONAL & CONFIDENTIAL

Re: 83-18 Dun & Bradstreet v. Greenmoss Builders, Inc.

Dear Lewis,

Please do not read this until you are truly ready to go back to work. It can wait.

This case has been making its uncertain way through this Court for two terms now. I am not sure the Court will succeed in resolving it in any way which I regard as satisfactory. But during your illness something has occurred which offers the possibility that four, and perhaps five, of us can partially agree on one significant feature.

Byron has shown me a rough draft of his proposed opinion. He is not planning to join Bill Brennan, so there are potentially five votes in opposition to the circulating "majority" opinion. This is reason enough to make it worthwhile to pursue every avenue of agreement among those in dissent, who might thereby become a majority.

With that prospect in mind, there appears to be possible agreement by you, Byron, the Chief, Bill Rehnquist, and me that the Gertz standards apply at most to expression related to matters of public importance. Furthermore, I think that we all would agree that whatever the precise definition of "matters of public importance," it does not include a credit reporting service. If we were all to agree that the nature of the speech, rather than the nature of the speaker, determines whether Gertz applies, I believe we could then also agree this case should be affirmed, at least in part.

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related to government or other matters of general public concern. There is no credible argument that this sort of speech requires special protection to assure that 'debate on public issues [will] be uninhibited, robust, and wide-open.' New York Times Co. v. Sullivan, 376 U.S., at 270. Indeed, petitioner's subscription agreement itself prevented clients from disseminating the credit information. This sort of credit reporting is speech solely in the economic interests of the speaker and its business audience, cf. Central Hudson Gas & Elec., 447 U.S., at 561, and this interest warrants no special protection when-- as in this case-- the speech is wholly false and clearly damaging to the victim's reputation. These factors clearly placed petitioner's credit reporting in 'a subordinate postition in the scale of First Amendment values.' Ohralik, 436 U.S., at 456."

Perhaps it is worth a try.

We will be very glad indeed to have you actively back among us.

Sincerely,

Sandra

Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

February 19, 1985

No. 83-18 Dun & Bradstreet, Inc.
v. Greenmoss Builders, Inc.

Dear Lewis,

By now you have seen Byron's response to your recirculation. I have also talked to Bill Rehnquist and the Chief Justice and I feel reasonably confident that you will have four votes for your proposed new circulation. Byron would at least be a fifth vote to affirm the judgment which would effectively place the plurality opinion in your hands. Perhaps this is the best we can do but I am certainly with you on your recirculation.

Sincerely,

Sandra

Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

February 19, 1985

No. 83-18 Dun & Bradstreet, Inc.
v. Greenmoss Builders, Inc.

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Sincerely,

Sandra

Justice Powell

To Dan

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 19, 1985

83-18 - Dun and Bradstreet, Inc. v. Greenmoss Builders, Inc.

Dear Sandra,

I appreciate your passing on to me a copy of Lewis's proposed changes in his separate writing in this case.

Although Lewis has made substantial changes, I still have difficulty with this draft, which at several places states that the publication here was a private publication about a non-public matter. It is emphasized that the circulation here went only to subscribers. I take it, then, that if the publication had been a public one, Gertz rules would apply even if the subject matter was non-public. Although Lewis states that the distinction is not between media and non-media defendants, there obviously are different rules for those who publish publicly and those who circulate privately; and, obviously enough, a media defendant would always be publishing publicly and entitled to the protections of Gertz, whether the subject matter was public or private.

I thus doubt that I can join the draft in this form. To give more protection to those who publish publicly and hence do the most damage makes little sense to me. It also seems that Lewis could do what he wants to do by simply applying Gertz to matters of "public importance", regardless of who the publisher is. As I indicated in what I have already circulated, I believe I could join such an approach, at least for the purpose of producing a court opinion.

I am sending a copy of this to Lewis.

Sincerely,

Justice O'Connor

cc: Justice Powell

Lewis: It's great to have you back in the swim. Join
Carl yourself.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

February 22, 1985

Re: 83-18 Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.

Dear Lewis,

Please join me.

Sincerely,

Sandra

Justice Powell

Copies to the Conference

lfp/ss 03/04/85

Dun & Bradstreet

MEMO TO MYSELF:

Apart from the general complexity of the libel area involved, I am handicapped here in the apartment without books and face-to-face discussion with Justices as well as Dan.

Stated in the most elementary and summary way, my understand of the present status of relevant libel law is as follows:

1. Constitutional protection for the media (the malice test) was provided in NYT where the suit was brought by a public official. The Court did not consider whether there would be constitutional protection if a private individual had been the libeled plaintiff when the issue was one of public importance.

2. As I pointed out in Gertz, the N.Y.T. constituional protection was extended where libel suits were brought by "public figures" - not merely public officials. The cases, as I recall, involved Coach Bear Byrant of Alabama and also a retired general named Walker.

3. As I view it now, my opinion in Gertz is an example of overwriting a Court opinion. I said much that

was unnecessary to a decision of that case. A large part of Gertz is dicta. In Gertz a libel was published by a media publication against Gertz who was neither a public official or public figure. The subject of the libel was a case of general public interest, although my recollection is that the decision in Gertz did not "turn" on this fact.

4. Roosenbloom was addressed and criticized in Gertz. Justice Brennan in Rosenbloom would have extended N.Y.T. to libels of private persons if they concerned matters of general public interest. But the holding in Gertz was that since petitioner was not a public figure, the defendant magazine was not entitled to the N.Y.T. malice defense. I was impressed, by the argument that a private person - unlike a public official or a public figure - usually is in no position to protect himself when libeled by the media. He has limited access to reply, and probably limited means to sue.

5. Dun & Brandstreet (D&B) presents here for the first time the question whether the constitutional rule of N.Y.T. and Gertz should be extended where both the personal libeled is private, and the subject matter of the expression was of no general public interest under the rationale of Justice Brennan's opinion in N.Y.T. Four

Justices are willing to say "yes". This would constitutionalize the entire law of libel. It now appears that there are five Justices unwilling to go this far. Stated very generally, the positions of the five of us are as follows:

(i) The CJ has joined no one, but has told me privately that he would join almost any opinion that is contrary to Brennan's opinion.

(ii) After making a false start based on the distinction between media and nonmedia defendants, I would decide this case on its facts - the critical ones being: (a) the subject of the libel is purely private and of no general public interest; and (b) the defendant was nonmedia and its circulation of the libel had been essentially private.

(iii) Justice O'Connor has joined my opinion, and thought that WHR and the Chief also would join. Despite recent letters from BRW and WHR, Justice O'Connor's clerk advises that she is still "with me".

(iv) After telling me that he had only minor changes to suggest, WHR's letter of March 1 expresses concern over the second element of my opinion, namely, that not only the libel must be private in character but

also its publication must essentially be private. Bill thinks there is an overemphasis on the second "privacy", and suggests that this either be removed or "very much subdued".

(v) Bill gives a rather telling example of how he views the consequences of my position: Under my analysis, as he reads it, if the libel in this case had been published widely by Dun & Bradstreet - say to a thousand of its subscribers in New Hampshire - there would have been no "private expression" and therefore the mere fact of extensive publication would entitle the defendant to constitutional protection. Bill therefore puts the following question:

> "Wouldn't it be enough in this case to say that the matter was one of 'private' concern - e.g., not a matter of public concern, and dispense with the fact that it was not widely circulated?" (see WHR's letter).

Bill goes on to say that if one who libels a private person can gain some constitutional immunity by widely circulating the defamation, the "doctrine has very little to commend it".

(v) Byron has expressed a similar view but in an opinion that seems to go well beyond what Bill Rehnquist has in mind.

* * *

As Dan's memo of March 1 points out, I am left in something of a dilemma particularly in view of what I wrote (perhaps unnecessarily) in Gertz. I can justify my present opinion on the ground that it goes as far as we need to go to decide the only question before us. I believe this is Justice O'Connor's view also. Yet, this would not be a helpful precedent There is considerable force to Bill Rehnquist's position.

My options appear to include the following:

1. Stand on my present opinion, with O'Connor joining it. This probably would not command a Court, as the Chief dissented in Gertz, and tends generally to agree with Byron that libel defendants already have too much protection. Thus, there probably would be three opinions: Brennan's, White's and mine. The bottom line would be to "affirm", but the law would still be left in considerable doubt.

2. I could, possibly, revise my opinion to focus primarily on the private character of the libel and

the absence of any general public interest in it. In other words, leave open the relevance of the extent to which the libel was circulated. This would require considerble revision of my opinion, but perhaps not as much as Dan suggests. I would not be "holding" that the extent of circulation is irrelevant where the subject is purely private.

3. I could accept WHR's views and probably get SOC and the CJ to agree.

* * *

After talking to Dan, I may then talk to WHR and SOC or try making some revisions in the present draft. I am not happy about wrestling any longer with this case - particularly under my present handicaps.

L.F.P., Jr.

ss

dro 03/07/85

MEMORANDUM

OK

To: JUSTICE POWELL

From: Dan

Re: Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., No. 83-18.

I have finished revising the last draft of this opinion as you requested. When I took it down to the publications unit, however, they informed me that they were having problems and could not promise to have the revisions done until tomorrow morning around 10:00 a.m. Ginny says that Nat can take the new draft over tomorrow as soon as its ready--so expect to see yet another version of the Court's most troublesome opinion late tomorrow morning.

Amen!

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 12, 1985

Re: No. 83-18 Dun & Bradstreet v. Greenmoss Builders

Dear Lewis,

Thank you for your response to my suggestions. I would be happy to join your fourth draft.

Sincerely,

Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 12, 1985

Re: No. 83-18 Dun & Bradstreet v. Greenmoss Builders

Dear Lewis,

Thank you for your response to my suggestions. I would be happy to join your fourth draft.

Sincerely,

WHR

Justice Powell

~~Cc: The Conference~~

March 13, 1985

PERSONAL

83-18 Dun & Bradstreet v. Greenmoss

Dear Chief:

We have some good news in this case at long last.

As I believe you know, Sandra, Bill Rehnquist, and I have been cooperating, and the three of us have agreed on the draft (my 4th draft) that I am circulating today. I enclose an extra copy for you.

My understanding is that this draft is in accord with your views also. Your vote will at least give us a plurality to affirm the decision, and prevent the constitutionalizing of all libel law that Bill Brennan's opinion would accomplish.

Sincerely,

The Chief Justice

lfp/ss

cc: Justice Rehnquist
Justice O'Connor

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 18, 1985

Re: No. 83-18 Dun & Bradstreet v. Greenmoss Builders

Dear Lewis,

Please join me.

Sincerely,

WHR/gb

Justice Powell

cc: The Conference

March 28, 1985

83-18 Dun & Bradstreet

Dear Bill and Sandra:

I send to each of you a copy of my opinion with a few suggested changes and additions in response to Bill Brennan's substantially rewritten draft. My clerk, Dan Ortiz, also is delivering a copy to your respective clerks who have been quite helpful.

There is a good deal more that could be said in reply, but I am inclined to think that our view of this case is adequately stated in my fifth draft. Bill Brennan's opinion, although 50% longer, still would constitutionalize the entire law of libel.

I will, of course, welcome any views that you may have. If you approve of my suggested changes, I will recirculate and perhaps - at long last - this case can be brought down. I believe the Chief will join us, but perhaps we should speak to him to make sure that we have a plurality opinion.

Sincerely,

Justice Rehnquist
Justice O'Connor

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

March 29, 1985

No. 83-18 Dun & Bradstreet v. Greenmoss Builders

Dear Lewis,

I agree with all your changes and have no suggestions. I am certainly well satisfied with your draft. I am somewhat concerned that the Chief has not yet joined. I spoke to him about a week ago expressing my earnest hope that he would be joining.

Sincerely,

Sandra

Justice Powell

cc: Justice Rehnquist

dro 04/09/85

file

MEMORANDUM

To: JUSTICE POWELL

From: Dan

Re: Response to THE CHIEF JUSTICE'S note on joining your opinion in Dun & Bradstreet v. Greenmoss Builders, Inc.

I have reread JUSTICE WHITE'S opinion in this case and believe that there is no technical inconsistency between it and yours. His opinion would state as alternate holdings (i) that New York Times and Gertz are no longer good law and (ii) that, even if they are, they do not apply here for the reason you state in your opinion. By joining both, THE CHIEF JUSTICE would be adopting JUSTICE WHITE'S position against New York Times v. Sullivan and Gertz, but then be agreeing that even if Gertz is considered good law it does not control here. The only contradiction will be implicit. By joining JUSTICE WHITE'S opinion, he will indicate that he believes New York Times should be overruled. By joining yours, he tacitly accepts it as the law. I am not sure that this type of contradiction warrants a personal response. Given his feelings on New York Times, there is probably little chance that you will be able to get him to join only your opinion. And, if you point to the implicit contradiction of joining both, you stand the risk of losing him to JUSTICE WHITE

completely. Furthermore, we can hope that the Chief's example will persuade JUSTICE WHITE to make his own opinion a general, rather than a special, concurrence. It is difficult to imagine that JUSTICE WHITE would swallow this implicit contradiction, but I suppose it is possible.

dro 04/11/85

MEMORANDUM

To: JUSTICE POWELL

From: Dan

Re: Conversation with the Chief's Clerk about a Join Letter in Dun & Bradstreet.

I spoke to the Chief's clerk who is working on Dun & Bradstreet and he told me that as far as he knew the Chief would not be sending you a separate join letter. He said, though, that he would ask about it, if he could, and would let me know if he found out anything.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

Personal

April 9, 1985

CONFIDENTIAL

Re: 83-18 - Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.

Dear Lewis:

As you know, I have long struggled with this case. You know what I think of the excess of New York Times and my reservations on your Gertz. I think my views are best served by joining both you and Byron.

This is a "tight rope" to walk and I hope I can do it sans explanation.

Regards,

WEB

Justice Powell

April 10, 1985

CONFIDENTIAL

83-18 Dun & Bradstreet

Dear Chief:

Thank you for your note of April 9 indicating that you would like to join both my opinion and Byron's.

I think this is feasible. There is no technical inconsistency between the two opinions. Byron, in effect, has alternative holdings: (i) that New York Times and Gertz are no longer good law and should be overruled, and (ii) that, even if they are good law, they do not apply here for the reasons stated in my opinion. By joining my opinion you would accept New York Times as the current law, but agree with Byron that it should be overruled.

I note that you prefer to join both "sans explanation". I am inclined to think a very brief opinion explaining your position would be helpful. It could be along the following lines:

"I join Justice Powell's opinion that correctly addresses and disposes of this case. I also join Justice White's opinion as I agree that the Court went too far in both New York Times v. Sullivan and Gertz, and agree that both should be overruled."

* * *

Of course, you could write a good deal more but I think something along the foregoing lines would suffice.

Sincerely,

The Chief Justice

lfp/ss

dro 04/11/85

stet (Dan - Talk to Reporter about this. I'd also ask CJ

MEMORANDUM

To: JUSTICE POWELL

From: Dan

Re: The Chief's proposed "opinion" in Dun & Bradstreet.

In your letter to the Chief, you suggested that write a brief opinion along the following lines to explain his position:

"I join Justice Powell's opinion that correctly addresses and disposes of this case. I also join Justice White's opinion as I agree that the Court went too far in both New York Times v. Sullivan and Gertz, and agree that both should be overruled."

Instead, the Chief has indicated in a memo circulated to the Conference that he plans to say:

> "I join those parts of Justice Powell's opinion essential to the disposition of the case; I agree generally with Justice White's opinion with respect to Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), and New York Times Co. v. Sullivan, 376 U.S. 254 (1964)."

Will the first clause in his opinion cause any problems? By indicating that he joins only "those parts of [your] opinion essential to the disposition of the case," is he making his concurrence something less than a general one? Can we still include him along with Justice Rehnquist and O'Connor at the top of the opinion as joining you? I ask these questions because I worry about the effect his limitation might have on the authority of your opinion.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 11, 1985

Re: No. 83-18 - Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.

MEMORANDUM TO THE CONFERENCE:

I will add something along the following line:

> I join those parts of Justice Powell's opinion essential to the disposition of the case; I agree generally with Justice White's opinion with respect to Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), and New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

Regards,

WEB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 11, 1985

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MEMORANDUM TO THE CONFERENCE:

I will add something along the following line:

> I join those parts of Justice Powell's opinion essential to the disposition of the case; I agree generally with Justice White's opinion with respect to Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), and New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

Regards,

April 12, 1985

CONFIDENTIAL

83-18 Dun & Bradstreet

Dear Chief:

I am concerned by the language in your memorandum circulated yesterday afternoon in which you state that you will "add something along the following lines":

> "I join those parts of Justice Powell's opinion essential to the disposition of the case; I agree generally with Justice White's opinion with respect to Gertz . . . and New York Times . . ."

Unless this language is refined, I cannot include you in what we have hoped would be a plurality opinion. Although there will be a judgment to affirm the Vermont court, Bill Brennan's opinion will have four votes - more support than either my views or Byron's. Furthermore, since it is not clear which parts of my opinion you believe are "essential to the disposition of the case" and which parts are not, other courts looking for guidance will have doubts as to where a majority of the Court stands.

As I believe my opinion makes clear, it would preserve the common law of libel in all cases where the subject of the libel is not of general public interest: the typical private libel suit. Bill Brennan's opinion, on the other hand, would extend the "actual malice" standard of Gertz and New York Times to all types of libel cases - thereby abrogating the entire common law.

It was necessary for me to cite Gertz and New York Times to distinguish them. As Byron's opinion implicitly recognizes, Gertz and New York Times at present are "the law". I simply did not consider - and the disposition of this case does not require us to consider - whether these two cases should be reversed.

I believe the purpose of your proposed opinion would be fully achieved by simply saying:

"I join Justice Powell's opinion disposing of this case; I agree generally, however, with Justice White's opinion with respect to Gertz and New York Times."

This would give us a solid plurality for the reasons why the entire law of libel should not be constitutionalized, and - with Byron's opinion - there would be clear guidance to all lower courts.

I have talked to Bill Rehnquist about this, and he also hopes that you can make this sort of clarification of your views. You would still fully preserve your views as to Gertz and New York Times.

Sincerely,

The Chief Justice

lfp/ss

April 22, 1985

83-18 Dun & Bradstreet

Dear Chief:

It was suggested at Friday's Conference that you confirm your assignment of this case to me.

I'll convert my dissent into a plurality opinion for the four of us.

Sincerely,

The Chief Justice

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 22, 1985

Re: 83-18 - Dun & Bradstreet

Dear Lewis:

I hereby reassign the above case to you with all the "pluses" and "minuses" that go with it!

Regards,

WEB

Justice Powell

Copies to the Conference

May 9, 1985

83-18 Dun & Bradstreet

Dear Bill and Sandra:

I am delivering two copies to each of you of what I hope will be a plurality opinion in this case that has now dragged on for almost two years. I wanted you to see it before I circulated.

I have not changed the substance of what you have approved, and yet I think the opinion has been somewhat strengthened. I wrote the Chief a personal letter and talked to him sometime ago in an effort to persuade him that he could join our opinion without qualification, and still agree with Byron that New York Times and Gertz should be overruled. I do not know what he will do.

Sincerely,

Justice Rehnquist
Justice O'Connor

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

May 9, 1985

No. 83-18 Dun & Bradstreet v. Greenmoss Builders

Dear Lewis,

Your draft opinion for the plurality looks splendid. I am very happy to join it and think it will be helpful in a number of First Amendment cases in the future.

Sincerely,

Sandra

Justice Powell

cc: Justice Rehnquist

May 27, 1985

83-18 Dun & Bradstreet

Dear Bill:

I will probably make some response to your 23-page dissenting opinion, and it may take me a while to do this.

Sincerely,

Justice Brennan

lfp/ss

cc: The Conference

lfp/ss 05/28/85

MEMORANDUM

TO: Dan DATE: May 28, 1985

FROM: Lewis F. Powell, Jr.

83-18 Dun & Bradstreet

What would think of adding something along the following lines to our opinion:

"If the dissent were the law, a woman of impeccable character who was branded a whore would have no effective recourse unless she could prove 'malice' by clear and convincing evidence - not in the ordinary meaning of that term but under the more demanding standard of New York Times. The dissent would, in effect, constitutionalize the entire common law of libel."

In an earlier opinion we had some hypotheticals. With a citation - as I recall. I have not checked up on this.

L.F.P., Jr.

ss

June 19, 1985

83-18 Dun & Bradstreet

Dear Bill and Sandra:

Here is a fourth draft of my opinion in which I respond to Bill Brennan.

I do not think there is anything new in the three additional footnotes, but would appreciate your taking a look before I circulate.

With my thanks.

Sincerely,

Justice Rehnquist
Justice O'Connor

lfp/ss
Enc.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 19, 1985

No. 83-18 Dun & Bradstreet, Inc. v.
Greenmoss Builders, Inc.

Dear Lewis,

I am still in agreement.

Sincerely,

Sandra

Justice Powell

cc: Justice Rehnquist

[C. JUNE 19, 1985]

Supreme Court of the United States

Memorandum

J. Powell, 19

The revisions you have made on Dean and Brandeis are fine with WHR.

HE

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 19, 1985

No. 83-18 Dun & Bradstreet, Inc. v.
Greenmoss Builders, Inc.

Dear Lewis,

I am still in agreement.

Sincerely,

Sandra

Dan - OK to
circulate

Justice Powell

cc: Justice Rehnquist

83-18 Dun & Bradstreet v. Greenmoss (Dan)

WJB for the Court 6/10/84
1st draft 12/30/84
2nd draft 12/14/84
3rd draft 1/17/85
4th draft 3/20/85
Joined by JPS
HAB 11/1/84
TM 11/1/84

LFP dissent
1st draft 11/23/84
2nd draft 12/26/84
3rd draft 2/22/85
6th draft 4/1/85
Joined by SOC 2/22/85
Joined by WHR 3/18/85

CJ concurring in the judgment
1st draft 5/23/85
2nd draft 6/17/85

LFP will dissent 10/30/48
CJ awaiting BRW's views. Does not like our draft 11/29/84

BRW dissenting
1st draft 1/24/85
2nd draft 3/5/85
3rd draft 3/8/85
4th draft 3/29/85
Joined by CJ 4/11/85
5th draft 6/11/85
6th draft 6/21/85

CJ awaiting further writing 12/20/84
BRW will circulate something 1/25/85

LFP for the Court 4/22/85
1st draft 5/10/85
3rd draft 5/16/85
4th draft 6/19/85
Joined by SOC and WHR

WJB dissenting
1st draft 5/23/85
2nd draft 6/24/85
Two copies to Mr. Lind 6/20/85

Dan's version

Can handed down 6/26

lfp/ss 06/24/85 DUN SALLY-POW

83-18 Dun & Bradstreet v. Greenmoss

This case is here on writ of certiorari to the Supreme Court of Vermont. It presents a First Amendment question not previously considered by this Court.

The petitioner, Dun & Bradstreet, issued a false credit report that the respondent had taken bankruptcy. The report was sent to respondent's bank and to ~~six~~ four other recipients of D&B reports. The report was based on an investigation by a 17-year-old inexperienced employee of petitioner.

In this libel suit the Vermont Supreme Court approved a judgment for $50,000 of presumed and $300,000 of punitive damages. Petitioner defended on the ground that the First Amendment required proof of "actual malice" in the sense defined in New York Times v. Sullivan. In that case, for the first time, this Court held that where a libel suit was by a public official, ~~against a media defendant~~, the plaintiff must prove malice - defined as a knowing falsehood or a reckless disregard of the truth.

This malice standard

This malice standard has been applied by this Court only where ~~there was a media defendant and~~ the alleged libel concerned a matter of public interest.

Unlike any of these cases, the suit today - by a private party - involves only a matter of private interest to the parties. In a word, this is a typical common law libel suit. A majority of the Court declines to constitutionalize the entire law of libel.

Accordingly the judgment of the Vermont Supreme Court is affirmed. There is, however, no Court opinion. I have filed an opinion in which Justices Rehnquist and O'Connor have joined. The Chief Justice agrees with my opinion in part, but has filed a separate opinion, as has Justice White.

Justice Brennan has filed a dissenting opinion, joined by Justices Marhsall, Blackmun and Stevens, ~~in which they would extend the rule of New York Times to cases of this kind.~~

jen 05/30/84

MEMORANDUM TO JUSTICE POWELL

From: Joe

Re: No. 83-18 Dun & Bradstreet v. Greenmoss Builders

This memo discusses general approaches that you might wish to take in dissent from WJB's opinion in this case.

There are four elements to the constitutional law of defamation:

(1) Public figures must show that the defendant libeled them with "actual malice"--knowing it was false, or reckless whether it was false.

(2) Private figures must show some level of fault--generally negligence--on the part of the defendant. At common law, there was strict liability for publication of false defamatory information, unless the publication was privileged.

(3) All plaintiffs must show actual damages, unless they can show "actual malice." Only if such "actual malice" is shown can presumed damages be recovered. At common law, damages were presumed for "all libel" and for the four categories of slander per se.

(4) Punitive damages are recoverable only if the plaintiff can show "actual malice." At common law, punitive damages were recoverable upon a showing of "common law malice," that is, ill will or fraud or perhaps reckless indifference to consequences.

WJB's opinion discusses only numbers 3 and 4--whether presumed and punitive damages are available only when "actual malice" is shown. He says yes, reasoning as follows: Gertz held that presumed and punitive damages deter potential speakers from engaging in constitutionally protected truthful expression. If the credit reports at issue here are as deserving of constitutional protection as the Birch Society newsletter in Gertz, then presumed and punitive damages should not be allowed here. The opinion then rejects two proposed distinctions: (1) media/nonmedia (because of the difficulty of drawing lines, and a reluctance to give the press special rights) and (2)

political/economic speech (because of the difficulty of drawing lines, and a reluctance to limit full First Amendment protection to political or public speech).

You have suggested to me that while you do not object to barring States from awarding punitive damages except under the New York Times standard in the present situation, you would find a constitutionalizing of the entire law of libel to be unacceptable. My suspicion is that WJB's opinion will have the latter effect. That is, while it holds only that the award of punitive and presumed damages is governed by constitutional standards in private defamation cases like this one, its reasoning would apply to the question of whether strict liability is permitted in such cases. The proposed distinctions between this case and Gertz would be the same as those that would be raised in a case challenging a common law strict liability judgment. The answers WJB gives are not limited to the present context. Thus, if it is possible to write a coherent dissent articulating a contrary view, you should not join WJB's opinion.

Dissenting from WJB's opinion would mean adopting one of the distinctions he rejects. The better one, to my mind, is some version of the political/economic speech distinction. In my view, WJB's refusal to give the press as such special rights is sound. I am less persuaded by his conclusion that all forms of speech have equivalent First Amendment protection. Commercial speech and obscenity are precedent for providing different kinds of speech differing levels of protection depending on the extent to which First Amendment values are implicated. It seems to me a

common sense idea that back-fence gossip or negligent credit reporting do not implicate any constitutional question (unless such gossip concerns public affairs or public questions). These are private matters, not matters of interest to the political community. This was essentially the idea advanced by the plurality in Rosenbloom.

While it is commonly said that Gertz rejected that proposal for all purposes, I think a careful reading suggests otherwise. Gertz questioned the wisdom of having judges determine what is of general or public interest. It also said that allowing the New York Times test to govern in every defamation suit concerning matters of general interest would infringe the legitimate state interest in protecting reputation to an unacceptable degree. 418 U.S., at 346. Thus, Gertz rejected the Rosenbloom test in part because it drew the wrong balance between constitutional values and state interest in that setting. It was no doubt the sense of the Court that nearly anything published by a newspaper would be of public interest, and thus would get the very high New York Times protection. Therefore, the Court provided decreased protection for certain kinds of things published in newspapers (specifically, those defaming private persons). But where the test is viewed not so much as distinguishing what things published in a newspaper get constitutional protection, but whether whole categories of private conduct are left to state law, the question becomes quite different. A test distinguishing between categories of public and private speech would both be easier to apply and would leave large areas to state law.[1]

Footnote(s) 1 will appear on following pages.

Unfortunately, this is not the end of the matter. In order to avoid constitutional protection, not only must the speech be less protected by the First Amendment, but also there must be a state interest in its common law rule. Here, there is some language in Gertz that complicates matters. In discussing both presumed and punitive damages, the Court there wrote that the countervailing state interest in compensating individuals for injury to reputation "extends no further than compensation for actual injury. ... [T]he States have no substantial interest in securing for plaintiffs such as this petitioner gratuitous awards of money damages far in excess of actual injury." 418 U.S., at 349. The context makes it clear that the Court was speaking of presumed damages here.

There are two possibile resolutions. One is that you could simply concur in the result. That is, you could point out that

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[1] I note that a few state courts have distinguished Gertz on approximately this ground. E.g.:

> "There is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability casuing a reaction of self-censorship by the press. The facts of the present case are wholly without the First Amendment concerns with which the Supreme Court of the United States has been struggling." Harley-Davidson Motorsports, Inc. v. Markley, 279 Or. 361, 366 (1977).

Accord, Rowe v. Metz, 195 Colo. 424, 426 (1978) (Gertz should not be "blindly applied to the case of a private plaintiff against a nonmedia defendant for a defamation which is essentially private in nature"); Calero v. Del Chemical Corp., 68 Wis. 2d 487, 506 (1975).

private speech like that here may have less protection than the public speech involved in Gertz, but say that in any case the state interest in presumed and punitive damages is so minimal that States cannot impose them at all except under constitutional standards. The second possibility is that you could back away slightly from Gertz's statement that there was no state interest in presumed and punitive damages. That is, you could say that Gertz was speaking in the context at issue there. It meant that there was no net state interest in these forms of damages, after the First Amendment values were considered. Of course, there is some interest in allowing presumed damages, and perhaps some in allowing punitive damages as well.

I recommend the latter course. This would allow you to make most clearly the point that the Court is constitutionalizing the law of libel. I also think there is obviously some state interest in awarding presumed damages--the lesson of the common law is that States have come to believe that plaintiffs who must prove actual damages remain undercompensated. In a footnote, you could suggest that perhaps the interest in punitive damages is less persuasive (you would not want to exempt punitive damages entirely, because that would open you to the charge of inserting a constitutional question in every private defamation case).

In sum, I think a dissent can be written, but it requires some fairly fine parsing and reinterpreting of the language of Gertz. Frankly, it might be better if SOC or WHR did this in an opinion that you would join. Therefore, I would not seek the dissent unless it is offered.

jen 05/30/84

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jen 05/31/84

MEMORANDUM TO JUSTICE POWELL

From: Joe

Re: No. 83-18 Dun & Bradstreet v. Greenmoss Builders

This memo continues our discussion of various approaches that might be taken in this case. I begin with a brief review of this Court's cases so far.

Since New York Times, this Court has expanded the areas in which the law of defamation is governed by constitutional rather than common law rules. The Court addressed first the case of political speech about a public official, holding that "actual malice" must be shown. It later expanded this rule to public figures. Then in Rosenbloom and Gertz it considered whether political speech about a private figure should be subject to constitutional rules. In those cases the Court held that at least some defamation suits involving private figures also should be governed by constitutional rules; rather than require the high standard of "actual malice," however, the Court allowed the States to use any standard of liability other than strict liability.

In addition, the Court in Gertz for the first time addressed whether the remedies available in defamation suits (as opposed to the standard of liability) were affected by constitutional rules. The Court held that they were and limited the circumstances in which presumed and punitive damages might be obtained. As the law stands now, therefore, a public figure can only recover when "actual malice" is shown, and then he can recover both presumed

and punitive damages. A private figure--at least in a case involving a media defendant--can recover by showing negligence. He needs to show "actual malice" only if he wants to recover presumed and punitive damages.

This case does not involve the rules governing public figures. The question here is only whether the constitutional rules governing defamation actions by private figures apply when the suit is not against a newspaper but against a commercial credit agency, and the challenged speech is not political but economic. There are three possible answers:

(1) The constitutional rules apply just as they did in Gertz.

(2) The constitutional rules do not apply. These suits are left entirely to state law. Joe favors this.

(3) Some of the constitutional rules apply (such as the ones barring punitive and presumed damages) but not others (such as the one barring strict liability).

We should evaluate these possibilities in terms of both their practical and theoretical impact on the law. The first possibility is essentially the answer given by WJB in his opinion. In my view, the practical effect of this holding would not be very great, and would probably be beneficial. The constitutional rules when applied to private figures do not vary greatly from the common law rules. As for punitive damages, the "actual malice" standard of New York Times is not really all that different from the "common law malice" standard of the common law. As for presumed damages, the difference is that a person would have to under what I wrote in Gertz offer some proof of damage. But the range of damages recoverable

under Gertz is very broad. So the effect is merely to require a person to advance some proof, which is probably a good idea. Finally, as for strict liability, the constitutional rules would require some showing of negligence. In many cases, this rule would make no difference at all, because many defamation defendants have a common law privilege that raises the standard of liability to negligence. (For example, the vast majority of States provide such a privilege to commercial credit reporters like Dun & Bradstreet.) Even in cases where there is no privilege--generally cases of one individual suing another--the constitutional rule would have an effect only where a person committed purely accidental libel, and where it was impossible to get evidence of fault. Given liberal discovery, such cases would be rare. WJB's approach has another advantage, and that is simplicity. Any approach that left some kinds of speech to the common law would only leave the law of defamation even more complicated than it was in 1960: the common law, with its historical complexity, would apply to some kinds of speech, while the also complex constitutional standards would apply to other kinds. In short, as a practical matter, it might be a good thing to clean up the antiquated and complicated rules of the common law.

As a theoretical matter, however, WJB's result does intrude on state law in areas where the constitutional interest seems slim. It is hard to see why state law should be displaced in order to ensure adequate protection for truthful gossip and accurate credit reporting. Like advertising, these are fairly hardy forms of speech that are unlikely to be chilled by even the

harshness of the common law rules. They also do not implicate the political values that ~~at least arguably are~~ were at the core of the First Amendment. In N.Y. Times opinion. As one commentator has written, if the first amendment protections of Gertz apply to a defamation case against a commercial credit reporter, "there is something clearly wrong with the first amendment or with Gertz." Such a result "would trivialize the first amendment." Shiffrin, 78 Nw. L. Rev. 1212, 1268, 1269 (1983). In sum, WJB's result would not be a bad thing for the world, but it does tend to trample unnecessarily on principles of federalism. For me this would probably be enough to reach a different result, but it is a close call.

The difficult problem with reaching one of the other two results is drawing the line between the speech involved in Gertz and that involved here. That is, if the constitutional rules do not apply here, it must be decided what does divide speech to which constitutional rules apply from speech to which they do not. The answer to this question depends on what forms of speech, if any, have less constitutional protection than the "political" speech involved in Gertz (in which the John Birch Society newspaper called a lawyer a communist because he was representing a person suing a police officer for murder). We know that commercial speech--which has in the past meant only advertising--has less protection. One possibility would be to include credit reporting in the category of commercial speech. A second possibility would be to conclude that all speech by nonmedia has less protection than speech by media. A third possibility would be to hold that

speech not involving subjects of public or general importance has lesser protection.

None of these choices is ideal, and every exercise in line-drawing has problems. You asked in particular about commercial speech. The only problem with it is that almost any definition--such as speech that is in the commercial interest of both speaker and audience--would include much that I am not sure we want to rule on now. For example, it would include financial reporting by newspapers, or stock quotations. For me, perhaps the best approach is not to try to set out in this case precisely which cases are governed by the constitutional rules and which are not. I now favor essentially listing the factors that make us conclude that this is not an area of speech that implicates constitutional values to the degree that they were implicated in Gertz. These factors are that this is not an issue of public or general importance, that this is not speech that appears in a newspaper, and that this is speech of an economic or commercial nature that is unlikely to be chilled very much by application of state rules. It is speech that makes the economy function smoothly, rather than furthering political welfare. In short, I would adopt the approach of the court that I quoted in my last memo:

> "There is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-censorship by the press. The facts of the present case are wholly without the First Amendment concerns with which the Supreme Court of the United States has been struggling." 279 Or. 361, 366 (1977).

I do not think this approach conflicts with the language in Gertz that rejected a case-by-case approach to deciding when consti-

First Amend protects the speech of persons as well as the press. But the law of libel was established in 1787, and its application may be different when special rules of malice are not involved.

tutional rules apply. See 418 U.S., at 343. What I propose would apply to broad categories of speech, not to individual cases. That is, all commercial credit reporting cases would be treated alike. All back-fence gossip cases would be treated alike. Probably all media cases would be treated alike. Also, as I said in my last memo, while there is language in Gertz that suggests the courts should not evaluate the degree of First Amendment interest in particular speech, id., at 346, I do not think that language is insurmountable. Once again, line-drawing among broad "kinds" of speech is different from line-drawing among various articles appearing in a newspaper. Thus, while language in Gertz tends to point towards WJB's result, I do not think you are precluded from reaching a different one here.

The question remains whether the second or third approach above is the better one. That is, should a separate opinion concur in the judgment barring presumed and punitive damages, but leave open the question of strict liability, or should it dissent entirely? I believe that you should not concur. As I have said above, the point of disagreeing with WJB is not the practical result of applying constitutional rules here, but the theoretical problem of preempting state law without very good reason. I am not convinced that there is a significantly better constitutional reason to interfere with state law with respect to punitive damages than with respect to strict liability. The point is that this speech generally is a matter of local concern with which the States can deal as they like. Moreover, an approach that chose various common law rules to be applied in some situations and not

others would make defamation law almost unimaginably complex and uncertain.

In sum, I recommend that you dissent on the ground that this is simply not a case that implicates First Amendment values in the way that Gertz did. Gertz therefore does not "control," as WJB's opinion claims. Rather, a new balance should be struck that allows state law to deal with this local concern. My major hesitations are as follows: (1) if adopted, such an approach to this area would only make more complex an already complex area of the law; and (2) I am not certain that the Court should create a variety of levels of First Amendment protection for speech. } There are trouble-some

jen 06/11/84

MEMORANDUM TO JUSTICE POWELL

From: Joe

Re: No. 83-18 Dun & Bradstreet v. Greenmoss Builders

Here is a second draft of the dissent in this case. I have typed in your editing and done a little bit of my own. I have also added citations to Bellotti and Central Hudson, per your suggestions. The major substantive changes are in n. 2 and on pp. 15-17.

p. 1--I have reinserted the fact that past defamation cases have included not only media defendants, but also issues of public concern. Consistent with our approach later in the opinion, we should not suggest that we are accepting the media/nonmedia distinction (or any other bright-line distinction).

p. 4, n.2--This note is new, and responds to your suggestion that we mention the fact that the Framers were familiar with the common law of libel. It appears that Justice White's dissent is actually the best source. He pulls together a variety of sources, and draws conclusions from them. Most of the individual sources he cites deal with seditious libel, which is a little off the mark for our purposes. If this is not satisfactory, I may be able to find other sources.

p. 7, line 4--You suggested, "This view misreads Gertz." This seemed to me redundant in light of the final sentence of the paragraph. How is my suggested rewrite?

p. 10--I have inserted mention here of the idea that false speech is not protected, per your suggestion.

p. 12--I have included teachers in the list of licensed professions who "speak for a living," as you suggested. I am not sure, though. Is it true that teachers are licensed? I know that teachers in public schools need a certificate, but I had thought teachers in private schools did not. If that is true, the certificate may be merely a condition of employment, and not a license requirement.

Joe is probably write

p. 15, n.12--You suggested that this note attempted to say too much. I have rewritten the note. I eliminated the examples of categories that might be treated alike, and added the citations.

pp.15-16--I have expanded and rewritten this discussion, incorporating some of the language we discussed. On p. 16, ¶ 2, I have suggested that the discussion in Gertz of the state interest in presumed and punitive damages should be read in context, although I have not said so openly. I do not think we have to respond to any attack until it comes, and I am not sure it will. Our reading is not unreasonable.

You made two other suggestions, ~~that~~ which I have not incorporated in this draft:

1. I looked at the language in Saxbe and Bellotti with respect to the need to treat all speakers alike, while recognizing a special role for the press. 417 U.S., at 863-864; 435 U.S., at 781-783. I do not see any place for a citation to it, since we do not draw a distinction between speakers. We distinguish speech at the core of the First Amendment from other kinds of speech, without specifying the dividing line. In any case, the language in those opinions does not clearly say that speech by the press is entitled to greater protection than other speech. Perhaps I missed something in our discussion.

2. I have not added a footnote about blindsiding state AGs. It seems to me that the questions presented by the petns for cert should have put the AGs on notice of the issues that the Court would decide. I don't think this is a case that has developed very differently from the positions the parties argued in their briefs. Also, I am not sure we want to rely on the absence of amici briefs in a case. They may not have been filed for any of a number of reasons (for example, the state government role in enforcing libel laws is rather small these days, so the AGs may not have seen a vested government interest).

jen 06/13/84

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From: Joe

Re: 83-18 Dun & Bradstreet v. Greenmoss Builders

As threatened, here is a third draft of the opinion. This draft incorporates your changes from the last draft. Also, as I said, I think we should implement a substantive change suggested by David, Cammie and Rob. They thought that including the Rosenbloom factor in the list of factors that distinguish this case from Gertz was inconsistent with Gertz. That is, on page 13, they thought the opinion should not mention that the libel here did not "concern an issue of public or general importance." They were not convinced on this score with our attempt to distinguish Gertz in note 12. I have marked in red the sections of the opinion that would have to be deleted to accomplish this change. (P. 8, 13, 17.) It is a close call, but I am persuaded that the opinion would be improved by this change. We are not losing very much because calling the speech "commercial" is a way of saying that it does not concern public issues. We also are not purporting to set out an exhaustive list of the factors that make this different from Gertz, so conceivably Rosenbloom could be resurrected in another case. And we are being more consistent with Gertz. Thus, I now recommend deleting the language marked with red.

OK

Yes

Yes

There are several other changes that should be explained:

P. 10--In the seventh line from the bottom, I have replaced "the most relevant example" with "the most prominent example." David correctly pointed out that the defamation example on p. 11 is probably the most relevant example.

P. 13--I found a place for a cite to Saxbe. I do not think Bellotti on balance supports us.

Pp. 17, n.13--I have edited the language of your note without intending to affect its substance. Also, because of where I have placed the note I have altered some of the preceding text from what you wrote on the last draft. However, I think the note is too long. I believe the language marked in blue could be deleted without losing clarity. So you can see the entire note with these recommendations, I have attached a clean copy to this memo. I have added citations to the final paragraph of the footnote.

See my memo to you

P. 18--Per your suggestion, I have edited the first full sentence on this page.

The clerks made two other suggestions that perhaps you should be aware of, although I do not recommend either. Agree

First, David suggested some reorganization of the beginning of part II. In particular, he thought the different levels of protection evidenced by New York Times and Gertz was the most persuasive evidence on our side, and the obscenity and fighting words cases to be the least. He suggested we lead with, and spend more time on, the former, while relegating the latter to a footnote. David's point is a good one, but my inclination is to stay with our present organization. The flow of this section of the opinion is from the familiar to the somewhat less familiar. This seems to me a reasonable rhetorical technique in these circumstances, so I have not implemented the suggestion.

The clerks also thought we should reinsert in footnote 12 the examples of categories of speech that might be treated alike under our approach (i.e., all business-speech cases, all personal gossip cases, all media cases). They thought we were too vague without these. As we have discussed, including these probably attempted to decide too much. I think deleting the "public or general importance" factor from the opinion will cure some of the vagueness, and therefore think the examples should stay out.

significantly less constitutional interest. To abrogate state law in this context would require us to find that the common law--and the two centuries of our experience with it--seriously erred in concluding that these remedies

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[13]There is language in Gertz that can be read broadly to the effect that presumed and punitive damages have no place in the law of defamation. It is necessary, however, to view this language in the context of the only issue before the Court. The suit was by a private person against a media defendant. It was the presence of a media defendant that primarily caused the Court in Gertz to limit recovery to "actual injury." Gertz, supra, at 349. Presumed and punitive damages were deemed--for the reasons first articulated in New York Times--to threaten the historic role of the media in a representative democracy. Id., at 349-350. No such threat is present when one private party is libeled by another private party--at least where the libel is circulated in the course of, and is solely concerned with, both parties' businesses.

In considering generally the utility and appropriateness of punitive damages, it is well to bear in mind that the merit of such damages reasonably may vary with the context in which the issue arises. Defamation actions are unusual in this connection. In the broad category of personal injury litigation, proof of substantial actual damages is commonplace. The role of punitive damages in addition to such actual damages is to punish and to deter--a role normally left to the government. See Smith v. Wade, ___ U.S. ___, ___ (1983) (REHNQUIST, J., dissenting) (103 SCt 1641). In defamation cases, such damages may serve the very different purpose noted by Judge Friendly of "financing the cost of deserving litigation where only small compensatory damages can be expected [and] diverting the plaintiff's desire for revenge into peaceful channels." Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 838 (1967).

jen 06/22/84

MEMORANDUM TO JUSTICE POWELL

From: Joe

Re: 83-18 Dun & Bradstreet v. Greenmoss Builders

Justice Brennan's 4th draft will require at least one change in your dissent since he has deleted some of the more extreme language that we quoted in our footnote 14. Discussion of each of WJB's most recent additions follows.

P. 13, n. 4--This new paragraph adds detail to the argument made in the last draft that our approach will "generate an immeasurable volume of litigation." We have responded to the argument in our n. 12 on p. 10. The one point that it occurs to me to add is the following insert in the fifth line of the footnote on p. 10:

> Certainly the state courts noted supra, at 6, have found little difficulty in drawing them.

OK

Pp. 18-20, nn. 7 & 8--Note 7 is a rewritten version of the prior n. 7, essentially deleting some of the hyperbole that we attacked in our n. 14. In addition, along with note 8, it makes the following points: (1) there is no reason to think nonmedia reports such as this one will be deterred less than the same report in the Wall St. Journal; (2) thus, we allow commercial speech to be suppressed; (3) the interest in protecting private figures from the media is as great as the interest in protecting them from nonmedia; (4) we do not show why a report of a bankruptcy is less valuable when it appears in a credit report than

} what does this mean

The state interest in ~~protecting~~ providing remedies to private persons may be the same in a common law case. But under the 1st amend. the ~~common~~ state interest is greater when D is media

when it appears in the media. I suggest the following answer, to be inserted in place of the current note 14:

[14]The Court suggests that this approach would result in allowing the States "to accomplish indirectly what we have held cannot be accomplished directly--namely, the suppression of protected 'economic' speech." Ante, at 19, n. 7. We have never held that the incidental suppression of "economic" speech in pursuit of a substantial state interest such as protecting private reputation is prohibited. Quite to the contrary, we have held repeatedly that speech in the economic realm, "which occurs in an area traditionally subject to government regulation," Ohralik, 436 U.S., at 456, is entitled to only a limited measure of protection. E.g., ibid.; Central Hudson Gas & Elec. v. Public Serv. Comm'n, 447 U.S. 557, 562-563 (1980). It may be banned even directly if the State asserts a substantial governmental interest. Id., at 566. The Court does not dispute that the state interest in protecting reputation is a strong one. See ante, at 19, n. 8.

The Court also asserts that the interest in protecting private figures from defamation by the media is at least as great as that in protecting them from defamation by credit reports. Ibid. This misses the point. I do not suggest that the state interest in remedying injury to reputation, considered alone, is

greater here than it was in Gertz; the point is that the constitutional interest in protecting ~~the truthful, nondefamatory speech at issue is significantly~~ less.

Finally, the Court suggests that I should detail precisely why the result in a case involving a bankruptcy report in the Wall Street Journal would be different from the result here. Ante, at 18, n. 7, 19, n. 8. I do not say it would be. ~~I believe that is~~ a different case that may raise different considerations and that should be left for another day. There are instances--and I believe this difficult case presents one of them--when ~~it is best not to lay~~ prudence strongly counsels against laying down rules to govern all cases, but only to indicate the factors that govern the result here. The Court's insistence on a bright-line rule ~~seems to me misplaced~~.

Thus, this proposed new footnote answers WJB's points in the following order: (2), (3), and then (1) & (4) together.

lfp/ss 06/14/84

MEMORANDUM

TO: Joe DATE: June 14, 1984

FROM: Lewis F. Powell, Jr.

Dun & Bradstreet

I approve of all of your changes except possibly for note 13.

It is important to get this draft to a printer for a printed Chambers draft and I hope this can be done this morning before the print shop gets too busy with cases that will come down next week.

As to note 13, I approve of omitting the third sentence as you have suggested, and changing the sentence that you have marked in red - though I may have some further thoughts about it later. And, for the time being, leave my language in that is repetitious but important.

The long sentence that carries over on page 18 that I edited, is not really satisfactory. It is too long and may try to say too much in one sentence. It can go to the print shop as it is, and we can improve it in the Chambers draft.

L.F.P. Jr.

ss

Joe - You must have been here late last night!

Joe - what do you think?

lfp/ss 06/26/84 QUESTION SALLY-POW

Whether, in a defamation action, the constitutional rule of New York Times and Gertz with respect to presumed and punitive damages should apply to non-media defendants and particularly - as in this case - where the defendant is engaged in the business of reporting on the financial condition of a private party.

jen 06/26/84

MEMORANDUM TO JUSTICE POWELL

From: Joe

Re: 83-18 Dun & Bradstreet: Questions for Reargument

1. Whether, in a defamation action, the constitutional rule of New York Times and Gertz with respect to presumed and punitive damages should apply where the suit is against a nonmedia defendant and the speech is dissimilar from that at issue in those cases.

2. Whether, in a defamation action, the constitutional rule of New York Times and Gertz with respect to presumed and punitive damages should apply to nonmedia defendants sued for reports on the financial condition of private parties.

3. Whether, in a defamation action, the constitutional rule of New York Times and Gertz with respect to presumed and punitive damages should apply where the suit is against a nonmedia defendant and the alleged defamation is a report on the financial condition of a private party.

4. Whether, in a defamation action, the constitutional rule of New York Times and Gertz with respect to presumed and punitive damages should apply in suits against nonmedia defendants involving speech of an economic nature.

jen 06/26/84

MEMORANDUM TO JUSTICE POWELL

From: Joe

Re: Dun & Bradstreet

I am not sure your suggested question will focus attention on the content of the speech, as opposed to the character of the speaker. Also, both of our questions are not general enough. How about this counteroffer:

Whether, in a defamation action, the constitutional rule of New York Times and Gertz with respect to presumed and punitive damages should apply where the suit is against a nonmedia defendant and the speech is dissimilar from that at issue in those cases.

lfp/ss 06/30/84

MEMORANDUM

TO: Dan DATE: June 30, 1984

FROM: Lewis F. Powell, Jr.

83-18 Dun & Bradstreet v. Greenmoss

In this important case, the vote at Conference was five to reverse and four to affirm. Justice Brennan, the senior among those voting to reverse, wrote an opinion for the Court. I wrote a dissent.

Justice White, who had voted to reverse, was not able to join either WJB's opinion or my dissent. He thought, with some justification, that although the issues clearly had been raised, they were not briefed and argued satisfactorily.

Accordingly, the case was set for reargument (by a five to four vote), and to focus the attention of counsel, the reargument order will identify two questions to be addressed.

Cammie Robinson was initially assigned to this case, and wrote a fine bench memo. As Cammie became somewhat overcommitted on other cases, Joe Neuhaus worked with me and drafted the dissent. As you would expect, I

worked closely with Joe but he is the major draftsman of what I modestly think is a fine example of legal writing.

I would appreciate your taking over this case. I think it unlikely that Justice Brennan will change his opinion substantially, and possibly major changes in our opinion will not be necessary. I know from experience, however, that additional time for reflection and research often does enable one to improve an opinion. As we may have a chance to win BRW, this is worth a try.

In addition to the prior drafts, the entire file may be enlightening. Joe will briefly you thoroughly.

In dividing up summer bench memos, you should take this in lieu of at least one bench memo.

L.F.P., Jr.

ss

cc: Joe

lfp/ss 06/30/84

MEMORANDUM

TO: Dan DATE: June 30, 1984

FROM: Lewis F. Powell, Jr.

83-18 Dun & Bradstreet v. Greenmoss

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L.F.P., Jr.

ss

cc: Joe

In addition, Britain has narrowed the kinds of cases in which they may be awarded. In 1964, the House of Lords held that punitive damages could be awarded in only three situations: (i) where government officials engage in oppressive, arbitrary, or unconstitutional action, (ii) where the defendant has calculated that his conduct will make a profit which exceeds the compensation payable to the plaintiff, and (iii) where punitive damages are expressly authorized by statute. Rookes v. Barnard, [1964] 1 All E.R. 367 (H.L.); Cassell & Co. Ltd. v. Broome, [1972] 1 All E.R. 801 (H.L.); 12 Hailsham, Halsbury's Laws of England ¶1190 (4th ed. 1975). The House of Lords further held that any award of punitive damages should be guided by three considerations: (i) that the plaintiff not recover punitive damages unless he is the victim of the punishable behavior, (ii) that courts award punitive damages with restraint, and (iii) that the means of the parties are relevant. Rookes v. Barnard, [1964] 1 All E.R., at 411 (Devlin, L.); 12 Hailsham, Halsbury's Laws of England, supra, at ¶1190.

II. Obstacles to Judicial Reform.

There are several obstacles to judicial reform of punitive damages in this country. First and greatest is the long line of cases, some of them recent, in which this Court has approved punitive awards. E.g., Silkwood v. Kerr-McGee Corp., 104 S.Ct. 615 (1984); Smith v. Wade, 103 S.Ct. 1625 (1983). Despite all the arguments against these awards, this line of precedent could be a high hurdle to leap. Second, there is the obstacle of

statutory punitive damages. These damages, such as treble damages under the antitrust laws, pose difficulties only because I assume you do not necessarily want to invalidate them too. The problem is that insofar as they are "penal" rather than "compensatory," they suffer from some of the same problems that do punitive damages. Both, for example, impose "punishment" without any of the safeguards ordinarily required in criminal proceedings. Awards of specific multiple damages, on the other hand, are not as standardless as most common law punitive awards.

Third, some of those who criticize the standardless imposition of punitive awards have found the awards themselves justified in several types of cases. In particular, they point to three situations in which economic efficiency may justify punitive awards: (i) when the probability that a tortfeasor will be held liable is less than the probability that loss will occur, (ii) when compensatory damages are by their nature less than the actual loss, and (iii) when the subjective cost of avoiding a tort is greater than the cost recognized by law. D. Ellis, "Fairness and Efficiency in the Law of Punitive Damages," 56 S. Cal. L. Rev. 1, 23-33 (1982). In these three types of cases, actual damages do not deter tortious behavior because the tortfeasor's expected liability is less than the victim's expected loss. The aim of punitive damages in all these situations is to deter by equalizing these expectations.

The major objection to this economic theory is that it assumes that the jury knows when to impose punitive damages in order to make the economic equation work out. I doubt, however,

that the current standard for awarding such damages--basically that the defendant's conduct is so egregious that it warrants "punishment"--comports with the economic aims. Egregiousness is a poor proxy for any of the three economic factors listed above. Furthermore, it seems unlikely that juries could ever award damages on the basis of this economic theory. It is much more likely that their gut reaction to the defendant's behavior and other, perhaps impermissible factors would control. If this is the case and punitive damages are haphazardly and arbitrarily imposed, they are no more likely to further economic efficiency than to hinder it. In fact, the uncertainty of their imposition could "chill" some economically-productive behavior.

III. Approaches to Reform.

You could overcome each of these obstacles to reform through various means. The first, "precedential" obstacle could be surmounted by simply saying that the question of whether punitive damages comport with due process has never been directly presented. This is true because each of the cases appears to have simply assumed their validity. And given the long history of judicial criticism of these awards, this tacit assumption cannot really be said to indicate their "fundamental fairness." You could overcome the second obstacle--that of statutory multiple damages (presuming that you do not want to reform them too)--by basing your due process analysis not so much on the difference between "penal" and "compensatory" awards as on the standardlessness of current common law punitive awards. Such an

approach would, of course, allow juries to award multiple damages as punishment when authorized by statute, but it would leave them little room to abuse discretion. Finally, you could reject the economic arguments favoring punitive awards as based on unrealistic assumptions.

Taking a procedural rather than a substantive due process approach would even further reduce the force of these objections. First, it would confine jury discretion without "constitutionalizing" common law. States could still develop this remedy as they thought appropriate so long as they observed certain procedural safeguards. Second, procedural reform would less directly conflict with this Court's prior cases. Third, there is much greater precedential authority for procedural reform. Mathews v. Eldridge and its progeny would provide adequate support for imposing the necessary safeguards. Most academic commentators, observing this Court's implicit approval of punitive damages, have taken a procedural approach. E.g., M. Wheeler, "The Constitutional Case for Reforming Punitive Damages Procedures," 69 Va. L. Rev. 269 (1983); D. Owen, "Civil Punishment and the Public Good," 56 S. Cal. L. Rev. 103 (1982); J. Mallor & B. Roberts, "Punitive Damages: Towards a Principled Approach," 31 Hast. L.J. 639 (1980). They have suggested six different ways of channeling the jury's discretion.

First, they propose making the standards for imposing punitive liability and for determining the amount of damages more precise. This is an attractive but probably unworkable suggestion. The present liability standard--whether the defendant act-

ed "willfully," "maliciously," or "recklessly"--is no less precise than other tort standards and it is hard to imagine making it much more precise and still applying it to a variety of tort situations.

Second, they suggest requiring the plaintiff to prove punitive liability by the higher standard of clear and convincing evidence. This would ensure that the jury imposed penalties in only the clearest cases and would minimize the risk of penalizing an innocent defendant. Skewing the risk of error in this direction would protect defendants from undeserved penalties without affecting the plaintiff's right to compensation.

Third, the Court could hold unconstitutional only those punitive awards whose amounts are not specified or at least "capped" by statute. This requirement would allow multiple damages provisions and would also alleviate some of the problems arising from multiple recoveries in mass tort litigation, like the Dalkon shield cases. Permitting each plaintiff to receive no more than a certain multiple of his actual damages, for example, would still encourage him to sue and would still penalize the defendant without subjecting him to unreasonable awards by different juries in different cases.

Fourth, the jury could surrender some of its current power and discretion to the judge. For example, although under any system the jury should probably retain the power to decide liability for punitive damages, the judge might set the actual amount of the award. Such a change would at least improve consistency between awards, for judges, unlike juries, would be able

to compare the amounts of awards in different cases. Other possible ways of increasing the judge's control include encouraging the use of summary judgment, directed verdicts, and j.n.o.v.s against punitive claims whenever appropriate.

Fifth, the court might bifurcate the trial between punitive and compensatory damages. Splitting it would avoid some of the prejudice that may now result when evidence of a defendant's wealth, which is admissible in most jurisdictions in setting punitive damages, is presented to the jury before it has decided liability for and the amount of compensatory damages.

Finally, if the Court is worried more about the "penal" aspect of punitive damages rather than about their standardlessnes, it might impose some of the procedural safeguards now required in criminal proceedings. Prior cases discussing the applicability of Fourth, Fifth, and Sixth Amendment guarantees to civil penalty proceedings would provide support for imposing some of these requirements to punitive damages proceedings. See United States v. Ward, 448 U.S. 242 (1980) (characterizing civil penalty as "criminal" or "quasi-criminal" compels application of various procedural safeguards); Wheeler, supra, at 322-351.

IV. Presumed v. Punitive Damages.

Whatever course you decide to take on punitive damages, you might consider distinguishing more sharply between them and presumed damages in the Dun & Bradstreet opinion. From your memos, it appears that much of your disagreement with JUSTICE

BRENNAN stems from your belief that punitive damages are sometimes necessary to compensate the tort victim fully. In this view, they are justified primarily by the difficulty of proving actual damages. This, however, is exactly the purpose of presumed damages, which were awarded here. The judge instructed the jury on presumed damages as follows:

> "[Y]ou must consider the question of damages; where, as in this case there is a libel per se, damages are presumed and actual damages may not be proven, you must determine the amount of compensatory damages to be awarded. In determining the amount of compensatory damages to award, you may consider such items as lost profits and expenditures proximately caused by any wrong doing on the part of the Defendant. Although the law presumes damages in some amount in a case of libel per se and therefore relieves the Plaintiff of the burden of establishing by specific proof that damages have occurred, the law does not compel you to return a verdict of substantial damages unless you are persuaded by a preponderance of the evidence that substantial damages have in fact occurred. It is proper, if, in your judgment you deem it to be correct, even in a case of libel per se, for you to return a verdict of nominal damges such as One Dollar, or damages in such other amount as you feel is fair and just compensation to the Plaintiff for the damages actually caused by the Defendant." Jt. App. 19 (emphasis added).

Their compensatory aim is unmistakeable. The judge then proceeded to instruct the jury on punitive damages:

> "Now a word or two about punitive damages. If you find that Defendant's conduct was not privileged, and if you also find, on the basis of clear and convincing evidence, that the Defendant acted with actual malice in publishing the article in question, then you may award Plaintiff punitive or exemplary damages in addition to the actual damages assessed. Punitive damages are designed to punish the offender and serve as an example to others. Whether or not to award such damages and to the amount thereof are matters confided solely to you for decision. In considering whether Defendant acted with actual malice so as to support an award of punitive damages, you may consider the conduct of the Defendant both before and after the publication of the Erroneous Report. In considering whether or not to award punitive damages, you may take into account

> whether Defendant took any steps to mitigate or reduce the injury to the Plaintiff. If you find the Defendant attempted to mitigate damages, you must lessen your award of damages to the extent that you believe appropriate under the circumstances." Ibid., at 20 (emphasis added).

If the jury followed its instructions, the presumed damages should have fully compensated Greenmoss. Furthermore, as the instructions make clear, the punitive damages had no "compensatory" component. Their sole aim was to punish. Your concern, then, that punitive damages may be necessary to compensate the tort victim may be unwarranted when, as here, presumed damages are available. In fact, when presumed damages are available, "compensatory" punitive damages, if they actually exist, represent a form of double counting. Exactly

V. Recommendation.

These thoughts suggest an approach which differs from those outlined in your memo but which includes elements of all three. I would (1) stick to the body of the present draft of the opinion--your discussion of the "media/non-media" and "commercial" speech issues. These have to be the basis of any elucidation of Gertz. Then I would (2) distinguish between presumed and punitive damages in a way that would make the opinion both broader and narrower than JUSTICE BRENNAN'S. Since punitive damages are not necessary to compensate for injury, you could lay out your objections to them and suggest either voiding them entirely on substantive due process grounds or hemming them in procedurally. To me, the former approach is preferable on policy grounds but might be more difficult to accomplish given prior development True

of the law. Of course, presumed damages are open to some of the same objections; they too leave much to the discretion of the jury. Both the tort victim and the State, however, have a great interest in adequate compensation. Thus, to minimize the risk of unfairness, presumed damages should be allowed only when actual damages would fail fully to compensate the victim. And even in this situation, you might consider requiring some of the safeguards discussed above to limit and guide the jury's discretion. Such an approach to punitive and presumed damages would protect defendants from arbitrary awards while at the same time ensuring the plaintiff compensation. In the present case, this would mean upholding the $50,000 award of presumed damages and reversing the $300,000 award of punitives. Especially given the First Amendment values at play here, such an approach would represent a reasonable and sensitive accomodation of the individuals' and State's interests.

lfp/ss 09/13/84 DUN SALLY-POW

MEMORANDUM

TO: Dan DATE: Sept. 13, 1984

FROM: Lewis F. Powell, Jr.

Dun & Bradstreet

You will recall our brief conversation about punitive damages. A thought occurrs to me that I share with you as a question.

I have gradually become persuaded that at least in personal injury cases - or perhaps in any cases where compensatory damages are provable - punitive damages are an archaic carryover from a different age. The difference is that the proof of compensatory damages has become a specialized professional skill. There is less need for punitive damages.In the early years of my law practice I tried a number of suits, including common law and FELA damage suits, brought against the Southern Railroad. My law firm was state litigation counsel. Proof even of compensatory damages was rather primitive. Punitive damages were rarely even requested. Today, techniques of proof, developed by the American Trial Lawyers Association, enable injured plaintiffs to recover fully

for present and estimated future damges, including speculative damages for pain and suffering.

My reluctance last Term to join the majority view in Dun & Bradstreet was based primarily on two considerations: (i) particularly in defamation cases, it is difficult to prove compensatory damages, and injured persons would be without a remedy; and (ii) I am reluctant to have this Court constitutionalize the common law of a large number of states only in defamation cases.

The question is whether I could write a principled opinion holding that punitive damages - by definition a penalty - lawfully may be imposed only by the state in cases where compensatory damages can be proved? This, I suppose, would be a constitutional decision invalidating the imposition of a "fine" by a jury or a court without standards or any of the protections against arbitrary action that the criminal law provides. Our present system now is analogous to "peoples courts" in revolutionary countries.

This would be an unprecedented change, but the system as a whole would be fairer. In libel cases - under my Gertz formula - some damges could be awarded as compensatory.

L.F.P., Jr.

ss

lfp/ss 09/17/84 STREET SALLY-POW

MEMORANDUM

TO: Dan DATE: Sept. 17, 1984

FROM: Lewis F. Powell, Jr.

83-18 Dun & Bradstreet

Having now reread the opinions last Term, and also in Gertz, I record these more or less random observations about punitive damages.

There is considerable language in WJB's opinion on the characteristics of punitive damages: he referred to the "oddity of tort law" that "confers on juries 'largely uncontrolled discretion' to award damages even in the absence of proof of harm or loss". P. 8.

Punitive damages are characterized as "disproportionate awards". P. 9.

In pursuing these thoughts, WJB stated that in Gertz we "followed its reasoning with respect to damages in excess of actual harm in analogous areas of the law", citing Electrical Workers v. Foust, 442 U.S. 42 (1979), a case in which the Court held that employees could not recover punitive damages for a union's breach of its duty of fair representation. This was said to undermine the "policies of the Railway Labor Act", and again WJB

explained that punitive damages "go beyond compensation for actual loss", and are "unpredictable and potentially substantial". P. 9.

Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981) also was cited by WJB as an "area of the law" "analogous" to defamation cases. P. 9. I note here that I do not see the analogy, but in Newport as well as in Electrial Workers, the Court relied on "policy" considerations. See Newport, p. 266-270, for a discussion of the relevancy of "history and policy" in determining the appropriateness of punitive damages. The Court in Newport also stated:

> "Punitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct." Newport, at 267.

WJB also has a good quote attributed to Justice O'Connor dissenting, apparently from WJB's opinion in Smith v. Wade. See last paragraph on p. 9. My dissentin Silkwood also is cited. See, e.g., fn. 3, on p. 3.

Again on p. 10 of his opinion, WJB characterized punitive damages as "unpredictable and disproportionate". In fn. 3, p. 10, WJB cites a number of state court cases

to the effect that punitive damages "in defamation suits" are barred "where the party injured by defamation recovers adequate compensation". One wonders what constitutes "adequate compensation" in a defamation suit.

Of course, WJB was focusing only on First Amendment cases. Yet, the essentially irrational characterization of punitive damages apply with greater force where compensatory damages have satisfied the "underlying aim of the law . . . to compensate for harm actually caused". See Harlan, J., dissenting in Rosenblum (cited by WJB at p. 7).

* * *

In thinking of my position on reargument of this case, possibly my alternatives may be stated generally as follows:

1. Assuming that WJB adheres substantially to last Term's Court opinion (and he will unless BRW compells some changes), I could stand on last Term's dissent. Probably Dan could make some of the arguments more strongly or suggest new ones.

2. I could retain the substance of my dissent, but add a separate Part that argues more fully the difference between allowing punitive damages in defamation

cases and in cases (particularly damage suits) in which fully compensatory damages are provable and recoverable. With respect to the latter, I would argue that the imposition of punitive damages is punishment without due process of law and should be held unconstitutional. There are persuasive reasons for such a view, despite the apparent antiquity of allowing juries to impose this form of punishment.

3. A third possible position, at the moment one that seems less attractive than either of the foregoing, would be to join the Court's judgment but argue that puntive damages in all types of cases - absent proof of malice (as defined) - violate the Constitution. New York Times would be extended as WJB proposes to all defamation actions. In addition to a violation of the First Amendment, it could be argued that the imposition of punishment in civil suits for damages violates the Fifth and Sixth Amendments. This would require me to ignore the basic policy and analytical differences between punitive damages in defamation cases (where compensatory damages rarely can be proved with any degree of certainty) and in other tort cases in which compensatory damages are provable and have become far more generous.

* * *

I hardly need say I am not at rest, but these possibilities are rather intriguing. I will be quite interested in the state of the law in Great Britain; and whether there is any authority, primary or secondary, for the view that imposition of punitive damages is punishment imposed without due process. One problem with this view is that its logic would require that punitive damages be invalidated even when malice is shown.

Silkwood can be read as approving punitive damages even in the absence of evidence of malice. The jury was instructed that punitive damages need not be proved by "direct evidence of fraud, malice or gross negligence". Rather, these could be "inferred". See BRW's opinion, p. 5 of slip opinion. Curiously, WHR and SOC joined Justice White, despite what I believe they wrote - but have not checked - dissenting in Smith v. Wade.

L.F.P., Jr.

ss

dro 09/26/84

BENCH MEMORANDUM

No. 83-18

Dun & Bradstreet, Inc. v. Greeenmoss Builders, Inc.

Dan September 26, 1984

I have few suggestions to make about the Dun & Bradstreet opinion you circulated last Term. It sharply focuses the issues and clearly outlines the disagreement between you and JUSTICE BRENNAN. The reargument briefs do not help focus the "media/non-media" and "commercial speech" issues any more clearly. My only suggestions concern damages. As I suggest later, you might consider drawing a sharper distinction between presumed and

punitive damages and treating them differently. In particular, you might consider approving presumed damages in situations where actual damages would fail to compensate the tort victim fully and striking down punitive damages in all situations. And, if you believe that prior decisions of this Court make it impossible to strike down punitive damages in general, you should at least try to circumscribe the jury's discretion in awarding them. The rest of the memo, I hope, will make all this clear.

I. The Problems and Some Jurisdictions' Approaches.

Three sentences of yours in Gertz sum up most of the objections to punitive damages:

> "In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredicatable amounts bearing no necessary relation to the actual harm caused. And they remain free to use their discretion selectively to punish expressions of unpopular views." 418 U.S. 323, 350 (1974).

This passage points out the problems courts and commentators have often noted about punitive damages: lack of legislative or judicial standards, unbridled jury discretion, ineffective judicial review, disproportionality and arbitrariness of awards, and discrimination based on improper considerations. Partly in recognition of these problems, at least four states have outlawed punitive damages in most tort cases. See Ricard v. State, 390 So.2d 882, 884 (La. 1980); Caperci v. Huntoon, 397 F.2d 799, 801 (CA1) (Massachusetts law), cert. denied, 393 U.S. 940 (1968); Prather v. Eisenmann, 200 Neb. 1, 11, 261 N.W.2d 766, 772 (1978); Maki v. Aluminum Building Products, 73 Wash. 2d 23, 436 P.2d 186 (1968).

In addition, Britain has narrowed the kinds of cases in which they may be awarded. In 1964, the House of Lords held that punitive damages could be awarded in only three situations: (i) where government officials engage in oppressive, arbitrary, or unconstitutional action, (ii) where the defendant has calculated that his conduct will make a profit which exceeds the compensation payable to the plaintiff, and (iii) where punitive damages are expressly authorized by statute. Rookes v. Barnard, [1964] 1 All E.R. 367 (H.L.); Cassell & Co. Ltd. v. Broome, [1972] 1 All E.R. 801 (H.L.); 12 Hailsham, Halsbury's Laws of England ¶1190 (4th ed. 1975). The House of Lords further held that any award of punitive damages should be guided by three considerations: (i) that the plaintiff not recover punitive damages unless he is the victim of the punishable behavior, (ii) that courts award punitive damages with restraint, and (iii) that the means of the parties are relevant. Rookes v. Barnard, [1964] 1 All E.R., at 411 (Devlin, L.); 12 Hailsham, Halsbury's Laws of England, supra, at ¶1190.

II. Obstacles to Judicial Reform.

There are several obstacles to judicial reform of punitive damages in this country. First and greatest is the long line of cases, some of them recent, in which this Court has approved punitive awards. E.g., Silkwood v. Kerr-McGee Corp., 104 S.Ct. 615 (1984); Smith v. Wade, 103 S.Ct. 1625 (1983). Despite all the arguments against these awards, this line of precedent could be a high hurdle to leap. Second, there is the obstacle of

statutory punitive damages. These damages, such as treble damages under the antitrust laws, pose difficulties only because I assume you do not necessarily want to invalidate them too. The problem is that insofar as they are "penal" rather than "compensatory," they suffer from some of the same problems that do punitive damages. Both, for example, impose "punishment" without any of the safeguards ordinarily required in criminal proceedings. Awards of specific multiple damages, on the other hand, are not as standardless as most common law punitive awards.

Third, some of those who criticize the standardless imposition of punitive awards have found the awards themselves justified in several types of cases. In particular, they point to three situations in which economic efficiency may justify punitive awards: (i) when the probability that a tortfeasor will be held liable is less than the probability that loss will occur, (ii) when compensatory damages are by their nature less than the actual loss, and (iii) when the subjective cost of avoiding a tort is greater than the cost recognized by law. D. Ellis, "Fairness and Efficiency in the Law of Punitive Damages," 56 S. Cal. L. Rev. 1, 23-33 (1982). In these three types of cases, actual damages do not deter tortious behavior because the tortfeasor's expected liability is less than the victim's expected loss. The aim of punitive damages in all these situations is to deter by equalizing these expectations.

The major objection to this economic theory is that it assumes that the jury knows when to impose punitive damages in order to make the economic equation work out. I doubt, however,

that the current standard for awarding such damages--basically that the defendant's conduct is so egregious that it warrants "punishment"--comports with the economic aims. Egregiousness is a poor proxy for any of the three economic factors listed above. Furthermore, it seems unlikely that juries could ever award damages on the basis of this economic theory. It is much more likely that their gut reaction to the defendant's behavior and other, perhaps impermissible factors would control. If this is the case and punitive damages are haphazardly and arbitrarily imposed, they are no more likely to further economic efficiency than to hinder it. In fact, the uncertainty of their imposition could "chill" some economically-productive behavior.

III. Approaches to Reform.

You could overcome each of these obstacles to reform through various means. The first, "precedential" obstacle could be surmounted by simply saying that the question of whether punitive damages comport with due process has never been directly presented. This is true because each of the cases appears to have simply assumed their validity. And given the long history of judicial criticism of these awards, this tacit assumption cannot really be said to indicate their "fundamental fairness." You could overcome the second obstacle--that of statutory multiple damages (presuming that you do not want to reform them too)--by basing your due process analysis not so much on the difference between "penal" and "compensatory" awards as on the standardlessness of current common law punitive awards. Such an

approach would, of course, allow juries to award multiple damages as punishment when authorized by statute, but it would leave them little room to abuse discretion. Finally, you could reject the economic arguments favoring punitive awards as based on unrealistic assumptions.

Taking a procedural rather than a substantive due process approach would even further reduce the force of these objections. First, it would confine jury discretion without "constitutionalizing" common law. States could still develop this remedy as they thought appropriate so long as they observed certain procedural safeguards. Second, procedural reform would less directly conflict with this Court's prior cases. Third, there is much greater precedential authority for procedural reform. Mathews v. Eldridge and its progeny would provide adequate support for imposing the necessary safeguards. Most academic commentators, observing this Court's implicit approval of punitive damages, have taken a procedural approach. E.g., M. Wheeler, "The Constitutional Case for Reforming Punitive Damages Procedures," 69 Va. L. Rev. 269 (1983); D. Owen, "Civil Punishment and the Public Good," 56 S. Cal. L. Rev. 103 (1982); J. Mallor & B. Roberts, "Punitive Damages: Towards a Principled Approach," 31 Hast. L.J. 639 (1980). They have suggested six different ways of channeling the jury's discretion.

First, they propose making the standards for imposing punitive liability and for determining the amount of damages more precise. This is an attractive but probably unworkable suggestion. The present liability standard--whether the defendant act-

ed "willfully," "maliciously," or "recklessly"--is no less precise than other tort standards and it is hard to imagine making it much more precise and still applying it to a variety of tort situations.

Second, they suggest requiring the plaintiff to prove punitive liability by the higher standard of clear and convincing evidence. This would ensure that the jury imposed penalties in only the clearest cases and would minimize the risk of penalizing an innocent defendant. Skewing the risk of error in this direction would protect defendants from undeserved penalties without affecting the plaintiff's right to compensation.

Third, the Court could hold unconstitutional only those punitive awards whose amounts are not specified or at least "capped" by statute. This requirement would allow multiple damages provisions and would also alleviate some of the problems arising from multiple recoveries in mass tort litigation, like the Dalkon shield cases. Permitting each plaintiff to receive no more than a certain multiple of his actual damages, for example, would still encourage him to sue and would still penalize the defendant without subjecting him to unreasonable awards by different juries in different cases.

Fourth, the jury could surrender some of its current power and discretion to the judge. For example, although under any system the jury should probably retain the power to decide liability for punitive damages, the judge might set the actual amount of the award. Such a change would at least improve consistency between awards, for judges, unlike juries, would be able

to compare the amounts of awards in different cases. Other possible ways of increasing the judge's control include encouraging the use of summary judgment, directed verdicts, and j.n.o.v.s against punitive claims whenever appropriate.

Fifth, the court might bifurcate the trial between punitive and compensatory damages. Splitting it would avoid some of the prejudice that may now result when evidence of a defendant's wealth, which is admissible in most jurisdictions in setting punitive damages, is presented to the jury before it has decided liability for and the amount of compensatory damages.

Finally, if the Court is worried more about the "penal" aspect of punitive damages rather than about their standardlessnes, it might impose some of the procedural safeguards now required in criminal proceedings. Prior cases discussing the applicability of Fourth, Fifth, and Sixth Amendment guarantees to civil penalty proceedings would provide support for imposing some of these requirements to punitive damages proceedings. See United States v. Ward, 448 U.S. 242 (1980) (characterizing civil penalty as "criminal" or "quasi-criminal" compels application of various procedural safeguards); Wheeler, supra, at 322-351.

IV. Presumed v. Punitive Damages.

Whatever course you decide to take on punitive damages, you might consider distinguishing more sharply between them and presumed damages in the Dun & Bradstreet opinion. From your memos, it appears that much of your disagreement with JUSTICE

BRENNAN stems from your belief that punitive damages are sometimes necessary to compensate the tort victim fully. In this view, they are justified primarily by the difficulty of proving actual damages. This, however, is exactly the purpose of presumed damages, which were awarded here. The judge instructed the jury on presumed damages as follows:

> "[Y]ou must consider the question of damages; where, as in this case there is a libel per se, damages are presumed and actual damages may not be proven, you must determine the amount of compensatory damages to be awarded. In determining the amount of compensatory damages to award, you may consider such items as lost profits and expenditures proximately caused by any wrong doing on the part of the Defendant. Although the law presumes damages in some amount in a case of libel per se and therefore relieves the Plaintiff of the burden of establishing by specific proof that damages have occurred, the law does not compel you to return a verdict of substantial damages unless you are persuaded by a preponderance of the evidence that substantial damages have in fact occurred. It is proper, if, in your judgment you deem it to be correct, even in a case of libel per se, for you to return a verdict of nominal damges such as One Dollar, or damages in such other amount as you feel is fair and just compensation to the Plaintiff for the damages actually caused by the Defendant." Jt. App. 19 (emphasis added).

Their compensatory aim is unmistakeable. The judge then proceeded to instruct the jury on punitive damages:

> "Now a word or two about punitive damages. If you find that Defendant's conduct was not privileged, and if you also find, on the basis of clear and convincing evidence, that the Defendant acted with actual malice in publishing the article in question, then you may award Plaintiff punitive or exemplary damages in addition to the actual damages assessed. Punitive damages are designed to punish the offender and serve as an example to others. Whether or not to award such damages and to the amount thereof are matters confided solely to you for decision. In considering whether Defendant acted with actual malice so as to support an award of punitive damages, you may consider the conduct of the Defendant both before and after the publication of the Erroneous Report. In considering whether or not to award punitive damages, you may take into account

> whether Defendant took any steps to mitigate or reduce the injury to the Plaintiff. If you find the Defendant attempted to mitigate damages, you must lessen your award of damages to the extent that you believe appropriate under the circumstances." Ibid., at 20 (emphasis added).

If the jury followed its instructions, the presumed damages should have fully compensated Greenmoss. Furthermore, as the instructions make clear, the punitive damages had no "compensatory" component. Their sole aim was to punish. Your concern, then, that punitive damages may be necessary to compensate the tort victim may be unwarranted when, as here, presumed damages are available. In fact, when presumed damages are available, "compensatory" punitive damages, if they actually exist, represent a form of double counting.

V. Recommendation.

These thoughts suggest an approach which differs from those outlined in your memo but which includes elements of all three. I would stick to the body of the present draft of the opinion--your discussion of the "media/non-media" and "commercial" speech issues. These have to be the basis of any elucidation of Gertz. Then I would distinguish between presumed and punitive damages in a way that would make the opinion both broader and narrower than JUSTICE BRENNAN'S. Since punitive damages are not necessary to compensate for injury, you could lay out your objections to them and suggest either voiding them entirely on substantive due process grounds or hemming them in procedurally. To me, the former approach is preferable on policy grounds but might be more difficult to accomplish given prior development

of the law. Of course, presumed damages are open to some of the same objections; they too leave much to the discretion of the jury. Both the tort victim and the State, however, have a great interest in adequate compensation. Thus, to minimize the risk of unfairness, presumed damages should be allowed only when actual damages would fail fully to compensate the victim. And even in this situation, you might consider requiring some of the safeguards discussed above to limit and guide the jury's discretion. Such an approach to punitive and presumed damages would protect defendants from arbitrary awards while at the same time ensuring the plaintiff compensation. In the present case, this would mean upholding the $50,000 award of presumed damages and reversing the $300,000 award of punitives. Especially given the First Amendment values at play here, such an approach would represent a reasonable and sensitive accomodation of the individuals' and State's interests.

dro 09/26/84

Excellent memo!

BENCH MEMORANDUM

No. 83-18

Dun & Bradstreet, Inc. v. Greeenmoss Builders, Inc.

Dan September 26, 1984

I have few suggestions to make about the Dun & Bradstreet opinion you circulated last Term. It sharply focuses the issues and clearly outlines the disagreement between you and JUSTICE BRENNAN. The reargument briefs do not help focus the "media/non-media" and "commercial speech" issues any more clearly. My only suggestions concern damages. As I suggest later, you might consider drawing a sharper distinction between presumed and

10/4/84

MEMORANDUM

To: JUSTICE POWELL

From: Dan

Re: Dun & Bradstreet, Inc. v. Greenmos Builders, Inc.

In answer to your questions of this morning:

1. The rule you are now contemplating in Dun & Bradstreet would (i) deny punitive damages in all libel actions, (ii) allow presumed damages in all non-media action without proof of actual malice, and (iii) allow presumed damages against media defendants only on a showing of actual malice. Insofar as your rule would deny punitive damages to public persons even when actual malice is shown, it would alter the New York Times v. Sullivan rule. This is the only clearly established constitutional rule your plan would affect.

2. Present liability rules are as follows:

(a) Public persons may recover damages "only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth." Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974) (explaining New York Times standard).

(b) Private persons may recover punitive and presumed damages from media defendants only upon a similar showing. Id., at 349. They may, however, recover "compensation for actual injury" upon a showing of at least negligence.

3. New York Times clearly holds that "actual malice" cannot be presumed. 376 U.S. 254, 283-284 (1964). The Court's analysis of the facts in that case, moreover, indicates that the proof must be fairly strict. Id., at 285-288. Silkwood v. Kerr-McGee Corp., 104 S.Ct. 615, 619 (1984), on the other hand, allows the jury to infer malice to a great degree. You discuss the extent of the inference the Court permitted in that case in your dissent. Id., at 636.

4. Bose Corp. v. Consumer Union of United States, Inc., 104 S.Ct. 1949 (1984), the "loudspeaker case"

from last Term, does not really authorize appellate review of the amount of presumed damages. In that case, the Court held that an appellate court could review a finding of "actual malice" notwithstanding the "clearly erroneous" standard of Fed. R. Civ. P. 52(a). It reasoned that this "fact" was actually as question of mixed law and fact which greatly implicated a constitutional rule. This was the reason why Rule 52(a) did not apply. It would be hard indeed to stretch this reasoning to support review of the amount of damages awarded in a libel case.

file

lfp/ss 10/04/84 DB SALLY-POW

Then is a draft that I would refine.

83-18 Dun & Bradstreet

My memorandum to Dan of 9/17 is confused particularly on pp. 4 and 5. I am not sure I have yet thought through all of the implications of trying to develop a new theory of damage liability. This memo is dictated to help me sort out thoughts, subject to further consideration and discussion with Dan.

My Opinion in Gertz

Although I was proud of the opinion at the time, I now view it as far too long and unnecessarily broad in its sweep. I hope I have learned a good deal about opinion writing since the 1973 Term. But, I think the basic holding of Gertz is clear and sound at that time. It involved a suit by a private party (neither a public

official nor public figure) against a media defendant. Gertz held that in such a suit the states may not permit recovery of presumed or punitive damages in the absence of proof of malice as defined uniquely in New York Times.

Gertz recognized, however, the necessity of an "accommodation of the competing values at stake in defamation suits by private individuals". These values were held to allow "the states to impose liability in such a suit on the publisher of defamation falsehood on a less demanding showing than that required by New York Times", 418 U.S., at 348.[1]

The Gertz opinion went on to say: "[B]ut this

[1]As I read WJB's opinion last Term, he reads Gertz as imposing the identical standard of "actual damages" as in New York Times. Counsel for petr. in this case agrees.

contervailing state interest extends no further than compensation for actual injury." We said it is necessary "to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disgregard for the truth in compensation for actual injury . . . Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamation falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering." Id., at 350.

None of this Court's prior defamation cases involved a private party suing another private party. Justice Brennan would extend Gertz to - and thereby constitutionalize - all defamation suits between private

parties. He rejects any "distinction between media and non-media defendants". But WJB would allow "actual damages" to be recovered when proved. Is this different from New York Times - as Gertz suggested? (I must verify this).

Proposed Reform

Subject to further thought and discussions with Dan, I would consider the following:

1. In private defamation cases such as this, allow presumed damages without proof of malice, but allow no punitive damages. See the instructions given in this case with respect to each type of damages.

2. Hold that punitive damages are not recoverable in any defamation case without regard to

whether or not malice if proved. Recovery against a media defendant would be limited to presumed damages, and allow these only when malice as defined at common law is proved.

3. The argument against the imposition of punitive damages in defamation cases would be broad enough to apply to any cases in which compensatory damages may be recovered. Exception would be made for limited special damages when standards are prescribed by law.

dro 10/18/84

MEMORANDUM

To: JUSTICE POWELL

From: Dan

Re: Dun & Bradstreet

Here is the first draft of the Dun & Bradstreet opinion. The changes are very minor until the end. At that point, I have written a new section distinguishing between presumed and punitive damages and balancing each against the state's interest in compensation. The discussion tracks your ideas as I understand them.

Because the changes affect only one section in a major way, the Publications Office told me not to modify the original ATEX file but to mark up the changes on a xerox of the last draft of the opinion from last Term. This explains why I have given you last Term's version with the changes marked in rather than a clean copy of the whole opinion.

Uncertain whether my ideas were truly following your own, I have not yet asked my co-clerks to edit my changes. If

after quickly going over them you believe that they accurately reflect your views and do no harm to Joe's work, I will hand them over to someone else for improvement.

mention not abrogate. The law of libel up many states

dro 11/12/84

Dan — Your draft is excellent. I have done some editing. See my MEMORANDUM notes below. You can go to a Chambers printed draft if you agree. LFP

To: JUSTICE POWELL

From: Dan

Re: Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., No. 83-18.

My co-clerks have read the draft dissent and helpfully criticized it. I have incorporated most of their suggestions and yours from the last draft. All noticed a tension in the draft which may appear an inconsistency. Although you criticize JUSTICE BRENNAN for abrogating the common law, your own position now also abrogates it. We realized this might be a problem, but I am unsure how to minimize it. Lynda made the suggestion of changing "common law libel actions" to "libel actions" whenever that term appears in order to avoid bringing unnecessary rhetorical attention to the problem. I have done this at several points in the draft, especially in the new section, and I think it helps. Do you think it might also be helpful (1) to criticize JUSTICE BRENNAN not for abrogating the common law, but (2) for abrogating it unnecessarily. Also, might you consider critizing him for being unfaithful to the aims of the common law? One could argue that

yes

yes

But the common law of England has been changed w/respect to punative damages

although you are abrogating the common law, you are at least remaining true to its most important aim in damages--compensation-- } Yes!

while JUSTICE BRENNAN is not.

Lynda also made the suggestion of moving footnote one in the new section up into the text. This is certainly possible, but I hesitated because you mentioned that you wanted this material as a footnote. Would you prefer it in the text?

I now agree

Dan - what do you think of finding a place for the substance of this?

lfp/ss 11/17/84 DB SALLY-POW

Dun & Bradstreet

Reminder to LFP:

When I review D&B consider whether something along the following lines should be added:

Many libeled persons suffer losses of reputation that extend long into the future - even into the history books. The truth often never overtakes a published falsehood, and quantifying the extent of the injury and resulting damages presents a unique problem of proof. For the reasons I have stated, permitting a jury - in the absence of standards of any kind - to award punitive damages is an unprincipled answer to ~~this question~~ the problem of proof. But presumed compensatory damages are a necessary, though an imperfect, means of resolving this problem. A person injured by ~~libel~~ a libelous ~~statement~~ utterance should not go remedyless anymore than one who suffers physical injury.

L.F.P., Jr.

ss

- whether by a media or a non-media defendant -

lfp/ss 10/22/84

MEMORANDUM

TO: Dan DATE: October 22, 1984

FROM: Lewis F. Powell, Jr.

83-18 Dun & Branstreet

On the basis of a first reading of your rider that would become most of Part III of my dissent, I dictate the following thoughts - not in any particular order.

1. I like your transition from last Term's opinion into the distinction between presumed and punitive damages (p. 1). I do question the quote from Gertz with respect to "actual injury". This can be viewed as a stricter standard than presumed injury. In Gertz, I emphasized that there had to be some evidence of actual injury. Perhaps this quote should be omitted.

2. Footnote 1 is excellent, and reflects a lot of careful research on your part. I suggest, however, that we give greater emphasis to the change in Great Britain. In Part I and II of the dissent, we emphasize the common law inherited from England. Try doing a paragraph to be included in the text that refers back to the common law, and points out that this has been modified

in Great Britain on the basis of experience. Then state in greater detail the present law in Great Britain. If there is an English case that is relevant, it should be cited with any quote that may be helpful.

3. At the top of p. 4, "due process concerns" are mentioned without elaboration. Is there any reference to due process or the due process clause in any of the cases cited in n. 1 or in secondary authorities in this country or in England? If so, these might make an interesting footnote.

4. I do not want to generalize with respect to punitive damages in all types of tort cases, as only a libel case is at issue. If, however, there is any authority we could cite, I would like to say in a footnote that in the context of the criminal law, the Due Process Clause is a constitutional protection as vital to our liberties as the First Amendment. Only in civil tort cases may juries impose heavy "fines" witout any of the protections guaranteed by the Due Process Clause and the Sixth Amendment.

5. Also on p. 4, we come to a critical decision that I must make. Your draft states that I would hold that a state may not permit recovery of punitive damages

unless the plaintiff proves actual malice. (emphasis added). Is it logical to allow punitive damages even upon proof of actual malice? Subject to further thought and discussion with you, I am inclined to say that punitive damages are not appropriate even where actual malice can be shown. If I reach this conclusion, I would hold that in a non-media case (such as this case), presumed damages may be recovered with no showing of malice required; but where the libel defendant is a member of the media, I would require proof of actual malice as a predicate for recovering presumed damages.

Of course, the foregoing views would be a significant departure from New York Times and Gertz. This departure might have considerable attraction for the members of the Court who have joined WJB. It would be rejected heatedly by Justices who joined me last Term. If we went this route, WJB might take this part of my opinion away from me. I believe he would be deterred, however, by recognizing that he would be retreating from his views as to punitive damages in Smith v. Wade and the Court's opinion in Silkwood. In any event, this would be an interesting situation.

This is an important decision, and I would like the benefit particularly of your thinking and also of the my other clerks. I leave to you whether to brief them orally, though probably a revision of the Rider along the above lines as a "trial balloon" would be helpful for all five of us to consider.

6. I have some hesitation in appearing to approve the jury instructions given in this case. Perhaps it would suffice if we simply said that in this case the judge recognized in his instructions to the jury the distinction between presumed and punitive damages. This would lead me to affirm as to presumed damages, but reverse as to punitive damages.

At page 6, the Rider states that presumed damages share some of the problems of punitive damages. I doubt the wisdom of moving into this discussion. To be sure, there is an absence of a <u>definitive standard</u> with respect to both types of damages. Yet, the common law has recognized a clear distinction. I failed to do this in <u>Gertz</u>, and therefore I think it best not to emphasize - as the draft does - language from that case. My thinking in this area has undergone a good deal of refinement in the first private libel case I have considered carefully.

7. I have not tried to edit pages 7-10, as I would like to defer this until I make my basic decision as to how far to go. There are some good points made in these pages, particularly the emphasis of the fact that in the typical libel case proof of actual damages rarely is possible. The quote from Justice White that you use is on point. Applying the ordinary standard of proof would indeed be ineffective. In tort actions generally - particularly personal injury cases - compensatory damages are adequate and I would be inclined in the proper case to rule out punitive damages where full compensatory damages are provable. But I need not do so in this case.

L.F.P., Jr.

ss

lfp/ss 10/22/84

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Of course, the foregoing views would be a significant departure from New York Times and Gertz. This departure might have considerable attraction for the members of the Court who have joined WJB. It would be rejected heatedly by Justices who joined me last Term. If we went this route, WJB might take this part of my opinion away from me. I believe he would be deterred, however, by recognizing that he would be retreating from his views as to punitive damages in Smith v. Wade and the Court's opinion in Silkwood. In any event, this would be an interesting situation.

This is an important decision, and I would like the benefit particularly of your thinking and also of the my other clerks. I leave to you whether to brief them orally, though probably a revision of the Rider along the above lines as a "trial balloon" would be helpful for all five of us to consider.

6. I have some hesitation in appearing to approve the jury instructions given in this case. Perhaps it would suffice if we simply said that in this case the judge recognized in his instructions to the jury the distinction between presumed and punitive damages. This would lead me to affirm as to presumed damages, but reverse as to punitive damages.

At page 6, the Rider states that presumed damages share some of the problems of punitive damages. I doubt the wisdom of moving into this discussion. To be sure, there is an absence of a <u>definitive standard</u> with respect to both types of damages. Yet, the common law has recognized a clear distinction. I failed to do this in <u>Gertz</u>, and therefore I think it best not to emphasize - as the draft does - language from that case. My thinking in this area has undergone a good deal of refinement in the first private libel case I have considered carefully.

7. I have not tried to edit pages 7-10, as I would like to defer this until I make my basic decision as to how far to go. There are some good points made in these pages, particularly the emphasis of the fact that in the typical libel case proof of actual damages rarely is possible. The quote from Justice White that you use is on point. Applying the ordinary standard of proof would indeed be ineffective. In tort actions generally - particularly personal injury cases - compensatory damages are adequate and I would be inclined in the proper case to rule out punitive damages where full compensatory damages are provable. But I need not do so in this case.

L.F.P., Jr.

ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

NOV 2 3 1984

83-18 Dun & Bradstreet

Dear Chief:

I am circulating an opinion along the lines I indicated at Conference. I adhere to my view of last Term that the entire law of libel should not be constitutionalized. This would be an unprecedented extension of New York Times and Gertz.

After considerable thought, I have concluded that punitive damages should be abolished except where authorized by a statute that prescribes appropriate standards. The imposition of punishment is a function of the state, not of lay juries without standards or statutory limitations. I do not see how permitting a jury to impose private fines can be reconciled with the Fifth and Fourteenth Amendments. Also the purpose of tort recovery is to compensate - not to confer a windfall.

Accordingly, I would hold that in libel cases against non-media defendants punitive damages are improper. I would allow presumed damages that traditionally have been viewed as compensatory. As at common law, no showing of malice should be required.

In libel suits against a media defendant, on the other hand, I would adhere to New York Times and Gertz and allow presumed damages upon proof of actual malice. I would not allow punitive damages as they are not compensatory.

The opinion is divided into parts so that you may, if you wish, join it in part. You would be welcome.

Sincerely,

Lewis

The Chief Justice

lfp/ss

cc: Justice Rehnquist
Justice O'Connor

Wayne. Beauty & case.?

dro 12/17/84

MEMORANDUM

To: JUSTICE POWELL

From: Dan

Re: 2d Draft of JUSTICE BRENNAN'S opinion in Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., No 83-18.

JUSTICE BRENNAN has decided to make surprisingly few changes in response to your revised dissent. I discuss each in turn.

1. In footnote 5, JUSTICE BRENNAN attacks your distinction between media and nonmedia defendants. This is not new, of course, but he has changed his discussion to focus on presumed damages. As before, he takes you to task particularly for your failure to draw lines. Your discussion about how it would be unwise and injudicious for the Court itself now to draw lines responds to this attack.

The second paragraph of footnote 5 quotes a passage of yours from Gertz in which you pointed out that "the doctrine of presumed damages invites juries to persecute unpopular opinion rather than to compensate individuals for injury sustained by the publication of false fact." 418 U.S., at 349. I do not quite know how to respond to this beyond what is already in the dis-

See my Rider

sent. I think it would be counterproductive to try now to disavow what was said in Gertz. You might, however, consider adding a footnote pointing out that presumed damages, like awards of actual damages, are subject to appellate review on the ground that the jury's prejudice made them excessive.

2. In footnote 9, JUSTICE BRENNAN argues that in cases of commercial speech "proving actual damages is relatively easy." The only authority for this proposition is the anecdotal example he offers. It would be easy enough to come up with a few others in which the opposite is true. Unfortunately, the case itself is not the best such example.

Ignore

JUSTICE BRENNAN also misses the point of part of your argument. From the last sentence in footnote 9 it appears that he thinks you believe that damages in libel cases involving commercial speech are inherently more difficult to measure than damages in libel cases involving other kinds of speech. Your argument is different. It is, as you state quite clearly, that commercial speech is subject to less constitutional protection. I am not quite sure how you can make this clearer short of directly pointing out JUSTICE BRENNAN'S confusion. Perhaps it would be better simply not to respond to this particular point on the ground that readers will understand you.

Yes

3. JUSTICE BRENNAN is right in saying that the state cases in footnote 10 do not distinguish between media and nonmedia defendants. You could respond by saying that his view still abrogates

Dan - do most of these cases say there is no distinction & why, or do they simply require malice

w/o proving malice

common law by constitutionalizing the law of some states. Such a step not only overrides the judgments of the other states but also prevents these states themselves from ever changing their common law rules in the future to make this distinction. The only difficulty with making this type of abrogation argument is that it also applies--and perhaps with more force--to your own argument on punitive damages.

dro 12/18/84

MEMORANDUM

Please revise and circulate.

Renewed - A perceptive memo with which I agree. I also was surprised by WJB's stress of new cases apparently WJB and I both missed them.

To: JUSTICE POWELL

From: Dan

Re: Further Reflections on JUSTICE BRENNAN'S 2d Draft of Dun & Bradstreet, No. 83-18.

I have read most of the cases JUSTICE BRENNAN cites in his footnote 10. None of ~~the~~ his cases from the jurisdictions we claimed had abolished punitives indicates that they have not done so. Eleven of the cited states simply apply the New York Times actual malice standard to both media and nonmedia defendants without discussing any possible distinction. Eight states go further to "hold" that the actual malice standard applies to media and nonmedia defendants alike. 8 States Two cases cited are not clearly relevant. And one case states that "[i]t is plain that the holding in Gertz was limited to media expression." Jacron Sales Co. v. Sindorf, 350 A.2d 688, 694 (Md. 1976). This same case, however, goes on to hold that as a matter of state law there is no distinction. This is the only case of those I have read that decides the issue on state law grounds. All the other cases holding that no distinction should be made rest on state court (mis)interpretations of Gertz.

Two kinds of response are possible. First, you could say that most cases that have applied the actual malice standard to nonmedia defendants have apparently not really considered whether they should do so. Since these cases do not actually consider or even discuss the issue, they do not stand as strong authority against you. Even the ones that do discuss it, you could argue, do not pose much of a problem. Since they rest--with one exception--on interpretations of Gertz, they indicate at most what the state courts believe the federal Constitution requires them to do, not what their own common law would require if it had not been abrogated. Only the Maryland case goes clearly against you.

Second, in going through all the state cases I was pushed into rereading New York Times and few of this Court's other pre-Gertz cases. I noticed that several of them, including New York Times itself, apply the actual malice standard to nonmedia defendants. St. Amant v. Thompson, 390 U.S. 727 (1968) (political candidate); Henry v. Collins, 380 U.S. 356 (1965) (per curiam) (individual arrested for disturbing the peace); Garrison v. Louisiana, 379 U.S. 64 (1964) (district attorney); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (private citizens who placed ad in newspaper). This is not to suggest that you should abandon your distinction between media and nonmedia defendants. Rather, I recommend that you modify it. From your dissent, it appears that you are not interested so much in distinguishing between media and nonmedia defendants as between libels involving media and nonmedia expression. This Court's prior cases, more-

That is true

over, support something like the second distinction but not really the first. St. Amant v. Thompson, supra (televised speech by nonmedia defendant); Henry v. Collins, 380 U.S. 356 (1965) (per curiam) (news articles reported by individual arrested for disturbing the peace); Garrison v. Louisiana, supra (press conference by district attorney); New York Times Co. v. Sullivan, supra (ad in newspaper placed by private citizens) May I suggest that you consider recharacterizing the distinction as one between private and public expression. This recharacterization would better accord with this Court's prior cases and would also harmonize nearly all of the state cases JUSTICE BRENNAN cites in his footnote 10. Such a change of emphasis would, I believe, also better mesh with your distinction between commercial and noncommercial speech.

agree

This modification would also follow two remarks of yours in the current draft of the dissent. On page 5, for example, you distinguish Gertz from the present case as follows:

> "Gertz involved a media article directly relevant to the effective operation of our system of democratic self-government.
>
> In contrast, the case today is a purely private defamation action ...." (emphasis added)

Similarly, on pages 10 and 11 you discuss why the libel in this case should be subject to reduced constitutional protection:

> "I think it clear that the libelous speech at issue here implicates the First Amendment at most only tangentially. Petitioner's credit reporting is purely private. It does not appear in a newspaper or magazine of general and regular circulation nor on the broadcast media. In fact, petitioner's subscription agreement prevented its clients from disseminating its credit information." (emphasis added) (citations omitted).

In this passage at least, it appears that you viewed the fact that there was a media defendant as significant because it evidenced that the libel was a public, as opposed to a private, expression. Making this clear would pull the teeth out of JUSTICE BRENNAN'S criticism.

I am sorry to be suggesting such a change to you now, but because I did not question last year's research in the earlier part of the opinion, I was as surprised as you to see the many cases in footnote 10.

lfp/ss 12/17/84 Rider A, p. (Dun & Bradstreet)

DBBLANK SALLY-POW

2nd draft

My opinion for the Court in Gertz, as the Court today noted, did not distinguish between presumed and punitive damages in libel suits against media defendants. Ante, at n. 5, p. 15. Upon more mature reflection, required today when the Court in this case in which constitutionalizes the entire law of libel, I find both historic and logical reasons for the distinction I now make.

The purpose of presumed damages essentially is compensatory. As I have noted in the text above, they are appropriate where it is clear from the nature of the libel that injury occurred and where proving a dollar amount for the injury often is impossible. This compensatory rationale for allowing presumed damages is wholly different from allowing a private litigant to punish a defendant by awarding punitive damages without due process of any kind.

dro January 24, 1985

MEMORANDUM

To: JUSTICE POWELL

From: Dan

Re: Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 83-18.

I enclose a private letter JUSTICE O'CONNOR sent over yesterday on this case. Although she asked that you not see it until you return to Washington, when I saw it concerned Dun & Bradstreet I asked if I could send it along to you. I explained that you had already asked me to send you some materials on this case and were thinking about it now. The clerk working on the case for JUSTICE O'CONNOR thought I could send it along so long as I was sure to say that you should not feel any pressure to respond or indeed even to think about it until you are back in Washington and feeling fine. There you have it.

re O'C's suggestion
has merit.
I will review it
with sympathetic
interest
1/25/85

dro 02/14/85

MEMORANDUM Return to Dan

To: JUSTICE POWELL

From: Dan

Re: February 13th Draft of Dun & Bradstreet.

I have revised the last draft of Dun & Bradstreet to work out the problems with JUSTICE O'CONNOR'S suggested changes. The new draft is much closer to your second draft. Scott Bales, the O'Connor clerk working on the case, went over the new draft with me and said that he didn't see anything in the revisions that he had reason to believe JUSTICE O'CONNOR would object to. Rather than send the revisions on to her, I thought it would be better to let you see them at this point. The new language does, I believe, avoid most of the problems that JUSTICE O'CONNOR'S original suggestions could have led to.

I have started working on splitting the opinion into two. Unfortunately, the logistics of it are so complicated that I will have to work with a person in the computer room who is only there Mondays through Fridays from 9 to 5. We have tentatively arranged to start working on the split on Monday. Since this is a rather unusual task for them, I have been told that we might run into problems and that it might take more than just one

day. With any luck, I'll have both opinions to you around the middle of next week.

As you requested, I have enclosed a copy of your second draft in Dun & Bradstreet, the one that contained the language you were most happy with. As you will see, the latest version largely returns to our original formulation, namely, that "private expression on matters of private concern" is subject to reduced constitutional protection. This is most clearly stated on page eight of the latest version.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 25, 1985

MEMORANDUM TO THE CONFERENCE

No. 83-18

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.

Obviously, Byron's dissent requires a considered response. I'll undertake to make one as soon as I can.

Sincerely,

Bill

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 25, 1985

83-18 - Dun & Bradstreet, Inc.
v. Greenmoss Builders, Inc.

Dear Bill,

It will not surprise you, I am sure, to learn that I am voting to affirm in this case. I shall circulate shortly indicating my position. Neither am I joining Lewis at this point. Having said this, I am fleeing the city for a week or two.

Sincerely,

Byron

Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 1, 1985

Re: No. 83-18 Dun & Bradstreet v. Greenmoss Builders

Dear Lewis,

I don't fully agree with either your circulation or Byron's as they now stand, I want very much to affirm the judgment of the Supreme Court of Vermont, and I have a strong disinclination to write anything on my own where the Court is already going to be fragmented.

Bill's objection is that may op. is limited to this case!

My principal difficulty with your circulation, which has evolved only after I have given considerable thought to it, is its emphasis on the fact that in this case we have a "matter of private expression" on a matter of private concern." See, e.g., page 8 of your circulation of February 22nd. I would like to see the emphasis on the "private" nature of the expression either removed or very much subdued, because it seems to me that the way it is now the doctrine has a very ironic twist. A "private expression" that may be circulated to only three or four people is subject to no constitutional protection, but a similar expression on a matter of "private concern" that is circulated to 1,000 people may be able to claim constitutional protection. This runs contrary to one of the principal tenets of libel law, as I understand it, a tenet based on the idea that the greater the circulation of the falsehood, the greater the damage to the plaintiff. Wouldn't it be enough in this case to say that the matter was one of "private" concern--e.g., not a matter of "public concern" and dispense with the fact that it was not widely circulated. If one who falsely defames can gain some sort of constitutional immunity by widely circulating the defamation, I think the doctrine has very little to commend it, and I think you end up deciding only this case.

Ask Dan why this is not so

Bill's view

what is answer

The distinction between matters of "public concern" and other matters, which Bill Brennan attempted to draw in his

Typ

Bill agrees we rejected Rosenbloom test in Gertz

plurality opinion in Metromedia, 403 U.S. 29, 44, is by no means an easy one, and I think the Court rejected it in Gertz when offered as a substitute for the distinction between public figures and private figures in constitutional libel law. Nonetheless, unless one is to go all the way with Bill Brennan and constitutionalize everything--which I certainly don't want to do--or draw the line between media and non-media defendants--which I likewise do not want to do--some useful distinction that can be developed in subsequent cases has to be made here. I think the one you have hit upon--"matters of private concern" versus other matters--is worth a try, but I don't think it should be freighted with the additional requirement that the circulation or expression be "private." I also think that Byron's opinion for the Court in Connick v. Myers offers some additional guidance on matters of public concern versus matters of private concern.

key is subject of libel is one of private concern.

If you find it is not palatable to modify your opinion in this regard, I will think anew and much more promptly than I have previously done about what to do in this case. It is not clear to me from Byron's circulation whether he would affirm the judgment of the Supreme Court of Vermont; but if he would, I might well join him. But since Sandra has already joined you, I would like to join you if possible.

Sincerely,

WEB

Justice Powell
Justice White
Justice O'Connor

Under Bill view, even if libel is published by NYT, it would have no Const. protection unless the Π is a public figure or public official. The test would be the "subject" of libel. If NYT had falsely published that Resp. was bankrupt, it would have no const. protection. State libel laws would apply.

dro 02/11/85

MEMORANDUM

To: JUSTICE POWELL

From: Dan

Re: Revisions to Your Opinion in Dun & Bradstreet, No. 83-18.

(3rd Draft ~ 2/9)

I have made the changes which JUSTICE O'CONNOR suggested. From what I understand of JUSTICE WHITE'S position, these changes should make the opinion more to his liking. My only worry is that the changes will practically overrule Gertz in two respects. First, by distinguishing Gertz on the ground that it concerned "public expression upon matters of public importance or concern," the draft essentially adopts the Rosenbloom test, which this Court expressly rejected in Gertz. The Court rejected it there for two reasons: (i) it inadequately protected both the state interest in compensating private individuals for injury to their reputations and the First Amendment interest in protecting the press when it has taken every reasonable precaution to ensure against falsehood and (ii) it was almost impossible to apply in a principled fashion. Both these difficulties still apply, especially the second. Furthermore, if the new standard is interpreted quite narrowly, as JUSTICE O'CONNOR and certainly JUSTICE WHITE would like, it would allow states to subject defendants to strict liability for defamatory statements in many cases. For,

But there was a media defendant

under it, as long as the libel does not concern a matter of public importance, none of Gertz's constitutional protections (even the limited limitations imposed on private figure suits) apply. This is one of the exact concerns that caused you to reject the Rosenbloom standard in Gertz:

> "[Under the Rosenbloom standard, a] publisher or broadcaster of a defamatory error which a court deems unrelated to an issue of public or general interest may be held liable in damages even if it took every reasonable precaution to ensure the accuracy of its assertions. And liability may far exceed compensation for any actual injury to the plaintiff, for the jury may be permitted to presume damages without proof of loss and even to award punitive damages." Gertz, 418 U.S., at 346.

Second, there is a real danger that lower courts (or even this Court) might interpret the "public importance or concern" standard to be roughly coextensive with the Gertz public figure test. From my conversation with JUSTICE O'CONNOR'S clerk, this appears to be what she has in mind. Doing so, however, would effectively overrule the larger part of Gertz. For if the line between public and private figures nearly matches the line between matters of public and private importance or concern, defendants in suits brought by private figures would be accorded no First Amendment protection at all. The careful accommodation of interests you worked out in Gertz would come to nought. The only way to avoid this danger and ensure that the Gertz accommodation is preserved is to make clear that the "public importance or concern" distinction is quite different from the one between public and private figures. A short discussion in the opinion of the relative scope of the public importance or concern test and the public figure distinction would make clear that there should be

three tiers of protection: (i) no special protection for speech not involving matters of public importance or concern (in a broad sense); (ii) limited protection for libels of private figures involving such matters; and (iii) full protection for libels of public figures involving such matters. If this is not made clear, the lower courts might interpret the new standard much too narrowly and squeeze out the second category of speech. The difficulty with making it clear, of course, is that JUSTICE WHITE and perhaps others in your potential majority might object. For the more narrowly the new standard is interpreted, the more Gertz is overruled.

I write all this so that you may consider whether you would like a very short discussion making clear the relative scopes of the different standards without defining them precisely. I understand from Lynda that you would like me to start working on splitting the punitive damages section of the opinion away from the rest. I'll start right away. I'll also give you a call this afternoon after you may have had time both to look over the changes already made and consider whether you would like me to include a brief discussion like the one I suggested.

2/14

Talked to Dan on 2/11
he will try another draft.

WJB – "content based destruction"

~~SOC~~

~~The problem~~

SG'C would like to extend the ~~last part of my~~ second component of my test ("matter of private concern") to enable courts to ~~read~~ read Gertz narrowly – if not as having been overruled.

D & B 1

Our present conf. Draft is limited to the cases where both publication & subject are private

B R W's Letter:

A media D (e.g. Wall St Journal) always will publish publicly. Thus under Gertz, it would be liable only if malice is shown.

BK

→ makes sense

B R W says it makes little sense to give more protection (the malice defense) to a defendant who publishes its libel than to the defendant who did not publish publicly.

Thus, W/S Journal - having given wide publicity to the libel - would fare better than D. & B. that had published only privately.

Rosenbloom 1.

B. R. W. thinks I could simply apply Gertz to matters of "public importance" whether published privately or publicly. (i.e. whether media or non-media) - We would affirm here because no matter of public importance
B R W would favor

3315

Thanks Fields' cosher,

D. & B. – Sandra 2/16

New draft that I hope you will find acceptable.

1. Its reasoning is ~~that~~ that where the "expression is private", & the issue is one of "private concern only", N & T & Gertz do not apply. (your view)

2. I have omitted discussion of distinction bet. ~~pre~~ "presumed" & "punitive" damages.

Opinion is limited to this case – many others like it

3. I may write a separate op.

Met Life

Dam

Dunn & Brad

1. Changes pp 1-10 are OK.

2. Discussion of punative damages starts at p 11.
   This would be omitted if WHR 50 C & C J except pp 1-10.

3. The bottom line there would be to "affirm" + simply say nothing about punative damages.

3. I could forego a "Separate Op" if this would facilitate a court ruling on pp 1-10. (private expression on matter of private concern)

But would like a separate Op if we can make it reasonable to do this.

Probably would say that destruction but "presumed & punative" was not presented in this case. I would write separately to say the issue is simple, & merits consideration in a

N Y T - public official
Gertz - private person
~~Rosenbloom~~ Rosenbloom - matters of public imp. or concern even when no "public figure or public person was involved. (WJB would extend his malice standard whenever issue was of public importance).

(required malice when ~~press~~ media is sued)

applied N Y T standard

My 1st op. - distinction bet. med & non-med Δs

My 2nd op - distinction: ~~between~~ in based on:
~~as to subject matter~~
(i) "private expression"
or an issue of purely
(ii) private concern." (see p 1) —
not on whether Δ was media
or the π a public figure.

Assume: John Smith (a nonentity) was included in a list of persons with several felony convictions ~~who had been pardoned~~ by a newspaper falsely
Smith sued - no pub. issue
no public figure.

dro 03/01/85

WHR joined Gertz
WJB dissented because we held for Gertz on ground he was neither a public person or public official.

MEMORANDUM

To: JUSTICE POWELL

From: Dan

Re: JUSTICE REHNQUIST'S Views on Dun & Bradstreet.

JUSTICE REHNQUIST has just written you a letter (attached) in which he expresses certain reservations with the current draft of Dun & Bradstreet. In short, he asks you to drop the "public expression" prong of your test and, in effect, adopt JUSTICE WHITE'S position. On the second page of his letter he admits that this is tantamount to accepting the Rosenbloom test. (not all 4)

WHR recognizes this would establish Rosenbloom test

In our previous discussions, we considered the consequences of taking this position. You would not only have to adopt a test rejected in Gertz, but also risk in practical terms overruling much of what Gertz accomplished. This risk stems from the way the Rosenbloom standard would define the threshold for First Amendment protection. JUSTICE WHITE'S position would, in effect, define three categories of libel: (i) libels not about matters of public concern, which would receive no First Amendment protection; (ii) libels on matter of public concern involving a private figure, which would receive reduced First Amendment protection; and (iii) libels on matters of public concern involving public figures, which would receive enhanced First Amendment pro-

but the issue was public ?

* There is N.Y.T.

tection. The achievement of Gertz lies in its creation of the second category. JUSTICE WHITE'S position threatens this second category in the following way. If "matters of public concern" is not interpreted quite liberally, then the threshold for any sort of First Amendment protection will be quite high and might approach the dividing line between the second and third categories of libel. (Of course, the public/private-figure distinction operates on a slightly different dimension than does the public/private-"matter of concern" distinction, but in practice they could define fairly coextensive categories of speech.) This high a "threshold" would effectively squeeze out the second category of speech, which Gertz created. There would then be a regime granting New York Times protection to certain kinds of speech and no protection--reduced or otherwise--to everything else.

I see only one ground of possible compromise. You could, as JUSTICE REHNQUIST suggests, adopt JUSTICE WHITE'S approach, but make it very clear that Gertz still applies to a broad category of speech. In other words, you would have to say that the term "matters of public concern" is to be interpreted quite broadly and that it includes much more than just speech concerning public figures. Such an approach would preserve Gertz's achievement, but it would still, of course, adopt the very standard rejected by Gertz. It would adopt it, however, for a different purpose than that for which JUSTICE BRENNAN proposed it in Rosenbloom. The Gertz public/private-figure distinction would remain, but it would apply only in the sphere defined by

Rosenbloom. Thus, you would be adopting Rosenbloom as a "supplement" to Gertz, not as a replacement for it, and not all of your reasons in Gertz for rejecting the Rosenbloom standard would still apply. It would still be true, of course, that the Rosenbloom standard would require courts to make content-based determinations, which you thought somewhat invidious in Gertz. However, the other Gertz concerns justifying adoption of the public/private-figure distinction over the Rosenbloom distinction would not be disturbed, for they would still operate though now only as to "matters of public concern."

At this point, I really don't know what to suggest. You have made reasonable accommodations to the views of others without much success. Further concessions, while possibly gaining a Court or plurality, entail some risks and in practical terms would require major changes in the opinion. You would probably have to drop the whole section discussing private expression and perhaps much of the discussion of commercial speech. Both would be largely displaced by a discussion focusing on "matters of public concern."

JUSTICE O'CONNOR'S clerk asked me to tell you that she was "surprised and shocked" by JUSTICE REHNQUIST'S letter and will stay with you whether or not you follow its suggestions.

I will be in tomorrow (Saturday) and may ask the police to drive a memo on Atkins v. Parker over to you in the evening. Unfortunately, I will not be able to make it in until lunchtime because of physical therapy I am undergoing for tendonitis in my right elbow.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 1, 1985

Re: No. 83-18 Dun & Bradstreet v. Greenmoss Builders

Dear Lewis,

I don't fully agree with either your circulation or Byron's as they now stand, I want very much to affirm the judgment of the Supreme Court of Vermont, and I have a strong disinclination to write anything on my own where the Court is already going to be fragmented.

My principal difficulty with your circulation, which has evolved only after I have given considerable thought to it, is its emphasis on the fact that in this case we have a "matter of private expression on a matter of private concern." See, e.g., page 8 of your circulation of February 22nd. I would like to see the emphasis on the "private" nature of the expression either removed or very much subdued, because it seems to me that the way it is now the doctrine has a very ironic twist. A "private expression" that may be circulated to only three or four people is subject to no constitutional protection, but a similar expression on a matter of "private concern" that is circulated to 1,000 people may be able to claim constitutional protection. This runs contrary to one of the principal tenets of libel law, as I understand it, a tenet based on the idea that the greater the circulation of the falsehood, the greater the damage to the plaintiff. Wouldn't it be enough in this case to say that the matter was one of "private" concern--e.g., not a matter of "public concern" and dispense with the fact that it was not widely circulated. If one who falsely defames can gain some sort of constitutional immunity by widely circulating the defamation, I think the doctrine has very little to commend it, and I think you end up deciding only this case.

The distinction between matters of "public concern" and other matters, which Bill Brennan attempted to draw in his

plurality opinion in Metromedia, 403 U.S. 29, 44, is by no means an easy one, and I think the Court rejected it in Gertz when offered as a substitute for the distinction between public figures and private figures in constitutional libel law. Nonetheless, unless one is to go all the way with Bill Brennan and constitutionalize everything--which I certainly don't want to do--or draw the line between media and non-media defendants--which I likewise do not want to do--some useful distinction that can be developed in subsequent cases has to be made here. I think the one you have hit upon--"matters of private concern" versus other matters--is worth a try, but I don't think it should be freighted with the additional requirement that the circulation or expression be "private." I also think that Byron's opinion for the Court in Connick v. Myers offers some additional guidance on matters of public concern versus matters of private concern.

If you find it is not palatable to modify your opinion in this regard, I will think anew and much more promptly than I have previously done about what to do in this case. It is not clear to me from Byron's circulation whether he would affirm the judgment of the Supreme Court of Vermont; but if he would, I might well join him. But since Sandra has already joined you, I would like to join you if possible.

Sincerely,

WJBrennan

Justice Powell
Justice White
Justice O'Connor

lfp/ss 03/04/85

Dun & Bradstreet

MEMO TO MYSELF:

Apart from the general complexity of the libel area involved, I am handicapped here in the apartment without books and face-to-face discussion with Justices as well as Dan.

Stated in the most elementary and summary way, my understand of the present status of relevant libel law is as follows:

1. Constitutional protection for the media (the malice test) was provided in NYT where the suit was brought by a public official. The Court did not consider whether there would be constitutional protection if a private individual had been the libeled plaintiff when the issue was one of public importance.

2. As I pointed out in Gertz, the N Y.T. constituional protection was extended where libel suits were brought by "public figures" - not merely public officials. The cases, as I recall, involved Coach Bear Byrant of Alabama and also a retired general named Walker.

3. As I view it now, my opinion in Gertz is an example of overwriting a Court opinion. I said much that

was unnecessary to a decision of that case. A large part of Gertz is dicta. In Gertz a libel was published by a media publication against Gertz who was neither a public official or public figure. The subject of the libel was a case of general public interest, although my recollection is that the decision in Gertz did not "turn" on this fact.

4. Roosenbloom was addressed and criticized in Gertz. Justice Brennan in Rosenbloom would have extended N.Y.T. to libels of private persons if they concerned matters of general public interest. But the holding in Gertz was that since petitioner was not a public figure, the defendant magazine was not entitled to the N.Y.T. malice defense. I was impressed, by the argument that a private person - unlike a public official or a public figure - usually is in no position to protect himself when libeled by the media. He has limited access to reply, and probably limited means to sue.

5. Dun & Brandstreet (D&B) presents here for the first time the question whether the constitutional rule of N.Y.T. and Gertz should be extended where both the personal libeled is private, and the subject matter of the expression was of no general public interest under the rationale of Justice Brennan's opinion in N.Y.T. Four

Justices are willing to say "yes". This would constitutionalize the entire law of libel. It now appears that there are five Justices unwilling to go this far. Stated very generally, the positions of the five of us are as follows:

(i) The CJ has joined no one, but has told me privately that he would join almost any opinion that is contrary to Brennan's opinion.

(ii) After making a false start based on the distinction between media and nonmedia defendants, I would decide this case on its facts - the critical ones being: (a) the subject of the libel is purely private and of no general public interest; and (b) the defendant was nonmedia and its circulation of the libel had been essentially private.

(iii) Justice O'Connor has joined my opinion, and thought that WHR and the Chief also would join. Despite recent letters from BRW and WHR, Justice O'Connor's clerk advises that she is still "with me".

(iv) After telling me that he had only minor changes to suggest, WHR's letter of March 1 expresses concern over the second element of my opinion, namely, that not only the libel must be private in character but

also its publication must essentially be private. Bill thinks there is an overemphasis on the second "privacy", and suggests that this either be removed or "very much subdued".

(v) Bill gives a rather telling example of how he views the consequences of my position: Under my analysis, as he reads it, if the libel in this case had been published widely by Dun & Bradstreet - say to a thousand of its subscribers in New Hampshire - there would have been no "private expression" and therefore the mere fact of extensive publication would entitle the defendant to constitutional protection. Bill therefore puts the following question:

> "Wouldn't it be enough in this case to say that the matter was one of 'private' concern - e.g., not a matter of public concern, and dispense with the fact that it was not widely circulated?" (see WHR's letter).

Bill goes on to say that if one who libels a private person can gain some constitutional immunity by widely circulating the defamation, the "doctrine has very little to commend it".

(v) Byron has expressed a similar view but in an opinion that seems to go well beyond what Bill Rehnquist has in mind.

* * *

As Dan's memo of March 1 points out, I am left in something of a dilemma particularly in view of what I wrote (perhaps unnecessarily) in Gertz. I can justify my present opinion on the ground that it goes as far as we need to go to decide the only question before us. I believe this is Justice O'Connor's view also. Yet, this would not be a helpful precedent There is considerable force to Bill Rehnquist's position.

My options appear to include the following:

1. Stand on my present opinion, with O'Connor joining it. This probably would not command a Court, as the Chief dissented in Gertz, and tends generally to agree with Byron that libel defendants already have too much protection. Thus, there probably would be three opinions: Brennan's, White's and mine. The bottom line would be to "affirm", but the law would still be left in considerable doubt.

2. I could, possibly, revise my opinion to focus primarily on the private character of the libel and

the absence of any general public interest in it. In other words, leave open the relevance of the extent to which the libel was circulated. This would require considerble revision of my opinion, but perhaps not as much as Dan suggests. I would not be "holding" that the extent of circulation is irrelevant where the subject is purely private.

3. I could accept WHR's views and probably get SOC and the CJ to agree.

* * *

After talking to Dan, I may then talk to WHR and SOC or try making some revisions in the present draft. I am not happy about wrestling any longer with this case - particularly under my present handicaps.

L.F.P., Jr.

ss

dro 03/05/85

MEMORANDUM

To: JUSTICE POWELL

From: Dan

Re: Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., No. 83-18.

I have spoken to Alan Vickery, one of JUSTICE REHNQUIST'S clerks, about this case. He believes that JUSTICE REHNQUIST would like you to drop entirely the private expression prong of your "private expression on a matter of private concern" test. This makes JUSTICE REHNQUIST'S position practically identical to JUSTICE WHITE'S. Dropping the "private expression" prong is no problem, but I do have one concern that I thought I should mention to you before I proceed very far.

WHR's view

Affirming the Vt. S. Ct. in this case on the ground that the First Amendment applies only when a libel involves a matter of public concern would imply that bankruptcies and perhaps most instances of commercial speech are not mattters of public concern. This was not a source of concern in the previous drafts because they made clear that commercial speech was entitled to some, albeit reduced, protection. It was only when the context of the speech was also private than no First Amendment protections applied. If you drop the private expression prong and af-

firm the Vt. S. Ct., bankruptcy reports and presumably many other commercial speech matters will be entitled to no protection--no matter what the context. The difficulty will come in distinguishing later cases involving commercial reporting, say a Wall Street Journal report on a bankruptcy, like that of the Johns Mansville Co. Since the test would look only to the content, not to the context, of the speech, I am not sure that there would be any principled way to distinguish this other type of case. It seems from your footnotes in the earlier drafts of the opinion, however, that you do see a difference. I would be wary of resting such a "distinction on," among other things, the size of the company, since the bankruptcy of a small company in a small Vermont town could be of "more public concern" to the relevant audience than the bankruptcy of the larger company would be. Distinguishing on the basis of the size of the interested audience would also appear unsatisfactory, because it would represent a return to the "private expression" test.

In short, if you see no problem with not offering commercial reporting any protection, then there is nothing wrong with affirming the Vt. S. Ct. on the ground that the speech in this case does not involve a matter of public concern. I can simply redraft the opinion to drop all reference to "private expression." If, on the other hand, you do see a problem, I am unsure how to proceed. I see three choices: (i) adopting a different test; (ii) creating a new category of speech that is entitled to some, but not Gertz, protection; or (iii) adopting the public concern test but reversing the Vt. S. Ct. in this case on

but not in this case

the ground that commercial reporting does involve matters of public concern. From what I can tell, the first approach would not gain JUSTICE REHNQUIST'S vote. The second probably would not either and it would complicate further an already complex area of law. The third approach, however, might have some benefits. For one thing, the test, if not the result, would command a majority of the Court, for you would essentially be adopting JUSTICE WHITE'S position. For another, your result would command a majority, although a different one, for it is the same result reached in JUSTICE BRENNAN'S four-justice opinion. The third choice would, however, entail a surprising change in outcome.

I draft this memo not to convince you of the merits of any particular approach, but rather to apprise you of the particular difficulties to which each would lead. Because the implications of moving to a "public concern" test touch upon some of the motivating concerns of your very early drafts, I thought I should bring these implications to your attention before proceeding very far.

3/7

D & B

Possible compromise:

1. W & R dislikes emphasis on "private expression". Could we de-emphasize.

2. Retain emphasis on "private concern" but leave open when ~~the~~ expression may be viewed as public.

See ~~[redacted]~~ p. 9

In this case where there was no public interest in the NYT sense, I'd reach same result if D & B had circulated to 1000 customers.

3. If the D & B ~~report~~ to 1000 had said the only bank in town was bankrupt, there were be local public concern.

But would this be the type of public concern ~~often~~ with the NYT / Gertz sense of "robust debate" on public issues?

4. A Johns Manville or Continental Bank situation would be of national economic concern, & expression would be public.

5. Leave open when the expression is public - just as we leave ~~[illegible]~~ open when it is private.

Dan suggests:

dro 03/21/85 No changes until we know reaction of ~~Gertz~~ WHR + 50'c. As now written the opinion says nothing about "liability standards". Gertz said "strict liability" was out (i.e. there must ~~be~~ at least be proof of negligence or some fault ~~etc~~

MEMORANDUM

To: JUSTICE POWELL

From: Dan

Re: JUSTICE BRENNAN'S Fourth Draft in Dun & Bradstreet.

This is the strongest draft yet from JUSTICE BRENNAN. Apart from making a very strong and spirited defense of New York Times v. Sullivan, it makes two points which you should keep in mind when preparing the next draft.

First, JUSTICE BRENNAN argues that this case concerns only damages rules and not "liability standards". Technically, of course, he is correct. Because the jury found that Dun & Bradstreet acted with negligence, neither party argues against the Gertz requirement of some kind of "fault." You could make clear (1) in a footnote, if you wished, that your opinion expresses no views on liability standards or ~~that~~ it retains the minimum liability standards described in Gertz. The former position would leave unclear whether States could impose strict liability for libels not involving matters of public concern while the latter would make clear that they cannot. I would be happy taking either position, but I am not sure how much sense it would make to say that the First Amendment either does or might abrogate one kind of standard but not the other. Also, taking either of these

"negligence" was conceded

My options

* my op could say I'd

positions might kill any chance that JUSTICE WHITE might join your opinion. As his dissent in Gertz indicates, his greatest concern in this area is that States be permitted to impose strict liability. You should give this issue some thought, for in the end liability standards are at least as important as those for damages.

Second, JUSTICE BRENNAN tries to hold you to much of your language in Gertz and tries to show that the Court's prior commercial speech cases compel the holding that Dun & Bradstreet's credit report is deserving of First Amendment protection. His attack on these grounds should not present too much of a problem. You can, I believe, distinguish most of the commercial speech cases he cites and rely on other cases, e.g., Connick v. Myers, for your "public concern" standard.

Because the only two votes still up in the air are THE CHIEF JUSTICE'S and JUSTICE WHITE'S, I would suggest that you make no changes at this point unless you feel that there is a danger that they might be persuaded by some of JUSTICE BRENNAN'S criticisms. It would be better, I feel, to wait to see what changes they may suggest before trying to answer JUSTICE BRENNAN. Also, it would be easier to respond to JUSTICE BRENNAN when we transform the opinion into a plurality or (we can hope) majority opinion. For now, I suggest you just sit tight.

Liability standards

D. & B;

3/22

WJB's op. of 3/20

Dan - points

1. See my notes on back of op.

2. Statement as to Gertz (p 14) - no presumed or punitive damages in ~~any~~ any libel suit." Repeated p 16. But see n 4, p 19

(made only as to suits by private party vs media on "public issue")

3.

4. WJB returns his 35 of 42 states note - n 5, p 19

3. "Only Q presented is "whether the jury award of presumed & punitive damages on less than a showing of actual malice is ~~cons~~ const. permissible? - 19 We say it is where subject is of gen. interest.

WJB says Gertz provides answer - 19 But

Talk to Dan

→ "Liability standards" (Gertz left to states) but fault not required

~~Negligence~~

Standards included no fault need be shown Malice

dro 05/14/85

MEMORANDUM

To: JUSTICE POWELL

From: Dan

Re: Comments other Chambers on Dun & Bradstreet.

Clerks from several other Chambers have spoken to me about three words in our draft that they consider misleading. On page 5, we state that "the Court [in New York Times] held that a public official cannot recover presumed and punitive damages for defamatory falsehood unless he proves that the false statement was made with 'actual malice--that is, with knowledge that it was false or with reckless disregard of whether it was false or not.'" This is technically correct. Clerks from other chambers believe, however, that the reference to "presumed and punitive" damages, rather than to damages in general, suggests that we are modifying the New York Times rule. That case, of course, held that a public official could not recover any damages--including actual damages--without a showing of actual malice.

While we did not mean to reinterpret the New York Times rule and nowhere say that it limits only presumed and punitive damages and not actual damages, I can understand the concern of other chambers. Because of the sensitive nature of the case, I would suggest that we delete the three words "presumed and puni-

tive" in the last full sentence on page 5. This would allay fears that we are trying to work a major revision to New York Times, would be a more precise reading of precedent, and might gain some goodwill, trust, or respect from other chambers. It would also have no effect on our reasoning or affect the integrity of your opinion. May I make this change in the next draft.

lfp/ss 05/27/85 DUN SALLY-POW

MEMORANDUM

TO: Dan DATE: May 27, 1985

FROM: Lewis F. Powell, Jr.

83-18 Dun & Bradstreet

With an increasing rise in my blood pressure, I have read WJB's dissent. It repeatedly attributes to our opinion views we did not express. It is essentially a "straw man" type of argument in which easy targets are associated with our opinion and then knocked down. Although no good purpose would be served by trying to answer the dissent in detail, I do think some answer may bedesriable. I suggest below possible points to be consider.

1. On p. 6, the dissent - as WJB did in his original opinion - states that Gertz "specifically held" that the award of presumed and punitive damages on a showing of less than actual malice is not a proper means "of protecting the reputation of private persons". Gertz did not so "hold" except possibly where the issue was one of conceded public concern.

2. The dissent comes close to adopting my view of punitive damages - even in a Gertz or New York Times.

See WJB's opinion p. 4-6, with a cite to my dissent in Silkwood. I am still uneasy about our not saying anything about punitive damages as an issue not before us. WJB's opinion may give us an appropriate opportunity to say something. As you have noted, the validity of punitive damages in all tort cases including libel was not at issue in any of the prior cases.

3. WJB criticizes us for reliance on a "balancing test". P. 11. Can we not answer that WJB would adopt no test or standard. He would ignore the traditional state interest - and the concurrent interest of the individual - that have been the foundation of the law of libel for centuries. The only interest he recognizes is the perceived First Amendment interest in all libel cases, however the libel may be remote from any public concern or interest. One of the strengths of our opinion is the way the "balancing test" is applied. WJB ignores the interest of the libeled party.

4. The dissent incorrectly states that we would exclude from the New York Times standard all "credit reporting". We emphasize the subject matter of a particular libel. Our opinion is not based on a "credit reporting" analysis.

5. Similarly, WJB erroneously reads our opinion as suggesting - if not holding - that all "economic" matters would be viewed as of private concern only. See WJB's opinion p. 13, 14-19.

6. Similarly, the dissent says our opinion relies on an analogy to the "advertising" cases. P. 19, et seq. This is not true except to suggest that the degree of First Amendment interest may vary when balanced against the state and individual interests.

7. The dissent repeatedly argues that the speech here was a matter of public interest. I doubt that this silly argument merits a reply.

* * *

The foregoing reflects my initial reaction to the dissent. I am open to discuss all of this with you, and will be particularly interested in your thoughts.

L.F.P., Jr.

ss

dro 05/25/85

MEMORANDUM

To: JUSTICE POWELL

From: Dan

Re: Responses to JUSTICE BRENNAN'S dissent in Dun & Bradstreet, NO. 83-18.

On the whole, I'm surprised by the approach JUSTICE BRENNAN has taken. For the most part, his draft emphasizes the common ground between the justices' different positions and it attacks your opinion fairly mildly. I summarize five points JUSTICE BRENNAN makes to which you might think of responding.

1. In note 10, JUSTICE BRENNAN states that you do not "expressly reject the media/nonmedia distinction, but d[o] expressly decline to apply that distinction to resolve this case." There is really no reason for you to express a view on this issue given the reasoning of the opinion as it now stands. However, if you feel that expressly rejecting this distinction might make the opinion more attractive to JUSTICE WHITE, you might think of doing so.

Leave as is. BRW will not join.

Yes

2. JUSTICE BRENNAN takes you to task for not laying down a test for "matters of public concern." You could respond in a footnote by citing his position in Rosenbloom, where he left this same test to develop in future cases.

Discuss in Memo

Yes. Thought in Gertz I retained Rosenbloom

At one point we had a note - I believe - conceding that some dicta in Gertz went beyond the issues in the case and are not authoritative.

3. In note 11 on page 12, JUSTICE BRENNAN states "[a]t several points the Court in Gertz makes perfectly clear the restrictions of presumed and punitive damages were to apply in all cases. 418 U.S., at 346, 349-350." Both cited passages in Gertz are arguably distinguishable, but the first is only tenuously so. In the passage on page 346 of Gertz, you described why the "public or general interest test" of Rosenbloom did not adequately serve First Amendment interests:

> "[A] publisher or broadcaster of a defamatory error which a court deems unrelated to an issue of public or general interest may be held liable in damages even if it took every reasonable precaution to ensure the accuracy of its assertions. And liability may far exceed compensation for any actual injury to the plaintiff, for the jury may be permitted to presume damages without proof of loss and even to award punitive damages."

[redacted] Dan - why is this inconsistent with our holding today?

Unfortunately, these two sentences do suggest that the Gertz standards apply even if the libel involves no matter of public concern.

I'll not answer WJB expressly. We might repeat that what was said in Gertz must be read in light of the issue presented. Yes

You could distinguish this statement on the grounds that its discussion of damages presupposes liability and that Gertz's liability protections still apply. This approach is not very persuasive, however, because the concerns of your second sentence are valid regardless of the particular liability standard. Strict liability makes presumed and punitives more dangerous, but their problems remain even under higher liability standards. Furthermore, for now it may be a good idea to mention liability standards as little as possible. Strict liability is JUSTICE WHITE'S big bugaboo, and, to the extent you suggest that Gertz's liability rules are not affected at all by Dun & Bradstreet, you may lose any chance of adding his name to your opinion.

Dan - please draft a note

The other Gertz passage can be distinguished more satisfactorily and probably ought to be discussed in a footnote. In that passage, you wrote (i) that "the States have no substantial interest in securing for plaintiffs ... gratuitous awards of money damages far in excess of any actual injury" and, more important, (ii) that "punitive damages are wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions." JUSTICE BRENNAN argues that since the state interests are the same in this case and in Gertz punitive damages are still "wholly irrelevant" and the State still has no "substantial interest" in presumed damages. Thus, he believes, the Gertz damages rules should apply.

You could reply that these two statements, particularly the second, do not mean what JUSTICE BRENNAN takes them to say. Obviously, if punitive damages were really "wholly irrelevant" to the state interest, then Gertz would itself have found them barred by the First Amendment. Thus, what Gertz must actually mean is that there is no substantial state interest relative to the competing First Amendment interest. Read with this gloss, the second remark poses no problem.

I would recommend that you clarify what you meant in this second passage for another reason as well. Later in his opinion, JUSTICE BRENNAN takes you to task for upholding punitives even though they are "impermissibly broad" given the First Amendment interests at stake. This criticism, which is based on your comment in Gertz that punitives are "wholly irrelevant" to the state interest, is basically a recharacterization of

his last objection. To the extent you explain what you meant by "wholly irrelevant" in Gertz, you will answer his criticisms here. Yes

4. In footnote 18, JUSTICE BRENNAN states that "[t]he assertion that the limited and confidential circulation might make the expression less a matter of public concern is dubious on its own terms and flatly inconsistent with our decision in Givhan v. Western Line Consolidated School Dist., 439 U.S. 410 (1979)." This contention of his should cause you no concern. Givhan concerned a public school teacher who privately complained to school authorities. This Court found her complaints about the school system to be protected First Amendment speech--even though they were private. Dun & Bradstreet poses no conflict, for you are using the confidential aspect of D & B's credit report in a different way. Right now you use it only to show that D & B cannot claim any First Amendment interest in the report stemming from the need to ensure the free flow of commercial information--an interest found by this Court in Virginia Board of Pharmacy. There simply can be no "free flow" interest when petr itself prevents the free dissemination of its reports. The only problem with making this clear in a footnote is that it may limit the significance the Court can give to the limited circulation of a communication in future cases. I make no recommendation about whether you should respond to this criticism for it depends on a judgment call which you can make much better than I can.

Yes

Yes - We should say this except for the effect on future cases - as you suggest. I'm inclined not to make this debating point.

5. Finally, JUSTICE BRENNAN's extended discussion of commercial speech appears to misconceive your opinion. You do not

Yes

affirm the Vt. S. Ct. because the speech is commercial. You merely point to some of the concerns that argue for reduced First Amendment protection of commercial speech and show how they, among other concerns, also apply here. You may want to point this out, but I am afraid that confronting JUSTICE BRENNAN head-on on the commercial speech doctrine--an already confused area of the First Amendment--might confuse things and create more problems than it solves.

file

lfp/ss 05/27/85 DUN SALLY-POW

MEMORANDUM

TO: Dan DATE: May 27, 1985

FROM: Lewis F. Powell, Jr.

83-18 Dun & Bradstreet

With an increasing rise in my blood pressure, I have read WJB's dissent. It repeatedly attributes to our opinion views we did not express. It is essentially a "straw man" type of argument in which easy targets are associated with our opinion and then knocked down. Although no good purpose would be served by trying to answer the dissent in detail, I do think some answer may bedesriable. I suggest below possible points to be consider.

1. On p. 6, the dissent - as WJB did in his original opinion - states that Gertz "specifically held" that the award of presumed and punitive damages on a showing of less than actual malice is not a proper means "of protecting the reputation of private persons". Gertz did not so "hold" except possibly where the issue was one of conceded public concern.

2. The dissent comes close to adopting my view of punitive damages - even in a Gertz or New York Times.

See WJB's opinion p. 4-6, with a cite to my dissent in Silkwood. I am still uneasy about our not saying anything about punitive damages as an issue not before us. WJB's opinion may give us an appropriate opportunity to say something. As you have noted, the validity of punitive damages in all tort cases including libel was not at issue in any of the prior cases.

3. WJB criticizes us for reliance on a "balancing test". P. 11. Can we not answer that WJB would adopt no test or standard. He would ignore the traditional state interest - and the concurrent interest of the individual - that have been the foundation of the law of libel for centuries. The only interest he recognizes is the perceived First Amendment interest in all libel cases, however the libel may be remote from any public concern or interest. One of the strengths of our opinion is the way the "balancing test" is applied. WJB ignores the interest of the libeled party.

4. The dissent incorrectly states that we would exclude from the New York Times standard all "credit reporting". We emphasize the subject matter of a particular libel. Our opinion is not based on a "credit reporting" analysis.

5. Similarly, WJB erroneously reads our opinion as suggesting - if not holding - that all "economic" matters would be viewed as of private concern only. See WJB's opinion p. 13, 14-19.

6. Similarly, the dissent says our opinion relies on an analogy to the "advertising" cases. P. 19, et seq. This is not true except to suggest that the degree of First Amendment interest may vary when balanced against the state and individual interests.

7. The dissent repeatedly argues that the speech here was a matter of public interest. I doubt that this silly argument merits a reply.

* * *

The foregoing reflects my initial reaction to the dissent. I am open to discuss all of this with you, and will be particularly interested in your thoughts.

L.F.P., Jr.

ss

dro 05/21/85

Sally - file this in 84-9 Mass Mutual v Russell

83-18

also make a c c for D & B file

MEMORANDUM

To: JUSTICE POWELL

From: Dan

Re: Footnote on Punitive Damages in Dun & Bradstreet.
(not an issue in D & B)

I have one reservation about the footnote you propose. The first sentence suggests that both presumed and punitive damages are justified by the difficulty of proving actual damages in libel cases. Strictly speaking, however, this is the role of presumed, not punitive, damages. When presumed damages are available, there is simply no compensatory rationale supporting punitives. It is the second sentence that suggests the real rationale of punitive damages: punishment. The third sentence, however, implies that the unique justification for punitives in libel cases is compensation, and it offers this as a possible way of distinguishing the position you take in Dun & Bradstreet from your position in Massachusetts Mutual v. Russell.

My reservation concerns the overall implications of the footnote. It seems to me that when it states that "[w]e have no occasion to consider the appropriateness of punitive damages in non-libel cases ...," it implies that Dun & Bradstreet actually supports the constitutionality of punitives in libel cases. Do you really want to go this far? Taking this position might cre-

ate two problems. First, it would prevent you from later treating punitives in libel and non-libel cases similarly. In fact, since presumed damages are generally unavailable in non-libel cases, it could be argued that in some cases punitives are actually more justified as compensation in non-libel cases. Also, since libel cases touch free speech concerns, it could be argued that punitives are less justified in libel cases on First Amendment grounds.

Second, the footnote suggests that there is an inconsistency between your positions in Dun & Bradstreet and in Russell, when, in fact, there may not be. It would be easy enough in later cases simply to say that Dun & Bradstreet did not consider the constitutionality of punitive damages because the issue was not raised by the parties. This would remove any seeming inconsistency. To the extent that you indicate that Dun & Bradstreet supports the constitutionality of punitives, the footnote might backfire by undercutting your own position in Russell. It would be very easy for someone to argue later that you proferred distinction--the difficulty of proving actual damages in libel cases--makes no difference since presumed damages are available in libel cases exactly for this reason.

lfp/ss 05/28/85

MEMORANDUM

TO: Dan DATE: May 28, 1985

FROM: Lewis F. Powell, Jr.

83-18 Dun & Bradstreet

What would think of adding something along the following lines to our opinion:

"If the dissent were the law, a woman of impeccable character who was branded a whore would have no effective recourse unless she could prove 'malice' by clear and convincing evidence - not in the ordinary meaning of that term but under the more demanding standard of New York Times. The dissent would, in effect, constitutionalize the entire common law of libel."

In an earlier opinion we had some hypotheticals, with a citation - as I recall. I have not checked up on this.

L.F.P., Jr.

ss

dro 06/13/85

Dan - Take a look at my comments & let me know what you think. All of your drafts look good to me. But I think the last one (#5) is marginal. Not sure either whether this would trouble WH&R & 50's. Also see pp 2&3

MEMORANDUM

To: JUSTICE POWELL

From: Dan

Re: Proposed Changes to Dun & Bradstreet, No. 83-18.

After reviewing our memos on JUSTICE BRENNAN'S latest draft in this case, I have drafted several footnotes for your consideration. I have addressed all the concerns you mention in your memo with the exception of discussing the constitutionality of punitive damages. We could drop a footnote indicating that petr raised no due process challenge to punitives, but you may want to consider how Justices Rehnquist and O'Connor would take this. The footnotes follow.

yes

1) footnote to be inserted after last sentence in part III on page 7 of your current draft:

The dissent states that "[a]t several points the Court in Gertz makes perfectly clear [that] the restrictions of presumed and punitive damages were to apply in all cases." Post, at 12, n. 11. Given the context of Gertz, however, the Court could have made "perfectly clear" only that these restrictions applied in cases involving public speech. In fact, the dissent itself

concedes that "Gertz ... focused largely on defining the circumstances under which protection of the central First Amendment value of robust debate of public issues should mandate plaintiffs to show actual malice to obtain a judgment and actual damages ...." Post, at 3 (original emphasis). The dissent also ~~misleadingly~~ incorrectly states that "the Court in Gertz specifically held that the award of presumed and punitive damages on less than a showing of actual malice is not a narrowly tailored means to achieve the legitimate state purpose of protecting the reputation of private persons ...." Post, at 6. At most, we "specifically held" this within the context of public speech.

None of the "several points" that the dissent points to in Gertz, moreover, indicates a result different from the one we reach today. For example, one of the dissent's cited passages states that "the States have no substantial interest in securing for plaintiffs ... gratuitous awards of money damages far in excess of any actual injury" and that "punitive damages are wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions." 418 U.S., at 349-350. The dissent argues that since the state interests are the same in this case and in Gertz punitive damages are still "wholly irrelevant" and the State still has no "substantial interest" in presumed damages. Thus, it would hold, the Gertz damages rules should apply equally here.

These statements, however, do not mean what the dissent takes them to say. If punitive damages were really "wholly irrelevant" to the state interest, then Gertz itself would have

Dan, To shorten this note, what do you think about omitting these two Fns? If we omit them, does the final sentence follow? Or is some transition required. I think not, but want your views.

found them barred by the First Amendment. What these statements in Gertz must actually mean is that there is no substantial state interest in punitive and presumed damages relative to the competing First Amendment interest. Since this competing interest is attenuated in cases involving no matter of public concern, the balance in the present case shifts in favor of the traditional common law rules.

The dissent similarly misinterprets another part of Gertz when it states that "Gertz specifically held that unrestrained presumed and punitive damages were 'unnecessarily' broad ... in relation to the legitimate state interests." Post, at 20. Although we did make this statement, we did so only within the context of public speech. This statement cannot control here. What was "irrelevant," id., with respect to public speech is not necessarily "irrelevant" with respect to the type of speech now at issue. Properly understood, Gertz is consistent with the result we reach today.

2) footnote to be inserted at the end of the last sentence in section IV, which is also the last sentence on p. 10:

The dissent, employing the same balancing test that we do today, concludes that even speech on purely private matters is entitled to the protections of Gertz. Post, at 12. Its "balance," however, rests on a misinterpretation. In particular, the dissent finds language in Gertz that, it believes, shows the State's interest to be "irrelevant." See post, at 20. It is

then an easy step for the dissent to say that the State's interest is outweighed by even the reduced First Amendment interest in private speech. Gertz, however, did not say that the state interest was "irrelevant" in absolute terms. ~~See previous draft note.~~ Indeed, such a statement is belied by Gertz itself, for it held that presumed and punitive damages were available under some circumstances. 418 U.S., at Rather, what the Gertz language indicates is that the State's interest is not substantial relative to the First Amendment interest in public speech. This language is thus irrelevant to today's decision.

The dissent's "balance," moreover, would lead to the protection of all libels--no matter how attenuated their constitutional interest. If the dissent were the law, a woman of impeccable character who was branded a "whore" by a jerk would have no effective recourse unless she could prove "actual malice" by clear and convincing evidence--not malice in the ordinary sense, moreover, but in the more demanding sense of New York Times. The dissent would, in effect, constitutionalize the entire common law of libel.

3) footnote to be added at end of sentence reading "These factors indicate ... concerns no public issue" on page 11:

The dissent suggests that our holding today leaves all credit reporting subject to reduced First Amendment protection. This is untrue. The protection to be accorded a particular credit report depends on whether the report's "content, form, and

context" indicate that it concerns a public matter. We also do not hold, as the dissent suggests we do, post, at 13-19, that the report is subject to reduced constitutional protection because it constitutes economic or commercial speech. We discuss such speech, along with advertising, only to show how many of the same concerns that argue in favor of reduced constitutional protection in those areas apply here as well.

4) footnote to be added at end of first sentence in part VI on page 12:

Because negligence was shown at trial, we do not consider the extent to which Gertz's fault requirement applies to libels involving no matter of public concern. Like damages rules, liability standards are subject to First Amendment scrutiny. See Gertz v. Robert Welch, Inc., 418 U.S., at 347-348; New York Times Co. v. Sullivan, supra. They do, however, involve somewhat different concerns and we indicate no opinion today on how these competing interests balance under Gertz.

I have some doubt as to desirability of this note. What do you think?

dro 06/22/85

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Dun & Bradstreet, Inc. v. Greenmoss Builders Inc., No. 83-18.

This case, on writ of certiorari to the Supreme Court of Vermont, presents the question whether the First Amendment requirement that private individuals prove "actual malice" before recovering presumed and punitive damages in defamation actions applies to a credit report issued by petr that incorrectly stated that resp had filed for voluntary bankruptcy. The Vermont Supreme Court, believing that this requirement did not apply in libel actions against nonmedia defendants, held that presumed and punitive damages could be awarded without a showing of "actual malice."

We agree with the Vermont Supreme Court's result, although for different reasons. All of our prior cases in which we have held that the First Amendment restricts libel damages involved speech on matters of public concern. We have never held that the First Amendment restricts presumed and punitive damages in cases not involving speech of such central First Amendment concern. In these cases, we have determined the extent to which the First Amendment restricts damages by balancing the First Amendment interest against the State's interest in providing recovery for injury to reputation. When, as here, the speech is of reduced First Amendment interest because it involves no matter of public concern, the balance shifts in favor of the State. We therefore affirm the judgment of the Vermont Supreme Court.

JUSTICE REHNQUIST and JUSTICE O'CONNOR joined this opinion, and THE CHIEF JUSTICE and JUSTICE WHITE filed separate opinions concurring in the judgment.

JUSTICE BRENNAN filed a dissenting opinion, which JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS joined.

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **The Chief Justice**

Circulated: MAY 2 3 1985

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83–18

DUN & BRADSTREET, INC., PETITIONERS *v.*
GREENMOSS BUILDERS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

[May ——, 1985]

CHIEF JUSTICE BURGER, concurring in the judgment.

In *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974), contrary to well-established common law prevailing in the states, a divided Court held that a private plaintiff in a defamation action cannot recover for a published falsehood unless he proves that the defendant was at least negligent in publishing the falsehood. The Court further held that there can be no "presumed" damages in such an action and that the private plaintiff cannot receive "punitive" damages unless it is established that the publication was made with "actual malice," as defined in *New York Times* v. *Sullivan*, 376 U. S. 254 (1964).

I dissented in *Gertz* because I believed that, insofar as the "ordinary private citizen" was concerned, 418 U. S., at 355, the Court's opinion "abandon[ed] the traditional thread," *id.*, at 354, that had been the theme of the law in this country up to that time. I preferred "to allow this area of law to continue to evolve as it [had] up to [then] with respect to private citizens rather than embark on a new doctrinal theory which [had] no jurisprudential ancestry." *Ibid.* *Gertz*, however, is now the law of the land, and until it is overruled, it must, under the principle of *stare decisis*, be applied by this Court.

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 expres-

sion 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, and that the expression in question here relates to a matter of essentially private concern. I therefore agree with the plurality opinion to the extent that it holds that *Gertz* is inapplicable in this case for the two reasons indicated. No more is needed to dispose of the present case.

I continue to believe, however, that *Gertz* was ill-conceived, and therefore agree with JUSTICE WHITE that *Gertz* should be overruled. I also agree generally with JUSTICE WHITE's observations concerning *New York Times* v. *Sullivan*. But since *New York Times* equates "reckless disregard of the truth" with malice, this should permit a jury instruction that malice may be found if the defendant is shown to have published defamatory material which, in the exercise of reasonable care, would have been revealed as untrue. If this is not what *New York Times* v. *Sullivan* means, I agree with JUSTICE WHITE that it should be reexamined. The great rights guaranteed by the First Amendment carry with them certain responsibilities.

Consideration of these issues inevitably recalls the aphorism of journalism attributed to the late Roy Howard that, "too much checking on the facts has ruined many a good news story."

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **The Chief Justice**

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

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[May ——, 1985]

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I honestly can't see why he doesn't join us.) I agree - see p 2
—Dan

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To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **The Chief Justice**

Circulated: _____

Recirculated: JUN 17 1985

CHANGES AS MARKED: 1, 2

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83–18

DUN & BRADSTREET, INC., PETITIONERS *v.* GREENMOSS BUILDERS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

[June ——, 1985]

CHIEF JUSTICE BURGER, concurring in the judgment.

In *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974), contrary to well-established common law prevailing in the states, a divided Court held that a private plaintiff in a defamation action cannot recover for a published falsehood unless he proves that the defendant was at least negligent in publishing the falsehood. The Court further held that there can be no "presumed" damages in such an action and that the private plaintiff cannot receive "punitive" damages unless it is established that the publication was made with "actual malice," as defined in *New York Times* v. *Sullivan*, 376 U. S. 254 (1964).

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I continue to believe, however, that *Gertz* was ill-conceived, and therefore agree with JUSTICE WHITE that *Gertz* should be overruled. I also agree generally with JUSTICE WHITE's observations concerning *New York Times* v. *Sullivan*. *New York Times*, however, equates "reckless disregard of the truth" with malice; this should permit a jury instruction that malice may be found if the defendant is shown to have published defamatory material which, in the exercise of reasonable care, would have been revealed as untrue. But since the Court has not applied the literal language of *New York Times* in this way, I agree with JUSTICE WHITE that it should be reexamined. The great rights guaranteed by the First Amendment carry with them certain responsibilities as well.

Consideration of these issues inevitably recalls the aphorism of journalism attributed to the late Roy Howard that, "too much checking on the facts has ruined many a good news story."

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

Circulated: _____

Recirculated: MAR 8 1985

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 1

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-18

DUN & BRADSTREET, INC., PETITIONERS *v.*
GREENMOSS BUILDERS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

[March ——, 1985]

JUSTICE WHITE, dissenting.

Until *New York Times* v. *Sullivan*, 376 U. S. 254 (1964), the law of defamation was almost exclusively the business of state courts and legislatures. Under the prevailing state libel law, the defamed individual had only to prove a false written publication that subjected him to hatred, contempt or ridicule. Truth was a defense; but given a defamatory false circulation, general injury to reputation was presumed; special damages, such as pecuniary loss and emotional distress, could be recovered; and punitive damages were available if common-law malice were shown. General damages for injury to reputation were presumed and awarded because the judgment of history was that "in many cases the effect of defamatory statements is so subtle and indirect that it is impossible directly to trace the effects thereof in loss to the person defamed." Restatement of Torts § 621, Comment a, p. 314 (1938). The defendant was permitted to show that there was no reputational injury; but at the very least, the prevailing rule was that at least nominal damages were to be awarded for any defamatory publication actionable per se. This rule performed

> "[A] vindicatory function by enabling the plaintiff publicly to brand the defamatory publication as false. The salutary social value of this rule is preventive in charac-

Nothing new.
—Dan

> ter since it often permits a defamed person to expose the groundless character of a defamtory rumor before harm to the reputation has resulted therefrom." *Id.* § 569, Comment b, p. 166.

Similar rules applied to slanderous statements that were actionable per se.[1]

New York Times v. *Sullivan* was the first major step in what proved to be a seemingly irreversible process of constitutionalizing the entire law of libel and slander. Under that case, a public official suing for libel could no longer make out his case by proving a false and damaging publication. He could not establish liability and recover any damages, whether presumed or actually proved, unless he proved "malice", which was defined in that case as a knowing falsehood or a reckless disregard for the truth. 376 U. S., at 280. Given that proof, however, the usual damages were available, including presumed and punitive damages. This judgment overturning 200 years of libel law was said to be necessary to implement the First Amendment interest in "uninhibited, robust, and wide-open" debate on public issues. *Id.*, at 270. Three years later, the same rule was applied to those plaintiffs who were not public officials, but were what was termed public figures. *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130, 155 (1967).

In 1971, four Justices were of the view that the *New York Times* rules should apply where the publication concerned any manner of general or public interest, even though the plaintiff was a private person. *Rosenbloom* v. *Metromedia*,

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[1] At the common law, slander, unlike libel, was actionable per se only when it dealt with a narrow range of statements: those imputing a criminal offense, a venereal or loathsome and communicable disease, improper conduct of a lawful business, or unchastity of a woman. Restatement of Torts § 570 (1938). To be actionable, all other slanderous statements required additional proof of special damages other than an injury to reputation or emotional distress. The special damage most often takes the form of material or pecuniary loss. *Id.*, § 575 and Comment b, pp. 185–187.

Inc., 403 U. S. 29. That view did not command a majority. But in *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974), the Court again dealt with defamation actions by private individuals, for the first time holding that such plaintiffs could no longer recover by proving a false statement, no matter how damaging it might be to reputation. They must, in addition, prove some "fault", at least negligence. 418 U. S., at 347, 350. Even with that proof, damages were not presumed but had to be proved. *Id.*, at 349. No punitive damages were available without proof of *New York Times* malice. *Id.*, at 350. This decision, which again purported to implement First Amendment values, seemingly left no defamation actions free from federal constitutional limitations.

I joined the judgment and opinion in *New York Times*. I also joined later decisions extending the *New York Times* standard to other situations. But I came to have increasing doubts about the soundness of the Court's approach and about some of the assumptions underlying it. I could not join the plurality opinion in *Rosenbloom*, and I dissented in *Gertz*, asserting that the common-law remedies should be retained for private plaintiffs. I remain convinced that *Gertz* was erroneously decided. I have also become convinced that the Court struck an improvident balance in the *New York Times* case between the public's interest in being fully informed about public officials and public affairs and the competing interest of those who have been defamed in vindicating their reputation.

In a country like this, where the people purport to be able to govern themselves through their elected representatives, adequate information about their government is of transcendent importance. That flow of intelligence deserves full First Amendment protection. Criticism and assessment of the performance of public officials and of government in general are not subject to penalties imposed by law. But these First Amendment values are not at all served by circulating false statements of fact about public officials. On the con-

trary, erroneous information frustrates these values. They are even more disserved when the statements falsely impugn the honesty of those men and women and hence lessen the confidence in government. As the Court said in *Gertz*, "there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues." 418 U. S., at 340. Yet in the *New York Times* cases, the public official's complaint will be dismissed unless he alleges and makes out a jury case of a knowing or reckless falsehood. Absent such proof, there will be no jury verdict or judgment of any kind in his favor, even if the challenged publication is admittedly false. The lie will stand, and the public continue to be misinformed about public matters. This will recurringly happen because the putative plaintiff's burden is so exceedingly difficult to satisfy and can be discharged only by expensive litigation. Even if the plaintiff sues, he frequently loses on summary judgment or never gets to the jury because of insufficient proof of malice. If he wins before the jury, verdicts are often overturned by appellate courts for failure to prove malice. Furthermore, when the plaintiff loses, the jury will likely return a general verdict and there will be no judgment that the publication was false, even though it was without foundation in reality.[2] The public is left to conclude that the challenged statement was true after all. Their only chance of being accurately informed is measured by the public official's ability himself to counter the lie, unaided by the courts. That is a decidedly weak reed to depend on for the vindication of First Amendment interests—"it is the rare case

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[2] If there is a jury case of malice, it may be that the jury will be asked to bring in separate verdicts on falsity and malice. In that event, there could be a verdict in favor of the plaintiff on falsity, but against him on malice. There would be no judgment in his favor, but the verdict on falsity would be a public one and would tend to set the record right and clear the plaintiff's name.

where the denial overtakes the original charge. Denials, retractions, and corrections are not 'hot' news, and rarely receive the prominence of the original story." *Rosenbloom*, opinion of BRENNAN, J., 403 U. S., at 46–47; *Gertz*, dissenting opinion of BRENNAN, J., 418 U. S., at 363–364.

Also, by leaving the lie uncorrected, the *New York Times* rule plainly leaves the public official without a remedy for the damage to his reputation. Yet the Court has observed that the individual's right to the protection of his own good name is a basic consideration of our constitutional system, reflecting "our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty." *Gertz*, 418 U. S., at 341, quoting *Rosenblatt* v. *Baer*, 383 U. S. 75, 92 (1966) (Stewart, J, concurring). Moreover, it must be remembered that we are not talking about mere criticism or opinion, but about misstatements of fact that tend to harm the reputation of another, so as to lower him in the estimation of the community or to deter third persons from associating or dealing with him. Restatement of Torts, § 559 (1938). The upshot is that the public official must suffer the injury, often cannot get a judgment identifying the lie for what it is, and has very little, if any, chance of countering that lie in the public press.

The *New York Times* rule thus countenances two evils: first, the stream of information about public officials and public affairs is polluted and often remains polluted by false information; and second, the reputation and professional life of the defeated plaintiff may be destroyed by falsehoods that might have been avoided with a reasonable effort to investigate the facts. In terms of the First Amendment and reputational interests at stake, these seem grossly perverse results.

Of course, the Court in *New York Times* could not have been unaware of these realities. Despite our ringing endorsement of "wide-open" and "uninhibited" debate, which taken literally would protect falsehoods of all kinds, we can-

not fairly be accused of giving constitutional protection to false information as such. We nevertheless found constitutional justification for our decision, which in the end had that precise effect. The constitutional interest in the flow of information about public affairs was thought to be very strong, and discovering the truth in this area very difficult, even with the best of efforts. These considerations weighed so heavily that those who write and speak about public affairs must have some breathing room—that is, they should be permitted to err and misinform the public as long as they act unknowingly and without recklessness. If the press could be faced with possibly sizeable damages for every mistaken publication injurious to reputation, the result would be an unacceptable degree of self-censorship, which might prevent the occasional mistaken libel, but would also often prevent the timely flow of information that is thought to be true but cannot be readily verified. The press must therefore be privileged to spread false information, even though that information has negative First Amendment value and is severely damaging to reputation, in order to encourage the full flow of the truth, which otherwise might be withheld.

Gertz is subject to similar observations. Although rejecting the *New York Times* malice standard where the plaintiff is neither a public official nor a public figure, the Court nevertheless deprived the private plaintiff of his common-law remedies, making recovery more difficult in order to provide a margin for error. In doing so, the Court ruled that without proof of at least negligence, a plaintiff damaged by the most outrageous falsehoods would be remediless, and the lie very likely would go uncorrected. And even if fault were proved, actual damage to reputation would have to be shown, a burden traditional libel law considered difficult, if not impossible, to discharge. For this reason JUSTICE POWELL would not impose on the plaintiff the burden of proving damages in the case now before us.

Although there was much talk in *Gertz* about liability without fault and the unfairness of presuming damages, all of this, as was the case in *New York Times*, was done in the name of the First Amendment, purportedly to protect the press and others writing about public affairs from possibly intimidating damages liability. But if protection of the press from intimidating damages liability that might lead to excessive timidity was the driving force behind *New York Times* and *Gertz*, it is evident that the Court engaged in severe overkill in both cases.

In *New York Times*, instead of escalating the plaintiff's burden of proof to an almost impossible level, we could have achieved our stated goal by limiting the recoverable damages to a level that would not unduly threaten the press. Punitive damages might have beeen scrutinized as Justice Harlan suggested in *Rosenbloom*, 403 U. S., at 77, or perhaps even entirely forbidden. Presumed damages to reputation might have been prohibited, as in *Gertz*. Had that course been taken and the common-law standard of liability been retained, the defamed public official, upon proving falsity, could at least have had a judgment to that effect. His reputation would then be vindicated; and to the extent possible, the misinformation circulated would have been countered. He might have also recovered a modest amount, enough perhaps to pay his litigation expenses. In this way, both First Amendment and reputational interests would have been far better served.

I still believe the common-law rules should have been retained where plaintiff is not a public official or public figure. As I see it, the Court undervalued the reputational interest at stake in such cases. I have also come to doubt the easy assumption that the common-law rules would muzzle the press. But even accepting the *Gertz* premise that the press also needed protection in suits by private parties, there was no need to modify the common-law requirements for establishing liability and to increase the burden of proof that must

be satisfied to secure a judgment authorizing at least nominal damages and the recovery of additional sums within the limitations that the Court might have set.[3]

It is interesting that JUSTICE POWELL declines to follow the *Gertz* approach in this case. 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 or not it implicates a matter of public importance. JUSTICE POWELL, however, distinguishes *Gertz* on the two grounds. First, *Gertz* involved a *public* expression, *i. e.*, a distribution to the public at large. Here the circulation was private and sent only to subscribers to the Dun & Bradstreet service. Second, *Gertz* involved a matter of public importance; here the issue is not one of general or public import. These two preconditions to the application of *Gertz* would confine that case to its facts. Insisting on both of them would mean that a "private" disseminator would never have the protection of *Gertz* while a defendant speaking to the public at large would enjoy its protection—if the misstatement at issue concerned a matter of public importance, but not otherwise. Confining *Gertz* to this limited extent would be an improvement, but I find the distinction between public and private utterances unacceptable.

For all practical purposes, the public-private publication dichotomy is a crude way of distinguishing between media and non-media defendants. That is, a media defendant would almost always be engaged in public dissemination; only non-media persons could be categorized as private ones. The media would almost always be entitled to more constitutional protection than would others whose publications reach a smaller audience. In this respect, I agree with Justice Brennan that the First Amendment gives no more protection

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[3] The Court was unresponsive to my suggestion in dissent, 418 U. S., at 391–392, that the plaintiff should be able to prove and obtain a judgment of falsehood without having to establish any kind of fault.

to the press in defamation suits than it does to others exercising their freedom of speech. None of our cases affords such a distinction; to the contrary, the Court has rejected it at every turn.[4] It should be rejected again, particularly in this context, since it makes no sense to give the most protection to those publishers who reach the most readers and therefore pollute the channels of communication with the most misinformation and do the most damage to private reputation. If *Gertz* is not to apply to this case, it would make far more sense, it seems to me, to treat all defendants alike in defamation suits by plaintiffs who are neither public officials nor public figures, and to hold that *Gertz* is to be read as applying only where the allegedly false publication deals with a matter of general or public importance. If the false publication does not deal with such a matter, the common-law rules would apply whether the defendant is a member of the media or other public disseminator or a non-media individual publishing privately.

As I have said, I dissented in *Gertz*, and I doubt that the decision in that case has made any measurable contribution to First Amendment or reputational values since its announcement. Nor am I sure that it has saved the press a great deal

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[4] We explained in *Branzburg* v. *Hayes*, 408 U. S. 665 (1972) that "the informative function asserted by representatives of the organized press" to justify greater privileges under the First Amendment was also "performed by lecturers, political pollsters, novelists, academic researchers, and dramatists." *Id.*, at 705. From its inception, without discussing the issue, we have applied the rule of *New York Times* to non-media defendants. See *New York Times*, 376 U. S., at 254, n.*, 286; *Henry* v. *Collins*, 380 U. S. 356 (1965); *Garrison* v. *Louisiana*, 379 U. S. 64 (1967). And this Court has made plain that the organized press has a monopoly neither on the First Amendment nor on the ability to enlighten. *First National Bank* v. *Bellotti*, 435 U. S. 765, 782 (1978). See also *Pell* v. *Procunier*, 417 U. S. 817 (1974) (press has no independent First Amendment right of access to prisons). Cf. *Buckley* v. *Valeo*, 424 U. S. 1, 48–49 (1976) (the idea that government can restrict the speech of some elements of society to enhance the relative voice of others is "wholly foreign" to the First Amendment).

of money. Like the *New York Times* decision, the burden that plaintiffs must meet invites long and complicated discovery involving detailed investigation of the workings of the press, how a news story is developed, and the state of mind of the reporter and publisher. See *Herbert* v. *Lando*, 441 U. S. 153 (1979). That kind of litigation is very expensive. I suspect that the press would be no worse off financially if the common-law rules were to apply and if the judiciary was careful to insist that damages awards be kept within bounds. However that may be, I cannot assume that the press, as successful and powerful as it is, will be intimidated into withholding news that by decent journalistic standards it believes to be true.

The question before us is whether *Gertz* is to be applied in this case. For either of two reasons, I believe that it should not. First, I am unreconciled to the *Gertz* holding and believe that it should be overruled. Second, as JUSTICE POWELL indicates, the defamatory publication in this case does not deal with a matter of public importance. Consequently, I dissent from the Court's judgment and cannot join its opinion.

STYLISTIC CHANGES THROUGHOUT;
see pp. 4, 5, 6, 7, 8, 9, 10, 11.

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

Circulated: _____

Recirculated: 3/29/85

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-18

DUN & BRADSTREET, INC., PETITIONERS *v.*
GREENMOSS BUILDERS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

[March ——, 1985]

JUSTICE WHITE, dissenting.

Until *New York Times* v. *Sullivan*, 376 U. S. 254 (1964), the law of defamation was almost exclusively the business of state courts and legislatures. Under the prevailing state libel law, the defamed individual had only to prove a false written publication that subjected him to hatred, contempt or ridicule. Truth was a defense; but given a defamatory false circulation, general injury to reputation was presumed; special damages, such as pecuniary loss and emotional distress, could be recovered; and punitive damages were available if common-law malice were shown. General damages for injury to reputation were presumed and awarded because the judgment of history was that "in many cases the effect of defamatory statements is so subtle and indirect that it is impossible directly to trace the effects thereof in loss to the person defamed." Restatement of Torts § 621, Comment a, p. 314 (1938). The defendant was permitted to show that there was no reputational injury; but at the very least, the prevailing rule was that at least nominal damages were to be awarded for any defamatory publication actionable per se. This rule performed

> "[A] vindicatory function by enabling the plaintiff publicly to brand the defamatory publication as false. The salutary social value of this rule is preventive in charac-

Justice White has eliminated his attacks on your opinion from this draft. He adds nothing that requires a response from us. —Dan

> ter since it often permits a defamed person to expose the groundless character of a defamatory rumor before harm to the reputation has resulted therefrom." *Id.* § 569, Comment b, p. 166.

Similar rules applied to slanderous statements that were actionable per se.[1]

New York Times v. *Sullivan* was the first major step in what proved to be a seemingly irreversible process of constitutionalizing the entire law of libel and slander. Under the rule announced in that case, a public official suing for libel could no longer make out his case by proving a false and damaging publication. He could not establish liability and recover any damages, whether presumed or actually proved, unless he proved "malice", which was defined as a knowing falsehood or a reckless disregard for the truth. 376 U. S., at 280. Given that proof, however, the usual damages were available, including presumed and punitive damages. This judgment overturning 200 years of libel law was deemed necessary to implement the First Amendment interest in "uninhibited, robust, and wide-open" debate on public issues. *Id.*, at 270. Three years later, the same rule was applied to plaintiffs who were not public officials, but who were termed public figures. *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130, 155 (1967).

In 1971, four Justices took the view that the *New York Times* rules should apply wherever a publication concerned any manner of general or public interest, even though the plaintiff was a private person. *Rosenbloom* v. *Metromedia*,

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[1] At the common law, slander, unlike libel, was actionable per se only when it dealt with a narrow range of statements: those imputing a criminal offense, a venereal or loathsome and communicable disease, improper conduct of a lawful business, or unchastity of a woman. Restatement of Torts § 570 (1938). To be actionable, all other slanderous statements required additional proof of special damages other than an injury to reputation or emotional distress. The special damage most often took the form of material or pecuniary loss. *Id.*, § 575 and Comment b, pp. 185–187.

Inc., 403 U. S. 29. That view did not command a majority. But in *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974), the Court again dealt with defamation actions by private individuals, for the first time holding that such plaintiffs could no longer recover by proving a false statement, no matter how damaging it might be to reputation. They must, in addition, prove some "fault", at least negligence. 418 U. S., at 347, 350. Even with that proof, damages were not presumed but had to be proved. *Id.*, at 349. No punitive damages were available without proof of *New York Times* malice. *Id.*, at 350. This decision, which again purported to implement First Amendment values, seemingly left no defamation actions free from federal constitutional limitations.

I joined the judgment and opinion in *New York Times*. I also joined later decisions extending the *New York Times* standard to other situations. But I came to have increasing doubts about the soundness of the Court's approach and about some of the assumptions underlying it. I could not join the plurality opinion in *Rosenbloom*, and I dissented in *Gertz*, asserting that the common-law remedies should be retained for private plaintiffs. I remain convinced that *Gertz* was erroneously decided. I have also become convinced that the Court struck an improvident balance in the *New York Times* case between the public's interest in being fully informed about public officials and public affairs and the competing interest of those who have been defamed in vindicating their reputation.

In a country like ours, where the people purport to be able to govern themselves through their elected representatives, adequate information about their government is of transcendent importance. That flow of intelligence deserves full First Amendment protection. Criticism and assessment of the performance of public officials and of government in general are not subject to penalties imposed by law. But these First Amendment values are not at all served by circulating false statements of fact about public officials. On the con-

trary, erroneous information frustrates these values. They are even more disserved when the statements falsely impugn the honesty of those men and women and hence lessen the confidence in government. As the Court said in *Gertz*, "there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues." 418 U. S., at 340. Yet in *New York Times* cases, the public official's complaint will be dismissed unless he alleges and makes out a jury case of a knowing or reckless falsehood. Absent such proof, there will be no jury verdict or judgment of any kind in his favor, even if the challenged publication is admittedly false. The lie will stand, and the public continue to be misinformed about public matters. This will recurringly happen because the putative plaintiff's burden is so exceedingly difficult to satisfy and can be discharged only by expensive litigation. Even if the plaintiff sues, he frequently loses on summary judgment or never gets to the jury because of insufficient proof of malice. If he wins before the jury, verdicts are often overturned by appellate courts for failure to prove malice. Furthermore, when the plaintiff loses, the jury will likely return a general verdict and there will be no judgment that the publication was false, even though it was without foundation in reality.[2] The public is left to conclude that the

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[2] If the plaintiff succeeds in proving a jury case of malice, it may be that the jury will be asked to bring in separate verdicts on falsity and malice. In that event, there could be a verdict in favor of the plaintiff on falsity, but against him on malice. There would be no judgment in his favor, but the verdict on falsity would be a public one and would tend to set the record right and clear the plaintiff's name.

Today, JUSTICE BRENNAN concedes that a such a special verdict form is permissible, but only "when it is merely a by-product of considered application of the actual malice standard." *Ante*, at 8, n. 2. Such a view relegates the central interest of a libel plaintiff—that of clearing his name—to an incidental and largely irrelevant side effect of an examination into the defendant's behavior. Missing from such an approach is the recognition

challenged statement was true after all. Their only chance of being accurately informed is measured by the public official's ability himself to counter the lie, unaided by the courts. That is a decidedly weak reed to depend on for the vindication of First Amendment interests—"it is the rare case where the denial overtakes the original charge. Denials, retractions, and corrections are not 'hot' news, and rarely receive the prominence of the original story." *Rosenbloom*, opinion of BRENNAN, J., 403 U. S., at 46–47; *Gertz*, dissenting opinion of BRENNAN, J., 418 U. S., at 363–364.

Also, by leaving the lie uncorrected, the *New York Times* rule plainly leaves the public official without a remedy for the damage to his reputation. Yet the Court has observed that the individual's right to the protection of his own good name is a basic consideration of our constitutional system, reflecting "our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty." *Gertz*, 418 U. S., at 341, quoting *Rosenblatt* v. *Baer*, 383 U. S. 75, 92 (1966) (Stewart, J, con-

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that the harm suffered by the plaintiff in a defamation case is the continuing injury to reputation brought on by the defamatory statement. A libel suit permits a plaintiff not only opportunity for monetary recovery to compensate for harm already suffered, but also the additional prospective remedy of a judicial declaration that the original statement was false.

JUSTICE BRENNAN suggests that courts, as organs of the government, cannot be trusted to discern what the truth is. *Ante*, at 8–9. But the logical consequence of that view is that the First Amendment forbids all libel and slander suits, for in each such suit, there will be no recovery unless the court finds the publication at issue to be factually false. Of course, no forum is perfect, but that is not a justification for leaving whole classes of defamed individuals without redress or a realistic opportunity to clear their names. We entrust to juries and the courts the responsibility of decisions affecting the life and liberty of persons. It is perverse indeed to say that these bodies are incompetent to inquire into the truth of a statement of fact in a defamation case. I can therefore discern nothing in the Constitution which forbids a plaintiff from obtaining a judicial decree that a statement is false—a decree he can then use in the community to clear his name and to prevent further damage from a defamation already published.

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curring). The upshot is that the public official must suffer the injury, often cannot get a judgment identifying the lie for what it is, and has very little, if any, chance of countering that lie in the public press.

The *New York Times* rule thus countenances two evils: first, the stream of information about public officials and public affairs is polluted and often remains polluted by false information; and second, the reputation and professional life of the defeated plaintiff may be destroyed by falsehoods that might have been avoided with a reasonable effort to investigate the facts. In terms of the First Amendment and reputational interests at stake, these seem grossly perverse results.

Of course, the Court in *New York Times* could not have been unaware of these realities. Despite our ringing endorsement of "wide-open" and "uninhibited" debate, which taken literally would protect falsehoods of all kinds, we cannot fairly be accused of giving constitutional protection to false information as such, for we did find constitutional justification for our decision. The constitutional interest in the flow of information about public affairs was thought to be very strong, and discovering the truth in this area very difficult, even with the best of efforts. These considerations weighed so heavily that those who write and speak about public affairs were thought to require some breathing room—that is, they should be permitted to err and misinform the public as long as they act unknowingly and without recklessness. If the press could be faced with possibly sizeable damages for every mistaken publication injurious to reputation, the result would be an unacceptable degree of self-censorship, which might prevent the occasional mistaken libel, but would also often prevent the timely flow of information that is thought to be true but cannot be readily verified. The press must therefore be privileged to spread false information, even though that information has negative First Amendment value and is severely damaging to reputation, in

order to encourage the full flow of the truth, which otherwise might be withheld.

Gertz is subject to similar observations. Although rejecting the *New York Times* malice standard where the plaintiff is neither a public official nor a public figure, there the Court nevertheless deprived the private plaintiff of his common-law remedies, making recovery more difficult in order to provide a margin for error. In doing so, the Court ruled that without proof of at least negligence, a plaintiff damaged by the most outrageous falsehoods would be remediless, and the lie very likely would go uncorrected. And even if fault were proved, actual damage to reputation would have to be shown, a burden traditional libel law considered difficult, if not impossible, to discharge. For this reason JUSTICE POWELL would not impose on the plaintiff the burden of proving damages in the case now before us.

Although there was much talk in *Gertz* about liability without fault and the unfairness of presuming damages, all of this, as was the case in *New York Times*, was done in the name of the First Amendment, purportedly to protect the press and others writing about public affairs from possibly intimidating damages liability. But if protection of the press from intimidating damages liability that might lead to excessive timidity was the driving force behind *New York Times* and *Gertz*, it is evident that the Court engaged in severe overkill in both cases.

In *New York Times*, instead of escalating the plaintiff's burden of proof to an almost impossible level, we could have achieved our stated goal by limiting the recoverable damages to a level that would not unduly threaten the press. Punitive damages might have beeen scrutinized as Justice Harlan suggested in *Rosenbloom*, 403 U. S., at 77, or perhaps even entirely forbidden. Presumed damages to reputation might have been prohibited, or limited, in *Gertz*. Had that course been taken and the common-law standard of liability been retained, the defamed public official, upon proving falsity, could

at least have had a judgment to that effect. His reputation would then be vindicated; and to the extent possible, the misinformation circulated would have been countered. He might have also recovered a modest amount, enough perhaps to pay his litigation expenses. At the very least, the public official should not have been required to satisfy the actual malice standard where he sought no damages but only to clear his name. In this way, both First Amendment and reputational interests would have been far better served.

JUSTICE BRENNAN suggests that to allow a public official a forum when he has been injured by a negligent defamation would subject the nation to "the effective return of seditious libel prosecution." *Ante*, at 10. That view substitutes hyperbole for an analysis of the interests actually at stake. We are not talking in these cases about mere criticism or opinion, but about misstatements of fact that seriously harm the reputation of another, by lowering him in the estimation of the community or to deter third persons from associating or dealing with him. Restatement of Torts, § 559 (1938). The necessary breathing room for speakers can be ensured by limitations on recoverable damages; it does not also require depriving many public figures of any room to vindicate their reputations sullied by false statements of fact. JUSTICE BRENNAN suggests that even without the threat of large presumed and punitive damage awards, press defendants' communication will be unduly chilled by having to pay for the actual damages caused to those they defame. *Ante*, at 11. But other commercial enterprises in this country must pay for the damages they cause as a cost of doing business, and it is difficult to argue that the United States did not have a free and vigorous press before the rule in *New York Times* was announced. In any event, the *New York Times* standard was formulated to protect the press from the chilling danger of numerous large damage awards. Nothing in the central rationale behind *New York Times* demands an absolute immunity from suits to establish the falsity of a defamatory mis-

statement about a public figure where the plaintiff cannot make out a jury case of actual malice.

I still believe the common-law rules should have been retained where plaintiff is not a public official or public figure. As I see it, the Court undervalued the reputational interest at stake in such cases. I have also come to doubt the easy assumption that the common-law rules would muzzle the press. But even accepting the *Gertz* premise that the press also needed protection in suits by private parties, there was no need to modify the common-law requirements for establishing liability and to increase the burden of proof that must be satisfied to secure a judgment authorizing at least nominal damages and the recovery of additional sums within the limitations that the Court might have set.[3]

It is interesting that JUSTICE POWELL declines to follow the *Gertz* approach in this case. 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 or not it implicates a matter of public importance. JUSTICE POWELL, however, distinguishes *Gertz* as a case that involved a matter of public importance, an element absent here. Wisely, in my view, JUSTICE POWELL does not rest his application of a different rule here on a distinction drawn between media and non-media defendants. On that issue, I agree with JUSTICE BRENNAN that the First Amendment gives no more protection to the press in defamation suits than it does to others exercising their freedom of speech. None of our cases affords such a distinction; to the contrary, the Court has rejected it at every turn.[4] It should be rejected again, particularly in

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[3] The Court was unresponsive to my suggestion in dissent, 418 U. S., at 391–392, that the plaintiff should be able to prove and obtain a judgment of falsehood without having to establish any kind of fault.

[4] We explained in *Branzburg* v. *Hayes*, 408 U. S. 665 (1972) that "the informative function asserted by representatives of the organized press" to justify greater privileges under the First Amendment was also "performed

this context, since it makes no sense to give the most protection to those publishers who reach the most readers and therefore pollute the channels of communication with the most misinformation and do the most damage to private reputation. If *Gertz* is to be distinguished from this case, it should be on the ground that it applies only where the allegedly false publication deals with a matter of general or public importance. If the false publication does not deal with such a matter, the common-law rules would apply whether the defendant is a member of the media or other public disseminator or a non-media individual publishing privately.

As I have said, I dissented in *Gertz*, and I doubt that the decision in that case has made any measurable contribution to First Amendment or reputational values since its announcement. Nor am I sure that it has saved the press a great deal of money. Like the *New York Times* decision, the burden that plaintiffs must meet invites long and complicated discovery involving detailed investigation of the workings of the press, how a news story is developed, and the state of mind of the reporter and publisher. See *Herbert* v. *Lando*, 441 U. S. 153 (1979). That kind of litigation is very expensive. I suspect that the press would be no worse off financially if the common-law rules were to apply and if the judiciary was careful to insist that damages awards be kept within bounds.

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by lecturers, political pollsters, novelists, academic researchers, and dramatists." *Id.*, at 705. From its inception, without discussing the issue, we have applied the rule of *New York Times* to non-media defendants. See *New York Times*, 376 U. S., at 254, n.*, 286; *Henry* v. *Collins*, 380 U. S. 356 (1965); *Garrison* v. *Louisiana*, 379 U. S. 64 (1967). And this Court has made plain that the organized press has a monopoly neither on the First Amendment nor on the ability to enlighten. *First National Bank* v. *Bellotti*, 435 U. S. 765, 782 (1978). See also *Pell* v. *Procunier*, 417 U. S. 817 (1974) (press has no independent First Amendment right of access to prisons). Cf. *Buckley* v. *Valeo*, 424 U. S. 1, 48–49 (1976) (the idea that government can restrict the speech of some elements of society to enhance the relative voice of others is "wholly foreign" to the First Amendment).

However that may be, I cannot assume that the press, as successful and powerful as it is, will be intimidated into withholding news that by decent journalistic standards it believes to be true.

The question before us is whether *Gertz* is to be applied in this case. For either of two reasons, I believe that it should not. First, I am unreconciled to the *Gertz* holding and believe that it should be overruled. Second, as JUSTICE POWELL indicates, the defamatory publication in this case does not deal with a matter of public importance. Consequently, I dissent from the Court's judgment and would affirm the judgment of the Supreme Court of Vermont.

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

Circulated: JAN 2 5 1985

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-18

DUN & BRADSTREET, INC., PETITIONERS *v.*
GREENMOSS BUILDERS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

[January ——, 1985]

JUSTICE WHITE, dissenting.

Until *New York Times* v. *Sullivan*, 376 U. S. 254 (1964), the law of defamation was almost exclusively the business of state courts and legislatures. Under the prevailing state libel law, the defamed individual had only to prove a false written publication that subjected him to hatred, contempt or ridicule. Truth was a defense; but given a defamatory false circulation, general injury to reputation was presumed; special damages, such as pecuniary loss and emotional distress, could be recovered; and punitive damages were available if common-law malice were shown. General damages for injury to reputation were presumed and awarded because the judgment of history was that "in many cases the effect of defamatory statements is so subtle and indirect that it is impossible directly to trace the effects thereof in loss to the person defamed." Restatement of Torts § 621, Comment a, p. 314 (1938). The defendant was permitted to show that there was no reputational injury; but at the very least, the prevailing rule was that at least nominal damages were to be awarded for any defamatory publication actionable per se. This rule performed

> "[A] vindicatory function by enabling the plaintiff publicly to brand the defamatory publication as false. The salutary social value of this rule is preventive in charac-

> ter since it often permits a defamed person to expose the groundless character of a defamtory rumor before harm to the reputation has resulted therefrom." *Id.* § 569, Comment b, p. 166.

Similar rules applied to slanderous statements that were actionable per se.[1]

New York Times v. *Sullivan* was the first major step in what proved to be a seemingly irreversible process of constitutionalizing the entire law of libel and slander. Under that case, a public official suing for libel could no longer make out his case by proving a false and damaging publication. He could not establish liability and recover any damages, whether presumed or actually proved, unless he proved "malice", which was defined in that case as a knowing falsehood or a reckless disregard for the truth. 376 U. S., at 280. Given that proof, however, the usual damages were available, including presumed and punitive damages. This judgment overturning 200 years of libel law was said to be necessary to implement the First Amendment interest in "uninhibited, robust, and wide-open" debate on public issues. *Id.*, at 270. Three years later, the same rule was applied to those plaintiffs who were not public officials, but were what was termed public figures. *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130, 155 (1967).

In 1971, four Justices were of the view that the *New York Times* rules should apply where the publication concerned any manner of general or public interest, even though the plaintiff was a private person. *Rosenbloom* v. *Metromedia*,

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[1] At the common law, slander, unlike libel, was actionable per se only when it dealt with a narrow range of statements: those imputing a criminal offense, a venereal or loathsome and communicable disease, improper conduct of a lawful business, or unchastity of a woman. Restatement of Torts § 570 (1938). To be actionable, all other slanderous statements required additional proof of special damages other than an injury to reputation or emotional distress. The special damage most often takes the form of material or pecuniary loss. *Id.*, § 575 and Comment b, pp. 185–187.

Inc., 403 U. S. 29. That view did not command a majority. But in *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974), the Court again dealt with defamation actions by private individuals, for the first time holding that such plaintiffs could no longer recover by proving a false statement, no matter how damaging it might be to reputation. They must, in addition, prove some "fault", at least negligence. 418 U. S., at 347, 350. Even with that proof, damages were not presumed but had to be proved. *Id.*, at 349. No punitive damages were available without proof of *New York Times* malice. *Id.*, at 350. This decision, which again purported to implement First Amendment values, seemingly left no defamation actions free from federal constitutional limitations.

I joined the judgment and opinion in *New York Times*. I also joined later decisions extending the *New York Times* standard to other situations. But I came to have increasing doubts about the soundness of the Court's approach and about some of the assumptions underlying it. I could not join the plurality opinion in *Rosenbloom*, and I dissented in *Gertz*, asserting that the common-law remedies should be retained for private plaintiffs. I remain convinced that *Gertz* was erroneously decided. I have also become convinced that the Court struck an improvident balance in the *New York Times* case between the public's interest in being fully informed about public officials and public affairs and the competing interest of those who have been defamed in vindicating their reputation.

In a country like this, where the people purport to be able to govern themselves through their elected representatives, adequate information about their government is of transcendent importance. That flow of intelligence deserves full First Amendment protection. Criticism and assessment of the performance of public officials and of government in general are not subject to penalties imposed by law. But these First Amendment values are not at all served by circulating false statements of fact about public officials. On the con-

trary, erroneous information frustrates these values. They are even more disserved when the statements falsely impugn the honesty of those men and women and hence lessen the confidence in government. As the Court said in *Gertz*, "there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues." 418 U. S., at 340. Yet in *New York Times* cases, the plaintiff must overcome the burden of showing not only falsity but also that the publisher either deliberately lied or recklessly disregarded the truth or falsity of a statement obviously very damaging to reputation. Absent that proof, there will be no judgment in his favor. The lie will stand, and the public continue to be misinformed about public matters. This will recurringly happen because the putative plaintiff's burden is so exceedingly difficult to satisfy and can be discharged only by expensive litigation. Even if the plaintiff sues, he frequently loses on summary judgment or never gets to the jury because of insufficient proof of malice. If he wins before the jury, verdicts are often overturned by appellate courts for failure to prove malice. Furthermore, when the plaintiff loses, the jury will likely return a general verdict and there will be no judgment that the publication was false, even though it was without foundation in reality. The public is left to conclude that the challenged statement was true after all. Their only chance of being accurately informed is measured by the public official's ability himself to counter the lie, unaided by the courts. That is a decidedly weak reed to depend on for the vindication of First Amendment interests—"it is the rare case where the denial overtakes the original charge. Denials, retractions, and corrections are not 'hot' news, and rarely receive the prominence of the original story." *Rosenbloom*, opinion of BRENNAN, J., 403 U. S., at 46–47; *Gertz*, dissenting opinion of BRENNAN, J., 418 U. S., at 363–364.

Also, by leaving the lie uncorrected, the *New York Times* rule plainly leaves the public official without a remedy for the damage to his reputation. Yet the Court has observed that the individual's right to the protection of his own good name is a basic consideration of our constitutional system, reflecting "our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty." *Gertz*, 418 U. S., at 341, quoting *Rosenblatt* v. *Baer*, 383 U. S. 75, 92 (1966) (Stewart, J, concurring). Moreover, it must be remembered that we are not talking about mere criticism or opinion, but about misstatements of fact that tend to harm the reputation of another, so as to lower him in the estimation of the community or to deter third persons from associating or dealing with him. Restatement of Torts, § 559 (1938). The upshot is that the public official must suffer the injury, often cannot get a judgment identifying the lie for what it is, and has very little, if any, chance of countering that lie in the public press.

The *New York Times* rule thus countenances two evils: first, the stream of information about public officials and public affairs is polluted and often remains polluted by false information; and second, the reputation and professional life of the defeated plaintiff may be destroyed by falsehoods that might have been avoided with a reasonable effort to investigate the facts. In terms of the First Amendment and reputational interests at stake, these seem grossly perverse results.

Of course, the Court in *New York Times* could not have been unaware of these realities. Despite our ringing endorsement of "wide-open" and "uninhibited" debate, which taken literally would protect falsehoods of all kinds, we cannot fairly be accused of giving constitutional protection to false information as such. We nevertheless found constitutional justification for our decision, which in the end had that precise effect. The constitutional interest in the flow of information about public affairs was thought to be very strong,

and discovering the truth in this area very difficult, even with the best of efforts. These considerations weighed so heavily that those who write and speak about public affairs must have some breathing room—that is, they should be permitted to err and misinform the public as long as they act unknowingly and without recklessness. If the press could be faced with possibly sizeable damages for every mistaken publication injurious to reputation, the result would be an unacceptable degree of self-censorship, which might prevent the occasional mistaken libel, but would also often prevent the timely flow of information that is thought to be true but cannot be readily verified. The press must therefore be privileged to spread false information, even though that information has negative First Amendment value and is severely damaging to reputation, in order to encourage the full flow of the truth, which otherwise might be withheld.

Gertz is subject to similar observations. Although rejecting the *New York Times* malice standard where the plaintiff is neither a public official nor a public figure, the Court nevertheless deprived the private plaintiff of his common-law remedies, making recovery more difficult in order to provide a margin for error. In doing so, the Court ruled that without proof of at least negligence, a plaintiff damaged by the most outrageous falsehoods would be remediless, and the lie very likely would go uncorrected. And even if fault were proved, actual damage to reputation would have to be shown, a burden traditional libel law considered difficult, if not impossible, to discharge. For this reason JUSTICE POWELL would not impose on the plaintiff the burden of proving damages in the case now before us.

Although there was much talk in *Gertz* about liability without fault and the unfairness of presuming damages, all of this, as was the case in *New York Times*, was done in the name of the First Amendment, purportedly to protect the press and others writing about public affairs from possibly intimidating damages liability. But if protection of the press from intimi-

dating damages liability that might lead to excessive timidity was the driving force behind *New York Times* and *Gertz*, it is evident that the Court engaged in severe overkill in both cases.

In *New York Times*, instead of escalating the plaintiff's burden of proof to an almost impossible level, we could have achieved our stated goal by limiting the recoverable damages to a level that would not unduly threaten the press. Punitive damages might be scrutinized as Justice Harlan suggested in *Rosenbloom*, 403 U. S., at 77, or entirely forbidden as JUSTICE POWELL would have it in this case. Presumed damages to reputation might have been prohibited, as in *Gertz*. Had that course been taken and the common-law standard of liability been retained, the defamed public official, upon proving falsity, could at least have had a judgment to that effect. His reputation would then be vindicated; and to the extent possible, the misinformation circulated would have been countered. He might have also recovered a modest amount, enough perhaps to pay his litigation expenses. In this way, both First Amendment and reputational interests would have been far better served.

I still believe the common-law rules should have been retained where plaintiff is not a public official or public figure. As I see it, the Court undervalued the reputational interest at stake in such cases. I have also come to doubt the easy assumption that the common-law rules would muzzle the press. But even accepting the *Gertz* premise that the press also needed protection in suits by private parties, there was no need to modify the common-law requirements for establishing liability and to increase the burden of proof that must be satisfied to secure a judgment authorizing at least nominal damages and the recovery of additional sums within the limitations that the Court might have set. I note that in the present case, JUSTICE POWELL follows this very route in resolving whatever tensions there might be between First Amendment and reputational interests.

It is indeed interesting that JUSTICE POWELL declines to follow the *Gertz* approach in this case. I had thought that the decision in *Gertz* was intended to reach cases where non-media as well as media defendants are sued, as well as those cases that involve any false statements of fact injurious to reputation, whether the statement implicates a matter of public importance or not. JUSTICE POWELL, however, distinguishes *Gertz* on the two grounds. First, *Gertz* involved a *public* expression, *i. e.*, a media or similar publication. Here the circulation was private and sent only to subscribers to the Dun & Bradstreet service. Second, *Gertz* involved a matter of public importance; here the issue is not one of general or public import. These two preconditions to the application of *Gertz* would confine that case to its facts. Insisting on both of them would mean that a non-media defendant would never have the protection of *Gertz* while a media defendant would deserve its protection if the misstatement at issue concerned a matter of public importance, but not otherwise. Confining *Gertz* to this limited extent would be an improvement, but since later in his concurring opinion, JUSTICE POWELL appears to collapse the two distinguishing elements of *Gertz* into one—the public expression aspect—I am unclear as to what the Justice thinks the limits of *Gertz* are, other than that a media defendant is sheltered by it and a non-media defendant is not.

I find that distinction unacceptable. In this respect, I agree with JUSTICE BRENNAN that the First Amendment gives no more protection to the press in defamation suits than it does to others exercising their freedom of speech. None of our cases affords such a distinction; to the contrary, the Court has rejected it at every turn.[2] It should be rejected

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[2] We explained in *Branzburg* v. *Hayes*, 408 U. S. 665 (1972) that "the informative function asserted by representatives of the organized press" to justify greater privileges under the First Amendment was also "performed by lecturers, political pollsters, novelists, academic researchers, and dramatists." *Id.*, at 705. From its inception, without discussing the issue,

again, particularly in this context, since it makes no sense to give the most protection to those publishers who reach the most readers and therefore pollute the channels of communication with the most misinformation and do the most damage to private reputation. If *Gertz* is not to apply to this case, it would make far more sense, it seems to me, to treat all defendants alike in defamation suits by private plaintiffs and to hold that *Gertz* is to be read as applying only where the allegedly false publication deals with a matter of general or public importance. If the false publication does not deal with such a matter, the common-law rules would apply whether the defendant is a member of the media or a non-media individual or concern.

As I have said, I dissented in *Gertz*, and I doubt that the decision in that case has made any measurable contribution to First Amendment or reputational values since its announcement. Nor am I sure that it has saved the press a great deal of money. Like the *New York Times* decision, the burden that plaintiffs must meet invites long and complicated discovery involving detailed investigation of the workings of the press, how a news story is developed, and the state of mind of the reporter and publisher. See *Herbert* v. *Lando*, 441 U. S. 153 (1979). That kind of litigation is very expensive. I suspect that the press would be no worse off financially if the common-law rules were to apply and if the judiciary was careful to insist that damages awards be kept within bounds.

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we have applied the rule of *New York Times* to non-media defendants. See *New York Times*, 376 U. S., at 254, n.*, 286; *Henry* v. *Collins*, 380 U. S. 356 (1965); *Garrison* v. *Louisiana*, 379 U. S. 64 (1967). And this Court has made plain that the organized press has a monopoly neither on the First Amendment nor on the ability to enlighten. *First National Bank* v. *Bellotti*, 435 U. S. 765, 782 (1978). See also *Pell* v. *Procunier*, 417 U. S. 817 (1974) (press has no independent First Amendment right of access to prisons). Cf. *Buckley* v. *Valeo*, 424 U. S. 1, 48–49 (1976) (the idea that government can restrict the speech of some elements of society to enhance the relative voice of others is "wholly foreign" to the First Amendment).

However that may be, I cannot assume that the press, as successful and powerful as it is, will be intimidated into withholding news that by decent journalistic standards it believes to be true.

The question before us is whether *Gertz* is to be applied in this case. For either of two reasons, I believe that it should not. First, I am unreconciled to the *Gertz* holding and believe that it should be overruled. Second, as JUSTICE POWELL indicates, the defamatory publication in this case does not deal with a matter of public importance. Consequently, I dissent from the Court's judgment and cannot join its opinion.

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

2 pp

From: **Justice White**

Circulated: _____

Recirculated: MAR 5 1985

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES:

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83–18

DUN & BRADSTREET, INC., PETITIONERS *v.*
GREENMOSS BUILDERS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

[March ——, 1985]

JUSTICE WHITE, dissenting.

Until *New York Times* v. *Sullivan*, 376 U. S. 254 (1964), the law of defamation was almost exclusively the business of state courts and legislatures. Under the prevailing state libel law, the defamed individual had only to prove a false written publication that subjected him to hatred, contempt or ridicule. Truth was a defense; but given a defamatory false circulation, general injury to reputation was presumed; special damages, such as pecuniary loss and emotional distress, could be recovered; and punitive damages were available if common-law malice were shown. General damages for injury to reputation were presumed and awarded because the judgment of history was that "in many cases the effect of defamatory statements is so subtle and indirect that it is impossible directly to trace the effects thereof in loss to the person defamed." Restatement of Torts § 621, Comment a, p. 314 (1938). The defendant was permitted to show that there was no reputational injury; but at the very least, the prevailing rule was that at least nominal damages were to be awarded for any defamatory publication actionable per se. This rule performed

> "[A] vindicatory function by enabling the plaintiff publicly to brand the defamatory publication as false. The salutary social value of this rule is preventive in charac-

No real changes.
—Dan

> ter since it often permits a defamed person to expose the groundless character of a defamtory rumor before harm to the reputation has resulted therefrom." *Id.* § 569, Comment b, p. 166.

Similar rules applied to slanderous statements that were actionable per se.[1]

New York Times v. *Sullivan* was the first major step in what proved to be a seemingly irreversible process of constitutionalizing the entire law of libel and slander. Under that case, a public official suing for libel could no longer make out his case by proving a false and damaging publication. He could not establish liability and recover any damages, whether presumed or actually proved, unless he proved "malice", which was defined in that case as a knowing falsehood or a reckless disregard for the truth. 376 U. S., at 280. Given that proof, however, the usual damages were available, including presumed and punitive damages. This judgment overturning 200 years of libel law was said to be necessary to implement the First Amendment interest in "uninhibited, robust, and wide-open" debate on public issues. *Id.*, at 270. Three years later, the same rule was applied to those plaintiffs who were not public officials, but were what was termed public figures. *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130, 155 (1967).

In 1971, four Justices were of the view that the *New York Times* rules should apply where the publication concerned any manner of general or public interest, even though the plaintiff was a private person. *Rosenbloom* v. *Metromedia*,

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[1] At the common law, slander, unlike libel, was actionable per se only when it dealt with a narrow range of statements: those imputing a criminal offense, a venereal or loathsome and communicable disease, improper conduct of a lawful business, or unchastity of a woman. Restatement of Torts § 570 (1938). To be actionable, all other slanderous statements required additional proof of special damages other than an injury to reputation or emotional distress. The special damage most often takes the form of material or pecuniary loss. *Id.*, § 575 and Comment b, pp. 185–187.

Inc., 403 U. S. 29. That view did not command a majority. But in *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974), the Court again dealt with defamation actions by private individuals, for the first time holding that such plaintiffs could no longer recover by proving a false statement, no matter how damaging it might be to reputation. They must, in addition, prove some "fault", at least negligence. 418 U. S., at 347, 350. Even with that proof, damages were not presumed but had to be proved. *Id.*, at 349. No punitive damages were available without proof of *New York Times* malice. *Id.*, at 350. This decision, which again purported to implement First Amendment values, seemingly left no defamation actions free from federal constitutional limitations.

I joined the judgment and opinion in *New York Times*. I also joined later decisions extending the *New York Times* standard to other situations. But I came to have increasing doubts about the soundness of the Court's approach and about some of the assumptions underlying it. I could not join the plurality opinion in *Rosenbloom*, and I dissented in *Gertz*, asserting that the common-law remedies should be retained for private plaintiffs. I remain convinced that *Gertz* was erroneously decided. I have also become convinced that the Court struck an improvident balance in the *New York Times* case between the public's interest in being fully informed about public officials and public affairs and the competing interest of those who have been defamed in vindicating their reputation.

In a country like this, where the people purport to be able to govern themselves through their elected representatives, adequate information about their government is of transcendent importance. That flow of intelligence deserves full First Amendment protection. Criticism and assessment of the performance of public officials and of government in general are not subject to penalties imposed by law. But these First Amendment values are not at all served by circulating false statements of fact about public officials. On the con-

trary, erroneous information frustrates these values. They are even more disserved when the statements falsely impugn the honesty of those men and women and hence lessen the confidence in government. As the Court said in *Gertz*, "there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues." 418 U. S., at 340. Yet in the *New York Times* cases, the public official's complaint will be dismissed unless he alleges and makes out a jury case of a knowing or reckless falsehood. Absent such proof, there will be no jury verdict or judgment of any kind in his favor, even if the challenged publication is admittedly false. The lie will stand, and the public continue to be misinformed about public matters. This will recurringly happen because the putative plaintiff's burden is so exceedingly difficult to satisfy and can be discharged only by expensive litigation. Even if the plaintiff sues, he frequently loses on summary judgment or never gets to the jury because of insufficient proof of malice. If he wins before the jury, verdicts are often overturned by appellate courts for failure to prove malice. Furthermore, when the plaintiff loses, the jury will likely return a general verdict and there will be no judgment that the publication was false, even though it was without foundation in reality.[2] The public is left to conclude that the challenged statement was true after all. Their only chance of being accurately informed is measured by the public official's ability himself to counter the lie, unaided by the courts. That is a decidedly weak reed to depend on for the vindication of First Amendment interests—"it is the rare case

[2] If there is a jury case of malice, it may be that the jury will be asked to bring in separate verdicts on falsity and malice. In that event, there could be a verdict in favor of the plaintiff on falsity, but against him on malice. There would be no judgment in his favor, but the verdict on falsity would be a public one and would tend to set the record right and clear the plaintiff's name.

where the denial overtakes the original charge. Denials, retractions, and corrections are not 'hot' news, and rarely receive the prominence of the original story." *Rosenbloom*, opinion of BRENNAN, J., 403 U. S., at 46–47; *Gertz*, dissenting opinion of BRENNAN, J., 418 U. S., at 363–364.

Also, by leaving the lie uncorrected, the *New York Times* rule plainly leaves the public official without a remedy for the damage to his reputation. Yet the Court has observed that the individual's right to the protection of his own good name is a basic consideration of our constitutional system, reflecting "our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty." *Gertz*, 418 U. S., at 341, quoting *Rosenblatt* v. *Baer*, 383 U. S. 75, 92 (1966) (Stewart, J, concurring). Moreover, it must be remembered that we are not talking about mere criticism or opinion, but about misstatements of fact that tend to harm the reputation of another, so as to lower him in the estimation of the community or to deter third persons from associating or dealing with him. Restatement of Torts, § 559 (1938). The upshot is that the public official must suffer the injury, often cannot get a judgment identifying the lie for what it is, and has very little, if any, chance of countering that lie in the public press.

The *New York Times* rule thus countenances two evils: first, the stream of information about public officials and public affairs is polluted and often remains polluted by false information; and second, the reputation and professional life of the defeated plaintiff may be destroyed by falsehoods that might have been avoided with a reasonable effort to investigate the facts. In terms of the First Amendment and reputational interests at stake, these seem grossly perverse results.

Of course, the Court in *New York Times* could not have been unaware of these realities. Despite our ringing endorsement of "wide-open" and "uninhibited" debate, which taken literally would protect falsehoods of all kinds, we can-

not fairly be accused of giving constitutional protection to false information as such. We nevertheless found constitutional justification for our decision, which in the end had that precise effect. The constitutional interest in the flow of information about public affairs was thought to be very strong, and discovering the truth in this area very difficult, even with the best of efforts. These considerations weighed so heavily that those who write and speak about public affairs must have some breathing room—that is, they should be permitted to err and misinform the public as long as they act unknowingly and without recklessness. If the press could be faced with possibly sizeable damages for every mistaken publication injurious to reputation, the result would be an unacceptable degree of self-censorship, which might prevent the occasional mistaken libel, but would also often prevent the timely flow of information that is thought to be true but cannot be readily verified. The press must therefore be privileged to spread false information, even though that information has negative First Amendment value and is severely damaging to reputation, in order to encourage the full flow of the truth, which otherwise might be withheld.

Gertz is subject to similar observations. Although rejecting the *New York Times* malice standard where the plaintiff is neither a public official nor a public figure, the Court nevertheless deprived the private plaintiff of his common-law remedies, making recovery more difficult in order to provide a margin for error. In doing so, the Court ruled that without proof of at least negligence, a plaintiff damaged by the most outrageous falsehoods would be remediless, and the lie very likely would go uncorrected. And even if fault were proved, actual damage to reputation would have to be shown, a burden traditional libel law considered difficult, if not impossible, to discharge. For this reason JUSTICE POWELL would not impose on the plaintiff the burden of proving damages in the case now before us.

Although there was much talk in *Gertz* about liability without fault and the unfairness of presuming damages, all of this, as was the case in *New York Times*, was done in the name of the First Amendment, purportedly to protect the press and others writing about public affairs from possibly intimidating damages liability. But if protection of the press from intimidating damages liability that might lead to excessive timidity was the driving force behind *New York Times* and *Gertz*, it is evident that the Court engaged in severe overkill in both cases.

In *New York Times*, instead of escalating the plaintiff's burden of proof to an almost impossible level, we could have achieved our stated goal by limiting the recoverable damages to a level that would not unduly threaten the press. Punitive damages might be scrutinized as Justice Harlan suggested in *Rosenbloom*, 403 U. S., at 77, or entirely forbidden as JUSTICE POWELL would have it in this case. Presumed damages to reputation might have been prohibited, as in *Gertz*. Had that course been taken and the common-law standard of liability been retained, the defamed public official, upon proving falsity, could at least have had a judgment to that effect. His reputation would then be vindicated; and to the extent possible, the misinformation circulated would have been countered. He might have also recovered a modest amount, enough perhaps to pay his litigation expenses. In this way, both First Amendment and reputational interests would have been far better served.

I still believe the common-law rules should have been retained where plaintiff is not a public official or public figure. As I see it, the Court undervalued the reputational interest at stake in such cases. I have also come to doubt the easy assumption that the common-law rules would muzzle the press. But even accepting the *Gertz* premise that the press also needed protection in suits by private parties, there was no need to modify the common-law requirements for establishing liability and to increase the burden of proof that must

be satisfied to secure a judgment authorizing at least nominal damages and the recovery of additional sums within the limitations that the Court might have set.[3]

It is interesting that JUSTICE POWELL declines to follow the *Gertz* approach in this case. 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 or not it implicates a matter of public importance. JUSTICE POWELL, however, distinguishes *Gertz* on the two grounds. First, *Gertz* involved a *public* expression, *i. e.*, a distribution to the public at large. Here the circulation was private and sent only to subscribers to the Dun & Bradstreet service. Second, *Gertz* involved a matter of public importance; here the issue is not one of general or public import. These two preconditions to the application of *Gertz* would confine that case to its facts. Insisting on both of them would mean that a "private" disseminator would never have the protection of *Gertz* while a defendant speaking to the public at large would enjoy its protection—if the misstatement at issue concerned a matter of public importance, but not otherwise. Confining *Gertz* to this limited extent would be an improvement, but I find the distinction between public and private utterances unacceptable.

For all practical purposes, the public-private publication dichotomy is a crude way of distinguishing between media and non-media defendants. That is, a media defendant would almost always be engaged in public dissemination; only non-media persons could be categorized as private ones. The media would almost always be entitled to more constitutional protection than would others whose publications reach a smaller audience. In this respect, I agree with Justice Brennan that the First Amendment gives no more protection

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[3] The Court was unresponsive to my suggestion in dissent, 418 U. S., at 391–392, that the plaintiff should be able to prove and ~~have~~ obtain a judgment of falsehood without having to establish any kind of fault.

to the press in defamation suits than it does to others exercising their freedom of speech. None of our cases affords such a distinction; to the contrary, the Court has rejected it at every turn.[4] It should be rejected again, particularly in this context, since it makes no sense to give the most protection to those publishers who reach the most readers and therefore pollute the channels of communication with the most misinformation and do the most damage to private reputation. If *Gertz* is not to apply to this case, it would make far more sense, it seems to me, to treat all defendants alike in defamation suits by plaintiffs who are neither public officials nor public figures, and to hold that *Gertz* is to be read as applying only where the allegedly false publication deals with a matter of general or public importance. If the false publication does not deal with such a matter, the common-law rules would apply whether the defendant is a member of the media or other public disseminator or a non-media individual publishing privately.

As I have said, I dissented in *Gertz*, and I doubt that the decision in that case has made any measurable contribution to First Amendment or reputational values since its announcement. Nor am I sure that it has saved the press a great deal

[4] We explained in *Branzburg* v. *Hayes*, 408 U. S. 665 (1972) that "the informative function asserted by representatives of the organized press" to justify greater privileges under the First Amendment was also "performed by lecturers, political pollsters, novelists, academic researchers, and dramatists." *Id.*, at 705. From its inception, without discussing the issue, we have applied the rule of *New York Times* to non-media defendants. See *New York Times*, 376 U. S., at 254, n.*, 286; *Henry* v. *Collins*, 380 U. S. 356 (1965); *Garrison* v. *Louisiana*, 379 U. S. 64 (1967). And this Court has made plain that the organized press has a monopoly neither on the First Amendment nor on the ability to enlighten. *First National Bank* v. *Bellotti*, 435 U. S. 765, 782 (1978). See also *Pell* v. *Procunier*, 417 U. S. 817 (1974) (press has no independent First Amendment right of access to prisons). Cf. *Buckley* v. *Valeo*, 424 U. S. 1, 48–49 (1976) (the idea that government can restrict the speech of some elements of society to enhance the relative voice of others is "wholly foreign" to the First Amendment).

of money. Like the *New York Times* decision, the burden that plaintiffs must meet invites long and complicated discovery involving detailed investigation of the workings of the press, how a news story is developed, and the state of mind of the reporter and publisher. See *Herbert* v. *Lando*, 441 U. S. 153 (1979). That kind of litigation is very expensive. I suspect that the press would be no worse off financially if the common-law rules were to apply and if the judiciary was careful to insist that damages awards be kept within bounds. However that may be, I cannot assume that the press, as successful and powerful as it is, will be intimidated into withholding news that by decent journalistic standards it believes to be true.

The question before us is whether *Gertz* is to be applied in this case. For either of two reasons, I believe that it should not. First, I am unreconciled to the *Gertz* holding and believe that it should be overruled. Second, as JUSTICE POWELL indicates, the defamatory publication in this case does not deal with a matter of public importance. Consequently, I dissent from the Court's judgment and cannot join its opinion.

Dan - If we responded as you suggest as a possibility, would we not alienate W.J.B. & SOC ?

pp. 1, 3, 4, 6, 7, 8, 9, 10, 11

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

Circulated: _____

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5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-18

DUN & BRADSTREET, INC., PETITIONERS *v.*
GREENMOSS BUILDERS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

[June ——, 1985]

JUSTICE WHITE, concurring in the judgment.

Until *New York Times* v. *Sullivan*, 376 U. S. 254 (1964), the law of defamation was almost exclusively the business of state courts and legislatures. Under the then prevailing state libel law, the defamed individual had only to prove a false written publication that subjected him to hatred, contempt or ridicule. Truth was a defense; but given a defamatory false circulation, general injury to reputation was presumed; special damages, such as pecuniary loss and emotional distress, could be recovered; and punitive damages were available if common-law malice were shown. General damages for injury to reputation were presumed and awarded because the judgment of history was that "in many cases the effect of defamatory statements is so subtle and indirect that it is impossible directly to trace the effects thereof in loss to the person defamed." Restatement of Torts § 621, Comment a, p. 314 (1938). The defendant was permitted to show that there was no reputational injury; but at the very least, the prevailing rule was that at least nominal damages were to be awarded for any defamatory publication actionable per se. This rule performed

> "[A] vindicatory function by enabling the plaintiff publicly to brand the defamatory publication as false. The salutary social value of this rule is preventive in charac-

There is nothing here that you need respond to except perhaps for Justice White's statement on p. 10 that your ruling extends to liability rules. Since BRW is dead set against

> ter since it often permits a defamed person to expose the groundless character of a defamatory rumor before harm to the reputation has resulted therefrom." *Id.* § 569, Comment b, p. 166.

Similar rules applied to slanderous statements that were actionable per se.[1]

New York Times v. *Sullivan* was the first major step in what proved to be a seemingly irreversible process of constitutionalizing the entire law of libel and slander. Under the rule announced in that case, a public official suing for libel could no longer make out his case by proving a false and damaging publication. He could not establish liability and recover any damages, whether presumed or actually proved, unless he proved "malice", which was defined as a knowing falsehood or a reckless disregard for the truth. 376 U. S., at 280. Given that proof, however, the usual damages were available, including presumed and punitive damages. This judgment overturning 200 years of libel law was deemed necessary to implement the First Amendment interest in "uninhibited, robust, and wide-open" debate on public issues. *Id.*, at 270. Three years later, the same rule was applied to plaintiffs who were not public officials, but who were termed public figures. *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130, 155 (1967).

In 1971, four Justices took the view that the *New York Times* rules should apply wherever a publication concerned any manner of general or public interest, even though the plaintiff was a private person. *Rosenbloom* v. *Metromedia*,

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[1] At the common law, slander, unlike libel, was actionable per se only when it dealt with a narrow range of statements: those imputing a criminal offense, a venereal or loathsome and communicable disease, improper conduct of a lawful business, or unchastity of a woman. Restatement of Torts § 570 (1938). To be actionable, all other slanderous statements required additional proof of special damages other than an injury to reputation or emotional distress. The special damage most often took the form of material or pecuniary loss. *Id.*, § 575 and Comment b, pp. 185–187.

Inc., 403 U. S. 29. That view did not command a majority. But in *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974), the Court again dealt with defamation actions by private individuals, for the first time holding that such plaintiffs could no longer recover by proving a false statement, no matter how damaging it might be to reputation. They must, in addition, prove some "fault", at least negligence. 418 U. S., at 347, 350. Even with that proof, damages were not presumed but had to be proved. *Id.*, at 349. Furthermore, punitive damages were available without proof of *New York Times* malice. *Id.*, at 350. This decision, which again purported to implement First Amendment values, seemingly left no defamation actions free from federal constitutional limitations.

I joined the judgment and opinion in *New York Times*. I also joined later decisions extending the *New York Times* standard to other situations. But I came to have increasing doubts about the soundness of the Court's approach and about some of the assumptions underlying it. I could not join the plurality opinion in *Rosenbloom*, and I dissented in *Gertz*, asserting that the common-law remedies should be retained for private plaintiffs. I remain convinced that *Gertz* was erroneously decided. I have also become convinced that the Court struck an improvident balance in the *New York Times* case between the public's interest in being fully informed about public officials and public affairs and the competing interest of those who have been defamed in vindicating their reputation.

In a country like ours, where the people purport to be able to govern themselves through their elected representatives, adequate information about their government is of transcendent importance. That flow of intelligence deserves full First Amendment protection. Criticism and assessment of the performance of public officials and of government in general are not subject to penalties imposed by law. But these First Amendment values are not at all served by circulating false statements of fact about public officials. On the con-

trary, erroneous information frustrates these values. They are even more disserved when the statements falsely impugn the honesty of those men and women and hence lessen the confidence in government. As the Court said in *Gertz*, "there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues." 418 U. S., at 340. Yet in *New York Times* cases, the public official's complaint will be dismissed unless he alleges and makes out a jury case of a knowing or reckless falsehood. Absent such proof, there will be no jury verdict or judgment of any kind in his favor, even if the challenged publication is admittedly false. The lie will stand, and the public continue to be misinformed about public matters. This will recurringly happen because the putative plaintiff's burden is so exceedingly difficult to satisfy and can be discharged only by expensive litigation. Even if the plaintiff sues, he frequently loses on summary judgment or never gets to the jury because of insufficient proof of malice. If he wins before the jury, verdicts are often overturned by appellate courts for failure to prove malice. Furthermore, when the plaintiff loses, the jury will likely return a general verdict and there will be no judgment that the publication was false, even though it was without foundation in reality.[2] The public is left to conclude that the

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It might be suggested that courts, as organs of the government, cannot be trusted to discern what the truth is. ~~*Ante*, at 8–9.~~ But the logical consequence of that view is that the First Amendment forbids all libel and slander suits, for in each such suit, there will be no recovery unless the court finds the publication at issue to be factually false. Of course, no forum is perfect, but that is not a justification for leaving whole classes of

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Also, by leaving the lie uncorrected, the *New York Times* rule plainly leaves the public official without a remedy for the damage to his reputation. Yet the Court has observed that the individual's right to the protection of his own good name is a basic consideration of our constitutional system, reflecting "our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty." *Gertz*, 418 U. S., at 341, quoting *Rosenblatt* v. *Baer*, 383 U. S. 75, 92 (1966) (Stewart, J, concurring). The upshot is that the public official must suffer the injury, often cannot get a judgment identifying the lie for what it is, and has very little, if any, chance of countering that lie in the public press.

The *New York Times* rule thus countenances two evils: first, the stream of information about public officials and public affairs is polluted and often remains polluted by false information; and second, the reputation and professional life of the defeated plaintiff may be destroyed by falsehoods that might have been avoided with a reasonable effort to investi-

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gate the facts. In terms of the First Amendment and reputational interests at stake, these seem grossly perverse results.

Of course, the Court in *New York Times* could not have been unaware of these realities. Despite our ringing endorsement of "wide-open" and "uninhibited" debate, which taken literally would protect falsehoods of all kinds, we cannot fairly be accused of giving constitutional protection to false information as such, for we went on to find competing and overriding constitutional justification for our decision. The constitutional interest in the flow of information about public affairs was thought to be very strong, and discovering the truth in this area very difficult, even with the best of efforts. These considerations weighed so heavily that those who write and speak about public affairs were thought to require some breathing room—that is, they should be permitted to err and misinform the public as long as they act unknowingly and without recklessness. If the press could be faced with possibly sizeable damages for every mistaken publication injurious to reputation, the result would be an unacceptable degree of self-censorship, which might prevent the occasional mistaken libel, but would also often prevent the timely flow of information that is thought to be true but cannot be readily verified. The press must therefore be privileged to spread false information, even though that information has negative First Amendment value and is severely damaging to reputation, in order to encourage the full flow of the truth, which otherwise might be withheld.

Gertz is subject to similar observations. Although rejecting the *New York Times* malice standard where the plaintiff is neither a public official nor a public figure, there the Court nevertheless deprived the private plaintiff of his common-law remedies, making recovery more difficult in order to provide a margin for error. In doing so, the Court ruled that without proof of at least negligence, a plaintiff damaged by the most outrageous falsehoods would be remediless, and the lie

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Although there was much talk in *Gertz* about liability without fault and the unfairness of presuming damages, all of this, as was the case in *New York Times*, was done in the name of the First Amendment, purportedly to shield the press and others writing about public affairs from possibly intimidating damages liability. But if protecting the press from intimidating damages liability that might lead to excessive timidity was the driving force behind *New York Times* and *Gertz*, it is evident that the Court engaged in severe overkill in both cases.

In *New York Times*, instead of escalating the plaintiff's burden of proof to an almost impossible level, we could have achieved our stated goal by limiting the recoverable damages to a level that would not unduly threaten the press. Punitive damages might have beeen scrutinized as Justice Harlan suggested in *Rosenbloom*, 403 U. S., at 77, or perhaps even entirely forbidden. Presumed damages to reputation might have been prohibited, or limited, as in *Gertz*. Had that course been taken and the common-law standard of liability been retained, the defamed public official, upon proving falsity, could at least have had a judgment to that effect. His reputation would then be vindicated; and to the extent possible, the misinformation circulated would have been countered. He might have also recovered a modest amount, enough perhaps to pay his litigation expenses. At the very least, the public official should not have been required to satisfy the actual malice standard where he sought no damages but only to clear his name. In this way, both First Amendment and reputational interests would have been far better served.

We are not talking in these cases about mere criticism or opinion, but about misstatements of fact that seriously harm the reputation of another, by lowering him in the estimation of the community or to deter third persons from associating or dealing with him. Restatement of Torts, § 559 (1938). The necessary breathing room for speakers can be ensured by limitations on recoverable damages; it does not also require depriving many public figures of any room to vindicate their reputations sullied by false statements of fact. It could be suggested that even without the threat of large presumed and punitive damage awards, press defendants' communication will be unduly chilled by having to pay for the actual damages caused to those they defame. But other commercial enterprises in this country not in the business of disseminating information must pay for the damage they cause as a cost of doing business, and it is difficult to argue that the United States did not have a free and vigorous press before the rule in *New York Times* was announced. In any event, the *New York Times* standard was formulated to protect the press from the chilling danger of numerous large damage awards. Nothing in the central rationale behind *New York Times* demands an absolute immunity from suits to establish the falsity of a defamatory misstatement about a public figure where the plaintiff cannot make out a jury case of actual malice.

I still believe the common-law rules should have been retained where plaintiff is not a public official or public figure. As I see it, the Court undervalued the reputational interest at stake in such cases. I have also come to doubt the easy assumption that the common-law rules would muzzle the press. But even accepting the *Gertz* premise that the press also needed protection in suits by private parties, there was no need to modify the common-law requirements for establishing liability and to increase the burden of proof that must be satisfied to secure a judgment authorizing at least nominal

damages and the recovery of additional sums within the limitations that the Court might have set.[3]

It is interesting that JUSTICE POWELL declines to follow the *Gertz* approach in this case. 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 or not it implicates a matter of public importance. JUSTICE POWELL, however, distinguishes *Gertz* as a case that involved a matter of public concern, an element absent here. Wisely, in my view, JUSTICE POWELL does not rest his application of a different rule here on a distinction drawn between media and non-media defendants. On that issue, I agree with JUSTICE BRENNAN that the First Amendment gives no more protection to the press in defamation suits than it does to others exercising their freedom of speech. None of our cases affords such a distinction; to the contrary, the Court has rejected it at every turn.[4] It should be rejected again, particularly in this context, since it makes no sense to give the most protec-

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[4]We explained in *Branzburg* v. *Hayes*, 408 U. S. 665 (1972) that "the informative function asserted by representatives of the organized press" to justify greater privileges under the First Amendment was also "performed by lecturers, political pollsters, novelists, academic researchers, and dramatists." *Id.*, at 705. From its inception, without discussing the issue, we have applied the rule of *New York Times* to non-media defendants. See *New York Times*, 376 U. S., at 254, n.*, 286; *Henry* v. *Collins*, 380 U. S. 356 (1965); *Garrison* v. *Louisiana*, 379 U. S. 64 (1967). And this Court has made plain that the organized press has a monopoly neither on the First Amendment nor on the ability to enlighten. *First National Bank* v. *Bellotti*, 435 U. S. 765, 782 (1978). See also *Pell* v. *Procunier*, 417 U. S. 817 (1974) (press has no independent First Amendment right of access to prisons). Cf. *Buckley* v. *Valeo*, 424 U. S. 1, 48–49 (1976) (the idea that government can restrict the speech of some elements of society to enhance the relative voice of others is "wholly foreign" to the First Amendment).

tion to those publishers who reach the most readers and therefore pollute the channels of communication with the most misinformation and do the most damage to private reputation. If *Gertz* is to be distinguished from this case, on the ground that it applies only where the allegedly false publication deals with a matter of general or public importance, then where the false publication does not deal with such a matter, the common-law rules would apply whether the defendant is a member of the media or other public disseminator or a non-media individual publishing privately. Although JUSTICE POWELL speaks only of the inapplicability of the *Gertz* rule with respect to presumed and punitive damages, it 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.

As I have said, I dissented in *Gertz*, and I doubt that the decision in that case has made any measurable contribution to First Amendment or reputational values since its announcement. Nor am I sure that it has saved the press a great deal of money. Like the *New York Times* decision, the burden that plaintiffs must meet invites long and complicated discovery involving detailed investigation of the workings of the press, how a news story is developed, and the state of mind of the reporter and publisher. See *Herbert* v. *Lando*, 441 U. S. 153 (1979). That kind of litigation is very expensive. I suspect that the press would be no worse off financially if the common-law rules were to apply and if the judiciary was careful to insist that damages awards be kept within bounds. However that may be, I cannot assume that the press, as successful and powerful as it is, will be intimidated into withholding news that by decent journalistic standards it believes to be true.

The question before us is whether *Gertz* is to be applied in this case. For either of two reasons, I believe that it should not. First, I am unreconciled to the *Gertz* holding and believe that it should be overruled. Second, as JUSTICE POW-

ELL indicates, the defamatory publication in this case does not deal with a matter of public importance. Consequently, I concur in the Court's judgment.

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

p. 10

Circulated: _____

Recirculated: 6/21

6th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-18

DUN & BRADSTREET, INC., PETITIONERS *v.* GREENMOSS BUILDERS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

[June —, 1985]

JUSTICE WHITE, concurring in the judgment.

Until *New York Times* v. *Sullivan*, 376 U. S. 254 (1964), the law of defamation was almost exclusively the business of state courts and legislatures. Under the then prevailing state libel law, the defamed individual had only to prove a false written publication that subjected him to hatred, contempt or ridicule. Truth was a defense; but given a defamatory false circulation, general injury to reputation was presumed; special damages, such as pecuniary loss and emotional distress, could be recovered; and punitive damages were available if common-law malice were shown. General damages for injury to reputation were presumed and awarded because the judgment of history was that "in many cases the effect of defamatory statements is so subtle and indirect that it is impossible directly to trace the effects thereof in loss to the person defamed." Restatement of Torts § 621, Comment a, p. 314 (1938). The defendant was permitted to show that there was no reputational injury; but at the very least, the prevailing rule was that at least nominal damages were to be awarded for any defamatory publication actionable per se. This rule performed

> "[A] vindicatory function by enabling the plaintiff publicly to brand the defamatory publication as false. The salutary social value of this rule is preventive in charac-

The change doesn't affect me.
— Dan

> ter since it often permits a defamed person to expose the groundless character of a defamatory rumor before harm to the reputation has resulted therefrom." *Id.* § 569, Comment b, p. 166.

Similar rules applied to slanderous statements that were actionable per se.[1]

New York Times v. *Sullivan* was the first major step in what proved to be a seemingly irreversible process of constitutionalizing the entire law of libel and slander. Under the rule announced in that case, a public official suing for libel could no longer make out his case by proving a false and damaging publication. He could not establish liability and recover any damages, whether presumed or actually proved, unless he proved "malice", which was defined as a knowing falsehood or a reckless disregard for the truth. 376 U. S., at 280. Given that proof, however, the usual damages were available, including presumed and punitive damages. This judgment overturning 200 years of libel law was deemed necessary to implement the First Amendment interest in "uninhibited, robust, and wide-open" debate on public issues. *Id.*, at 270. Three years later, the same rule was applied to plaintiffs who were not public officials, but who were termed public figures. *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130, 155 (1967).

In 1971, four Justices took the view that the *New York Times* rules should apply wherever a publication concerned any manner of general or public interest, even though the plaintiff was a private person. *Rosenbloom* v. *Metromedia*,

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[1] At the common law, slander, unlike libel, was actionable per se only when it dealt with a narrow range of statements: those imputing a criminal offense, a venereal or loathsome and communicable disease, improper conduct of a lawful business, or unchastity of a woman. Restatement of Torts § 570 (1938). To be actionable, all other slanderous statements required additional proof of special damages other than an injury to reputation or emotional distress. The special damage most often took the form of material or pecuniary loss. *Id.*, § 575 and Comment b, pp. 185–187.

Inc., 403 U. S. 29. That view did not command a majority. But in *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974), the Court again dealt with defamation actions by private individuals, for the first time holding that such plaintiffs could no longer recover by proving a false statement, no matter how damaging it might be to reputation. They must, in addition, prove some "fault", at least negligence. 418 U. S., at 347, 350. Even with that proof, damages were not presumed but had to be proved. *Id.*, at 349. Furthermore, no punitive damages were available without proof of *New York Times* malice. *Id.*, at 350. This decision, which again purported to implement First Amendment values, seemingly left no defamation actions free from federal constitutional limitations.

I joined the judgment and opinion in *New York Times*. I also joined later decisions extending the *New York Times* standard to other situations. But I came to have increasing doubts about the soundness of the Court's approach and about some of the assumptions underlying it. I could not join the plurality opinion in *Rosenbloom*, and I dissented in *Gertz*, asserting that the common-law remedies should be retained for private plaintiffs. I remain convinced that *Gertz* was erroneously decided. I have also become convinced that the Court struck an improvident balance in the *New York Times* case between the public's interest in being fully informed about public officials and public affairs and the competing interest of those who have been defamed in vindicating their reputation.

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[4] We explained in *Branzburg* v. *Hayes*, 408 U. S. 665 (1972) that "the informative function asserted by representatives of the organized press" to justify greater privileges under the First Amendment was also "performed by lecturers, political pollsters, novelists, academic researchers, and dramatists." *Id.*, at 705. From its inception, without discussing the issue, we have applied the rule of *New York Times* to non-media defendants. See *New York Times*, 376 U. S., at 254, n.*, 286; *Henry* v. *Collins*, 380 U. S. 356 (1965); *Garrison* v. *Louisiana*, 379 U. S. 64 (1967). And this Court has made plain that the organized press has a monopoly neither on the First Amendment nor on the ability to enlighten. *First National Bank* v. *Bellotti*, 435 U. S. 765, 782 (1978). See also *Pell* v. *Procunier*, 417 U. S. 817 (1974) (press has no independent First Amendment right of access to prisons). Cf. *Buckley* v. *Valeo*, 424 U. S. 1, 48–49 (1976) (the idea that government can restrict the speech of some elements of society to enhance the relative voice of others is "wholly foreign" to the First Amendment).

tion to those publishers who reach the most readers and therefore pollute the channels of communication with the most misinformation and do the most damage to private reputation. If *Gertz* is to be distinguished from this case, on the ground that it applies only where the allegedly false publication deals with a matter of general or public importance, then where the false publication does not deal with such a matter, the common-law rules would apply whether the defendant is a member of the media or other public disseminator or a non-media individual publishing privately. Although JUSTICE POWELL speaks only of the inapplicability of the *Gertz* rule with respect to presumed and punitive damages, it 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.

As I have said, I dissented in *Gertz*, and I doubt that the decision in that case has made any measurable contribution to First Amendment or reputational values since its announcement. Nor am I sure that it has saved the press a great deal of money. Like the *New York Times* decision, the burden that plaintiffs must meet invites long and complicated discovery involving detailed investigation of the workings of the press, how a news story is developed, and the state of mind of the reporter and publisher. See *Herbert* v. *Lando*, 441 U. S. 153 (1979). That kind of litigation is very expensive. I suspect that the press would be no worse off financially if the common-law rules were to apply and if the judiciary was careful to insist that damages awards be kept within bounds. A legislative solution to the damages problem would also be appropriate. Moreover, since libel plaintiffs are very likely more interested in clearing their names than in damages, I doubt that limiting recoveries would deter or be unfair to them. In any event, I cannot assume that the press, as successful and powerful as it is, will be intimidated into withholding news that by decent journalistic standards it believes to be true.

The question before us is whether *Gertz* is to be applied in this case. For either of two reasons, I believe that it should not. First, I am unreconciled to the *Gertz* holding and believe that it should be overruled. Second, as JUSTICE POWELL indicates, the defamatory publication in this case does not deal with a matter of public importance. Consequently, I concur in the Court's judgment.

N.Y. Times applied to non-media Ds - 6
See pre-Gertz case cited n 2 - p 6
Rosenberg limits availability of punitive damages - p 6, n 7 (Harlan)
Gertz - strong state interest in protecting reputation of private citizens - 7, 8

L.F.P

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

Circulated: MAY 29 1984

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83–18

DUN & BRADSTREET, INC., PETITIONER *v.*
GREENMOSS BUILDERS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

[May ——, 1984]

JUSTICE BRENNAN delivered the opinion of the Court.

In *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974), a libel action against a magazine, we held that the First Amendment prohibits awards of presumed or punitive damages for false and defamatory statements absent a showing of knowing falsity or reckless disregard for the truth. The question presented by this case is whether that constitutional protection extends to "nonmedia" defendants.

I

Petitioner Dun & Bradstreet, a credit reporting agency, provides subscribers with financial and related information about corporations. On July 26, 1976, petitioner incorrectly reported that respondent, a Vermont corporation engaged in construction contracting, had filed a voluntary petition for bankruptcy. On the day the report was issued, respondent's president learned of it from a bank official with whom he was discussing the possibility of future financing. Eight days later, after being contacted by respondent's president, petitioner confirmed the falsity of the report and sent a retraction to each of its subscribers who had received the original report. Petitioner refused, however, to supply respondent with the names of those subscribers.

Respondent then brought this defamation action in Vermont state court, alleging that the false report injured its

reputation and seeking $7500 in compensatory and $15,000 in punitive damages. The testimony at trial established that the error in petitioner's report had been caused when one of its employees, a high school student paid to review Vermont bankruptcy pleadings, had inadvertently attributed a bankruptcy petition filed by one of respondent's former employees to respondent itself. Respondent's evidence regarding damages consisted solely of testimony by its president who stated that the report had caused the bank to delay consideration of a pending loan and ultimately to terminate the company's credit. A representative of the bank, called by petitioner, testified that when he received the report he did not believe it and that the bank terminated respondent's credit for reasons wholly unrelated to petitioner's report. Respondent's president also testified that the report had impaired the company's sales and profits and caused it to incur expenses contacting individuals to refute the false information.

After trial, the jury returned a verdict in favor of respondent and awarded $50,000 in compensatory and $300,000 in punitive damages. Petitioner then moved for a new trial. It noted that in *Gertz* v. *Robert Welch, Inc.*, *supra*, at 349, this Court had held "that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth," and argued that the judge's instructions permitted the jury to award such damages on a lesser showing. The trial court agreed with petitioner and granted the motion for a new trial. App. 25–26.

On appeal, the Vermont Supreme Court reversed. 461 A. 2d 414 (1983). Although recognizing that "in certain instances the distinction between media and nonmedia defendants may be difficult to draw," the court stated that "no such difficulty is presented with credit reporting agencies, which are in the business of selling financial information to a limited number of subscribers who have paid substantial fees for their services." *Id.*, at 417. Relying on this distinguishing

characteristic of credit reporting firms, the court concluded that such firms are not "the type of media worthy of First Amendment protection as contemplated by *New York Times* [v. *Sullivan*, 376 U. S. 254 (1964)] and its progeny," 461 A. 2d, at 417–418, and that the balance between a private plaintiff's right to recover presumed and punitive damages without a showing of fault and the First Amendment rights of "nonmedia" speakers "must be struck in favor of the private plaintiff defamed by a nonmedia defendant," *id.*, at 418. Accordingly, the court held "that as a matter of federal constitutional law, the media protections outlined in *Gertz* are inapplicable to nonmedia defamation actions." *Ibid.*

The lower courts have divided over whether "nonmedia" defendants enjoy any constitutional protections in defamation suits, either in suits brought by public figures or officials or in those brought by private plaintiffs. See Smolla, Let the Author Beware: The Rejuvenation of the American Law of Libel, 132 U. Pa. L. Rev. 1, 29–35 and nn. 147, 162 (1983). We granted certiorari to resolve this conflict, —— U. S. —— (1983), and we now reverse. We reject any distinction between "media" and "nonmedia" defendants for purposes of the First Amendment principles applicable to defamation suits. Because petitioner's accurate credit reports constitute speech protected by the First Amendment, the reasoning of *Gertz* applies fully to libel actions brought to redress injury caused by petitioner's inaccurate reports.

II

At the outset, respondent contends that we need not determine in this case whether *Gertz* is applicable to "nonmedia" defendants because the jury instructions satisfied the standards set out in that decision.[1] As noted above, *Gertz* held

[1] Respondent also argues that petitioner did not seek the protections outlined in *Gertz* before the jury instructions were given and that therefore the issue was not preserved for review. In view of the fact that the Vermont Supreme Court considered the federal constitutional issue properly

that presumed or punitive damages may not be awarded to a private defamation plaintiff on any showing less than knowledge of falsity or reckless disregard for the truth—the "actual malice" standard first announced in *New York Times* v. *Sullivan*, *supra*, at 280. The trial court in this case instructed the jury that, because petitioner's statement imputing the insolvency of respondent's business was libelous *per se*, respondent was not required "to prove actual damages resulting from the libel since damage and loss [are] conclusively presumed." App. 17. See also *id.*, at 19 (instructing that "where, as in this case there is a libel per se, damages are presumed and actual damages may not be proven" and that "the law presumes damages in some amount in a case of libel per se and therefore relieves the Plaintiff of the burden of establishing by specific proof that damages have occurred").

Respondent acknowledges that these portions of the trial court's instructions, standing alone, do not satisfy the requirements of *Gertz*. Brief at 40. It notes, however, that the trial court also instructed the jury that respondent could not recover any damages if a common law privilege for credit reporting agencies, barring liability for negligent falsehoods, applied. See App. 18. The charge explained that the privilege was not available if respondent could show "malice or lack of good faith on the part of the Defendant." *Ibid.* The court also told the jury that, "[i]f you find that Defendant's conduct was not privileged, and if you also find, on the basis of clear and convincing evidence, that the Defendant acted with actual malice in publishing the article in question, then you may award Plaintiff punitive or exemplary damages in addition to the actual damages assessed." *Id.*, at 20. Accordingly, respondent argues, the instructions did not permit an award of presumed or punitive damages without proof of "actual malice."

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presented and passed upon it, respondent's contention is unavailing. See *Orr* v. *Orr*, 440 U. S. 268, 274–275 (1979).

The trial judge's definition of "malice or lack of good faith" did not, however, comport with the *New York Times* standard. In defining the circumstances under which the common law privilege would be defeated, the court explained to the jury:

> "If you find that the Defendant acted in a [sic] bad faith towards the plaintiff in publishing the Erroneous Report, *or* that Defendant intended to injure the Plaintiff in its business, *or* that it acted in a willful, wanton or reckless disregard of the rights and interests of the Plaintiff, the Defendant has acted maliciously and the privilege is destroyed. *Further*, if the Report was made with reckless disregard of the possible consequence, *or* if it was made with the knowledge that it was false or with reckless disregard of it's [sic] truth or falsity, it was made with malice." App. 18–19 (emphasis added).

Although these instructions included the *New York Times* formulation, the definition of the kind of malice necessary to support an award of presumed damages was plainly not limited to that standard. See, *e. g.*, *Bose Corp.* v. *Consumers Union of United States, Inc.*, —— U. S. ——, —— n. 30 (1984); *St. Amant* v. *Thompson*, 390 U. S. 727, 731 (1968). Consequently, the trial court's conclusion that the instructions did not satisfy *Gertz* was correct and the Vermont Supreme Court's determination that *Gertz* was inapplicable was necessary to its decision that the trial court erred in granting the motion for a new trial. We therefore turn to our reasons for rejecting the Vermont Supreme Court's conclusion.

III

The decision in *Gertz* was the culmination of a decade long effort "to define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment." 418 U. S., at 325. Ten years earlier, in *New York Times* v. *Sullivan*, *supra*, at 279–80, we first announced "a federal rule that prohibits a public official

from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.*, at 279–280. That rule was subsequently extended to libel actions brought by "public figures," *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130 (1967), and, beginning with *New York Times* itself, was applied to cases involving "nonmedia" defendants. See *New York Times*, 376 U. S., at 254 n.*, 286.[2] We had no occasion, however, to consider the applicability of First Amendment principles to libel actions brought by private individuals until the decision in *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29 (1971).

Rosenbloom concerned a libel suit brought by a distributor of nudist magazines against a radio station. Although a majority of Justices were unable to agree on the appropriate standard of liability in defamation actions brought by private individuals, a plurality would have extended the *New York Times* privilege to such cases when the statements at issue concerned matters of "public or general interest," 403 U. S., at 43 (opinion of BRENNAN, J.). Despite the variety of views on liability, however, there was a clear consensus for the conclusion that, at the very least, the First Amendment limits the availability of punitive damages awards in defamation actions brought by private parties. See 403 U. S., at 59 (WHITE, J., concurring in the judgment) (summarizing positions for which there was majority support). Indeed, the

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[2] See *Henry* v. *Collins*, 380 U. S. 356 (1965); *Garrison* v. *Louisiana*, 379 U. S. 64 (1967); *Saint Amant* v. *Thompson*, 390 U. S. 727 (1968). See also *Letter Carriers* v. *Austin*, 418 U. S. 264 (1974) (applying *New York Times* privilege to defamation actions arising from labor disputes); *Linn* v. *United Plant Guard Workers*, 383 U. S. 53 (1966) (labor dispute); *Time, Inc.* v. *Hill*, 385 U. S. 374 (1967) ("false lights" action); *Pickering* v. *Board of Education*, 391 U. S. 563 (1968) (teacher dismissal based on newspaper letter critical of school board). But see *Hutchinson* v. *Proxmire*, 443 U. S. 111, 133 n. 16 (1979).

dissenters were particularly emphatic on this point. Justice Harlan explained:

> "At a minimum, *even in the purely private libel area*, I think the First Amendment should be construed to limit the imposition of punitive damages to those situations where actual malice is proved. This is the typical standard employed in assessing anyone's liability for punitive damages where the underlying aim of the law is to compensate for harm actually caused, . . . and no conceivable state interest could justify imposing a harsher standard on the exercise of those freedoms that are given explicit protection by the First Amendment." *Id.*, at 73 (Harlan, J., dissenting) (emphasis added).

Justices MARSHALL and Stewart went even further and concluded that the largely uncontrolled discretion of juries to award punitive damages in defamation actions created too great a threat to First Amendment freedoms and that such damages should for that reason be held to be precluded. *Id.*, at 84–85 (MARSHALL, J., dissenting).

In *Gertz*, a libel suit brought by an attorney who had been defamed by false statements in a monthly magazine reflecting the views of the John Birch Society, the Court revisted the issues canvassed in *Rosenbloom* and this time a majority of the Court agreed on the minimum constitutional requirements for defamation actions brought by private individuals, at least in cases involving "media" defendants. The Court rejected the extension of *New York Times* proposed by the plurality in *Rosenbloom*, both because that approach was thought unacceptably to impair the strong state interest in protecting the reputations of private individuals, *id.*, at 344–346, and because "it 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—to determine, in the words of MR. JUSTICE MARSHALL, 'what information is relevant to self-government.' *Rosenbloom* v. *Metromedia, Inc.*, 403

U. S., at 79." 418 U. S., at 346. Instead, the Court held that, at least where "the substance of the defamatory statement 'makes substantial danger to reputation apparent,'" *id.*, at 348 (quoting *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130, 155 (1967)), the States may impose any standard of liability for defamation of a private individual, short of liability without fault. *Id.*, at 347.

The Court further concluded, however, that "the strong and legitimate state interest in compensating private individuals for injury to reputation . . . extends no further than compensation for actual injury." *Id.*, at 348–349. Although it had no occasion to consider whether, as Justices MARSHALL and Stewart had urged in *Rosenbloom*, presumed and punitive damages in defamation actions are invariably incompatible with the First Amendment, see also *Smith* v. *Wade*, —— U. S. ——, ——, nn. 19–20 (1983), the Court held that such damages could not be awarded "at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." 418 U. S., at 349. The Court explained that the common law doctrine of presumed damages for defamation, "an oddity of tort law," confers on juries "largely uncontrolled discretion" to award damages even in the absence of proof of harm or loss. *Ibid.* Similarly, "juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused." *Id.*, at 350. And both presumed and punitive damages permit juries "to use their discretion selectively to punish expressions of unpopular views." *Ibid.* Because the threat of such large, disproportionate awards "unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms," and because "the States have no substantial interest in securing for plaintiffs such as this petitioner gratuitous awards of money damages far in excess of any actual injury," *id.*, at 349, the Court concluded that "the private defamation plaintiff who establishes liability under a

less demanding standard than that stated by *New York Times* may recover only such damages as are sufficient to compensate him for actual injury," *id.*, at 350.

Since the decision in *Gertz*, we have followed its reasoning with respect to damages in excess of actual harm in analogous areas of the law. In *Electrical Workers* v. *Foust*, 442 U. S. 42 (1979), for example, we relied on *Gertz* when we concluded that permitting employees to recover punitive damages for a union's breach of its duty of fair representation would undermine the policies of the Railway Labor Act. We explained that, because they go beyond compensation for actual loss, such "unpredictable and potentially substantial" awards undermine the balance between the interest in compensating injured parties and the need to maintain a union's freedom and effectiveness in pursuing grievances. *Id.*, at 48–52. As in *Gertz*, we also noted that "punitive damages may be employed to punish unpopular defendants." *Id.*, at 50–51 n. 14. Similarly, *Newport* v. *Fact Concerts, Inc.*, 453 U. S. 247, 270–271 (1981), relied in part on *Gertz* in concluding that municipalities are immune from punitive damages in § 1983 suits.

These cases, like *Gertz*, reflect a recognition that "the alleged deterrence achieved by punitive damage awards is likely outweighed by the costs—such as the encouragement of unnecessary litigation and the chilling of desirable conduct—flowing from the rule, at least when the standards on which the awards are based are ill-defined." *Smith* v. *Wade*, —— U. S. ——, —— (1983) (REHNQUIST, J., dissenting). See *id.*, at —— – —— (majority opinion) (noting prevailing view that punitive damages may only be awarded for "'conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others,'" quoting Restatement (Second) of Torts § 908(2) (1977) (emphasis deleted)); *id.*, at —— (O'CONNOR, J., dissenting). *Silkwood* v. *Kerr-McGee Corp.*, —— U. S. ——, —— (1984); *id.*, at —— (BLACKMUN, J., dissenting); *id.*, at —— (POW-

ELL, J., dissenting). Although this "chilling of desirable conduct" may be necessary or tolerable in some contexts, it poses a danger of constitutional dimension when the "desirable conduct" deterred by the threat of presumed or punitive damages is expression protected by the First Amendment. See *Rosenbloom* v. *Metromedia*, 403 U. S. 29, 72–78 (1971) (Harlan, J., dissenting); *id.*, at 81–87 (MARSHALL, J., dissenting). The Constitution presupposes that freedom of expression is both an instrinsic element of individual liberty and an essential means to society's search for truth. See *Bose Corp.* v. *Consumers Union of United States, Inc.*, —— U. S., at ——; *Whitney* v. *California*, 274 U. S. 357, 375 (1927 (Brandeis, J., concurring). Accordingly, when the threat of unpredictable and disproportionate damages induces potential speakers to refrain from speaking, both the speaker and society as a whole are the losers.[3]

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[3] Experience in the lower courts since *Gertz* has demonstrated that this concern is not speculative. Notwithstanding the constitutional minima set out in that case, jury awards of punitive damages in the millions of dollars have become increasingly common in defamation suits. See Brief for Washington Post as *Amicus Curiae* 12–16 (listing 10 punitive damages awards ranging from $1–25 million between 1980 and 1983); Smolla, 132 U. Pa. L. Rev., at 6–7, 12–14, 21. See also Wall St. Journal, Sept. 29, 1983, p. 1 (describing how $9.2 million libel judgment drove small town newspaper into temporary bankruptcy).

Indeed, the problems posed by punitive damages in defamation suits have led a number of state courts to conclude that the First Amendment, or comparable state constitutional provisions, bars any such damages in cases where the party injured by defamation recovers adequate compensatory damages. *E. g.*, *Hall* v. *May Department Stores*, 292 Or. 131, 637 P. 2d 126 (1981); *McHale* v. *Lake Charles American Press*, 390 So. 2d 556 (La. App. 1980); *Tasket* v. *KING Broadcasting Co.*, 86 Wash. 2d 439, 546 P. 2d 81 (1976); *Sprouse* v. *Clay Communications, Inc.*, 211 S. E. 2d 674, 692 (W. Va. 1975); *Stone* v. *Essex County Newspapers, Inc.*, 367 Mass. 849, 330 N. E. 2d 161 (1975). Two other states have concluded that punitive damages in defamation actions are barred by their own constitutions unless there is proof that the publisher acted with actual hatred or ill will. *AAFCO Heating & Air Condition Co.* v. *Northwest Publications, Inc.*,

IV

Petitioner does not contend that the plaintiff in this case is a public figure; accordingly, it does not challenge the fact that the jury awarded respondent compensatory damages on a showing less than that required by *New York Times*. Instead, petitioner argues only that, as in *Gertz*, presumed or punitive damages could not be awarded in this case without at least "a showing of knowledge of falsity or reckless disregard for the truth." *Gertz*, 418 U. S., at 349. As noted, the rule in *Gertz* was premised on the conclusion that, by punishing those who make the erroneous statements inevitable in free discourse, unconstrained awards of presumed or punitive damages deter potential speakers from engaging in constitutionally protected truthful expression. The reasoning of *Gertz* therefore squarely controls this case if petitioner's *accurate* reports are protected by the First Amendment. Relying first on the identity of the speaker and second on the nature of speech at issue, respondent contends that petitioner's truthful credit reports are less deserving of constitutional protection than the magazine article at issue in *Gertz*. We do not, however, find these distinctions persuasive.

A

As noted, the defendant in *Gertz* was a monthly magazine expressing the views of the John Birch Society; at various points, the opinion of the Court in that case stressed the importance of a "vigorous and uninhibited press," 418 U. S., at 342, referred to the dangers of "media self-censorship," *id.*, and stated that the Constitution "shields the press and broadcast media from the rigors of strict liability for defamation,"

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162 Ind. App. 671, 321 N. E. 2d 580 (1974); *Walker* v. *Colorado Springs Sun, Inc.*, 188 Colo. 86, 538 P. 2d 450 (1975).

More generally, as JUSTICE REHNQUIST noted last Term, "a significant number of American jurisdictions refuse to condone punitive damages awards" altogether. *Smith* v. *Wade*, —— U. S. ——, —— (1983) (dissenting opinion).

id., at 348. Noting these and other aspects of that decision, respondent argues that "*Gertz* is patently limited only to cases in which there is a media defendant," Brief 26, and contends that petitioner is not such a defendant.

We do not, however, believe any "media/non-media" distinction is appropriate in the defamation context for several reasons. First, as this case demonstrates, the definitional problems associated with such an approach are formidable and present serious First Amendment problems of their own. Like an account of judicial proceedings in a newspaper, magazine, or news broadcast, a statement in petitioner's reports that a particular company has filed for bankruptcy is a report of a timely "news" event conveyed to members of the public by a business organized to collect and disseminate such information. Petitioner could therefore be easily characterized as a "media" defendant. The Vermont Supreme Court rejected that characterization, however, because petitioner is "in the business of selling financial information to a limited number of subscribers who have paid substantial fees for [its] services." 461 A. 2d, at 417. The court added that "[t]here is a clear distinction between a publication which disseminates news for public consumption and one which provides specialized information to a selective, finite audience." *Ibid.*

But the fact that petitioner's information is "specialized" or that its subscribers pay "substantial fees" hardly distinguishes these reports from articles in many publications to which respondent would presumably attach the label "media"; few statements in many publications are of universal interest and few publications are distributed free of charge. Nor is there any apparent reason to treat petitioner differently than a more widely circulated publication because it has "a limited number of subscribers." Indeed, it would be paradoxical to increase protection to statements injurious to reputation as the size of their audience grows. Cf. *Keeton* v. *Hustler Magazine, Inc.*, —— U. S. ——, —— – —— (1984). These line-drawing difficulties demonstrate that ef-

forts to define the difference between "media" and "nonmedia" defendants in defamation suits would, in practice, substantially complicate defamation law, see Smolla, 132 U. Pa. L. Rev., at 90, and would necessarily involve the courts in precisely the kinds of *ad hoc* content-based judgments that *Gertz* sought to prevent. See 418 U. S., at 343–344, 346; *Branzburg* v. *Hayes*, 408 U. S. 665, 703–705, and n. 40 (1972). Cf. *Police Department* v. *Mosley*, 408 U. S. 92, 95 (1972). Furthermore, to the extent that those judgments turned on the public interest in the speaker's message as reflected in the size of the audience or the subject matter of the speech, the "media/nonmedia" distinction would revive the kind of inquiry into the importance of the speaker's message proposed by the plurality in *Rosenbloom* and rejected by the Court in *Gertz*. See *supra*, at ——. See generally Note, 95 Harv. L. Rev. 1876, 1884–1885 (1982).

More fundamentally, however, respondent's argument rests on a misapprehension of those cases in which we have noted the importance of a free press in our constitutional system. Recognizing the critical historical role played by the press in gathering and disseminating information for the benefit of the public, we have often emphasized the need for careful judicial scrutiny of government actions that impede the exercise of that function or that single out the press for differential treatment.[4] That public fiduciary function is

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[4]See *e. g.*, *Minneapolis Star* v. *Minnesota Comm'r of Revenue*, —— U. S. ——, —— – —— (1983); *Columbia Broadcasting System, Inc.* v. *FCC*, 453 U. S. 367, 395 (1981); *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241 (1974); *Branzburg* v. *Hayes*, 408 U. S. 665, 707 (1972); *New York Times* v. *United States*, 403 U. S. 713 (1971); *Mills* v. *Alabama*, 384 U. S. 214, 218–219 (1966); *Grosjean* v. *American Press Co., Inc.*, 297 U. S. 233, 250 (1936). See also *Herbert* v. *Lando*, 441 U. S. 153, 180–199 (1979) (BRENNAN, J., dissenting in part); *Saxbe* v. *Washington Post Co.*, 417 U. S. 843, 850 (1974) (POWELL, J., dissenting); *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations*, 413 U. S. 376, 393 (1973) (BURGER, C. J.,, dissenting); *Red Lion Broadcasting Co.* v. *FCC*, 395

not, however, performed exclusively by the organs of mass communication. To the contrary,

> "[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. . . . Freedom of the press is a 'fundamental personal right' which 'is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.' *Lovell* v. *Griffin*, 303 U. S. 444, 450, 452 (1938). . . . The informative function asserted by representatives of the organized press . . . is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists." *Branzburg* v. *Hayes*, *supra*, at 704–705.

In guaranteeing equal liberty of expression, the First Amendment furthers a central object of our constitutional scheme, to assure every member of society an equal right to dignity, respect, and the opportunity to participate in self-government. See, *e. g.*, *Carey* v. *Brown*, 447 U. S. 455, 459–464 (1980); *Police Department* v. *Mosley*, 408 U. S. 92, 95 (1972); *Cohen* v. *California*, 403 U. S. 15, 19, 24 (1971); *Whitney* v. *California*, 274 U. S. 357, 375–377 (1927) (Brandeis, J., concurring). Consistent with this goal, the constitutional protections afforded speech depend on the nature, context, and function of the expressive activity at issue, not on the status or identity of the speaker. See *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 778–784 (1978). Accordingly, the rights of the institutional press, however defined, are no greater and no less than those enjoyed by other individuals or organizations engaged in the same activities. Compare *Globe Newspaper Co.* v. *Superior Court*, 457

U. S. 367, 390 (1969); *Time, Inc.* v. *Hill*, 385 U. S. 374, 389 (1967); Stewart, "Or of the Press," 26 Hastings L. J. 631 (1975).

U. S. 596, 603 (1982) (recognizing that "the press and general public have a constitutional right of access to criminal trials") with *Pell* v. *Procunier*, 417 U. S. 817, 834 (1974) (concluding that First Amendment does not "accord the press special access to information not shared by members of the public generally").

We therefore reject the argument that petitioner's credit reports are entitled to diminished constitutional protection because of petitioner's status or the form in which its communications appear. We turn to consider whether *Gertz* is nevertheless inapplicable because of the character or content of petitioner's speech.

B

Respondent argues that petitioner's reports on the financial status of corporations bear little or no relationship to the values of self-expression, autonomy, and robust discussion of public affairs that the First Amendment is intended to serve.[5] We have, of course, identified certain narrow categories of expression that "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572 (1942). See *Bose Corp.* v. *Consumers Union of U. S., Inc.*, —— U. S., at ——–——. But apart from identifying those limited types of unprotected expression, judges, like other government officials, are not free to decide on the basis of their content which sorts of protected expression are in their judgment less "valuable" than others. *Gertz*, 418 U. S., at 346; *Branzburg* v. *Hayes*, 408 U. S. 665, 705 n. 40 (1972); *Cohen* v. *California*, 403 U. S. 15, 24–25 (1971). See *New York* v. *Ferber*, 458 U. S. 747, 763–764 (1982). The content of pe-

[5] *E. g.*, *Carey* v. *Brown*, 447 U. S. 455, 466–467 (1980); *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 777 n. 12, 783 (1978); *Wooley* v. *Maynard*, 430 U. S. 705, 714–715 (1977); *NAACP* v. *Button*, 371 U. S. 415, 429–431 (1963); *Winters* v. *New York*, 333 U. S. 507, 510 (1948).

titioner's accurate reports plainly do not place them among those types of speech the evils of which "so overwhelmingly outweigh[] the expressive interests, if any, at stake" that, as a class, they are entitled to virtually no First Amendment protection. *Id.*, at 764.

On the contrary, we long ago rejected the suggestion that, simply because speech concerns economic matters or is in the financial interest of the speaker or audience, it lacks constitutional value. See, *e. g.*, *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 501–502 (1952); *AFL* v. *Swing*, 3112 U. S. 321, 325–326 (1941); *Thornhill* v. *Alabama*, 310 U. S. 88, 101–103 (1940); see also *Abood* v. *Detroit Board of Education*, 431 U. S. 231–232 and n. 28 (1977). Our free market economy is predicated on the assumption that human welfare will be improved through informed private decisionmaking. In this respect, ensuring broad distribution of accurate financial information—no less than protecting a wide variety of other facts and ideas concerning "philosophical, social, artistic, economic, literary, or ethical matters," *Abood*, *supra*, at 231—comports with the fundamental premise of the First Amendment "that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public . . . ," *Associated Press* v. *United States*, 326 U. S. 1, 20 (1945). As we emphasized in *Virginia Board of Pharmacy*, *supra* at 765, "the free flow of commercial information is indispensable . . . [both] to the proper allocation of resources in a free enterprise system, [and also] to the formation of intelligent opinions as to how that system ought to be regulated or altered."

In partial support for that statement, we cited views of Justice Douglas that are especially pertinent here:

> "The language of the First Amendment does not except speech directed at private economic decisionmaking. Certainly such speech could not be regarded as less important than political expression. When immersed in a free flow of commercial information, private sector deci-

> sionmaking is at least as effective an institution as are our various governments in furthering the social interest in obtaining the best general allocation of resources. . . . The financial data circulated by Dun & Bradstreet, Inc., are part of the fabric of national commercial communication." *Dun & Bradstreet, Inc.* v. *Grove*, 404 U. S. 898, 905–906 (1971) (Douglas, J., dissenting from denial of certiorari).

Justice Douglas further noted that "[p]resumably the credit reports published by the petitioner facilitate through the price system the improvement of human welfare at least as much as did the underlying disagreement in our most recent libel opinion, *Rosenbloom* v. *Metromedia, Inc.*, *supra*, arising out of a squabble over whether a vendor had sold obscene magazines." *Id.*, at 905 n. 9.

Justice Douglas's conclusion that the kind of speech at issue here deserves First Amendment protection is strongly supported by the fact that statements identical to those published by petitioner—namely, accounts of bankruptcy filings or other financial developments concerning specific corporations—would surely be entitled to full constitutional safeguards if they appeared in, for example, a national business magazine or in a small Vermont newspaper. That information is no less important because it appears in a credit report format. It is worth noting in this regard that the defamation law of most States, although apparently not that of Vermont, see 461 A. 2d, at 419, recognizes a qualified common-law privilege for reports like that at issue here. See Maurer, Common Law Defamation and the Fair Credit Reporting Act, 72 Geo. L. J. 95, 99–105 (1983). The privilege typically precludes recovery for false and defamatory credit information without a showing of bad faith or malice, a standard of proof which is often defined according to the *New York Times* formulation. See, *e. g.*, *Datacon, Inc.* v. *Dun & Bradstreet*, 465 F. Supp. 706, 708 (ND Tex. 1979). The adoption of this privilege reflects a widely held recognition of the substantial

public interest in ensuring that the preparation and dissemination of accurate credit reports are not inhibited by unconstrained libel judgments. In short, petitioner's truthful credit reports are not entitled to less than full First Amendment protection simply because they are sold for a profit and concern financial matters.

To be sure, we have modified our traditional First Amendment standards with respect to one type of speech involving the economic interests of speaker and audience—advertisements that "do no more than propose a commercial transaction." *Pittsburgh Press Co.* v. *Human Relations Comm'n*, 413 U. S. 376, 385 (1973).[6] The principal rationale for affording protection to purely commercial advertising is the view that accurately informed private decisions about consumption are attributes of the kind of knowledgeable, self-governing citizenry that the First Amendment was meant to foster. See generally *Virginia Board of Pharmacy*, *supra*. We have concluded, however, that, in contrast to factual misstatements in the political arena, false and misleading advertising is relatively easy to identify and causes special harms far disproportionate to any value it might have. Compare *Ohralik* v. *Ohio State Bar Ass'n*, 436 U. S. 447, 455–456 (1978); *Virginia Board of Pharmacy* v. *Virginia*

[6] See, *e. g.*, *Bolger* v. *Young Drug Products Corp.*, —— U. S. —— (1983) (contraceptive advertising); *In re R. M. J.*, 455 U. S. 191 (1982) (lawyer advertising); *Metromedia, Inc.* v. *City of San Diego*, 453 U. S. 490 (1981) (commercial billboard advertising); *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n*, 447 U. S. 530 (1980) (advertising of electricity); *Friedman* v. *Rogers*, 440 U. S. 1 (1979) (optometrist advertising); *Ohralik* v. *Ohio State Bar Ass'n*, 436 U. S. 447, 455–456 (1978) (lawyer's solicitation of business); *Bates* v. *State Bar of Arizona*, 433 U. S. 350 (1977) (lawyer advertising); *Linmark Associates, Inc.* v. *Willingboro*, 431 U. S. 85 (1977) (real estate advertising). But see *Carey* v. *Population Services Int'l*, 431 U. S. 678, 700–701 (1977) (total suppression of contraceptive advertising); *New York Times* v. *Sullivan*, 376 U. S. 254, 265–266 (1964) (discussion of public issues in advertising form); *Murdock* v. *Pennsylvania*, 319 U. S. 105, 111 (1943) (advertisement for religious book); *Jamison* v. *Texas*, 318 U. S. 413, 417 (1943) (same).

Consumers Council, 425 U. S., at 771–772 and n. 24 with *Brown* v. *Hartlage*, 456 U. S. 45, 61 (1982); *New York Times* v. *Sullivan*, 376 U. S., at 279 n. 19. For that reason, we have recognized differences in the applicability of First Amendment standards to that form of speech. See *Virginia Board of Pharmacy*, 425 U. S., at 772 n. 24.

Respondent argues that our commercial advertising decisions govern this case because petitioner's statements are "made in a commercial mileu" and "involve and are about business." Brief 14. In particular, respondent relies on our conclusion in *Bates* v. *State Bar of Arizona*, 433 U. S. 350, 383 (1977), that "the leeway for untruthful or misleading expression [permitted in cases like *Gertz*] has little force in the commercial arena." See also *Virginia Board of Pharmacy*, 425 U. S., at 772 n. 24. As we have explained, however, the mere fact that petitioner's speech concerns commerce or business in itself provides no basis for altering the constitutional analysis. See also *Central Hudson Gas* v. *Electrical Co.* v. *Public Service Comm'n*, 447 U. S., at 579–580 (STEVENS, J., concurring in the judgment). *Bates*, like the other cases in its line, involved oral and written offers to sell goods or services; it concluded that because "the advertiser knows his product and has a commercial interest in its dissemination, we have little worry that regulation to assure truthfulness will discourage protected speech." 433 U. S., at 350. See also *Bose Corp.* v. *Consumers Union of U. S., Inc.*, —— U. S., at —— n. 22; *Virginia Board of Pharmacy*, 425 U. S., at 777–778 (Stewart, J., concurring). That reasoning has no application to petitioner's reports which, as respondent concedes, propose no commercial transaction and concern no facts uniquely within the speaker's knowledge. Brief 23.

Of course, the commercial context of petitioner's reports is relevant to the constitutional analysis insofar as it implicates the strong state "interest in protecting consumers and regulating commercial transactions," *Ohralik* v. *Ohio State Bar Ass'n*, 436 U. S. 447, 460 (1978). Cf. *Bolger* v. *Young Drug*

Products Corp., —— U. S. ——, ——– —— (1983) (STEVENS, J., concurring in the judgment). The special harms caused by inaccurate credit reports, the lack of public sophistication about or access to such reports, and the fact that such reports by and large contain statements that are demonstrably true or false, all may justify a variety of regulations reasonably designed to prevent the social losses caused by false credit reports. See *Virginia Board of Pharmacy*, 425 U. S., at 771–773 and n. 24; *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U. S., at 573–576 (BLACKMUN, J., concurring in the judgment). See also Maurer, 72 Geo. L. J., at 126; Comment, 130 U. Pa. L. Rev. 131 (1981). As we explained in *Gertz*, however, the state interest in redressing the harm caused by false statements in the defamation context is fully served by damages that compensate for actual injury. Unconstrained awards of presumed and punitive damages, in contrast, do more than require speakers to bear the costs of their false and harmful statements; by providing damages unrelated to the actual harm caused by false statements, such awards necessarily deter and penalize truthful statements as well. Accordingly, once the actual damages caused by false credit reports are recompensed, the state interest in preventing the special hazards posed by the form of speech at issue here can support no distinction between petitioner and the magazine defendant in *Gertz*.

Such as what

V

The judgment of the Vermont Supreme Court is reversed and the case remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83–18

DUN & BRADSTREET, INC., PETITIONER *v.*
GREENMOSS BUILDERS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

[June ——, 1984]

JUSTICE BRENNAN delivered the opinion of the Court.

In *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974), a libel action against a magazine, we held that the First Amendment prohibits awards of presumed or punitive damages for false and defamatory statements absent a showing of knowing falsity or reckless disregard for the truth. The question presented by this case is whether that constitutional protection extends to "nonmedia" defendants.

I

Petitioner Dun & Bradstreet, a credit reporting agency, provides subscribers with financial and related information about corporations. On July 26, 1976, petitioner incorrectly reported that respondent, a Vermont corporation engaged in construction contracting, had filed a voluntary petition for bankruptcy. On the day the report was issued, respondent's president learned of it from a bank official with whom he was discussing the possibility of future financing. Eight days later, after being contacted by respondent's president, petitioner confirmed the falsity of the report and sent a retraction to each of its subscribers who had received the original report. Petitioner refused, however, to supply respondent with the names of those subscribers.

Respondent then brought this defamation action in Vermont state court, alleging that the false report injured its

reputation and seeking $7500 in compensatory and $15,000 in punitive damages. The testimony at trial established that the error in petitioner's report had been caused when one of its employees, a high school student paid to review Vermont bankruptcy pleadings, had inadvertently attributed a bankruptcy petition filed by one of respondent's former employees to respondent itself. Respondent's evidence regarding damages consisted solely of testimony by its president who stated that the report had caused the bank to delay consideration of a pending loan and ultimately to terminate the company's credit. A representative of the bank, called by petitioner, testified that when he received the report he did not believe it and that the bank terminated respondent's credit for reasons wholly unrelated to petitioner's report. Respondent's president also testified that the report had impaired the company's sales and profits and caused it to incur expenses contacting individuals to refute the false information.

After trial, the jury returned a verdict in favor of respondent and awarded $50,000 in compensatory or presumed damages and $300,000 in punitive damages. Petitioner then moved for a new trial. It noted that in *Gertz* v. *Robert Welch, Inc.*, *supra*, at 349, this Court had held "that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth," and argued that the judge's instructions permitted the jury to award such damages on a lesser showing. The trial court agreed with petitioner and granted the motion for a new trial. App. 25–26.

On appeal, the Vermont Supreme Court reversed. 461 A. 2d 414 (1983). Although recognizing that "in certain instances the distinction between media and nonmedia defendants may be difficult to draw," the court stated that "no such difficulty is presented with credit reporting agencies, which are in the business of selling financial information to a limited number of subscribers who have paid substantial fees for

their services." *Id.*, at 417. Relying on this distinguishing characteristic of credit reporting firms, the court concluded that such firms are not "the type of media worthy of First Amendment protection as contemplated by *New York Times* [v. *Sullivan*, 376 U. S. 254 (1964)] and its progeny," 461 A. 2d, at 417–418, and that the balance between a private plaintiff's right to recover presumed and punitive damages without a showing of fault and the First Amendment rights of "nonmedia" speakers "must be struck in favor of the private plaintiff defamed by a nonmedia defendant," *id.*, at 418. Accordingly, the court held "that as a matter of federal constitutional law, the media protections outlined in *Gertz* are inapplicable to nonmedia defamation actions." *Ibid.*

The lower courts have divided over whether "nonmedia" defendants enjoy any constitutional protections in defamation suits, either in suits brought by public figures or officials or in those brought by private plaintiffs. See Smolla, Let the Author Beware: The Rejuvenation of the American Law of Libel, 132 U. Pa. L. Rev. 1, 29–35 and nn. 147, 162 (1983). We granted certiorari to resolve this conflict, —— U. S. —— (1983), and we now reverse. We reject any distinction between "media" and "nonmedia" defendants for purposes of the First Amendment principles applicable to defamation suits. Because petitioner's accurate credit reports constitute speech protected by the First Amendment, the reasoning of *Gertz* applies fully to libel actions brought to redress injury caused by petitioner's inaccurate reports.

II

At the outset, respondent contends that we need not determine in this case whether *Gertz* is applicable to "nonmedia" defendants because the jury instructions satisfied the standards set out in that decision.[1] As noted above, *Gertz* held

[1] Respondent also argues that petitioner did not seek the protections outlined in *Gertz* before the jury instructions were given and that therefore the issue was not preserved for review. In view of the fact that the Ver-

that presumed or punitive damages may not be awarded to a private defamation plaintiff on any showing less than knowledge of falsity or reckless disregard for the truth—the "actual malice" standard first announced in *New York Times* v. *Sullivan*, *supra*, at 280. The trial court in this case instructed the jury that, because petitioner's statement imputing the insolvency of respondent's business was libelous *per se*, respondent was not required "to prove actual damages resulting from the libel since damage and loss [are] conclusively presumed." App. 17. See also *id.*, at 19 (instructing that "where, as in this case there is a libel per se, damages are presumed and actual damages may not be proven" and that "the law presumes damages in some amount in a case of libel per se and therefore relieves the Plaintiff of the burden of establishing by specific proof that damages have occurred").

Respondent acknowledges that these portions of the trial court's instructions, standing alone, do not satisfy the requirements of *Gertz*. Brief at 40. It notes, however, that the trial court also instructed the jury that respondent could not recover any damages if a common law privilege for credit reporting agencies, barring liability for negligent falsehoods, applied. See App. 18. The charge explained that the privilege was not available if respondent could show "malice or lack of good faith on the part of the Defendant." *Ibid.* The court also told the jury that, "[i]f you find that Defendant's conduct was not privileged, and if you also find, on the basis of clear and convincing evidence, that the Defendant acted with actual malice in publishing the article in question, then you may award Plaintiff punitive or exemplary damages in addition to the actual damages assessed." *Id.*, at 20. Accordingly, respondent argues, the instructions did not permit an award of presumed or punitive damages without proof of "actual malice."

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mont Supreme Court considered the federal constitutional issue properly presented and passed upon it, respondent's contention is unavailing. See *Orr* v. *Orr*, 440 U. S. 268, 274–275 (1979).

The trial judge's definition of "malice or lack of good faith" did not, however, comport with the *New York Times* standard. In defining the circumstances under which the common law privilege would be defeated, the court explained to the jury:

> "If you find that the Defendant acted in a [sic] bad faith towards the plaintiff in publishing the Erroneous Report, *or* that Defendant intended to injure the Plaintiff in its business, *or* that it acted in a willful, wanton or reckless disregard of the rights and interests of the Plaintiff, the Defendant has acted maliciously and the privilege is destroyed. *Further*, if the Report was made with reckless disregard of the possible consequence, *or* if it was made with the knowledge that it was false or with reckless disregard of it's [sic] truth or falsity, it was made with malice." App. 18–19 (emphasis added).

Although these instructions included the *New York Times* formulation, the definition of the kind of malice necessary to support an award of presumed damages was plainly not limited to that standard. See, *e. g.*, *Bose Corp.* v. *Consumers Union of United States, Inc.*, —— U. S. ——, —— n. 30 (1984); *St. Amant* v. *Thompson*, 390 U. S. 727, 731 (1968). Consequently, the trial court's conclusion that the instructions did not satisfy *Gertz* was correct and the Vermont Supreme Court's determination that *Gertz* was inapplicable was necessary to its decision that the trial court erred in granting the motion for a new trial. We therefore turn to our reasons for rejecting the Vermont Supreme Court's conclusion.

III

The decision in *Gertz* was the culmination of a decade long effort "to define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment." 418 U. S., at 325. Ten years earlier, in *New York Times* v. *Sullivan*, *supra*, at 279–80, we first announced "a federal rule that prohibits a public official

from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.*, at 279–280. That rule was subsequently extended to libel actions brought by "public figures," *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130 (1967), and, beginning with *New York Times* itself, was applied to cases involving "nonmedia" defendants. See *New York Times*, 376 U. S., at 254 n.*, 286.[2] We had no occasion, however, to consider the applicability of First Amendment principles to libel actions brought by private individuals until the decision in *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29 (1971).

Rosenbloom concerned a libel suit brought by a distributor of nudist magazines against a radio station. Although a majority of Justices were unable to agree on the appropriate standard of liability in defamation actions brought by private individuals, a plurality would have extended the *New York Times* privilege to such cases when the statements at issue concerned matters of "public or general interest," 403 U. S., at 43 (opinion of BRENNAN, J.). Despite the variety of views on liability, however, there was a clear consensus for the conclusion that, at the very least, the First Amendment limits the availability of punitive damages awards in defamation actions brought by private parties. See 403 U. S., at 59 (WHITE, J., concurring in the judgment) (summarizing positions for which there was majority support). Indeed, the

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[2] See *Henry* v. *Collins*, 380 U. S. 356 (1965); *Garrison* v. *Louisiana*, 379 U. S. 64 (1967); *Saint Amant* v. *Thompson*, 390 U. S. 727 (1968). See also *Letter Carriers* v. *Austin*, 418 U. S. 264 (1974) (applying *New York Times* privilege to defamation actions arising from labor disputes); *Linn* v. *United Plant Guard Workers*, 383 U. S. 53 (1966) (labor dispute); *Time, Inc.* v. *Hill*, 385 U. S. 374 (1967) ("false lights" action); *Pickering* v. *Board of Education*, 391 U. S. 563 (1968) (teacher dismissal based on newspaper letter critical of school board). But see *Hutchinson* v. *Proxmire*, 443 U. S. 111, 133, n. 16 (1979).

dissenters were particularly emphatic on this point. Justice Harlan explained:

> "At a minimum, *even in the purely private libel area*, I think the First Amendment should be construed to limit the imposition of punitive damages to those situations where actual malice is proved. This is the typical standard employed in assessing anyone's liability for punitive damages where the underlying aim of the law is to compensate for harm actually caused, . . . and no conceivable state interest could justify imposing a harsher standard on the exercise of those freedoms that are given explicit protection by the First Amendment." *Id.*, at 73 (Harlan, J., dissenting) (emphasis added).

Justices MARSHALL and Stewart went even further and concluded that the largely uncontrolled discretion of juries to award punitive damages in defamation actions created too great a threat to First Amendment freedoms and that such damages should for that reason be held to be precluded. *Id.*, at 84–85 (MARSHALL, J., dissenting).

In *Gertz*, a libel suit brought by an attorney who had been defamed by false statements in a monthly magazine reflecting the views of the John Birch Society, the Court revisted the issues canvassed in *Rosenbloom* and this time a majority of the Court agreed on the minimum constitutional requirements for defamation actions brought by private individuals, at least in cases involving "media" defendants. The Court rejected the extension of *New York Times* proposed by the plurality in *Rosenbloom*, both because that approach was thought unacceptably to impair the strong state interest in protecting the reputations of private individuals, *id.*, at 344–346, and because "it 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—to determine, in the words of MR. JUSTICE MARSHALL, 'what information is relevant to self-government.' *Rosenbloom* v. *Metromedia, Inc.*, 403

U. S., at 79." 418 U. S., at 346. Instead, the Court held that, at least where "the substance of the defamatory statement 'makes substantial danger to reputation apparent,'" *id.*, at 348 (quoting *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130, 155 (1967)), the States may impose any standard of liability for defamation of a private individual, short of liability without fault. *Id.*, at 347.

The Court further concluded, however, that "the strong and legitimate state interest in compensating private individuals for injury to reputation . . . extends no further than compensation for actual injury." *Id.*, at 348–349. Although it had no occasion to consider whether, as Justices MARSHALL and Stewart had urged in *Rosenbloom*, presumed and punitive damages in defamation actions are invariably incompatible with the First Amendment, see also *Smith* v. *Wade*, —— U. S. ——, ——, nn. 19–20 (1983), the Court held that such damages could not be awarded "at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." 418 U. S., at 349. The Court explained that the common law doctrine of presumed damages for defamation, "an oddity of tort law," confers on juries "largely uncontrolled discretion" to award damages even in the absence of proof of harm or loss. *Ibid.* Similarly, "juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused." *Id.*, at 350. And both presumed and punitive damages permit juries "to use their discretion selectively to punish expressions of unpopular views." *Ibid.* Because the threat of such large, disproportionate awards "unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms," and because "the States have no substantial interest in securing for plaintiffs such as this petitioner gratuitous awards of money damages far in excess of any actual injury," *id.*, at 349, the Court concluded that "the private defamation plaintiff who establishes liability under a

less demanding standard than that stated by *New York Times* may recover only such damages as are sufficient to compensate him for actual injury," *id.*, at 350.

Since the decision in *Gertz*, we have followed its reasoning with respect to damages in excess of actual harm in analogous areas of the law. In *Electrical Workers* v. *Foust*, 442 U. S. 42 (1979), for example, we relied on *Gertz* when we concluded that permitting employees to recover punitive damages for a union's breach of its duty of fair representation would undermine the policies of the Railway Labor Act. We explained that, because they go beyond compensation for actual loss, such "unpredictable and potentially substantial" awards undermine the balance between the interest in compensating injured parties and the need to maintain a union's freedom and effectiveness in pursuing grievances. *Id.*, at 48–52. As in *Gertz*, we also noted that "punitive damages may be employed to punish unpopular defendants." *Id.*, at 50–51 n. 14. Similarly, *Newport* v. *Fact Concerts, Inc.*, 453 U. S. 247, 270–271 (1981), relied in part on *Gertz* in concluding that municipalities are immune from punitive damages in § 1983 suits.

These cases, like *Gertz*, reflect a recognition that "the alleged deterrence achieved by punitive damage awards is likely outweighed by the costs—such as the encouragement of unnecessary litigation and the chilling of desirable conduct—flowing from the rule, at least when the standards on which the awards are based are ill-defined." *Smith* v. *Wade*, —— U. S. ——, —— (1983) (REHNQUIST, J., dissenting). See *id.*, at ——–—— (majority opinion) (noting prevailing view that punitive damages may only be awarded for "'conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others,'" quoting Restatement (Second) of Torts § 908(2) (1977) (emphasis deleted)); *id.*, at —— (O'CONNOR, J., dissenting). *Silkwood* v. *Kerr-McGee Corp.*, —— U. S. ——, —— (1984); *id.*, at —— (BLACKMUN, J., dissenting); *id.*, at —— (POW-

ELL, J., dissenting). Although this "chilling of desirable conduct" may be necessary or tolerable in some contexts, it poses a danger of constitutional dimension when the "desirable conduct" deterred by the threat of presumed or punitive damages is expression protected by the First Amendment. See *Rosenbloom* v. *Metromedia*, 403 U. S. 29, 72–78 (1971) (Harlan, J., dissenting); *id.*, at 81–87 (MARSHALL, J., dissenting). The Constitution presupposes that freedom of expression is both an instrinsic element of individual liberty and an essential means to society's search for truth. See *Bose Corp.* v. *Consumers Union of United States, Inc.*, —— U. S., at ——; *Whitney* v. *California*, 274 U. S. 357, 375 (1927 (Brandeis, J., concurring). Accordingly, when the threat of unpredictable and disproportionate damages induces potential speakers to refrain from speaking, both the speaker and society as a whole are the losers.[3]

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[3] Experience in the lower courts since *Gertz* has demonstrated that this concern is not speculative. Notwithstanding the constitutional minima set out in that case, jury awards of punitive damages in the millions of dollars have become increasingly common in defamation suits. See Brief for Washington Post as *Amicus Curiae* 12–16 (listing 10 punitive damages awards ranging from $1–25 million between 1980 and 1983); Smolla, 132 U. Pa. L. Rev., at 6–7, 12–14, 21. See also Wall St. Journal, Sept. 29, 1983, p. 1 (describing how $9.2 million libel judgment drove small town newspaper into temporary bankruptcy).

Indeed, the problems posed by punitive damages in defamation suits have led a number of state courts to conclude that the First Amendment, or comparable state constitutional provisions, bars any such damages in cases where the party injured by defamation recovers adequate compensatory damages. *E. g.*, *Hall* v. *May Department Stores*, 292 Or. 131, 637 P. 2d 126 (1981); *McHale* v. *Lake Charles American Press*, 390 So. 2d 556 (La. App. 1980); *Tasket* v. *KING Broadcasting Co.*, 86 Wash. 2d 439, 546 P. 2d 81 (1976); *Sprouse* v. *Clay Communications, Inc.*, 211 S. E. 2d 674, 692 (W. Va. 1975); *Stone* v. *Essex County Newspapers, Inc.*, 367 Mass. 849, 330 N. E. 2d 161 (1975). Two other states have concluded that punitive damages in defamation actions are barred by their own constitutions unless there is proof that the publisher acted with actual hatred or ill will. *AAFCO Heating & Air Condition Co.* v. *Northwest Publications, Inc.*,

IV

Petitioner does not contend that the plaintiff in this case is a public figure; accordingly, it acknowledges that the jury could have awarded respondent actual damages on a showing less than that required by *New York Times*. Instead, petitioner argues only that, as in *Gertz*, presumed or punitive damages could not be awarded in this case without at least "a showing of knowledge of falsity or reckless disregard for the truth." *Gertz*, 418 U. S., at 349. As noted, the rule in *Gertz* was premised on the conclusion that, by punishing those who make the erroneous statements inevitable in free discourse, unconstrained awards of presumed or punitive damages deter potential speakers from engaging in constitutionally protected truthful expression. The reasoning of *Gertz* therefore squarely controls this case if petitioner's *accurate* reports are protected by the First Amendment. Relying first on the identity of the speaker and second on the nature of speech at issue, respondent contends that petitioner's truthful credit reports are less deserving of constitutional protection than the magazine article at issue in *Gertz*. We do not, however, find these distinctions persuasive.

A

As noted, the defendant in *Gertz* was a monthly magazine expressing the views of the John Birch Society; at various points, the opinion of the Court in that case stressed the importance of a "vigorous and uninhibited press," 418 U. S., at 342, referred to the dangers of "media self-censorship," *id.*, and stated that the Constitution "shields the press and broadcast media from the rigors of strict liability for defamation,"

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162 Ind. App. 671, 321 N. E. 2d 580 (1974); *Walker* v. *Colorado Springs Sun, Inc.*, 188 Colo. 86, 538 P. 2d 450 (1975).

More generally, as JUSTICE REHNQUIST noted last Term, "a significant number of American jurisdictions refuse to condone punitive damages awards" altogether. *Smith* v. *Wade*, —— U. S. ——, —— (1983) (dissenting opinion).

id., at 348. Noting these and other aspects of that decision, respondent argues that "*Gertz* is patently limited only to cases in which there is a media defendant," Brief 26, and contends that petitioner is not such a defendant.

We do not, however, believe any "media/non-media" distinction is appropriate in the defamation context for several reasons. First, as this case demonstrates, the definitional problems associated with such an approach are formidable and present serious First Amendment problems of their own. Like an account of judicial proceedings in a newspaper, magazine, or news broadcast, a statement in petitioner's reports that a particular company has filed for bankruptcy is a report of a timely "news" event conveyed to members of the public by a business organized to collect and disseminate such information. Petitioner could therefore be easily characterized as a "media" defendant. The Vermont Supreme Court rejected that characterization, however, because petitioner is "in the business of selling financial information to a limited number of subscribers who have paid substantial fees for [its] services." 461 A. 2d, at 417. The court added that "[t]here is a clear distinction between a publication which disseminates news for public consumption and one which provides specialized information to a selective, finite audience." *Ibid.*

But the fact that petitioner's information is "specialized" or that its subscribers pay "substantial fees" hardly distinguishes these reports from articles in many publications to which respondent would presumably attach the label "media"; few statements in many publications are of universal interest and few publications are distributed free of charge. Nor is there any apparent reason to treat petitioner differently than a more widely circulated publication because it has "a limited number of subscribers." Indeed, it would be paradoxical to increase protection to statements injurious to reputation as the size of their audience grows. Cf. *Keeton* v. *Hustler Magazine, Inc.*, —— U. S. ——, ——–—— (1984). These line-drawing difficulties demonstrate that ef-

forts to define the difference between "media" and "nonmedia" defendants in defamation suits would, in practice, substantially complicate defamation law, see Smolla, 132 U. Pa. L. Rev., at 90, and would necessarily involve the courts in precisely the kinds of *ad hoc* content-based judgments that *Gertz* sought to prevent. See 418 U. S., at 343–344, 346; *Branzburg* v. *Hayes*, 408 U. S. 665, 703–705, and n. 40 (1972). Cf. *Police Department* v. *Mosley*, 408 U. S. 92, 95 (1972). Furthermore, to the extent that those judgments turned on the public interest in the speaker's message as reflected in the size of the audience or the subject matter of the speech, the "media/nonmedia" distinction would revive the kind of inquiry into the importance of the speaker's message proposed by the plurality in *Rosenbloom* and rejected by the Court in *Gertz*. See *supra*, at ——. See generally Note, 95 Harv. L. Rev. 1876, 1884–1885 (1982).

More fundamentally, however, respondent's argument rests on a misapprehension of those cases in which we have noted the importance of a free press in our constitutional system. Recognizing the critical historical role played by the press in gathering and disseminating information for the benefit of the public, we have often emphasized the need for careful judicial scrutiny of government actions that impede the exercise of that function or that single out the press for differential treatment.[4] That public fiduciary function is

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[4] See *e. g.*, *Minneapolis Star* v. *Minnesota Comm'r of Revenue*, —— U. S. ——, —— – —— (1983); *Columbia Broadcasting System, Inc.* v. *FCC*, 453 U. S. 367, 395 (1981); *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241 (1974); *Branzburg* v. *Hayes*, 408 U. S. 665, 707 (1972); *New York Times* v. *United States*, 403 U. S. 713 (1971); *Mills* v. *Alabama*, 384 U. S. 214, 218–219 (1966); *Grosjean* v. *American Press Co., Inc.*, 297 U. S. 233, 250 (1936). See also *Herbert* v. *Lando*, 441 U. S. 153, 180–199 (1979) (BRENNAN, J., dissenting in part); *Saxbe* v. *Washington Post Co.*, 417 U. S. 843, 850 (1974) (POWELL, J., dissenting); *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations*, 413 U. S. 376, 393 (1973) (BURGER, C. J.,, dissenting); *Red Lion Broadcasting Co.* v. *FCC*, 395

not, however, performed exclusively by the organs of mass communication. To the contrary,

> "[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. . . . Freedom of the press is a 'fundamental personal right' which 'is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.' *Lovell* v. *Griffin*, 303 U. S. 444, 450, 452 (1938). . . . The informative function asserted by representatives of the organized press . . . is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists." *Branzburg* v. *Hayes*, *supra*, at 704–705.

In guaranteeing equal liberty of expression, the First Amendment furthers a central object of our constitutional scheme, to assure every member of society an equal right to dignity, respect, and the opportunity to participate in self-government. See, *e. g.*, *Carey* v. *Brown*, 447 U. S. 455, 459–463 (1980); *Police Department* v. *Mosley*, 408 U. S. 92, 95 (1972); *Cohen* v. *California*, 403 U. S. 15, 24 (1971); *Whitney* v. *California*, 274 U. S. 357, 375–377 (1927) (Brandeis, J., concurring). Consistent with this goal, the constitutional protections afforded speech depend on the nature, context, and function of the expressive activity at issue, not on the status or identity of the speaker. See *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 778–784 (1978). Accordingly, the rights of the institutional press, however defined, are no greater and no less than those enjoyed by other individuals or organizations engaged in the same activities. Compare *Globe Newspaper Co.* v. *Superior Court*, 457 U. S.

U. S. 367, 390 (1969); *Time, Inc.* v. *Hill*, 385 U. S. 374, 389 (1967); Stewart, "Or of the Press," 26 Hastings L. J. 631 (1975).

596, 603 (1982) (recognizing that "the press and general public have a constitutional right of access to criminal trials") with *Pell* v. *Procunier*, 417 U. S. 817, 834 (1974) (concluding that First Amendment does not "accord the press special access to information not shared by members of the public generally").

We therefore reject the argument that petitioner's credit reports are entitled to diminished constitutional protection because of petitioner's status or the form in which its communications appear. We turn to consider whether *Gertz* is nevertheless inapplicable because of the character or content of petitioner's speech.

B

Respondent argues that petitioner's reports on the financial status of corporations bear little or no relationship to the values of self-expression, autonomy, and robust discussion of public affairs that the First Amendment is intended to serve.[5] We have, of course, identified certain narrow categories of expression that "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572 (1942). See *Bose Corp.* v. *Consumers Union of U. S., Inc.*, —— U. S., at —— – ——. But apart from identifying those limited types of unprotected expression, judges, like other government officials, are not free to decide on the basis of their message which sorts of protected expression are in their judgment less "valuable" than others. *Gertz*, 418 U. S., at 346; *Branzburg* v. *Hayes*, 408 U. S. 665, 705, n. 40 (1972); *Cohen* v. *California*, 403 U. S. 15, 24–25 (1971). See *New York* v. *Ferber*, 458 U. S. 747, 763–764 (1982). The

[5] *E. g.*, *Carey* v. *Brown*, 447 U. S. 455, 466–467 (1980); *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 777, n. 12, 783 (1978); *Wooley* v. *Maynard*, 430 U. S. 705, 714–715 (1977); *NAACP* v. *Button*, 371 U. S. 415, 429–431 (1963); *Winters* v. *New York*, 333 U. S. 507, 510 (1948).

content of petitioner's accurate reports plainly do not place them among those types of speech the evils of which "so overwhelmingly outweigh[] the expressive interests, if any, at stake" that, as a class, they are entitled to virtually no First Amendment protection. *Id.*, at 764.

On the contrary, we long ago rejected the suggestion that, simply because speech concerns economic matters or is in the financial interest of the speaker or audience, it lacks constitutional value. See, *e. g.*, *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 501–502 (1952); *AFL* v. *Swing*, 3112 U. S. 321, 325–326 (1941); *Thornhill* v. *Alabama*, 310 U. S. 88, 101–103 (1940); see also *Abood* v. *Detroit Board of Education*, 431 U. S. 231–232 and n. 28 (1977). Our free market economy is predicated on the assumption that human welfare will be improved through informed private decisionmaking. In this respect, ensuring broad distribution of accurate financial information—no less than protecting a wide variety of other facts and ideas concerning "philosophical, social, artistic, economic, literary, or ethical matters," *Abood*, *supra*, at 231—comports with the fundamental premise of the First Amendment "that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public . . . ," *Associated Press* v. *United States*, 326 U. S. 1, 20 (1945). As we emphasized in *Virginia Board of Pharmacy*, *supra* at 765, "the free flow of commercial information is indispensable . . . [both] to the proper allocation of resources in a free enterprise system, [and also] to the formation of intelligent opinions as to how that system ought to be regulated or altered."

In partial support for that statement, we cited views of Justice Douglas that are especially pertinent here:

> "The language of the First Amendment does not except speech directed at private economic decisionmaking. Certainly such speech could not be regarded as less important than political expression. When immersed in a free flow of commercial information, private sector deci-

> sionmaking is at least as effective an institution as are our various governments in furthering the social interest in obtaining the best general allocation of resources. . . . The financial data circulated by Dun & Bradstreet, Inc., are part of the fabric of national commercial communication." *Dun & Bradstreet, Inc.* v. *Grove*, 404 U. S. 898, 905–906 (1971) (Douglas, J., dissenting from denial of certiorari).

Justice Douglas further noted that "[p]resumably the credit reports published by the petitioner facilitate through the price system the improvement of human welfare at least as much as did the underlying disagreement in our most recent libel opinion, *Rosenbloom* v. *Metromedia, Inc., supra*, arising out of a squabble over whether a vendor had sold obscene magazines." *Id.*, at 905, n. 9.

Justice Douglas's conclusion that the kind of speech at issue here deserves First Amendment protection is strongly supported by the fact that statements identical to those published by petitioner—namely, accounts of bankruptcy filings or other financial developments concerning specific corporations—would surely be entitled to full constitutional safeguards if they appeared in, for example, a national business magazine or in a small Vermont newspaper. That information is no less important because it appears in a credit report format. It is worth noting in this regard that the defamation law of most States, although apparently not that of Vermont, see 461 A. 2d, at 419, recognizes a qualified common-law privilege for reports like that at issue here. See Maurer, Common Law Defamation and the Fair Credit Reporting Act, 72 Geo. L. J. 95, 99–105 (1983). The privilege typically precludes recovery for false and defamatory credit information without a showing of bad faith or malice, a standard of proof which is often defined according to the *New York Times* formulation. See, *e. g.*, *Datacon, Inc.* v. *Dun & Bradstreet*, 465 F. Supp. 706, 708 (ND Tex. 1979). The adoption of this privilege reflects a widely held recognition of the substantial

public interest in ensuring that the preparation and dissemination of accurate credit reports are not inhibited by unconstrained libel judgments. In short, petitioner's truthful credit reports are not entitled to less than full First Amendment protection simply because they are sold for a profit and concern financial matters.

To be sure, not all of our traditional First Amendment standards are fully applicable with respect to one type of speech involving the economic interests of speaker and audience—advertisements that "do no more than propose a commercial transaction." *Pittsburgh Press Co.* v. *Human Relations Comm'n*, 413 U. S. 376, 385 (1973).[6] The principal rationale for affording protection to purely commercial advertising is the view that accurately informed private decisions about consumption are attributes of the kind of knowledgeable, self-governing citizenry that the First Amendment was meant to foster. See generally *Virginia Board of Pharmacy*, *supra*. We have concluded, however, that, in contrast to factual misstatements in the political arena, false and misleading advertising is relatively easy to identify and causes special harms far disproportionate to any value it might have. Compare *Ohralik* v. *Ohio State Bar Ass'n*, 436 U. S. 447, 455–456 (1978); *Virginia Board of Pharmacy* v.

[6] See, *e. g.*, *Bolger* v. *Young Drug Products Corp.*, —— U. S. —— (1983) (contraceptive advertising); *In re R. M. J.*, 455 U. S. 191 (1982) (lawyer advertising); *Metromedia, Inc.* v. *City of San Diego*, 453 U. S. 490 (1981) (commercial billboard advertising); *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n*, 447 U. S. 530 (1980) (advertising of electricity); *Friedman* v. *Rogers*, 440 U. S. 1 (1979) (optometrist advertising); *Ohralik* v. *Ohio State Bar Ass'n*, 436 U. S. 447, 455–456 (1978) (lawyer's solicitation of business); *Bates* v. *State Bar of Arizona*, 433 U. S. 350 (1977) (lawyer advertising); *Linmark Associates, Inc.* v. *Willingboro*, 431 U. S. 85 (1977) (real estate advertising). But see *Carey* v. *Population Services Int'l*, 431 U. S. 678, 700–701 (1977) (total suppression of contraceptive advertising); *New York Times* v. *Sullivan*, 376 U. S. 254, 265–266 (1964) (discussion of public issues in advertising form); *Murdock* v. *Pennsylvania*, 319 U. S. 105, 111 (1943) (advertisement for religious book); *Jamison* v. *Texas*, 318 U. S. 413, 417 (1943) (same).

Virginia Consumers Council, 425 U. S., at 771–772, and n. 24 with *Brown* v. *Hartlage*, 456 U. S. 45, 61 (1982); *New York Times* v. *Sullivan*, 376 U. S., at 279, n. 19. For that reason, we have recognized differences in the applicability of some First Amendment standards to that form of speech. See *Virginia Board of Pharmacy*, 425 U. S., at 772, n. 24.

Respondent argues that our commercial advertising decisions govern this case because petitioner's statements are "made in a commercial mileu" and "involve and are about business." Brief 14. In particular, respondent relies on our conclusion in *Bates* v. *State Bar of Arizona*, 433 U. S. 350, 383 (1977), that "the leeway for untruthful or misleading expression [permitted in cases like *Gertz*] has little force in the commercial arena." See also *Virginia Board of Pharmacy*, 425 U. S., at 772, n. 24. As we have explained, however, the mere fact that petitioner's speech concerns commerce or business in itself provides no basis for altering the constitutional analysis. See also *Central Hudson Gas* v. *Electrical Co.* v. *Public Service Comm'n*, 447 U. S., at 579–580 (STEVENS, J., concurring in the judgment). *Bates*, like the other cases in its line, involved oral and written offers to sell goods or services; it concluded that because "the advertiser knows his product and has a commercial interest in its dissemination, we have little worry that regulation to assure truthfulness will discourage protected speech." 433 U. S., at 350. See also *Bose Corp.* v. *Consumers Union of U. S., Inc.*, —— U. S., at ——, n. 22; *Virginia Board of Pharmacy*, 425 U. S., at 777–778 (Stewart, J., concurring). That reasoning has no application to petitioner's reports which, as respondent concedes, propose no commercial transaction and concern no facts uniquely within the speaker's knowledge. Brief 23.

Of course, the commercial context of petitioner's reports is relevant to the constitutional analysis insofar as it implicates the strong state "interest in protecting consumers and regulating commercial transactions," *Ohralik* v. *Ohio State Bar Ass'n*, 436 U. S. 447, 460 (1978). Cf. *Bolger* v. *Young Drug*

Products Corp., —— U. S. ——, ———— (1983) (STEVENS, J., concurring in the judgment). The special harms caused by inaccurate credit reports, the lack of public sophistication about or access to such reports, and the fact that such reports by and large contain statements that are demonstrably true or false, all may justify a variety of regulations reasonably designed to prevent the social losses caused by false credit reports. See *Virginia Board of Pharmacy*, 425 U. S., at 771–773, and n. 24; *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U. S., at 573–576 (BLACKMUN, J., concurring in the judgment). See also Maurer, 72 Geo. L. J., at 126; Comment, 130 U. Pa. L. Rev. 131 (1981). As we explained in *Gertz*, however, the state interest in redressing the harm caused by false statements in the defamation context is fully served by damages that compensate for actual injury. Unconstrained awards of presumed and punitive damages, in contrast, do more than require speakers to bear the costs of their false and harmful statements; by providing damages unrelated to the actual harm caused by false statements, such awards necessarily deter and penalize truthful statements as well. Accordingly, once the actual damages caused by false credit reports are recompensed, the state interest in preventing the special hazards posed by the form of speech at issue here can support no distinction between petitioner and the magazine defendant in *Gertz*.

V

The judgment of the Vermont Supreme Court is reversed and the case remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

no distinction bet. media & non-media - 3 403 U.S. 29

Rosenbloom - majority ruled out punitive damages - 6

Harlan - 403 U.S. at 73 (p7 this draft)

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 13, 18, 20-21

Gertz - "punitive - uncontrolled discretion of the jurors" - 8

Punitive damages banned in variety type of case - 2 - 10

9a "bar" absolute where compensatory damages are adequate - 10

"Unpredictable & uncontrollable" - 10

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

(are not D/P rights as important where only private parties are involved?)

From: **Justice Brennan**

Circulated: _____

Recirculated: JUN 19 1984

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-18

DUN & BRADSTREET, INC., PETITIONER *v.* GREENMOSS BUILDERS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

[June ——, 1984]

JUSTICE BRENNAN delivered the opinion of the Court.

In *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974), a libel action against a magazine, we held that the First Amendment prohibits awards of presumed or punitive damages for false and defamatory statements absent a showing of knowing falsity or reckless disregard for the truth. The question presented by this case is whether that constitutional protection extends to "nonmedia" defendants.

I

Petitioner Dun & Bradstreet, a credit reporting agency, provides subscribers with financial and related information about corporations. On July 26, 1976, petitioner incorrectly reported that respondent, a Vermont corporation engaged in construction contracting, had filed a voluntary petition for bankruptcy. On the day the report was issued, respondent's president learned of it from a bank official with whom he was discussing the possibility of future financing. Eight days later, after being contacted by respondent's president, petitioner confirmed the falsity of the report and sent a retraction to each of its subscribers who had received the original report. Petitioner refused, however, to supply respondent with the names of those subscribers.

Respondent then brought this defamation action in Vermont state court, alleging that the false report injured its

See 10 particularly

10 are responding by addition to a couple of notes on my dissent

LFP 6/19

Sept '84

reputation and seeking $7500 in compensatory and $15,000 in punitive damages. The testimony at trial established that the error in petitioner's report had been caused when one of its employees, a high school student paid to review Vermont bankruptcy pleadings, had inadvertently attributed a bankruptcy petition filed by one of respondent's former employees to respondent itself. Respondent's evidence regarding damages consisted solely of testimony by its president who stated that the report had caused the bank to delay consideration of a pending loan and ultimately to terminate the company's credit. A representative of the bank, called by petitioner, testified that when he received the report he did not believe it and that the bank terminated respondent's credit for reasons wholly unrelated to petitioner's report. Respondent's president also testified that the report had impaired the company's sales and profits and caused it to incur expenses contacting individuals to refute the false information.

After trial, the jury returned a verdict in favor of respondent and awarded $50,000 in compensatory or presumed damages and $300,000 in punitive damages. Petitioner then moved for a new trial. It noted that in *Gertz* v. *Robert Welch, Inc.*, *supra*, at 349, this Court had held "that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth," and argued that the judge's instructions permitted the jury to award such damages on a lesser showing. The trial court agreed with petitioner and granted the motion for a new trial. App. 25–26.

On appeal, the Vermont Supreme Court reversed. 461 A. 2d 414 (1983). Although recognizing that "in certain instances the distinction between media and nonmedia defendants may be difficult to draw," the court stated that "no such difficulty is presented with credit reporting agencies, which are in the business of selling financial information to a limited number of subscribers who have paid substantial fees for

their services." *Id.*, at 417. Relying on this distinguishing characteristic of credit reporting firms, the court concluded that such firms are not "the type of media worthy of First Amendment protection as contemplated by *New York Times* [v. *Sullivan*, 376 U. S. 254 (1964)] and its progeny," 461 A. 2d, at 417–418, and that the balance between a private plaintiff's right to recover presumed and punitive damages without a showing of fault and the First Amendment rights of "nonmedia" speakers "must be struck in favor of the private plaintiff defamed by a nonmedia defendant," *id.*, at 418. Accordingly, the court held "that as a matter of federal constitutional law, the media protections outlined in *Gertz* are inapplicable to nonmedia defamation actions." *Ibid.*

The lower courts have divided over whether "nonmedia" defendants enjoy any constitutional protections in defamation suits, either in suits brought by public figures or officials or in those brought by private plaintiffs. See Smolla, Let the Author Beware: The Rejuvenation of the American Law of Libel, 132 U. Pa. L. Rev. 1, 29–35 and nn. 147, 162 (1983). We granted certiorari to resolve this conflict, —— U. S. —— (1983), and we now reverse. We reject any distinction between "media" and "nonmedia" defendants for purposes of the First Amendment principles applicable to defamation suits. Because petitioner's accurate credit reports constitute speech protected by the First Amendment, the reasoning of *Gertz* applies fully to libel actions brought to redress injury caused by petitioner's inaccurate reports.

II

At the outset, respondent contends that we need not determine in this case whether *Gertz* is applicable to "nonmedia" defendants because the jury instructions satisfied the standards set out in that decision.[1] As noted above, *Gertz* held

[1] Respondent also argues that petitioner did not seek the protections outlined in *Gertz* before the jury instructions were given and that therefore the issue was not preserved for review. In view of the fact that the Ver-

that presumed or punitive damages may not be awarded to a private defamation plaintiff on any showing less than knowledge of falsity or reckless disregard for the truth—the "actual malice" standard first announced in *New York Times* v. *Sullivan*, *supra*, at 280. The trial court in this case instructed the jury that, because petitioner's statement imputing the insolvency of respondent's business was libelous *per se*, respondent was not required "to prove actual damages resulting from the libel since damage and loss [are] conclusively presumed." App. 17. See also *id.*, at 19 (instructing that "where, as in this case there is a libel per se, damages are presumed and actual damages may not be proven" and that "the law presumes damages in some amount in a case of libel per se and therefore relieves the Plaintiff of the burden of establishing by specific proof that damages have occurred").

Respondent acknowledges that these portions of the trial court's instructions, standing alone, do not satisfy the requirements of *Gertz*. Brief at 40. It notes, however, that the trial court also instructed the jury that respondent could not recover any damages if a common law privilege for credit reporting agencies, barring liability for negligent falsehoods, applied. See App. 18. The charge explained that the privilege was not available if respondent could show "malice or lack of good faith on the part of the Defendant." *Ibid.* The court also told the jury that, "[i]f you find that Defendant's conduct was not privileged, and if you also find, on the basis of clear and convincing evidence, that the Defendant acted with actual malice in publishing the article in question, then you may award Plaintiff punitive or exemplary damages in addition to the actual damages assessed." *Id.*, at 20. Accordingly, respondent argues, the instructions did not permit an award of presumed or punitive damages without proof of "actual malice."

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mont Supreme Court considered the federal constitutional issue properly presented and passed upon it, respondent's contention is unavailing. See *Orr* v. *Orr*, 440 U. S. 268, 274–275 (1979).

The trial judge's definition of "malice or lack of good faith" did not, however, comport with the *New York Times* standard. In defining the circumstances under which the common law privilege would be defeated, the court explained to the jury:

> "If you find that the Defendant acted in a [sic] bad faith towards the plaintiff in publishing the Erroneous Report, *or* that Defendant intended to injure the Plaintiff in its business, *or* that it acted in a willful, wanton or reckless disregard of the rights and interests of the Plaintiff, the Defendant has acted maliciously and the privilege is destroyed. *Further*, if the Report was made with reckless disregard of the possible consequence, *or* if it was made with the knowledge that it was false or with reckless disregard of it's [sic] truth or falsity, it was made with malice." App. 18–19 (emphasis added).

Although these instructions included the *New York Times* formulation, the definition of the kind of malice necessary to support an award of presumed damages was plainly not limited to that standard. See, *e. g.*, *Bose Corp.* v. *Consumers Union of United States, Inc.*, —— U. S. ——, —— n. 30 (1984); *St. Amant* v. *Thompson*, 390 U. S. 727, 731 (1968). Consequently, the trial court's conclusion that the instructions did not satisfy *Gertz* was correct and the Vermont Supreme Court's determination that *Gertz* was inapplicable was necessary to its decision that the trial court erred in granting the motion for a new trial. We therefore turn to our reasons for rejecting the Vermont Supreme Court's conclusion.

III

The decision in *Gertz* was the culmination of a decade long effort "to define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment." 418 U. S., at 325. Ten years earlier, in *New York Times* v. *Sullivan*, *supra*, at 279–80, we first announced "a federal rule that prohibits a public official

from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.*, at 279–280. That rule was subsequently extended to libel actions brought by "public figures," *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130 (1967), and, beginning with *New York Times* itself, was applied to cases involving "nonmedia" defendants. See *New York Times*, 376 U. S., at 254 n.*, 286.[2] We had no occasion, however, to consider the applicability of First Amendment principles to libel actions brought by private individuals until the decision in *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29 (1971).

Rosenbloom concerned a libel suit brought by a distributor of nudist magazines against a radio station. Although a majority of Justices were unable to agree on the appropriate standard of liability in defamation actions brought by private individuals, a plurality would have extended the *New York Times* privilege to such cases when the statements at issue concerned matters of "public or general interest," 403 U. S., at 43 (opinion of BRENNAN, J.). Despite the variety of views on liability, however, there was a clear consensus for the conclusion that, at the very least, the First Amendment limits the availability of punitive damages awards in defamation actions brought by private parties. See 403 U. S., at 59 (WHITE, J., concurring in the judgment) (summarizing positions for which there was majority support). Indeed, the

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[2] See *Henry* v. *Collins*, 380 U. S. 356 (1965); *Garrison* v. *Louisiana*, 379 U. S. 64 (1967); *Saint Amant* v. *Thompson*, 390 U. S. 727 (1968). See also *Letter Carriers* v. *Austin*, 418 U. S. 264 (1974) (applying *New York Times* privilege to defamation actions arising from labor disputes); *Linn* v. *United Plant Guard Workers*, 383 U. S. 53 (1966) (labor dispute); *Time, Inc.* v. *Hill*, 385 U. S. 374 (1967) ("false lights" action); *Pickering* v. *Board of Education*, 391 U. S. 563 (1968) (teacher dismissal based on newspaper letter critical of school board). But see *Hutchinson* v. *Proxmire*, 443 U. S. 111, 133, n. 16 (1979).

dissenters were particularly emphatic on this point. Justice Harlan explained:

> "At a minimum, *even in the purely private libel area*, I think the First Amendment should be construed to limit the imposition of punitive damages to those situations where actual malice is proved. This is the typical standard employed in assessing anyone's liability for punitive damages where the underlying aim of the law is to 'compensate for harm actually caused,' . . . and no conceivable state interest could justify imposing a harsher standard on the exercise of those freedoms that are given explicit protection by the First Amendment." *Id.*, at 73 (Harlan, J., dissenting) (emphasis added).

Justices MARSHALL and Stewart went even further and concluded that the largely uncontrolled discretion of juries to award punitive damages in defamation actions created too great a threat to First Amendment freedoms and that such damages should for that reason be held to be precluded. *Id.*, at 84–85 (MARSHALL, J., dissenting).

In *Gertz*, a libel suit brought by an attorney who had been defamed by false statements in a monthly magazine reflecting the views of the John Birch Society, the Court revisted the issues canvassed in *Rosenbloom* and this time a majority of the Court agreed on the minimum constitutional requirements for defamation actions brought by private individuals, at least in cases involving "media" defendants. The Court rejected the extension of *New York Times* proposed by the plurality in *Rosenbloom*, both because that approach was thought unacceptably to impair the strong state interest in protecting the reputations of private individuals, *id.*, at 344–346, and because "it 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—to determine, in the words of MR. JUSTICE MARSHALL, 'what information is relevant to self-government.' *Rosenbloom* v. *Metromedia, Inc.*, 403

U. S., at 79." 418 U. S., at 346. Instead, the Court held that, at least where "the substance of the defamatory statement 'makes substantial danger to reputation apparent,'" *id.*, at 348 (quoting *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130, 155 (1967)), the States may impose any standard of liability for defamation of a private individual, short of liability without fault. *Id.*, at 347.

The Court further concluded, however, that "the strong and legitimate state interest in compensating private individuals for injury to reputation . . . extends no further than compensation for actual injury." *Id.*, at 348–349. Although it had no occasion to consider whether, as Justices MARSHALL and Stewart had urged in *Rosenbloom*, presumed and punitive damages in defamation actions are invariably incompatible with the First Amendment, see also *Smith* v. *Wade*, —— U. S. ——, ——, nn. 19–20 (1983), the Court held that such damages could not be awarded "at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." 418 U. S., at 349. The Court explained that the common law doctrine of presumed damages for defamation, "an oddity of tort law," confers on juries "largely uncontrolled discretion" to award damages even in the absence of proof of harm or loss. *Ibid.* Similarly, "juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused." *Id.*, at 350. And both presumed and punitive damages permit juries "to use their discretion selectively to punish expressions of unpopular views." *Ibid.* Because the threat of such large, disproportionate awards "unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms," and because "the States have no substantial interest in securing for plaintiffs such as this petitioner gratuitous awards of money damages far in excess of any actual injury," *id.*, at 349, the Court concluded that "the private defamation plaintiff who establishes liability under a

less demanding standard than that stated by *New York Times* may recover only such damages as are sufficient to compensate him for actual injury," *id.*, at 350.

Since the decision in *Gertz*, we have followed its reasoning with respect to damages in excess of actual harm in analogous areas of the law. In *Electrical Workers* v. *Foust*, 442 U. S. 42 (1979), for example, we relied on *Gertz* when we concluded that permitting employees to recover punitive damages for a union's breach of its duty of fair representation would undermine the policies of the Railway Labor Act. We explained that, because they go beyond compensation for actual loss, such "unpredictable and potentially substantial" awards undermine the balance between the interest in compensating injured parties and the need to maintain a union's freedom and effectiveness in pursuing grievances. *Id.*, at 48–52. As in *Gertz*, we also noted that "punitive damages may be employed to punish unpopular defendants." *Id.*, at 50–51 n. 14. Similarly, *Newport* v. *Fact Concerts, Inc.*, 453 U. S. 247, 270–271 (1981), relied in part on *Gertz* in concluding that municipalities are immune from punitive damages in § 1983 suits.

These cases, like *Gertz*, reflect a recognition that "the alleged deterrence achieved by punitive damage awards is likely outweighed by the costs—such as the encouragement of unnecessary litigation and the chilling of desirable conduct—flowing from the rule, at least when the standards on which the awards are based are ill-defined." *Smith* v. *Wade*, —— U. S. ——, —— (1983) (REHNQUIST, J., dissenting). See *id.*, at ——– —— (majority opinion) (noting prevailing view that punitive damages may only be awarded for "'conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others,'" quoting Restatement (Second) of Torts § 908(2) (1977) (emphasis deleted)); *id.*, at —— (O'CONNOR, J., dissenting). *Silkwood* v. *Kerr-McGee Corp.*, —— U. S. ——, —— (1984); *id.*, at —— (BLACKMUN, J., dissenting); *id.*, at —— (POW-

ELL, J., dissenting). Although this "chilling of desirable conduct" may be necessary or tolerable in some contexts, it poses a danger of constitutional dimension when the "desirable conduct" deterred by the threat of presumed or punitive damages is expression protected by the First Amendment. See *Rosenbloom* v. *Metromedia*, 403 U. S. 29, 72–78 (1971) (Harlan, J., dissenting); *id.*, at 81–87 (MARSHALL, J., dissenting). The Constitution presupposes that freedom of expression is both an instrinsic element of individual liberty and an essential means to society's search for truth. See *Bose Corp.* v. *Consumers Union of United States, Inc.*, —— U. S., at ——; *Whitney v. California*, 274 U. S. 357, 375 (1927 (Brandeis, J., concurring). Accordingly, when the threat of unpredictable and disproportionate damages induces potential speakers to refrain from speaking, both the speaker and society as a whole are the losers.[3]

[3] Experience in the lower courts since *Gertz* has demonstrated that this concern is not speculative. Notwithstanding the constitutional minima set out in that case, jury awards of punitive damages in the millions of dollars have become increasingly common in defamation suits. See Brief for Washington Post as *Amicus Curiae* 12–16 (listing 10 punitive damages awards ranging from $1–25 million between 1980 and 1983); Smolla, 132 U. Pa. L. Rev., at 6–7, 12–14, 21. See also Wall St. Journal, Sept. 29, 1983, p. 1 (describing how $9.2 million libel judgment drove small town newspaper into temporary bankruptcy).

Indeed, the problems posed by punitive damages in defamation suits have led a number of state courts to conclude that the First Amendment, or comparable state constitutional provisions, bars any such damages in cases where the party injured by defamation recovers adequate compensatory damages. *E. g.*, *Hall* v. *May Department Stores*, 292 Or. 131, 637 P. 2d 126 (1981); *McHale* v. *Lake Charles American Press*, 390 So. 2d 556 (La. App. 1980); *Tasket* v. *KING Broadcasting Co.*, 86 Wash. 2d 439, 546 P. 2d 81 (1976); *Sprouse* v. *Clay Communications, Inc.*, 211 S. E. 2d 674, 692 (W. Va. 1975); *Stone* v. *Essex County Newspapers, Inc.*, 367 Mass. 849, 330 N. E. 2d 161 (1975). Two other states have concluded that punitive damages in defamation actions are barred by their own constitutions unless there is proof that the publisher acted with actual hatred or ill will. *AAFCO Heating & Air Condition Co.* v. *Northwest Publications, Inc.*,

IV

Petitioner does not contend that the plaintiff in this case is a public figure; accordingly, it acknowledges that the jury could have awarded respondent actual damages on a showing less than that required by *New York Times*. Instead, petitioner argues only that, as in *Gertz*, presumed or punitive damages could not be awarded in this case without at least "a showing of knowledge of falsity or reckless disregard for the truth." *Gertz*, 418 U. S., at 349. As noted, the rule in *Gertz* was premised on the conclusion that, by punishing those who make the erroneous statements inevitable in free discourse, unconstrained awards of presumed or punitive damages deter potential speakers from engaging in constitutionally protected truthful expression. The reasoning of *Gertz* therefore squarely controls this case if petitioner's *accurate* reports are protected by the First Amendment. Relying first on the identity of the speaker and second on the nature of speech at issue, respondent contends that petitioner's truthful credit reports are less deserving of constitutional protection than the magazine article at issue in *Gertz*. We do not, however, find these distinctions persuasive.

A

As noted, the defendant in *Gertz* was a monthly magazine expressing the views of the John Birch Society; at various points, the opinion of the Court in that case stressed the importance of a "vigorous and uninhibited press," 418 U. S., at 342, referred to the dangers of "media self-censorship," *id.*, and stated that the Constitution "shields the press and broadcast media from the rigors of strict liability for defamation,"

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162 Ind. App. 671, 321 N. E. 2d 580 (1974); *Walker* v. *Colorado Springs Sun, Inc.*, 188 Colo. 86, 538 P. 2d 450 (1975).

More generally, as JUSTICE REHNQUIST noted last Term, "a significant number of American jurisdictions refuse to condone punitive damages awards" altogether. *Smith* v. *Wade*, —— U. S. ——, —— (1983) (dissenting opinion).

id., at 348. Noting these and other aspects of that decision, respondent argues that "*Gertz* is patently limited only to cases in which there is a media defendant," Brief 26, and contends that petitioner is not such a defendant.

We do not, however, believe any "media/non-media" distinction is appropriate in the defamation context for several reasons. First, as this case demonstrates, the definitional problems associated with such an approach are formidable and present serious First Amendment problems of their own. Like an account of judicial proceedings in a newspaper, magazine, or news broadcast, a statement in petitioner's reports that a particular company has filed for bankruptcy is a report of a timely "news" event conveyed to members of the public by a business organized to collect and disseminate such information. Petitioner could therefore be easily characterized as a "media" defendant. The Vermont Supreme Court rejected that characterization, however, because petitioner is "in the business of selling financial information to a limited number of subscribers who have paid substantial fees for [its] services." 461 A. 2d, at 417. The court added that "[t]here is a clear distinction between a publication which disseminates news for public consumption and one which provides specialized information to a selective, finite audience." *Ibid.*

But the fact that petitioner's information is "specialized" or that its subscribers pay "substantial fees" hardly distinguishes these reports from articles in many publications to which respondent would presumably attach the label "media"; few statements in many publications are of universal interest and few publications are distributed free of charge. Nor is there any apparent reason to treat petitioner differently than a more widely circulated publication because it has "a limited number of subscribers." Indeed, it would be paradoxical to increase protection to statements injurious to reputation as the size of their audience grows. Cf. *Keeton* v. *Hustler Magazine, Inc.*, —— U. S. ——, ——–—— (1984). These line-drawing difficulties demonstrate that ef-

forts to define the difference between "media" and "nonmedia" defendants in defamation suits would, in practice, substantially complicate defamation law, see Smolla, 132 U. Pa. L. Rev., at 90, and would necessarily involve the courts in precisely the kinds of *ad hoc* content-based judgments that *Gertz* sought to prevent. See 418 U. S., at 343–344, 346; *Branzburg* v. *Hayes*, 408 U. S. 665, 703–705, and n. 40 (1972). Cf. *Police Department* v. *Mosley*, 408 U. S. 92, 95 (1972). Furthermore, to the extent that those judgments turned on the public interest in the speaker's message as reflected in the size of the audience or the subject matter of the speech, the "media/nonmedia" distinction would revive the kind of inquiry into the importance of the speaker's message proposed by the plurality in *Rosenbloom* and rejected by the Court in *Gertz*. See *supra*, at ——. See generally Note, 95 Harv. L. Rev. 1876, 1884–1885 (1982).[4]

More fundamentally, however, respondent's argument rests on a misapprehension of those cases in which we have noted the importance of a free press in our constitutional system. Recognizing the critical historical role played by the press in gathering and disseminating information for the benefit of the public, we have often emphasized the need for careful judicial scrutiny of government actions that impede the exercise of that function or that single out the press for differential treatment.[5] That public fiduciary function is

what have the "free press" cases got to do with non-press Δs?

[4] The dissent's claim that its approach would not require a return to the *ad hoc* assessment of the type of speech involved in a given defamation case is belied by the fact that nowhere in the 12-page opinion does it offer a single, verbal formulation for determining whether a libel defendant is entitled to the protections established in *Gertz*. If the dissent itself cannot state a test, then its approach, if adopted, could not help but generate an immeasurable volume of litigation attempting to chart the new course it proposes.

[5] See *e. g.*, *Minneapolis Star* v. *Minnesota Comm'r of Revenue*, —— U. S. ——, ———— (1983); *Columbia Broadcasting System, Inc.* v. *FCC*, 453 U. S. 367, 395 (1981); *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241 (1974); *Branzburg* v. *Hayes*, 408 U. S. 665, 707 (1972); *New*

not, however, performed exclusively by the organs of mass communication. To the contrary,

> "[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. . . . Freedom of the press is a 'fundamental personal right' which 'is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.' *Lovell* v. *Griffin*, 303 U. S. 444, 450, 452 (1938). . . . The informative function asserted by representatives of the organized press . . . is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists." *Branzburg* v. *Hayes*, *supra*, at 704–705.

In guaranteeing equal liberty of expression, the First Amendment furthers a central object of our constitutional scheme, to assure every member of society an equal right to dignity, respect, and the opportunity to participate in self-government. See, *e. g.*, *Carey* v. *Brown*, 447 U. S. 455, 459–463 (1980); *Police Department* v. *Mosley*, 408 U. S. 92, 95 (1972); *Cohen* v. *California*, 403 U. S. 15, 24 (1971); *Whitney* v. *California*, 274 U. S. 357, 375–377 (1927) (Brandeis, J., concurring). Consistent with this goal, the constitutional protections afforded speech depend on the nature, context, and function of the expressive activity at issue, not on the

York Times v. *United States*, 403 U. S. 713 (1971); *Mills* v. *Alabama*, 384 U. S. 214, 218–219 (1966); *Grosjean* v. *American Press Co., Inc.*, 297 U. S. 233, 250 (1936). See also *Herbert* v. *Lando*, 441 U. S. 153, 180–199 (1979) (BRENNAN, J., dissenting in part); *Saxbe* v. *Washington Post Co.*, 417 U. S. 843, 850 (1974) (POWELL, J., dissenting); *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations*, 413 U. S. 376, 393 (1973) (BURGER, C. J.,, dissenting); *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 390 (1969); *Time, Inc.* v. *Hill*, 385 U. S. 374, 389 (1967); Stewart, "Or of the Press," 26 Hastings L. J. 631 (1975).

status or identity of the speaker. . See *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 778–784 (1978). Accordingly, the rights of the institutional press, however defined, are no greater and no less than those enjoyed by other individuals or organizations engaged in the same activities. Compare *Globe Newspaper Co.* v. *Superior Court*, 457 U. S. 596, 603 (1982) (recognizing that "the press and general public have a constitutional right of access to criminal trials") with *Pell* v. *Procunier*, 417 U. S. 817, 834 (1974) (concluding that First Amendment does not "accord the press special access to information not shared by members of the public generally").

We therefore reject the argument that petitioner's credit reports are entitled to diminished constitutional protection because of petitioner's status or the form in which its communications appear. We turn to consider whether *Gertz* is nevertheless inapplicable because of the character or content of petitioner's speech.

B

Respondent argues that petitioner's reports on the financial status of corporations bear little or no relationship to the values of self-expression, autonomy, and robust discussion of public affairs that the First Amendment is intended to serve.[6] We have, of course, identified certain narrow categories of expression that "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572 (1942). See *Bose Corp.* v. *Consumers Union of U. S., Inc.*, —— U. S., at —— – ——. But apart from identifying those limited types of unprotected expression, judges, like other

[6] *E. g.*, *Carey* v. *Brown*, 447 U. S. 455, 466–467 (1980); *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 777, n. 12, 783 (1978); *Wooley* v. *Maynard*, 430 U. S. 705, 714–715 (1977); *NAACP* v. *Button*, 371 U. S. 415, 429–431 (1963); *Winters* v. *New York*, 333 U. S. 507, 510 (1948).

government officials, are not free to decide on the basis of their message which sorts of protected expression are in their judgment less "valuable" than others. *Gertz*, 418 U. S., at 346; *Branzburg* v. *Hayes*, 408 U. S. 665, 705, n. 40 (1972); *Cohen* v. *California*, 403 U. S. 15, 24–25 (1971). See *New York* v. *Ferber*, 458 U. S. 747, 763–764 (1982). The content of petitioner's accurate reports plainly do not place them among those types of speech the evils of which "so overwhelmingly outweigh[] the expressive interests, if any, at stake" that, as a class, they are entitled to virtually no First Amendment protection. *Id.*, at 764.

On the contrary, we long ago rejected the suggestion that, simply because speech concerns economic matters or is in the financial interest of the speaker or audience, it lacks constitutional value. See, *e. g.*, *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 501–502 (1952); *AFL* v. *Swing*, 312 U. S. 321, 325–326 (1941); *Thornhill* v. *Alabama*, 310 U. S. 88, 101–103 (1940); see also *Abood* v. *Detroit Board of Education*, 431 U. S. 209, 231–232, and n. 28 (1977). Our free market economy is predicated on the assumption that human welfare will be improved through informed private decisionmaking. In this respect, ensuring broad distribution of accurate financial information—no less than protecting a wide variety of other facts and ideas concerning "philosophical, social, artistic, economic, literary, or ethical matters," *Abood*, *supra*, at 231—comports with the fundamental premise of the First Amendment "that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public . . . ," *Associated Press* v. *United States*, 326 U. S. 1, 20 (1945). As we emphasized in *Virginia Board of Pharmacy*, *supra* at 765, "the free flow of commercial information is indispensable . . . [both] to the proper allocation of resources in a free enterprise system, [and also] to the formation of intelligent opinions as to how that system ought to be regulated or altered."

In partial support for that statement, we cited views of Justice Douglas that are especially pertinent here:

> "The language of the First Amendment does not except speech directed at private economic decisionmaking. Certainly such speech could not be regarded as less important than political expression. When immersed in a free flow of commercial information, private sector decisionmaking is at least as effective an institution as are our various governments in furthering the social interest in obtaining the best general allocation of resources. . . . The financial data circulated by Dun & Bradstreet, Inc., are part of the fabric of national commercial communication." *Dun & Bradstreet, Inc.* v. *Grove*, 404 U. S. 898, 905–906 (1971) (Douglas, J., dissenting from denial of certiorari).

Justice Douglas further noted that "[p]resumably the credit reports published by the petitioner facilitate through the price system the improvement of human welfare at least as much as did the underlying disagreement in our most recent libel opinion, *Rosenbloom* v. *Metromedia, Inc.*, *supra*, arising out of a squabble over whether a vendor had sold obscene magazines." *Id.*, at 905, n. 9.

Justice Douglas's conclusion that the kind of speech at issue here deserves First Amendment protection is strongly supported by the fact that statements identical to those published by petitioner—namely, accounts of bankruptcy filings or other financial developments concerning specific corporations—would surely be entitled to full constitutional safeguards if they appeared in, for example, a national business magazine or in a small Vermont newspaper. That information is no less important because it appears in a credit report format. It is worth noting in this regard that the defamation law of most States, although apparently not that of Vermont, see 461 A. 2d, at 419, recognizes a qualified common-law privilege for reports like that at issue here. See Maurer, Common Law Defamation and the Fair Credit Reporting

Of course — but

Act, 72 Geo. L. J. 95, 99–105 (1983). The privilege typically precludes recovery for false and defamatory credit information without a showing of bad faith or malice, a standard of proof which is often defined according to the *New York Times* formulation. See, *e. g.*, *Datacon, Inc.* v. *Dun & Bradstreet*, 465 F. Supp. 706, 708 (ND Tex. 1979). The adoption of this privilege reflects a widely held recognition of the substantial public interest in ensuring that the preparation and dissemination of accurate credit reports are not inhibited by unconstrained libel judgments. In short, petitioner's truthful credit reports are not entitled to less than full First Amendment protection simply because they are sold for a profit and concern financial matters.[7]

To be sure, not all of our traditional First Amendment standards are fully applicable with respect to one type of speech involving the economic interests of speaker and audience—advertisements that "do no more than propose a commercial transaction." *Pittsburgh Press Co.* v. *Human Relations Comm'n*, 413 U. S. 376, 385 (1973).[8] The principal

[7] The dissent offers a number of reasons for its view that petitioner's truthful credit reports are entitled to diminished constitutional protection. Among other things, the dissent seems to rely on the fact that petitioner is not a "media" defendant, *ante*, at 8, as well as on the fact that credit reports constitute "speech solely in the economic interests of the speaker and audience," *ante*, at 8–9. The short answer to the dissent's position is that we have repeatedly held that truthful and non-misleading speech relating to the economic interests of speaker and audience—without regard to the speaker's status—is entitled to First Amendment protection. It is noteworthy in this respect that the Court of Appeals decisions on which the dissent relies were all decided prior to *Virginia Pharamacy*. If the dissent's view prevailed, the protections recognized in that case and its successors would become entirely illusory; unconstrained awards of presumed and punitive damages could accomplish indirectly what we have held cannot be accomplished directly.

True but irrelevant

[8] See, *e. g.*, *Bolger* v. *Young Drug Products Corp.*, —— U. S. —— (1983) (contraceptive advertising); *In re R. M. J.*, 455 U. S. 191 (1982) (lawyer advertising); *Metromedia, Inc.* v. *City of San Diego*, 453 U. S. 490 (1981) (commercial billboard advertising); *Central Hudson Gas & Electric*

rationale for affording protection to purely commercial advertising is the view that accurately informed private decisions about consumption are attributes of the kind of knowledgeable, self-governing citizenry that the First Amendment was meant to foster. See generally *Virginia Board of Pharmacy, supra.* We have concluded, however, that, in contrast to factual misstatements in the political arena, false and misleading advertising is relatively easy to identify and causes special harms far disproportionate to any value it might have. Compare *Ohralik* v. *Ohio State Bar Ass'n*, 436 U. S. 447, 455–456 (1978); *Virginia Board of Pharmacy* v. *Virginia Consumers Council*, 425 U. S., at 771–772, and n. 24 with *Brown* v. *Hartlage*, 456 U. S. 45, 61 (1982); *New York Times* v. *Sullivan*, 376 U. S., at 279, n. 19. For that reason, we have recognized differences in the applicability of some First Amendment standards to that form of speech. See *Virginia Board of Pharmacy*, 425 U. S., at 772, n. 24.

Respondent argues that our commercial advertising decisions govern this case because petitioner's statements are "made in a commercial mileu" and "involve and are about business." Brief 14. In particular, respondent relies on our conclusion in *Bates* v. *State Bar of Arizona*, 433 U. S. 350, 383 (1977), that "the leeway for untruthful or misleading expression [permitted in cases like *Gertz*] has little force in the commercial arena." See also *Virginia Board of Pharmacy*, 425 U. S., at 772, n. 24. As we have explained, however,

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Corp. v. *Public Service Comm'n*, 447 U. S. 530 (1980) (advertising of electricity); *Friedman* v. *Rogers*, 440 U. S. 1 (1979) (optometrist advertising); *Ohralik* v. *Ohio State Bar Ass'n*, 436 U. S. 447, 455–456 (1978) (lawyer's solicitation of business); *Bates* v. *State Bar of Arizona*, 433 U. S. 350 (1977) (lawyer advertising); *Linmark Associates, Inc.* v. *Willingboro*, 431 U. S. 85 (1977) (real estate advertising). But see *Carey* v. *Population Services Int'l*, 431 U. S. 678, 700–701 (1977) (total suppression of contraceptive advertising); *New York Times* v. *Sullivan*, 376 U. S. 254, 265–266 (1964) (discussion of public issues in advertising form); *Murdock* v. *Pennsylvania*, 319 U. S. 105, 111 (1943) (advertisement for religious book); *Jamison* v. *Texas*, 318 U. S. 413, 417 (1943) (same).

the mere fact that petitioner's speech concerns commerce or business in itself provides no basis for altering the constitutional analysis. See also *Central Hudson Gas* v. *Electrical Co.* v. *Public Service Comm'n*, 447 U. S., at 579–580 (STEVENS, J., concurring in the judgment). *Bates*, like the other cases in its line, involved oral and written offers to sell goods or services; it concluded that because "the advertiser knows his product and has a commercial interest in its dissemination, we have little worry that regulation to assure truthfulness will discourage protected speech." 433 U. S., at 350. See also *Bose Corp.* v. *Consumers Union of U. S., Inc.*, —— U. S., at ——, n. 22; *Virginia Board of Pharmacy*, 425 U. S., at 777–778 (Stewart, J., concurring). That reasoning has no application to petitioner's reports which, as respondent concedes, propose no commercial transaction and concern no facts uniquely within the speaker's knowledge. Brief 23.

Of course, the commercial context of petitioner's reports is relevant to the constitutional analysis insofar as it implicates the strong state "interest in protecting consumers and regulating commercial transactions," *Ohralik* v. *Ohio State Bar Ass'n*, 436 U. S. 447, 460 (1978). Cf. *Bolger* v. *Young Drug Products Corp.*, —— U. S. ——, ———— (1983) (STEVENS, J., concurring in judgment). The special harms caused by inaccurate credit reports, the lack of public sophistication about or access to such reports, and the fact that such reports by and large contain statements that are demonstrably true or false, all may justify a variety of regulations reasonably designed to prevent the social losses caused by false credit reports. See *Virginia Board of Pharmacy*, 425 U. S., at 771–773, and n. 24; *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U. S., at 573–576 (BLACKMUN, J., concurring in judgment).[9] As we explained

[9] See also Maurer, 72 Geo. L. J., at 126:

"Under *Gertz*, plaintiffs may be compensated for actual damages upon establishing the fault of the defendant; to obtain punitive damages, a plaintiff must demonstrate malice. Sections 1681o and 11681n [of the Fair

in *Gertz*, however, the state interest in redressing the harm caused by false statements in the defamation context is fully served by damages that compensate for actual injury. Unconstrained awards of presumed and punitive damages, in contrast, do more than require speakers to bear the costs of their false and harmful statements; by providing damages unrelated to the actual harm caused by false statements, such awards necessarily deter and penalize truthful statements as well. Accordingly, once the actual damages caused by false credit reports are recompensed, the state interest in preventing the special hazards posed by the form of speech at issue here can support no distinction between petitioner and the magazine defendant in *Gertz*.

V

The judgment of the Vermont Supreme Court is reversed and the case remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Credit Reporting Act] are consistent with these constitutional principles. Section 1681o provides for recovery of actual damages upon a showing of negligence, which presumably satisfies the *Gertz* requirement of fault. Section 1681n authorizes punitive damages for willful violation of the Act. Whether section 1681n is equivalent to *Gertz's* malice standard depends on whether a court would consider it to be possible to fail willfully to follow reasonable procedures and yet not manifest reckless disregard for the truth. Such a fine distinction appears unworkable as a categorical test, so that section 1681n would likely be regarded as harmonious with the principles of *Gertz*. Thus, the Act appears to provide the degree of protection for commercial speech currently required under first amendment doctrine" (footnotes omitted).

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 13, 18, 20-21

From: **Justice Brennan**

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3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83–18

DUN & BRADSTREET, INC., PETITIONER *v.*
GREENMOSS BUILDERS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

[June ——, 1984]

JUSTICE BRENNAN delivered the opinion of the Court.

In *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974), a libel action against a magazine, we held that the First Amendment prohibits awards of presumed or punitive damages for false and defamatory statements absent a showing of knowing falsity or reckless disregard for the truth. The question presented by this case is whether that constitutional protection extends to "nonmedia" defendants.

I

Petitioner Dun & Bradstreet, a credit reporting agency, provides subscribers with financial and related information about corporations. On July 26, 1976, petitioner incorrectly reported that respondent, a Vermont corporation engaged in construction contracting, had filed a voluntary petition for bankruptcy. On the day the report was issued, respondent's president learned of it from a bank official with whom he was discussing the possibility of future financing. Eight days later, after being contacted by respondent's president, petitioner confirmed the falsity of the report and sent a retraction to each of its subscribers who had received the original report. Petitioner refused, however, to supply respondent with the names of those subscribers.

Respondent then brought this defamation action in Vermont state court, alleging that the false report injured its

I don't find these responses very persuasive or dangerous. We anticipated in our note 12 the problem pointed to in note 4 of this opinion, and note 7 seems entirely rhetorical. (Note 9 is trivial.) Since we have already written BRW about these matters, I would be love

reputation and seeking $7500 in compensatory and $15,000 in punitive damages. The testimony at trial established that the error in petitioner's report had been caused when one of its employees, a high school student paid to review Vermont bankruptcy pleadings, had inadvertently attributed a bankruptcy petition filed by one of respondent's former employees to respondent itself. Respondent's evidence regarding damages consisted solely of testimony by its president who stated that the report had caused the bank to delay consideration of a pending loan and ultimately to terminate the company's credit. A representative of the bank, called by petitioner, testified that when he received the report he did not believe it and that the bank terminated respondent's credit for reasons wholly unrelated to petitioner's report. Respondent's president also testified that the report had impaired the company's sales and profits and caused it to incur expenses contacting individuals to refute the false information.

After trial, the jury returned a verdict in favor of respondent and awarded $50,000 in compensatory or presumed damages and $300,000 in punitive damages. Petitioner then moved for a new trial. It noted that in *Gertz* v. *Robert Welch, Inc.*, *supra*, at 349, this Court had held "that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth," and argued that the judge's instructions permitted the jury to award such damages on a lesser showing. The trial court agreed with petitioner and granted the motion for a new trial. App. 25–26.

On appeal, the Vermont Supreme Court reversed. 461 A. 2d 414 (1983). Although recognizing that "in certain instances the distinction between media and nonmedia defendants may be difficult to draw," the court stated that "no such difficulty is presented with credit reporting agencies, which are in the business of selling financial information to a limited number of subscribers who have paid substantial fees for

their services." *Id.*, at 417. Relying on this distinguishing characteristic of credit reporting firms, the court concluded that such firms are not "the type of media worthy of First Amendment protection as contemplated by *New York Times* [v. *Sullivan*, 376 U. S. 254 (1964)] and its progeny," 461 A. 2d, at 417–418, and that the balance between a private plaintiff's right to recover presumed and punitive damages without a showing of fault and the First Amendment rights of "nonmedia" speakers "must be struck in favor of the private plaintiff defamed by a nonmedia defendant," *id.*, at 418. Accordingly, the court held "that as a matter of federal constitutional law, the media protections outlined in *Gertz* are inapplicable to nonmedia defamation actions." *Ibid.*

The lower courts have divided over whether "nonmedia" defendants enjoy any constitutional protections in defamation suits, either in suits brought by public figures or officials or in those brought by private plaintiffs. See Smolla, Let the Author Beware: The Rejuvenation of the American Law of Libel, 132 U. Pa. L. Rev. 1, 29–35 and nn. 147, 162 (1983). We granted certiorari to resolve this conflict, —— U. S. —— (1983), and we now reverse. We reject any distinction between "media" and "nonmedia" defendants for purposes of the First Amendment principles applicable to defamation suits. Because petitioner's accurate credit reports constitute speech protected by the First Amendment, the reasoning of *Gertz* applies fully to libel actions brought to redress injury caused by petitioner's inaccurate reports.

II

At the outset, respondent contends that we need not determine in this case whether *Gertz* is applicable to "nonmedia" defendants because the jury instructions satisfied the standards set out in that decision.[1] As noted above, *Gertz* held

[1] Respondent also argues that petitioner did not seek the protections outlined in *Gertz* before the jury instructions were given and that therefore the issue was not preserved for review. In view of the fact that the Ver-

that presumed or punitive damages may not be awarded to a private defamation plaintiff on any showing less than knowledge of falsity or reckless disregard for the truth—the "actual malice" standard first announced in *New York Times* v. *Sullivan, supra*, at 280. The trial court in this case instructed the jury that, because petitioner's statement imputing the insolvency of respondent's business was libelous *per se*, respondent was not required "to prove actual damages resulting from the libel since damage and loss [are] conclusively presumed." App. 17. See also *id.*, at 19 (instructing that "where, as in this case there is a libel per se, damages are presumed and actual damages may not be proven" and that "the law presumes damages in some amount in a case of libel per se and therefore relieves the Plaintiff of the burden of establishing by specific proof that damages have occurred").

Respondent acknowledges that these portions of the trial court's instructions, standing alone, do not satisfy the requirements of *Gertz*. Brief at 40. It notes, however, that the trial court also instructed the jury that respondent could not recover any damages if a common law privilege for credit reporting agencies, barring liability for negligent falsehoods, applied. See App. 18. The charge explained that the privilege was not available if respondent could show "malice or lack of good faith on the part of the Defendant." *Ibid.* The court also told the jury that, "[i]f you find that Defendant's conduct was not privileged, and if you also find, on the basis of clear and convincing evidence, that the Defendant acted with actual malice in publishing the article in question, then you may award Plaintiff punitive or exemplary damages in addition to the actual damages assessed." *Id.*, at 20. Accordingly, respondent argues, the instructions did not permit an award of presumed or punitive damages without proof of "actual malice."

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mont Supreme Court considered the federal constitutional issue properly presented and passed upon it, respondent's contention is unavailing. See *Orr* v. *Orr*, 440 U. S. 268, 274–275 (1979).

The trial judge's definition of "malice or lack of good faith" did not, however, comport with the *New York Times* standard. In defining the circumstances under which the common law privilege would be defeated, the court explained to the jury:

> "If you find that the Defendant acted in a [sic] bad faith towards the plaintiff in publishing the Erroneous Report, *or* that Defendant intended to injure the Plaintiff in its business, *or* that it acted in a willful, wanton or reckless disregard of the rights and interests of the Plaintiff, the Defendant has acted maliciously and the privilege is destroyed. *Further*, if the Report was made with reckless disregard of the possible consequence, *or* if it was made with the knowledge that it was false or with reckless disregard of it's [sic] truth or falsity, it was made with malice." App. 18–19 (emphasis added).

Although these instructions included the *New York Times* formulation, the definition of the kind of malice necessary to support an award of presumed damages was plainly not limited to that standard. See, *e. g.*, *Bose Corp.* v. *Consumers Union of United States, Inc.*, —— U. S. ——, —— n. 30 (1984); *St. Amant* v. *Thompson*, 390 U. S. 727, 731 (1968). Consequently, the trial court's conclusion that the instructions did not satisfy *Gertz* was correct and the Vermont Supreme Court's determination that *Gertz* was inapplicable was necessary to its decision that the trial court erred in granting the motion for a new trial. We therefore turn to our reasons for rejecting the Vermont Supreme Court's conclusion.

III

The decision in *Gertz* was the culmination of a decade long effort "to define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment." 418 U. S., at 325. Ten years earlier, in *New York Times* v. *Sullivan*, *supra*, at 279–80, we first announced "a federal rule that prohibits a public official

from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.*, at 279–280. That rule was subsequently extended to libel actions brought by "public figures," *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130 (1967), and, beginning with *New York Times* itself, was applied to cases involving "nonmedia" defendants. See *New York Times*, 376 U. S., at 254 n.*, 286.[2] We had no occasion, however, to consider the applicability of First Amendment principles to libel actions brought by private individuals until the decision in *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29 (1971).

Rosenbloom concerned a libel suit brought by a distributor of nudist magazines against a radio station. Although a majority of Justices were unable to agree on the appropriate standard of liability in defamation actions brought by private individuals, a plurality would have extended the *New York Times* privilege to such cases when the statements at issue concerned matters of "public or general interest," 403 U. S., at 43 (opinion of BRENNAN, J.). Despite the variety of views on liability, however, there was a clear consensus for the conclusion that, at the very least, the First Amendment limits the availability of punitive damages awards in defamation actions brought by private parties. See 403 U. S., at 59 (WHITE, J., concurring in the judgment) (summarizing positions for which there was majority support). Indeed, the

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[2] See *Henry* v. *Collins*, 380 U. S. 356 (1965); *Garrison* v. *Louisiana*, 379 U. S. 64 (1967); *Saint Amant* v. *Thompson*, 390 U. S. 727 (1968). See also *Letter Carriers* v. *Austin*, 418 U. S. 264 (1974) (applying *New York Times* privilege to defamation actions arising from labor disputes); *Linn* v. *United Plant Guard Workers*, 383 U. S. 53 (1966) (labor dispute); *Time, Inc.* v. *Hill*, 385 U. S. 374 (1967) ("false lights" action); *Pickering* v. *Board of Education*, 391 U. S. 563 (1968) (teacher dismissal based on newspaper letter critical of school board). But see *Hutchinson* v. *Proxmire*, 443 U. S. 111, 133, n. 16 (1979).

dissenters were particularly emphatic on this point. Justice Harlan explained:

> "At a minimum, *even in the purely private libel area*, I think the First Amendment should be construed to limit the imposition of punitive damages to those situations where actual malice is proved. This is the typical standard employed in assessing anyone's liability for punitive damages where the underlying aim of the law is to compensate for harm actually caused, . . . and no conceivable state interest could justify imposing a harsher standard on the exercise of those freedoms that are given explicit protection by the First Amendment." *Id.*, at 73 (Harlan, J., dissenting) (emphasis added).

Justices MARSHALL and Stewart went even further and concluded that the largely uncontrolled discretion of juries to award punitive damages in defamation actions created too great a threat to First Amendment freedoms and that such damages should for that reason be held to be precluded. *Id.*, at 84–85 (MARSHALL, J., dissenting).

In *Gertz*, a libel suit brought by an attorney who had been defamed by false statements in a monthly magazine reflecting the views of the John Birch Society, the Court revisted the issues canvassed in *Rosenbloom* and this time a majority of the Court agreed on the minimum constitutional requirements for defamation actions brought by private individuals, at least in cases involving "media" defendants. The Court rejected the extension of *New York Times* proposed by the plurality in *Rosenbloom*, both because that approach was thought unacceptably to impair the strong state interest in protecting the reputations of private individuals, *id.*, at 344–346, and because "it 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—to determine, in the words of MR. JUSTICE MARSHALL, 'what information is relevant to self-government.' *Rosenbloom* v. *Metromedia, Inc.*, 403

U. S., at 79." 418 U. S., at 346. Instead, the Court held that, at least where "the substance of the defamatory statement 'makes substantial danger to reputation apparent,'" *id.*, at 348 (quoting *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130, 155 (1967)), the States may impose any standard of liability for defamation of a private individual, short of liability without fault. *Id.*, at 347.

The Court further concluded, however, that "the strong and legitimate state interest in compensating private individuals for injury to reputation . . . extends no further than compensation for actual injury." *Id.*, at 348–349. Although it had no occasion to consider whether, as Justices MARSHALL and Stewart had urged in *Rosenbloom*, presumed and punitive damages in defamation actions are invariably incompatible with the First Amendment, see also *Smith* v. *Wade*, —— U. S. ——, ——, nn. 19–20 (1983), the Court held that such damages could not be awarded "at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." 418 U. S., at 349. The Court explained that the common law doctrine of presumed damages for defamation, "an oddity of tort law," confers on juries "largely uncontrolled discretion" to award damages even in the absence of proof of harm or loss. *Ibid.* Similarly, "juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused." *Id.*, at 350. And both presumed and punitive damages permit juries "to use their discretion selectively to punish expressions of unpopular views." *Ibid.* Because the threat of such large, disproportionate awards "unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms," and because "the States have no substantial interest in securing for plaintiffs such as this petitioner gratuitous awards of money damages far in excess of any actual injury," *id.*, at 349, the Court concluded that "the private defamation plaintiff who establishes liability under a

less demanding standard than that stated by *New York Times* may recover only such damages as are sufficient to compensate him for actual injury," *id.*, at 350.

Since the decision in *Gertz*, we have followed its reasoning with respect to damages in excess of actual harm in analogous areas of the law. In *Electrical Workers* v. *Foust*, 442 U. S. 42 (1979), for example, we relied on *Gertz* when we concluded that permitting employees to recover punitive damages for a union's breach of its duty of fair representation would undermine the policies of the Railway Labor Act. We explained that, because they go beyond compensation for actual loss, such "unpredictable and potentially substantial" awards undermine the balance between the interest in compensating injured parties and the need to maintain a union's freedom and effectiveness in pursuing grievances. *Id.*, at 48–52. As in *Gertz*, we also noted that "punitive damages may be employed to punish unpopular defendants." *Id.*, at 50–51 n. 14. Similarly, *Newport* v. *Fact Concerts, Inc.*, 453 U. S. 247, 270–271 (1981), relied in part on *Gertz* in concluding that municipalities are immune from punitive damages in § 1983 suits.

These cases, like *Gertz*, reflect a recognition that "the alleged deterrence achieved by punitive damage awards is likely outweighed by the costs—such as the encouragement of unnecessary litigation and the chilling of desirable conduct—flowing from the rule, at least when the standards on which the awards are based are ill-defined." *Smith* v. *Wade*, —— U. S. ——, —— (1983) (REHNQUIST, J., dissenting). See *id.*, at —— – —— (majority opinion) (noting prevailing view that punitive damages may only be awarded for "'conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others,'" quoting Restatement (Second) of Torts § 908(2) (1977) (emphasis deleted)); *id.*, at —— (O'CONNOR, J., dissenting). *Silkwood* v. *Kerr-McGee Corp.*, —— U. S. ——, —— (1984); *id.*, at —— (BLACKMUN, J., dissenting); *id.*, at —— (POW-

ELL, J., dissenting). Although this "chilling of desirable conduct" may be necessary or tolerable in some contexts, it poses a danger of constitutional dimension when the "desirable conduct" deterred by the threat of presumed or punitive damages is expression protected by the First Amendment. See *Rosenbloom* v. *Metromedia*, 403 U. S. 29, 72–78 (1971) (Harlan, J., dissenting); *id.*, at 81–87 (MARSHALL, J., dissenting). The Constitution presupposes that freedom of expression is both an instrinsic element of individual liberty and an essential means to society's search for truth. See *Bose Corp.* v. *Consumers Union of United States, Inc.*, —— U. S., at ——; *Whitney* v. *California*, 274 U. S. 357, 375 (1927 (Brandeis, J., concurring). Accordingly, when the threat of unpredictable and disproportionate damages induces potential speakers to refrain from speaking, both the speaker and society as a whole are the losers.[3]

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[3] Experience in the lower courts since *Gertz* has demonstrated that this concern is not speculative. Notwithstanding the constitutional minima set out in that case, jury awards of punitive damages in the millions of dollars have become increasingly common in defamation suits. See Brief for Washington Post as *Amicus Curiae* 12–16 (listing 10 punitive damages awards ranging from $1–25 million between 1980 and 1983); Smolla, 132 U. Pa. L. Rev., at 6–7, 12–14, 21. See also Wall St. Journal, Sept. 29, 1983, p. 1 (describing how $9.2 million libel judgment drove small town newspaper into temporary bankruptcy).

Indeed, the problems posed by punitive damages in defamation suits have led a number of state courts to conclude that the First Amendment, or comparable state constitutional provisions, bars any such damages in cases where the party injured by defamation recovers adequate compensatory damages. *E. g.*, *Hall* v. *May Department Stores*, 292 Or. 131, 637 P. 2d 126 (1981); *McHale* v. *Lake Charles American Press*, 390 So. 2d 556 (La. App. 1980); *Tasket* v. *KING Broadcasting Co.*, 86 Wash. 2d 439, 546 P. 2d 81 (1976); *Sprouse* v. *Clay Communications, Inc.*, 211 S. E. 2d 674, 692 (W. Va. 1975); *Stone* v. *Essex County Newspapers, Inc.*, 367 Mass. 849, 330 N. E. 2d 161 (1975). Two other states have concluded that punitive damages in defamation actions are barred by their own constitutions unless there is proof that the publisher acted with actual hatred or ill will. *AAFCO Heating & Air Condition Co.* v. *Northwest Publications, Inc.*,

IV

Petitioner does not contend that the plaintiff in this case is a public figure; accordingly, it acknowledges that the jury could have awarded respondent actual damages on a showing less than that required by *New York Times*. Instead, petitioner argues only that, as in *Gertz*, presumed or punitive damages could not be awarded in this case without at least "a showing of knowledge of falsity or reckless disregard for the truth." *Gertz*, 418 U. S., at 349. As noted, the rule in *Gertz* was premised on the conclusion that, by punishing those who make the erroneous statements inevitable in free discourse, unconstrained awards of presumed or punitive damages deter potential speakers from engaging in constitutionally protected truthful expression. The reasoning of *Gertz* therefore squarely controls this case if petitioner's *accurate* reports are protected by the First Amendment. Relying first on the identity of the speaker and second on the nature of speech at issue, respondent contends that petitioner's truthful credit reports are less deserving of constitutional protection than the magazine article at issue in *Gertz*. We do not, however, find these distinctions persuasive.

A

As noted, the defendant in *Gertz* was a monthly magazine expressing the views of the John Birch Society; at various points, the opinion of the Court in that case stressed the importance of a "vigorous and uninhibited press," 418 U. S., at 342, referred to the dangers of "media self-censorship," *id.*, and stated that the Constitution "shields the press and broadcast media from the rigors of strict liability for defamation,"

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162 Ind. App. 671, 321 N. E. 2d 580 (1974); *Walker* v. *Colorado Springs Sun, Inc.*, 188 Colo. 86, 538 P. 2d 450 (1975).

More generally, as JUSTICE REHNQUIST noted last Term, "a significant number of American jurisdictions refuse to condone punitive damages awards" altogether. *Smith* v. *Wade*, —— U. S. ——, —— (1983) (dissenting opinion).

id., at 348. Noting these and other aspects of that decision, respondent argues that "*Gertz* is patently limited only to cases in which there is a media defendant," Brief 26, and contends that petitioner is not such a defendant.

We do not, however, believe any "media/non-media" distinction is appropriate in the defamation context for several reasons. First, as this case demonstrates, the definitional problems associated with such an approach are formidable and present serious First Amendment problems of their own. Like an account of judicial proceedings in a newspaper, magazine, or news broadcast, a statement in petitioner's reports that a particular company has filed for bankruptcy is a report of a timely "news" event conveyed to members of the public by a business organized to collect and disseminate such information. Petitioner could therefore be easily characterized as a "media" defendant. The Vermont Supreme Court rejected that characterization, however, because petitioner is "in the business of selling financial information to a limited number of subscribers who have paid substantial fees for [its] services." 461 A. 2d, at 417. The court added that "[t]here is a clear distinction between a publication which disseminates news for public consumption and one which provides specialized information to a selective, finite audience." *Ibid.*

But the fact that petitioner's information is "specialized" or that its subscribers pay "substantial fees" hardly distinguishes these reports from articles in many publications to which respondent would presumably attach the label "media"; few statements in many publications are of universal interest and few publications are distributed free of charge. Nor is there any apparent reason to treat petitioner differently than a more widely circulated publication because it has "a limited number of subscribers." Indeed, it would be paradoxical to increase protection to statements injurious to reputation as the size of their audience grows. Cf. *Keeton* v. *Hustler Magazine, Inc.*, —— U. S. ——, ——–—— (1984). These line-drawing difficulties demonstrate that ef-

forts to define the difference between "media" and "nonmedia" defendants in defamation suits would, in practice, substantially complicate defamation law, see Smolla, 132 U. Pa. L. Rev., at 90, and would necessarily involve the courts in precisely the kinds of *ad hoc* content-based judgments that *Gertz* sought to prevent. See 418 U. S., at 343–344, 346; *Branzburg* v. *Hayes*, 408 U. S. 665, 703–705, and n. 40 (1972). Cf. *Police Department* v. *Mosley*, 408 U. S. 92, 95 (1972). Furthermore, to the extent that those judgments turned on the public interest in the speaker's message as reflected in the size of the audience or the subject matter of the speech, the "media/nonmedia" distinction would revive the kind of inquiry into the importance of the speaker's message proposed by the plurality in *Rosenbloom* and rejected by the Court in *Gertz*. See *supra*, at ——. See generally Note, 95 Harv. L. Rev. 1876, 1884–1885 (1982).[4]

More fundamentally, however, respondent's argument rests on a misapprehension of those cases in which we have noted the importance of a free press in our constitutional system. Recognizing the critical historical role played by the press in gathering and disseminating information for the benefit of the public, we have often emphasized the need for careful judicial scrutiny of government actions that impede the exercise of that function or that single out the press for differential treatment.[5] That public fiduciary function is

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[4] The dissent's claim that its approach would not require a return to the *ad hoc* assessment of the type of speech involved in a given defamation case is belied by the fact that nowhere in the 12-page opinion does it offer a single, verbal formulation for determining whether a libel defendant is entitled to the protections established in *Gertz*. If the dissent itself cannot state a test, then its approach, if adopted, could not help but generate an immeasurable volume of litigation attempting to chart the new course it proposes.

[5] See *e. g.*, *Minneapolis Star* v. *Minnesota Comm'r of Revenue*, —— U. S. ——, —— (1983); *Columbia Broadcasting System, Inc.* v. *FCC*, 453 U. S. 367, 395 (1981); *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241 (1974); *Branzburg* v. *Hayes*, 408 U. S. 665, 707 (1972); *New*

not, however, performed exclusively by the organs of mass communication. To the contrary,

> "[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. . . . Freedom of the press is a 'fundamental personal right' which 'is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.' *Lovell* v. *Griffin*, 303 U. S. 444, 450, 452 (1938). . . . The informative function asserted by representatives of the organized press . . . is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists." *Branzburg* v. *Hayes*, *supra*, at 704–705.

In guaranteeing equal liberty of expression, the First Amendment furthers a central object of our constitutional scheme, to assure every member of society an equal right to dignity, respect, and the opportunity to participate in self-government. See, *e. g.*, *Carey* v. *Brown*, 447 U. S. 455, 459–463 (1980); *Police Department* v. *Mosley*, 408 U. S. 92, 95 (1972); *Cohen* v. *California*, 403 U. S. 15, 24 (1971); *Whitney* v. *California*, 274 U. S. 357, 375–377 (1927) (Brandeis, J., concurring). Consistent with this goal, the constitutional protections afforded speech depend on the nature, context, and function of the expressive activity at issue, not on the

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York Times v. *United States*, 403 U. S. 713 (1971); *Mills* v. *Alabama*, 384 U. S. 214, 218–219 (1966); *Grosjean* v. *American Press Co., Inc.*, 297 U. S. 233, 250 (1936). See also *Herbert* v. *Lando*, 441 U. S. 153, 180–199 (1979) (BRENNAN, J., dissenting in part); *Saxbe* v. *Washington Post Co.*, 417 U. S. 843, 850 (1974) (POWELL, J., dissenting); *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations*, 413 U. S. 376, 393 (1973) (BURGER, C. J.,, dissenting); *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 390 (1969); *Time, Inc.* v. *Hill*, 385 U. S. 374, 389 (1967); Stewart, "Or of the Press," 26 Hastings L. J. 631 (1975).

status or identity of the speaker. See *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 778–784 (1978). Accordingly, the rights of the institutional press, however defined, are no greater and no less than those enjoyed by other individuals or organizations engaged in the same activities. Compare *Globe Newspaper Co.* v. *Superior Court*, 457 U. S. 596, 603 (1982) (recognizing that "the press and general public have a constitutional right of access to criminal trials") with *Pell* v. *Procunier*, 417 U. S. 817, 834 (1974) (concluding that First Amendment does not "accord the press special access to information not shared by members of the public generally").

We therefore reject the argument that petitioner's credit reports are entitled to diminished constitutional protection because of petitioner's status or the form in which its communications appear. We turn to consider whether *Gertz* is nevertheless inapplicable because of the character or content of petitioner's speech.

B

Respondent argues that petitioner's reports on the financial status of corporations bear little or no relationship to the values of self-expression, autonomy, and robust discussion of public affairs that the First Amendment is intended to serve.[6] We have, of course, identified certain narrow categories of expression that "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572 (1942). See *Bose Corp.* v. *Consumers Union of U. S., Inc.*, —— U. S., at —— – ——. But apart from identifying those limited types of unprotected expression, judges, like other

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[6] *E. g.*, *Carey* v. *Brown*, 447 U. S. 455, 466–467 (1980); *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 777, n. 12, 783 (1978); *Wooley* v. *Maynard*, 430 U. S. 705, 714–715 (1977); *NAACP* v. *Button*, 371 U. S. 415, 429–431 (1963); *Winters* v. *New York*, 333 U. S. 507, 510 (1948).

government officials, are not free to decide on the basis of their message which sorts of protected expression are in their judgment less "valuable" than others. *Gertz*, 418 U. S., at 346; *Branzburg* v. *Hayes*, 408 U. S. 665, 705, n. 40 (1972); *Cohen* v. *California*, 403 U. S. 15, 24–25 (1971). See *New York* v. *Ferber*, 458 U. S. 747, 763–764 (1982). The content of petitioner's accurate reports plainly do not place them among those types of speech the evils of which "so overwhelmingly outweigh[] the expressive interests, if any, at stake" that, as a class, they are entitled to virtually no First Amendment protection. *Id.*, at 764.

On the contrary, we long ago rejected the suggestion that, simply because speech concerns economic matters or is in the financial interest of the speaker or audience, it lacks constitutional value. See, *e. g.*, *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 501–502 (1952); *AFL* v. *Swing*, 312 U. S. 321, 325–326 (1941); *Thornhill* v. *Alabama*, 310 U. S. 88, 101–103 (1940); see also *Abood* v. *Detroit Board of Education*, 431 U. S. 209, 231–232, and n. 28 (1977). Our free market economy is predicated on the assumption that human welfare will be improved through informed private decisionmaking. In this respect, ensuring broad distribution of accurate financial information—no less than protecting a wide variety of other facts and ideas concerning "philosophical, social, artistic, economic, literary, or ethical matters," *Abood*, *supra*, at 231—comports with the fundamental premise of the First Amendment "that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public . . . ," *Associated Press* v. *United States*, 326 U. S. 1, 20 (1945). As we emphasized in *Virginia Board of Pharmacy*, *supra* at 765, "the free flow of commercial information is indispensable . . . [both] to the proper allocation of resources in a free enterprise system, [and also] to the formation of intelligent opinions as to how that system ought to be regulated or altered."

In partial support for that statement, we cited views of Justice Douglas that are especially pertinent here:

> "The language of the First Amendment does not except speech directed at private economic decisionmaking. Certainly such speech could not be regarded as less important than political expression. When immersed in a free flow of commercial information, private sector decisionmaking is at least as effective an institution as are our various governments in furthering the social interest in obtaining the best general allocation of resources. . . . The financial data circulated by Dun & Bradstreet, Inc., are part of the fabric of national commercial communication." *Dun & Bradstreet, Inc.* v. *Grove*, 404 U. S. 898, 905–906 (1971) (Douglas, J., dissenting from denial of certiorari).

Justice Douglas further noted that "[p]resumably the credit reports published by the petitioner facilitate through the price system the improvement of human welfare at least as much as did the underlying disagreement in our most recent libel opinion, *Rosenbloom* v. *Metromedia, Inc.*, *supra*, arising out of a squabble over whether a vendor had sold obscene magazines." *Id.*, at 905, n. 9.

Justice Douglas's conclusion that the kind of speech at issue here deserves First Amendment protection is strongly supported by the fact that statements identical to those published by petitioner—namely, accounts of bankruptcy filings or other financial developments concerning specific corporations—would surely be entitled to full constitutional safeguards if they appeared in, for example, a national business magazine or in a small Vermont newspaper. That information is no less important because it appears in a credit report format. It is worth noting in this regard that the defamation law of most States, although apparently not that of Vermont, see 461 A. 2d, at 419, recognizes a qualified common-law privilege for reports like that at issue here. See Maurer, Common Law Defamation and the Fair Credit Reporting

Act, 72 Geo. L. J. 95, 99–105 (1983). The privilege typically precludes recovery for false and defamatory credit information without a showing of bad faith or malice, a standard of proof which is often defined according to the *New York Times* formulation. See, *e. g.*, *Datacon, Inc.* v. *Dun & Bradstreet*, 465 F. Supp. 706, 708 (ND Tex. 1979). The adoption of this privilege reflects a widely held recognition of the substantial public interest in ensuring that the preparation and dissemination of accurate credit reports are not inhibited by unconstrained libel judgments. In short, petitioner's truthful credit reports are not entitled to less than full First Amendment protection simply because they are sold for a profit and concern financial matters.[7]

To be sure, not all of our traditional First Amendment standards are fully applicable with respect to one type of speech involving the economic interests of speaker and audience—advertisements that "do no more than propose a commercial transaction." *Pittsburgh Press Co.* v. *Human Relations Comm'n*, 413 U. S. 376, 385 (1973).[8] The principal

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[7] The dissent offers a number of reasons for its view that petitioner's truthful credit reports are entitled to diminished constitutional protection. Among other things, the dissent seems to rely on the fact that petitioner is not a "media" defendant, *ante*, at 8, as well as on the fact that credit reports constitute "speech solely in the economic interests of the speaker and audience," *ante*, at 8–9. The short answer to the dissent's position is that we have repeatedly held that truthful and non-misleading speech relating to the economic interests of speaker and audience—without regard to the speaker's status—is entitled to First Amendment protection. It is noteworthy in this respect that the Court of Appeals decisions on which the dissent relies were all decided prior to *Virginia Pharamacy*. If the dissent's view prevailed, the protections recognized in that case and its successors would become entirely illusory; unconstrained awards of presumed and punitive damages could accomplish indirectly what we have held cannot be accomplished directly.

[8] See, *e. g.*, *Bolger* v. *Young Drug Products Corp.*, —— U. S. —— (1983) (contraceptive advertising); *In re R. M. J.*, 455 U. S. 191 (1982) (lawyer advertising); *Metromedia, Inc.* v. *City of San Diego*, 453 U. S. 490 (1981) (commercial billboard advertising); *Central Hudson Gas & Electric*

rationale for affording protection to purely commercial advertising is the view that accurately informed private decisions about consumption are attributes of the kind of knowledgeable, self-governing citizenry that the First Amendment was meant to foster. See generally *Virginia Board of Pharmacy*, *supra*. We have concluded, however, that, in contrast to factual misstatements in the political arena, false and misleading advertising is relatively easy to identify and causes special harms far disproportionate to any value it might have. Compare *Ohralik* v. *Ohio State Bar Ass'n*, 436 U. S. 447, 455–456 (1978); *Virginia Board of Pharmacy* v. *Virginia Consumers Council*, 425 U. S., at 771–772, and n. 24 with *Brown* v. *Hartlage*, 456 U. S. 45, 61 (1982); *New York Times* v. *Sullivan*, 376 U. S., at 279, n. 19. For that reason, we have recognized differences in the applicability of some First Amendment standards to that form of speech. See *Virginia Board of Pharmacy*, 425 U. S., at 772, n. 24.

Respondent argues that our commercial advertising decisions govern this case because petitioner's statements are "made in a commercial mileu" and "involve and are about business." Brief 14. In particular, respondent relies on our conclusion in *Bates* v. *State Bar of Arizona*, 433 U. S. 350, 383 (1977), that "the leeway for untruthful or misleading expression [permitted in cases like *Gertz*] has little force in the commercial arena." See also *Virginia Board of Pharmacy*, 425 U. S., at 772, n. 24. As we have explained, however,

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Corp. v. *Public Service Comm'n*, 447 U. S. 530 (1980) (advertising of electricity); *Friedman* v. *Rogers*, 440 U. S. 1 (1979) (optometrist advertising); *Ohralik* v. *Ohio State Bar Ass'n*, 436 U. S. 447, 455–456 (1978) (lawyer's solicitation of business); *Bates* v. *State Bar of Arizona*, 433 U. S. 350 (1977) (lawyer advertising); *Linmark Associates, Inc.* v. *Willingboro*, 431 U. S. 85 (1977) (real estate advertising). But see *Carey* v. *Population Services Int'l*, 431 U. S. 678, 700–701 (1977) (total suppression of contraceptive advertising); *New York Times* v. *Sullivan*, 376 U. S. 254, 265–266 (1964) (discussion of public issues in advertising form); *Murdock* v. *Pennsylvania*, 319 U. S. 105, 111 (1943) (advertisement for religious book); *Jamison* v. *Texas*, 318 U. S. 413, 417 (1943) (same).

the mere fact that petitioner's speech concerns commerce or business in itself provides no basis for altering the constitutional analysis. See also *Central Hudson Gas* v. *Electrical Co.* v. *Public Service Comm'n*, 447 U. S., at 579–580 (STEVENS, J., concurring in the judgment). *Bates*, like the other cases in its line, involved oral and written offers to sell goods or services; it concluded that because "the advertiser knows his product and has a commercial interest in its dissemination, we have little worry that regulation to assure truthfulness will discourage protected speech." 433 U. S., at 350. See also *Bose Corp.* v. *Consumers Union of U. S., Inc.*, —— U. S., at ——, n. 22; *Virginia Board of Pharmacy*, 425 U. S., at 777–778 (Stewart, J., concurring). That reasoning has no application to petitioner's reports which, as respondent concedes, propose no commercial transaction and concern no facts uniquely within the speaker's knowledge. Brief 23.

Of course, the commercial context of petitioner's reports is relevant to the constitutional analysis insofar as it implicates the strong state "interest in protecting consumers and regulating commercial transactions," *Ohralik* v. *Ohio State Bar Ass'n*, 436 U. S. 447, 460 (1978). Cf. *Bolger* v. *Young Drug Products Corp.*, —— U. S. ——, ———— (1983) (STEVENS, J., concurring in judgment). The special harms caused by inaccurate credit reports, the lack of public sophistication about or access to such reports, and the fact that such reports by and large contain statements that are demonstrably true or false, all may justify a variety of regulations reasonably designed to prevent the social losses caused by false credit reports. See *Virginia Board of Pharmacy*, 425 U. S., at 771–773, and n. 24; *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U. S., at 573–576 (BLACKMUN, J., concurring in judgment).[9] As we explained

[9] See also Maurer, 72 Geo. L. J., at 126:

"Under *Gertz*, plaintiffs may be compensated for actual damages upon establishing the fault of the defendant; to obtain punitive damages, a plaintiff must demonstrate malice. Sections 1681o and 11681n [of the Fair

in *Gertz*, however, the state interest in redressing the harm caused by false statements in the defamation context is fully served by damages that compensate for actual injury. Unconstrained awards of presumed and punitive damages, in contrast, do more than require speakers to bear the costs of their false and harmful statements; by providing damages unrelated to the actual harm caused by false statements, such awards necessarily deter and penalize truthful statements as well. Accordingly, once the actual damages caused by false credit reports are recompensed, the state interest in preventing the special hazards posed by the form of speech at issue here can support no distinction between petitioner and the magazine defendant in *Gertz*.

V

The judgment of the Vermont Supreme Court is reversed and the case remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Credit Reporting Act] are consistent with these constitutional principles. Section 1681o provides for recovery of actual damages upon a showing of negligence, which presumably satisfies the *Gertz* requirement of fault. Section 1681n authorizes punitive damages for willful violation of the Act. Whether section 1681n is equivalent to *Gertz's* malice standard depends on whether a court would consider it to be possible to fail willfully to follow reasonable procedures and yet not manifest reckless disregard for the truth. Such a fine distinction appears unworkable as a categorical test, so that section 1681n would likely be regarded as harmonious with the principles of *Gertz*. Thus, the Act appears to provide the degree of protection for commercial speech currently required under first amendment doctrine" (footnotes omitted).

13, 18

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

L.F.P

From: **Justice Brennan**

Circulated: OCT 30 1984

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83–18

DUN & BRADSTREET, INC., PETITIONER *v.*
GREENMOSS BUILDERS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

[November ——, 1984]

JUSTICE BRENNAN delivered the opinion of the Court.

In *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974), a libel action against a magazine, we held that the First Amendment prohibits awards of presumed or punitive damages for false and defamatory statements absent a showing of knowing falsity or reckless disregard for the truth. The question presented by this case is whether that constitutional protection extends to "nonmedia" defendants.

I

Petitioner Dun & Bradstreet, a credit reporting agency, provides subscribers with financial and related information about corporations. On July 26, 1976, petitioner incorrectly reported that respondent, a Vermont corporation engaged in construction contracting, had filed a voluntary petition for bankruptcy. On the day the report was issued, respondent's president learned of it from a bank official with whom he was discussing the possibility of future financing. Eight days later, after being contacted by respondent's president, petitioner confirmed the falsity of the report and sent a retraction to each of its subscribers who had received the original report. Petitioner refused, however, to supply respondent with the names of those subscribers.

Respondent then brought this defamation action in Vermont state court, alleging that the false report injured its

reputation and seeking $7,500 in compensatory and $15,000 in punitive damages. The testimony at trial established that the error in petitioner's report had been caused when one of its employees, a high school student paid to review Vermont bankruptcy pleadings, had inadvertently attributed a bankruptcy petition filed by one of respondent's former employees to respondent itself. Respondent's evidence regarding damages consisted solely of testimony by its president who stated that the report had caused the bank to delay consideration of a pending loan and ultimately to terminate the company's credit. A representative of the bank, called by petitioner, testified that when he received the report he did not believe it and that the bank terminated respondent's credit for reasons wholly unrelated to petitioner's report. Respondent's president also testified that the report had impaired the company's sales and profits and caused it to incur expenses contacting individuals to refute the false information.

After trial, the jury returned a verdict in favor of respondent and awarded $50,000 in compensatory or presumed damages and $300,000 in punitive damages. Petitioner then moved for a new trial. It noted that in *Gertz* v. *Robert Welch, Inc.*, *supra*, at 349, this Court had held "that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth," and argued that the judge's instructions permitted the jury to award such damages on a lesser showing. The trial court agreed with petitioner and granted the motion for a new trial. App. 25–26.

On appeal, the Vermont Supreme Court reversed. 461 A. 2d 414 (1983). Although recognizing that "in certain instances the distinction between media and nonmedia defendants may be difficult to draw," the court stated that "no such difficulty is presented with credit reporting agencies, which are in the business of selling financial information to a limited number of subscribers who have paid substantial fees for

their services." *Id.*, at 417. Relying on this distinguishing characteristic of credit reporting firms, the court concluded that such firms are not "the type of media worthy of First Amendment protection as contemplated by *New York Times* [v. *Sullivan*, 376 U. S. 254 (1964)] and its progeny," 461 A. 2d, at 417–418, and that the balance between a private plaintiff's right to recover presumed and punitive damages without a showing of fault and the First Amendment rights of "nonmedia" speakers "must be struck in favor of the private plaintiff defamed by a nonmedia defendant," *id.*, at 418. Accordingly, the court held "that as a matter of federal constitutional law, the media protections outlined in *Gertz* are inapplicable to nonmedia defamation actions." *Ibid.*

The lower courts have divided over whether "nonmedia" defendants enjoy any constitutional protections in defamation suits, either in suits brought by public figures or officials or in those brought by private plaintiffs. See Smolla, Let the Author Beware: The Rejuvenation of the American Law of Libel, 132 U. Pa. L. Rev. 1, 29–35 and nn. 147, 162 (1983). We granted certiorari to resolve this conflict, —— U. S. —— (1983), and we now reverse. We reject any distinction between "media" and "nonmedia" defendants for purposes of the First Amendment principles applicable to defamation suits. Because petitioner's accurate credit reports constitute speech protected by the First Amendment, the reasoning of *Gertz* applies fully to libel actions brought to redress injury caused by petitioner's inaccurate reports.

no distinction

relies on reasoning of Gertz

II

At the outset, respondent contends that we need not determine in this case whether *Gertz* is applicable to "nonmedia" defendants because the jury instructions satisfied the standards set out in that decision.[1] As noted above, *Gertz* held

[1] Respondent also argues that petitioner did not seek the protections outlined in *Gertz* before the jury instructions were given and that therefore the issue was not preserved for review. In view of the fact that the Ver-

that presumed or punitive damages may not be awarded to a private defamation plaintiff on any showing less than knowledge of falsity or reckless disregard for the truth—the "actual malice" standard first announced in *New York Times* v. *Sullivan*, *supra*, at 280. The trial court in this case instructed the jury that, because petitioner's statement imputing the insolvency of respondent's business was libelous *per se*, respondent was not required "to prove actual damages resulting from the libel since damage and loss [are] conclusively presumed." App. 17. See also *id.*, at 19 (instructing that "where, as in this case there is a libel per se, damages are presumed and actual damages may not be proven" and that "the law presumes damages in some amount in a case of libel per se and therefore relieves the Plaintiff of the burden of establishing by specific proof that damages have occurred").

Respondent acknowledges that these portions of the trial court's instructions, standing alone, do not satisfy the requirements of *Gertz*. Brief at 40. It notes, however, that the trial court also instructed the jury that respondent could not recover any damages if a common law privilege for credit reporting agencies, barring liability for negligent falsehoods, applied. See App. 18. The charge explained that the privilege was not available if respondent could show "malice or lack of good faith on the part of the Defendant." *Ibid.* The court also told the jury that, "[i]f you find that Defendant's conduct was not privileged, and if you also find, on the basis of clear and convincing evidence, that the Defendant acted with actual malice in publishing the article in question, then you may award Plaintiff punitive or exemplary damages in addition to the actual damages assessed." *Id.*, at 20. Accordingly, respondent argues, the instructions did not permit an award of presumed or punitive damages without proof of "actual malice."

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mont Supreme Court considered the federal constitutional issue properly presented and passed upon it, respondent's contention is unavailing. See *Orr* v. *Orr*, 440 U. S. 268, 274–275 (1979).

The trial judge's definition of "malice or lack of good faith" did not, however, comport with the *New York Times* standard. In defining the circumstances under which the common law privilege would be defeated, the court explained to the jury:

> "If you find that the Defendant acted in a [sic] bad faith towards the plaintiff in publishing the Erroneous Report, *or* that Defendant intended to injure the Plaintiff in its business, *or* that it acted in a willful, wanton or reckless disregard of the rights and interests of the Plaintiff, the Defendant has acted maliciously and the privilege is destroyed. *Further*, if the Report was made with reckless disregard of the possible consequence, *or* if it was made with the knowledge that it was false or with reckless disregard of it's [sic] truth or falsity, it was made with malice." App. 18–19 (emphasis added).

Although these instructions included the *New York Times* formulation, the definition of the kind of malice necessary to support an award of presumed damages was plainly not limited to that standard. See, *e. g.*, *Bose Corp.* v. *Consumers Union of United States, Inc.*, —— U. S. ——, ——, n. 30 (1984); *St. Amant* v. *Thompson*, 390 U. S. 727, 731 (1968). Consequently, the trial court's conclusion that the instructions did not satisfy *Gertz* was correct and the Vermont Supreme Court's determination that *Gertz* was inapplicable was necessary to its decision that the trial court erred in granting the motion for a new trial. We therefore turn to our reasons for rejecting the Vermont Supreme Court's conclusion.

III

The decision in *Gertz* was the culmination of a decade long effort "to define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment." 418 U. S., at 325. Ten years earlier, in *New York Times* v. *Sullivan*, *supra*, at 279–80, we first announced "a federal rule that prohibits a public official

from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.*, at 279–280. That rule was subsequently extended to libel actions brought by "public figures," *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130 (1967), and, beginning with *New York Times* itself, was applied to cases involving "nonmedia" defendants. See *New York Times*, 376 U. S., at 254 n.*, 286.[2] We had no occasion, however, to consider the applicability of First Amendment principles to libel actions brought by private individuals until the decision in *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29 (1971).

Rosenbloom concerned a libel suit brought by a distributor of nudist magazines against a radio station. Although a majority of Justices were unable to agree on the appropriate standard of liability in defamation actions brought by private individuals, a plurality would have extended the *New York Times* privilege to such cases when the statements at issue concerned matters of "public or general interest," 403 U. S., at 43 (opinion of BRENNAN, J.). Despite the variety of views on liability, however, there was a clear consensus for the conclusion that, at the very least, the First Amendment limits the availability of punitive damages awards in defamation actions brought by private parties. See 403 U. S., at 59 (WHITE, J., concurring in judgment) (summarizing positions for which there was majority support). Indeed, the dissent-

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[2] See *Henry* v. *Collins*, 380 U. S. 356 (1965); *Garrison* v. *Louisiana*, 379 U. S. 64 (1967); *Saint Amant* v. *Thompson*, 390 U. S. 727 (1968). See also *Letter Carriers* v. *Austin*, 418 U. S. 264 (1974) (applying *New York Times* privilege to defamation actions arising from labor disputes); *Linn* v. *United Plant Guard Workers*, 383 U. S. 53 (1966) (labor dispute); *Time, Inc.* v. *Hill*, 385 U. S. 374 (1967) ("false lights" action); *Pickering* v. *Board of Education*, 391 U. S. 563 (1968) (teacher dismissal based on newspaper letter critical of school board). But see *Hutchinson* v. *Proxmire*, 443 U. S. 111, 133, n. 16 (1979).

ers were particularly emphatic on this point. Justice Harlan explained:

> "At a minimum, *even in the purely private libel area*, I think the First Amendment should be construed to limit the imposition of punitive damages to those situations where actual malice is proved. This is the typical standard employed in assessing anyone's liability for punitive damages where the underlying aim of the law is to compensate for harm actually caused, . . . and no conceivable state interest could justify imposing a harsher standard on the exercise of those freedoms that are given explicit protection by the First Amendment." *Id.*, at 73 (Harlan, J., dissenting) (emphasis added).

Justices MARSHALL and Stewart went even further and concluded that the largely uncontrolled discretion of juries to award punitive damages in defamation actions created too great a threat to First Amendment freedoms and that such damages should for that reason be held to be precluded. *Id.*, at 84–85 (MARSHALL, J., dissenting).

In *Gertz*, a libel suit brought by an attorney who had been defamed by false statements in a monthly magazine reflecting the views of the John Birch Society, the Court revisted the issues canvassed in *Rosenbloom* and this time a majority of the Court agreed on the minimum constitutional requirements for defamation actions brought by private individuals, at least in cases involving "media" defendants. The Court rejected the extension of *New York Times* proposed by the plurality in *Rosenbloom*, both because that approach was thought unacceptably to impair the strong state interest in protecting the reputations of private individuals, *id.*, at 344–346, and because "it 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—to determine, in the words of MR. JUSTICE MARSHALL, 'what information is relevant to self-government.' *Rosenbloom* v. *Metromedia, Inc.*, 403

U. S., at 79." 418 U. S., at 346. Instead, the Court held that, at least where "the substance of the defamatory statement 'makes substantial danger to reputation apparent,'" *id.*, at 348 (quoting *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130, 155 (1967)), the States may impose any standard of liability for defamation of a private individual, short of liability without fault. *Id.*, at 347.

The Court further concluded, however, that "the strong and legitimate state interest in compensating private individuals for injury to reputation . . . extends no further than compensation for actual injury." *Id.*, at 348–349. Although it had no occasion to consider whether, as Justices MARSHALL and Stewart had urged in *Rosenbloom*, presumed and punitive damages in defamation actions are invariably incompatible with the First Amendment, see also *Smith* v. *Wade*, —— U. S. ——, ——, nn. 19–20 (1983), the Court held that such damages could not be awarded "at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." 418 U. S., at 349. The Court explained that the common law doctrine of presumed damages for defamation, "an oddity of tort law," confers on juries "largely uncontrolled discretion" to award damages even in the absence of proof of harm or loss. *Ibid.* Similarly, "juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused." *Id.*, at 350. And both presumed and punitive damages permit juries "to use their discretion selectively to punish expressions of unpopular views." *Ibid.* Because the threat of such large, disproportionate awards "unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms," and because "the States have no substantial interest in securing for plaintiffs such as this petitioner gratuitous awards of money damages far in excess of any actual injury," *id.*, at 349, the Court concluded that "the private defamation plaintiff who establishes liability under a less demanding

standard than that stated by *New York Times* may recover only such damages as are sufficient to compensate him for actual injury," *id.*, at 350.

Since the decision in *Gertz*, we have followed its reasoning with respect to damages in excess of actual harm in analogous areas of the law. In *Electrical Workers* v. *Foust*, 442 U. S. 42 (1979), for example, we relied on *Gertz* when we concluded that permitting employees to recover punitive damages for a union's breach of its duty of fair representation would undermine the policies of the Railway Labor Act. We explained that, because they go beyond compensation for actual loss, such "unpredictable and potentially substantial" awards undermine the balance between the interest in compensating injured parties and the need to maintain a union's freedom and effectiveness in pursuing grievances. *Id.*, at 48–52. As in *Gertz*, we also noted that "punitive damages may be employed to punish unpopular defendants." *Id.*, at 50–51, n. 14. Similarly, *Newport* v. *Fact Concerts, Inc.*, 453 U. S. 247, 270–271 (1981), relied in part on *Gertz* in concluding that municipalities are immune from punitive damages in § 1983 suits.

These cases, like *Gertz*, reflect a recognition that "the alleged deterrence achieved by punitive damage awards is likely outweighed by the costs—such as the encouragement of unnecessary litigation and the chilling of desirable conduct—flowing from the rule, at least when the standards on which the awards are based are ill-defined." *Smith* v. *Wade*, —— U. S. ——, —— (1983) (REHNQUIST, J., dissenting). See *id.*, at —— – —— (majority opinion) (noting prevailing view that punitive damages may only be awarded for "'conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others,'" quoting Restatement (Second) of Torts § 908(2) (1977) (emphasis deleted)); *id.*, at —— (O'CONNOR, J., dissenting). *Silkwood* v. *Kerr-McGee Corp.*, —— U. S. ——, —— (1984); *id.*, at —— (BLACKMUN, J., dissenting); *id.*, at —— (POW-

ELL, J., dissenting). Although this "chilling of desirable conduct" may be necessary or tolerable in some contexts, it poses a danger of constitutional dimension when the "desirable conduct" deterred by the threat of presumed or punitive damages is expression protected by the First Amendment. See *Rosenbloom* v. *Metromedia*, 403 U. S. 29, 72–78 (1971) (Harlan, J., dissenting); *id.*, at 81–87 (MARSHALL, J., dissenting). The Constitution presupposes that freedom of expression is both an instrinsic element of individual liberty and an essential means to society's search for truth. See *Bose Corp.* v. *Consumers Union of United States, Inc.*, —— U. S., at ——; *Whitney* v. *California*, 274 U. S. 357, 375 (1927) (Brandeis, J., concurring). Accordingly, when the threat of unpredictable and disproportionate damages induces potential speakers to refrain from speaking, both the speaker and society as a whole are the losers.[3]

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[3] Experience in the lower courts since *Gertz* has demonstrated that this concern is not speculative. Notwithstanding the constitutional minima set out in that case, jury awards of punitive damages in the millions of dollars have become increasingly common in defamation suits. See Brief for Washington Post as *Amicus Curiae* 12–16 (listing 10 punitive damages awards ranging from $1–25 million between 1980 and 1983); Smolla, 132 U. Pa. L. Rev., at 6–7, 12–14, 21. See also Wall St. Journal, Sept. 29, 1983, p. 1 (describing how $9.2 million libel judgment drove small town newspaper into temporary bankruptcy).

Indeed, the problems posed by punitive damages in defamation suits have led a number of state courts to conclude that the First Amendment, or comparable state constitutional provisions, bars any such damages in cases where the party injured by defamation recovers adequate compensatory damages. *E. g.*, *Hall* v. *May Department Stores*, 292 Or. 131, 637 P. 2d 126 (1981); *McHale* v. *Lake Charles American Press*, 390 So. 2d 556 (La. App. 1980); *Tasket* v. *KING Broadcasting Co.*, 86 Wash. 2d 439, 546 P. 2d 81 (1976); *Sprouse* v. *Clay Communications, Inc.*, 211 S. E. 2d 674, 692 (W. Va. 1975); *Stone* v. *Essex County Newspapers, Inc.*, 367 Mass. 849, 330 N. E. 2d 161 (1975). Two other states have concluded that punitive damages in defamation actions are barred by their own constitutions unless there is proof that the publisher acted with actual hatred or ill will. *AAFCO Heating & Air Condition Co.* v. *Northwest Publications, Inc.*,

IV

Petitioner does not contend that the plaintiff in this case is a public figure; accordingly, it acknowledges that the jury could have awarded respondent actual damages on a showing less than that required by *New York Times*. Instead, petitioner argues only that, as in *Gertz*, presumed or punitive damages could not be awarded in this case without at least "a showing of knowledge of falsity or reckless disregard for the truth." *Gertz*, 418 U. S., at 349. As noted, the rule in *Gertz* was premised on the conclusion that, by punishing those who make the erroneous statements inevitable in free discourse, unconstrained awards of presumed or punitive damages deter potential speakers from engaging in constitutionally protected truthful expression. The reasoning of *Gertz* therefore squarely controls this case if petitioner's *accurate* reports are protected by the First Amendment. Relying first on the identity of the speaker and second on the nature of speech at issue, respondent contends that petitioner's truthful credit reports are less deserving of constitutional protection than the magazine article at issue in *Gertz*. We do not, however, find these distinctions persuasive.

A

As noted, the defendant in *Gertz* was a monthly magazine expressing the views of the John Birch Society; at various points, the opinion of the Court in that case stressed the importance of a "vigorous and uninhibited press," 418 U. S., at 342, referred to the dangers of "media self-censorship," *id.*, and stated that the Constitution "shields the press and broadcast media from the rigors of strict liability for defamation,"

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162 Ind. App. 671, 321 N. E. 2d 580 (1974); *Walker* v. *Colorado Springs Sun, Inc.*, 188 Colo. 86, 538 P. 2d 450 (1975).

More generally, as JUSTICE REHNQUIST noted last Term, "a significant number of American jurisdictions refuse to condone punitive damages awards" altogether. *Smith* v. *Wade*, —— U. S. ——, —— (1983) (dissenting opinion).

id., at 348. Noting these and other aspects of that decision, respondent argues that "*Gertz* is patently limited only to cases in which there is a media defendant," Brief 26, and contends that petitioner is not such a defendant.

We do not, however, believe any "media/non-media" distinction is appropriate in the defamation context for several reasons. First, as this case demonstrates, the definitional problems associated with such an approach are formidable and present serious First Amendment problems of their own. Like an account of judicial proceedings in a newspaper, magazine, or news broadcast, a statement in petitioner's reports that a particular company has filed for bankruptcy is a report of a timely "news" event conveyed to members of the public by a business organized to collect and disseminate such information. Petitioner could therefore be easily characterized as a "media" defendant. The Vermont Supreme Court rejected that characterization, however, because petitioner is "in the business of selling financial information to a limited number of subscribers who have paid substantial fees for [its] services." 461 A. 2d, at 417. The court added that "[t]here is a clear distinction between a publication which disseminates news for public consumption and one which provides specialized information to a selective, finite audience." *Ibid.*

But the fact that petitioner's information is "specialized" or that its subscribers pay "substantial fees" hardly distinguishes these reports from articles in many publications to which respondent would presumably attach the label "media"; few statements in many publications are of universal interest and few publications are distributed free of charge. Nor is there any apparent reason to treat petitioner differently than a more widely circulated publication because it has "a limited number of subscribers." Indeed, it would be paradoxical to increase protection to statements injurious to reputation as the size of their audience grows. Cf. *Keeton* v. *Hustler Magazine, Inc.*, —— U. S. ——, ——– —— (1984). These line-drawing difficulties demonstrate that

efforts to define the difference between "media" and "nonmedia" defendants in defamation suits would, in practice, substantially complicate defamation law, see Smolla, 132 U. Pa. L. Rev., at 90, and would necessarily involve the courts in precisely the kinds of *ad hoc* content-based judgments that *Gertz* sought to prevent. See 418 U. S., at 343–344, 346; *Branzburg* v. *Hayes*, 408 U. S. 665, 703–705, and n. 40 (1972). Cf. *Police Department* v. *Mosley*, 408 U. S. 92, 95 (1972). Furthermore, to the extent that those judgments turned on the public interest in the speaker's message as reflected in the size of the audience or the subject matter of the speech, the "media/nonmedia" distinction would revive the kind of inquiry into the importance of the speaker's message proposed by the plurality in *Rosenbloom* and rejected by the Court in *Gertz*. See *supra*, at ——. See generally Note, 95 Harv. L. Rev. 1876, 1884–1885 (1982).

More fundamentally, however, respondent's argument rests on a misapprehension of those cases in which we have noted the importance of a free press in our constitutional system. Recognizing the critical historical role played by the press in gathering and disseminating information for the benefit of the public, we have often emphasized the need for careful judicial scrutiny of government actions that impede the exercise of that function or that single out the press for differential treatment.[4] That public fiduciary function is

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[4] See *e. g.*, *Minneapolis Star* v. *Minnesota Comm'r of Revenue*, —— U. S. ——, ——— (1983); *Columbia Broadcasting System, Inc.* v. *FCC*, 453 U. S. 367, 395 (1981); *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241 (1974); *Branzburg* v. *Hayes*, 408 U. S. 665, 707 (1972); *New York Times* v. *United States*, 403 U. S. 713 (1971); *Mills* v. *Alabama*, 384 U. S. 214, 218–219 (1966); *Grosjean* v. *American Press Co., Inc.*, 297 U. S. 233, 250 (1936). See also *Herbert* v. *Lando*, 441 U. S. 153, 180–199 (1979) (BRENNAN, J., dissenting in part); *Saxbe* v. *Washington Post Co.*, 417 U. S. 843, 850 (1974) (POWELL, J., dissenting); *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations*, 413 U. S. 376, 393 (1973) (BURGER, C. J., dissenting); *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S.

not, however, performed exclusively by the organs of mass communication. To the contrary,

> "[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. . . . Freedom of the press is a 'fundamental personal right' which 'is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.' *Lovell* v. *Griffin*, 303 U. S. 444, 450, 452 (1938). . . . The informative function asserted by representatives of the organized press . . . is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists." *Branzburg* v. *Hayes, supra,* at 704–705.

In guaranteeing equal liberty of expression, the First Amendment furthers a central object of our constitutional scheme, to assure every member of society an equal right to dignity, respect, and the opportunity to participate in self-government. See, *e. g.*, *Carey* v. *Brown*, 447 U. S. 455, 459–463 (1980); *Police Department* v. *Mosley*, 408 U. S. 92, 95 (1972); *Cohen* v. *California*, 403 U. S. 15, 24 (1971); *Whitney* v. *California*, 274 U. S. 357, 375–377 (1927) (Brandeis, J., concurring). Consistent with this goal, the constitutional protections afforded speech depend on the nature, context, and function of the expressive activity at issue, not on the status or identity of the speaker. See *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 778–784 (1978). Accordingly, the rights of the institutional press, however defined, are no greater and no less than those enjoyed by other individuals or organizations engaged in the same activities. Compare *Globe Newspaper Co.* v. *Superior Court,* 457 U. S.

367, 390 (1969); *Time, Inc.* v. *Hill*, 385 U. S. 374, 389 (1967); Stewart, "Or of the Press," 26 Hastings L. J. 631 (1975).

596, 603 (1982) (recognizing that "the press and general public have a constitutional right of access to criminal trials") with *Pell* v. *Procunier*, 417 U. S. 817, 834 (1974) (concluding that First Amendment does not "accord the press special access to information not shared by members of the public generally").

We therefore reject the argument that petitioner's credit reports are entitled to diminished constitutional protection because of petitioner's status or the form in which its communications appear. We turn to consider whether *Gertz* is nevertheless inapplicable because of the character or content of petitioner's speech.

B

Respondent argues that petitioner's reports on the financial status of corporations bear little or no relationship to the values of self-expression, autonomy, and robust discussion of public affairs that the First Amendment is intended to serve.[5] We have, of course, identified certain narrow categories of expression that "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572 (1942). See *Bose Corp.* v. *Consumers Union of U. S., Inc.*, —— U. S., at ——– – ——. But apart from identifying those limited types of unprotected expression, judges, like other government officials, are not free to decide on the basis of their message which sorts of protected expression are in their judgment less "valuable" than others. *Gertz*, 418 U. S., at 346; *Branzburg* v. *Hayes*, 408 U. S. 665, 705, n. 40 (1972); *Cohen* v. *California*, 403 U. S. 15, 24–25 (1971). See *New York* v. *Ferber*, 458 U. S. 747, 763–764 (1982). The

[5] *E. g.*, *Carey* v. *Brown*, 447 U. S. 455, 466–467 (1980); *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 777, n. 12, 783 (1978); *Wooley* v. *Maynard*, 430 U. S. 705, 714–715 (1977); *NAACP* v. *Button*, 371 U. S. 415, 429–431 (1963); *Winters* v. *New York*, 333 U. S. 507, 510 (1948).

content of petitioner's accurate reports plainly do not place them among those types of speech the evils of which "so overwhelmingly outweigh[] the expressive interests, if any, at stake" that, as a class, they are entitled to virtually no First Amendment protection. *Id.*, at 764.

On the contrary, we long ago rejected the suggestion that, simply because speech concerns economic matters or is in the financial interest of the speaker or audience, it lacks constitutional value. See, *e. g.*, *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 501–502 (1952); *AFL* v. *Swing*, 312 U. S. 321, 325–326 (1941); *Thornhill* v. *Alabama*, 310 U. S. 88, 101–103 (1940); see also *Abood* v. *Detroit Board of Education*, 431 U. S. 209, 231–232, and n. 28 (1977). Our free market economy is predicated on the assumption that human welfare will be improved through informed private decisionmaking. In this respect, ensuring broad distribution of accurate financial information—no less than protecting a wide variety of other facts and ideas concerning "philosophical, social, artistic, economic, literary, or ethical matters," *Abood*, *supra*, at 231—comports with the fundamental premise of the First Amendment "that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public . . . ," *Associated Press* v. *United States*, 326 U. S. 1, 20 (1945). As we emphasized in *Virginia Board of Pharmacy*, *supra* at 765, "the free flow of commercial information is indispensable . . . [both] to the proper allocation of resources in a free enterprise system, [and also] to the formation of intelligent opinions as to how that system ought to be regulated or altered."

In partial support for that statement, we cited views of Justice Douglas that are especially pertinent here:

> "The language of the First Amendment does not except speech directed at private economic decisionmaking. Certainly such speech could not be regarded as less important than political expression. When immersed in a free flow of commercial information, private sector deci-

> sionmaking is at least as effective an institution as are our various governments in furthering the social interest in obtaining the best general allocation of resources. . . . The financial data circulated by Dun & Bradstreet, Inc., are part of the fabric of national commercial communication." *Dun & Bradstreet, Inc.* v. *Grove*, 404 U. S. 898, 905–906 (1971) (Douglas, J., dissenting from denial of certiorari).

Justice Douglas further noted that "[p]resumably the credit reports published by the petitioner facilitate through the price system the improvement of human welfare at least as much as did the underlying disagreement in our most recent libel opinion, *Rosenbloom* v. *Metromedia, Inc., supra*, arising out of a squabble over whether a vendor had sold obscene magazines." *Id.*, at 905, n. 9.

Justice Douglas's conclusion that the kind of speech at issue here deserves First Amendment protection is strongly supported by the fact that statements identical to those published by petitioner—namely, accounts of bankruptcy filings or other financial developments concerning specific corporations—would surely be entitled to full constitutional safeguards if they appeared in, for example, a national business magazine or in a small Vermont newspaper. That information is no less important because it appears in a credit report format. It is worth noting in this regard that the defamation law of most States, although apparently not that of Vermont, see 461 A. 2d, at 419, recognizes a qualified common-law privilege for reports like that at issue here. See Maurer, Common Law Defamation and the Fair Credit Reporting Act, 72 Geo. L. J. 95, 99–105 (1983). The privilege typically precludes recovery for false and defamatory credit information without a showing of bad faith or malice, a standard of proof which is often defined according to the *New York Times* formulation. See, *e. g.*, *Datacon, Inc.* v. *Dun & Bradstreet*, 465 F. Supp. 706, 708 (ND Tex. 1979). The adoption of this privilege reflects a widely held recognition of the substantial

public interest in ensuring that the preparation and dissemination of accurate credit reports are not inhibited by unconstrained libel judgments. In short, petitioner's truthful credit reports are not entitled to less than full First Amendment protection simply because they are sold for a profit and concern financial matters.

To be sure, not all of our traditional First Amendment standards are fully applicable with respect to one type of speech involving the economic interests of speaker and audience—advertisements that "do no more than propose a commercial transaction." *Pittsburgh Press Co.* v. *Human Relations Comm'n*, 413 U. S. 376, 385 (1973).[6] The principal rationale for affording protection to purely commercial advertising is the view that accurately informed private decisions about consumption are attributes of the kind of knowledgeable, self-governing citizenry that the First Amendment was meant to foster. See generally *Virginia Board of Pharmacy*, *supra*. We have concluded, however, that, in contrast to factual misstatements in the political arena, false and misleading advertising is relatively easy to identify and causes special harms far disproportionate to any value it might have. Compare *Ohralik* v. *Ohio State Bar Ass'n*, 436

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[6] See, *e. g.*, *Bolger* v. *Young Drug Products Corp.*, —— U. S. —— (1983) (contraceptive advertising); *In re R. M. J.*, 455 U. S. 191 (1982) (lawyer advertising); *Metromedia, Inc.* v. *City of San Diego*, 453 U. S. 490 (1981) (commercial billboard advertising); *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n*, 447 U. S. 530 (1980) (advertising of electricity); *Friedman* v. *Rogers*, 440 U. S. 1 (1979) (optometrist advertising); *Ohralik* v. *Ohio State Bar Ass'n*, 436 U. S. 447, 455–456 (1978) (lawyer's solicitation of business); *Bates* v. *State Bar of Arizona*, 433 U. S. 350 (1977) (lawyer advertising); *Linmark Associates, Inc.* v. *Willingboro*, 431 U. S. 85 (1977) (real estate advertising). But see *Carey* v. *Population Services Int'l*, 431 U. S. 678, 700–701 (1977) (total suppression of contraceptive advertising); *New York Times* v. *Sullivan*, 376 U. S. 254, 265–266 (1964) (discussion of public issues in advertising form); *Murdock* v. *Pennsylvania*, 319 U. S. 105, 111 (1943) (advertisement for religious book); *Jamison* v. *Texas*, 318 U. S. 413, 417 (1943) (same).

U. S. 447, 455–456 (1978); *Virginia Board of Pharmacy* v. *Virginia Consumers Council*, 425 U. S., at 771–772, and n. 24 with *Brown* v. *Hartlage*, 456 U. S. 45, 61 (1982); *New York Times* v. *Sullivan*, 376 U. S., at 279, n. 19. For that reason, we have recognized differences in the applicability of some First Amendment standards to that form of speech. See *Virginia Board of Pharmacy*, 425 U. S., at 772, n. 24.

Respondent argues that our commercial advertising decisions govern this case because petitioner's statements are "made in a commercial mileu" and "involve and are about business." Brief 14. In particular, respondent relies on our conclusion in *Bates* v. *State Bar of Arizona*, 433 U. S. 350, 383 (1977), that "the leeway for untruthful or misleading expression [permitted in cases like *Gertz*] has little force in the commercial arena." See also *Virginia Board of Pharmacy*, 425 U. S., at 772, n. 24. As we have explained, however, the mere fact that petitioner's speech concerns commerce or business in itself provides no basis for altering the constitutional analysis. See also *Central Hudson Gas* v. *Electrical Co.* v. *Public Service Comm'n*, 447 U. S., at 579–580 (STEVENS, J., concurring in the judgment). *Bates*, like the other cases in its line, involved oral and written offers to sell goods or services; it concluded that because "the advertiser knows his product and has a commercial interest in its dissemination, we have little worry that regulation to assure truthfulness will discourage protected speech." 433 U. S., at 350. See also *Bose Corp.* v. *Consumers Union of U. S., Inc.*, —— U. S., at ——, n. 22; *Virginia Board of Pharmacy*, 425 U. S., at 777–778 (Stewart, J., concurring). That reasoning has no application to petitioner's reports which, as respondent concedes, propose no commercial transaction and concern no facts uniquely within the speaker's knowledge. Brief 23.

Of course, the commercial context of petitioner's reports is relevant to the constitutional analysis insofar as it implicates the strong state "interest in protecting consumers and regulating commercial transactions," *Ohralik* v. *Ohio State Bar*

Ass'n, 436 U. S. 447, 460 (1978). Cf. *Bolger* v. *Young Drug Products Corp.*, —— U. S. ——, ———— (1983) (STEVENS, J., concurring in judgment). The special harms caused by inaccurate credit reports, the lack of public sophistication about or access to such reports, and the fact that such reports by and large contain statements that are demonstrably true or false, all may justify a variety of regulations reasonably designed to prevent the social losses caused by false credit reports. See *Virginia Board of Pharmacy*, 425 U. S., at 771–773, and n. 24; *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U. S., at 573–576 (BLACKMUN, J., concurring in judgment).[7] As we explained in *Gertz*, however, the state interest in redressing the harm caused by false statements in the defamation context is fully served by damages that compensate for actual injury. Unconstrained awards of presumed and punitive damages, in contrast, do more than require speakers to bear the costs of their false and harmful statements; by providing damages unrelated to the actual harm caused by false statements, such awards necessarily deter and penalize truthful statements as well. Accordingly, once the actual damages caused by false credit reports are recompensed, the state interest in prevent-

[7] See also Maurer, 72 Geo. L. J., at 126:

"Under *Gertz*, plaintiffs may be compensated for actual damages upon establishing the fault of the defendant; to obtain punitive damages, a plaintiff must demonstrate malice. Sections 1681o and 11681n [of the Fair Credit Reporting Act] are consistent with these constitutional principles. Section 1681o provides for recovery of actual damages upon a showing of negligence, which presumably satisfies the *Gertz* requirement of fault. Section 1681n authorizes punitive damages for willful violation of the Act. Whether section 1681n is equivalent to *Gertz's* malice standard depends on whether a court would consider it to be possible to fail willfully to follow reasonable procedures and yet not manifest reckless disregard for the truth. Such a fine distinction appears unworkable as a categorical test, so that section 1681n would likely be regarded as harmonious with the principles of *Gertz*. Thus, the Act appears to provide the degree of protection for commercial speech currently required under first amendment doctrine" (footnotes omitted).

ing the special hazards posed by the form of speech at issue here can support no distinction between petitioner and the magazine defendant in *Gertz*.

V

The judgment of the Vermont Supreme Court is reversed and the case remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

15,21,22-23

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

Circulated: _____

Recirculated: DEC 14 1984

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SUPREME COURT OF THE UNITED STATES

No. 83–18

DUN & BRADSTREET, INC., PETITIONER *v.*
GREENMOSS BUILDERS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

[December —, 1984]

JUSTICE BRENNAN delivered the opinion of the Court.

In *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974), a libel action against a magazine, we held that the First Amendment prohibits awards of presumed or punitive damages for false and defamatory statements absent a showing of knowing falsity or reckless disregard for the truth. The question presented by this case is whether that constitutional protection extends to "nonmedia" defendants.

I

Petitioner Dun & Bradstreet, a credit reporting agency, provides subscribers with financial and related information about corporations. On July 26, 1976, petitioner incorrectly reported that respondent, a Vermont corporation engaged in construction contracting, had filed a voluntary petition for bankruptcy. On the day the report was issued, respondent's president learned of it from a bank official with whom he was discussing the possibility of future financing. Eight days later, after being contacted by respondent's president, petitioner confirmed the falsity of the report and sent a retraction to each of its subscribers who had received the original report. Petitioner refused, however, to supply respondent with the names of those subscribers.

Respondent then brought this defamation action in Vermont state court, alleging that the false report injured its

reputation and seeking $7,500 in compensatory and $15,000 in punitive damages. The testimony at trial established that the error in petitioner's report had been caused when one of its employees, a high school student paid to review Vermont bankruptcy pleadings, had inadvertently attributed a bankruptcy petition filed by one of respondent's former employees to respondent itself. Respondent's evidence regarding damages consisted solely of testimony by its president who stated that the report had caused the bank to delay consideration of a pending loan and ultimately to terminate the company's credit. A representative of the bank, called by petitioner, testified that when he received the report he did not believe it and that the bank terminated respondent's credit for reasons wholly unrelated to petitioner's report. Respondent's president also testified that the report had impaired the company's sales and profits and caused it to incur expenses contacting individuals to refute the false information.

After trial, the jury returned a verdict in favor of respondent and awarded $50,000 in compensatory or presumed damages and $300,000 in punitive damages. Petitioner then moved for a new trial. It noted that in *Gertz* v. *Robert Welch, Inc.*, *supra*, at 349, this Court had held "that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth," and argued that the judge's instructions permitted the jury to award such damages on a lesser showing. The trial court agreed with petitioner and granted the motion for a new trial. App. 25–26.

On appeal, the Vermont Supreme Court reversed. 461 A. 2d 414 (1983). Although recognizing that "in certain instances the distinction between media and nonmedia defendants may be difficult to draw," the court stated that "no such difficulty is presented with credit reporting agencies, which are in the business of selling financial information to a limited number of subscribers who have paid substantial fees for

their services." *Id.*, at 417. Relying on this distinguishing characteristic of credit reporting firms, the court concluded that such firms are not "the type of media worthy of First Amendment protection as contemplated by *New York Times* [v. *Sullivan*, 376 U. S. 254 (1964)] and its progeny," 461 A. 2d, at 417–418, and that the balance between a private plaintiff's right to recover presumed and punitive damages without a showing of fault and the First Amendment rights of "nonmedia" speakers "must be struck in favor of the private plaintiff defamed by a nonmedia defendant," *id.*, at 418. Accordingly, the court held "that as a matter of federal constitutional law, the media protections outlined in *Gertz* are inapplicable to nonmedia defamation actions." *Ibid.*

The lower courts have divided over whether "nonmedia" defendants enjoy any constitutional protections in defamation suits, either in suits brought by public figures or officials or in those brought by private plaintiffs. See Smolla, Let the Author Beware: The Rejuvenation of the American Law of Libel, 132 U. Pa. L. Rev. 1, 29–35 and nn. 147, 162 (1983). We granted certiorari to resolve this conflict, —— U. S. —— (1983), and we now reverse. We reject any distinction between "media" and "nonmedia" defendants for purposes of the First Amendment principles applicable to defamation suits. Because petitioner's accurate credit reports constitute speech protected by the First Amendment, the reasoning of *Gertz* applies fully to libel actions brought to redress injury caused by petitioner's inaccurate reports.

II

At the outset, respondent contends that we need not determine in this case whether *Gertz* is applicable to "nonmedia" defendants because the jury instructions satisfied the standards set out in that decision.[1] As noted above, *Gertz* held

[1] Respondent also argues that petitioner did not seek the protections outlined in *Gertz* before the jury instructions were given and that therefore the issue was not preserved for review. In view of the fact that the Ver-

that presumed or punitive damages may not be awarded to a private defamation plaintiff on any showing less than knowledge of falsity or reckless disregard for the truth—the "actual malice" standard first announced in *New York Times* v. *Sullivan*, *supra*, at 280. The trial court in this case instructed the jury that, because petitioner's statement imputing the insolvency of respondent's business was libelous *per se*, respondent was not required "to prove actual damages resulting from the libel since damage and loss [are] conclusively presumed." App. 17. See also *id.*, at 19 (instructing that "where, as in this case there is a libel per se, damages are presumed and actual damages may not be proven" and that "the law presumes damages in some amount in a case of libel per se and therefore relieves the Plaintiff of the burden of establishing by specific proof that damages have occurred").

Respondent acknowledges that these portions of the trial court's instructions, standing alone, do not satisfy the requirements of *Gertz*. Brief, at 40. It notes, however, that the trial court also instructed the jury that respondent could not recover any damages if a common law privilege for credit reporting agencies, barring liability for negligent falsehoods, applied. See App. 18. The charge explained that the privilege was not available if respondent could show "malice or lack of good faith on the part of the Defendant." *Ibid.* The court also told the jury that, "[i]f you find that Defendant's conduct was not privileged, and if you also find, on the basis of clear and convincing evidence, that the Defendant acted with actual malice in publishing the article in question, then you may award Plaintiff punitive or exemplary damages in addition to the actual damages assessed." *Id.*, at 20. Accordingly, respondent argues, the instructions did not permit an award of presumed or punitive damages without proof of "actual malice."

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mont Supreme Court considered the federal constitutional issue properly presented and passed upon it, respondent's contention is unavailing. See *Orr* v. *Orr*, 440 U. S. 268, 274–275 (1979).

The trial judge's definition of "malice or lack of good faith" did not, however, comport with the *New York Times* standard. In defining the circumstances under which the common law privilege would be defeated, the court explained to the jury:

> "If you find that the Defendant acted in a [sic] bad faith towards the plaintiff in publishing the Erroneous Report, *or* that Defendant intended to injure the Plaintiff in its business, *or* that it acted in a willful, wanton or reckless disregard of the rights and interests of the Plaintiff, the Defendant has acted maliciously and the privilege is destroyed. *Further*, if the Report was made with reckless disregard of the possible consequence, *or* if it was made with the knowledge that it was false or with reckless disregard of it's [sic] truth or falsity, it was made with malice." App. 18–19 (emphasis added).

Although these instructions included the *New York Times* formulation, the definition of the kind of malice necessary to support an award of presumed damages was plainly not limited to that standard. See, *e. g.*, *Bose Corp.* v. *Consumers Union of United States, Inc.*, —— U. S. ——, ——, n. 30 (1984); *St. Amant* v. *Thompson*, 390 U. S. 727, 731 (1968). Consequently, the trial court's conclusion that the instructions did not satisfy *Gertz* was correct and the Vermont Supreme Court's determination that *Gertz* was inapplicable was necessary to its decision that the trial court erred in granting the motion for a new trial. We therefore turn to our reasons for rejecting the Vermont Supreme Court's conclusion.

III

The decision in *Gertz* was the culmination of a decade long effort "to define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment." 418 U. S., at 325. Ten years earlier, in *New York Times* v. *Sullivan*, *supra*, at 279–280, we first announced "a federal rule that prohibits a public offi-

cial from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.*, at 279–280. That rule was subsequently extended to libel actions brought by "public figures," *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130 (1967), and, beginning with *New York Times* itself, was applied to cases involving "nonmedia" defendants. See *New York Times*, 376 U. S., at 254, n.*, 286.[2] We had no occasion, however, to consider the applicability of First Amendment principles to libel actions brought by private individuals until the decision in *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29 (1971).

Rosenbloom concerned a libel suit brought by a distributor of nudist magazines against a radio station. Although a majority of Justices were unable to agree on the appropriate standard of liability in defamation actions brought by private individuals, a plurality would have extended the *New York Times* privilege to such cases when the statements at issue concerned matters of "public or general interest," 403 U. S., at 43 (opinion of BRENNAN, J.). Despite the variety of views on liability, however, there was a clear consensus for the conclusion that, at the very least, the First Amendment limits the availability of punitive damages awards in defamation actions brought by private parties. See 403 U. S., at 59 (WHITE, J., concurring in judgment) (summarizing positions for which there was majority support). Indeed, the dissent-

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[2] See *Henry* v. *Collins*, 380 U. S. 356 (1965); *Garrison* v. *Louisiana*, 379 U. S. 64 (1967); *Saint Amant* v. *Thompson*, 390 U. S. 727 (1968). See also *Letter Carriers* v. *Austin*, 418 U. S. 264 (1974) (applying *New York Times* privilege to defamation actions arising from labor disputes); *Linn* v. *United Plant Guard Workers*, 383 U. S. 53 (1966) (labor dispute); *Time, Inc.* v. *Hill*, 385 U. S. 374 (1967) ("false lights" action); *Pickering* v. *Board of Education*, 391 U. S. 563 (1968) (teacher dismissal based on newspaper letter critical of school board). But see *Hutchinson* v. *Proxmire*, 443 U. S. 111, 133, n. 16 (1979).

ers were particularly emphatic on this point. Justice Harlan explained:

> "At a minimum, *even in the purely private libel area*, I think the First Amendment should be construed to limit the imposition of punitive damages to those situations where actual malice is proved. This is the typical standard employed in assessing anyone's liability for punitive damages where the underlying aim of the law is to compensate for harm actually caused, . . . and no conceivable state interest could justify imposing a harsher standard on the exercise of those freedoms that are given explicit protection by the First Amendment." *Id.*, at 73 (Harlan, J., dissenting) (emphasis added).

Justices MARSHALL and Stewart went even further and concluded that the largely uncontrolled discretion of juries to award punitive damages in defamation actions created too great a threat to First Amendment freedoms and that such damages should for that reason be held to be precluded. *Id.*, at 84–85 (MARSHALL, J., dissenting).

In *Gertz*, a libel suit brought by an attorney who had been defamed by false statements in a monthly magazine reflecting the views of the John Birch Society, the Court revisited the issues canvassed in *Rosenbloom* and this time a majority of the Court agreed on the minimum constitutional requirements for defamation actions brought by private individuals, at least in cases involving "media" defendants. The Court rejected the extension of *New York Times* proposed by the plurality in *Rosenbloom*, both because that approach was thought unacceptably to impair the strong state interest in protecting the reputations of private individuals, *id.*, at 344–346, and because "it 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—to determine, in the words of MR. JUSTICE MARSHALL, 'what information is relevant to self-government.' *Rosenbloom* v. *Metromedia, Inc.*, 403

U. S., at 79." 418 U. S., at 346. Instead, the Court held that, at least where "the substance of the defamatory statement 'makes substantial danger to reputation apparent,'" *id.*, at 348 (quoting *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130, 155 (1967)), the States may impose any standard of liability for defamation of a private individual, short of liability without fault. *Id.*, at 347.

The Court further concluded, however, that "the strong and legitimate state interest in compensating private individuals for injury to reputation . . . extends no further than compensation for actual injury." *Id.*, at 348–349. Although it had no occasion to consider whether, as Justices MARSHALL and Stewart had urged in *Rosenbloom*, presumed and punitive damages in defamation actions are invariably incompatible with the First Amendment, see also *Smith* v. *Wade*, —— U. S. ——, ——, nn. 19–20 (1983), the Court held that such damages could not be awarded "at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." 418 U. S., at 349. The Court explained that the common law doctrine of presumed damages for defamation, "an oddity of tort law," confers on juries "largely uncontrolled discretion" to award damages even in the absence of proof of harm or loss. *Ibid.* Similarly, "juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused." *Id.*, at 350. And both presumed and punitive damages permit juries "to use their discretion selectively to punish expressions of unpopular views." *Ibid.* Because the threat of such large, disproportionate awards "unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms," and because "the States have no substantial interest in securing for plaintiffs such as this petitioner gratuitous awards of money damages far in excess of any actual injury," *id.*, at 349, the Court concluded that "the private defamation plaintiff who establishes liability under a less demanding

standard than that stated by *New York Times* may recover only such damages as are sufficient to compensate him for actual injury," *id.*, at 350.

Since the decision in *Gertz*, we have followed its reasoning with respect to damages in excess of actual harm in analogous areas of the law. In *Electrical Workers* v. *Foust*, 442 U. S. 42 (1979), for example, we relied on *Gertz* when we concluded that permitting employees to recover punitive damages for a union's breach of its duty of fair representation would undermine the policies of the Railway Labor Act. We explained that, because they go beyond compensation for actual loss, such "unpredictable and potentially substantial" awards undermine the balance between the interest in compensating injured parties and the need to maintain a union's freedom and effectiveness in pursuing grievances. *Id.*, at 48–52. As in *Gertz*, we also noted that "punitive damages may be employed to punish unpopular defendants." *Id.*, at 50–51, n. 14. Similarly, *Newport* v. *Fact Concerts, Inc.*, 453 U. S. 247, 270–271 (1981), relied in part on *Gertz* in concluding that municipalities are immune from punitive damages in § 1983 suits.

These cases, like *Gertz*, reflect a recognition that "the alleged deterrence achieved by punitive damage awards is likely outweighed by the costs—such as the encouragement of unnecessary litigation and the chilling of desirable conduct—flowing from the rule, at least when the standards on which the awards are based are ill-defined." *Smith* v. *Wade*, —— U. S. ——, —— (1983) (REHNQUIST, J., dissenting). See *id.*, at —— – —— (majority opinion) (noting prevailing view that punitive damages may only be awarded for "'conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others,'" quoting Restatement (Second) of Torts § 908(2) (1977) (emphasis deleted)); *id.*, at —— (O'CONNOR, J., dissenting). *Silkwood* v. *Kerr-McGee Corp.*, —— U. S. ——, —— (1984); *id.*, at —— (BLACKMUN, J., dissenting); *id.*, at —— (POW-

ELL, J., dissenting). Although this "chilling of desirable conduct" may be necessary or tolerable in some contexts, it poses a danger of constitutional dimension when the "desirable conduct" deterred by the threat of presumed or punitive damages is expression protected by the First Amendment. See *Rosenbloom* v. *Metromedia*, 403 U. S. 29, 72–78 (1971) (Harlan, J., dissenting); *id.*, at 81–87 (MARSHALL, J., dissenting). The Constitution presupposes that freedom of expression is both an instrinsic element of individual liberty and an essential means to society's search for truth. See *Bose Corp.* v. *Consumers Union of United States, Inc.*, —— U. S., at ——; *Whitney* v. *California*, 274 U. S. 357, 375 (1927) (Brandeis, J., concurring). Accordingly, when the threat of unpredictable and disproportionate damages induces potential speakers to refrain from speaking, both the speaker and society as a whole are the losers.[3]

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[3] Experience in the lower courts since *Gertz* has demonstrated that this concern is not speculative. Notwithstanding the constitutional minima set out in that case, jury awards of punitive damages in the millions of dollars have become increasingly common in defamation suits. See Brief for Washington Post as *Amicus Curiae* 12–16 (listing 10 punitive damages awards ranging from $1–25 million between 1980 and 1983); Smolla, 132 U. Pa. L. Rev., at 6–7, 12–14, 21. See also Wall St. Journal, Sept. 29, 1983, p. 1 (describing how $9.2 million libel judgment drove small town newspaper into temporary bankruptcy).

Indeed, the problems posed by punitive damages in defamation suits have led a number of state courts to conclude that the First Amendment, or comparable state constitutional provisions, bars any such damages in cases where the party injured by defamation recovers adequate compensatory damages. *E. g.*, *Hall* v. *May Department Stores*, 292 Or. 131, 637 P. 2d 126 (1981); *McHale* v. *Lake Charles American Press*, 390 So. 2d 556 (La. App. 1980); *Tasket* v. *KING Broadcasting Co.*, 86 Wash. 2d 439, 546 P. 2d 81 (1976); *Sprouse* v. *Clay Communications, Inc.*, 211 S. E. 2d 674, 692 (W. Va. 1975); *Stone* v. *Essex County Newspapers, Inc.*, 367 Mass. 849, 330 N. E. 2d 161 (1975). Two other states have concluded that punitive damages in defamation actions are barred by their own constitutions unless there is proof that the publisher acted with actual hatred or ill will. *AAFCO Heating & Air Condition Co.* v. *Northwest Publications, Inc.*,

IV

Petitioner does not contend that the plaintiff in this case is a public figure; accordingly, it acknowledges that the jury could have awarded respondent actual damages on a showing less than that required by *New York Times*. Instead, petitioner argues only that, as in *Gertz*, presumed or punitive damages could not be awarded in this case without at least "a showing of knowledge of falsity or reckless disregard for the truth." *Gertz*, 418 U. S., at 349. As noted, the rule in *Gertz* was premised on the conclusion that, by punishing those who make the erroneous statements inevitable in free discourse, unconstrained awards of presumed or punitive damages deter potential speakers from engaging in constitutionally protected truthful expression. The reasoning of *Gertz* therefore squarely controls this case if petitioner's *accurate* reports are protected by the First Amendment. Relying first on the identity of the speaker and second on the nature of speech at issue, respondent contends that petitioner's truthful credit reports are less deserving of constitutional protection than the magazine article at issue in *Gertz*. We do not, however, find these distinctions persuasive.

A

As noted, the defendant in *Gertz* was a monthly magazine expressing the views of the John Birch Society; at various points, the opinion of the Court in that case stressed the importance of a "vigorous and uninhibited press," 418 U. S., at 342, referred to the dangers of "media self-censorship," *id.*, and stated that the Constitution "shields the press and broadcast media from the rigors of strict liability for defamation,"

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162 Ind. App. 671, 321 N. E. 2d 580 (1974); *Walker* v. *Colorado Springs Sun, Inc.*, 188 Colo. 86, 538 P. 2d 450 (1975).

More generally, as JUSTICE REHNQUIST noted last Term, "a significant number of American jurisdictions refuse to condone punitive damages awards" altogether. *Smith* v. *Wade*, —— U. S. ——, —— (1983) (dissenting opinion).

id., at 348. Noting these and other aspects of that decision, respondent argues that "*Gertz* is patently limited only to cases in which there is a media defendant," Brief 26, and contends that petitioner is not such a defendant.

We do not, however, believe any "media/non-media" distinction is appropriate in the defamation context for several reasons. First, as this case demonstrates, the definitional problems associated with such an approach are formidable and present serious First Amendment problems of their own. Like an account of judicial proceedings in a newspaper, magazine, or news broadcast, a statement in petitioner's reports that a particular company has filed for bankruptcy is a report of a timely "news" event conveyed to members of the public by a business organized to collect and disseminate such information. Petitioner could therefore be easily characterized as a "media" defendant. The Vermont Supreme Court rejected that characterization, however, because petitioner is "in the business of selling financial information to a limited number of subscribers who have paid substantial fees for [its] services." 461 A. 2d, at 417. The court added that "[t]here is a clear distinction between a publication which disseminates news for public consumption and one which provides specialized information to a selective, finite audience." *Ibid.*

But the fact that petitioner's information is "specialized" or that its subscribers pay "substantial fees" hardly distinguishes these reports from articles in many publications to which respondent would presumably attach the label "media"; few statements in many publications are of universal interest and few publications are distributed free of charge. Nor is there any apparent reason to treat petitioner differently than a more widely circulated publication because it has "a limited number of subscribers." Indeed, it would be paradoxical to increase protection to statements injurious to reputation as the size of their audience grows. Cf. *Keeton* v. *Hustler Magazine, Inc.*, —— U. S. ——, —— – —— (1984). These line-drawing difficulties demonstrate that

efforts to define the difference between "media" and "nonmedia" defendants in defamation suits would, in practice, substantially complicate defamation law, see Smolla, 132 U. Pa. L. Rev., at 90, and would necessarily involve the courts in precisely the kinds of *ad hoc* content-based judgments that *Gertz* sought to prevent. See 418 U. S., at 343–344, 346; *Branzburg* v. *Hayes*, 408 U. S. 665, 703–705, and n. 40 (1972). Cf. *Police Department* v. *Mosley*, 408 U. S. 92, 95 (1972). Furthermore, to the extent that those judgments turned on the public interest in the speaker's message as reflected in the size of the audience or the subject matter of the speech, the "media/nonmedia" distinction would revive the kind of inquiry into the importance of the speaker's message proposed by the plurality in *Rosenbloom* and rejected by the Court in *Gertz*. See *supra*, at ——. See generally Note, 95 Harv. L. Rev. 1876, 1884–1885 (1982).

More fundamentally, however, respondent's argument rests on a misapprehension of those cases in which we have noted the importance of a free press in our constitutional system. Recognizing the critical historical role played by the press in gathering and disseminating information for the benefit of the public, we have often emphasized the need for careful judicial scrutiny of government actions that impede the exercise of that function or that single out the press for differential treatment.[4] That public fiduciary function is

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[4] See *e. g.*, *Minneapolis Star* v. *Minnesota Comm'r of Revenue*, —— U. S. ——, —— (1983); *Columbia Broadcasting System, Inc.* v. *FCC*, 453 U. S. 367, 395 (1981); *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241 (1974); *Branzburg* v. *Hayes*, 408 U. S. 665, 707 (1972); *New York Times* v. *United States*, 403 U. S. 713 (1971); *Mills* v. *Alabama*, 384 U. S. 214, 218–219 (1966); *Grosjean* v. *American Press Co., Inc.*, 297 U. S. 233, 250 (1936). See also *Herbert* v. *Lando*, 441 U. S. 153, 180–199 (1979) (BRENNAN, J., dissenting in part); *Saxbe* v. *Washington Post Co.*, 417 U. S. 843, 850 (1974) (POWELL, J., dissenting); *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations*, 413 U. S. 376, 393 (1973) (BURGER, C. J., dissenting); *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S.

not, however, performed exclusively by the organs of mass communication. To the contrary,

> "[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. . . . Freedom of the press is a 'fundamental personal right' which 'is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.' *Lovell* v. *Griffin*, 303 U. S. 444, 450, 452 (1938). . . . The informative function asserted by representatives of the organized press . . . is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists." *Branzburg* v. *Hayes*, *supra*, at 704–705.

In guaranteeing equal liberty of expression, the First Amendment furthers a central object of our constitutional scheme, to assure every member of society an equal right to dignity, respect, and the opportunity to participate in self-government. See, *e. g.*, *Carey* v. *Brown*, 447 U. S. 455, 459–463 (1980); *Police Department* v. *Mosley*, 408 U. S. 92, 95 (1972); *Cohen* v. *California*, 403 U. S. 15, 24 (1971); *Whitney* v. *California*, 274 U. S. 357, 375–377 (1927) (Brandeis, J., concurring). Consistent with this goal, the constitutional protections afforded speech depend on the nature, context, and function of the expressive activity at issue, not on the status or identity of the speaker. See *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 778–784 (1978). Accordingly, the rights of the institutional press, however defined, are no greater and no less than those enjoyed by other individuals or organizations engaged in the same activities. Compare *Globe Newspaper Co.* v. *Superior Court*, 457 U. S. 367, 390 (1969); *Time, Inc.* v. *Hill*, 385 U. S. 374, 389 (1967); Stewart, "Or of the Press," 26 Hastings L. J. 631 (1975).

596, 603 (1982) (recognizing that "the press and general public have a constitutional right of access to criminal trials") with *Pell* v. *Procunier*, 417 U. S. 817, 834 (1974) (concluding that First Amendment does not "accord the press special access to information not shared by members of the public generally").

We therefore reject the argument that petitioner's credit reports are entitled to diminished constitutional protection because of petitioner's status or the form in which its communications appear.[5] We turn to consider whether *Gertz* is

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[5]JUSTICE POWELL would allow presumed damages against a "nonmedia" defendant without a showing of actual malice, *post*, at 7–8, 14–16, but would hold that an award of punitive damages would be unconstitutional as a denial of due process of law. *Id.*, at 10–14. JUSTICE POWELL, however, offers no clear basis for distinquishing between "media" and "nonmedia" defendants for purposes of First Amendment protection. To the extent such a distinction is based on the nature of the speaker it would flout our decisions. See *supra*, at 14–15. Also, in light of "the increasingly prominent role of mass media in our society and the awesome power it has placed in the hands of a select few," *Gertz*, at 402 (WHITE, J., dissenting), protection for the speech of "nonmedia" defendants is essential to ensure a diversity of perspectives. See J. Barron, Freedom of the Press for Whom? (1973). "Uninhibited, robust and wide-open" debate, *New York Times* v. *Sullivan*, 376 U. S., at 370, among nonmedia speakers is as essential to the fostering and development of an individual's political thought as is such debate in the mass media. See J. Klapper, The Effects of Mass Communications (1960). Finally, to the extent JUSTICE POWELL distinguishes between "media" and "nonmedia" defendants on the basis of the nature of their utterances, he would force courts to engage in precisely the content-based evaluation of particular utterances as to public affairs that *Gertz* held was impermissible.

JUSTICE POWELL's rationale for prohibiting punitive damages in libel cases is the same as that relied on by the Court in *Gertz* for prohibiting presumed damages in the absence of a showing of actual malice—"the largely uncontrolled discretion of juries to award damages where there is no loss compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms. Additionally, the doctrine of presumed damages invites juries to persecute unpopular opinion rather than to compensate individuals for injury sus-

nevertheless inapplicable because of the character or content of petitioner's speech.

B

Respondent argues that petitioner's reports on the financial status of corporations bear little or no relationship to the values of self-expression, autonomy, and robust discussion of public affairs that the First Amendment is intended to serve.[6] We have, of course, identified certain narrow categories of expression that "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572 (1942). See *Bose Corp.* v. *Consumers Union of U. S., Inc.*, —— U. S., at ——– – ——. But apart from identifying those limited types of unprotected expression, judges, like other government officials, are not free to decide on the basis of their message which sorts of protected expression are in their judgment less "valuable" than others. *Gertz*, 418 U. S., at 346; *Branzburg* v. *Hayes*, 408 U. S. 665, 705, n. 40 (1972); *Cohen* v. *California*, 403 U. S. 15, 24–25 (1971). See *New York* v. *Ferber*, 458 U. S. 747, 763–764 (1982). The content of petitioner's accurate reports plainly do not place them among those types of speech the evils of which "so overwhelmingly outweigh[ ] the expressive interests, if any, at stake" that, as a class, they are entitled to virtually no First Amendment protection. *Id.*, at 764.

On the contrary, we long ago rejected the suggestion that, simply because speech concerns economic matters or is in the financial interest of the speaker or audience, it lacks constitu-

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tained by the publication of a false fact." 418 U. S., at 349. We adhere to that rationale.

[6] *E. g.*, *Carey* v. *Brown*, 447 U. S. 455, 466–467 (1980); *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 777, n. 12, 783 (1978); *Wooley* v. *Maynard*, 430 U. S. 705, 714–715 (1977); *NAACP* v. *Button*, 371 U. S. 415, 429–431 (1963); *Winters* v. *New York*, 333 U. S. 507, 510 (1948).

tional value. See, *e. g.*, *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 501–502 (1952); *AFL* v. *Swing*, 312 U. S. 321, 325–326 (1941); *Thornhill* v. *Alabama*, 310 U. S. 88, 101–103 (1940); see also *Abood* v. *Detroit Board of Education*, 431 U. S. 209, 231–232, and n. 28 (1977). Our free market economy is predicated on the assumption that human welfare will be improved through informed private decisionmaking. In this respect, ensuring broad distribution of accurate financial information—no less than protecting a wide variety of other facts and ideas concerning "philosophical, social, artistic, economic, literary, or ethical matters," *Abood*, *supra*, at 231—comports with the fundamental premise of the First Amendment "that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public . . . ," *Associated Press* v. *United States*, 326 U. S. 1, 20 (1945). As we emphasized in *Virginia Board of Pharmacy*, *supra* at 765, "the free flow of commercial information is indispensable . . . [both] to the proper allocation of resources in a free enterprise system, [and also] to the formation of intelligent opinions as to how that system ought to be regulated or altered."

In partial support for that statement, we cited views of Justice Douglas that are especially pertinent here:

> "The language of the First Amendment does not except speech directed at private economic decisionmaking. Certainly such speech could not be regarded as less important than political expression. When immersed in a free flow of commercial information, private sector decisionmaking is at least as effective an institution as are our various governments in furthering the social interest in obtaining the best general allocation of resources. . . . The financial data circulated by Dun & Bradstreet, Inc., are part of the fabric of national commercial communication." *Dun & Bradstreet, Inc.* v. *Grove*, 404 U. S. 898, 905–906 (1971) (Douglas, J., dissenting from denial of certiorari).

Justice Douglas further noted that "[p]resumably the credit reports published by the petitioner facilitate through the price system the improvement of human welfare at least as much as did the underlying disagreement in our most recent libel opinion, *Rosenbloom* v. *Metromedia, Inc.*, *supra*, arising out of a squabble over whether a vendor had sold obscene magazines." *Id.*, at 905, n. 9.

Justice Douglas's conclusion that the kind of speech at issue here deserves First Amendment protection is strongly supported by the fact that statements identical to those published by petitioner—namely, accounts of bankruptcy filings or other financial developments concerning specific corporations—would surely be entitled to full constitutional safeguards if they appeared in, for example, a national business magazine or in a small Vermont newspaper. That information is no less important because it appears in a credit report format. It is worth noting in this regard that the defamation law of most States, although apparently not that of Vermont, see 461 A. 2d, at 419, recognizes a qualified common-law privilege for reports like that at issue here. See Maurer, Common Law Defamation and the Fair Credit Reporting Act, 72 Geo. L. J. 95, 99–105 (1983). The privilege typically precludes recovery for false and defamatory credit information without a showing of bad faith or malice, a standard of proof which is often defined according to the *New York Times* formulation. See, *e. g.*, *Datacon, Inc.* v. *Dun & Bradstreet*, 465 F. Supp. 706, 708 (ND Tex. 1979). The adoption of this privilege reflects a widely held recognition of the substantial public interest in ensuring that the preparation and dissemination of accurate credit reports are not inhibited by unconstrained libel judgments. In short, petitioner's truthful credit reports are not entitled to less than full First Amendment protection simply because they are sold for a profit and concern financial matters.

To be sure, not all of our traditional First Amendment standards are fully applicable with respect to one type of

speech involving the economic interests of speaker and audience—advertisements that "do no more than propose a commercial transaction." *Pittsburgh Press Co.* v. *Human Relations Comm'n*, 413 U. S. 376, 385 (1973).[7] The principal rationale for affording protection to purely commercial advertising is the view that accurately informed private decisions about consumption are attributes of the kind of knowledgeable, self-governing citizenry that the First Amendment was meant to foster. See generally *Virginia Board of Pharmacy*, *supra*. We have concluded, however, that, in contrast to factual misstatements in the political arena, false and misleading advertising is relatively easy to identify and causes special harms far disproportionate to any value it might have. Compare *Ohralik* v. *Ohio State Bar Ass'n*, 436 U. S. 447, 455–456 (1978); *Virginia Board of Pharmacy* v. *Virginia Consumers Council*, 425 U. S., at 771–772, and n. 24 with *Brown* v. *Hartlage*, 456 U. S. 45, 61 (1982); *New York Times* v. *Sullivan*, 376 U. S., at 279, n. 19. For that reason, we have recognized differences in the applicability of some First Amendment standards to that form of speech. See *Virginia Board of Pharmacy*, 425 U. S., at 772, n. 24.

Respondent argues that our commercial advertising decisions govern this case because petitioner's statements are

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[7] See, *e. g.*, *Bolger* v. *Young Drug Products Corp.*, —— U. S. —— (1983) (contraceptive advertising); *In re R. M. J.*, 455 U. S. 191 (1982) (lawyer advertising); *Metromedia, Inc.* v. *City of San Diego*, 453 U. S. 490 (1981) (commercial billboard advertising); *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n*, 447 U. S. 530 (1980) (advertising of electricity); *Friedman* v. *Rogers*, 440 U. S. 1 (1979) (optometrist advertising); *Ohralik* v. *Ohio State Bar Ass'n*, 436 U. S. 447, 455–456 (1978) (lawyer's solicitation of business); *Bates* v. *State Bar of Arizona*, 433 U. S. 350 (1977) (lawyer advertising); *Linmark Associates, Inc.* v. *Willingboro*, 431 U. S. 85 (1977) (real estate advertising). But see *Carey* v. *Population Services Int'l*, 431 U. S. 678, 700–701 (1977) (total suppression of contraceptive advertising); *New York Times* v. *Sullivan*, 376 U. S. 254, 265–266 (1964) (discussion of public issues in advertising form); *Murdock* v. *Pennsylvania*, 319 U. S. 105, 111 (1943) (advertisement for religious book); *Jamison* v. *Texas*, 318 U. S. 413, 417 (1943) (same).

"made in a commercial mileu" and "involve and are about business." Brief 14. In particular, respondent relies on our conclusion in *Bates* v. *State Bar of Arizona*, 433 U. S. 350, 383 (1977), that "the leeway for untruthful or misleading expression [permitted in cases like *Gertz*] has little force in the commercial arena." See also *Virginia Board of Pharmacy*, 425 U. S., at 772, n. 24. As we have explained, however, the mere fact that petitioner's speech concerns commerce or business in itself provides no basis for altering the constitutional analysis. See also *Central Hudson Gas* v. *Electrical Co.* v. *Public Service Comm'n*, 447 U. S., at 579–580 (STEVENS, J., concurring in the judgment). *Bates*, like the other cases in its line, involved oral and written offers to sell goods or services; it concluded that because "the advertiser knows his product and has a commercial interest in its dissemination, we have little worry that regulation to assure truthfulness will discourage protected speech." 433 U. S., at 350. See also *Bose Corp.* v. *Consumers Union of U. S., Inc.*, —— U. S., at ——, n. 22; *Virginia Board of Pharmacy*, 425 U. S., at 777–778 (Stewart, J., concurring). That reasoning has no application to petitioner's reports which, as respondent concedes, propose no commercial transaction and concern no facts uniquely within the speaker's knowledge. Brief 23.

Of course, the commercial context of petitioner's reports is relevant to the constitutional analysis insofar as it implicates the strong state "interest in protecting consumers and regulating commercial transactions," *Ohralik* v. *Ohio State Bar Ass'n*, 436 U. S. 447, 460 (1978). Cf. *Bolger* v. *Young Drug Products Corp.*, —— U. S. ——, ———— (1983) (STEVENS, J., concurring in judgment). The special harms caused by inaccurate credit reports, the lack of public sophistication about or access to such reports, and the fact that such reports by and large contain statements that are demonstrably true or false, all may justify a variety of regulations reasonably designed to prevent the social losses caused by false credit reports. See *Virginia Board of Pharmacy*, 425 U. S.,

at 771–773, and n. 24; *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U. S., at 573–576 (BLACKMUN, J., concurring in judgment).[8] As we explained in *Gertz*, however, the state interest in redressing the harm caused by false statements in the defamation context is fully served by damages that compensate for actual injury. Unconstrained awards of presumed and punitive damages, in contrast, do more than require speakers to bear the costs of their false and harmful statements; by providing damages unrelated to the actual harm caused by false statements, such awards necessarily deter and penalize truthful statements as well.[9] Accordingly, once the actual damages caused by false

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[8] See also Maurer, 72 Geo. L. J., at 126:

"Under *Gertz*, plaintiffs may be compensated for actual damages upon establishing the fault of the defendant; to obtain punitive damages, a plaintiff must demonstrate malice. Sections 1681o and 11681n [of the Fair Credit Reporting Act] are consistent with these constitutional principles. Section 1681o provides for recovery of actual damages upon a showing of negligence, which presumably satisfies the *Gertz* requirement of fault. Section 1681n authorizes punitive damages for willful violation of the Act. Whether section 1681n is equivalent to *Gertz's* malice standard depends on whether a court would consider it to be possible to fail willfully to follow reasonable procedures and yet not manifest reckless disregard for the truth. Such a fine distinction appears unworkable as a categorical test, so that section 1681n would likely be regarded as harmonious with the principles of *Gertz*. Thus, the Act appears to provide the degree of protection for commercial speech currently required under first amendment doctrine" (footnotes omitted).

[9] JUSTICE POWELL argues that petitioner's credit reporting is in the realm of commmerical expression and therefore that an award of presumed damages should be permissible without a showing of actual malice. But JUSTICE POWELL concedes that presumed damages "are not intended to replace actual damages when those damages can be proved." *Post*, at 14. However, if the report is viewed as commercial expression, proving that actual damages occurred is relatively easy. For instance, if an alleged libel concerning a bank's customer causes the bank to lower the credit limit or raise the interest rate charged that customer, the damages caused by such action should at worst be no more difficult to ascertain than many other traditional elements of tort damages. See, *e. g.*, *Seffert* v. *Los An-*

credit reports are recompensed, the state interest in preventing the special hazards posed by the form of speech at issue here can support no distinction between petitioner and the magazine defendant in *Gertz*.[10]

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geles Transit Lines, 56 Cal. 2d 498, 509, 364 P. 2d 337, 344 (1961) (Traynor, J., dissenting) (pain and suffering); *Russell* v. *City of Wildwood*, 428 F. 2d 1176, 1181 (CA3 1970) (future earnings). Although there may be some elements of damage that would be more difficult to evaluate, the same is true in any tort action; the commercial context does not increase the need for presumed damages, but rather demonstrates the lack of justification for the chilling that could result.

[10] The fallacy of JUSTICE POWELL's argument that today's decision overturns or unnecessarily burdens the libel laws of the states (*post*, at 4) is plainly evident from the fact that 35 of the 42 states that have considered the issue have not distinquished between "media" and "nonmedia" defendants but have extended the actual malice standard to nonmedia defendants. *Beneficial Management Corp.* v. *Evans*, 421 So. 2d 92 (Ala. 1982); *Antwerp Diamond Exchange* v. *Better Business Bureau*, 130 Arizona 523, 637 P. 2d 733 (1981); *Moriarity* v. *Lippe*, 162 Conn. 371, 294 A. 2d 326 (1972); *Jackson* v. *Filliber*, 281 A. 2d 604 (Del. 1971); *Smith* v. *Russel*, 456 So. 2d 462 (Fla. 1984); *Williams* v. *Church's Fried Chicken*, 158 Ga. App. 26, 279 S. E. 2d 465 (Ga. 1981); *Rodrigues* v. *Nishiki*, 65 Haw. 430, 653 P. 2d 1145 (1982); *Millsaps* v. *Bankers Life Co.*, 35 Ill. App. 3d 735, 342 N. E. 2d 329 (1976); *Elliot* v. *Roach*, 409 N. E. 2d 661 (Ind. App. Dist. 1980); *Anderson* v. *Low Rent Housing Commission*, 304 N. W. 2d 239 (Iowa 1981); *Hanrahan* v. *Horn*, 232 Kan. 531, 657 P. 2d 561 (1983); *Sparks* v. *Boone*, 560 S. W. 2d 236 (Ky. App. 1977); *Wattigny* v. *Lambert*, 453 So. 2d 1272 (La. App. 1984); *Michaud* v. *Inhabitants of the Town of Livermore Falls*, 381 A. 2d 111 (Me.1978); *Jacron Sales Co.* v. *Sindorf*, 276 Md. 580, 350 A. 2d 688 (1976); *Aarco, Inc.* v. *Baynes* 462 N. E. 2d 1107 (Mass. 1984); *Grebner* v. *Runyon*, 347 N. W. 2d 741 (Mich. App. 1984); *Newson* v. *Henry*, 433 So. 2d 817 (Miss. 1983); *Ramacciotti* v. *Zinn*, 550 S. W. 2d 217 (Mo. App. 1977); *Williams* v. *Pasma*, 656 P. 2d 212 (Mont. 1982); *Dairy Stores, Inc.* v. *Sentinel Pub. Co.*, 191 N. J. Super. 202, 465 A. 2d 953 (1983); *Trails West, Inc.* v. *Wolff*, 32 NY. 2d 207, 344 NYS. 3d 863, 298 N. E. 2d 52 (1973); *Angel* v. *Ward*, 43 N. C. App. 288, 258 S. E. 2d 788 (1979); *Hahn* v. *Kotten*, 43 Ohio St.2nd. 237, 331 N. E. 2d 713 (1975); *Wright* v. *Haas*, 586 P. 2d 1093 (Okla.1978); *Fox* v. *Kahn*, 421 Pa.563, 221 A. 2d 181 (1966); *De Carvalho* v. *Dasilva*, 414 A. 2d 806 (R. I. 1980); *Scott* v. *McCain*, 272 S. C. 198, 250 S. E. 2d 118 (1978); *Wollman* v. *Graff*, 287 N. W. 2d 104 (SD 1980); *Moore* v. *Bailey*, 628 S. W. 2d 431 (Tenn. App. 1981); *Ryder Truck*

Op p 12 of my opinion: I note cites here to ~~[illegible]~~ many. We cite an old op. (1891), & a 1981 op on rejecting punative damages. What does ~~[illegible]~~ say about punative damages. Also Indiana is cited in my op at p 12 and ~~La~~, Washington

What there a fuss done about "presumed" damages?

V

The judgment of the Vermont Supreme Court is reversed and the case remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Rentals, Inc. v. *Latham*, 593 S. W. 2d 334 (Tex. Cir. App. 1979); *Fleming* v. *Moore*, 221 Va. 884, 275 S. E. 2d 632 (1981); *Bender* v. *City of Seattle*, 99 Wash. 2d 582, 664 P. 2d 492 (1983); *Mauck* v. *City of Martinsburg*, 280 S. E. 2d 216 (W. Va. 1981); *Phifer* v. *Foe*, 443 P. 2d 870 (Wyo. 1968). The District of Columbia has also applied the actual malice standard to cases involving non-media defendants. *Nader* v. *De Toledano*, 408 A. 2d 31 (D. C. App. 1979). The states that have declined to extend the actual malice standard to nonmedia defendants include: *Roemer* v. *Retail Credit Co.*, 44 Cal. App. 3d 926, 119 Cal. Rptr. 82 (1975); *Rowe* v. *Metz*, 195 Colo. 424, 579 P. 2d 83 (1978); *Stuempges* v. *Park Davis & Co.*, 297 N. W. 2d 252 (Minn. 1980); *Gengler* v. *Phelps*, 92 N. M. 465, 589 P. 2d 1056 (N. M. App. 1978); *Wheeler* v. *Green*, 286 Or. 99, 593 P. 2d 777 (1979); *Denny* v. *Mertz*, 106 Wis. 2d 636, 318 N. W. 2d 141 (1982).

14-16, 22

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

Circulated: _____

Recirculated: JAN 17 1985

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83–18

DUN & BRADSTREET, INC., PETITIONER *v.*
GREENMOSS BUILDERS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

[January ——, 1985]

JUSTICE BRENNAN delivered the opinion of the Court.

In *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974), a libel action against a magazine, we held that the First Amendment prohibits awards of presumed or punitive damages for false and defamatory statements absent a showing of knowing falsity or reckless disregard for the truth. The question presented by this case is whether that constitutional protection extends to "nonmedia" defendants.

I

Petitioner Dun & Bradstreet, a credit reporting agency, provides subscribers with financial and related information about corporations. On July 26, 1976, petitioner incorrectly reported that respondent, a Vermont corporation engaged in construction contracting, had filed a voluntary petition for bankruptcy. On the day the report was issued, respondent's president learned of it from a bank official with whom he was discussing the possibility of future financing. Eight days later, after being contacted by respondent's president, petitioner confirmed the falsity of the report and sent a retraction to each of its subscribers who had received the original report. Petitioner refused, however, to supply respondent with the names of those subscribers.

Respondent then brought this defamation action in Vermont state court, alleging that the false report injured its

No substantive changes or changes requiring a response. —Dan

reputation and seeking $7,500 in compensatory and $15,000 in punitive damages. The testimony at trial established that the error in petitioner's report had been caused when one of its employees, a high school student paid to review Vermont bankruptcy pleadings, had inadvertently attributed a bankruptcy petition filed by one of respondent's former employees to respondent itself. Respondent's evidence regarding damages consisted solely of testimony by its president who stated that the report had caused the bank to delay consideration of a pending loan and ultimately to terminate the company's credit. A representative of the bank, called by petitioner, testified that when he received the report he did not believe it and that the bank terminated respondent's credit for reasons wholly unrelated to petitioner's report. Respondent's president also testified that the report had impaired the company's sales and profits and caused it to incur expenses contacting individuals to refute the false information.

After trial, the jury returned a verdict in favor of respondent and awarded $50,000 in compensatory or presumed damages and $300,000 in punitive damages. Petitioner then moved for a new trial. It noted that in *Gertz* v. *Robert Welch, Inc.*, *supra*, at 349, this Court had held "that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth," and argued that the judge's instructions permitted the jury to award such damages on a lesser showing. The trial court agreed with petitioner and granted the motion for a new trial. App. 25–26.

On appeal, the Vermont Supreme Court reversed. 461 A. 2d 414 (1983). Although recognizing that "in certain instances the distinction between media and nonmedia defendants may be difficult to draw," the court stated that "no such difficulty is presented with credit reporting agencies, which are in the business of selling financial information to a limited number of subscribers who have paid substantial fees for

their services." *Id.*, at 417. Relying on this distinguishing characteristic of credit reporting firms, the court concluded that such firms are not "the type of media worthy of First Amendment protection as contemplated by *New York Times* [v. *Sullivan*, 376 U. S. 254 (1964)] and its progeny," 461 A. 2d, at 417–418, and that the balance between a private plaintiff's right to recover presumed and punitive damages without a showing of fault and the First Amendment rights of "nonmedia" speakers "must be struck in favor of the private plaintiff defamed by a nonmedia defendant," *id.*, at 418. Accordingly, the court held "that as a matter of federal constitutional law, the media protections outlined in *Gertz* are inapplicable to nonmedia defamation actions." *Ibid.*

The lower courts have divided over whether "nonmedia" defendants enjoy any constitutional protections in defamation suits, either in suits brought by public figures or officials or in those brought by private plaintiffs. See Smolla, Let the Author Beware: The Rejuvenation of the American Law of Libel, 132 U. Pa. L. Rev. 1, 29–35 and nn. 147, 162 (1983). We granted certiorari to resolve this conflict, —— U. S. —— (1983), and we now reverse. We reject any distinction between "media" and "nonmedia" defendants for purposes of the First Amendment principles applicable to defamation suits. Because petitioner's accurate credit reports constitute speech protected by the First Amendment, the reasoning of *Gertz* applies fully to libel actions brought to redress injury caused by petitioner's inaccurate reports.

II

At the outset, respondent contends that we need not determine in this case whether *Gertz* is applicable to "nonmedia" defendants because the jury instructions satisfied the standards set out in that decision.[1] As noted above, *Gertz* held

[1] Respondent also argues that petitioner did not seek the protections outlined in *Gertz* before the jury instructions were given and that therefore the issue was not preserved for review. In view of the fact that the Ver-

that presumed or punitive damages may not be awarded to a private defamation plaintiff on any showing less than knowledge of falsity or reckless disregard for the truth—the "actual malice" standard first announced in *New York Times* v. *Sullivan*, *supra*, at 280. The trial court in this case instructed the jury that, because petitioner's statement imputing the insolvency of respondent's business was libelous *per se*, respondent was not required "to prove actual damages resulting from the libel since damage and loss [are] conclusively presumed." App. 17. See also *id.*, at 19 (instructing that "where, as in this case there is a libel per se, damages are presumed and actual damages may not be proven" and that "the law presumes damages in some amount in a case of libel per se and therefore relieves the Plaintiff of the burden of establishing by specific proof that damages have occurred").

Respondent acknowledges that these portions of the trial court's instructions, standing alone, do not satisfy the requirements of *Gertz*. Brief, at 40. It notes, however, that the trial court also instructed the jury that respondent could not recover any damages if a common law privilege for credit reporting agencies, barring liability for negligent falsehoods, applied. See App. 18. The charge explained that the privilege was not available if respondent could show "malice or lack of good faith on the part of the Defendant." *Ibid.* The court also told the jury that, "[i]f you find that Defendant's conduct was not privileged, and if you also find, on the basis of clear and convincing evidence, that the Defendant acted with actual malice in publishing the article in question, then you may award Plaintiff punitive or exemplary damages in addition to the actual damages assessed." *Id.*, at 20. Accordingly, respondent argues, the instructions did not permit an award of presumed or punitive damages without proof of "actual malice."

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mont Supreme Court considered the federal constitutional issue properly presented and passed upon it, respondent's contention is unavailing. See *Orr* v. *Orr*, 440 U. S. 268, 274–275 (1979).

The trial judge's definition of "malice or lack of good faith" did not, however, comport with the *New York Times* standard. In defining the circumstances under which the common law privilege would be defeated, the court explained to the jury:

> "If you find that the Defendant acted in a [sic] bad faith towards the plaintiff in publishing the Erroneous Report, *or* that Defendant intended to injure the Plaintiff in its business, *or* that it acted in a willful, wanton or reckless disregard of the rights and interests of the Plaintiff, the Defendant has acted maliciously and the privilege is destroyed. *Further*, if the Report was made with reckless disregard of the possible consequence, *or* if it was made with the knowledge that it was false or with reckless disregard of it's [sic] truth or falsity, it was made with malice." App. 18–19 (emphasis added).

Although these instructions included the *New York Times* formulation, the definition of the kind of malice necessary to support an award of presumed damages was plainly not limited to that standard. See, *e. g.*, *Bose Corp.* v. *Consumers Union of United States, Inc.*, —— U. S. ——, ——, n. 30 (1984); *St. Amant* v. *Thompson*, 390 U. S. 727, 731 (1968). Consequently, the trial court's conclusion that the instructions did not satisfy *Gertz* was correct and the Vermont Supreme Court's determination that *Gertz* was inapplicable was necessary to its decision that the trial court erred in granting the motion for a new trial. We therefore turn to our reasons for rejecting the Vermont Supreme Court's conclusion.

III

The decision in *Gertz* was the culmination of a decade long effort "to define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment." 418 U. S., at 325. Ten years earlier, in *New York Times* v. *Sullivan*, *supra*, at 279–280, we first announced "a federal rule that prohibits a public offi-

cial from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.*, at 279–280. That rule was subsequently extended to libel actions brought by "public figures," *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130 (1967), and, beginning with *New York Times* itself, was applied to cases involving "nonmedia" defendants. See *New York Times*, 376 U. S., at 254, n.*, 286.[2] We had no occasion, however, to consider the applicability of First Amendment principles to libel actions brought by private individuals until the decision in *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29 (1971).

Rosenbloom concerned a libel suit brought by a distributor of nudist magazines against a radio station. Although a majority of Justices were unable to agree on the appropriate standard of liability in defamation actions brought by private individuals, a plurality would have extended the *New York Times* privilege to such cases when the statements at issue concerned matters of "public or general interest," 403 U. S., at 43 (opinion of BRENNAN, J.). Despite the variety of views on liability, however, there was a clear consensus for the conclusion that, at the very least, the First Amendment limits the availability of punitive damages awards in defamation actions brought by private parties. See 403 U. S., at 59 (WHITE, J., concurring in judgment) (summarizing positions for which there was majority support). Indeed, the dissent-

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[2] See *Henry* v. *Collins*, 380 U. S. 356 (1965); *Garrison* v. *Louisiana*, 379 U. S. 64 (1967); *Saint Amant* v. *Thompson*, 390 U. S. 727 (1968). See also *Letter Carriers* v. *Austin*, 418 U. S. 264 (1974) (applying *New York Times* privilege to defamation actions arising from labor disputes); *Linn* v. *United Plant Guard Workers*, 383 U. S. 53 (1966) (labor dispute); *Time, Inc.* v. *Hill*, 385 U. S. 374 (1967) ("false lights" action); *Pickering* v. *Board of Education*, 391 U. S. 563 (1968) (teacher dismissal based on newspaper letter critical of school board). But see *Hutchinson* v. *Proxmire*, 443 U. S. 111, 133, n. 16 (1979).

ers were particularly emphatic on this point. Justice Harlan explained:

> "At a minimum, *even in the purely private libel area*, I think the First Amendment should be construed to limit the imposition of punitive damages to those situations where actual malice is proved. This is the typical standard employed in assessing anyone's liability for punitive damages where the underlying aim of the law is to compensate for harm actually caused, . . . and no conceivable state interest could justify imposing a harsher standard on the exercise of those freedoms that are given explicit protection by the First Amendment." *Id.*, at 73 (Harlan, J., dissenting) (emphasis added).

Justices MARSHALL and Stewart went even further and concluded that the largely uncontrolled discretion of juries to award punitive damages in defamation actions created too great a threat to First Amendment freedoms and that such damages should for that reason be held to be precluded. *Id.*, at 84–85 (MARSHALL, J., dissenting).

In *Gertz*, a libel suit brought by an attorney who had been defamed by false statements in a monthly magazine reflecting the views of the John Birch Society, the Court revisted the issues canvassed in *Rosenbloom* and this time a majority of the Court agreed on the minimum constitutional requirements for defamation actions brought by private individuals, at least in cases involving "media" defendants. The Court rejected the extension of *New York Times* proposed by the plurality in *Rosenbloom*, both because that approach was thought unacceptably to impair the strong state interest in protecting the reputations of private individuals, *id.*, at 344–346, and because "it 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—to determine, in the words of MR. JUSTICE MARSHALL, 'what information is relevant to self-government.' *Rosenbloom* v. *Metromedia, Inc.*, 403

U. S., at 79." 418 U. S., at 346. Instead, the Court held that, at least where "the substance of the defamatory statement 'makes substantial danger to reputation apparent,'" *id.*, at 348 (quoting *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130, 155 (1967)), the States may impose any standard of liability for defamation of a private individual, short of liability without fault. *Id.*, at 347.

The Court further concluded, however, that "the strong and legitimate state interest in compensating private individuals for injury to reputation . . . extends no further than compensation for actual injury." *Id.*, at 348–349. Although it had no occasion to consider whether, as Justices MARSHALL and Stewart had urged in *Rosenbloom*, presumed and punitive damages in defamation actions are invariably incompatible with the First Amendment, see also *Smith* v. *Wade*, —— U. S. ——, ——, nn. 19–20 (1983), the Court held that such damages could not be awarded "at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." 418 U. S., at 349. The Court explained that the common law doctrine of presumed damages for defamation, "an oddity of tort law," confers on juries "largely uncontrolled discretion" to award damages even in the absence of proof of harm or loss. *Ibid.* Similarly, "juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused." *Id.*, at 350. And both presumed and punitive damages permit juries "to use their discretion selectively to punish expressions of unpopular views." *Ibid.* Because the threat of such large, disproportionate awards "unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms," and because "the States have no substantial interest in securing for plaintiffs such as this petitioner gratuitous awards of money damages far in excess of any actual injury," *id.*, at 349, the Court concluded that "the private defamation plaintiff who establishes liability under a less demanding

standard than that stated by *New York Times* may recover only such damages as are sufficient to compensate him for actual injury," *id.*, at 350.

Since the decision in *Gertz*, we have followed its reasoning with respect to damages in excess of actual harm in analogous areas of the law. In *Electrical Workers* v. *Foust*, 442 U. S. 42 (1979), for example, we relied on *Gertz* when we concluded that permitting employees to recover punitive damages for a union's breach of its duty of fair representation would undermine the policies of the Railway Labor Act. We explained that, because they go beyond compensation for actual loss, such "unpredictable and potentially substantial" awards undermine the balance between the interest in compensating injured parties and the need to maintain a union's freedom and effectiveness in pursuing grievances. *Id.*, at 48–52. As in *Gertz*, we also noted that "punitive damages may be employed to punish unpopular defendants." *Id.*, at 50–51, n. 14. Similarly, *Newport* v. *Fact Concerts, Inc.*, 453 U. S. 247, 270–271 (1981), relied in part on *Gertz* in concluding that municipalities are immune from punitive damages in § 1983 suits.

These cases, like *Gertz*, reflect a recognition that "the alleged deterrence achieved by punitive damage awards is likely outweighed by the costs—such as the encouragement of unnecessary litigation and the chilling of desirable conduct—flowing from the rule, at least when the standards on which the awards are based are ill-defined." *Smith* v. *Wade*, —— U. S. ——, —— (1983) (REHNQUIST, J., dissenting). See *id.*, at ——– —— (majority opinion) (noting prevailing view that punitive damages may only be awarded for "'conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others,'" quoting Restatement (Second) of Torts § 908(2) (1977) (emphasis deleted)); *id.*, at —— (O'CONNOR, J., dissenting). *Silkwood* v. *Kerr-McGee Corp.*, —— U. S. ——, —— (1984); *id.*, at —— (BLACKMUN, J., dissenting); *id.*, at —— (POW-

ELL, J., dissenting). Although this "chilling of desirable conduct" may be necessary or tolerable in some contexts, it poses a danger of constitutional dimension when the "desirable conduct" deterred by the threat of presumed or punitive damages is expression protected by the First Amendment. See *Rosenbloom* v. *Metromedia*, 403 U. S. 29, 72–78 (1971) (Harlan, J., dissenting); *id.*, at 81–87 (MARSHALL, J., dissenting). The Constitution presupposes that freedom of expression is both an instrinsic element of individual liberty and an essential means to society's search for truth. See *Bose Corp.* v. *Consumers Union of United States, Inc.*, —— U. S., at ——; *Whitney* v. *California*, 274 U. S. 357, 375 (1927) (Brandeis, J., concurring). Accordingly, when the threat of unpredictable and disproportionate damages induces potential speakers to refrain from speaking, both the speaker and society as a whole are the losers.[3]

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[3] Experience in the lower courts since *Gertz* has demonstrated that this concern is not speculative. Notwithstanding the constitutional minima set out in that case, jury awards of punitive damages in the millions of dollars have become increasingly common in defamation suits. See Brief for Washington Post as *Amicus Curiae* 12–16 (listing 10 punitive damages awards ranging from $1–25 million between 1980 and 1983); Smolla, 132 U. Pa. L. Rev., at 6–7, 12–14, 21. See also Wall St. Journal, Sept. 29, 1983, p. 1 (describing how $9.2 million libel judgment drove small town newspaper into temporary bankruptcy).

Indeed, the problems posed by punitive damages in defamation suits have led a number of state courts to conclude that the First Amendment, or comparable state constitutional provisions, bars any such damages in cases where the party injured by defamation recovers adequate compensatory damages. *E. g.*, *Hall* v. *May Department Stores*, 292 Or. 131, 637 P. 2d 126 (1981); *McHale* v. *Lake Charles American Press*, 390 So. 2d 556 (La. App. 1980); *Tasket* v. *KING Broadcasting Co.*, 86 Wash. 2d 439, 546 P. 2d 81 (1976); *Sprouse* v. *Clay Communications, Inc.*, 211 S. E. 2d 674, 692 (W. Va. 1975); *Stone* v. *Essex County Newspapers, Inc.*, 367 Mass. 849, 330 N. E. 2d 161 (1975). Two other states have concluded that punitive damages in defamation actions are barred by their own constitutions unless there is proof that the publisher acted with actual hatred or ill will. *AAFCO Heating & Air Condition Co.* v. *Northwest Publications, Inc.*,

IV

Petitioner does not contend that the plaintiff in this case is a public figure; accordingly, it acknowledges that the jury could have awarded respondent actual damages on a showing less than that required by *New York Times*. Instead, petitioner argues only that, as in *Gertz*, presumed or punitive damages could not be awarded in this case without at least "a showing of knowledge of falsity or reckless disregard for the truth." *Gertz*, 418 U. S., at 349. As noted, the rule in *Gertz* was premised on the conclusion that, by punishing those who make the erroneous statements inevitable in free discourse, unconstrained awards of presumed or punitive damages deter potential speakers from engaging in constitutionally protected truthful expression. The reasoning of *Gertz* therefore squarely controls this case if petitioner's *accurate* reports are protected by the First Amendment. Relying first on the identity of the speaker and second on the nature of speech at issue, respondent contends that petitioner's truthful credit reports are less deserving of constitutional protection than the magazine article at issue in *Gertz*. We do not, however, find these distinctions persuasive.

A

As noted, the defendant in *Gertz* was a monthly magazine expressing the views of the John Birch Society; at various points, the opinion of the Court in that case stressed the importance of a "vigorous and uninhibited press," 418 U. S., at 342, referred to the dangers of "media self-censorship," *id.*, and stated that the Constitution "shields the press and broadcast media from the rigors of strict liability for defamation,"

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162 Ind. App. 671, 321 N. E. 2d 580 (1974); *Walker* v. *Colorado Springs Sun, Inc.*, 188 Colo. 86, 538 P. 2d 450 (1975).

More generally, as JUSTICE REHNQUIST noted last Term, "a significant number of American jurisdictions refuse to condone punitive damages awards" altogether. *Smith* v. *Wade*, —— U. S. ——, —— (1983) (dissenting opinion).

id., at 348. Noting these and other aspects of that decision, respondent argues that "*Gertz* is patently limited only to cases in which there is a media defendant," Brief 26, and contends that petitioner is not such a defendant.

We do not, however, believe any "media/non-media" distinction is appropriate in the defamation context for several reasons. First, as this case demonstrates, the definitional problems associated with such an approach are formidable and present serious First Amendment problems of their own. Like an account of judicial proceedings in a newspaper, magazine, or news broadcast, a statement in petitioner's reports that a particular company has filed for bankruptcy is a report of a timely "news" event conveyed to members of the public by a business organized to collect and disseminate such information. Petitioner could therefore be easily characterized as a "media" defendant. The Vermont Supreme Court rejected that characterization, however, because petitioner is "in the business of selling financial information to a limited number of subscribers who have paid substantial fees for [its] services." 461 A. 2d, at 417. The court added that "[t]here is a clear distinction between a publication which disseminates news for public consumption and one which provides specialized information to a selective, finite audience." *Ibid.*

But the fact that petitioner's information is "specialized" or that its subscribers pay "substantial fees" hardly distinguishes these reports from articles in many publications to which respondent would presumably attach the label "media"; few statements in many publications are of universal interest and few publications are distributed free of charge. Nor is there any apparent reason to treat petitioner differently than a more widely circulated publication because it has "a limited number of subscribers." Indeed, it would be paradoxical to increase protection to statements injurious to reputation as the size of their audience grows. Cf. *Keeton* v. *Hustler Magazine, Inc.*, —— U. S. ——, ——–—— (1984). These line-drawing difficulties demonstrate that

efforts to define the difference between "media" and "nonmedia" defendants in defamation suits would, in practice, substantially complicate defamation law, see Smolla, 132 U. Pa. L. Rev., at 90, and would necessarily involve the courts in precisely the kinds of *ad hoc* content-based judgments that *Gertz* sought to prevent. See 418 U. S., at 343–344, 346; *Branzburg* v. *Hayes*, 408 U. S. 665, 703–705, and n. 40 (1972). Cf. *Police Department* v. *Mosley*, 408 U. S. 92, 95 (1972). Furthermore, to the extent that those judgments turned on the public interest in the speaker's message as reflected in the size of the audience or the subject matter of the speech, the "media/nonmedia" distinction would revive the kind of inquiry into the importance of the speaker's message proposed by the plurality in *Rosenbloom* and rejected by the Court in *Gertz*. See *supra*, at ——. See generally Note, 95 Harv. L. Rev. 1876, 1884–1885 (1982).

More fundamentally, however, respondent's argument rests on a misapprehension of those cases in which we have noted the importance of a free press in our constitutional system. Recognizing the critical historical role played by the press in gathering and disseminating information for the benefit of the public, we have often emphasized the need for careful judicial scrutiny of government actions that impede the exercise of that function or that single out the press for differential treatment.[4] That public fiduciary function is

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[4]See *e. g.*, *Minneapolis Star* v. *Minnesota Comm'r of Revenue*, —— U. S. ——, ——–—— (1983); *Columbia Broadcasting System, Inc.* v. *FCC*, 453 U. S. 367, 395 (1981); *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241 (1974); *Branzburg* v. *Hayes*, 408 U. S. 665, 707 (1972); *New York Times* v. *United States*, 403 U. S. 713 (1971); *Mills* v. *Alabama*, 384 U. S. 214, 218–219 (1966); *Grosjean* v. *American Press Co., Inc.*, 297 U. S. 233, 250 (1936). See also *Herbert* v. *Lando*, 441 U. S. 153, 180–199 (1979) (BRENNAN, J., dissenting in part); *Saxbe* v. *Washington Post Co.*, 417 U. S. 843, 850 (1974) (POWELL, J., dissenting); *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations*, 413 U. S. 376, 393 (1973) (BURGER, C. J., dissenting); *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S.

not, however, performed exclusively by the organs of mass communication. To the contrary,

> "[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. . . . Freedom of the press is a 'fundamental personal right' which 'is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.' *Lovell* v. *Griffin*, 303 U. S. 444, 450, 452 (1938). . . . The informative function asserted by representatives of the organized press . . . is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists." *Branzburg* v. *Hayes*, *supra*, at 704–705.

In guaranteeing equal liberty of expression, the First Amendment furthers a central object of our constitutional scheme, to assure every member of society an equal right to dignity, respect, and the opportunity to participate in self-government. See, *e. g.*, *Carey* v. *Brown*, 447 U. S. 455, 459–463 (1980); *Police Department* v. *Mosley*, 408 U. S. 92, 95 (1972); *Cohen* v. *California*, 403 U. S. 15, 24 (1971); *Whitney* v. *California*, 274 U. S. 357, 375–377 (1927) (Brandeis, J., concurring). Also, in light of "the increasingly prominent role of mass media in our society, and the awesome power it has placed in the hands of a select few," *Gertz*, *supra*, at 402 (WHITE, J., dissenting), protection for the speech of "nonmedia" defendants is essential to ensure a diversity of perspectives. See J. Barron, Freedom of the Press for Whom? (1973). "Uninhibited, robust and wide-open" debate, *New York Times* v. *Sullivan*, 376 U. S., at 370, among nonmedia speakers is as essential to the fostering and development of

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367, 390 (1969); *Time, Inc.* v. *Hill*, 385 U. S. 374, 389 (1967); Stewart, "Or of the Press," 26 Hastings L. J. 631 (1975).

an individual's political thought as is such debate in the mass media. See J. Klapper, The Effects of Mass Communications (1960). Consistent with this goal, the constitutional protections afforded speech depend on the nature, context, and function of the expressive activity at issue, not on the status or identity of the speaker. See *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 778–784 (1978). Accordingly, the rights of the institutional press, however defined, are no greater and no less than those enjoyed by other individuals or organizations engaged in the same activities. Compare *Globe Newspaper Co.* v. *Superior Court*, 457 U. S. 596, 603 (1982) (recognizing that "the press and general public have a constitutional right of access to criminal trials") with *Pell* v. *Procunier*, 417 U. S. 817, 834 (1974) (concluding that First Amendment does not "accord the press special access to information not shared by members of the public generally").

We therefore reject the argument that petitioner's credit reports are entitled to diminished constitutional protection because of petitioner's status or the form in which its communications appear.[5] We turn to consider whether *Gertz* is

[5] JUSTICE POWELL would allow presumed damages without a showing of actual malice in cases which neither threaten public expression nor involve a public figure or issue, *post*, at 3, 6–9, 14–16, but would hold that an award of punitive damages would be unconstitutional as a denial of due process of law. *Id.*, at 10–14. JUSTICE POWELL, however, offers no clear basis for distinquishing between public and private expression. In part the distinction seems to turn on the identity of the speaker. See *post*, at 8 ("Petitioner's credit reporting is purely private expression. It does not appear in a newspaper or magazine of general and regular circulation nor on the broadcast media"). To the extent such a distinction is based on the identity of the speaker it would flout our decisions. See *supra*, at 12–15. In part JUSTICE POWELL's distinction seems to turn on the nature of the speech. *Post*, at 8. ("This sort of credit reporting is speech solely in the economic interest of the speaker and its business audience."). To the extent JUSTICE POWELL distinguishes between public and private expression on the basis of the nature of the utterances, he would force courts to engage in

nevertheless inapplicable because of the character or content of petitioner's speech.

B

Respondent argues that petitioner's reports on the financial status of corporations bear little or no relationship to the values of self-expression, autonomy, and robust discussion of public affairs that the First Amendment is intended to serve.[6] We have, of course, identified certain narrow categories of expression that "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572 (1942). See *Bose Corp.* v. *Consumers Union of U. S., Inc.*, —— U. S., at ——–––——. But apart from identifying those limited types of unprotected expression, judges, like other government officials, are not free to decide on the basis of their message which sorts of protected expression are in their judgment less "valuable" than others. *Gertz*, 418 U. S., at 346; *Branzburg* v. *Hayes*, 408 U. S. 665, 705, n. 40 (1972); *Cohen* v. *California*, 403 U. S. 15, 24–25 (1971). See *New York* v. *Ferber*, 458 U. S. 747, 763–764 (1982). The

precisely the content-based evaluation of particular utterances as to public affairs that *Gertz* held was impermissible. See also *supra*, at 16–19.

JUSTICE POWELL's rationale for prohibiting punitive damages in libel cases is the same as that relied on by the Court in *Gertz* for prohibiting presumed damages in the absence of a showing of actual malice—"the largely uncontrolled discretion of juries to award damages where there is no loss compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms. Additionally, the doctrine of presumed damages invites juries to persecute unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact." 418 U. S., at 349. We adhere to that rationale.

[6] *E. g.*, *Carey* v. *Brown*, 447 U. S. 455, 466–467 (1980); *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 777, n. 12, 783 (1978); *Wooley* v. *Maynard*, 430 U. S. 705, 714–715 (1977); *NAACP* v. *Button*, 371 U. S. 415, 429–431 (1963); *Winters* v. *New York*, 333 U. S. 507, 510 (1948).

content of petitioner's accurate reports plainly do not place them among those types of speech the evils of which "so overwhelmingly outweigh[ ] the expressive interests, if any, at stake" that, as a class, they are entitled to virtually no First Amendment protection. *Id.*, at 764.

On the contrary, we long ago rejected the suggestion that, simply because speech concerns economic matters or is in the financial interest of the speaker or audience, it lacks constitutional value. See, *e. g.*, *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 501–502 (1952); *AFL* v. *Swing*, 312 U. S. 321, 325–326 (1941); *Thornhill* v. *Alabama*, 310 U. S. 88, 101–103 (1940); see also *Abood* v. *Detroit Board of Education*, 431 U. S. 209, 231–232, and n. 28 (1977). Our free market economy is predicated on the assumption that human welfare will be improved through informed private decisionmaking. In this respect, ensuring broad distribution of accurate financial information—no less than protecting a wide variety of other facts and ideas concerning "philosophical, social, artistic, economic, literary, or ethical matters," *Abood*, *supra*, at 231—comports with the fundamental premise of the First Amendment "that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public . . . ," *Associated Press* v. *United States*, 326 U. S. 1, 20 (1945). As we emphasized in *Virginia Board of Pharmacy*, *supra* at 765, "the free flow of commercial information is indispensable . . . [both] to the proper allocation of resources in a free enterprise system, [and also] to the formation of intelligent opinions as to how that system ought to be regulated or altered."

In partial support for that statement, we cited views of Justice Douglas that are especially pertinent here:

> "The language of the First Amendment does not except speech directed at private economic decisionmaking. Certainly such speech could not be regarded as less important than political expression. When immersed in a free flow of commercial information, private sector deci-

> sionmaking is at least as effective an institution as are our various governments in furthering the social interest in obtaining the best general allocation of resources. . . . The financial data circulated by Dun & Bradstreet, Inc., are part of the fabric of national commercial communication." *Dun & Bradstreet, Inc.* v. *Grove*, 404 U. S. 898, 905–906 (1971) (Douglas, J., dissenting from denial of certiorari).

Justice Douglas further noted that "[p]resumably the credit reports published by the petitioner facilitate through the price system the improvement of human welfare at least as much as did the underlying disagreement in our most recent libel opinion, *Rosenbloom* v. *Metromedia, Inc.*, *supra*, arising out of a squabble over whether a vendor had sold obscene magazines." *Id.*, at 905, n. 9.

Justice Douglas's conclusion that the kind of speech at issue here deserves First Amendment protection is strongly supported by the fact that statements identical to those published by petitioner—namely, accounts of bankruptcy filings or other financial developments concerning specific corporations—would surely be entitled to full constitutional safeguards if they appeared in, for example, a national business magazine or in a small Vermont newspaper. That information is no less important because it appears in a credit report format. It is worth noting in this regard that the defamation law of most States, although apparently not that of Vermont, see 461 A. 2d, at 419, recognizes a qualified common-law privilege for reports like that at issue here. See Maurer, Common Law Defamation and the Fair Credit Reporting Act, 72 Geo. L. J. 95, 99–105 (1983). The privilege typically precludes recovery for false and defamatory credit information without a showing of bad faith or malice, a standard of proof which is often defined according to the *New York Times* formulation. See, *e. g.*, *Datacon, Inc.* v. *Dun & Bradstreet*, 465 F. Supp. 706, 708 (ND Tex. 1979). The adoption of this privilege reflects a widely held recognition of the substantial

public interest in ensuring that the preparation and dissemination of accurate credit reports are not inhibited by unconstrained libel judgments. In short, petitioner's truthful credit reports are not entitled to less than full First Amendment protection simply because they are sold for a profit and concern financial matters.

To be sure, not all of our traditional First Amendment standards are fully applicable with respect to one type of speech involving the economic interests of speaker and audience—advertisements that "do no more than propose a commercial transaction." *Pittsburgh Press Co.* v. *Human Relations Comm'n*, 413 U. S. 376, 385 (1973).[7] The principal rationale for affording protection to purely commercial advertising is the view that accurately informed private decisions about consumption are attributes of the kind of knowledgeable, self-governing citizenry that the First Amendment was meant to foster. See generally *Virginia Board of Pharmacy*, *supra*. We have concluded, however, that, in contrast to factual misstatements in the political arena, false and misleading advertising is relatively easy to identify and causes special harms far disproportionate to any value it might have. Compare *Ohralik* v. *Ohio State Bar Ass'n*, 436

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[7] See, *e. g.*, *Bolger* v. *Young Drug Products Corp.*, —— U. S. —— (1983) (contraceptive advertising); *In re R. M. J.*, 455 U. S. 191 (1982) (lawyer advertising); *Metromedia, Inc.* v. *City of San Diego*, 453 U. S. 490 (1981) (commercial billboard advertising); *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n*, 447 U. S. 530 (1980) (advertising of electricity); *Friedman* v. *Rogers*, 440 U. S. 1 (1979) (optometrist advertising); *Ohralik* v. *Ohio State Bar Ass'n*, 436 U. S. 447, 455–456 (1978) (lawyer's solicitation of business); *Bates* v. *State Bar of Arizona*, 433 U. S. 350 (1977) (lawyer advertising); *Linmark Associates, Inc.* v. *Willingboro*, 431 U. S. 85 (1977) (real estate advertising). But see *Carey* v. *Population Services Int'l*, 431 U. S. 678, 700–701 (1977) (total suppression of contraceptive advertising); *New York Times* v. *Sullivan*, 376 U. S. 254, 265–266 (1964) (discussion of public issues in advertising form); *Murdock* v. *Pennsylvania*, 319 U. S. 105, 111 (1943) (advertisement for religious book); *Jamison* v. *Texas*, 318 U. S. 413, 417 (1943) (same).

U. S. 447, 455–456 (1978); *Virginia Board of Pharmacy* v. *Virginia Consumers Council*, 425 U. S., at 771–772, and n. 24 with *Brown* v. *Hartlage*, 456 U. S. 45, 61 (1982); *New York Times* v. *Sullivan*, 376 U. S., at 279, n. 19. For that reason, we have recognized differences in the applicability of some First Amendment standards to that form of speech. See *Virginia Board of Pharmacy*, 425 U. S., at 772, n. 24.

Respondent argues that our commercial advertising decisions govern this case because petitioner's statements are "made in a commercial mileu" and "involve and are about business." Brief 14. In particular, respondent relies on our conclusion in *Bates* v. *State Bar of Arizona*, 433 U. S. 350, 383 (1977), that "the leeway for untruthful or misleading expression [permitted in cases like *Gertz*] has little force in the commercial arena." See also *Virginia Board of Pharmacy*, 425 U. S., at 772, n. 24. As we have explained, however, the mere fact that petitioner's speech concerns commerce or business in itself provides no basis for altering the constitutional analysis. See also *Central Hudson Gas* v. *Electrical Co.* v. *Public Service Comm'n*, 447 U. S., at 579–580 (STEVENS, J., concurring in the judgment). *Bates*, like the other cases in its line, involved oral and written offers to sell goods or services; it concluded that because "the advertiser knows his product and has a commercial interest in its dissemination, we have little worry that regulation to assure truthfulness will discourage protected speech." 433 U. S., at 350. See also *Bose Corp.* v. *Consumers Union of U. S., Inc.*, —— U. S., at ——, n. 22; *Virginia Board of Pharmacy*, 425 U. S., at 777–778 (Stewart, J., concurring). That reasoning has no application to petitioner's reports which, as respondent concedes, propose no commercial transaction and concern no facts uniquely within the speaker's knowledge. Brief 23.

Of course, the commercial context of petitioner's reports is relevant to the constitutional analysis insofar as it implicates the strong state "interest in protecting consumers and regulating commercial transactions," *Ohralik* v. *Ohio State Bar*

Ass'n, 436 U. S. 447, 460 (1978). Cf. *Bolger* v. *Young Drug Products Corp.*, —— U. S. ——, ———— (1983) (STEVENS, J., concurring in judgment). The special harms caused by inaccurate credit reports, the lack of public sophistication about or access to such reports, and the fact that such reports by and large contain statements that are demonstrably true or false, all may justify a variety of regulations reasonably designed to prevent the social losses caused by false credit reports. See *Virginia Board of Pharmacy*, 425 U. S., at 771–773, and n. 24; *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U. S., at 573–576 (BLACKMUN, J., concurring in judgment).[8] As we explained in *Gertz*, however, the state interest in redressing the harm caused by false statements in the defamation context is fully served by damages that compensate for actual injury. Unconstrained awards of presumed and punitive damages, in contrast, do more than require speakers to bear the costs of their false and harmful statements; by providing damages unrelated to the actual harm caused by false statements, such awards necessarily deter and penalize truthful statements as

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[8] See also Maurer, 72 Geo. L. J., at 126:

"Under *Gertz*, plaintiffs may be compensated for actual damages upon establishing the fault of the defendant; to obtain punitive damages, a plaintiff must demonstrate malice. Sections 1681o and 11681n [of the Fair Credit Reporting Act] are consistent with these constitutional principles. Section 1681o provides for recovery of actual damages upon a showing of negligence, which presumably satisfies the *Gertz* requirement of fault. Section 1681n authorizes punitive damages for willful violation of the Act. Whether section 1681n is equivalent to *Gertz's* malice standard depends on whether a court would consider it to be possible to fail willfully to follow reasonable procedures and yet not manifest reckless disregard for the truth. Such a fine distinction appears unworkable as a categorical test, so that section 1681n would likely be regarded as harmonious with the principles of *Gertz*. Thus, the Act appears to provide the degree of protection for commercial speech currently required under first amendment doctrine" (footnotes omitted).

well.[9] Accordingly, once the actual damages caused by false credit reports are recompensed, the state interest in preventing the special hazards posed by the form of speech at issue here can support no distinction between petitioner and the magazine defendant in *Gertz*.[10]

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[9] JUSTICE POWELL argues that petitioner's credit reporting is in the realm of commmerical expression and therefore that an award of presumed damages should be permissible without a showing of actual malice. But JUSTICE POWELL concedes that presumed damages "are not intended to replace actual damages when these can be proved." *Post*, at 16. However, if the report is viewed as commercial expression, proving that actual damages occurred is relatively easy. For instance, if an alleged libel concerning a bank's customer causes the bank to lower the credit limit or raise the interest rate charged that customer, the damages caused by such action should at worst be no more difficult to ascertain than many other traditional elements of tort damages. See, *e. g.*, *Seffert* v. *Los Angeles Transit Lines*, 56 Cal. 2d 498, 509, 364 P. 2d 337, 344 (1961) (Traynor, J., dissenting) (pain and suffering); *Russell* v. *City of Wildwood*, 428 F. 2d 1176, 1181 (CA3 1970) (future earnings). Although there may be some elements of damage that would be more difficult to evaluate, the same is true in any tort action; the commercial context does not increase the need for presumed damages, but if anything reduces the need for making such a presumption.

[10] Contrary to JUSTICE POWELL's suggestions, *post*, at 4, today's decision does not significantly burden or overturn libel law as it has developed in the states. This is plainly evident from the fact that 35 of the 42 states that have considered the issue have not distinquished between "media" and "nonmedia" defendants but have extended the actual malice standard to nonmedia defendants. *Beneficial Management Corp.* v. *Evans*, 421 So. 2d 92 (Ala. 1982); *Antwerp Diamond Exchange* v. *Better Business Bureau*, 130 Arizona 523, 637 P. 2d 733 (1981); *Moriarity* v. *Lippe*, 162 Conn. 371, 294 A. 2d 326 (1972); *Jackson* v. *Filliber*, 281 A. 2d 604 (Del. 1971); *Smith* v. *Russel*, 456 So. 2d 462 (Fla. 1984); *Williams* v. *Church's Fried Chicken*, 158 Ga. App. 26, 279 S. E. 2d 465 (Ga. 1981); *Rodrigues* v. *Nishiki*, 65 Haw. 430, 653 P. 2d 1145 (1982); *Millsaps* v. *Bankers Life Co.*, 35 Ill. App. 3d 735, 342 N. E. 2d 329 (1976); *Elliot* v. *Roach*, 409 N. E. 2d 661 (Ind. App. Dist. 1980); *Anderson* v. *Low Rent Housing Commission*, 304 N. W. 2d 239 (Iowa 1981); *Hanrahan* v. *Horn*, 232 Kan. 531, 657 P. 2d 561 (1983); *Sparks* v. *Boone*, 560 S. W. 2d 236 (Ky. App. 1977); *Wattigny* v. *Lambert*, 453 So. 2d 1272 (La. App. 1984); *Michaud* v. *Inhabitants of the Town of Livermore Falls*, 381 A. 2d 111 (Me.1978); *Jacron Sales Co.* v. *Sindorf*; 276

V

The judgment of the Vermont Supreme Court is reversed and the case remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Md. 580, 350 A. 2d 688 (1976); *Aarco, Inc.* v. *Baynes* 462 N. E. 2d 1107 (Mass. 1984); *Grebner* v. *Runyon*, 347 N. W. 2d 741 (Mich. App. 1984); *Newson* v. *Henry*, 433 So. 2d 817 (Miss. 1983); *Ramacciotti* v. *Zinn*, 550 S. W. 2d 217 (Mo. App. 1977); *Williams* v. *Pasma*, 656 P. 2d 212 (Mont. 1982); *Dairy Stores, Inc.* v. *Sentinel Pub. Co.*, 191 N. J. Super. 202, 465 A. 2d 953 (1983); *Trails West, Inc.* v. *Wolff*, 32 NY. 2d 207, 344 NYS. 3d 863, 298 N. E. 2d 52 (1973); *Angel* v. *Ward*, 43 N. C. App. 288, 258 S. E. 2d 788 (1979); *Hahn* v. *Kotten*, 43 Ohio St.2nd. 237, 331 N. E. 2d 713 (1975); *Wright* v. *Haas*, 586 P. 2d 1093 (Okla.1978); *Fox* v. *Kahn*, 421 Pa.563, 221 A. 2d 181 (1966); *De Carvalho* v. *Dasilva*, 414 A. 2d 806 (R. I. 1980); *Scott* v. *McCain*, 272 S. C. 198, 250 S. E. 2d 118 (1978); *Wollman* v. *Graff*, 287 N. W. 2d 104 (SD 1980); *Moore* v. *Bailey*, 628 S. W. 2d 431 (Tenn. App. 1981); *Ryder Truck Rentals, Inc.* v. *Latham*, 593 S. W. 2d 334 (Tex. Cir. App. 1979); *Fleming* v. *Moore*, 221 Va. 884, 275 S. E. 2d 632 (1981); *Bender* v. *City of Seattle*, 99 Wash. 2d 582, 664 P. 2d 492 (1983); *Mauck* v. *City of Martinsburg*, 280 S. E. 2d 216 (W. Va. 1981); *Phifer* v. *Foe*, 443 P. 2d 870 (Wyo. 1968). The District of Columbia has also applied the actual malice standard to cases involving non-media defendants. *Nader* v. *De Toledano*, 408 A. 2d 31 (D. C. App. 1979). The states that have declined to extend the actual malice standard to nonmedia defendants include: *Roemer* v. *Retail Credit Co.*, 44 Cal. App. 3d 926, 119 Cal. Rptr. 82 (1975); *Rowe* v. *Metz*, 195 Colo. 424, 579 P. 2d 83 (1978); *Stuempges* v. *Park Davis & Co.*, 297 N. W. 2d 252 (Minn. 1980); *Gengler* v. *Phelps*, 92 N. M. 465, 589 P. 2d 1056 (N. M. App. 1978); *Wheeler* v. *Green*, 286 Or. 99, 593 P. 2d 777 (1979); *Denny* v. *Mertz*, 106 Wis. 2d 636, 318 N. W. 2d 141 (1982).

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

L.F.P.

From: **Justice Brennan**

Circulated: _____

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STYLISTIC CHANGES THROUGHOUT.
SEE PAGES:
1, 5-13, 14-17, 18-19, 20, 21, 23, 24, 26, 27, 28, 29, 30, 31-33

Holds that Resp. must show actual malice to recover more than actual damages — relying on Gertz. But what was said in Gertz applied where suit was vs media & on subject to public interest.

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-18

DUN & BRADSTREET, INC., PETITIONERS *v.*
GREENMOSS BUILDERS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

[March ——, 1985]

JUSTICE BRENNAN delivered the opinion of the Court.

In *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974), a libel action against a magazine, we held that the First Amendment prohibits awards of presumed or punitive damages for false and defamatory statements absent a showing of knowing falsity or reckless disregard for the truth. The question presented by this case is whether *Gertz* should be restricted to cases that do not involve "nonmedia" defendants or speech about economic and commercial matters.

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I

Petitioner Dun & Bradstreet, a credit reporting agency, provides subscribers with financial and related information about corporations. On July 26, 1976, petitioner incorrectly reported that respondent, a Vermont corporation engaged in construction contracting, had filed a voluntary petition for bankruptcy. On the day the report was issued, respondent's president learned of it from a bank official with whom he was discussing the possibility of future financing. Eight days later, after being contacted by respondent's president, petitioner confirmed the falsity of the report and sent a retraction to each of its subscribers who had received the original report. Petitioner refused, however, to supply respondent with the names of those subscribers.

5 on p 19

35 of 42 states

Respondent then brought this defamation action in Vermont state court, alleging that the false report injured its reputation and seeking $7,500 in compensatory and $15,000 in punitive damages. The testimony at trial established that the error in petitioner's report had been caused when one of its employees, a high school student paid to review Vermont bankruptcy pleadings, had inadvertently attributed a bankruptcy petition filed by one of respondent's former employees to respondent itself. Respondent's evidence regarding damages consisted solely of testimony by its president who stated that the report had caused the bank to delay consideration of a pending loan and ultimately to terminate the company's credit. A representative of the bank, called by petitioner, testified that when he received the report he did not believe it and that the bank terminated respondent's credit for reasons wholly unrelated to petitioner's report. Respondent's president also testified that the report had impaired the company's sales and profits and caused it to incur expenses contacting individuals to refute the false information.

After trial, the jury returned a verdict in favor of respondent and awarded $50,000 in compensatory or presumed damages and $300,000 in punitive damages. Petitioner then moved for a new trial. It noted that in *Gertz* v. *Robert Welch, Inc.*, *supra*, at 349, this Court had held "that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth," and argued that the judge's instructions permitted the jury to award such damages on a lesser showing. The trial court agreed with petitioner and granted the motion for a new trial. App. 25–26.

On appeal, the Vermont Supreme Court reversed. 461 A. 2d 414 (1983). Although recognizing that "in certain instances the distinction between media and nonmedia defendants may be difficult to draw," the court stated that "no such difficulty is presented with credit reporting agencies, which

are in the business of selling financial information to a limited number of subscribers who have paid substantial fees for their services." *Id.*, at 417. Relying on this distinguishing characteristic of credit reporting firms, the court concluded that such firms are not "the type of media worthy of First Amendment protection as contemplated by *New York Times* [v. *Sullivan*, 376 U. S. 254 (1964)] and its progeny," 461 A. 2d, at 417–418, and that the balance between a private plaintiff's right to recover presumed and punitive damages without a showing of fault and the First Amendment rights of "nonmedia" speakers "must be struck in favor of the private plaintiff defamed by a nonmedia defendant," *id.*, at 418. Accordingly, the court held "that as a matter of federal constitutional law, the media protections outlined in *Gertz* are inapplicable to nonmedia defamation actions." *Ibid.*

The lower courts have divided over whether "nonmedia" defendants enjoy any constitutional protections in defamation suits, either in suits brought by public figures or officials or in those brought by private plaintiffs. See Smolla, Let the Author Beware: The Rejuvenation of the American Law of Libel, 132 U. Pa. L. Rev. 1, 29–35, and nn. 147, 162 (1983). We granted certiorari to resolve this conflict, —— U. S. —— (1983), and we now reverse. We reject any distinction between "media" and "nonmedia" defendants for purposes of the First Amendment principles applicable to defamation suits. Because petitioner's accurate credit reports constitute speech protected by the First Amendment, the reasoning of *Gertz* applies fully to libel actions brought to redress injury caused by petitioner's inaccurate reports.

II

At the outset, respondent contends that we need not determine in this case whether *Gertz* is applicable to "nonmedia" defendants because the jury instructions satisfied the stand-

ards set out in that decision.[1] As noted above, *Gertz* held that presumed or punitive damages may not be awarded to a private defamation plaintiff on any showing less than knowledge of falsity or reckless disregard for the truth—the "actual malice" standard first announced in *New York Times* v. *Sullivan*, *supra*, at 280. The trial court in this case instructed the jury that, because petitioner's statement imputing the insolvency of respondent's business was libelous *per se*, respondent was not required "to prove actual damages resulting from the libel since damage and loss [are] conclusively presumed." App. 17. See also *id.*, at 19 (instructing that "where, as in this case there is a libel per se, damages are presumed and actual damages may not be proven" and that "the law presumes damages in some amount in a case of libel per se and therefore relieves the Plaintiff of the burden of establishing by specific proof that damages have occurred").

Respondent acknowledges that these portions of the trial court's instructions, standing alone, do not satisfy the requirements of *Gertz*. Brief, at 40. It notes, however, that the trial court also instructed the jury that respondent could not recover any damages if a common law privilege for credit reporting agencies, barring liability for negligent falsehoods, applied. See App. 18. The charge explained that the privilege was not available if respondent could show "malice or lack of good faith on the part of the Defendant." *Ibid.* The court also told the jury that, "[i]f you find that Defendant's conduct was not privileged, and if you also find, on the basis of clear and convincing evidence, that the Defendant acted with actual malice in publishing the article in question, then you may award Plaintiff punitive or exemplary damages in

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[1] Respondent also argues that petitioner did not seek the protections outlined in *Gertz* before the jury instructions were given and that therefore the issue was not preserved for review. In view of the fact that the Vermont Supreme Court considered the federal constitutional issue properly presented and passed upon it, respondent's contention is unavailing. See *Orr* v. *Orr*, 440 U. S. 268, 274–275 (1979).

addition to the actual damages assessed." *Id.*, at 20. Accordingly, respondent argues, the instructions did not permit an award of presumed or punitive damages without proof of "actual malice."

The trial judge's definition of "malice or lack of good faith" did not, however, comport with the *New York Times* standard. In defining the circumstances under which the common law privilege would be defeated, the court explained to the jury:

> "If you find that the Defendant acted in a [sic] bad faith towards the plaintiff in publishing the Erroneous Report, *or* that Defendant intended to injure the Plaintiff in its business, *or* that it acted in a willful, wanton or reckless disregard of the rights and interests of the Plaintiff, the Defendant has acted maliciously and the privilege is destroyed. *Further*, if the Report was made with reckless disregard of the possible consequence, *or* if it was made with the knowledge that it was false or with reckless disregard of it's [sic] truth or falsity, it was made with malice." App. 18–19 (emphasis added).

Although these instructions included the *New York Times* formulation, the definition of the kind of malice necessary to support an award of presumed damages was plainly not limited to that standard. See, *e. g.*, *Bose Corp.* v. *Consumers Union of United States, Inc.*, —— U. S. ——, ——, n. 30 (1984); *St. Amant* v. *Thompson*, 390 U. S. 727, 731 (1968). Consequently, the trial court's conclusion that the instructions did not satisfy *Gertz* was correct and the Vermont Supreme Court's determination that *Gertz* was inapplicable was necessary to its decision that the trial court erred in granting the motion for a new trial. We therefore turn to our reasons for rejecting the Vermont Supreme Court's conclusion.

III

A

New York Times v. *Sullivan*, 376 U. S. 254, is the well-

spring for this Court's First Amendment libel jurisprudence. To shield the citizen-critic of government and nuture the "uninhibited, robust, and wide-open" debate on public issues that is the lifeblood of a democratic people, the Court set forth in that case a federal constitutional rule delimiting a State's power to award damages in libel actions brought by public officials against critics of their official conduct. Recovery must be premised on the now-familiar "actual malice" standard—a clear and convincing showing that the defendant knew the defamatory statement was false or subjectively entertained serious doubt as to the truth of the statement. 376 U. S., at 280. This standard had its genesis in our recognition of two principles. The crucial, but often overlooked, first step in *New York Times* v. *Sullivan* was recognition that defamation law regulates speech and thus implicates the guarantees of the First Amendment. *Id.*, at 269 ("Libel . . . can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment"). The second step was recognition that protection for robust debate of public issues and sharp criticism of official conduct is "the central meaning of the First Amendment" in our democratic polity. *Id.*, at 273; see also *id.*, at 274.

Our goal in implementing these principles through the actual malice standard was not immunization of false statements of fact as such; false statements arguably have no intrinsic First Amendment value. See *Gertz* v. *Robert Welch, Inc.*, 418 U. S., at 340. Rather, we sought to instill in all who spoke in good faith the confidence that their criticism of official conduct would not result in eventual liability. This guarantee provides the breathing space necessary to foster the vital criticism of official conduct that is not false but is so easily chilled by a rule permitting a public official to recover for damage to reputation based merely upon a showing of falsehood. See *New York Times* v. *Sullivan*, *supra*, at 278.

The actual malice standard of *New York Times* v. *Sullivan* thus largely reflects a judgment about the likelihood of self-censorship under a regime imposing liability for political speech based on no more than a test of its accuracy in the courtroom. As a matter of human nature, James Madison noted, "[s]ome degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press." 4 Elliot's Debates 571 (1876). See also *Cantwell* v. *Connecticut*, 310 U. S. 296, 310 (1940) ("To persuade others to his own point of view, the pleader, as we all know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement"); *Beauharnais* v. *Illinois*, 343 U. S. 250, 286–287 (1952) (Douglas, J., dissenting); *Herbert* v. *Lando*, 441 U. S. 153, 171–172 (1979). Because the "erroneous statement is inevitable in free debate . . . [it] must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'" *New York Times* v. *Sullivan*, *supra*, at 271–272, quoting *NAACP* v. *Button*, 371 U. S. 415, 433 (1963); See *Bose Corp.* v. *Consumers Union of United States, Inc.*, —— U. S., at ——.

Even if the erroneous assertion were not the inevitable companion of the truthful one in robust discourse, the difficulty of litigating the question of "truth" would, we suggested in *New York Times* v. *Sullivan*, still stand as a daunting deterrent. 376 U. S., at 279. Our cases in the two decades since that decision bear out this perception about the risks of a judicial test of truth. Often the spoken or written word will capture a judgment, inference or interpretation the "truth" of which is not readily susceptible to adjudication. See, *e. g.*, *Bose Corp.* v. *Consumers Union*, *supra*, at ——; *Time, Inc.* v. *Pape*, 401 U. S. 279, 290 (1971) (protecting statement that "amounted to one of a number of possible rational interpretations of a document that bristled with ambiguities"). "Truth" will often be a matter of degree or context. See *Greenbelt Cooperative Publishing Association* v.

Bressler, 398 U. S. 6, 14 (1970). Particularly when we debate the unwisdom of a policy or political point of view, our perspective on "truth" will be colored by the shared assumptions of the day; often what seems truth is but fashion. As Justice Harlan warned, "a nation which counts the *Scopes* trial as part of its heritage cannot so readily expose ideas to sanctions on a jury finding of falsity." *Time, Inc.* v. *Hill*, 385 U. S. 374, 406 (1967) (concurring in part and dissenting in part). The amorphous essence of political "truth" creates the risk of erroneous imposition of liability, and thereby chills debate, even when a jury seeks to discharge its duty in good faith. When the speaker is unpopular and the jury hostile, a rule of law permitting the imposition of liability for mere inaccuracy gives the jury *carte blanche* to oppress.

The aversion to a judicial test of political truth also reflects a related judgment about the propriety of vesting an organ of government with such powers to say what the truth is.[2] "[T]he censorial power is in the people over the Government, and not in the Government over the people." James Madison, 4 Annals of Congress, p. 934 (1794). When we entrust to courts, to the government, the unfettered power to resolve ambiguous questions about the truth of political expression we cede a measure of our individual liberty and right of self-government and hazard a regime of imposed orthodoxy. That is why Justice Brandeis thought that "the fitting rem-

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[2] We intend no disapproval of the use of special verdict forms in a defamation case requiring the jury to make separate findings of falsity and actual malice. Within the context of the *New York Times* v. *Sullivan* standards such special verdicts may serve the salutary purpose of clarifying for the jury the components of its task and may thus discourage awards of liability based solely on a jury's disapproval of journalistic practices. And such special verdicts may provide the incidental benefit of permitting a public official or public figure to obtain a judgment that an alleged libel was false, even where that plaintiff does not prevail on the merits because actual malice is not proven. Such a result does not contravene First Amendment values when it is merely a by-product of considered application of the actual malice standard.

edy for evil counsels is good ones," *Whitney* v. *California*, 274 U. S. 357, 375 (1927) (Brandeis, J., concurring), and why Jefferson too thought that "these are far *safer* corrections than the conscience of the judge." Quoted in *Whitney* v. *California*, *supra*, at 375, n. 7 (Brandeis, J., concurring) (emphasis added). Sharp criticism and free trade in political ideas does not guarantee the discovery of political truth, but our Constitution embodies the judgment that it is far better to risk error than suffer tyranny. See generally *Linmark Associates, Inc.* v. *Willingboro*, 435 U. S. 85, 97 (1977).

Thus we sought in *New York Times* v. *Sullivan* to embolden the citizen-critic of government, to remove the "pall of fear and timidity" imposed by the Damoclean threat of damages for a sharp criticism a court might later label erroneous. 376 U. S., at 278. It was our judgment then, and it has remained our judgment to this day, that to keep faith with the central meaning of the First Amendment we must give a wide berth to the citizen-critic; that vigorous public criticism, exposing official malfeasance and peculation, is essential to check the urge to tyranny in every government, see *Whitney* v. *California*, *supra*, 375 (Brandeis, J., concurring) ("the greatest threat to freedom is an inert people"); that robust debate of public issues is "a political duty," *id.*, and "the essence of self-government," *Garrison* v. *Louisiana*, 379 U. S. 64, 74–75 (1964); and that a rule of law imposing liability for unintentionally inaccurate criticism of a public official's conduct is irreconcilable with these central First Amendment values.

JUSTICE WHITE, who joined the opinion for the Court in *New York Times* v. *Sullivan*, now views the actual malice standard as an "improvident balance" with "grossly perverse" results. *Post*, at 3, 5 (WHITE, J., dissenting). He is particularly troubled by two "evils" he perceives to be consequences of the rule: "first, the stream of information about public officials and public affairs is polluted and often remains polluted by false information; and second, the reputation and

professional life of the defeated plaintiff may be destroyed by falsehoods that might have been avoided with a reasonable effort to investigate the facts." *Id.*, at 5.

These "evils" are chimeras. The criticism that the actual malice standard disserves the public interest by leaving misinformation uncorrected does not even acknowledge the crux of *New York Times* v. *Sullivan*: that extending constitutional protection to the unintentional inaccuracy will unleash valuable accurate expression on public issues that would otherwise be chilled by the risk of liability. 376 U. S., at 279. Our judgment then was that the release of this expression about public issues more than counterbalanced the detriment of the falsehoods left judicially uncorrected. No reason exists for so casual a disregard of this insight. Nor is it certain that inaccurate speech inevitably goes uncorrected and thereby misleads the public. The actual malice standard does not bar all judicial correction of falsehood. There is no reason, moreover, to presume that the public *believes* every false statement the courts do not correct. The effect of a falsehood will obviously depend on any number of factors, including the integrity of the source, the success of the public official in rebutting the charge, and the possibility of third-party rebuttals.

Even if these perceived "evils" were more substantial than spectral, the proposal to abandon the actual malice standard of *New York Times* v. *Sullivan* is a cure far worse than the disease. To guarantee public officials a judicial forum to vindicate their reputations, the nation would be required to endure the effective return of the seditious libel prosecution. Our history and experience should make clear that, in the hands of a public official, a libel suit is often a truncheon wielded to cow the rising voices of dissent. *E. g.*, *New York Times* v. *Sullivan*, *supra*, at 256; *The Trial of Mr. John Peter Zenger*, 17 How. St. Tr. 675 (1735). See also *Garrison* v. *Louisiana* 379 U. S. 64; *St. Amant* v. *Thompson*, 390 U. S. 727. Given the risks inherent in subjecting political

speech to a judicial test of truth, returning such power to public officials will surely chill speech crucial to First Amendment values. Protection of this speech crucial to our democracy may require some diminution in the ability of public officials to vindicate their reputations. It was our judgment in *New York Times* v. *Sullivan* that this cost was more than outweighed by the threat to democratic values that a contrary rule would impose.

Restrictions on damages such as those that seem to have been suggested as an alternative to the actual malice standard, see *post*, at 7 (WHITE, J., dissenting), would not ameliorate the threat and thereby shift the balance. It is far from clear that JUSTICE WHITE has suggested any restrictions more severe than those already embodied in the law. If a more stringent limit, perhaps elimination of presumed and punitive damages, is intended, such a limitation would at best tend to fortify only the most wealthy or powerful institutional speakers: "a small newspaper suffers equally from a substantial damage award, whether the label of the award be 'actual' or 'punitive.'" *Rosenbloom*, *supra*, at 52–53 (opinion of BRENNAN, J.). And it is far from certain that even the media powers would retain sufficient protection. In light of the increasing willingness of juries to compensate for emotional or psychic injury as an element of actual tort damages, a rule merely restricting presumed or punitive damages would not significantly diminish the deterrent potential of a standard of strict liability. See Smolla, 132 U. Pa. L. Rev., at 14–36.

Nor would a shift in emphasis from proof of defendant's state of mind to proof of the truth of the challenged speech reduce the chilling effect of litigation costs. Allegations of libel will often raise difficult historical or policy questions that can only be answered through complex, and consequently expensive, litigation. The would-be critic will be deterred not only by the cost of his or her own attorney fees but also by the prospect of liability for the other side's fees if the

jury verdict is unfavorable. See *post*, at 7. And this approach adds incremental deterrence because it encourages public officials to sue to vindicate their reputations and thereby increases the number of libel suits a would-be critic will be faced with defending. See *Rosenbloom*, *supra*, at 52–53 (opinion of BRENNAN, J.). Thus the suggested alternative would result in more suits and more victories for plaintiffs and would not significantly reduce the deterrent potential of damages that could be awarded in these suits.

BRW's

The proposal to abandon the standards of *New York Times* v. *Sullivan* reveals a preference for a pure public discourse—one cleansed by government of misleading political falsehood—even if that discourse is thin and tame. Such an approach breaks faith not only with the lessons of two decades of precedent but also with deeply held constitutional principles. When we countenance strict liability for false citizen criticism of a public official we leave to the courts, to government, the responsibility to say what political truth is. We doubt the *ability* of the people to make up their own minds through a process of robust debate. We doubt the wisdom—even the possibility—of such a process of robust debate. We embrace an ideological paternalism irreconcilable with our concept of self-government and we desert our most ennobling ideals. "Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. . . . If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. . . . Such must be the rule if authority is to be reconciled with freedom." *Whitney* v. *California*, 270 U. S. 357, 377 (Brandeis, J., concurring).

B

Our First Amendment libel decisions in the last two decades have in large measure been an effort to explore the implications of *New York Times* v. *Sullivan*.

One important theme has been recognition that the subject matter of robust debate essential to self-government has a far broader compass than speech critical of the official conduct of those who hold public office. Thus in *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130 (1967), we held that the actual malice standard applies to libel actions brought by "public figures," those "whose views and actions with respect to public issues and events are often of as much concern to the citizen as the attitudes and behavior of 'public officials' with respect to the same issues and events." *Id.*, at 162 (Opinion of Warren, C. J.). In *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29 (1971), we considered the possible extension of the actual malice standard of liability to suits brought by plaintiffs who were neither public officeholders nor public figures in the sense that term was used in *Curtis Publishing Co., supra.* Although a majority of the Justices were unable to agree on the appropriate standard, a plurality would have applied the actual malice test when the alleged libel concerned matters of "public or general interest," irrespective of the status of the plaintiff. 403 U. S., at 43 (opinion of BRENNAN, J.).

In *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, the Court returned to the *Rosenbloom* issue and, for two reasons, rejected the *Rosenbloom* plurality approach. This approach was thought unacceptably to impair the reputational interests of private individuals, who, unlike public officials or public figures, neither assume the risk of rough treatment by entering the public arena nor have ready access to the media to rebut false charges. 418 U. S., at 344–345. This approach was also thought to "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.'" 418 U. S., at 346 (citation omitted). Thus, *Gertz* concluded, a public official or public figure must show actual malice to obtain a judgment and actual damages but a private figure need not, even if the alleged libel concerns a matter of public interest or general importance.

The debate in *Rosenbloom* and *Gertz* focused largely on defining the circumstances under which protection of the central First Amendment values of robust debate of *public issues* should mandate plaintiffs to show actual malice to obtain a judgment and actual damages.[3] Those cases, however, also established other more comprehensive but less stringent limitations on the common law of defamation. Building on suggestions in *Rosenbloom*, see, *e. g.*, 403 U. S., at 73, (Harlan, J., dissenting), *Gertz* set forth a constitutional rule precluding the award of presumed and punitive damages in any libel action on less than a showing of actual malice. 418 U. S., at 350. *Gertz* also held that no plaintiff may obtain a judgment or actual damages on less than a showing of "fault." *Id.*, at 349. These limitations did not have their genesis only in the need to protect the citizen-critic or foster robust debate of public issues. They sprang from a more basic principle: even where the value of robust debate of public issues is not directly implicated, the First Amendment still limits the permissible boundaries of state libel law.

The need to protect the citizen-critic and robust public debate is certainly at the center of the First Amendment's meaning, but protection of these interests does not exhaust the scope of the free speech guarantee. "[O]ur cases have never suggested that expression about philosophical, social,

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[3] The Court in *Gertz* settled on differential treatment of public figures and private figures, even though speech about private figures might at times involve issues of public or general interest and thus implicate important First Amendment values. Two reasons were advanced. First, the State was thought to have a greater regulatory interest in protecting the reputation of private individuals. 418 U. S., at 344–345. Second, it was thought that significant First Amendment difficulties inhered in the proposed alternative of permitting courts to decide on a case-by-case basis what topics were of public or general interest. *Id.*, at 346. In light of these rationales, the differential treatment of public figures and private figures can be understood as reflecting a judgment that alleged libels of private figures are significantly less likely as a categorical matter to involve issues of public interest than are alleged libels of public figures.

artistic, economic, literary, or ethical matters—to take a nonexhaustive list of labels—is not entitled to full First Amendment protection." *Abood* v. *Detroit Board of Education*, 431 U. S. 209, 231 (1977). See also *Young* v. *American Mini Theaters*, 427 U. S. 50, 70 (1976); *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 501, 502 (1952); cf. *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U. S. 748, 765 (1976) ("So long as we preserve a predominantly free enterprise economy . . . the free flow of commericial information is indispensible"). The breadth of this protection evinces recognition that freedom of expression is not only essential to check tyranny and foster self-government but also intrinsic to individual liberty and dignity and instrumental in society's search for truth. See *Bose Corp.* v. *Consumers Union of United States, Inc.*, —— U. S. ——, —— (1984); *Whitney* v. *California*, 274 U. S. 357, 375 (1927) (Brandeis, J., concurring).

Our cases have proceeded from the general premise that all libel law implicates First Amendment values to the extent it deters true speech that would otherwise be protected by the First Amendment. *New York Times* v. *Sullivan*, 376 U. S., at 269. In this sense libel does not differ from state regulatory efforts to control obscenity, see *Miller* v. *California*, 413 U. S. 15, 23–24 (1973), ensure loyalty, see *Speiser* v. *Randall*, 357 U. S. 513 (1957), or pursue other public welfare goals. "When we deal with the complex of strands in the web of freedoms which make up free speech, the operation and effect of the method by which speech is sought to be restrained must be subjected to close analysis and critical judgment in the light of the particular circumstances to which it is applied." *Id.*, at 520.

In libel, no less than any other governmental effort to regulate unprotected speech, states may be required to use finer instruments to ensure adequate space for protected expression. This does not necessarily mean that actual malice as a standard of liability should apply in every libel action. Con-

versely, that an alleged libel might involve speech at some remove from the criticism of public officials for which we provided stringent protection in *New York Times* v. *Sullivan*, does not mean that such speech is entitled to no constitutional protection from the chilling potential of state libel law.

The ready availability and unconstrained application of presumed and punitive damages in libel actions is too blunt a regulatory instrument to satisfy the First Amendment, even when the alleged libel does not implicate directly the type of speech at issue in *New York Times* v. *Sullivan*. Justice Harlan made precisely this point in *Rosenbloom*:

> "At a minimum, *even in the purely private libel area*, I think the First Amendment should be construed to limit the imposition of punitive damages to those situations in which actual malice is proved. This is the typical standard employed in assessing anyone's liability for punitive damages where the underlying aim of the law is to compensate for harm actually caused, . . . and no conceivable state interest could justify imposing a harsher standard on the exercise of *those freedoms that are given explicit protection by the First Amendment*." 403 U. S., at 73 (Harlan, J., dissenting) (emphasis added).

See also *id.*, at 65 ("because the presence of such values dictates closer scrutiny of this aspect of state tort law than the Fourteenth Amendment would otherwise command, it may well be that certain rules, impervious to attack when applied to ordinary human conduct, may have to be altered or abandoned where used to regulate speech"); *New York Times* v. *Sullivan*, *supra*, at 269 ("Libel . . . can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment").

It was upon this broad principle that the Court in *Gertz* built the comprehensive requirements of "fault" and of a showing of actual malice as a prerequisite to recovery of presumed and punitive damages in every defamation action. The Court explained that state rules permitting presumed

and punitive damages conferred on juries "largely uncontrolled discretion" to assess damages "in wholly unpredictable amounts bearing no necessary relation to the actual harm caused." 418 U. S., at 350. Because the threat of such awards "unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms," the Court concluded that "the private defamation plaintiff who establishes liability under a less demanding standard than that stated by *New York Times* may recover only such damages as are sufficient to compensate him for actual injury." *Ibid.*

Since the decision in *Gertz*, we have applied its reasoning with respect to damages in excess of compensation for actual harm in other areas of the law. See, *e. g.*, *Electrical Workers* v. *Foust*, 442 U. S. 42, 48–52 (1979) (permitting employees to recover punitive damages for a union's breach of duty of fair representation is inconsistent with policies of the Railway Labor Act because such "unpredictable and potentially substantial" awards undermine the balance between the interest in compensating injured parties and the need to maintain a union's freedom and effectiveness in pursuing grievances); *Newport* v. *Fact Concerts, Inc.*, 453 U. S. 247, 270–271 (1981). These cases, like *Gertz*, recognize that "the alleged deterrence achieved by the punitive damage awards is likely outweighed by the costs—such as the encouragement of unnecessary litigation and the chilling of desirable conduct—flowing from the rule, at least when the standards on which the awards are based are ill-defined." *Smith* v. *Wade*, —— U. S. ——, —— (1984) (REHNQUIST, J., dissenting). See *id.*, at —— – —— (court opinion) (noting prevailing view that punitive damages may only be awarded for "'conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others,'" quoting Restatement (Second) of Torts § 908(2) (1977) (emphasis deleted)); *id.*, at —— (O'CONNOR, J., dissenting); *Silkwood* v. *Kerr-McGee Corp.*, —— U. S. ——, —— (1984); *id.* at ——

(BLACKMUN, J., dissenting); *id.*, at —— (POWELL, J., dissenting).

The First Amendment and the common law of libel share a long and variegated frontier. Our endeavor to chart that frontier has required us to explore the implications of the two principles recognized in *New York Times* v. *Sullivan*: first, that all libel law, like any other state effort to regulate speech, has the potential to chill protected expression; and second, that protection of robust debate of public issues is the central meaning of the First Amendment guarantee. When the alleged libel involves criticism of a public official or public figure these two principles coalesce to require actual malice as a standard of liability. When the alleged libel involves speech that falls outside these especially important categories, we have held that the Constitution permits the states significant leeway to compensate for actual damage to reputation. Nonetheless, we have held that the Constitution requires actual malice as a prerequisite to presumed and punitive damages because even where the central concerns of *New York Times* v. *Sullivan* are not present the First Amendment demands protection for a vast range of expression. It has remained the judgment of this Court since *Gertz* that this two-tier structure of protection best accomodates the values of the constitutional free speech guarantee and the states' interest in protecting reputation.

IV

The present case does not involve the question whether the full panoply of *New York Times* v. *Sullivan* protections applies to Dun & Bradstreet's credit report. Neither the parties nor the courts below have suggested that Respondent Greenmoss Builders should be required to show actual malice to obtain a judgment and actual compensatory damages.[4]

[4]JUSTICE POWELL'S fear that every defamation action "arising out of back-fence gossip or commercial incompetence will be subject to the same constitutional protections as speech upon matters of the greatest public

Nor do the parties question the requirement of *Gertz* that respondent must show fault to obtain a judgment and actual damages. The only question presented is whether a jury award of presumed and punitive damages based on less than a showing of actual malice is constitutionally permissible.

Gertz provides a forthright negative answer. To protect against inhibition of the vigorous exercise of First Amendment expression, 418 U. S., at 350, that case imposed a comprehensive constitutional rule conditioning any recovery of presumed and punitive damages upon a showing of actual malice. If the jury verdict in this case were to survive, therefore, the protective mantle of *Gertz* would have to be cut away to some extent. Following the analysis of the Vermont Supreme Court in this case, respondent urges that the protections of *Gertz* ought not apply to the speech at issue because Dun & Bradstreet is not a "media" defendant. JUSTICE POWELL in his separate opinion today urges a similar retraction of *Gertz* because the speech is "on an issue of purely private concern." *Post*, at 1 (POWELL, J., dissenting).[5]

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concern," *Post*, at 4 (POWELL, J., dissenting), is thus generally without foundation. It is not suggested that private plaintiffs in such actions be required to show actual malice in order to obtain a judgment and actual compensatory damages.

Only in the infrequent case where an alleged libel of a private figure involves an issue of public interest is it plausible to suggest that back-fence gossip will be entitled to the same protection as speech upon matters of public concern. That is a consequence, however, of the reduced First Amendment protection afforded in that circumstance as a result of the perceived strength of the state interest in protecting repuation in such cases, the perceived First Amendment difficulties of case-by-case judicial determination of whether speech concerns public issues, and the categorical decision that in most cases alleged libel of private figures will not involve matters of great public concern. See note 3 *supra*. Except for this rare situation, JUSTICE POWELL'S view is simply inaccurate.

[5] Contrary to JUSTICE POWELL'S suggestion, see *post*, at 4, today's decision does not repudiate the common law as it has developed in the states. Thirty-five of the 42 states to have considered the issue, have applied *Gertz* comprehensively to all libel actions and have not drawn a media/nonmedia

Respondent seeks to prune *Gertz* in part on the basis of the nature of the speaker and in part on the basis of the content of the speech. JUSTICE POWELL seeks the same result

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distinction. *Beneficial Management Corp.* v. *Evans*, 421 So. 2d 92 (Ala. 1982); *Antwerp Diamond Exchange* v. *Better Business Bureau*, 130 Arizona 523, 637 P. 2d 733 (1981); *Moriarity* v. *Lippe*, 162 Conn. 371, 294 A. 2d 326 (1972); *Jackson* v. *Filliber*, 281 A. 2d 604 (Del. 1971); *Smith* v. *Russel*, 456 So. 2d 462 (Fla. 1984); *Williams* v. *Church's Fried Chicken*, 158 Ga. App. 26, 279 S. E. 2d 465 (Ga. 1981); *Rodrigues* v. *Nishiki*, 65 Haw. 430, 653 P. 2d 1145 (1982); *Millsaps* v. *Bankers Life Co.*, 35 Ill. App. 3d 735, 342 N. E. 2d 329 (1976); *Elliot* v. *Roach*, 409 N. E. 2d 661 (Ind. App. Dist. 1980); *Anderson* v. *Low Rent Housing Commission*, 304 N. W. 2d 239 (Iowa 1981); *Hanrahan* v. *Horn*, 232 Kan. 531, 657 P. 2d 561 (1983); *Sparks* v. *Boone*, 560 S. W. 2d 236 (Ky. App. 1977); *Wattigny* v. *Lambert*, 453 So. 2d 1272 (La. App. 1984); *Michaud* v. *Inhabitants of the Town of Livermore Falls*, 381 A. 2d 111 (Me.1978); *Jacron Sales Co.* v. *Sindorf*, 276 Md. 580, 350 A. 2d 688 (1976); *Aarco, Inc.* v. *Baynes* 462 N. E. 2d 1107 (Mass. 1984); *Grebner* v. *Runyon*, 347 N. W. 2d 741 (Mich. App. 1984); *Newson* v. *Henry*, 433 So. 2d 817 (Miss. 1983); *Ramacciotti* v. *Zinn*, 550 S. W. 2d 217 (Mo. App. 1977); *Williams* v. *Pasma*, 656 P. 2d 212 (Mont. 1982); *Dairy Stores, Inc.* v. *Sentinel Pub. Co.*, 191 N. J. Super. 202, 465 A. 2d 953 (1983); *Trails West, Inc.* v. *Wolff*, 32 N. Y. 2d 207, 344 NYS. 3d 863, 298 N. E. 2d 52 (1973); *Angel* v. *Ward*, 43 N. C. App. 288, 258 S. E. 2d 788 (1979); *Hahn* v. *Kotten*, 43 Ohio St.2nd. 237, 331 N. E. 2d 713 (1975); *Wright* v. *Haas*, 586 P. 2d 1093 (Okla.1978); *Fox* v. *Kahn*, 421 Pa.563, 221 A. 2d 181 (1966); *De Carvalho* v. *Dasilva*, 414 A. 2d 806 (R. I. 1980); *Scott* v. *McCain*, 272 S. C. 198, 250 S. E. 2d 118 (1978); *Wollman* v. *Graff*, 287 N. W. 2d 104 (SD 1980); *Moore* v. *Bailey*, 628 S. W. 2d 431 (Tenn. App. 1981); *Ryder Truck Rentals, Inc.* v. *Latham*, 593 S. W. 2d 334 (Tex. Cir. App. 1979); *Fleming* v. *Moore*, 221 Va. 884, 275 S. E. 2d 632 (1981); *Bender* v. *City of Seattle*, 99 Wash. 2d 582, 664 P. 2d 492 (1983); *Mauck* v. *City of Martinsburg*, 280 S. E. 2d 216 (W. Va. 1981); *Phifer* v. *Foe*, 443 P. 2d 870 (Wyo. 1968). The District of Columbia has also applied the actual malice standard to cases involving non-media defendants. *Nader* v. *De Toledano*, 408 A. 2d 31 (D. C. App. 1979). The states that have declined to extend the actual malice standard to nonmedia defendants include: *Roemer* v. *Retail Credit Co.*, 44 Cal. App. 3d 926, 119 Cal. Rptr. 82 (1975); *Rowe* v. *Metz*, 195 Colo. 424, 579 P. 2d 83 (1978); *Stuempges* v. *Park Davis & Co.*, 297 N. W. 2d 252 (Minn. 1980); *Gengler* v. *Phelps*, 92 N. M. 465, 589 P. 2d 1056 (N. M. App. 1978); *Wheeler* v. *Green*, 286 Or. 99, 593 P. 2d 777 (1979); *Denny* v. *Mertz*, 106 Wis. 2d 636, 318 N. W. 2d 141 (1982).

solely on the basis of the content of the speech. We find both approaches unworkable and irreconcilable with our precedents. More fundamentally, we reject them because they contravene basic First Amendment values. Insofar as respondent's approach would draw distinctions based on the nature of the speaker, it flouts the First Amendment guarantee of an equal right of expression. See *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 777 (1978). Insofar as both approaches would limit protection based on the content of this speech, they share a flawed and incomplete vision of the breadth of the guarantee of free expression as a limit on presumed and punitive damages in state defamation law. Respondent's effort to blend these two rationales into an argument for denying Dun & Bradstreet the protections of *Gertz* must likewise fail. Only legal alchemy could tranform these independently insufficient rationales into a legitimate justification for denying the type of speech at issue in this case any protection from the chill of unrestrained presumed and punitive damage awards.

A

"The inherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union or individual." *First National Bank of Boston* v. *Bellotti*, *supra*, at 777. This Court, beginning with *New York Times* v. *Sullivan* itself, has honored this salutary principle by applying constitutional limits on state standards of liability in suits against "nonmedia" defendants as well as media defendants. 376 U. S., at 254 n.*, 286.[6] Nonetheless, respondent draws

[6] See *Henry* v. *Collins*, 380 U. S. 356 (1965); *Garrison* v. *Louisiana*, 379 U. S. 64 (1967); *Saint Amant* v. *Thompson*, 390 U. S. 727 (1968). See also *Letter Carriers* v. *Austin*, 418 U. S. 264 (1974) (applying *New York Times* privilege to defamation actions arising from labor disputes); *Linn* v. *United Plant Guard Workers*, 383 U. S. 53 (1966) (labor dispute); *Pickering* v. *Board of Education*, 391 U. S. 563 (1968) (teacher dismissal based on

on language in *Gertz* referring to the dangers of "media self-censorship," 418 U. S., at 342,[7] to argue that "*Gertz* is patently limited only to cases in which there is a media defendant," Brief 26, and that Dun & Bradstreet is not such a defendant.

We reject any attempt to superimpose a "media/nonmedia" distinction upon the structure of constitutional libel law. The distinction is not self-executing and formidable First Amendment difficulties lurk in the definitional questions such an approach would generate. An attempt to characterize Petitioner Dun & Bradstreet illustrates the point. Like an account of judicial proceedings in a newspaper, magazine or news broadcast, a statement in petitioner's reports that a particular company has filed for bankruptcy is a report of a timely news event conveyed to members of the public by a business organized to collect and disseminate such information. Thus it is not obvious why petitioner should find less protection in the First Amendment than do established print or electronic media. The Vermont Supreme Court nonetheless characterized petitioner as a nonmedia defendant entitled to less protection because it is "in the business of selling financial information to a limited number of subscribers who have paid substantial fees for [its] services." 461 A. 2d, at 417. The court added that "[t]here is a clear distinction between a publication which disseminates news for public consumption and one which provides specialized information to a selective, finite audience." *Ibid.*

No clear line consistent with First Amendment principles can be drawn on the basis of the criteria upon which the court relied. That petitioner's information is "specialized" or that

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newspaper letter critical of school board). But see *Hutchinson* v. *Proxmire*, 443 U. S. 111, 116, n. 16 (1979).

[7] See also *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 342 (1974) (need for a "vigorous and uninhibited press"); *id.*, at 348 (Constitution "shields the press and broadcast media from the rigors of strict liability for defamation").

its subscribers pay "substantial fees" hardly distinguishes these reports from articles in many publications that would surely fall on the "media" side of the line the Vermont Supreme Court seeks to draw. Few published statements are of universal interest and few publications are distributed without charge. Much fare of any metropolitan daily is specialized information for which a selective, finite audience pays a fee. Nor is there any reason to treat petitioner differently than a more widely circulated publication because it has "a limited number of subscribers." Indeed, it would be paradoxical to increase protection to statements injurious to reputation as the size of their audience, and hence their potential to injure, grows. Cf. *Keeton* v. *Hustler Magazine, Inc.*, —— U. S. ——, —— (1984). And the "media/nonmedia" distinction would likely be born an anachronism; revolutionary technologies for collecting and disseminating information—such as subscription data bases—simply cannot be fit into categories of "media" or "nonmedia" for purposes of defamation law.[8]

These line-drawing difficulties demonstrate that efforts to define the difference between media and nonmedia defendants in defamation suits would, in practice, substantially com-

[8] Owing to transformations in the technological and economic structure of the communications industry, there has been an increasing convergence of what might be labeled "media" and "nonmedia." The coming of inexpensive short-run presses, personal computers, cable television, videotext, xerography, direct broadcast satellites and video cassettes has resulted in a simultaneous expansion of person-to-person communications into group communications, and, at the other end of the communications spectrum, increasing decentralization and diversification of the mass media. Pool, "The New Technologies: Promise of Abundant Channels at Lower Cost," in What's News: The Media in American Society 87 (1981). See also I. Pool, Technologies of Freedom (1983); FTC, Media Policy Session: Technology and Legal Change (1979); Subcommittee on Telecommunications, Consumer Protection, and Finance of the House Committee on Energy and Commerce, Telecommunications in Transition: The Status of Competition in the Telecommunications Industry, 97 Cong., 1st Sess. (Comm. Print 1981).

plicate defamation law, see Smolla, 132 U. Pa. L. Rev., at 90, and would necessarily involve the courts in precisely the kinds of *ad hoc* content-based judgments *Gertz* sought to prevent. 418 U. S., at 343–344, 346; see also *Branzenburg* v. *Hayes*, 408 U. S. 665, 703–705, and n. 40 (1972). Cf. *Police Department* v. *Mosley*, 408 U. S. 92, 95 (1972). To the extent that those judgments turned on the public interest in the speaker's message as reflected in the size of the audience or the subject matter of the speech, the "media/nonmedia" distinction would revive the kind of inquiry into the importance of the speaker's message rejected by the Court in *Gertz*. See *supra*, at ——. See generally Note, 95 Harv. L. Rev. 1876, 1884–1885 (1982).

More fundamentally, respondent's argument that the *Gertz* protections ought to be limited to established media misapprehends our cases. Recognizing the critical role the press has historically played in gathering and disseminating information for the benefit of the public, we have repeatedly emphasized the need for careful judicial scrutiny of government actions that impede the exercise of that function or that single out the press for differential treatment.[9] We protect the press to ensure the vitality of First Amendment guarantees. This solicitude should not, however, be interpreted as

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[9] See, *e. g.*, *Minneapolis Star* v. *Minnesota Comm'r of Revenue*, —— U. S. ——, —— (1983); *Columbia Broadcasting System, Inc.* v. *FCC*, 453 U. S. 367, 395 (1981); *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241 (1974); *Branzenburg* v. *Hayes*, 408 U. S. 665, 707 (1972); *New York Times Co.* v. *United States*, 403 U. S. 713 (1971); *Mills* v. *Alabama*, 384 U. S. 214, 218–219 (1966); *Grosjean* v. *American Press Co., Inc.*, 297 U. S. 233, 250 (1936). See also *Herbert* v. *Lando*, 441 U. S. 153, 180–199 (1979) (BRENNAN, J., dissenting in part); *Saxbe* v. *Washington Post Co.*, 417 U. S. 843, 850 (1974) (POWELL, J., dissenting); *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations*, 413 U. S. 376, 393 (1973) (BURGER, C. J., dissenting); *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 390 (1969); *Time, Inc.* v. *Hill*, 385 U. S. 374, 389 (1967); Stewart, "Or of the Press," 26 Hastings L. J. 631 (1975).

endorsement of the principle that speakers other than the press deserve lesser First Amendment protection.

> "Liberty 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. . . . Freedom of the press is a 'fundamental personal right' which 'is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.' *Lovell* v. *Griffin*, 303 U. S. 444, 450, 452 (1938). . . . The informative function asserted by representatives of the organized press . . . is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists." *Branzenburg* v. *Hayes*, *supra*, at 704–705.

The First Amendment provides to all an equal guarantee of freedom of speech; "In the realm of protected speech, the legislature is constitutionally disqualified from dictating . . . the speakers who may address a public issue." *First National Bank of Boston* v. *Bellotti*, *supra*, at 784–785. See *Bridges* v. *California*, 314 U. S. 252, 277–279 (1941). This guarantee ensures every member of society an equal right as a speaker to dignity, respect, and the opportunity to participate in self-government. See, *e. g.*, *Carey* v. *Brown*, 447 U. S. 455, 459–463 (1980); *Police Department* v. *Mosley*, 408 U. S. 92; *Cohen* v. *California*, 403 U. S. 15, 24 (1971); *Whitney* v. *California*, 274 U. S. 357, 375–377 (Brandeis, J., concurring). This guarantee also protects the rights of listeners to "the widest possible dissemination of information from diverse and antagonistic sources." *Associated Press* v. *United States*, 326 U. S. 1, 20 (1945). In light of the "increasingly prominent role of mass media in our society, and the awesome power it has placed in the hands of a select few," *Gertz*, *supra*, at 402 (WHITE, J., dissenting), protection for the

speech of nonmedia defendants is essential to ensure a diversity of perspectives. See J. Barron, Freedom of the Press for Whom? (1973). "Uninhibited, robust and wide-open" debate, *New York Times* v. *Sullivan*, 376 U. S., at 370, among nonmedia speakers is as essential to the fostering and development of an individual's political thought as is such debate in the mass media. See J. Klapper, The Effects of Mass Communications (1960).

Accordingly, in the context of defamation law, the rights of the institutional press, however defined, are no greater and no less than those enjoyed by other individuals or organizations engaged in the same activities. Compare *Globe Newspaper Co.* v. *Superior Court*, 457 U. S. 596, 603 (1982) (recognizing that "the press and general public have a constitutional right of access to criminal trials") with *Pell* v. *Procunier*, 417 U. S. 817, 834 (1974) (concluding that First Amendment does not "accord the press special access to information not shared by members of the public generally"). That petitioner might or might not be described as a media defendant can have no bearing on the degree of constitutional protection from state defamation law it receives.

B

In large part the argument for denying petitioner the protections of *Gertz* rests on an evaluation of the worth, in First Amendment terms, of credit reporting. The Vermont Supreme Court and JUSTICE POWELL both contend that credit reports have no relevance to the "uninhibited, robust and wide-open debate of public issues" that *New York Times* v. *Sullivan* was intended to protect. For this reason they would deny such speech any First Amendment protection in the libel context. This approach is built on a fallacy. No one has argued here that respondent need meet the *New York Times* v. *Sullivan* standard of showing actual malice to obtain a judgment and actual compensatory damages. And it need not be established that a credit report is political

speech at the center of the First Amendment guarantee to justify affording the lesser protections of *Gertz* to Dun & Bradstreet. The comprehensive requirement of a showing of actual malice as a prerequisite to obtaining *presumed and punitive* damages was intended to protect a range of expression far broader than that directly implicated in *New York Times* v. *Sullivan*, see *supra*, at 11–15.

We have identified certain narrow categories of expression that "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572 (1942); see *Bose Corp.* v. *Consumers Union of United States, Inc.*, —— U. S. ——, ——. Only if the general category of speech about which we are concerned in this case—credit reporting—were of a similar nature, so that irrespective of truth or falsity it would be entitled to no constitutional protection, could liability for defamatory speech in this category be left entirely free of constitutional constraints. If credit reports do not fall into such an unprotected category, then indiscriminate application of presumed and punitive damages for defamatory credit reports will "inhibit the vigorous exercise of First Amendment freedoms," *Gertz*, 418 U. S., at 350, by chilling significant expressive activity that has First Amendment value. Under these circumstances, as *Gertz* held, the free speech guarantee is implicated to the extent of limiting such damage awards to cases in which actual malice is proved.[10]

[10] JUSTICE POWELL today suggests that the *Gertz* restrictions on presumed and punitive damages were not intended to extend to all speech but merely to "public expression directly relevant to the effective operation of our system of democratic self-government." *Post*, at 5. One searches *Gertz* in vain for a single word to support this narrow reading of the scope of its limits on presumed and punitive damages. *Gertz* could not have been grounded in such a premise. Distrust of placing in the courts the power to decide what speech was relevant to self-government is precisely the rationale *Gertz* offered for rejecting the *Rosenbloom* plurality approach. It

It cannot seriously be suggested that because credit reports involve speech on commercial or economic matters they fall into any of the narrow categories of unprotected expression. This Court has consistently rejected the argument that speech is entitled to diminished First Amendment protection simply because it concerns economic matters or is in the economic interest of the speaker or the audience. See, *e. g.*, *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 501–502; *AFL* v. *Swing*, 312 U. S. 321, 325–326 (1941); *Thornhill* v. *Alabama*, 310 U. S. 88, 101–103 (1940); see also *Abood* v. *Detroit Bd. of Education*, 431 U. S. 209, 231–232, and n. 28. Speech about commercial or economic matters, even if not directly implicating the values that require protection of the citizen-critic, is an important part of our public discourse. This we made clear in the context of discussing labor relations speech in *Thornhill* v. *Alabama*, *supra*.

> "It is recognized now that satisfactory hours and wages and working conditions in industry and a bargaining position which makes these possible have an importance which is not less than the interests of those in the business or industry directly concerned. The health of the present generation and of those as yet unborn may depend on these matters, and the practices in a single factory may have economic repercussions upon a whole region and affect widespread systems of marketing. The merest glance at state and federal legislation on the subject demonstrates the force of the argument that labor

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would have been incongruous for the Court to go on to circumscribe the protection against presumed and punitive damages by reference to a judicial judgment as to whether the speech at issue concerned public expression relevant to self-government. We adhere to the understanding expressed in *Gertz* that presumed and punitive damages may never be awarded on less than a showing of actual malice.

Indeed, JUSTICE POWELL'S opinion today is fairly read as embracing the approach of the *Rosenbloom* plurality to deciding when the Constitution should limit state defamation law. The limits he would impose, however, are less stringent than those suggest by the *Rosenbloom* plurality.

> relations are not matters of mere local or private concern. Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effect and intelligent use of the processes of popular government to shape the destiny of modern industrial society." 310 U. S., at 102–103.

Similarly, in the context of discussing commercial advertising we have made clear that "the free flow of commercial information is indispensable . . . to the proper allocation of resources in a free enterprise system, [and] to the formation of intelligent opinions as to how that system ought to be regulated or altered." *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U. S. 748, 765.

Much of what was said in *Thornhill* and *Virginia State Board of Pharmacy* applies to the speech of Dun & Bradstreet at issue here. A credit report announcing the bankruptcy of a local company is information of potentially great concern to residents of the community where the company is located; such a bankruptcy "in a single factory may have economic repercussions for a whole region." And knowledge about solvency and the effect and prevalence of bankruptcy certainly would inform citizen opinions about questions of economic regulation.

Even if the credit report is considered purely a matter of private discourse, it falls well within the range of valuable expression for which the First Amendment demands protection. Our free market economy is predicated on the assumption that human welfare will be improved through informed private decisionmaking. In this respect, ensuring broad distribution of accurate financial information comports with the fundamental First Amendment premise that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Associated Press* v. *United States*, 326 U. S. 1, 20. "So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made

through numerous private economic decisions. . . . To this end, the free flow of commercial information is indispensible." *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U. S. 748, 765.

The economic information Dun & Bradstreet disseminates in its credit reports makes an undoubted contribution to this private discourse essential to our wellbeing in a free market economy. Justice Douglas has made precisely this point:

> "The language of the First Amendment does not except speech directed at private economic decisionmaking. Certainly such speech could not be regarded as less important than political expression. When immersed in a free flow of commercial information, private sector decisionmaking is at least as effective an institution as are our various governments in furthering the social interest in obtaining the best general allocation of resources. . . . The financial data circulated by Dun & Bradstreet, Inc., are part of the fabric of national commercial communication." *Dun & Bradstreet* v. *Grove*, 404 U. S. 898, 905–906 (1971) (Douglas, J., dissenting from denial of certiorari).

Justice Douglas further noted that "[p]resumably the credit reports published by the petitioner facilitate through the price system the improvement of human welfare at least as much as did the underlying disagreement in our most recent libel opinion, *Rosenbloom* v. *Metromedia, Inc. supra*, arising out of a squabble over whether a vendor had sold obscene magazines." *Id.*, at 905, n. 9.

Our cases permit some diminution in the degree of First Amendment protection afforded one category of speech about economic or commercial matters. "Commercial speech"—defined as advertisements that "do no more than propose a commercial transaction," *Pittsburgh Press Co.* v. *Human Relations Comm'n*, 413 U. S. 376, 385 (1973)—may be more closely regulated than other types of speech. Advertising is of course of significant First Amendment value, *Virginia*

State Board of Phramacy, supra, but more extensive regulation is countenanced because, since "the advertiser knows his product and has a commcercial interest in its dissemination, we have little worry that regulation to assure truthfulness will discourage protected speech." *Bates* v. *State Bar of Arizona,* 433 U. S. 350, 383 (1977). Respondent and JUSTICE POWELL both argue that these commercial advertising decisions support the denial of *Gertz* protections to credit reports. This argument misses the mark.[11]

The credit reports of Dun & Bradstreet bear none of the earmarks of commercial speech that might be entitled to somewhat less rigorous First Amendment protection. In *every* case in which we have permitted more extensive state regulation on the basis of a commercial speech rationale the speech being regulated was pure advertising—an offer to buy or sell goods or encouraging such buying and selling.[12]

[11] JUSTICE POWELL'S suggestion that this speech is solely commercial in nature undercuts his argument that presumed damages should be unrestrained in actions like this one because actual harm will be difficult to prove. See *post,* at 2 (POWELL, J., dissenting). If the credit report is viewed as commercial expression, proving that actual damages occurred is relatively easy. For instance, if an alleged libel concerning a bank's customer causes the bank to lower the credit limit or raise the interest rate charged that customer, the damages caused by such action should at worst be no more difficult to ascertain than many other traditional elements of tort damages. See, *e. g., Russell* v. *City of Wildwood,* 428 F. 2d 1176, 1181 (CA3 1970) (future earnings). Although there may be some elements of damage that would be more difficult to evaluate, the same is true in any tort action. See, *e. g., Seffert* v. *Los Angeles Transit Lines,* 56 Cal,2d 498, 509, 364 P. 2d 337, 344 (1961) (Traynor, J., dissenting) (pain and suffering). The commercial context does not increase the need for presumed damages, but if anything reduces the need to presume harm.

[12] See, *e. g., Bolger* v. *Young Products Corp.,* —— U. S. —— (1983) (contraceptive advertising); *In re R. M. J.,* 455 U. S. 191 (1982) (lawyer advertising); *Metromedia, Inc.* v. *City of San Diego,* 453 U. S. 490 (1981) (commercial billboard advertising); *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n,* 447 U. S. 530 (1980) (advertising of electricity); *Friedman* v. *Rogers* 44o U. S. 1 (1979) (optometrist advertising); *Ohralik* v. *Ohio State Bar Ass'n,* 436 U. S. 447 (19780 (lawyer's solicitation of busi-

Credit reports are not commercial advertisements for a good or service or a proposal to buy or sell such a product. We have been extremely chary about extending the "commercial speech" doctrine beyond this narrowly circumscribed category of advertising because often vitally important speech will be uttered to advance economic interests and because the profit motive making such speech hardy dissipates rapidly when the speech is not advertising. Compare *Central Hudson Gas & Elec. Corp.* v. *Public Service Comm.*, 447 U. S. 557 (1980) with *Consolidated Edison Co.* v. *Public Service Comm'n*, 447 U. S. 530 (1980). Dun & Bradstreet's credit reports are not infused with the irrepressibility that flows from the merchant's desire to sell. It is worth noting in this regard that the common law of most states, although apparently not of Vermont, 461 A. 2d, at 419, recognizes a qualified privilege for reports like that at issue here. See Maurer, Common Law Defamation and the Fair Credit Reporting Act, 72 Geo. L. Rev. 95, 99–105 (1983). The privilege typically precludes recovery for false and defamatory credit information without a showing of bad faith or malice, a standard of proof which is often defined according to the *New York Times* formulation. See, *e. g.*, *Datacon, Inc.* v. *Dun & Bradstreet*, 465 F. Supp. 706, 708 (ND Tex. 1979). The common law thus recognizes that, at least with respect to libel's chill, credit reporting is a less sturdy species of speech; this accumulated learning is worthy of respect.

Dun & Bradstreet's credit reports fall well within the ambit of protected First Amendment speech. Even if not at "the essence of self-government," *Garrison* v. *Louisiana*, 379 U. S., at 74–75, this speech is important to both our public discourse and our private welfare. That its motivation might be the economic interest of the speaker or listeners does not diminish its First Amendment value. See *Consolidated Edison Co.* v. *Public Service Comm'n supra.*

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ness); *Bates* v. *State Bar of Arizona*, 433 U. S. 350 (1977) (lawyer adverstising).

Whether or not such speech is sufficiently central to First Amendment values to require actual malice as a standard of liability, this speech certainly falls within the range of speech that *Gertz* sought to protect from the chill of unrestrained presumed and punitive damage awards.

Of course, the commercial context of Dun & Bradstreet's reports is relevant to the constitutional analysis insofar as it implicates the strong state interest "in protecting consumers and regulating commercial transactions," *Ohralik* v. *Ohio State Bar Ass'n*, 436 U. S. 447, 460 (1978). Cf. *Bolger* v. *Young Drug Products Corp.*, —— U. S. ——, —— (1983) (STEVENS, J., concurring in the judgment). The special harms caused by inaccurate credit reports, the lack of public sophistication about or access to such reports, and the fact that such reports by and large contain statements that are fairly readily susceptible of verification, all may justify some prophylactic regulation reasonably designed to prevent the social losses caused by false credit reports. See *Virginia State Board of Pharmacy*, *supra*, at 771–773, and n. 24; *Central Hudson Gas & Electric Corp.*, *supra*, at 573–576 (BLACKMUN, J., concurring in the judgment).[13] And in the libel context, the states' regulatory interest in protecting

[13] See also Maurer, 72 Geo. L. J., at 126:

"Under *Gertz*, plaintiffs may be compensated for actual damages upon establishing the fault of the defendant; to obtain punitive damages, a plaintiff must demonstrate malice. Sections 1681o and 1681n [of the Fair Credit Reporting Act] are consistent with these constitutional principles. Section 1681o provides for recovery of actual damages upon a showing of negligence, which presumably satisfies the *Gertz* requirement of fault. Section 1681n authorizes punitive damages for willful violation of the Act. Whether section 1681n is equivalent to *Gertz*'s malice standard depends on whether a court would consider it to be possible to fail willfully to follow reasonable procedures and yet not manifest reckless disregard for the truth. Such a fine distinction appears unworkable as a categorical test, so that section 1681n would likely be regarded as harmonious with the principles of *Gertz*. Thus, the Act appears to provide the degree of protection for commercial speech currently required under first amendment doctrine" (footnotes omitted).

reputation is served by rules permitting recovery for actual compensatory damages upon a showing of fault. Any further interest in deterring potential defamation by case-by-case judicial imposition of presumed and punitive damage awards on less than a showing of actual malice simply exacts too high a toll on First Amendment values. Credit reports are speech of sufficient First Amendment value to warrant protection from the deterrent effect of unconstrained presumed and punitive damage awards. Accordingly, respondent may recover for any actual damage it can show resulted from Dun & Bradstreet's negligently false credit report, but must show actual malice to receive presumed or punitive damages.

V

The judgment of the Vermont Supreme Court is reversed and the case remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

WJB's new draft

1. Still rejects any distinction between media & non-media Δs. Malice required in all cases - p 3

2. Redefines "malice" more strictly - 6

3. Defends NYT v Sullivan in flowery language - pp. 5-12. (This expansion of WJB's op. is prompted by BRW's attack on malice standard)

4. Rosenbloom - p 13

not re

5. Gertz - precluded presumed or punative damages in "any libel action" - 14 (Repeated Did I say this? See op. at p 350. See Gertz p 20 slip op for what I said about private persons. pp 20-21.

Gertz - "standard of liability" left to States - 23, 24.

As to presumed & punative damages, see p 25. But this appeared to suit by private individual vs a media Δ + whose subject was of public interest

Reputedly Attributes to my op. views not expressed in it
("Straw man" dissent)

1. Equates libel law to obscenity law - 4

2. Harlan on "punitive damages" - 5

3. Relies on Gertz as to unduly of punitive damages - 5,6

4. States what Gertz expressly held as to "punitive damages" - 6 (answer?)

5. BRW & CJ would make no distinction between media & non-media Δ's - 10 (Is this true?)

6. Criticizes my op. in Gertz for not addressing difference but matter of public & private concern - 11 (answer)

7. Criticizes me for "balancing" test - 11 (But WJB stated wholly ignores interest of State - 11) (answer)

8. Says I would exclude all "credit reporting" - 13 (not so, my emphasis was that subject matter was solely a matter of private concern - 13) (answer) (implies I would treat all economic matters of private - 13, 14 - 19)

Answer:

Effect of this op. is to extend N Y T to entire law of libel, a result contrary to the common law, & to the history of our country, and

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

Circulated: MAY 23 1985

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83–18

DUN & BRADSTREET, INC., PETITIONERS *v.* GREENMOSS BUILDERS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

[May —, 1985]

JUSTICE BRENNAN, with whom JUSTICE MARSHALL, JUSTICE BLACKMUN and JUSTICE STEVENS join, dissenting.

This case involves a difficult question of the proper application of *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974), to credit reporting—a type of speech at some remove from that which first gave rise to explicit First Amendment restrictions on state defamation law—and has produced a diversity of considered opinions, none of which speaks for the Court. JUSTICE POWELL's plurality opinion affirming the judgment below would not apply the *Gertz* limitations on presumed and punitive damages to this case; rather, the three Justices joining that opinion would hold that the First Amendment requirement of actual malice—a clear and convincing showing of knowing falsehood or reckless disregard for the truth—should have no application in this defamation action because the speech involved a subject of purely private concern and was circulated to an extremely limited audience. Establishing this exception, the opinion reaffirms *Gertz* for cases involving matters of public concern, *ante*, at 7, and reaffirms *New York Times* v. *Sullivan*, 376 U. S. 254 (1964), for cases in which the challenged speech allegedly libels a public official or a public figure. *Ante*, at 5–6. JUSTICE WHITE also would affirm; he would not apply *Gertz* to this case on the ground that the subject matter of the publication does not deal with a matter of general or public importance. *Ante*, at

(interest not recognized in his reputation with a total disregard of the rights of the

10 (concurring in the judgment).[1] THE CHIEF JUSTICE apparently agrees with JUSTICE WHITE. *Ante*, at 1 (concurring in the judgment). The four who join this opinion would reverse the judgment of the Vermont Supreme Court. We believe that, although protection of the type of expression at issue is admittedly not the "central meaning of the First Amendment," 376 U. S., at 273, *Gertz* makes clear that the First Amendment nonetheless requires restraints on presumed and punitive damage awards for this expression. The lack of consensus in approach to these idiosyncratic facts should not, however, obscure the solid allegiance the principles of *New York Times* v. *Sullivan* continue to command in the jurisprudence of this Court. See also *Bose Corp.* v. *Consumer's Union of the United States, Inc.*, —— U. S. —— (1984).

I

In *New York Times* v. *Sullivan* the Court held that the First Amendment shields all who speak in good faith from the threat of unrestrained libel judgments for unintentionally false criticism of a public official. Recognizing that libel law, like all other governmental regulation of the content of speech, "can claim no talismanic immunity from constitutional limitations [and] must be measured by standards that satisfy the First Amendment," 376 U. S., at 269, the Court drew from salutary common law developments, *id.*, at 280, and n. 20,[2] and unquestioned First Amendment principles,

[1] JUSTICE WHITE also ventures some modest proposals for restructuring the First Amendment protections currently afforded defendants in defamation actions. JUSTICE WHITE agrees with *New York Times* v. *Sullivan*, however, that the breathing space needed to ensure the robust debate of public issues essential to our democratic society is impermissibly threatened by unrestrained damage awards for defamatory remarks. *Ante*, at 6–8 (opinion concurring in the judgment).

[2] The principles were expressed as early as 1788 in an opinion of the Pennsylvania Supreme Court:

"What then is the meaning of *the bill of rights*, and *Constitution* of *Pennsylvania*, when they declare, 'That the freedom of the press shall not be

id., at 273–274, to formulate the now-familiar actual malice test. Because the "erroneous statement is inevitable in free debate . . . [it] must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'" *New York Times* v. *Sullivan*, *supra*, at 271–272, quoting *NAACP* v. *Button*, 371 U. S. 415, 433 (1963); See *Bose Corp.*, *supra*, at ——. These solidly accepted principles are not at issue today.

Our First Amendment libel decisions in the last two decades have in large measure been an effort to explore the full ramifications of the *New York Times* v. *Sullivan* principles. Building on the extension of actual malice to "public figure" plaintiffs in *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130 (1967), the Court in *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29 (1971), and *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, focused largely on defining the circumstances under which protection of the central First Amendment value of robust debate of *public issues* should mandate plaintiffs to show actual malice to obtain a judgment and actual damages; the Court settled on a rule requiring actual malice as a prerequisite to recovery only in suits brought by public officials or public figures. 418 U. S., at 344–346.[3] We have also

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restrained,' and 'that the printing presses shall be free to every person who undertakes to examine the proceedings of the legislature or any part of the government?' . . . [T]hey give to every citizen a right of investigating the conduct of those who are entrusted with the public business. . . . The true liberty of the press is amply secured by permitting every man to publish his opinion; but it is due to the peace and dignity of society to enquire into the motives of such publications, and to distinguish between those which are meant for use and reformation, and with an eye solely to the public good, and those which are intended merely to delude and defame. To the latter description, it is impossible that any good government should afford protection and impunity." *Respublica* v. *Oswald*, 1 Dall. 343, 345 (1788) (Supreme Court of Pennsylvania).

[3] A plurality in *Rosenbloom* would have applied the actual malice standard of liability when the alleged libel concerned matters of "public or general interest," irrespective of the status of the plaintiff. 403 U. S., at 43 (opinion of BRENNAN, J.). In *Gertz* the Court rejected the *Rosenbloom*

recognized, however, that the First Amendment requires significant protection from defamation law's chill for a range of expression far broader than simply speech about pure political issues. See *Time, Inc.* v. *Hill*, 385 U. S. 374, 388 (1967) ("The guarantees for free speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government"); cf. *Abood* v. *Detroit Board of Education*, 431 U. S. 209, 231 (1977).

Our cases since *New York Times* v. *Sullivan* have proceeded from the general premise that all libel law implicates First Amendment values to the extent it deters true speech that would otherwise be protected by the First Amendment. 376 U. S., at 269. In this sense defamation law does not differ from state efforts to control obscenity, see *Miller* v. *California*, 413 U. S. 15, 23–24 (1973), ensure loyalty, see *Speiser* v. *Randall*, 357 U. S. 513 (1957), protect consumers, see *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U. S. 748 (1976), oversee professions, see *Zauderer* v. *Office of Disciplinary Counsel of the Supreme Court of Ohio*, —— U. S. —— (1985), or pursue other public welfare goals through content-based regulation of speech. "When we deal with the complex of strands in the web of freedoms which make up free speech, the operation and effect of the method by which speech is sought to be restrained must be subjected to close analysis and critical judgment in the light of the particular circumstances to which it is applied." *Speiser* v. *Randall*, *supra*, at 520. This general

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plurality's "public or general interest" approach. That approach was thought unacceptably to impair the reputational interests of private individuals, who, unlike public officials or public figures, neither assume the risk of rough treatment by entering the public arena nor have ready access to the media to rebut false charges. 418 U. S., at 344–345. It was also thought to "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.'" 418 U. S., at 346 (citation omitted).

proscription against unnecessarily broad content-based regulation permeates First Amendment jurisprudence.

In libel law, no less than any other governmental effort to regulate speech, states must therefore use finer instruments to ensure adequate space for protected expression. Cf. *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n*, 447 U. S. 557, 565 (1980) (restriction "may extend only so far as the interest it serves"); *Lowe* v. *SEC*, —— U. S., ——, —— (1985) (WHITE, J., concurring in the judgment) ("the First Amendment permits restraints on speech only when they are narrowly tailored to advance a legitimate government interest"). The ready availability and unconstrained application of presumed and punitive damages in libel actions is too blunt a regulatory instrument to satisfy this First Amendment principle, even when the alleged libel does not implicate directly the type of speech at issue in *New York Times* v. *Sullivan*. Justice Harlan made precisely this point in *Rosenbloom:*

> "At a minimum, *even in the purely private libel area*, I think the First Amendment should be construed to limit the imposition of punitive damages to those situations in which actual malice is proved. This is the typical standard employed in assessing anyone's liability for punitive damages where the underlying aim of the law is to compensate for harm actually caused, . . . and no conceivable state interest could justify imposing a harsher standard on the exercise of *those freedoms that are given explicit protection by the First Amendment.*" 403 U. S., at 73 (dissenting opinion) (emphasis added).

See also *id.*, at 65; *New York Times* v. *Sullivan*, *supra*, at 269.

Justice Harlan's perception formed the cornerstone of the Court's analysis in *Gertz*. Requiring "that state remedies for defamatory falsehood reach no farther than is necessary to protect the legitimate interest involved," the Court found it "necessary to restrict defamation plaintiffs who do not

prove knowledge of falsity or reckless disregard for truth to compensation for actual injury." 418 U. S., at 349. The Court explained that state rules authorizing presumed and punitive damages conferred on juries "largely uncontrolled discretion" to assess damages "in wholly unpredictable amounts bearing no necessary relation to the actual harm caused." *Id.*, at 350. Punitive damages in particular were found to be "*wholly irrelevant* to the state interest" because "[t]hey are not compensation for actual injury." *Ibid* (emphasis added). For these reasons, the Court in *Gertz* specifically held that the award of presumed and punitive damages on less than a showing of actual malice is not a narrowly tailored means to acheive the legitimate state purpose of protecting the reputation of private persons: the common law approach, said the Court, "*unnecessarily* compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms." *Id.*, at 349 (emphasis added).[4]

Thus, when an alleged libel involves criticism of a public official or a public figure, the need to nurture robust debate of public issues and the requirement that all state regulation of

[4] Since the decision in *Gertz*, we have applied its reasoning with respect to damages in excess of compensation for actual harm in other areas of the law. See, *e. g.*, *Electrical Workers* v. *Foust*, 442 U. S. 42, 48–52 (1979); *Newport* v. *Fact Concerts, Inc.*, 453 U. S. 247, 270–271 (1981). These cases, like *Gertz*, recognize that "the alleged deterrence achieved by the punitive damage awards is likely outweighed by the costs—such as the encouragement of unnecessary litigation and the chilling of desirable conduct—flowing from the rule, at least when the standards on which the awards are based are ill-defined." *Smith* v. *Wade*, —— U. S. ——, —— (1984) (REHNQUIST, J., dissenting). See *id.*, at —— – —— (court opinion) (noting prevailing view that punitive damages may only be awarded for "'conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others;'" quoting Restatement (Second) of Torts § 908(2) (1977) (emphasis deleted)); *id.*, at —— (O'CONNOR, J., dissenting); *Silkwood* v. *Kerr-McGee Corp.*, —— U. S. ——, —— (1984); *id.*, at —— (BLACKMUN, J., dissenting); *id.*, at —— (POWELL, J., dissenting).

speech be narrowly tailored coalesce to require actual malice as a prerequisite to any recovery. When the alleged libel involves speech that falls outside these especially important categories, we have held that the Constitution permits states significant leeway to compensate for actual damage to reputation.[5] The requirement of narrowly tailored regulatory measures, however, always mandates at least a showing of fault and proscribes the award of presumed and punitive damages on less than a showing of actual malice. It has remained the judgment of this Court since *Gertz* that this comprehensive two-tiered structure best accomodates the values of the constitutional free speech guarantee and the states' interest in protecting reputation.

II

The question presented here is narrow. Neither the parties nor the courts below have suggested that Respondent Greenmoss Builders should be required to show actual malice to obtain a judgment and actual compensatory damages. Nor do the parties question the requirement of *Gertz* that respondent must show fault to obtain a judgment and actual damages. The only question presented is whether a jury award of presumed and punitive damages based on less than

[5] Such speech might at times involve issues of public or general interest within the meaning of *Rosenbloom* and thus implicate important First Amendment interests. To justify this cost, the Court in *Gertz* held that the state had an enhanced interest in protecting private reputation and cited the independent First Amendment difficulties inherent in case-by-case judicial determination of whether speech concerns a matter of public interest. 418 U. S., at 344–346. See n. 3 *supra*. The decision in *Gertz* is also susceptible of an alternative justification. Speech allegedly defaming a private person will generally be far less likely to implicate matters of public importance than will speech allegedly defaming public officials or public figures. In light of the problems inherent in case-by-case judicial determination of what is in the public interest, the Court's result could be explained as a decision that the cost of case-by-case evaluation could be avoided without significant chilling of speech involving matters of public importance.

a showing of actual malice is constitutionally permissible. *Gertz* provides a forthright negative answer. To preserve the jury verdict in this case, therefore, the opinions of JUSTICE POWELL and JUSTICE WHITE have cut away the protective mantle of *Gertz*.

A

Relying on the analysis of the Vermont Supreme Court, Respondent urged that this pruning be accomplished by restricting the applicability of *Gertz* to cases in which the defendant is a "media" entity. Such a distinction is irreconcilable with the fundamental First Amendment principle that "[t]he inherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 777 (1978). First Amendment difficulties lurk in the definitional questions such an approach would generate.[6]

I did not agree with this

[6] An attempt to characterize petitioner Dun & Bradstreet illustrates the point. Like an account of judicial proceedings in a newspaper, magazine or news broadcast, a statement in petitioner's reports that a particular company has filed for bankruptcy is a report of a timely news event conveyed to members of the public by a business organized to collect and disseminate such information. Thus it is not obvious why petitioner should find less protection in the First Amendment than do established print or electronic media. The Vermont Supreme Court nonetheless characterized petitioner as a nonmedia defendant entitled to less protection because it is "in the business of selling financial information to a limited number of subscribers who have paid substantial fees for [its] services." 461 A. 2d, at 417. The court added that "[t]here is a clear distinction between a publication which disseminates news for public consumption and one which provides specialized information to a selective, finite audience." *Ibid.*

No clear line consistent with First Amendment principles can be drawn on the basis of these criteria. That petitioner's information is "specialized" or that its subscribers pay "substantial fees" hardly distinguishes these reports from articles in many publications that would surely fall on the "media" side of the line the Vermont Supreme Court seeks to draw. Few published statements are of universal interest and few publications are distributed without charge. Much fare of any metropolitan daily is specialized information for which a selective, finite audience pays a fee. Nor

And the distinction would likely be born an anachronism.[7] Perhaps most importantly, the argument that *Gertz* should be limited to the media misapprehends our cases. We protect the press to ensure the vitality of First Amendment guarantees.[8] This solicitude implies no endorsement of the principle that speakers other than the press deserve lesser First Amendment protection. "In the realm of protected speech, the legislature is constitutionally disqualified from dictating . . . the speakers who may address a public issue." *First National Bank of Boston* v. *Bellotti*, *supra*, at 784–785. See *Bridges* v. *California*, 314 U. S. 252, 277–279 (1941).

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is there any reason to treat petitioner differently than a more widely circulated publication because it has "a limited number of subscribers." Indeed, it would be paradoxical to increase protection to statements injurious to reputation as the size of their audience, and hence their potential to injure, grows. Cf. *Keeton* v. *Hustler Magazine, Inc.*, —— U. S. ——, —— (1984).

[7] Owing to transformations in the technological and economic structure of the communications industry, there has been an increasing convergence of what might be labeled "media" and "nonmedia." Pool, The New Technologies: Promise of Abundant Channels at Lower Cost, in What's News: The Media in American Society 87 (1981). See also I. Pool, Technologies of Freedom (1983); FTC, Media Policy Session: Technology and Legal Change (1979); Subcommittee on Telecommunications, Consumer Protection, and Finance of the House Committee on Energy and Commerce, Telecommunications in Transition: The Status of Competition in the Telecommunications Industry, 97 Cong., 1st Sess. (Comm. Print 1981).

[8] See, *e. g.*, *Minneapolis Star* v. *Minnesota Comm'r of Revenue*, —— U. S. ——, —— (1983); *Columbia Broadcasting System, Inc.* v. *FCC*, 453 U. S. 367, 395 (1981); *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241 (1974); *Branzenburg* v. *Hayes*, 408 U. S. 665, 707 (1972); *New York Times Co.* v. *United States*, 403 U. S. 713 (1971); *Mills* v. *Alabama*, 384 U. S. 214, 218–219 (1966); *Grosjean* v. *American Press Co., Inc.*, 297 U. S. 233, 250 (1936). See also *Herbert* v. *Lando*, 441 U. S. 153, 180–199 (1979) (BRENNAN, J., dissenting in part); *Saxbe* v. *Washington Post Co.*, 417 U. S. 843, 850 (1974) (POWELL, J., dissenting); *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations*, 413 U. S. 376, 393 (1973) (BURGER, C. J., dissenting); *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 390 (1969); *Time, Inc.* v. *Hill*, 385 U. S. 374, 389 (1967); Stewart, "Or of the Press," 26 Hastings L. J. 631 (1975).

The free speech guarantee gives each citizen an equal right to self-expression and to participation in self-government. See, *e. g.*, *Carey* v. *Brown*, 447 U. S. 455, 459–463 (1980); *Police Department* v. *Mosley*, 408 U. S. 92; *Cohen* v. *California*, 403 U. S. 15, 24 (1971); *Whitney* v. *California*, 274 U. S. 357, 375–377 (Brandeis, J., concurring). This guarantee also protects the rights of listeners to "the widest possible dissemination of information from diverse and antagonistic sources." *Associated Press* v. *United States*, 326 U. S. 1, 20 (1945).[9] Accordingly, at least six Members of this Court (the four who join this opinion and JUSTICE WHITE and THE CHIEF JUSTICE) agree today that, in the context of defamation law, the rights of the institutional media are no greater and no less than those enjoyed by other individuals or organizations engaged in the same activities. See *ante*, at 9–10 (opinion concurring in the judgment).[10]

B

Eschewing the media/nonmedia distinction, the opinions of both JUSTICE WHITE and JUSTICE POWELL focus primarily on the content of the credit report as a reason for restricting the applicability of *Gertz*. Arguing that at most *Gertz* should protect speech that "deals with a matter of public or general importance," *ante*, at 10, JUSTICE WHITE, without analysis or explanation, decides that the credit report at issue here falls outside this protected category. The plurality opinion

[9] In light of the "increasingly prominent role of mass media in our society, and the awesome power it has placed in the hands of a select few," *Gertz*, *supra*, at 402 (WHITE, J., dissenting), protection for the speech of nonmedia defendants is essential to ensure a diversity of perspectives. See J. Barron, Freedom of the Press for Whom? (1973). "Uninhibited, robust and wide-open" debate, *New York Times* v. *Sullivan*, 376 U. S., at 370, among nonmedia speakers is as essential to the fostering and development of an individual's political thought as is such debate in the mass media. See J. Klapper, The Effects of Mass Communications (1960).

[10] JUSTICE POWELL's opinion does not expressly reject the media/nonmedia distinction, but does expressly decline to apply that distinction to resolve this case.

of JUSTICE POWELL offers virtually the same conclusion with at least a garnish of substantive analysis.

Purporting to "employ the approach approved in *Gertz*," *ante*, at 7, JUSTICE POWELL balances the state interest in protecting private reputation against the First Amendment interest in protecting expression on matters not of public concern. The state interest is found to be identical to that at stake in *Gertz*. The First Amendment interest is, however, found to be significantly weaker because speech on public issues, such as that involved in *Gertz*, receives greater constitutional protection than speech that is not a matter of public concern. See *ante*, at 9–10, citing *Connick* v. *Myers*, 461 U. S. 138 (1983). JUSTICE POWELL is willing to concede that such speech receives some First Amendment protection, but on balance finds that such protection does not reach so far as to restrain the state interest in protecting reputation through presumed and punitive damage awards in state defamation actions. *Ante*, at 10. Without explaining what *is* a "matter of public concern," the plurality opinion proceeds to serve up a smorgasbord of reasons why the speech at issue here is not, *ante*, at 11, and on this basis affirms the Vermont courts' award of presumed and punitive damages.

In professing allegiance to *Gertz*, the plurality opinion protests too much. As JUSTICE WHITE correctly observes, JUSTICE POWELL departs completely from the analytic framework and result of that case: "*Gertz* was intended to reach any false statements . . . whether or not [they] implicate[] a matter of public importance." *Ante*, at 9 (concurring in the judgment).[11] Even accepting the notion that a distinction

[11] One searches *Gertz* in vain for a single word to support the proposition that limits on presumed and punitive damages obtained only when speech involved 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. 418 U. S., at 346. It would have been incongruous for the Court to go on to circumscribe the protection against presumed and punitive damages by reference to a judi-

can and should be drawn between matters of public concern and matters of purely private concern, however, the analyses presented by both JUSTICE POWELL and JUSTICE WHITE fail on their own terms. Both, by virtue of what they hold in this case, propose an impoverished definition of "matters of public concern" that is irreconcilable with First Amendment principles. The credit reporting at issue here surely involves a subject matter of sufficient public concern to require the comprehensive protections of *Gertz*. Were this speech appropriately characterized as a matter of only private concern, moreover, the elimination of the *Gertz* restrictions on presumed and punitive damages would still violate basic First Amendment requirements.

credit report is matter of "public interest" - but even if "private" ~~court~~ NOT applies

(1)

The five Members of the Court voting to affirm the damage award in this case have provided almost no guidance as to what constitutes a protected "matter of public concern." JUSTICE WHITE offers nothing at all, but his opinion does indicate that the distinction turns on solely the subject matter of the expression and not on the extent or conditions of dissemination of that expression. *Ante*, at 10. JUSTICE POWELL adumbrates a rationale that would appear to focus pri-

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cial judgment as to whether the speech at issue involved matters of public concern. At several points the Court in *Gertz* makes perfectly clear the restrictions of presumed and punitive damages were to apply in all cases. 418 U. S., at 346, 349–350.

Indeed, JUSTICE POWELL's opinion today is fairly read as embracing the approach of the *Rosenbloom* plurality to deciding when the Constitution should limit state defamation law. The limits imposed, however, are less stringent than those suggest by the *Rosenbloom* plurality. Under the approach of today's plurality, speech about matters of public or general interest receives only the *Gertz* protections against unrestrained presumed and punitive damages, not the full *New York Times* v. *Sullivan* protections against any recovery absent a showing of actual malice.

marily on subject matter.[12] The opinion relies on the fact that the speech at issue was "solely in the individual interest of the speaker and its *business* audience," *ante*, at 11 (emphasis added). Analogizing explicitly to advertising, the opinion suggests that credit reporting is "hardy" and "solely motivated by the desire for profit." *Ibid.* These two strains of analysis suggest that JUSTICE POWELL is excluding the subject matter of credit reports from "matters of public concern" because the speech is predominantly in the realm of matters of economic concern.

LFP excludes all "credit reports"

In evaluating the subject matter of expression, this Court has consistently rejected the argument that speech is entitled to diminished First Amendment protection simply because it concerns economic matters or is in the economic interest of the speaker or the audience. See, *e. g.*, *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 501–502; *AFL* v. *Swing*, 312 U. S. 321, 325–326 (1941); *Thornhill* v. *Alabama*, 310 U. S. 88, 101–103 (1940); see also *Abood* v. *Detroit Bd. of Education*, 431 U. S. 209, 231–232, and n. 28. "[O]ur cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters—to take a nonexhaustive list of labels—is not entitled to full First Amendment protection." *Id.*, at 231. The breadth of this protection evinces recognition that freedom of expression is not only essential to check tyranny and foster self-govern-

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[12] JUSTICE POWELL also appears to rely in part on the fact that communication was limited and confidential. *Ante*, at 11. Given that his analysis also relies on the subject matter of the credit report, *ibid.*, it is difficult to dechiper exactly what role the nature and extent of dissemination plays in JUSTICE POWELL's analysis. But because the subject matter of the expression at issue is properly understood as a matter of public concern, see *infra*, at 17–19, it may well be that this element of confidentiality is crucial to the outcome as far as JUSTICE POWELL's opinion is concerned. In other words, it may be that JUSTICE POWELL thinks this particular expression could not could not contribute to public discourse welfare because the public generally does not receive it. This factor does not suffice to save the analysis. See n. 18 *infra*.

ment but also intrinsic to individual liberty and dignity and instrumental in society's search for truth. See *Bose Corp.* v. *Consumers Union of United States, Inc.*, —— U. S. ——, —— (1984); *Whitney* v. *California*, 274 U. S. 357, 375 (1927) (Brandeis, J., concurring).

Speech about commercial or economic matters, even if not directly implicating "the central meaning of the First Amendment," 376 U. S., at 273, is an important part of our public discourse. The Court made clear in the context of discussing labor relations speech in *Thornhill* v. *Alabama*, *supra*, that:

> "It is recognized now that satisfactory hours and wages and working conditions in industry and a bargaining position which makes these possible have an importance which is not less than the interests of those in the business or industry directly concerned. The health of the present generation and of those as yet unborn may depend on these matters, and the practices in a single factory may have economic repercussions upon a whole region and affect widespread systems of marketing. The merest glance at state and federal legislation on the subject demonstrates the force of the argument that labor relations are not matters of mere local or private concern. Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effect and intelligent use of the processes of popular government to shape the destiny of modern industrial society." 310 U. S., at 102–103.

As *Thornhill* suggests, the choices we make when we step into the voting booth may well be the products of what we have learned from the myriad of daily economic and social phenomenon that surround us. See *id.*, at 102 ("Freedom of discussion, if it should fulfill its historic function in this nation, must embrace all issues about which information is

needed or appropriate to enable the members of society to cope with the exigencies of their period").[13]

The credit reporting of Dun & Bradstreet falls within any reasonable definition of "public concern" consistent with our precedents. JUSTICE POWELL's reliance on the fact that Dun & Bradstreet publishes credit reports "for profit," *ante*, at 11, is wholly unwarranted. Time and again we have made clear that speech loses none of its constitutional protection "even though it is carried in a form that is 'sold' for profit." *Virginia Pharmacy Board*, *supra*, at 761. See also *Smith* v. *California* 361 U. S. 147, 150 (1959); *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 501 (1952). More importantly, an announcement of the bankruptcy of a local company is information of potentially great concern to residents of the community where the company is located; like the labor dispute at issue in *Thornhill*, such a bankruptcy "in a single factory may have economic repercussions for a whole region." And knowledge about solvency and the effect and prevalence of

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[13] Similarly, we have rejected the arguments for denying or restricting First Amendment protection of advertising on the ground that advertising is not a matter of public concern. Recognizing that even pure advertising may well be affected with a public interest, we have stated that "the free flow of commercial information is indispensable . . . to the formation of intelligent opinions as to how [our economic] system ought to be regulated or altered." *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U. S. 748, 765. See also *Bigelow* v. *Virginia*, 421 U. S. 802, 829 (1975) ("Viewed in its entirety the [abortion] advertisement conveyed information of potential interest and value to a diverse audience—not only to readers possibly in need of the services offered"). The potential political aspect of attempts to influence consumer preferences has also been recognized. See *Metromedia, Inc.* v. *San Diego*, 453 U. S. 490, 538–539 (1981) (BRENNAN, J., concurring in the judgment) ("May the city decide that a United Automobile Workers billboard with the message 'Be a patriot—do not buy Japanese-manufactured cars' is 'commercial' and therefore forbid it?"). The greater state latitude for regulating commercial advertising is instead a function of "greater objectivity and hardiness." *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council*, 425 U. S. 748, 772, n. 24 (1976).

bankruptcy certainly would inform citizen opinions about questions of economic regulation. It is difficult to suggest that a bankruptcy is not a subject matter of public concern when federal law requires invocation of judicial mechanisms to effectuate it and makes the fact of the bankruptcy a matter of public record. See *Cox Broadcasting Co.* v. *Cohen*, 420 U. S. 469 (1975).

Given that the subject matter of credit reporting directly implicates matters of public concern, the balancing analysis the Court today employs should properly lead to the conclusion that the type of expression here at issue should receive First Amendment protection from the chilling potential of unrestrained presumed and punitive damages in defamation actions.[14]

(2)

Even if the subject matter of credit reporting were properly considered—in the terms of JUSTICE WHITE and JUSTICE POWELL—as purely a matter of private discourse, this speech would fall well within the range of valuable expression for which the First Amendment demands protection. Much expression that does not directly involve public issues receives significant protection. Our cases do permit some diminution in the degree of protection afforded one category of speech about economic or commercial matters. "Commercial speech"—defined as advertisements that "do no more than propose a commercial transaction," *Pittsburgh Press Co.* v. *Human Relations Comm'n*, 413 U. S. 376, 385 (1973)—may be more closely regulated than other types of

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[14] JUSTICE POWELL purports to draw from *Connick* v. *Myers*, 461 U. S. 138 (1983), a test for distinguishing matters of public concern from matters of private concern. This reliance perpetuates a definition of "public concern" wholly out of accord with our consistent precedents and with the common law understanding of the concept. See *id.*, at 165, n. 5 (BRENNAN, J., dissenting). Moreover, *Connick* explicitly limited its distinction between public and private concern to the "context" of a government employment situation. 463 U. S., at 148, and n. 8.

speech. Even commercial speech, however, receives substantial First Amendment protection. *Zauderer* v. *Office of Disciplinary Counsel of the Supreme Court of Ohio*, —— U. S. —— (1985); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U. S. 748, 765 ("So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. . . . To this end, the free flow of commercial information is indispensible"). Credit reporting is not "commercial speech" as this Court has defined the term. Even if credit reporting were so considered, it would still be entitled to the substantial protections the First Amendment affords that category. See *Zauderer*, *supra*, at ——; *id.*, at —— (BRENNAN, J., concurring in part and dissenting in part). Under either view, the expression at issue in this case should receive protection from the chilling potential of unrestrained presumed and punitive damages awards in defamation actions.

Our economic system is predicated on the assumption that human welfare will be improved through informed decisionmaking. In this respect, ensuring broad distribution of accurate financial information comports with the fundamental First Amendment premise that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Associated Press* v. *United States*, 326 U. S. 1, 20. The economic information Dun & Bradstreet disseminates in its credit reports makes an undoubted contribution to this private discourse essential to our well-being. Justice Douglas made precisely this point:

> "The language of the First Amendment does not except speech directed at private economic decisionmaking. Certainly such speech could not be regarded as less important than political expression. When immersed in a free flow of commercial information, private sector decisionmaking is at least as effective an institution as are our various governments in furthering the social interest

> in obtaining the best general allocation of resources. . . . The financial data circulated by Dun & Bradstreet, Inc., are part of the fabric of national commercial communication." *Dun & Bradstreet* v. *Grove*, 404 U. S. 898, 905–906 (1971) (Douglas, J., dissenting from denial of certiorari).

Justice Douglas further noted that "[p]resumably the credit reports published by the petitioner facilitate through the price system the improvement of human welfare at least as much as did the underlying disagreement in our most recent libel opinion, *Rosenbloom* v. *Metromedia, Inc. supra*, arising out of a squabble over whether a vendor had sold obscene magazines." *Id.*, at 905, n. 9.

The credit reports of Dun & Bradstreet bear few of the earmarks of commercial speech that might be entitled to somewhat less rigorous protection. In *every* case in which we have permitted more extensive state regulation on the basis of a commercial speech rationale the speech being regulated was pure advertising—an offer to buy or sell goods and services or encouraging such buying and selling.[15] Credit reports are not commercial advertisements for a good or service or a proposal to buy or sell such a product. We have been extremely chary about extending the "commercial speech" doctrine beyond this narrowly circumscribed category of advertising because often vitally important speech will be uttered to advance economic interests and because the profit motive making such speech hardy dissipates rapidly when the

[15] See, *e. g.*, *Zauderer* v. *Office of Disciplinary Counsel of the Supreme Court of Ohio*, —— U. S. —— (1985); *Bolger* v. *Young Products Corp.*, —— U. S. —— (1983) (contraceptive advertising); *In re R. M. J.*, 455 U. S. 191 (1982) (lawyer advertising); *Metromedia, Inc.* v. *City of San Diego*, 453 U. S. 490 (1981) (commercial billboard advertising); *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n*, 447 U. S. 530 (1980) (advertising of electricity); *Friedman* v. *Rogers* 440 U. S. 1 (1979) (optometrist advertising); *Ohralik* v. *Ohio State Bar Ass'n*, 436 U. S. 447 (19780 (lawyer's solicitation of business); *Bates* v. *State Bar of Arizona*, 433 U. S. 350 (1977) (lawyer adverstising).

speech is not advertising. Compare *Central Hudson Gas & Elec. Corp.* v. *Public Service Comm.*, 447 U. S. 557 (1980) with *Consolidated Edison Co.* v. *Public Service Comm'n*, 447 U. S. 530 (1980).

It is worth noting in this regard that the common law of most states, although apparently not of Vermont, 461 A. 2d, at 419, recognizes a qualified privilege for reports like that at issue here. See Maurer, Common Law Defamation and the Fair Credit Reporting Act, 72 Geo. L. Rev. 95, 99–105 (1983). The privilege typically precludes recovery for false and defamatory credit information without a showing of bad faith or malice, a standard of proof which is often defined according to the *New York Times* formulation. See, *e. g.*, *Datacon, Inc.* v. *Dun & Bradstreet*, 465 F. Supp. 706, 708 (ND Tex. 1979). The common law thus recognizes that credit reporting is quite susceptible to libel's chill; this accumulated learning is worthy of respect.

Even if JUSTICE POWELL's characterization of the credit reporting at issue here were accepted in its entirety, his opinion would have done no more than demonstrate that this speech is the equivalent of commercial speech. The opinion, after all, relies on analogy to advertising. Credit reporting is said to be hardy, motivated by desire for profit, and relatively verifiable. *Ante*, at 11. But this does not justify the elimination of restrictions on presumed and punitive damages. State efforts to regulate commercial speech in the form of advertising must abide by the requirement that the regulatory means chosen be narrowly tailored so as to avoid any unnecessary chilling of protected expression. See *Zauderer*, *supra*; *Virginia Pharmacy Board* v. *Virginia Consumer Council*, *supra*; *Central Hudson Gas & Electric* v. *Public Service Comm'n*, *supra*.[16]

not so

[16] Indeed JUSTICE POWELL has chosen a particularly inapt set of facts as a basis for urging a return to the common law. Though the individual's interest in reputation is certainly at the core of notions of human dignity, *ante*, at 7, quoting *Rosenblatt* v. *Baer*, 383 U. S. 75, 92 (1966) (Stewart, J.

The Court in *Gertz* specifically held that unrestrained presumed and punitive damages were "unnecessarily" broad, 418 U. S., at 350, in relation to the legitimate state interests. Indeed, *Gertz* held that in a defamation action punitive damages, designed to chill and not to compensate, were "*wholly irrelevant*" to furtherance of any valid state interest. *Ibid.* The Court did not reach these conclusions by weighing the strength of the state interest against strength of the First Amendment interest. Rather, the Court recognized and applied the principle that regulatory measures that chill protected speech be no broader than necessary to serve the legitimate state interest asserted. The plurality opinion today recognizes, as it must, that the state interest at issue here is identical to that at issue in *Gertz*. What was "irrelevant" in *Gertz* must still be irrelevant and the requirement that the regulatory means be no broader than necessary is no less applicable even if the speech is simply the equivalent of commercial speech. Thus, unrestrained presumed and punitive damages for this type of speech must run afoul of First Amendment guarantees.[17]

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concurring); see *Paul* v. *Davis*, 424 U. S. 693, 714 (1976) (BRENNAN, J., dissenting), the reputational interest at stake here is that of a corporation. Similarly, that this speech is solely commercial in nature undercuts the argument that presumed damages should be unrestrained in actions like this one because actual harm will be difficult to prove. If the credit report is viewed as commercial expression, proving that actual damages occurred is relatively easy. For instance, an alleged libel concerning a bank's customer may cause the bank to lower the credit limit or raise the interest rate charged that customer. The commercial context does not increase the need for presumed damages, but if anything reduces the need to presume harm. At worst the commercial the damages caused by such action should be no more difficult to ascertain than many other traditional elements of tort damages. See, *e. g.*, *Russell* v. *City of Wildwood*, 428 F. 2d 1176, 1181 (CA3 1970) (future earnings); *Seffert* v. *Los Angeles Transit Lines*, 56 Cal.2d 498, 509, 364 P. 2d 337, 344 (1961) (Traynor, J., dissenting) (pain and suffering).

[17] JUSTICE POWELL's analysis fails to apply the requirement that regulation be narrowly tailored. At one point the opinion reads: "This particular

(3)

Even if not at "the essence of self-government," *Garrison* v. *Louisiana*, 379 U. S., at 74–75, the expression at issue in this case is important to both our public discourse and our private welfare. That its motivation might be the economic interest of the speaker or listeners does not diminish its First Amendment value. See *Consolidated Edison Co.* v. *Public Service Comm'n supra*. Whether or not such speech is sufficiently central to First Amendment values to require actual malice as a standard of liability, this speech certainly falls within the range of speech that *Gertz* sought to protect from the chill of unrestrained presumed and punitive damage awards.[18]

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interest [in credit reporting] warrants no special protection when . . . the speech is wholly false and clearly damaging to the victim's business reputation." *Ante*, at 11. The point, of course, is not that false speech intrinsically deserves protection, see *Gertz*, 418 U. S., at 340, but that the burdening of unintentional false speech potentially chills truthful speech. Thus, the state interest in compensating injury resulting from false speech must be vindicated by means are narrowly tailored to avoid this deleterious result.

[18] JUSTICE POWELL also relies in part on the fact that the expression had a limited circulation and was expressly kept confidential by those who received it. Because the subject matter of the expression at issue in this case would clearly receive the comprehensive protections of *Gertz* were the speech publicly disseminated, this factor of confidential circulation to a limited number of subscribers is perhaps properly understood as the linchpin of JUSTICE POWELL's analysis. See *ante*, at 11 (because of confidentiality "it cannot be said that the report involves any 'strong interest in the free flow of information'") (plurality opinion) (citation omitted). See also n. 12 *supra*.

This argument does not save the analysis. The assertion that the limited and confidential circulation might make the expression less a matter of public concern is dubious on its own terms and flatly inconsistent with our decision in *Givhan* v. *Western Line Consolidated School Dist.*, 439 U. S. 410 (1979). Perhaps more importantly, Dun & Bradstreet doubtless provides thousands of credit reports to thousands of subscribers who receive the information pursuant to the same strictures imposed on the recipients in this case. As a systemic matter, therefore, today's decision diminishes

Of course, the commercial context of Dun & Bradstreet's reports is relevant to the constitutional analysis insofar as it implicates the strong state interest "in protecting consumers and regulating commercial transactions," *Ohralik* v. *Ohio State Bar Ass'n*, 436 U. S. 447, 460 (1978). Cf. *Bolger* v. *Young Drug Products Corp.*, —— U. S. ——, —— (1983) (STEVENS, J., concurring in the judgment). The special harms caused by inaccurate credit reports, the lack of public sophistication about or access to such reports, and the fact that such reports by and large contain statements that are fairly readily susceptible of verification, all may justify appropriate regulation designed to prevent the social losses caused by false credit reports.[19] And in the libel context, the states' regulatory interest in protecting reputation is served by rules permitting recovery for actual compensatory damages upon a showing of fault. Any further interest in deterring potential defamation through case-by-case judicial imposition of presumed and punitive damage awards on less than a showing of actual malice simply exacts too high a toll on First Amendment values. Accordingly, Greenmoss Builders

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the free flow of information because Dun & Bradsteet will generally be made more reticent in providing information to all its subscribers.

[19] See Maurer, 72 Geo. L. J., at 126:

"Under *Gertz*, plaintiffs may be compensated for actual damages upon establishing the fault of the defendant; to obtain punitive damages, a plaintiff must demonstrate malice. Sections 1681o and 1681n [of the Fair Credit Reporting Act] are consistent with these constitutional principles. Section 1681o provides for recovery of actual damages upon a showing of negligence, which presumably satisfies the *Gertz* requirement of fault. Section 1681n authorizes punitive damages for willful violation of the Act. Whether section 1681n is equivalent to *Gertz*'s malice standard depends on whether a court would consider it to be possible to fail willfully to follow reasonable procedures and yet not manifest reckless disregard for the truth. Such a fine distinction appears unworkable as a categorical test, so that section 1681n would likely be regarded as harmonious with the principles of *Gertz*. Thus, the Act appears to provide the degree of protection for commercial speech currently required under first amendment doctrine" (footnotes omitted).

should be permitted to recover for any actual damage it can show resulted from Dun & Bradstreet's negligently false credit report, but should be required to show actual malice to receive presumed or punitive damages. Because the jury was not instructed in accordance with these principles, we would reverse and remand for further proceedings not inconsistent with this opinion.

~~Scope~~ Says maj op. relies on analogy to "advertising" — 19 not 20
Repeated argmt speech have core matter of public interest.

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES:

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

Circulated: _____

Recirculated: JUN 24 1985

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83–18

DUN & BRADSTREET, INC., PETITIONERS *v.* GREENMOSS BUILDERS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

[June ——, 1985]

JUSTICE BRENNAN, with whom JUSTICE MARSHALL, JUSTICE BLACKMUN and JUSTICE STEVENS join, dissenting.

This case involves a difficult question of the proper application of *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974), to credit reporting—a type of speech at some remove from that which first gave rise to explicit First Amendment restrictions on state defamation law—and has produced a diversity of considered opinions, none of which speaks for the Court. JUSTICE POWELL's plurality opinion affirming the judgment below would not apply the *Gertz* limitations on presumed and punitive damages to this case; rather, the three Justices joining that opinion would hold that the First Amendment requirement of actual malice—a clear and convincing showing of knowing falsehood or reckless disregard for the truth—should have no application in this defamation action because the speech involved a subject of purely private concern and was circulated to an extremely limited audience. Establishing this exception, the opinion reaffirms *Gertz* for cases involving matters of public concern, *ante*, at 7, and reaffirms *New York Times* v. *Sullivan*, 376 U. S. 254 (1964), for cases in which the challenged speech allegedly libels a public official or a public figure. *Ante*, at 5–6. JUSTICE WHITE also would affirm; he would not apply *Gertz* to this case on the ground that the subject matter of the publication does not deal with a matter of general or public importance. *Ante*, at

No substantive changes.
— Bill

10 (concurring in the judgment).[1] THE CHIEF JUSTICE apparently agrees with JUSTICE WHITE. *Ante*, at 1–2 (concurring in the judgment). The four who join this opinion would reverse the judgment of the Vermont Supreme Court. We believe that, although protection of the type of expression at issue is admittedly not the "central meaning of the First Amendment," 376 U. S., at 273, *Gertz* makes clear that the First Amendment nonetheless requires restraints on presumed and punitive damage awards for this expression. The lack of consensus in approach to these idiosyncratic facts should not, however, obscure the solid allegiance the principles of *New York Times* v. *Sullivan* continue to command in the jurisprudence of this Court. See also *Bose Corp.* v. *Consumer's Union of the United States, Inc.*, —— U. S. —— (1984).

I

In *New York Times* v. *Sullivan* the Court held that the First Amendment shields all who speak in good faith from the threat of unrestrained libel judgments for unintentionally false criticism of a public official. Recognizing that libel law, like all other governmental regulation of the content of speech, "can claim no talismanic immunity from constitutional limitations [and] must be measured by standards that satisfy the First Amendment," 376 U. S., at 269, the Court drew from salutary common law developments, *id.*, at 280, and n. 20,[2] and unquestioned First Amendment principles,

[1] JUSTICE WHITE also ventures some modest proposals for restructuring the First Amendment protections currently afforded defendants in defamation actions. JUSTICE WHITE agrees with *New York Times* v. *Sullivan*, however, that the breathing space needed to ensure the robust debate of public issues essential to our democratic society is impermissibly threatened by unrestrained damage awards for defamatory remarks. *Ante*, at 6–8 (opinion concurring in the judgment).

[2] The principles were expressed as early as 1788 in an opinion of the Pennsylvania Supreme Court:

"What then is the meaning of *the bill of rights*, and *Constitution* of *Pennsylvania*, when they declare, 'That the freedom of the press shall not be

id., at 273–274, to formulate the now-familiar actual malice test. Because the "erroneous statement is inevitable in free debate . . . [it] must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'" *New York Times* v. *Sullivan*, *supra*, at 271–272, quoting *NAACP* v. *Button*, 371 U. S. 415, 433 (1963); See *Bose Corp.*, *supra*, at ——. These solidly accepted principles are not at issue today.

Our First Amendment libel decisions in the last two decades have in large measure been an effort to explore the full ramifications of the *New York Times* v. *Sullivan* principles. Building on the extension of actual malice to "public figure" plaintiffs in *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130 (1967), the Court in *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29 (1971), and *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, focused largely on defining the circumstances under which protection of the central First Amendment value of robust debate of *public issues* should mandate plaintiffs to show actual malice to obtain a judgment and actual damages; the Court settled on a rule requiring actual malice as a prerequisite to recovery only in suits brought by public officials or public figures. 418 U. S., at 344–346.[3] We have also

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restrained,' and 'that the printing presses shall be free to every person who undertakes to examine the proceedings of the legislature or any part of the government?' . . . [T]hey give to every citizen a right of investigating the conduct of those who are entrusted with the public business. . . . The true liberty of the press is amply secured by permitting every man to publish his opinion; but it is due to the peace and dignity of society to enquire into the motives of such publications, and to distinguish between those which are meant for use and reformation, and with an eye solely to the public good, and those which are intended merely to delude and defame. To the latter description, it is impossible that any good government should afford protection and impunity." *Respublica* v. *Oswald*, 1 Dall. 343, 345 (1788) (Supreme Court of Pennsylvania).

[3] A plurality in *Rosenbloom* would have applied the actual malice standard of liability when the alleged libel concerned matters of "public or general interest," irrespective of the status of the plaintiff. 403 U. S., at 43 (opinion of BRENNAN, J.). In *Gertz* the Court rejected the *Rosenbloom*

recognized, however, that the First Amendment requires significant protection from defamation law's chill for a range of expression far broader than simply speech about pure political issues. See *Time, Inc.* v. *Hill*, 385 U. S. 374, 388 (1967) ("The guarantees for free speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government"); cf. *Abood* v. *Detroit Board of Education*, 431 U. S. 209, 231 (1977).

Our cases since *New York Times* v. *Sullivan* have proceeded from the general premise that all libel law implicates First Amendment values to the extent it deters true speech that would otherwise be protected by the First Amendment. 376 U. S., at 269. In this sense defamation law does not differ from state efforts to control obscenity, see *Miller* v. *California*, 413 U. S. 15, 23–24 (1973), ensure loyalty, see *Speiser* v. *Randall*, 357 U. S. 513 (1957), protect consumers, see *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U. S. 748 (1976), oversee professions, see *Zauderer* v. *Office of Disciplinary Counsel of the Supreme Court of Ohio*, —— U. S. —— (1985), or pursue other public welfare goals through content-based regulation of speech. "When we deal with the complex of strands in the web of freedoms which make up free speech, the operation and effect of the method by which speech is sought to be restrained must be subjected to close analysis and critical judgment in the light of the particular circumstances to which it is applied." *Speiser* v. *Randall*, *supra*, at 520. This general

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plurality's "public or general interest" approach. That approach was thought unacceptably to impair the reputational interests of private individuals, who, unlike public officials or public figures, neither assume the risk of rough treatment by entering the public arena nor have ready access to the media to rebut false charges. 418 U. S., at 344–345. It was also thought to "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.'" 418 U. S., at 346 (citation omitted).

proscription against unnecessarily broad content-based regulation permeates First Amendment jurisprudence.

In libel law, no less than any other governmental effort to regulate speech, states must therefore use finer instruments to ensure adequate space for protected expression. Cf. *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n*, 447 U. S. 557, 565 (1980) (restriction "may extend only so far as the interest it serves"); *Lowe* v. *SEC*, —— U. S., ——, —— (1985) (WHITE, J., concurring in the judgment) ("the First Amendment permits restraints on speech only when they are narrowly tailored to advance a legitimate government interest"). The ready availability and unconstrained application of presumed and punitive damages in libel actions is too blunt a regulatory instrument to satisfy this First Amendment principle, even when the alleged libel does not implicate directly the type of speech at issue in *New York Times* v. *Sullivan*. Justice Harlan made precisely this point in *Rosenbloom:*

> "At a minimum, *even in the purely private libel area,* I think the First Amendment should be construed to limit the imposition of punitive damages to those situations in which actual malice is proved. This is the typical standard employed in assessing anyone's liability for punitive damages where the underlying aim of the law is to compensate for harm actually caused, . . . and no conceivable state interest could justify imposing a harsher standard on the exercise of *those freedoms that are given explicit protection by the First Amendment.*" 403 U. S., at 73 (dissenting opinion) (emphasis added).

See also *id.*, at 65; *New York Times* v. *Sullivan*, *supra*, at 269.

Justice Harlan's perception formed the cornerstone of the Court's analysis in *Gertz*. Requiring "that state remedies for defamatory falsehood reach no farther than is necessary to protect the legitimate interest involved," the Court found it "necessary to restrict defamation plaintiffs who do not

prove knowledge of falsity or reckless disregard for truth to compensation for actual injury." 418 U. S., at 349. The Court explained that state rules authorizing presumed and punitive damages conferred on juries "largely uncontrolled discretion" to assess damages "in wholly unpredictable amounts bearing no necessary relation to the actual harm caused." *Id.*, at 350. Punitive damages in particular were found to be "*wholly irrelevant* to the state interest" because "[t]hey are not compensation for actual injury." *Ibid* (emphasis added). For these reasons, the Court in *Gertz* specifically held that the award of presumed and punitive damages on less than a showing of actual malice is not a narrowly tailored means to acheive the legitimate state purpose of protecting the reputation of private persons: the common law approach, said the Court, "*unnecessarily* compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms." *Id.*, at 349 (emphasis added).[4]

Thus, when an alleged libel involves criticism of a public official or a public figure, the need to nurture robust debate of public issues and the requirement that all state regulation of

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[4] Since the decision in *Gertz*, we have applied its reasoning with respect to damages in excess of compensation for actual harm in other areas of the law. See, *e. g.*, *Electrical Workers* v. *Foust*, 442 U. S. 42, 48–52 (1979); *Newport* v. *Fact Concerts, Inc.*, 453 U. S. 247, 270–271 (1981). These cases, like *Gertz*, recognize that "the alleged deterrence achieved by the punitive damage awards is likely outweighed by the costs—such as the encouragement of unnecessary litigation and the chilling of desirable conduct—flowing from the rule, at least when the standards on which the awards are based are ill-defined." *Smith* v. *Wade*, —— U. S. ——, —— (1984) (REHNQUIST, J., dissenting). See *id.*, at —— – —— (court opinion) (noting prevailing view that punitive damages may only be awarded for "'conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others,'" quoting Restatement (Second) of Torts § 908(2) (1977) (emphasis deleted)); *id.*, at —— (O'CONNOR, J., dissenting); *Silkwood* v. *Kerr-McGee Corp.*, —— U. S. ——, —— (1984); *id.*, at —— (BLACKMUN, J., dissenting); *id.*, at —— (POWELL, J., dissenting).

speech be narrowly tailored coalesce to require actual malice as a prerequisite to any recovery. When the alleged libel involves speech that falls outside these especially important categories, we have held that the Constitution permits states significant leeway to compensate for actual damage to reputation.[5] The requirement of narrowly tailored regulatory measures, however, always mandates at least a showing of fault and proscribes the award of presumed and punitive damages on less than a showing of actual malice. It has remained the judgment of this Court since *Gertz* that this comprehensive two-tiered structure best accomodates the values of the constitutional free speech guarantee and the states' interest in protecting reputation.

II

The question presented here is narrow. Neither the parties nor the courts below have suggested that Respondent Greenmoss Builders should be required to show actual malice to obtain a judgment and actual compensatory damages. Nor do the parties question the requirement of *Gertz* that respondent must show fault to obtain a judgment and actual damages. The only question presented is whether a jury award of presumed and punitive damages based on less than

[5] Such speech might at times involve issues of public or general interest within the meaning of *Rosenbloom* and thus implicate important First Amendment interests. To justify this cost, the Court in *Gertz* held that the state had an enhanced interest in protecting private reputation and cited the independent First Amendment difficulties inherent in case-by-case judicial determination of whether speech concerns a matter of public interest. 418 U. S., at 344–346. See n. 3 *supra*. The decision in *Gertz* is also susceptible of an alternative justification. Speech allegedly defaming a private person will generally be far less likely to implicate matters of public importance than will speech allegedly defaming public officials or public figures. In light of the problems inherent in case-by-case judicial determination of what is in the public interest, the Court's result could be explained as a decision that the cost of case-by-case evaluation could be avoided without significant chilling of speech involving matters of public importance.

a showing of actual malice is constitutionally permissible. *Gertz* provides a forthright negative answer. To preserve the jury verdict in this case, therefore, the opinions of JUSTICE POWELL and JUSTICE WHITE have cut away the protective mantle of *Gertz*.

A

Relying on the analysis of the Vermont Supreme Court, Respondent urged that this pruning be accomplished by restricting the applicability of *Gertz* to cases in which the defendant is a "media" entity. Such a distinction is irreconcilable with the fundamental First Amendment principle that "[t]he inherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 777 (1978). First Amendment difficulties lurk in the definitional questions such an approach would generate.[6]

[6] An attempt to characterize petitioner Dun & Bradstreet illustrates the point. Like an account of judicial proceedings in a newspaper, magazine or news broadcast, a statement in petitioner's reports that a particular company has filed for bankruptcy is a report of a timely news event conveyed to members of the public by a business organized to collect and disseminate such information. Thus it is not obvious why petitioner should find less protection in the First Amendment than do established print or electronic media. The Vermont Supreme Court nonetheless characterized petitioner as a nonmedia defendant entitled to less protection because it is "in the business of selling financial information to a limited number of subscribers who have paid substantial fees for [its] services." 461 A. 2d, at 417. The court added that "[t]here is a clear distinction between a publication which disseminates news for public consumption and one which provides specialized information to a selective, finite audience." *Ibid.*

No clear line consistent with First Amendment principles can be drawn on the basis of these criteria. That petitioner's information is "specialized" or that its subscribers pay "substantial fees" hardly distinguishes these reports from articles in many publications that would surely fall on the "media" side of the line the Vermont Supreme Court seeks to draw. Few published statements are of universal interest and few publications are distributed without charge. Much fare of any metropolitan daily is specialized information for which a selective, finite audience pays a fee. Nor is

And the distinction would likely be born an anachronism.[7] Perhaps most importantly, the argument that *Gertz* should be limited to the media misapprehends our cases. We protect the press to ensure the vitality of First Amendment guarantees.[8] This solicitude implies no endorsement of the principle that speakers other than the press deserve lesser First Amendment protection. "In the realm of protected speech, the legislature is constitutionally disqualified from dictating . . . the speakers who may address a public issue." *First National Bank of Boston* v. *Bellotti*, *supra*, at 784–785. See *Bridges* v. *California*, 314 U. S. 252, 277–279 (1941).

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there any reason to treat petitioner differently than a more widely circulated publication because it has "a limited number of subscribers." Indeed, it would be paradoxical to increase protection to statements injurious to reputation as the size of their audience, and hence their potential to injure, grows. Cf. *Keeton* v. *Hustler Magazine, Inc.*, —— U. S. ——, —— (1984).

[7] Owing to transformations in the technological and economic structure of the communications industry, there has been an increasing convergence of what might be labeled "media" and "nonmedia." Pool, The New Technologies: Promise of Abundant Channels at Lower Cost, in What's News: The Media in American Society 87 (1981). See also I. Pool, Technologies of Freedom (1983); FTC, Media Policy Session: Technology and Legal Change (1979); Subcommittee on Telecommunications, Consumer Protection, and Finance of the House Committee on Energy and Commerce, Telecommunications in Transition: The Status of Competition in the Telecommunications Industry, 97 Cong., 1st Sess. (Comm. Print 1981).

[8] See, *e. g.*, *Minneapolis Star* v. *Minnesota Comm'r of Revenue*, —— U. S. ——, —— (1983); *Columbia Broadcasting System, Inc.* v. *FCC*, 453 U. S. 367, 395 (1981); *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241 (1974); *Branzenburg* v. *Hayes*, 408 U. S. 665, 707 (1972); *New York Times Co.* v. *United States*, 403 U. S. 713 (1971); *Mills* v. *Alabama*, 384 U. S. 214, 218–219 (1966); *Grosjean* v. *American Press Co., Inc.*, 297 U. S. 233, 250 (1936). See also *Herbert* v. *Lando*, 441 U. S. 153, 180–199 (1979) (BRENNAN, J., dissenting in part); *Saxbe* v. *Washington Post Co.*, 417 U. S. 843, 850 (1974) (POWELL, J., dissenting); *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations*, 413 U. S. 376, 393 (1973) (BURGER, C. J., dissenting); *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 390 (1969); *Time, Inc.* v. *Hill*, 385 U. S. 374, 389 (1967); Stewart, "Or of the Press," 26 Hastings L. J. 631 (1975).

The free speech guarantee gives each citizen an equal right to self-expression and to participation in self-government. See, *e. g.*, *Carey* v. *Brown*, 447 U. S. 455, 459–463 (1980); *Police Department* v. *Mosley*, 408 U. S. 92; *Cohen* v. *California*, 403 U. S. 15, 24 (1971); *Whitney* v. *California*, 274 U. S. 357, 375–377 (Brandeis, J., concurring). This guarantee also protects the rights of listeners to "the widest possible dissemination of information from diverse and antagonistic sources." *Associated Press* v. *United States*, 326 U. S. 1, 20 (1945).[9] Accordingly, at least six Members of this Court (the four who join this opinion and JUSTICE WHITE and THE CHIEF JUSTICE) agree today that, in the context of defamation law, the rights of the institutional media are no greater and no less than those enjoyed by other individuals or organizations engaged in the same activities. See *ante*, at 9–10 (opinion concurring in the judgment).[10]

B

Eschewing the media/nonmedia distinction, the opinions of both JUSTICE WHITE and JUSTICE POWELL focus primarily on the content of the credit report as a reason for restricting the applicability of *Gertz*. Arguing that at most *Gertz* should protect speech that "deals with a matter of public or general importance," *ante*, at 10, JUSTICE WHITE, without analysis or explanation, decides that the credit report at issue here falls outside this protected category. The plurality opinion

[9] In light of the "increasingly prominent role of mass media in our society, and the awesome power it has placed in the hands of a select few," *Gertz*, *supra*, at 402 (WHITE, J., dissenting), protection for the speech of nonmedia defendants is essential to ensure a diversity of perspectives. See J. Barron, Freedom of the Press for Whom? (1973). "Uninhibited, robust and wide-open" debate, *New York Times* v. *Sullivan*, 376 U. S., at 370, among nonmedia speakers is as essential to the fostering and development of an individual's political thought as is such debate in the mass media. See J. Klapper, The Effects of Mass Communications (1960).

[10] JUSTICE POWELL's opinion does not expressly reject the media/nonmedia distinction, but does expressly decline to apply that distinction to resolve this case.

of JUSTICE POWELL offers virtually the same conclusion with at least a garnish of substantive analysis.

Purporting to "employ the approach approved in *Gertz*," *ante*, at 7, JUSTICE POWELL balances the state interest in protecting private reputation against the First Amendment interest in protecting expression on matters not of public concern. The state interest is found to be identical to that at stake in *Gertz*. The First Amendment interest is, however, found to be significantly weaker because speech on public issues, such as that involved in *Gertz*, receives greater constitutional protection than speech that is not a matter of public concern. See *ante*, at 9–10, citing *Connick* v. *Myers*, 461 U. S. 138 (1983). JUSTICE POWELL is willing to concede that such speech receives some First Amendment protection, but on balance finds that such protection does not reach so far as to restrain the state interest in protecting reputation through presumed and punitive damage awards in state defamation actions. *Ante*, at 10. Without explaining what *is* a "matter of public concern," the plurality opinion proceeds to serve up a smorgasbord of reasons why the speech at issue here is not, *ante*, at 11, and on this basis affirms the Vermont courts' award of presumed and punitive damages.

In professing allegiance to *Gertz*, the plurality opinion protests too much. As JUSTICE WHITE correctly observes, JUSTICE POWELL departs completely from the analytic framework and result of that case: "*Gertz* was intended to reach any false statements . . . whether or not [they] implicate[] a matter of public importance." *Ante*, at 9 (concurring in the judgment).[11] Even accepting the notion that a distinction

[11] One searches *Gertz* in vain for a single word to support the proposition that limits on presumed and punitive damages obtained only when speech involved 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. 418 U. S., at 346. It would have been incongruous for the Court to go on to circumscribe the protection against presumed and punitive damages by reference to a judi-

can and should be drawn between matters of public concern and matters of purely private concern, however, the analyses presented by both JUSTICE POWELL and JUSTICE WHITE fail on their own terms. Both, by virtue of what they hold in this case, propose an impoverished definition of "matters of public concern" that is irreconcilable with First Amendment principles. The credit reporting at issue here surely involves a subject matter of sufficient public concern to require the comprehensive protections of *Gertz*. Were this speech appropriately characterized as a matter of only private concern, moreover, the elimination of the *Gertz* restrictions on presumed and punitive damages would still violate basic First Amendment requirements.

(1)

The five Members of the Court voting to affirm the damage award in this case have provided almost no guidance as to what constitutes a protected "matter of public concern." JUSTICE WHITE offers nothing at all, but his opinion does indicate that the distinction turns on solely the subject matter of the expression and not on the extent or conditions of dissemination of that expression. *Ante*, at 10. JUSTICE POWELL adumbrates a rationale that would appear to focus pri-

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cial judgment as to whether the speech at issue involved matters of public concern. At several points the Court in *Gertz* makes perfectly clear the restrictions of presumed and punitive damages were to apply in all cases. 418 U. S., at 346, 349–350.

Indeed, JUSTICE POWELL's opinion today is fairly read as embracing the approach of the *Rosenbloom* plurality to deciding when the Constitution should limit state defamation law. The limits imposed, however, are less stringent than those suggest by the *Rosenbloom* plurality. Under the approach of today's plurality, speech about matters of public or general interest receives only the *Gertz* protections against unrestrained presumed and punitive damages, not the full *New York Times* v. *Sullivan* protections against any recovery absent a showing of actual malice.

marily on subject matter.[12] The opinion relies on the fact that the speech at issue was "solely in the individual interest of the speaker and its *business* audience," *ante*, at 11 (emphasis added). Analogizing explicitly to advertising, the opinion also states that credit reporting is "hardy" and "solely motivated by the desire for profit." *Ibid.* These two strains of analysis suggest that JUSTICE POWELL is excluding the subject matter of credit reports from "matters of public concern" because the speech is predominantly in the realm of matters of economic concern.

In evaluating the subject matter of expression, this Court has consistently rejected the argument that speech is entitled to diminished First Amendment protection simply because it concerns economic matters or is in the economic interest of the speaker or the audience. See, *e. g.*, *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 501–502; *AFL* v. *Swing*, 312 U. S. 321, 325–326 (1941); *Thornhill* v. *Alabama*, 310 U. S. 88, 101–103 (1940); see also *Abood* v. *Detroit Bd. of Education*, 431 U. S. 209, 231–232, and n. 28. "[O]ur cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters—to take a nonexhaustive list of labels—is not entitled to full First Amendment protection." *Id.*, at 231. The breadth of this protection evinces recognition that freedom of expression is not only essential to check tyranny and foster self-govern-

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[12] JUSTICE POWELL also appears to rely in part on the fact that communication was limited and confidential. *Ante*, at 11. Given that his analysis also relies on the subject matter of the credit report, *ibid.*, it is difficult to dechiper exactly what role the nature and extent of dissemination plays in JUSTICE POWELL's analysis. But because the subject matter of the expression at issue is properly understood as a matter of public concern, see *infra*, at 17–19, it may well be that this element of confidentiality is crucial to the outcome as far as JUSTICE POWELL's opinion is concerned. In other words, it may be that JUSTICE POWELL thinks this particular expression could not could not contribute to public welfare because the public generally does not receive it. This factor does not suffice to save the analysis. See n. 18 *infra*.

ment but also intrinsic to individual liberty and dignity and instrumental in society's search for truth. See *Bose Corp.* v. *Consumers Union of United States, Inc.*, —— U. S. ——, —— (1984); *Whitney* v. *California*, 274 U. S. 357, 375 (1927) (Brandeis, J., concurring).

Speech about commercial or economic matters, even if not directly implicating "the central meaning of the First Amendment," 376 U. S., at 273, is an important part of our public discourse. The Court made clear in the context of discussing labor relations speech in *Thornhill* v. *Alabama*, *supra*, that:

> "It is recognized now that satisfactory hours and wages and working conditions in industry and a bargaining position which makes these possible have an importance which is not less than the interests of those in the business or industry directly concerned. The health of the present generation and of those as yet unborn may depend on these matters, and the practices in a single factory may have economic repercussions upon a whole region and affect widespread systems of marketing. The merest glance at state and federal legislation on the subject demonstrates the force of the argument that labor relations are not matters of mere local or private concern. Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effect and intelligent use of the processes of popular government to shape the destiny of modern industrial society." 310 U. S., at 102–103.

As *Thornhill* suggests, the choices we make when we step into the voting booth may well be the products of what we have learned from the myriad of daily economic and social phenomenon that surround us. See *id.*, at 102 ("Freedom of discussion, if it should fulfill its historic function in this nation, must embrace all issues about which information is

needed or appropriate to enable the members of society to cope with the exigencies of their period").[13]

The credit reporting of Dun & Bradstreet falls within any reasonable definition of "public concern" consistent with our precedents. JUSTICE POWELL's reliance on the fact that Dun & Bradstreet publishes credit reports "for profit," *ante*, at 11, is wholly unwarranted. Time and again we have made clear that speech loses none of its constitutional protection "even though it is carried in a form that is 'sold' for profit." *Virginia Pharmacy Board*, *supra*, at 761. See also *Smith* v. *California* 361 U. S. 147, 150 (1959); *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 501 (1952). More importantly, an announcement of the bankruptcy of a local company is information of potentially great concern to residents of the community where the company is located; like the labor dispute at issue in *Thornhill*, such a bankruptcy "in a single factory may have economic repercussions for a whole region." And knowledge about solvency and the effect and prevalence of

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[13] Similarly, we have rejected the arguments for denying or restricting First Amendment protection of advertising on the ground that advertising is not a matter of public concern. Recognizing that even pure advertising may well be affected with a public interest, we have stated that "the free flow of commercial information is indispensable . . . to the formation of intelligent opinions as to how [our economic] system ought to be regulated or altered." *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U. S. 748, 765. See also *Bigelow* v. *Virginia*, 421 U. S. 802, 829 (1975) ("Viewed in its entirety the [abortion] advertisement conveyed information of potential interest and value to a diverse audience—not only to readers possibly in need of the services offered"). The potential political aspect of attempts to influence consumer preferences has also been recognized. See *Metromedia, Inc.* v. *San Diego*, 453 U. S. 490, 538–539 (1981) (BRENNAN, J., concurring in the judgment) ("May the city decide that a United Automobile Workers billboard with the message 'Be a patriot—do not buy Japanese-manufactured cars' is 'commercial' and therefore forbid it?"). The greater state latitude for regulating commercial advertising is instead a function of "greater objectivity and hardiness." *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council*, 425 U. S. 748, 772, n. 24 (1976).

bankruptcy certainly would inform citizen opinions about questions of economic regulation. It is difficult to suggest that a bankruptcy is not a subject matter of public concern when federal law requires invocation of judicial mechanisms to effectuate it and makes the fact of the bankruptcy a matter of public record. See *Cox Broadcasting Co.* v. *Cohen*, 420 U. S. 469 (1975).

Given that the subject matter of credit reporting directly implicates matters of public concern, the balancing analysis the Court today employs should properly lead to the conclusion that the type of expression here at issue should receive First Amendment protection from the chilling potential of unrestrained presumed and punitive damages in defamation actions.[14]

(2)

Even if the subject matter of credit reporting were properly considered—in the terms of JUSTICE WHITE and JUSTICE POWELL—as purely a matter of private discourse, this speech would fall well within the range of valuable expression for which the First Amendment demands protection. Much expression that does not directly involve public issues receives significant protection. Our cases do permit some diminution in the degree of protection afforded one category of speech about economic or commercial matters. "Commercial speech"—defined as advertisements that "do no more than propose a commercial transaction," *Pittsburgh Press Co.* v. *Human Relations Comm'n*, 413 U. S. 376, 385 (1973)—may be more closely regulated than other types of

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[14] JUSTICE POWELL purports to draw from *Connick* v. *Myers*, 461 U. S. 138 (1983), a test for distinguishing matters of public concern from matters of private concern. This reliance perpetuates a definition of "public concern" wholly out of accord with our consistent precedents and with the common law understanding of the concept. See *id.*, at 165, n. 5 (BRENNAN, J., dissenting). Moreover, *Connick* explicitly limited its distinction between public and private concern to the "context" of a government employment situation. 463 U. S., at 148, and n. 8.

speech. Even commercial speech, however, receives substantial First Amendment protection. *Zauderer* v. *Office of Disciplinary Counsel of the Supreme Court of Ohio*, —— U. S. —— (1985); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U. S. 748, 765 ("So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. . . . To this end, the free flow of commercial information is indispensible"). Credit reporting is not "commercial speech" as this Court has defined the term. Even if credit reporting were so considered, it would still be entitled to the substantial protections the First Amendment affords that category. See *Zauderer*, *supra*, at ——; *id.*, at —— (BRENNAN, J., concurring in part and dissenting in part). Under either view, the expression at issue in this case should receive protection from the chilling potential of unrestrained presumed and punitive damages awards in defamation actions.

Our economic system is predicated on the assumption that human welfare will be improved through informed decisionmaking. In this respect, ensuring broad distribution of accurate financial information comports with the fundamental First Amendment premise that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Associated Press* v. *United States*, 326 U. S. 1, 20. The economic information Dun & Bradstreet disseminates in its credit reports makes an undoubted contribution to this private discourse essential to our well-being. Justice Douglas made precisely this point:

> "The language of the First Amendment does not except speech directed at private economic decisionmaking. Certainly such speech could not be regarded as less important than political expression. When immersed in a free flow of commercial information, private sector decisionmaking is at least as effective an institution as are our various governments in furthering the social interest

> in obtaining the best general allocation of resources. . . . The financial data circulated by Dun & Bradstreet, Inc., are part of the fabric of national commercial communication." *Dun & Bradstreet* v. *Grove*, 404 U. S. 898, 905–906 (1971) (Douglas, J., dissenting from denial of certiorari).

Justice Douglas further noted that "[p]resumably the credit reports published by the petitioner facilitate through the price system the improvement of human welfare at least as much as did the underlying disagreement in our most recent libel opinion, *Rosenbloom* v. *Metromedia, Inc. supra*, arising out of a squabble over whether a vendor had sold obscene magazines." *Id.*, at 905, n. 9.

The credit reports of Dun & Bradstreet bear few of the earmarks of commercial speech that might be entitled to somewhat less rigorous protection. In *every* case in which we have permitted more extensive state regulation on the basis of a commercial speech rationale the speech being regulated was pure advertising—an offer to buy or sell goods and services or encouraging such buying and selling.[15] Credit reports are not commercial advertisements for a good or service or a proposal to buy or sell such a product. We have been extremely chary about extending the "commercial speech" doctrine beyond this narrowly circumscribed category of advertising because often vitally important speech will be uttered to advance economic interests and because the profit motive making such speech hardy dissipates rapidly when the

[15] See, *e. g.*, *Zauderer* v. *Office of Disciplinary Counsel of the Supreme Court of Ohio*, —— U. S. —— (1985); *Bolger* v. *Young Products Corp.*, —— U. S. —— (1983) (contraceptive advertising); *In re R. M. J.*, 455 U. S. 191 (1982) (lawyer advertising); *Metromedia, Inc.* v. *City of San Diego*, 453 U. S. 490 (1981) (commercial billboard advertising); *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n*, 447 U. S. 530 (1980) (advertising of electricity); *Friedman* v. *Rogers* 440 U. S. 1 (1979) (optometrist advertising); *Ohralik* v. *Ohio State Bar Ass'n*, 436 U. S. 447 (19780 (lawyer's solicitation of business); *Bates* v. *State Bar of Arizona*, 433 U. S. 350 (1977) (lawyer adverstising).

speech is not advertising. Compare *Central Hudson Gas & Elec. Corp.* v. *Public Service Comm.*, 447 U. S. 557 (1980) with *Consolidated Edison Co.* v. *Public Service Comm'n*, 447 U. S. 530 (1980).

It is worth noting in this regard that the common law of most states, although apparently not of Vermont, 461 A. 2d, at 419, recognizes a qualified privilege for reports like that at issue here. See Maurer, Common Law Defamation and the Fair Credit Reporting Act, 72 Geo. L. Rev. 95, 99–105 (1983). The privilege typically precludes recovery for false and defamatory credit information without a showing of bad faith or malice, a standard of proof which is often defined according to the *New York Times* formulation. See, *e. g.*, *Datacon, Inc.* v. *Dun & Bradstreet*, 465 F. Supp. 706, 708 (ND Tex. 1979). The common law thus recognizes that credit reporting is quite susceptible to libel's chill; this accumulated learning is worthy of respect.

Even if JUSTICE POWELL's characterization of the credit reporting at issue here were accepted in its entirety, his opinion would have done no more than demonstrate that this speech is the equivalent of commercial speech. The opinion, after all, relies on analogy to advertising. Credit reporting is said to be hardy, motivated by desire for profit, and relatively verifiable. *Ante*, at 11. But this does not justify the elimination of restrictions on presumed and punitive damages. State efforts to regulate commercial speech in the form of advertising must abide by the requirement that the regulatory means chosen be narrowly tailored so as to avoid any unnecessary chilling of protected expression. See *Zauderer*, *supra*; *Virginia Pharmacy Board* v. *Virginia Consumer Council*, *supra*; *Central Hudson Gas & Electric* v. *Public Service Comm'n*, *supra*.[16]

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[16] Indeed JUSTICE POWELL has chosen a particularly inapt set of facts as a basis for urging a return to the common law. Though the individual's interest in reputation is certainly at the core of notions of human dignity, *ante*, at 7, quoting *Rosenblatt* v. *Baer*, 383 U. S. 75, 92 (1966) (Stewart, J.

The Court in *Gertz* specifically held that unrestrained presumed and punitive damages were "unnecessarily" broad, 418 U. S., at 350, in relation to the legitimate state interests. Indeed, *Gertz* held that in a defamation action punitive damages, designed to chill and not to compensate, were "*wholly irrelevant*" to furtherance of any valid state interest. *Ibid.* The Court did not reach these conclusions by weighing the strength of the state interest against strength of the First Amendment interest. Rather, the Court recognized and applied the principle that regulatory measures that chill protected speech be no broader than necessary to serve the legitimate state interest asserted. The plurality opinion today recognizes, as it must, that the state interest at issue here is identical to that at issue in *Gertz*. What was "irrelevant" in *Gertz* must still be irrelevant and the requirement that the regulatory means be no broader than necessary is no less applicable even if the speech is simply the equivalent of commercial speech. Thus, unrestrained presumed and punitive damages for this type of speech must run afoul of First Amendment guarantees.[17]

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concurring); see *Paul* v. *Davis*, 424 U. S. 693, 714 (1976) (BRENNAN, J., dissenting), the reputational interest at stake here is that of a corporation. Similarly, that this speech is solely commercial in nature undercuts the argument that presumed damages should be unrestrained in actions like this one because actual harm will be difficult to prove. If the credit report is viewed as commercial expression, proving that actual damages occurred is relatively easy. For instance, an alleged libel concerning a bank's customer may cause the bank to lower the credit limit or raise the interest rate charged that customer. The commercial context does not increase the need for presumed damages, but if anything reduces the need to presume harm. At worst the commercial damages caused by such action should be no more difficult to ascertain than many other traditional elements of tort damages. See, *e. g.*, *Russell* v. *City of Wildwood*, 428 F. 2d 1176, 1181 (CA3 1970) (future earnings); *Seffert* v. *Los Angeles Transit Lines*, 56 Cal,2d 498, 509, 364 P. 2d 337, 344 (1961) (Traynor, J., dissenting) (pain and suffering).

[17] JUSTICE POWELL's analysis fails to apply the requirement that regulation be narrowly tailored. At one point the opinion reads: "This particular

(3)

Even if not at "the essence of self-government," *Garrison* v. *Louisiana*, 379 U. S., at 74–75, the expression at issue in this case is important to both our public discourse and our private welfare. That its motivation might be the economic interest of the speaker or listeners does not diminish its First Amendment value. See *Consolidated Edison Co.* v. *Public Service Comm'n supra*. Whether or not such speech is sufficiently central to First Amendment values to require actual malice as a standard of liability, this speech certainly falls within the range of speech that *Gertz* sought to protect from the chill of unrestrained presumed and punitive damage awards.[18]

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interest [in credit reporting] warrants no special protection when . . . the speech is wholly false and clearly damaging to the victim's business reputation." *Ante*, at 11. The point, of course, is not that false speech intrinsically deserves protection, see *Gertz*, 418 U. S., at 340, but that the burdening of unintentional false speech potentially chills truthful speech. Thus, the state interest in compensating injury resulting from false speech must be vindicated by means are narrowly tailored to avoid this deleterious result.

[18] JUSTICE POWELL also relies in part on the fact that the expression had a limited circulation and was expressly kept confidential by those who received it. Because the subject matter of the expression at issue in this case would clearly receive the comprehensive protections of *Gertz* were the speech publicly disseminated, this factor of confidential circulation to a limited number of subscribers is perhaps properly understood as the linchpin of JUSTICE POWELL's analysis. See *ante*, at 11 (because of confidentiality "it cannot be said that the report involves any 'strong interest in the free flow of information' ") (plurality opinion) (citation omitted). See also n. 12 *supra*.

This argument does not save the analysis. The assertion that the limited and confidential circulation might make the expression less a matter of public concern is dubious on its own terms and flatly inconsistent with our decision in *Givhan* v. *Western Line Consolidated School Dist.*, 439 U. S. 410 (1979). Perhaps more importantly, Dun & Bradstreet doubtless provides thousands of credit reports to thousands of subscribers who receive the information pursuant to the same strictures imposed on the recipients in this case. As a systemic matter, therefore, today's decision diminishes

Of course, the commercial context of Dun & Bradstreet's reports is relevant to the constitutional analysis insofar as it implicates the strong state interest "in protecting consumers and regulating commercial transactions," *Ohralik* v. *Ohio State Bar Ass'n*, 436 U. S. 447, 460 (1978). Cf. *Bolger* v. *Young Drug Products Corp.*, —— U. S. ——, —— (1983) (STEVENS, J., concurring in the judgment). The special harms caused by inaccurate credit reports, the lack of public sophistication about or access to such reports, and the fact that such reports by and large contain statements that are fairly readily susceptible of verification, all may justify appropriate regulation designed to prevent the social losses caused by false credit reports.[19] And in the libel context, the states' regulatory interest in protecting reputation is served by rules permitting recovery for actual compensatory damages upon a showing of fault. Any further interest in deterring potential defamation through case-by-case judicial imposition of presumed and punitive damage awards on less than a showing of actual malice simply exacts too high a toll on First Amendment values. Accordingly, Greenmoss Builders

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the free flow of information because Dun & Bradsteet will generally be made more reticent in providing information to all its subscribers.

[19] See Maurer, 72 Geo. L. J., at 126:

"Under *Gertz*, plaintiffs may be compensated for actual damages upon establishing the fault of the defendant; to obtain punitive damages, a plaintiff must demonstrate malice. Sections 1681o and 1681n [of the Fair Credit Reporting Act] are consistent with these constitutional principles. Section 1681o provides for recovery of actual damages upon a showing of negligence, which presumably satisfies the *Gertz* requirement of fault. Section 1681n authorizes punitive damages for willful violation of the Act. Whether section 1681n is equivalent to *Gertz*'s malice standard depends on whether a court would consider it to be possible to fail willfully to follow reasonable procedures and yet not manifest reckless disregard for the truth. Such a fine distinction appears unworkable as a categorical test, so that section 1681n would likely be regarded as harmonious with the principles of *Gertz*. Thus, the Act appears to provide the degree of protection for commercial speech currently required under first amendment doctrine" (footnotes omitted).

should be permitted to recover for any actual damage it can show resulted from Dun & Bradstreet's negligently false credit report, but should be required to show actual malice to receive presumed or punitive damages. Because the jury was not instructed in accordance with these principles, we would reverse and remand for further proceedings not inconsistent with this opinion.

L.F.P.

06/13/84 3d DRAFT

No. 83-18 Dun & Bradstreet, Inc. v. Greenmoss Builders

JUSTICE POWELL, dissenting.

The Court today extends the constitutional rule of New York Times Co. v. Sullivan, 376 U.S. 254 (1964), far beyond its origins or its purpose. In that case, the Court for the first time held that the Constitution limits the reach of state laws of libel and slander in suits against media defendants. A constitutional role was needed in such cases, the Court held, to ensure that "debate on public issues ... be uninhibited, robust, and wide-open." Id., at 270. All of the Court's decisions since then that have considered the constitutional role in defamation law also have involved suits against a media defendant arising out of an article or broadcast on an issue of public concern and importance. The Court today goes beyond these precedents and holds that the Constitution prevents the State of Vermont from applying its common law to a libel action between a construction company and a commercial credit reporting agency. In my view, this holding is not required by the First Amendment. Nor is it wise or commanded by logic or precedent.

I

The common law rules that the Court today repudiates are of ancient vintage. The rule that damages are presumed for libel was announced by Hale as early as 1670. Restatement of Torts §568, comment b, at 162 (1938). Punitive damages long have been available in actions for defamation, under a quite different standard than the one applied today. See, e.g., C. McCormick, Law of Damages §118, p. 431 (1935); M. Newell, Law of Defamation, Libel and Slander 842, 844-846 (1890) (citing cases). And since at least the early part of this century, a plaintiff in a garden-variety defamation suit could recover without showing any facts as to the state of mind of the defendant. W. Prosser, Law of Torts §113, pp. 772-773 (4th ed. 1971); Restatement (Second) of Torts §580B, comment b (1977).[1] The common law recognized some

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privileges, but generally to recover for written expression harmful to reputation the ordinary citizen had to show only falsity and publication.

These rules have not gone unquestioned. This Court itself has limited their reach in certain situations of overriding need. But in jurisdiction after jurisdiction they have been reaffirmed repeatedly. Thus, for example, it is the judgment of history that "proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact." Prosser, supra, §112, p. 765; accord, Rowe v. Metz, 195 Colo. 424, 425-426, 579 P.2d 83, 84 (1978); Note, Developments in the Law--Defamation, 69 Harv. L. Rev. 875, 891-892 (1956). As a result, courts for centuries have allowed juries to presume that some damage occurred from many defamatory utterances and publications.

This accumulated learning is worthy of respect. Moreover, the common law rules were developed in an area of the law that, since the founding of our country, has been the province of the state courts.[2] Even if one

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disagrees with these centuries-old rules,[3] this Court should discard them only if they conflict with the rights guaranteed to the people by federal law. Thus, this Court has modified these rules only when their operation threatened the core values of the First Amendment. More specifically, we have done so only in cases in which state law placed at risk "freedom of expression upon public questions." New York Times v. Sullivan, 376 U.S., at 269.

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[2]The Framers were familiar with the common law of libel, which had been adopted by the American colonies. See Gertz, 418 U.S., at 380-384 (WHITE, J., dissenting); Roth v. United States, 354 U.S. 476, 482-483, and n. 11 (1957) (13 States allowed prosecution for libel in 1792); Beauharnais v. Illinois, 343 U.S. 250-254-255 (1952). See also T. Cooley, Constitutional Limitations 602 (7th ed. 1903); Rutledge, The Law of Defamation: Recent Developments, 32 Alabama Lawyer 409, 410 (1971):

> "[T]he law of defamation has been an integral part of the laws of England, the colonies and the states since time immemorial. So many actions have been maintained and judgments recovered under the various laws of libel that the Constitutional validity of libel actions could be denied only by a Court willing to hold all its predecessors were wrong in their interpretation of the First Amendment and that two hundred years of precedents should be overruled."

[3]As the Court notes, there is room to doubt the wisdom of state laws that permit presumed and punitive damages on liberal terms. Ante, at 9, and 10, n. 3.

"The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." Roth v. United States, 354 U.S. 476, 484 (1957). "At the core of the First Amendment are certain basic conceptions about the manner in which political discussion in a representative democracy should proceed." Brown v. Hartlage, 456 U.S. 45, 52 (1982); accord First National Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978) (discussion of "'matters of public concern'" is "at the heart of the First Amendment's protection"). There is nothing of these core interests in the situation before us today. The Court today extends these constitutional rules to nothing less than the entire field of libel and slander.[4] Henceforth, every action by a former employee

[4]Moreover, the Court's holding affects not only state laws. Congress, too, has provided for actions that after today may well not meet the new constitutional standards. For example, the Fair Credit Reporting Act provides that punitive damages may be awarded where a credit service willfully has reported true but obsolete information as to a consumer. 15 U.S.C. §§1681c, 1681n. For the Court to uphold this law, it would have to find the governmental interest in protecting a debtor from the circulation of such true information to be significantly greater than the interest in protecting damage to

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complaining of a malicious negative recommendation by an employer,[5] every action by a dealer against a competitor who falsely reports bad service to the manufacturer,[6] every action by a spurned suitor for spreading false rumors about the reasons for his failure,[7] and numerous other actions arising out of back-fence gossip or commercial incompetence[8] will raise a constitutional

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reputation by malicious lies. In addition, the Act provides other procedures to assure accuracy and fairness to consumers. Previously, such reasonable regulation precisely aimed at a perceived commercial evil would not have been susceptible to constitutional attack. See Millstone v. O'Hanlon Reports, Inc., 528 F.2d 829 (CA8 1976) (upholding Act). After today, every such regulation of private and economic speech may be constitutionally suspect unless it meets the elaborate and rigorous standards of New York Times and Gertz. See also Brown v. Hartlage, 456 U.S. 45, 53-54 (1982) (restrictions on communication of ideas to voters must be supported by a compelling state interest). Similarly, the provisions of the securities laws, many of which regulate speech, e.g., 15 U.S.C. §§77k, 77l, 77o, 78r, will be subject to scrutiny under those standards. Cf. infra, at 10-11.

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question. The Court believes that its decision is "squarely control[led]" by our opinion in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). Ante, at 11. This result unnecessarily repudiates the common law and trivializes the First Amendment.[9] There is nothing in Gertz that requires it.

The facts in Gertz were very different from those here. Gertz was a libel suit against a media defendant: a

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[8]Suits by disgruntled consumers against credit reporting agencies appear to be disquietingly common. E.g., Millstone v. O'Hanlon Reports, Inc., 528 F.2d 829 (CA8 1976); Retail Credit Co. v. Russell, 234 Ga. 765, 218 S.E.2d 54 (1975); Hood v. Dun & Bradstreet, Inc., 486 F.2d 25 (CA5 1973), cert. denied, 415 U.S. 985 (1974); Grove v. Dun & Bradstreet, Inc., 438 F.2d 433 (CA3), cert. denied, 404 U.S. 898 (1971). In enacting the Fair Credit Reporting Act, 15 U.S.C. §§1681-1681t, Congress specifically found that "[t]here is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy." Id., §1681(a)(4).

[9]As one commentator has remarked with respect to "the case of a commercial supplier of credit information that defames a person applying for credit"--the very case before us today--"If the first amendment requirements outlined in Gertz apply, there is something clearly wrong with the first amendment or with Gertz." Shiffrin, The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment, 78 Nw. L. Rev. 1212, 1268 (1983) [hereinafter Shiffrin].

magazine called American Opinion, the monthly outlet of the John Birch Society. The article in question discussed a question of undoubted public importance--whether the prosecution of a policeman was part of a Communist campaign to discredit local law enforcement agencies. The plaintiff was a lawyer tangentially involved in the prosecution who, the magazine alleged, was the chief architect of the "frame-up" of the police officer. The article spoke of the lawyer's alleged links to Communist activity. Like every other case in which this Court has considered the constitutional limits on state laws of defamation, Gertz involved a media article directly relevant to the effective operation of our system of democratic self-government.

In contrast, the case today does not involve "expression upon public questions" of any kind. New York Times, supra, at 269. It is a purely private defamation action against a commercial credit reporting agency that falsely reported to respondent's creditors that respondent was bankrupt. A number of state courts, including the court below, have recognized that the role of the Constitution in regulating state libel law is far more

limited when the concerns that activated New York Times and Gertz are absent. In such a case,

> "[t]here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-censorship by the press. The facts of the present case are wholly without the First Amendment concerns with which the Supreme Court of the United States has been struggling." Harley-Davidson Motorsports, Inc. v. Markley, 279 Or. 361, 366, 568 P.2d 1359, 1363 (1977).

Accord, Rowe v. Metz, 195 Colo. 424, 426, 579 P.2d 83, 84 (1978) (Gertz should not be "blindly applied to the case of a private plaintiff against a nonmedia defendant for a defamation which is essentially private in nature."); Calero v. Del Chemical Corp., 68 Wis. 2d 487, 506, 228 N.W.2d 737, 748 (1975) ("In 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."); Denny v. Mertz, 106 Wis. 2d 636, 661, 318 N.W.2d 141, 153 (1982). I would agree generally with these courts, and hold that the common law rules of libel and slander do not violate the Constitution when applied to a case such as this.

II

This Court on many occasions has advanced the commonsense idea that certain kinds of speech are more central to the interests of the First Amendment than others. Obscene speech and "fighting words" have long been accorded no protection. Roth v. United States; Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); see also Near v. Minnesota ex rel. Olson, 283 U.S. 697, 716 (1931) (publication of troop ship sailings); Harisiades v. Shaughnessy, 342 U.S. 580, 591-592 (1952) (advocating violent overthrow of the government). Similarly, "libelous utterances are not within the area of constitutionally protected speech." Roth, 354 U.S., at 483; accord, Gertz, supra, at 340 ("there is no constitutional value in false statements of fact"). In the area of protected speech, the most prominent example of reduced protection for certain kinds of speech concerns commercial speech. Such speech, we have noted, occupies a "subordinate position in the scale of First Amendment values." Ohralik v. Ohio State Bar Assn., 436 U.S. 447, 456 (1978). It also is more easily verifiable and less likely to be deterred by proper regulation. Virginia

Pharmacy Bd. v. Virginia Consumer Council, 425 U.S. 748, 771, n. 24 (1976). Accordingly, it may be regulated in ways that might be impermissible in the realm of noncommercial expression. Ohralik, supra, at 456; Central Hudson Gas & Elec. v. Public Serv. Comm'n, 447 U.S. 557, 562-563 (1980).

The Court concedes the above, but appears to believe that commercial speech--defined as advertising that does no more than propose a commercial transaction--is the only type of expression entitled to less than full First Amendment protection. See ante, at 18. Our cases suggest otherwise. In the area of defamation law itself, for example, some types of speech are entitled to broader protection than others: speech about public figures receives the full protection of the New York Times standards, while speech about private figures is entitled at most to the lesser standards of our opinion in Gertz.

Other areas of the law provide further examples. In Ohralik we noted that there are "[n]umerous examples ... of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, ... corporate proxy statements, ... the exchange of price and production information among

competitors, ... and employers' threats of retaliation for the labor activities of employees." 436 U.S., at 456. Yet similar regulation of political speech is subject to the most rigorous scrutiny. See Brown v. Hartlage, 456 U.S. 45; New York Times Co. v. Sullivan, 376 U.S., at 279, n. 19; Buckley v. Valeo, 424 U.S. 1, 14 (1976). Likewise, while the power of the State to license lawyers, psychiatrists, public school teachers, and investment advisors--all of whom speak for a living--is unquestioned, this Court has held that a law requiring licensing of union organizers is unconstitutional under the First Amendment. Thomas v. Collins, 323 U.S. 516 (1945); see Shiffrin 1264. See also Rosenbloom v. Metromedia, 403 U.S. 29, 44 (1971) (opinion of BRENNAN, J.) ("the determinant whether the First Amendment applies to state libel actions is whether the utterance involved concerns an issue of public or general concern"); Young v. American Mini Theatres, 427 U.S. 50, 70 (1976) (opinion of STEVENS, J.) ("it is manifest that society's interest in protecting this type of expression [nonobscene erotic films] is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate").

III

I do not think it necessary or advisable to attempt to define precisely what sorts of speech safely can be left to regulation by state libel laws. Cf. Metromedia, at 44-45. In accord with the state courts quoted supra, at 8, I think it clear that the speech at issue here implicates the First Amendment at most only tangentially. Petitioner's credit reporting is purely private, does not concern an issue of public or general importance, and is not circulated widely. Cf. Rosenbloom; W. Prosser, Law of Torts §118, pp. 822-823 (4th ed. 1971) (at common law there is privilege for fair comment on "matters of public concern"). It does not appear in a newspaper or magazine of general and regular circulation nor on the broadcast media. See 15 U.S.C. §80b-2(a)(11)(D) (Investment Advisers Act does not apply to "any bona fide newspaper, news magazine or business or financial publication of general and regular circulation"); cf. Mills v. Alabama, 384 U.S. 214, 219 (1966); Saxbe v. Washington Post Co., 417 U.S. 843, 863-864 (1974) (POWELL, J., dissenting). It is speech solely in the economic interests of the speaker and audience. Cf. Central Hudson Gas & Elec., 447 U.S.,

at 561.[10] These factors clearly placed petitioner's credit reporting in "a subordinate position in the scale of First Amendment values." Ohralik, 436 U.S., at 456.

In addition, the speech here, like advertising, is hardier and less likely to be deterred by state regulation. See Virginia Pharmacy Board, 425 U.S., at 771, n. 24. It is solely motivated by the desire for profit, which, we have noted, is a force less likely to be deterred than others. Ibid. Arguably, the reporting here also was more objectively verifiable than speech deserving of greater protection. See ibid. In any case, the market provides a powerful incentive to a credit reporting agency to be accurate, since false credit reporting is of no use to creditors. Thus, any incremental "chilling" effect of libel suits would be of decreased significance.[11]

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[10] In addition, as Shiffrin notes, "[t]he interests in individual self-expression, autonomy, and the like are not present here or are present in only an attenuated way." Shiffrin 1268.

[11] The Fifth Circuit Court of Appeals has noted that, while most States provide a qualified privilege against libel suits for commercial credit reporting agencies, in those States that do not there is a thriving credit reporting business and commercial credit transactions are not inhibited. Hood v. Dun & Bradstreet, Inc., 486 F.2d

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Since the speech here does not involve any of the concerns that motivated the Court in New York Times and Gertz, I conclude that the First Amendment protection is substantially lessened.[12] This requires us to strike a

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25, 32 (1973), cert. denied, 415 U.S. 985 (1974). The court cited an empirical study comparing credit transactions in Boise, Idaho, where there is no privilege, with those in Spokane, Washington, where there is one. Id., at 32, and n. 18.

[12]As indicated supra, I would not in this case attempt to define the precise boundaries of the realm in which the common law of defamation may operate. The lines will be difficult to draw in some cases. For example, credit reports and such financial information as stock quotations that appear in newspapers and newsletters of general circulation may present hard cases. Nonetheless, as indicated in the text, the idea that certain kinds of speech are at the core of the First Amendment, while others are on the periphery, is not a new one to courts. See, e.g., Roth v. United States; Ohralik v. Ohio State Bar Assn.; Brown v. Hartlage; W. Prosser, Law of Torts §118, p. 822-823 (4th ed. 1971). I do not think that this common law approach is a return to the ad hoc resolution of the competing interests at stake in each particular case that we eschewed in Gertz. See 418 U.S., at 343-344, 346. Constitutional protections would apply identically to broad categories of speech, not to individual cases. This kind of broad categorization does not raise the same concerns of bias and the like that might be raised by judicial determinations of which particular articles or publications address issues of "general or public interest," cf. id., at 346. See Shiffrin 1268, n. 327. Moreover, prophylactic rules--such as a direction to err on the side of constitutional protection--might be suggested that would ensure that speech of genuine concern was not restrained.

new balance between the interests of the speaker here and the state interest in providing a legal remedy for defamatory falsehood. That state interest, we have said, is "strong and legitimate." Gertz, 418 U.S., at 348. A State will not lightly be required to abandon this purpose,

> "for, as MR. JUSTICE STEWART, has reminded us, the individual's right to the protection of his own good name
>
> 'reflects no more than our basic concept of the essential dignity and worth of every human being--a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. ...' Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (concurring opinion)."
>
> Gertz, supra, at 341.

As noted, the ~~merit~~ wisdom of imposing punitive and presumed damages reasonably may be doubted in some circumstances. In Gertz, we found that the state interest in awarding these remedies was not "substantial" in view of their effect on speech at the core of the First Amendment. 418 U.S., at 349.[13] But this case concerns speech of

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Footnote(s) 13 will appear on following pages.

significantly less constitutional interest. To abrogate

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[13]There is language in Gertz that can be read broadly to the effect that presumed and punitive damages have no place in the law of defamation. It is necessary, however, to view this language in the context of the only issue before the Court. The suit was by a private person against a media defendant. New York Times controlled unless the private character of the plaintiff--unlike the public officials and public persons in prior cases--was a distinguishing factor. Thus, much of the opinion focused on the presence of a private plaintiff.

It was the presence of a media defendant, ~~however,~~ that primarily caused the Court in Gertz to limit recovery to "actual injury." Gertz, supra, at 349. Presumed and punitive damages were deemed--for the reasons first articulated in New York Times--to threaten the historic role of the media in a representative democracy. Id., at 349-350. No such threat is present when one private party is libeled by another private party--at least where the ~~subject matter of the libel is unrelated to the concerns that justified this Court's decision in New York Times and its progeny.~~ In weighing the interests that may be at issue, it is well also to ~~remember~~ that there is a significant public interest "in compensating private individuals for wrongful injury to reputation". Gertz, supra, at 348-349. And, as Dean Prosser stated, the common law has allowed presumed and punitive damages because "proof of actual damage will be impossible in a great many [slander and libel] cases where . . . it is all but certain that serious harm has resulted in fact." Prosser, supra, §112, p. 765.

In considering generally the utility and appropriateness of punitive damages, it is well to bear in mind that the merit of such damages reasonably may vary with the context in which the issue arises. Defamation actions are unusual in this connection. In the broad category of personal injury litigation, proof of substantial actual damages is commonplace. The role of punitive damages in addition to such actual damages is to punish and to deter--a role normally left to the

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state law in this context would require us to find that the common law--and the two centuries of our experience with it--seriously erred in concluding that these remedies are necessary in purely private cases to compensate the plaintiff and to deter adequately the defamer even where "actual malice" cannot be proved. For any court to presume such error is a serious matter. Private defamation law has been respected and left to the States for 200 years. The Court identifies no new or overriding societal interest that justifies constitutionalizing it now.

IV

Constitutional principles retain force and respect only when they are applied sparingly where needed. A

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government. See Smith v. Wade, ___ U.S. ___, ___ (1983) (REHNQUIST, J., dissenting) (103 SCt 1641). In defamation cases, such damages may serve the very different purpose noted by Judge Friendly of "financing the cost of deserving litigation where only small compensatory damages can be expected [and] diverting the plaintiff's desire for revenge into peaceful channels." Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 838 (1967).

commonsense view of those spheres that are primarily of local concern persuades me that the Court should stay its hand in this case. As we have said in a related context, to require a parity of constitutional protection for the speech here and that in Gertz and New York Times "could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech." Ohralik, 436 U.S., at 456. I would leave this area of defamation law to the wisdom of the several States.

L.F.P. 6/14

06/14

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: _____

Recirculated: _____

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1st CHAMBERS DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-18

DUN & BRADSTREET, INC., PETITIONERS *v.* GREENMOSS BUILDERS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

[June ——, 1984]

JUSTICE POWELL, dissenting.

The Court today extends the constitutional rule of *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), far beyond its origins or its purpose. In that case, the Court for the first time held that the Constitution limits the reach of state laws of libel and slander in suits against media defendants. A constitutional role was needed in such cases, the Court held, to ensure that "debate on public issues . . . be uninhibited, robust, and wide-open." *Id.*, at 270. All of the Court's decisions since then that have considered the constitutional role in defamation law also have involved suits against a media defendant arising out of an article or broadcast on an issue of public concern and importance. The Court today goes beyond these precedents and holds that the Constitution prevents the State of Vermont from applying its common law to a libel action between a construction company and a commercial credit reporting agency. In my view, this holding is not required by the First Amendment. Nor is it wise or commanded by logic or precedent.

I

The common law rules that the Court today repudiates are of ancient vintage. The rule that damages are presumed for libel was announced by Hale as early as 1670. *Restatement of Torts* § 568, comment b, at 162 (1938). Punitive damages

Joe - are these statements consistent

long have been available in actions for defamation, under a quite different standard than the one applied today. See, *e. g.*, C. McCormick, Law of Damages § 118, p. 431 (1935); M. Newell, Law of Defamation, Libel and Slander 842, 844–846 (1890) (citing cases). And since at least the early part of this century, a plaintiff in a garden-variety defamation suit could recover without showing any facts as to the state of mind of the defendant. W. Prosser, Law of Torts § 113, pp. 772–773 (4th ed. 1971) (hereinafter Prosser); Restatement (Second) of Torts § 580B, comment b (1977).[1] The common law recognized some privileges, but generally to recover for written expression harmful to reputation the ordinary citizen had to show only falsity and publication.

Joe - ask me about these

Only in this century?

These rules have not gone unquestioned. This Court itself has limited their reach in certain situations of overriding need. But in jurisdiction after jurisdiction they have been reaffirmed repeatedly. Thus, for example, it is the judgment of history that "proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact." Prosser § 112, p. 765; accord, *Rowe* v. *Metz*, 195 Colo. 424, 425–426, 579 P. 2d 83, 84 (1978); Note, Developments in the Law—Defamation, 69 Harv. L. Rev. 875, 891–892 (1956). As a result, courts for centuries have allowed juries to presume that some damage occurred from many defamatory utterances and publications.

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This accumulated learning is worthy of respect. Moreover, the common law rules were developed in an area of the law that, since the founding of our country, has been the

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province of the state courts.[2] Even if one disagrees with these centuries-old rules,[3] this Court should discard them only if they conflict with the rights guaranteed to the people by federal law. Thus, this Court has modified these rules only when their operation threatened the core values of the First Amendment. More specifically, we have done so only in cases in which state law placed at risk "freedom of expression upon public questions." *New York Times* v. *Sullivan*, 376 U. S., at 269. "The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth* v. *United States*, 354 U. S. 476, 484 (1957). "At the core of the First Amendment are certain basic conceptions about the manner in which political discussion in a representative democracy should proceed." *Brown* v. *Hartlage*, 456 U. S. 45, 52 (1982); accord *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 776 (1978) (discussion of "'matters of public concern'" is "at the heart of the First Amendment's protection"). There is nothing of these ~~core~~ central interests in the situation before us today. The Court today extends these constitutional rules to nothing less than

Joe - three "cores" in sentence. It becomes a bit unmanageable

[2] The Framers were familiar with the common law of libel, which had been adopted by the American colonies. See *Gertz*, 418 U. S., at 380–384 (WHITE, J., dissenting); *Roth* v. *United States*, 354 U. S. 476, 482–483, and n. 11 (1957) (13 States allowed prosecution for libel in 1792); *Beauharnais* v. *Illinois*, 343 U. S. 250, 254–255 (1952). See also T. Cooley, Constitutional Limitations 602 (7th ed. 1903); Rutledge, The Law of Defamation: Recent Developments, 32 Alabama Lawyer 409, 410 (1971):

"[T]he law of defamation has been an integral part of the laws of England, the colonies and the states since time immemorial. So many actions have been maintained and judgments recovered under the various laws of libel that the Constitutional validity of libel actions could be denied only by a Court willing to hold all its predecessors were wrong in their interpretation of the First Amendment and that two hundred years of precedents should be overruled."

Joe - this or a paraphrase may be a strong substitute for the sentence

[3] As the Court notes, there is room to doubt the wisdom of state laws that permit presumed and punitive damages on liberal terms. *Ante*, at 9, and 10, n. 3.

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[8] Suits by disgruntled consumers against credit reporting agencies appear to be disquietingly common. *E. g.*, *Millstone* v. *O'Hanlon Reports, Inc.*, 528 F. 2d 829 (CA8 1976); *Retail Credit Co.* v. *Russell*, 234 Ga. 765, 218 S. E. 2d 54 (1975); *Hood* v. *Dun & Bradstreet, Inc.*, 486 F. 2d 25 (CA5 1973), cert. denied, 415 U. S. 985 (1974); *Grove* v. *Dun & Bradstreet, Inc.*,

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The facts in *Gertz* were very different from those here. *Gertz* was a libel suit against a media defendant: a magazine called American Opinion, the monthly outlet of the John Birch Society. The article in question discussed a question of undoubted public importance—whether the prosecution of a policeman was part of a Communist campaign to discredit local law enforcement agencies. The plaintiff was a lawyer tangentially involved in the prosecution who, the magazine alleged, was the chief architect of the "frame-up" of the police officer. The article spoke of the lawyer's alleged links to Communist activity. Like every other case in which this Court has considered the constitutional limits on state laws of defamation, *Gertz* involved a media article directly relevant to the effective operation of our system of democratic self-government.

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regulating state libel law is far more limited when the concerns that activated *New York Times* and *Gertz* are absent. In such a case,

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II

This Court on many occasions has advanced the commonsense idea that certain kinds of speech are more central to the interests of the First Amendment than others. Obscene speech and "fighting words" have long been accorded no protection. *Roth* v. *United States*, 354 U. S., at 483; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942); see also *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697, 716 (1931) (publication of troop ship sailings during war time may be enjoined); *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 591–592 (1952) (advocating violent overthrow of the government is

Joe
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Seattle Times Co. v. Rhinehart, — U.S. —, — (1984).

unprotected speech); Similarly, "libelous utterances are not within the area of constitutionally protected speech." *Roth*, 354 U. S., at 483; accord, *Gertz*, *supra*, at 340 ("there is no constitutional value in false statements of fact"). In the area of protected speech, the most prominent example of reduced protection for certain kinds of speech concerns commercial speech. Such speech, we have noted, occupies a "subordinate position in the scale of First Amendment values." *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 456 (1978). It also is more easily verifiable and less likely to be deterred by proper regulation. *Virginia Pharmacy Bd.* v. *Virginia Consumer Council*, 425 U. S. 748, 771, n. 24 (1976). Accordingly, it may be regulated in ways that might be impermissible in the realm of noncommercial expression. *Ohralik*, *supra*, at 456; *Central Hudson Gas & Elec.* v. *Public Serv. Comm'n*, 447 U. S. 557, 562–563 (1980).

The Court concedes the above, but appears to believe that commercial speech—defined as advertising that does no more than propose a commercial transaction—is the only type of expression entitled to less than full First Amendment protection. See *ante*, at 18. Our cases suggest otherwise. In the area of defamation law itself, for example, some types of speech are entitled to broader protection than others: speech about public figures receives the full protection of the *New York Times* standards, while speech about private figures is entitled at most to the lesser standards of our opinion in *Gertz*.

Joe - Is Gertz standard really "lesser"? If not, was what about statements, supra, such as fact/opinion in our op.?

Other areas of the law provide further examples. In *Ohralik* we noted that there are "[n]umerous examples . . . of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, . . . corporate proxy statements, . . . the exchange of price and production information among competitors, . . . and employers' threats of retaliation for the labor activities of employees." 436 U. S., at 456 (citations omitted). Yet similar regulation of political speech is subject to

and on p 9 & 12?

Constitutional standards were applied in both cases.

the most rigorous scrutiny. See *Brown* v. *Hartlage*, 456 U. S. 45; *New York Times Co.* v. *Sullivan*, 376 U. S., at 279, n. 19; *Buckley* v. *Valeo*, 424 U. S. 1, 14 (1976). Likewise, while the power of the State to license lawyers, psychiatrists, public school teachers, and investment advisors—all of whom speak for a living—is unquestioned, this Court has held that a law requiring licensing of union organizers is unconstitutional under the First Amendment. *Thomas* v. *Collins*, 323 U. S. 516 (1945); see Shiffrin 1264. See also *Rosenbloom* v. *Metromedia*, 403 U. S. 29, 44 (1971) (opinion of BRENNAN, J.) ("the determinant whether the First Amendment applies to state libel actions is whether the utterance involved concerns an issue of public or general concern"); *Young* v. *American Mini Theatres*, 427 U. S. 50, 70 (1976) (opinion of STEVENS, J.) ("it is manifest that society's interest in protecting this type of expression [nonobscene erotic films] is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate").

III

I do not think it necessary or advisable to attempt to define precisely what sorts of speech safely can be left to regulation by state libel laws. Cf. *Rosenbloom*, *supra*, at 44–45. In accord with the state courts quoted *supra*, at 9, I think it clear that the speech at issue here implicates the First Amendment at most only tangentially. Petitioner's credit reporting is purely private. It does not appear in a newspaper or magazine of general and regular circulation nor on the broadcast media. See 15 U. S. C. § 80b–2(a)(11)(D) (Investment Advisers Act does not apply to "any bona fide newspaper, news magazine or business or financial publication of general and regular circulation"); cf. *Mills* v. *Alabama*, 384 U. S. 214, 219 (1966); *Saxbe* v. *Washington Post Co.*, 417 U. S. 843, 863–864 (1974) (POWELL, J., dissenting). It is speech solely in the economic interests of the speaker and audience. Cf. *Central Hudson Gas & Elec.*, 447 U. S., at

561.[10] These factors clearly placed petitioner's credit reporting in "a subordinate position in the scale of First Amendment values." *Ohralik*, 436 U. S., at 456.

In addition, the speech here, like advertising, is hardier and less likely to be deterred by state regulation. See *Virginia Pharmacy Board*, 425 U. S., at 771, n. 24. It is solely motivated by the desire for profit, which, we have noted, is a force less likely to be deterred than others. *Ibid.* Arguably, the reporting here also was more objectively verifiable than speech deserving of greater protection. See *ibid.* In any case, the market provides a powerful incentive to a credit reporting agency to be accurate, since false credit reporting is of no use to creditors. Thus, any incremental "chilling" effect of libel suits would be of decreased significance.[11]

Since the speech here does not involve any of the concerns that motivated the Court in *New York Times* and *Gertz*, I conclude that the First Amendment protection is substantially lessened.[12] This requires us to strike a new balance be-

[10] In addition, as Shiffrin notes, "[t]he interests in individual self-expression, autonomy, and the like are not present here or are present in only an attenuated way." Shiffrin 1268.

[11] The Fifth Circuit Court of Appeals has noted that, while most States provide a qualified privilege against libel suits for commercial credit reporting agencies, in those States that do not there is a thriving credit reporting business and commercial credit transactions are not inhibited. *Hood* v. *Dun & Bradstreet, Inc.*, 486 F. 2d 25, 32 (1973), cert. denied, 415 U. S. 985 (1974). The court cited an empirical study comparing credit transactions in Boise, Idaho, where there is no privilege, with those in Spokane, Washington, where there is one. *Id.*, at 32, and n. 18.

[12] As indicated *supra*, I would not in this case attempt to define the precise boundaries of the realm in which the common law of defamation may operate. The lines will be difficult to draw in some cases. For example, credit reports and such financial information as stock quotations that appear in newspapers and newsletters of general circulation may present hard cases. Nonetheless, as indicated in the text, the idea that certain kinds of speech are at the core of the First Amendment, while others are on the periphery, is not a new one to courts. See, *e. g.*, *Roth* v. *United States*, 354 U. S. 476; *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447 (1978); *Brown* v. *Hartlage*, 456 U. S. 45; Prosser § 118, p. 822–823. I do

tween the interests of the speaker here and the state interest in providing a legal remedy for defamatory falsehood. That state interest, we have said, is "strong and legitimate." *Gertz*, 418 U. S., at 348. A State will not lightly be required to abandon this purpose,

> "for, as MR. JUSTICE STEWART, has reminded us, the individual's right to the protection of his own good name 'reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. . . .' *Rosenblatt* v. *Baer*, 383 U. S. 75, 92 (1966) (concurring opinion)."
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> *Gertz*, *supra*, at 341.

As noted, the wisdom of imposing punitive and presumed damages reasonably may be doubted in some circumstances. In *Gertz*, we found that the state interest in awarding these remedies was not "substantial" in view of their effect on speech at the core of the First Amendment. 418 U. S., at 349.[13] But this case concerns speech of significantly less con-

no one can

not think ~~that~~ this common law approach is a return to the *ad hoc* resolution of the competing interests at stake in each particular case that we eschewed in *Gertz*. See 418 U. S., at 343–344, 346. Constitutional protections would apply identically to broad categories of speech, not to individual cases. This kind of broad categorization does not raise the same concerns of bias and the like that might be raised by judicial determinations of which particular articles or publications address issues of "general or public interest," cf. *id.*, at 346. See Shiffrin 1268, n. 327. Moreover, prophylactic rules—such as a direction to err on the side of constitutional protection—might be suggested that would ensure that speech of genuine concern was not restrained.

[13] There is language in *Gertz* that can be read broadly to the effect that presumed and punitive damages have no place in the law of defamation. It is necessary, however, to view this language in the context of the only issue before the Court. The suit was by a private person against a media defendant. It was the presence of a media defendant that primarily

stitutional interest. To abrogate state law in *this* context would require us to find that the common law—and the two centuries of our experience with it—seriously erred in concluding that these remedies are necessary in purely private cases to compensate the plaintiff and to deter adequately the defamer even where "actual malice" cannot be proved. For any court to presume such error is a serious matter. Private defamation law has been respected and left to the States for 200 years. The Court identifies no new or overriding societal interest that justifies constitutionalizing it now.

IV

Constitutional principles retain force and respect only

caused the Court in *Gertz* to limit recovery to "actual injury." *Gertz*, *supra*, at 349. Presumed and punitive damages were deemed—for the reasons first articulated in *New York Times*—to threaten the historic role of the media in a representative democracy. *Id.*, at 349–350. No such threat is present when one private party is libeled by another private party—at least where the libel is circulated in the course of, and is solely concerned with, both parties' businesses. In weighing the interests that may be at issue, it is well also to repeat that there is a significant public interest "in compensating private individuals for wrongful injury to reputation." *Gertz*, *supra*, at 348–349. And, as Dean Prosser stated, the common law has allowed presumed and punitive damages because "proof of actual damage will be impossible in a great many [slander and libel] cases where . . . it is all but certain that serious harm has resulted in fact." Prosser § 112, p. 765.

In considering generally the utility and appropriateness of punitive damages, it is well to bear in mind that the merit of such damages reasonably may vary with the context in which the issue arises. Defamation actions are unusual in this connection. In the broad category of personal injury litigation, proof of substantial actual damages is commonplace. The role of punitive damages in addition to such actual damages is to punish and to deter—a role normally left to the government. See *Smith* v. *Wade*, —— U. S. ——, —— (1983) (REHNQUIST, J., dissenting). In defamation cases, such damages may serve the very different purpose noted by Judge Friendly of "financing the cost of deserving litigation where only small compensatory damages can be expected [and] diverting the plaintiff's desire for revenge into peaceful channels." *Roginsky* v. *Richardson-Merrell, Inc.*, 378 F. 2d 832, 838 (1967).

when they are applied sparingly where needed. A commonsense view of those spheres that are primarily of local concern persuades me that the Court should stay its hand in this case. As we have said in a related context, to require a parity of constitutional protection for the speech here and that in *Gertz* and *New York Times* "could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech." *Ohralik*, 436 U. S., at 456. I would leave this area of ~~defamation~~ law to the wisdom of the several States.

The Court identifies no new or overriding societal interest that justifies constitutionalizing defamation actions between private parties.

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To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: JUN 15 1984

Recirculated: _____

~~1st~~ 2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-18

DUN & BRADSTREET, INC., PETITIONERS *v.*
GREENMOSS BUILDERS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

[June ——, 1984]

JUSTICE POWELL, dissenting.

The Court today extends the constitutional rule of *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), far beyond its origins or its purpose. In that case, the Court for the first time held that the Constitution limits the reach of state laws of libel and slander in suits against media defendants. A constitutional role was needed in such cases, the Court held, to ensure that "debate on public issues . . . be uninhibited, robust, and wide-open." *Id.*, at 270. All of the Court's decisions since then that have considered the constitutional role in defamation law also have involved suits against a media defendant arising out of an article or broadcast on an issue of public concern and importance. The Court today goes beyond these precedents and holds that the Constitution prevents the State of Vermont from applying its common law to a libel action between a construction company and a commercial credit reporting agency. In my view, this holding is not required by the First Amendment. Nor is it wise or commanded by logic or precedent.

I

The common law rules that the Court today repudiates are of ancient vintage. The rule that damages are presumed for libel was announced by Hale as early as 1670. *Restatement of Torts* § 568, comment b, at 162 (1938). Punitive damages

long have been available in actions for defamation, under a quite different standard than the one applied today. See, *e. g.*, C. McCormick, Law of Damages § 118, p. 431 (1935); M. Newell, Law of Defamation, Libel and Slander 842, 844–846 (1890) (citing cases). And since at least the early part of this century, a plaintiff in a garden-variety defamation suit could recover without showing any facts as to the state of mind of the defendant. W. Prosser, Law of Torts § 113, pp. 772–773 (4th ed. 1971) (hereinafter Prosser); Restatement (Second) of Torts § 580B, comment b (1977).[1] The common law recognized some privileges, but generally to recover for written expression harmful to reputation the ordinary citizen had to show only falsity and publication.

These rules have not gone unquestioned. This Court itself has limited their reach in certain situations of overriding need. But in jurisdiction after jurisdiction they have been reaffirmed repeatedly. Thus, for example, it is the judgment of history that "proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact." Prosser § 112, p. 765; accord, *Rowe* v. *Metz*, 195 Colo. 424, 425–426, 579 P. 2d 83, 84 (1978); Note, Developments in the Law—Defamation, 69 Harv. L. Rev. 875, 891–892 (1956). As a result, courts for centuries have allowed juries to presume that some damage occurred from many defamatory utterances and publications.

This accumulated learning is worthy of respect. Moreover, the common law rules were developed in an area of the law that, since the founding of our country, has been the

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[1] While the Court's opinion discusses only the questions of presumed and punitive damages, its effect is broader. The logic of the opinion apparently would require that the rule announced in *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 347 (1974), barring liability without fault in cases involving media discussion of public issues, be applied in all defamation actions.

province of the state courts.[2] Even if one disagrees with these centuries-old rules,[3] this Court should discard them only if they conflict with the rights guaranteed to the people by federal law. Thus, this Court has modified these rules only when their operation threatened the core values of the First Amendment. More specifically, we have done so only in cases in which state law placed at risk "freedom of expression upon public questions." *New York Times* v. *Sullivan*, 376 U. S., at 269. "The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth* v. *United States*, 354 U. S. 476, 484 (1957). "At the core of the First Amendment are certain basic conceptions about the manner in which political discussion in a representative democracy should proceed." *Brown* v. *Hartlage*, 456 U. S. 45, 52 (1982); accord *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 776 (1978) (discussion of "'matters of public concern'" is "at the heart of the First Amendment's protection"). There is nothing of these central interests in the situation before us today. The Court today extends these constitutional rules to nothing less than

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[2] The Framers were familiar with the common law of libel, which had been adopted by the American colonies. See *Gertz*, 418 U. S., at 380–384 (WHITE, J., dissenting); *Roth* v. *United States*, 354 U. S. 476, 482–483, and n. 11 (1957) (13 States allowed prosecution for libel in 1792); *Beauharnais* v. *Illinois*, 343 U. S. 250, 254–255 (1952). See also T. Cooley, Constitutional Limitations 602 (7th ed. 1903); Rutledge, The Law of Defamation: Recent Developments, 32 Alabama Lawyer 409, 410 (1971):

"[T]he law of defamation has been an integral part of the laws of England, the colonies and the states since time immemorial. So many actions have been maintained and judgments recovered under the various laws of libel that the Constitutional validity of libel actions could be denied only by a Court willing to hold all its predecessors were wrong in their interpretation of the First Amendment and that two hundred years of precedents should be overruled."

[3] As the Court notes, there is room to doubt the wisdom of state laws that permit presumed and punitive damages on liberal terms. *Ante*, at 9.

the entire field of libel and slander.[4] Henceforth, every action by a former employee complaining of a malicious negative recommendation by an employer,[5] every action by a dealer against a competitor who falsely reports bad service to the manufacturer,[6] every action by a spurned suitor for spreading false rumors about the reasons for his failure,[7] and numerous other actions arising out of back-fence gossip or commercial incompetence[8] will raise a constitutional ques-

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[4] Moreover, the Court's holding affects not only state laws. Congress, too, has provided for actions that after today may well not meet the new constitutional standards. For example, the Fair Credit Reporting Act provides that punitive damages may be awarded where a credit service willfully has reported *true* but obsolete information as to a consumer. 15 U. S. C. §§ 1681c, 1681n. For the Court to uphold this law, it would have to find the governmental interest in protecting a debtor from the circulation of such true information to be significantly greater than the interest in protecting damage to reputation by malicious lies. In addition, the Act provides other procedures to assure accuracy and fairness to consumers. Previously, such reasonable regulation precisely aimed at a perceived commercial evil would not have been susceptible to constitutional attack. See *Millstone* v. *O'Hanlon Reports, Inc.*, 528 F. 2d 829 (CA8 1976) (upholding Act). After today, every such regulation of private and economic speech may be constitutionally suspect unless it meets the elaborate and rigorous standards of *New York Times* and *Gertz*. See also *Brown* v. *Hartlage*, 456 U. S. 45, 53–54 (1982) (restrictions on communication of ideas to voters must be supported by a compelling state interest). Similarly, the provisions of the securities laws, many of which regulate speech, *e. g.*, 15 U. S. C. §§ 77k, 77*l*, 77o, 78r, will be subject to scrutiny under those standards. See also *infra*, at 7–8.

[5] *E. g.*, *Calero* v. *Del Chemical Corp.*, 68 Wis. 2d 487, 228 N. W. 2d 737 (1975); *Stuempges* v. *Parke, Davis & Co.*, 297 N. W. 2d 252 (Minn. 1980).

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Other areas of the law provide further examples. In *Ohralik* we noted that there are "[n]umerous examples . . . of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, . . . corporate proxy statements, . . . the exchange of price and production information among competitors, . . . and employers' threats of retaliation for the labor

activities of employees." 436 U. S., at 456 (citations omitted). Yet similar regulation of political speech is subject to the most rigorous scrutiny. See *Brown* v. *Hartlage*, 456 U. S. 45; *New York Times Co.* v. *Sullivan*, 376 U. S., at 279, n. 19; *Buckley* v. *Valeo*, 424 U. S. 1, 14 (1976). Likewise, while the power of the State to license lawyers, psychiatrists, public school teachers, and investment advisors—all of whom speak for a living—is unquestioned, this Court has held that a law requiring licensing of union organizers is unconstitutional under the First Amendment. *Thomas* v. *Collins*, 323 U. S. 516 (1945); see Shiffrin 1264. See also *Rosenbloom* v. *Metromedia*, 403 U. S. 29, 44 (1971) (opinion of BRENNAN, J.) ("the determinant whether the First Amendment applies to state libel actions is whether the utterance involved concerns an issue of public or general concern"); *Young* v. *American Mini Theatres*, 427 U. S. 50, 70 (1976) (opinion of STEVENS, J.) ("it is manifest that society's interest in protecting this type of expression [nonobscene erotic films] is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate").

III

I do not think it necessary or advisable to attempt to define ~~precisely~~ what sorts of speech safely can be left to regulation by state libel laws. Cf. *Rosenbloom*, *supra*, at 44–45. In accord with the state courts quoted *supra*, at 6, I think it clear that the speech at issue here implicates the First Amendment at most only tangentially. Petitioner's credit reporting is purely private. It does not appear in a newspaper or magazine of general and regular circulation nor on the broadcast media. See 15 U. S. C. § 80b–2(a)(11)(D) (Investment Advisers Act does not apply to "any bona fide newspaper, news magazine or business or financial publication of general and regular circulation"); cf. *Mills* v. *Alabama*, 384 U. S. 214, 219 (1966); *Saxbe* v. *Washington Post Co.*, 417 U. S. 843, 863–864 (1974) (POWELL, J., dissenting). It is speech solely in the economic interests of the speaker and au-

dience. Cf. *Central Hudson Gas & Elec.*, 447 U. S., at 561.[10] These factors clearly placed petitioner's credit reporting in "a subordinate position in the scale of First Amendment values." *Ohralik*, 436 U. S., at 456.

In addition, the speech here, like advertising, is hardier and less likely to be deterred by state regulation. See *Virginia Pharmacy Board*, 425 U. S., at 771, n. 24. It is solely motivated by the desire for profit, which, we have noted, is a force less likely to be deterred than others. *Ibid.* Arguably, the reporting here also was more objectively verifiable than speech deserving of greater protection. See *ibid.* In any case, the market provides a powerful incentive to a credit reporting agency to be accurate, since false credit reporting is of no use to creditors. Thus, any incremental "chilling" effect of libel suits would be of decreased significance.[11]

Since the speech here does not involve any of the concerns that motivated the Court in *New York Times* and *Gertz*, I conclude that the First Amendment protection is substantially lessened.[12] This requires us to strike a new balance be-

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[10] In addition, as Shiffrin notes, "[t]he interests in individual self-expression, autonomy, and the like are not present here or are present in only an attenuated way." Shiffrin 1268.

[11] The Fifth Circuit Court of Appeals has noted that, while most States provide a qualified privilege against libel suits for commercial credit reporting agencies, in those States that do not there is a thriving credit reporting business and commercial credit transactions are not inhibited. *Hood* v. *Dun & Bradstreet, Inc.*, 486 F. 2d 25, 32 (1973), cert. denied, 415 U. S. 985 (1974). The court cited an empirical study comparing credit transactions in Boise, Idaho, where there is no privilege, with those in Spokane, Washington, where there is one. *Id.*, at 32, and n. 18.

[12] As indicated *supra*, I would not in this case attempt to define the precise boundaries of the realm in which the common law of defamation may operate. The lines will be difficult to draw in some cases. For example, reports of bankruptcies, stock quotations, and other items that appear in newspapers and newsletters of general circulation ~~may present hard cases.~~ Nonetheless, as indicated in the text, the idea that certain kinds of speech are at the core of the First Amendment, while others are on the periphery, is not a new one to courts. See, *e. g.*, *Roth* v. *United States*, 354 U. S.

tween the interests of the speaker here and the state interest in providing a legal remedy for defamatory falsehood. That state interest, we have said, is "strong and legitimate." *Gertz*, 418 U. S., at 348. A State will not lightly be required to abandon this purpose,

> "for, as MR. JUSTICE STEWART, has reminded us, the individual's right to the protection of his own good name 'reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. . . .' *Rosenblatt* v. *Baer*, 383 U. S. 75, 92 (1966) (concurring opinion)." *Gertz*, *supra*, at 341.

As noted, the merit of imposing punitive and presumed damages reasonably may be doubted in some circumstances. In *Gertz*, we found that the state interest in awarding these remedies was not "substantial" in view of their effect on speech at the core of the First Amendment. 418 U. S., at 349.[13] But this case concerns speech of significantly less con-

476; *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447 (1978); *Brown* v. *Hartlage*, 456 U. S. 45; Prosser § 118, p. 822–823. I do not think this common law approach is a return to the *ad hoc* resolution of the competing interests at stake in each particular case that we eschewed in *Gertz*. See 418 U. S., at 343–344, 346. Constitutional protections would apply identically to broad categories of speech, not to individual cases. This kind of broad categorization does not raise the same concerns of bias and the like that might be raised by judicial determinations of which particular articles or publications address issues of "general or public interest," cf. *id.*, at 346. See Shiffrin 1268, n. 327. Moreover, prophylactic rules—such as a direction to err on the side of constitutional protection—might be suggested that would ensure that speech of genuine concern was not restrained.

[13] There is language in *Gertz* that can be read broadly to the effect that presumed and punitive damages have no place in the law of defamation. It is necessary, however, to view this language in the context of the only issue before the Court. The suit was by a private person against a media

stitutional interest. The state interest in these remedies need not be compelling to support the incidental effect they may have on this kind of protected speech. As noted, the common law long ago concluded that requiring proof of damages incurred did not adequately compensate the plaintiff in many defamation cases. We should not lightly presume that this judgment—a judgment respected and left to the States for 200 years—was erroneous. The state interest in providing a remedy for defamation surely includes ensuring that those remedies are effective. In light of the reduced constitutional value in the speech at issue here, I would hold that the state interest adequately supports the common law rules.

IV

Constitutional principles retain force and respect only when they are applied sparingly where needed. A common-

defendant. It was the presence of the media defendant that primarily caused the Court in *Gertz* to limit recovery to "actual injury." *Gertz*, *supra*, at 349. Presumed and punitive damages were deemed—for the reasons first articulated in *New York Times*—to threaten the historic role of the media in a representative democracy. *Id.*, at 349–350. No such threat is present when one private party is libeled by another private party—at least where the libel is circulated in the course of, and is solely concerned with, both parties' businesses. In weighing the interests that may be at issue, it is well also to repeat that there is a significant public interest "in compensating private individuals for wrongful injury to reputation." *Gertz*, *supra*, at 348–349.

In considering generally the utility and appropriateness of punitive damages, it is well to bear in mind that the wisdom of imposing such damages reasonably may vary with the context in which the issue arises. Defamation actions are not comparable, for example, to personal injury litigation in which proof of substantial actual damages is commonplace. The role of punitive damages in addition to actual damages is not to compensate; rather it is to punish and deter—a role normally left to government. See *Smith* v. *Wade*, —— U. S. ——, —— (1983) (REHNQUIST, J., dissenting). In defamation cases, where proof of actual damages is difficult, punitive damages—in many cases—may be largely compensatory in purpose. See generally Prosser § 112, p. 765. Judge Friendly recognized this alternative purpose of punitive damages in *Roginsky* v. *Richardson-Merrell, Inc.*, 378 F. 2d 832, 838 (CA2 1967).

RIDER "C"

sense view of those spheres that are primarily of local concern persuades me that the Court should stay its hand in this case. As we have said in a related context, to require a parity of constitutional protection for the speech here and that in *Gertz* and *New York Times* "could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech." *Ohralik*, 436 U. S., at 456. The Court identifies no new or overriding societal interest that justifies constitutionalizing defamation actions between private parties. I would leave this area of law to the wisdom of the several States.

C. ROBINSON
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Justice Brennan
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Justice Rehnquist
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SUPREME COURT OF THE UNITED STATES

No: 83–18

DUN & BRADSTREET, INC., PETITIONERS *v.*
GREENMOSS BUILDERS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

[June ——, 1984]

JUSTICE POWELL, dissenting.

The Court today extends the constitutional rule of *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), far beyond its origins or its purpose. In that case, the Court for the first time held that the Constitution limits the reach of state laws of libel and slander in suits against media defendants. A constitutional role was needed in such cases, the Court held, to ensure that "debate on public issues . . . be uninhibited, robust, and wide-open." *Id.*, at 270. All of the Court's decisions since then that have considered the constitutional role in defamation law also have involved suits against a media defendant arising out of an article or broadcast on an issue of public concern and importance. The Court today goes beyond these precedents and holds that the Constitution prevents the State of Vermont from applying its common law to a libel action between a construction company and a commercial credit reporting agency. In my view, this holding is not required by the First Amendment. Nor is it wise or commanded by logic or precedent.

I

The common law rules that the Court today repudiates are of ancient vintage. The rule that damages are presumed for libel was announced by Hale as early as 1670. *Restatement of Torts* § 568, comment b, at 162 (1938). Punitive damages

long have been available in actions for defamation, under a quite different standard than the one applied today. See, *e. g.*, C. McCormick, Law of Damages § 118, p. 431 (1935); M. Newell, Law of Defamation, Libel and Slander 842, 844–846 (1890) (citing cases). And since at least the early part of this century, a plaintiff in a garden-variety defamation suit could recover without showing any facts as to the state of mind of the defendant. W. Prosser, Law of Torts § 113, pp. 772–773 (4th ed. 1971) (hereinafter Prosser); Restatement (Second) of Torts § 580B, comment b (1977).[1] The common law recognized some privileges, but generally to recover for written expression harmful to reputation the ordinary citizen had to show only falsity and publication.

These rules have not gone unquestioned. This Court itself has limited their reach in certain situations of overriding need. But in jurisdiction after jurisdiction they have been reaffirmed repeatedly. Thus, for example, it is the judgment of history that "proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact." Prosser § 112, p. 765; accord, *Rowe* v. *Metz*, 195 Colo. 424, 425–426, 579 P. 2d 83, 84 (1978); Note, Developments in the Law—Defamation, 69 Harv. L. Rev. 875, 891–892 (1956). As a result, courts for centuries have allowed juries to presume that some damage occurred from many defamatory utterances and publications.

This accumulated learning is worthy of respect. Moreover, the common law rules were developed in an area of the law that, since the founding of our country, has been the

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[1] While the Court's opinion discusses only the questions of presumed and punitive damages, its effect is broader. The logic of the opinion would require that the rule announced in *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 347 (1974), barring liability without fault in cases involving media discussion of public issues, be applied in all defamation actions.

apparently

province of the state courts.[2] Even if one disagrees with these centuries-old rules,[3] this Court should discard them only if they conflict with the rights guaranteed to the people by federal law. Thus, this Court has modified these rules only when their operation threatened the core values of the First Amendment. More specifically, we have done so only in cases in which state law placed at risk "freedom of expression upon public questions." *New York Times* v. *Sullivan*, 376 U. S., at 269. "The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth* v. *United States*, 354 U. S. 476, 484 (1957). "At the core of the First Amendment are certain basic conceptions about the manner in which political discussion in a representative democracy should proceed." *Brown* v. *Hartlage*, 456 U. S. 45, 52 (1982); accord *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 776 (1978) (discussion of "'matters of public concern'" is "at the heart of the First Amendment's protection"). There is nothing of these ~~core~~ central interests in the situation before us today. The Court today extends these constitutional rules to nothing less than

[2] The Framers were familiar with the common law of libel, which had been adopted by the American colonies. See *Gertz*, 418 U. S., at 380–384 (WHITE, J., dissenting); *Roth* v. *United States*, 354 U. S. 476, 482–483, and n. 11 (1957) (13 States allowed prosecution for libel in 1792); *Beauharnais* v. *Illinois*, 343 U. S. 250, 254–255 (1952). See also T. Cooley, Constitutional Limitations 602 (7th ed. 1903); Rutledge, The Law of Defamation: Recent Developments, 32 Alabama Lawyer 409, 410 (1971):

"[T]he law of defamation has been an integral part of the laws of England, the colonies and the states since time immemorial. So many actions have been maintained and judgments recovered under the various laws of libel that the Constitutional validity of libel actions could be denied only by a Court willing to hold all its predecessors were wrong in their interpretation of the First Amendment and that two hundred years of precedents should be overruled."

[3] As the Court notes, there is room to doubt the wisdom of state laws that permit presumed and punitive damages on liberal terms. *Ante*, at 9, ~~and 10, n. 8.~~

the entire field of libel and slander.[4] Henceforth, every action by a former employee complaining of a malicious negative recommendation by an employer,[5] every action by a dealer against a competitor who falsely reports bad service to the manufacturer,[6] every action by a spurned suitor for spreading false rumors about the reasons for his failure,[7] and numerous other actions arising out of back-fence gossip or commercial incompetence[8] will raise a constitutional ques-

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[4] Moreover, the Court's holding affects not only state laws. Congress, too, has provided for actions that after today may well not meet the new constitutional standards. For example, the Fair Credit Reporting Act provides that punitive damages may be awarded where a credit service willfully has reported *true* but obsolete information as to a consumer. 15 U. S. C. §§ 1681c, 1681n. For the Court to uphold this law, it would have to find the governmental interest in protecting a debtor from the circulation of such true information to be significantly greater than the interest in protecting damage to reputation by malicious lies. In addition, the Act provides other procedures to assure accuracy and fairness to consumers. Previously, such reasonable regulation precisely aimed at a perceived commercial evil would not have been susceptible to constitutional attack. See *Millstone* v. *O'Hanlon Reports, Inc.*, 528 F. 2d 829 (CA8 1976) (upholding Act). After today, every such regulation of private and economic speech may be constitutionally suspect unless it meets the elaborate and rigorous standards of *New York Times* and *Gertz*. See also *Brown* v. *Hartlage*, 456 U. S. 45, 53–54 (1982) (restrictions on communication of ideas to voters must be supported by a compelling state interest). Similarly, the provisions of the securities laws, many of which regulate speech, *e. g.*, 15 U. S. C. §§ 77k, 77*l*, 77o, 78r, will be subject to scrutiny under those standards. ~~Cf.~~ *infra*, at ~~10–11~~.

[5] *E. g.*, *Calero* v. *Del Chemical Corp.*, 68 Wis. 2d 487, 228 N. W. 2d 737 (1975); *Stuempges* v. *Parke, Davis & Co.*, 297 N. W. 2d 252 (Minn. 1980).

[6] *E. g.*, *Harley-Davidson Motorsports, Inc.* v. *Markley*, 279 Or. 361, 568 P. 2d 1359 (1977).

[7] *E. g.*, *Schomer* v. *Smidt*, 113 Cal. App. 3d 828, 170 Cal. Rptr. 662 (1980).

[8] Suits by disgruntled consumers against credit reporting agencies appear to be disquietingly common. *E. g.*, *Millstone* v. *O'Hanlon Reports, Inc.*, 528 F. 2d 829 (CA8 1976); *Retail Credit Co.* v. *Russell*, 234 Ga. 765, 218 S. E. 2d 54 (1975); *Hood* v. *Dun & Bradstreet, Inc.*, 486 F. 2d 25 (CA5 1973), cert. denied, 415 U. S. 985 (1974); *Grove* v. *Dun & Bradstreet, Inc.*,

See also 7-8

tion. The Court believes that its decision is "squarely control[led]" by our opinion in *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974). *Ante*, at 11. This result unnecessarily repudiates the common law and trivializes the First Amendment.[9] There is nothing in *Gertz* that requires it.

The facts in *Gertz* were very different from those here. *Gertz* was a libel suit against a media defendant: a magazine called American Opinion, the monthly outlet of the John Birch Society. The article in question discussed a question of undoubted public importance—whether the prosecution of a policeman was part of a Communist campaign to discredit local law enforcement agencies. The plaintiff was a lawyer tangentially involved in the prosecution who, the magazine alleged, was the chief architect of the "frame-up" of the police officer. The article spoke of the lawyer's alleged links to Communist activity. Like every other case in which this Court has considered the constitutional limits on state laws of defamation, *Gertz* involved a media article directly relevant to the effective operation of our system of democratic self-government.

In contrast, the case today is a purely private defamation action against a commercial credit reporting agency that falsely reported to respondent's creditors that respondent was bankrupt. A number of state courts, including the court below, have recognized that the role of the Constitution in

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438 F. 2d 433 (CA3), cert. denied, 404 U. S. 898 (1971). In enacting the Fair Credit Reporting Act, 15 U. S. C. §§ 1681–1681t, Congress specifically found that "[t]here is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy." *Id.*, § 1681(a)(4).

[9] As one commentator has remarked with respect to "the case of a commercial supplier of credit information that defames a person applying for credit"—the very case before us today—"If the first amendment requirements outlined in *Gertz* apply, there is something clearly wrong with the first amendment or with *Gertz*." Shiffrin, The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment, 78 Nw. L. Rev. 1212, 1268 (1983) [hereinafter Shiffrin].

regulating state libel law is far more limited when the concerns that activated *New York Times* and *Gertz* are absent. In such a case,

> "[t]here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-censorship by the press. The facts of the present case are wholly without the First Amendment concerns with which the Supreme Court of the United States has been struggling." *Harley-Davidson Motorsports, Inc.* v. *Markley*, 279 Or. 361, 366, 568 P. 2d 1359, 1363 (1977).

Accord, *Rowe* v. *Metz*, 195 Colo. 424, 426, 579 P. 2d 83, 84 (1978) (*Gertz* should not be "blindly applied to the case of a private plaintiff against a nonmedia defendant for a defamation which is essentially private in nature"); *Calero* v. *Del Chemical Corp.*, 68 Wis. 2d 487, 506, 228 N. W. 2d 737, 748 (1975) ("In 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"); *Denny* v. *Mertz*, 106 Wis. 2d 636, 661, 318 N. W. 2d 141, 153 (1982). I would agree generally with these courts, and hold that the common law rules of libel and slander do not violate the Constitution when applied to a case such as this.

cert. denied, 459 U.S. 883

II

This Court on many occasions has advanced the commonsense idea that certain kinds of speech are more central to the interests of the First Amendment than others. Obscene speech and "fighting words" have long been accorded no protection. *Roth* v. *United States*, 354 U. S., at 483; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942); see also *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697, 716 (1931) (publication of troop ship sailings during war time may be enjoined); *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 591–592 (1952) (advocating violent overthrow of the government is

unprotected speech). Similarly, "libelous utterances are not within the area of constitutionally protected speech." *Roth*, 354 U. S., at 483; accord, *Gertz*, *supra*, at 340 ("there is no constitutional value in false statements of fact"). In the area of protected speech, the most prominent example of reduced protection for certain kinds of speech concerns commercial speech. Such speech, we have noted, occupies a "subordinate position in the scale of First Amendment values." *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 456 (1978). It also is more easily verifiable and less likely to be deterred by proper regulation. *Virginia Pharmacy Bd.* v. *Virginia Consumer Council*, 425 U. S. 748, 771, n. 24 (1976). Accordingly, it may be regulated in ways that might be impermissible in the realm of noncommercial expression. *Ohralik*, *supra*, at 456; *Central Hudson Gas & Elec.* v. *Public Serv. Comm'n*, 447 U. S. 557, 562–563 (1980).

The Court concedes the above, but appears to believe that commercial speech—defined as advertising that does no more than propose a commercial transaction—is the only type of expression entitled to less than full First Amendment protection. See *ante*, at 18. Our cases suggest otherwise. In the area of defamation law itself, for example, some types of speech are entitled to broader protection than others: speech about public figures receives the full protection of the *New York Times* standards, while speech about private figures is entitled at most to the lesser standards of our opinion in *Gertz*.

Other areas of the law provide further examples. In *Ohralik* we noted that there are "[n]umerous examples . . . of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, . . . corporate proxy statements, . . . the exchange of price and production information among competitors, . . . and employers' threats of retaliation for the labor activities of employees." 436 U. S., at 456 (citations omitted). Yet similar regulation of political speech is subject to

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561.[10] These factors clearly placed petitioner's credit reporting in "a subordinate position in the scale of First Amendment values." *Ohralik*, 436 U. S., at 456.

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[12] As indicated *supra*, I would not in this case attempt to define the precise boundaries of the realm in which the common law of defamation may operate. The lines will be difficult to draw in some cases. For example, ~~credit reports and such~~ financial ~~information as stock quotations~~ that appear in newspapers and newsletters of general circulation may present hard cases. Nonetheless, as indicated in the text, the idea that certain kinds of speech are at the core of the First Amendment, while others are on the periphery, is not a new one to courts. See, *e. g.*, *Roth* v. *United States*, 354 U. S. 476; *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447 (1978); *Brown* v. *Hartlage*, 456 U. S. 45; Prosser § 118, p. 822–823. I do

tween the interests of the speaker here and the state interest in providing a legal remedy for defamatory falsehood. That state interest, we have said, is "strong and legitimate." *Gertz*, 418 U. S., at 348. A State will not lightly be required to abandon this purpose,

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> *Gertz*, *supra*, at 341.

As noted, the ~~wisdom~~ of imposing punitive and presumed damages reasonably may be doubted in some circumstances. In *Gertz*, we found that the state interest in awarding these remedies was not "substantial" in view of their effect on speech at the core of the First Amendment. 418 U. S., at 349.[13] But this case concerns speech of significantly less con-

not think ~~that~~ this common law approach is a return to the *ad hoc* resolution of the competing interests at stake in each particular case that we eschewed in *Gertz*. See 418 U. S., at 343–344, 346. Constitutional protections would apply identically to broad categories of speech, not to individual cases. This kind of broad categorization does not raise the same concerns of bias and the like that might be raised by judicial determinations of which particular articles or publications address issues of "general or public interest," cf. *id.*, at 346. See Shiffrin 1268, n. 327. Moreover, prophylactic rules—such as a direction to err on the side of constitutional protection—might be suggested that would ensure that speech of genuine concern was not restrained.

[13] There is language in *Gertz* that can be read broadly to the effect that presumed and punitive damages have no place in the law of defamation. It is necessary, however, to view this language in the context of the only issue before the Court. The suit was by a private person against a media defendant. It was the presence of a media defendant that primarily

stitutional interest. To abrogate state law in *this* context would require us to find that the common law—and the two centuries of our experience with it—seriously erred in concluding that these remedies are necessary in purely private cases to compensate the plaintiff and to deter adequately the defamer even where "actual malice" cannot be proved. For any court to presume such error is a serious matter. Private defamation law has been respected and left to the States for 200 years. The Court identifies no new or overriding societal interest that justifies constitutionalizing it now.

RIDER "A"

IV

Constitutional principles retain force and respect only

caused the Court in *Gertz* to limit recovery to "actual injury." *Gertz*, *supra*, at 349. Presumed and punitive damages were deemed—for the reasons first articulated in *New York Times*—to threaten the historic role of the media in a representative democracy. *Id.*, at 349–350. No such threat is present when one private party is libeled by another private party—at least where the libel is circulated in the course of, and is solely concerned with, both parties' businesses. In weighing the interests that may be at issue, it is well also to repeat that there is a significant public interest "in compensating private individuals for wrongful injury to reputation." *Gertz*, *supra*, at 348–349. And, as Dean Prosser stated, the common law has allowed presumed and punitive damages because "proof of actual damage will be impossible in a great many [slander and libel] cases where . . . it is all but certain that serious harm has resulted in fact." Prosser § 112, p. 765.

In considering generally the utility and appropriateness of punitive damages, it is well to bear in mind that the merit of such damages reasonably may vary with the context in which the issue arises. Defamation actions are unusual in this connection. In the broad category of personal injury litigation, proof of substantial actual damages is commonplace. The role of punitive damages in addition to such actual damages is to punish and to deter—a role normally left to the government. See *Smith* v. *Wade*, —— U. S. ——, —— (1983) (REHNQUIST, J., dissenting). In defamation cases, such damages may serve the very different purpose noted by Judge Friendly of "financing the cost of deserving litigation where only small compensatory damages can be expected [and] diverting the plaintiff's desire for revenge into peaceful channels." *Roginsky* v. *Richardson-Merrell, Inc.*, 378 F. 2d 832, 838 (1967).

wisdom of imposing

RIDER "B"

when they are applied sparingly where needed. A commonsense view of those spheres that are primarily of local concern persuades me that the Court should stay its hand in this case. As we have said in a related context, to require a parity of constitutional protection for the speech here and that in *Gertz* and *New York Times* "could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech." *Ohralik*, 436 U. S., at 456. I would leave this area of defamation law to the wisdom of the several States.

RIDER "C"

06/15

Will be reargued

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: JUN 15 1984

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-18

DUN & BRADSTREET, INC., PETITIONERS *v.*
GREENMOSS BUILDERS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

[June ——, 1984]

JUSTICE POWELL, dissenting.

The Court today extends the constitutional rule of *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), far beyond its origins or its purpose. In that case, the Court for the first time held that the Constitution limits the reach of state laws of libel and slander in suits against media defendants. A constitutional role was needed in such cases, the Court held, to ensure that "debate on public issues . . . be uninhibited, robust, and wide-open." *Id.*, at 270. All of the Court's decisions since then that have considered the constitutional role in defamation law also have involved suits against a media defendant arising out of an article or broadcast on an issue of public concern and importance. The Court today goes beyond these precedents and holds that the Constitution prevents the State of Vermont from applying its common law to a libel action between a construction company and a commercial credit reporting agency. In my view, this holding is not required by the First Amendment. Nor is it wise or commanded by logic or precedent.

I

The common law rules that the Court today repudiates are of ancient vintage. The rule that damages are presumed for libel was announced by Hale as early as 1670. *Restatement of Torts* § 568, comment b, at 162 (1938). Punitive damages

long have been available in actions for defamation, under a quite different standard than the one applied today. See, *e. g.*, C. McCormick, Law of Damages § 118, p. 431 (1935); M. Newell, Law of Defamation, Libel and Slander 842, 844–846 (1890) (citing cases). And since at least the early part of this century, a plaintiff in a garden-variety defamation suit could recover without showing any facts as to the state of mind of the defendant. W. Prosser, Law of Torts § 113, pp. 772–773 (4th ed. 1971) (hereinafter Prosser); Restatement (Second) of Torts § 580B, comment b (1977).[1] The common law recognized some privileges, but generally to recover for written expression harmful to reputation the ordinary citizen had to show only falsity and publication.

These rules have not gone unquestioned. This Court itself has limited their reach in certain situations of overriding need. But in jurisdiction after jurisdiction they have been reaffirmed repeatedly. Thus, for example, it is the judgment of history that "proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact." Prosser § 112, p. 765; accord, *Rowe* v. *Metz*, 195 Colo. 424, 425–426, 579 P. 2d 83, 84 (1978); Note, Developments in the Law—Defamation, 69 Harv. L. Rev. 875, 891–892 (1956). As a result, courts for centuries have allowed juries to presume that some damage occurred from many defamatory utterances and publications.

This accumulated learning is worthy of respect. Moreover, the common law rules were developed in an area of the law that, since the founding of our country, has been the

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[1] While the Court's opinion discusses only the questions of presumed and punitive damages, its effect is broader. The logic of the opinion apparently would require that the rule announced in *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 347 (1974), barring liability without fault in cases involving media discussion of public issues, be applied in all defamation actions.

province of the state courts.[2] Even if one disagrees with these centuries-old rules,[3] this Court should discard them only if they conflict with the rights guaranteed to the people by federal law. Thus, this Court has modified these rules only when their operation threatened the core values of the First Amendment. More specifically, we have done so only in cases in which state law placed at risk "freedom of expression upon public questions." *New York Times* v. *Sullivan*, 376 U. S., at 269. "The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth* v. *United States*, 354 U. S. 476, 484 (1957). "At the core of the First Amendment are certain basic conceptions about the manner in which political discussion in a representative democracy should proceed." *Brown* v. *Hartlage*, 456 U. S. 45, 52 (1982); accord *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 776 (1978) (discussion of "'matters of public concern'" is "at the heart of the First Amendment's protection"). There is nothing of these central interests in the situation before us today. The Court today extends these constitutional rules to nothing less than

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[2] The Framers were familiar with the common law of libel, which had been adopted by the American colonies. See *Gertz*, 418 U. S., at 380–384 (WHITE, J., dissenting); *Roth* v. *United States*, 354 U. S. 476, 482–483, and n. 11 (1957) (13 States allowed prosecution for libel in 1792); *Beauharnais* v. *Illinois*, 343 U. S. 250, 254–255 (1952). See also T. Cooley, Constitutional Limitations 602 (7th ed. 1903); Rutledge, The Law of Defamation: Recent Developments, 32 Alabama Lawyer 409, 410 (1971):

"[T]he law of defamation has been an integral part of the laws of England, the colonies and the states since time immemorial. So many actions have been maintained and judgments recovered under the various laws of libel that the Constitutional validity of libel actions could be denied only by a Court willing to hold all its predecessors were wrong in their interpretation of the First Amendment and that two hundred years of precedents should be overruled."

[3] As the Court notes, there is room to doubt the wisdom of state laws that permit presumed and punitive damages on liberal terms. *Ante*, at 9.

the entire field of libel and slander.[4] Henceforth, every action by a former employee complaining of a malicious negative recommendation by an employer,[5] every action by a dealer against a competitor who falsely reports bad service to the manufacturer,[6] every action by a spurned suitor for spreading false rumors about the reasons for his failure,[7] and numerous other actions arising out of back-fence gossip or commercial incompetence[8] will raise a constitutional ques-

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[4] Moreover, the Court's holding affects not only state laws. Congress, too, has provided for actions that after today may well not meet the new constitutional standards. For example, the Fair Credit Reporting Act provides that punitive damages may be awarded where a credit service willfully has reported *true* but obsolete information as to a consumer. 15 U. S. C. §§ 1681c, 1681n. For the Court to uphold this law, it would have to find the governmental interest in protecting a debtor from the circulation of such true information to be significantly greater than the interest in protecting damage to reputation by malicious lies. In addition, the Act provides other procedures to assure accuracy and fairness to consumers. Previously, such reasonable regulation precisely aimed at a perceived commercial evil would not have been susceptible to constitutional attack. See *Millstone* v. *O'Hanlon Reports, Inc.*, 528 F. 2d 829 (CA8 1976) (upholding Act). After today, every such regulation of private and economic speech may be constitutionally suspect unless it meets the elaborate and rigorous standards of *New York Times* and *Gertz*. See also *Brown* v. *Hartlage*, 456 U. S. 45, 53–54 (1982) (restrictions on communication of ideas to voters must be supported by a compelling state interest). Similarly, the provisions of the securities laws, many of which regulate speech, *e. g.*, 15 U. S. C. §§ 77k, 77*l*, 77o, 78r, will be subject to scrutiny under those standards. See also *infra*, at 7–8.

[5] *E. g.*, *Calero* v. *Del Chemical Corp.*, 68 Wis. 2d 487, 228 N. W. 2d 737 (1975); *Stuempges* v. *Parke, Davis & Co.*, 297 N. W. 2d 252 (Minn. 1980).

[6] *E. g.*, *Harley-Davidson Motorsports, Inc.* v. *Markley*, 279 Or. 361, 568 P. 2d 1359 (1977).

[7] *E. g.*, *Schomer* v. *Smidt*, 113 Cal. App. 3d 828, 170 Cal. Rptr. 662 (1980).

[8] Suits by disgruntled consumers against credit reporting agencies appear to be disquietingly common. *E. g.*, *Millstone* v. *O'Hanlon Reports, Inc.*, 528 F. 2d 829 (CA8 1976); *Retail Credit Co.* v. *Russell*, 234 Ga. 765, 218 S. E. 2d 54 (1975); *Hood* v. *Dun & Bradstreet, Inc.*, 486 F. 2d 25 (CA5 1973), cert. denied, 415 U. S. 985 (1974); *Grove* v. *Dun & Bradstreet, Inc.*,

tion. The Court believes that its decision is "squarely control[led]" by our opinion in *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974). *Ante*, at 11. This result unnecessarily repudiates the common law and trivializes the First Amendment.[9] There is nothing in *Gertz* that requires it.

The facts in *Gertz* were very different from those here. *Gertz* was a libel suit against a media defendant: a magazine called American Opinion, the monthly outlet of the John Birch Society. The article in question discussed a question of undoubted public importance—whether the prosecution of a policeman was part of a Communist campaign to discredit local law enforcement agencies. The plaintiff was a lawyer tangentially involved in the prosecution who, the magazine alleged, was the chief architect of the "frame-up" of the police officer. The article spoke of the lawyer's alleged links to Communist activity. Like every other case in which this Court has considered the constitutional limits on state laws of defamation, *Gertz* involved a media article directly relevant to the effective operation of our system of democratic self-government.

In contrast, the case today is a purely private defamation action against a commercial credit reporting agency that falsely reported to respondent's creditors that respondent was bankrupt. A number of state courts, including the court below, have recognized that the role of the Constitution in

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438 F. 2d 433 (CA3), cert. denied, 404 U. S. 898 (1971). In enacting the Fair Credit Reporting Act, 15 U. S. C. §§ 1681–1681t, Congress specifically found that "[t]here is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy." *Id.*, § 1681(a)(4).

[9] As one commentator has remarked with respect to "the case of a commercial supplier of credit information that defames a person applying for credit"—the very case before us today—"If the first amendment requirements outlined in *Gertz* apply, there is something clearly wrong with the first amendment or with *Gertz*." Shiffrin, The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment, 78 Nw. L. Rev. 1212, 1268 (1983) [hereinafter Shiffrin].

regulating state libel law is far more limited when the concerns that activated *New York Times* and *Gertz* are absent. In such a case,

> "[t]here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-censorship by the press. The facts of the present case are wholly without the First Amendment concerns with which the Supreme Court of the United States has been struggling." *Harley-Davidson Motorsports, Inc.* v. *Markley*, 279 Or. 361, 366, 568 P. 2d 1359, 1363 (1977).

Accord, *Rowe* v. *Metz*, 195 Colo. 424, 426, 579 P. 2d 83, 84 (1978) (*Gertz* should not be "blindly applied to the case of a private plaintiff against a nonmedia defendant for a defamation which is essentially private in nature"); *Calero* v. *Del Chemical Corp.*, 68 Wis. 2d 487, 506, 228 N. W. 2d 737, 748 (1975) ("In 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"); *Denny* v. *Mertz*, 106 Wis. 2d 636, 661, 318 N. W. 2d 141, 153, cert. denied, 459 U. S. 883 (1982). I would agree generally with these courts, and hold that the common law rules of libel and slander do not violate the Constitution when applied to a case such as this.

II

This Court on many occasions has advanced the commonsense idea that certain kinds of speech are more central to the interests of the First Amendment than others. Obscene speech and "fighting words" have long been accorded no protection. *Roth* v. *United States*, 354 U. S., at 483; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942); see also *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697, 716 (1931) (publication of troop ship sailings during war time may be enjoined); *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 591–592

(1952) (advocating violent overthrow of the government is unprotected speech); *Seattle Times Co.* v. *Rhinehart*, —— U. S. ——, —— (1984). Similarly, "libelous utterances are not within the area of constitutionally protected speech." *Roth*, 354 U. S., at 483; accord, *Gertz*, *supra*, at 340 ("there is no constitutional value in false statements of fact"). In the area of protected speech, the most prominent example of reduced protection for certain kinds of speech concerns commercial speech. Such speech, we have noted, occupies a "subordinate position in the scale of First Amendment values." *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 456 (1978). It also is more easily verifiable and less likely to be deterred by proper regulation. *Virginia Pharmacy Bd.* v. *Virginia Consumer Council*, 425 U. S. 748, 771, n. 24 (1976). Accordingly, it may be regulated in ways that might be impermissible in the realm of noncommercial expression. *Ohralik*, *supra*, at 456; *Central Hudson Gas & Elec.* v. *Public Serv. Comm'n*, 447 U. S. 557, 562–563 (1980).

The Court concedes the above, but appears to believe that commercial speech—defined as advertising that does no more than propose a commercial transaction—is the only type of expression entitled to less than full First Amendment protection. See *ante*, at 18. Our cases suggest otherwise. In the area of defamation law itself, for example, some types of speech are entitled to broader protection than others: speech about public figures receives the full protection of the *New York Times* standards, while speech about private figures is entitled at most to the lesser standards of our opinion in *Gertz*.

Other areas of the law provide further examples. In *Ohralik* we noted that there are "[n]umerous examples . . . of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, . . . corporate proxy statements, . . . the exchange of price and production information among competitors, . . . and employers' threats of retaliation for the labor

activities of employees." 436 U. S., at 456 (citations omitted). Yet similar regulation of political speech is subject to the most rigorous scrutiny. See *Brown* v. *Hartlage*, 456 U. S. 45; *New York Times Co.* v. *Sullivan*, 376 U. S., at 279, n. 19; *Buckley* v. *Valeo*, 424 U. S. 1, 14 (1976). Likewise, while the power of the State to license lawyers, psychiatrists, public school teachers, and investment advisors—all of whom speak for a living—is unquestioned, this Court has held that a law requiring licensing of union organizers is unconstitutional under the First Amendment. *Thomas* v. *Collins*, 323 U. S. 516 (1945); see Shiffrin 1264. See also *Rosenbloom* v. *Metromedia*, 403 U. S. 29, 44 (1971) (opinion of BRENNAN, J.) ("the determinant whether the First Amendment applies to state libel actions is whether the utterance involved concerns an issue of public or general concern"); *Young* v. *American Mini Theatres*, 427 U. S. 50, 70 (1976) (opinion of STEVENS, J.) ("it is manifest that society's interest in protecting this type of expression [nonobscene erotic films] is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate").

III

I do not think it necessary or advisable to attempt to define precisely what sorts of speech safely can be left to regulation by state libel laws. Cf. *Rosenbloom*, *supra*, at 44–45. In accord with the state courts quoted *supra*, at 6, I think it clear that the speech at issue here implicates the First Amendment at most only tangentially. Petitioner's credit reporting is purely private. It does not appear in a newspaper or magazine of general and regular circulation nor on the broadcast media. See 15 U. S. C. § 80b–2(a)(11)(D) (Investment Advisers Act does not apply to "any bona fide newspaper, news magazine or business or financial publication of general and regular circulation"); cf. *Mills* v. *Alabama*, 384 U. S. 214, 219 (1966); *Saxbe* v. *Washington Post Co.*, 417 U. S. 843, 863–864 (1974) (POWELL, J., dissenting). It is speech solely in the economic interests of the speaker and au-

dience. Cf. *Central Hudson Gas & Elec.*, 447 U. S., at 561.[10] These factors clearly placed petitioner's credit reporting in "a subordinate position in the scale of First Amendment values." *Ohralik*, 436 U. S., at 456.

In addition, the speech here, like advertising, is hardier and less likely to be deterred by state regulation. See *Virginia Pharmacy Board*, 425 U. S., at 771, n. 24. It is solely motivated by the desire for profit, which, we have noted, is a force less likely to be deterred than others. *Ibid.* Arguably, the reporting here also was more objectively verifiable than speech deserving of greater protection. See *ibid.* In any case, the market provides a powerful incentive to a credit reporting agency to be accurate, since false credit reporting is of no use to creditors. Thus, any incremental "chilling" effect of libel suits would be of decreased significance.[11]

Since the speech here does not involve any of the concerns that motivated the Court in *New York Times* and *Gertz*, I conclude that the First Amendment protection is substantially lessened.[12] This requires us to strike a new balance be-

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[10] In addition, as Shiffrin notes, "[t]he interests in individual self-expression, autonomy, and the like are not present here or are present in only an attenuated way." Shiffrin 1268.

[11] The Fifth Circuit Court of Appeals has noted that, while most States provide a qualified privilege against libel suits for commercial credit reporting agencies, in those States that do not there is a thriving credit reporting business and commercial credit transactions are not inhibited. *Hood* v. *Dun & Bradstreet, Inc.*, 486 F. 2d 25, 32 (1973), cert. denied, 415 U. S. 985 (1974). The court cited an empirical study comparing credit transactions in Boise, Idaho, where there is no privilege, with those in Spokane, Washington, where there is one. *Id.*, at 32, and n. 18.

[12] As indicated *supra*, I would not in this case attempt to define the precise boundaries of the realm in which the common law of defamation may operate. The lines will be difficult to draw in some cases. For example, reports of bankruptcies, stock quotations, and other financial items that appear in newspapers and newsletters of general circulation may present hard cases. Nonetheless, as indicated in the text, the idea that certain kinds of speech are at the core of the First Amendment, while others are on the periphery, is not a new one to courts. See, *e. g.*, *Roth* v. *United States*, 354 U. S.

tween the interests of the speaker here and the state interest in providing a legal remedy for defamatory falsehood. That state interest, we have said, is "strong and legitimate." *Gertz*, 418 U. S., at 348. A State will not lightly be required to abandon this purpose,

> "for, as MR. JUSTICE STEWART, has reminded us, the individual's right to the protection of his own good name 'reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. . . .' *Rosenblatt* v. *Baer*, 383 U. S. 75, 92 (1966) (concurring opinion)."
>
> *Gertz*, *supra*, at 341.

As noted, the merit of imposing punitive and presumed damages reasonably may be doubted in some circumstances. In *Gertz*, we found that the state interest in awarding these remedies was not "substantial" in view of their effect on speech at the core of the First Amendment. 418 U. S., at 349.[13] But this case concerns speech of significantly less con-

476; *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447 (1978); *Brown* v. *Hartlage*, 456 U. S. 45; Prosser § 118, p. 822–823. I do not think this common law approach is a return to the *ad hoc* resolution of the competing interests at stake in each particular case that we eschewed in *Gertz*. See 418 U. S., at 343–344, 346. Constitutional protections would apply identically to broad categories of speech, not to individual cases. This kind of broad categorization does not raise the same concerns of bias and the like that might be raised by judicial determinations of which particular articles or publications address issues of "general or public interest," cf. *id.*, at 346. See Shiffrin 1268, n. 327. Moreover, prophylactic rules—such as a direction to err on the side of constitutional protection—might be suggested that would ensure that speech of genuine concern was not restrained.

[13] There is language in *Gertz* that can be read broadly to the effect that presumed and punitive damages have no place in the law of defamation. It is necessary, however, to view this language in the context of the only issue before the Court. The suit was by a private person against a media

stitutional interest. The state interest in these remedies need not be compelling to support the incidental effect they may have on this kind of protected speech. As noted, the common law long ago concluded that requiring proof of damages incurred did not adequately compensate the plaintiff in many defamation cases. We should not lightly presume that this judgment—a judgment respected and left to the States for 200 years—was erroneous. The state interest in providing a remedy for defamation surely includes ensuring that those remedies are effective. In light of the reduced constitutional value in the speech at issue here, I would hold that the state interest adequately supports the common law rules.

IV

Constitutional principles retain force and respect only when they are applied sparingly where needed. A common-

defendant. It was the presence of the media defendant that primarily caused the Court in *Gertz* to limit recovery to "actual injury." *Gertz*, *supra*, at 349. Presumed and punitive damages were deemed—for the reasons first articulated in *New York Times*—to threaten the historic role of the media in a representative democracy. *Id.*, at 349–350. No such threat is present when one private party is libeled by another private party—at least where the libel is circulated in the course of, and is solely concerned with, both parties' businesses. In weighing the interests that may be at issue, it is well also to repeat that there is a significant public interest "in compensating private individuals for wrongful injury to reputation." *Gertz*, *supra*, at 348–349.

In considering generally the utility and appropriateness of punitive damages, it is well to bear in mind that the wisdom of imposing such damages reasonably may vary with the context in which the issue arises. Defamation actions are not comparable, for example, to personal injury litigation in which proof of substantial actual damages is commonplace. The role of punitive damages in addition to actual damages is not to compensate; rather it is to punish and deter—a role normally left to government. See *Smith* v. *Wade*, —— U. S. ——, —— (1983) (REHNQUIST, J., dissenting). In defamation cases, where proof of actual damages is difficult, punitive damages—in many cases—may be largely compensatory in purpose. See generally Prosser § 112, p. 765. Judge Friendly recognized this alternative purpose of punitive damages in *Roginsky* v. *Richardson-Merrell, Inc.*, 378 F. 2d 832, 838 (CA2 1967).

sense view of those spheres that are primarily of local concern persuades me that the Court should stay its hand in this case. As we have said in a related context, to require a parity of constitutional protection for the speech here and that in *Gertz* and *New York Times* "could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech." *Ohralik*, 436 U. S., at 456. The Court identifies no new or overriding societal interest that justifies constitutionalizing defamation actions between private parties. I would leave this area of law to the wisdom of the several States.

lfp/ss 06/20/84 Rider X, Dun & Bradstreet

RIDERX SALLY-POW

There is little reasons for the Court's anxiety that "an immeasurable volume of litigation" would result from this approach, ante, at 13, n. 4. New York Times was decided 20 years ago. It left the states free to adhere to the common law in non-media cases. The "flood-gates" argument simply is not justified in light of this experience. Moreover, the blanket rejection of what has been the prevailing law of defamation is a high price indeed to pay for a bright line rule that heretofore has never been considered necessary.

83-18 (Dissent, Powell, J.)
file name: DUNBRADA

RIDER A

7 The Court argues that its decision does not abrogate the common law. Ante, at 22 n. 10. Its numerous authorities, however, concern public, not private, expression, and nearly all of them rest on state court interpretations of Gertz. They indicate at most what these state courts believe the federal Constitution requires, not what the common law would require had it not been abrogated.

RIDER B

12 In a recent case, for example, a jury awarded compensatory damages of $1,510,000 and punitive damages of $25,025,000 against an author and the publisher of Penthouse magazine. Pring v. Penthouse International, Ltd., No. C-79-351B (Wyo., Feb. 20, 1981). The plaintiff, a former Miss Wyoming, claimed that a fanciful article describing her training for and competition at the Miss America pageant had injured her reputation. After reviewing the record, the District Court reduced the award of punitive damages to $12,500,000. Id. (April 20, 1981). The Court of Appeals reversed, holding that an obviously fictional account of the pageant could not be libelous under the narrow theory argued by plaintiff. 695 F.2d 438 (CA10 1982), cert. denied, ___ U.S. ___ (1983).

RIDER C

15 My opinion for the Court in Gertz, as the Court today notes, did not distinguish between presumed and punitive damages in libel suits involving public expression. Ante, at 15 n.5. Upon the more mature reflection required by the Court's constitutionalization of the entire law of libel, I find both historic and logical reasons for the distinction I now make.

The purpose of presumed damages is essentially compensatory. As I have noted, supra at 14-15, they are appropriate when it is clear from the nature of the libel that injury occurred and that measuring the damages precisely is impossible. This compensatory rationale for allowing presumed damages is wholly different from allowing a private litigant to punish a defendant by awarding punitive damages without due process of any kind.

06/20

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

8-10, 12

From: **Justice Powell**

Circulated: _____

Recirculated: JUN 21 1984

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-18

DUN & BRADSTREET, INC., PETITIONERS *v.*
GREENMOSS BUILDERS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

[June ——, 1984]

JUSTICE POWELL, dissenting.

The Court today extends the constitutional rule of *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), far beyond its origins or its purpose. In that case, the Court for the first time held that the Constitution limits the reach of state laws of libel and slander in suits against media defendants. A constitutional role was needed in such cases, the Court held, to ensure that "debate on public issues . . . be uninhibited, robust, and wide-open." *Id.*, at 270. All of the Court's decisions since then that have considered the constitutional role in defamation law also have involved suits against a media defendant arising out of an article or broadcast on an issue of public concern and importance. The Court today goes beyond these precedents and holds that the Constitution prevents the State of Vermont from applying its common law to a libel action between a construction company and a commercial credit reporting agency. In my view, this holding is not required by the First Amendment. Nor is it wise or commanded by logic or precedent.

I

The common law rules that the Court today repudiates are of ancient vintage. The rule that damages are presumed for libel was announced by Hale as early as 1670. *Restatement of Torts* § 568, comment b, at 162 (1938). Punitive damages

long have been available in actions for defamation, under a quite different standard than the one applied today. See, *e. g.*, C. McCormick, Law of Damages § 118, p. 431 (1935); M. Newell, Law of Defamation, Libel and Slander 842, 844–846 (1890) (citing cases). And since at least the early part of this century, a plaintiff in a garden-variety defamation suit could recover without showing any facts as to the state of mind of the defendant. W. Prosser, Law of Torts § 113, pp. 772–773 (4th ed. 1971) (hereinafter Prosser); Restatement (Second) of Torts § 580B, comment b (1977).[1] The common law recognized some privileges, but generally to recover for written expression harmful to reputation the ordinary citizen had to show only falsity and publication.

These rules have not gone unquestioned. This Court itself has limited their reach in certain situations of overriding need. But in jurisdiction after jurisdiction they have been reaffirmed repeatedly. Thus, for example, it is the judgment of history that "proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact." Prosser § 112, p. 765; accord, *Rowe* v. *Metz*, 195 Colo. 424, 425–426, 579 P. 2d 83, 84 (1978); Note, Developments in the Law—Defamation, 69 Harv. L. Rev. 875, 891–892 (1956). As a result, courts for centuries have allowed juries to presume that some damage occurred from many defamatory utterances and publications.

This accumulated learning is worthy of respect. Moreover, the common law rules were developed in an area of the law that, since the founding of our country, has been the

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[1] While the Court's opinion discusses only the questions of presumed and punitive damages, its effect is broader. The logic of the opinion apparently would require that the rule announced in *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 347 (1974), barring liability without fault in cases involving media discussion of public issues, be applied in all defamation actions.

province of the state courts.[2] Even if one disagrees with these centuries-old rules,[3] this Court should discard them only if they conflict with the rights guaranteed to the people by federal law. Thus, this Court has modified these rules only when their operation threatened the core values of the First Amendment. More specifically, we have done so only in cases in which state law placed at risk "freedom of expression upon public questions." *New York Times* v. *Sullivan*, 376 U. S., at 269. "The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth* v. *United States*, 354 U. S. 476, 484 (1957). "At the core of the First Amendment are certain basic conceptions about the manner in which political discussion in a representative democracy should proceed." *Brown* v. *Hartlage*, 456 U. S. 45, 52 (1982); accord *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 776 (1978) (discussion of "'matters of public concern'" is "at the heart of the First Amendment's protection"). There is nothing of these central interests in the situation before us today. The Court today extends these constitutional rules to nothing less than

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[2] The Framers were familiar with the common law of libel, which had been adopted by the American colonies. See *Gertz*, 418 U. S., at 380–384 (WHITE, J., dissenting); *Roth* v. *United States*, 354 U. S. 476, 482–483, and n. 11 (1957) (13 States allowed prosecution for libel in 1792); *Beauharnais* v. *Illinois*, 343 U. S. 250, 254–255 (1952). See also T. Cooley, Constitutional Limitations 602 (7th ed. 1903); Rutledge, The Law of Defamation: Recent Developments, 32 Alabama Lawyer 409, 410 (1971):

"[T]he law of defamation has been an integral part of the laws of England, the colonies and the states since time immemorial. So many actions have been maintained and judgments recovered under the various laws of libel that the Constitutional validity of libel actions could be denied only by a Court willing to hold all its predecessors were wrong in their interpretation of the First Amendment and that two hundred years of precedents should be overruled."

[3] As the Court notes, there is room to doubt the wisdom of state laws that permit presumed and punitive damages on liberal terms. *Ante*, at 9.

the entire field of libel and slander.[4] Henceforth, every action by a former employee complaining of a malicious negative recommendation by an employer,[5] every action by a dealer against a competitor who falsely reports bad service to the manufacturer,[6] every action by a spurned suitor for spreading false rumors about the reasons for his failure,[7] and numerous other actions arising out of back-fence gossip or commercial incompetence[8] will raise a constitutional ques-

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[4] Moreover, the Court's holding affects not only state laws. Congress, too, has provided for actions that after today may well not meet the new constitutional standards. For example, the Fair Credit Reporting Act provides that punitive damages may be awarded where a credit service willfully has reported *true* but obsolete information as to a consumer. 15 U. S. C. §§ 1681c, 1681n. For the Court to uphold this law, it would have to find the governmental interest in protecting a debtor from the circulation of such true information to be significantly greater than the interest in protecting damage to reputation by malicious lies. In addition, the Act provides other procedures to assure accuracy and fairness to consumers. Previously, such reasonable regulation precisely aimed at a perceived commercial evil would not have been susceptible to constitutional attack. See *Millstone* v. *O'Hanlon Reports, Inc.*, 528 F. 2d 829 (CA8 1976) (upholding Act). After today, every such regulation of private and economic speech may be constitutionally suspect unless it meets the elaborate and rigorous standards of *New York Times* and *Gertz*. See also *Brown* v. *Hartlage*, 456 U. S. 45, 53–54 (1982) (restrictions on communication of ideas to voters must be supported by a compelling state interest). Similarly, the provisions of the securities laws, many of which regulate speech, *e. g.*, 15 U. S. C. §§ 77k, 77*l*, 77o, 78r, will be subject to scrutiny under those standards. See also *infra*, at 7–8.

[5] *E. g.*, *Calero* v. *Del Chemical Corp.*, 68 Wis. 2d 487, 228 N. W. 2d 737 (1975); *Stuempges* v. *Parke, Davis & Co.*, 297 N. W. 2d 252 (Minn. 1980).

[6] *E. g.*, *Harley-Davidson Motorsports, Inc.* v. *Markley*, 279 Or. 361, 568 P. 2d 1359 (1977).

[7] *E. g.*, *Schomer* v. *Smidt*, 113 Cal. App. 3d 828, 170 Cal. Rptr. 662 (1980).

[8] Suits by disgruntled consumers against credit reporting agencies appear to be disquietingly common. *E. g.*, *Millstone* v. *O'Hanlon Reports, Inc.*, 528 F. 2d 829 (CA8 1976); *Retail Credit Co.* v. *Russell*, 234 Ga. 765, 218 S. E. 2d 54 (1975); *Hood* v. *Dun & Bradstreet, Inc.*, 486 F. 2d 25 (CA5 1973), cert. denied, 415 U. S. 985 (1974); *Grove* v. *Dun & Bradstreet, Inc.*,

tion. The Court believes that its decision is "squarely control[led]" by our opinion in *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974). *Ante*, at 11. This result unnecessarily repudiates the common law and trivializes the First Amendment.[9] There is nothing in *Gertz* that requires it.

The facts in *Gertz* were very different from those here. *Gertz* was a libel suit against a media defendant: a magazine called American Opinion, the monthly outlet of the John Birch Society. The article in question discussed a question of undoubted public importance—whether the prosecution of a policeman was part of a Communist campaign to discredit local law enforcement agencies. The plaintiff was a lawyer tangentially involved in the prosecution who, the magazine alleged, was the chief architect of the "frame-up" of the police officer. The article spoke of the lawyer's alleged links to Communist activity. Like every other case in which this Court has considered the constitutional limits on state laws of defamation, *Gertz* involved a media article directly relevant to the effective operation of our system of democratic self-government.

In contrast, the case today is a purely private defamation action against a commercial credit reporting agency that falsely reported to respondent's creditors that respondent was bankrupt. A number of state courts, including the court below, have recognized that the role of the Constitution in

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438 F. 2d 433 (CA3), cert. denied, 404 U. S. 898 (1971). In enacting the Fair Credit Reporting Act, 15 U. S. C. §§ 1681–1681t, Congress specifically found that "[t]here is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy." *Id.*, § 1681(a)(4).

[9] As one commentator has remarked with respect to "the case of a commercial supplier of credit information that defames a person applying for credit"—the very case before us today—"If the first amendment requirements outlined in *Gertz* apply, there is something clearly wrong with the first amendment or with *Gertz*." Shiffrin, The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment, 78 Nw. L. Rev. 1212, 1268 (1983) [hereinafter Shiffrin].

regulating state libel law is far more limited when the concerns that activated *New York Times* and *Gertz* are absent. In such a case,

> "[t]here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-censorship by the press. The facts of the present case are wholly without the First Amendment concerns with which the Supreme Court of the United States has been struggling." *Harley-Davidson Motorsports, Inc.* v. *Markley*, 279 Or. 361, 366, 568 P. 2d 1359, 1363 (1977).

Accord, *Rowe* v. *Metz*, 195 Colo. 424, 426, 579 P. 2d 83, 84 (1978) (*Gertz* should not be "blindly applied to the case of a private plaintiff against a nonmedia defendant for a defamation which is essentially private in nature"); *Calero* v. *Del Chemical Corp.*, 68 Wis. 2d 487, 506, 228 N. W. 2d 737, 748 (1975) ("In 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"); *Denny* v. *Mertz*, 106 Wis. 2d 636, 661, 318 N. W. 2d 141, 153, cert. denied, 459 U. S. 883 (1982). I would agree generally with these courts, and hold that the common law rules of libel and slander do not violate the Constitution when applied to a case such as this.

II

This Court on many occasions has advanced the commonsense idea that certain kinds of speech are more central to the interests of the First Amendment than others. Obscene speech and "fighting words" have long been accorded no protection. *Roth* v. *United States*, 354 U. S., at 483; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942); see also *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697, 716 (1931) (publication of troop ship sailings during war time may be enjoined); *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 591–592

(1952) (advocating violent overthrow of the government is unprotected speech); *Seattle Times Co.* v. *Rhinehart*, —— U. S. ——, —— (1984). Similarly, "libelous utterances are not within the area of constitutionally protected speech." *Roth*, 354 U. S., at 483; accord, *Gertz*, *supra*, at 340 ("there is no constitutional value in false statements of fact"). In the area of protected speech, the most prominent example of reduced protection for certain kinds of speech concerns commercial speech. Such speech, we have noted, occupies a "subordinate position in the scale of First Amendment values." *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 456 (1978). It also is more easily verifiable and less likely to be deterred by proper regulation. *Virginia Pharmacy Bd.* v. *Virginia Consumer Council*, 425 U. S. 748, 771, n. 24 (1976). Accordingly, it may be regulated in ways that might be impermissible in the realm of noncommercial expression. *Ohralik*, *supra*, at 456; *Central Hudson Gas & Elec.* v. *Public Serv. Comm'n*, 447 U. S. 557, 562–563 (1980).

The Court concedes the above, but appears to believe that commercial speech—defined as advertising that does no more than propose a commercial transaction—is the only type of expression entitled to less than full First Amendment protection. See *ante*, at 18. Our cases suggest otherwise. In the area of defamation law itself, for example, some types of speech are entitled to broader protection than others: speech about public figures receives the full protection of the *New York Times* standards, while speech about private figures is entitled at most to the lesser standards of our opinion in *Gertz*.

Other areas of the law provide further examples. In *Ohralik* we noted that there are "[n]umerous examples . . . of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, . . . corporate proxy statements, . . . the exchange of price and production information among competitors, . . . and employers' threats of retaliation for the labor

activities of employees." 436 U. S., at 456 (citations omitted). Yet similar regulation of political speech is subject to the most rigorous scrutiny. See *Brown* v. *Hartlage*, 456 U. S. 45; *New York Times Co.* v. *Sullivan*, 376 U. S., at 279, n. 19; *Buckley* v. *Valeo*, 424 U. S. 1, 14 (1976). Likewise, while the power of the State to license lawyers, psychiatrists, public school teachers, and investment advisors—all of whom speak for a living—is unquestioned, this Court has held that a law requiring licensing of union organizers is unconstitutional under the First Amendment. *Thomas* v. *Collins*, 323 U. S. 516 (1945); see Shiffrin 1264. See also *Rosenbloom* v. *Metromedia*, 403 U. S. 29, 44 (1971) (opinion of BRENNAN, J.) ("the determinant whether the First Amendment applies to state libel actions is whether the utterance involved concerns an issue of public or general concern"); *Young* v. *American Mini Theatres*, 427 U. S. 50, 70 (1976) (opinion of STEVENS, J.) ("it is manifest that society's interest in protecting this type of expression [nonobscene erotic films] is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate").

III

I do not think it necessary or advisable to attempt completely to define what sorts of speech safely can be left to regulation by state libel laws. Cf. *Rosenbloom*, *supra*, at 44–45. In accord with the state courts quoted *supra*, at 6, I think it clear that the speech at issue here implicates the First Amendment at most only tangentially. Petitioner's credit reporting is purely private. It does not appear in a newspaper or magazine of general and regular circulation nor on the broadcast media. See 15 U. S. C. § 80b–2(a)(11)(D) (Investment Advisers Act does not apply to "any bona fide newspaper, news magazine or business or financial publication of general and regular circulation"); cf. *Mills* v. *Alabama*, 384 U. S. 214, 219 (1966); *Saxbe* v. *Washington Post Co.*, 417 U. S. 843, 863–864 (1974) (POWELL, J., dissenting). It is speech solely in the economic interests of the speaker

and audience. Cf. *Central Hudson Gas & Elec.*, 447 U. S., at 561.[10] These factors clearly placed petitioner's credit reporting in "a subordinate position in the scale of First Amendment values." *Ohralik*, 436 U. S., at 456.

In addition, the speech here, like advertising, is hardier and less likely to be deterred by state regulation. See *Virginia Pharmacy Board*, 425 U. S., at 771, n. 24. It is solely motivated by the desire for profit, which, we have noted, is a force less likely to be deterred than others. *Ibid.* Arguably, the reporting here also was more objectively verifiable than speech deserving of greater protection. See *ibid.* In any case, the market provides a powerful incentive to a credit reporting agency to be accurate, since false credit reporting is of no use to creditors. Thus, any incremental "chilling" effect of libel suits would be of decreased significance.[11]

Since the speech here does not involve any of the concerns that motivated the Court in *New York Times* and *Gertz*, I conclude that the First Amendment protection is substantially lessened.[12] This requires us to strike a new balance be-

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[10] In addition, as Shiffrin notes, "[t]he interests in individual self-expression, autonomy, and the like are not present here or are present in only an attenuated way." Shiffrin 1268.

[11] The Fifth Circuit Court of Appeals has noted that, while most States provide a qualified privilege against libel suits for commercial credit reporting agencies, in those States that do not there is a thriving credit reporting business and commercial credit transactions are not inhibited. *Hood* v. *Dun & Bradstreet, Inc.*, 486 F. 2d 25, 32 (1973), cert. denied, 415 U. S. 985 (1974). The court cited an empirical study comparing credit transactions in Boise, Idaho, where there is no privilege, with those in Spokane, Washington, where there is one. *Id.*, at 32, and n. 18.

[12] As indicated *supra*, I would not in this case attempt to define the precise boundaries of the realm in which the common law of defamation may operate. The lines will be difficult to draw in some cases. For example, reports of bankruptcies, stock quotations, and other financial items that appear in newspapers and newsletters of general circulation would involve different considerations. Nonetheless, as indicated in the text, the idea that certain kinds of speech are at the core of the First Amendment, while others are on the periphery, is not a new one to courts. See, *e. g.*, *Roth* v.

tween the interests of the speaker here and the state interest in providing a legal remedy for defamatory falsehood. That state interest, we have said, is "strong and legitimate." *Gertz*, 418 U. S., at 348. A State will not lightly be required to abandon this purpose,

> "for, as MR. JUSTICE STEWART, has reminded us, the individual's right to the protection of his own good name 'reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. . . .' *Rosenblatt* v. *Baer*, 383 U. S. 75, 92 (1966) (concurring opinion)."
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> *Gertz*, *supra*, at 341.

United States, 354 U. S. 476; *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447 (1978); *Brown* v. *Hartlage*, 456 U. S. 45; Prosser § 118, p. 822–823. And the lines between media and nonmedia, and between commercial speech and other speech, are not unfamiliar to judges, nor would they be difficult to draw. I do not think this common law approach is a return to the *ad hoc* resolution of the competing interests at stake in each particular case that we eschewed in *Gertz*. See 418 U. S., at 343–344, 346. Constitutional protections would apply identically to broad categories of speech, not to individual cases. This kind of broad categorization does not raise the same concerns of bias and the like that might be raised by judicial determinations of which particular articles or publications address issues of "general or public interest," cf. *id.*, at 346. See Shiffrin 1268, n. 327. Moreover, prophylactic rules—such as a direction to err on the side of constitutional protection—might be suggested that would ensure that speech of genuine concern was not restrained.

There is little reason for the Court's anxiety that "an immeasurable volume of litigation" would result from this approach, *ante*, at 13, n. 4. *New York Times* was decided 20 years ago. It left the states free to adhere to the common law in non-media cases. The "flood-gates" argument simply is not justified in light of this experience. Moreover, the blanket rejection of what has been the prevailing law of defamation is a high price indeed to pay for a bright-line rule that heretofore has never been considered necessary.

As noted, the merit of imposing punitive and presumed damages reasonably may be doubted in some circumstances. In *Gertz*, we found that the state interest in awarding these remedies was not "substantial" in view of their effect on speech at the core of the First Amendment. 418 U. S., at 349.[13] But this case concerns speech of significantly less constitutional interest. The state interest in these remedies need not be compelling to support the incidental effect they may have on this kind of protected speech. As noted, the common law long ago concluded that requiring proof of damages incurred did not adequately compensate the plaintiff in many defamation cases. We should not lightly presume that

[13] There is language in *Gertz* that can be read broadly to the effect that presumed and punitive damages have no place in the law of defamation. It is necessary, however, to view this language in the context of the only issue before the Court. The suit was by a private person against a media defendant. It was the presence of the media defendant that primarily caused the Court in *Gertz* to limit recovery to "actual injury." *Gertz*, *supra*, at 349. Presumed and punitive damages were deemed—for the reasons first articulated in *New York Times*—to threaten the historic role of the media in a representative democracy. *Id.*, at 349–350. No such threat is present when one private party is libeled by another private party—at least where the libel is circulated in the course of, and is solely concerned with, both parties' businesses. In weighing the interests that may be at issue, it is well also to repeat that there is a significant public interest "in compensating private individuals for wrongful injury to reputation." *Gertz*, *supra*, at 348–349.

In considering generally the utility and appropriateness of punitive damages, it is well to bear in mind that the wisdom of imposing such damages reasonably may vary with the context in which the issue arises. Defamation actions are not comparable, for example, to personal injury litigation in which proof of substantial actual damages is commonplace. The role of punitive damages in addition to actual damages is not to compensate; rather it is to punish and deter—a role normally left to government. See *Smith* v. *Wade*, —— U. S. ——, —— (1983) (REHNQUIST, J., dissenting). In defamation cases, where proof of actual damages is difficult, punitive damages—in many cases—may be largely compensatory in purpose. See generally Prosser § 112, p. 765. Judge Friendly recognized this alternative purpose of punitive damages in *Roginsky* v. *Richardson-Merrell, Inc.*, 378 F. 2d 832, 838 (CA2 1967).

this judgment—a judgment respected and left to the States for 200 years—was erroneous. The state interest in providing a remedy for defamation surely includes ensuring that those remedies are effective. In light of the reduced constitutional value in the speech at issue here, I would hold that the state interest adequately supports the common law rules.[14]

IV

Constitutional principles retain force and respect only when they are applied sparingly where needed. A commonsense view of those spheres that are primarily of local concern persuades me that the Court should stay its hand in this case. As we have said in a related context, to require a parity of constitutional protection for the speech here and that in *Gertz* and *New York Times* "could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech." *Ohralik*, 436 U. S., at 456. The Court identifies no new or overriding societal interest that justifies constitutionalizing defamation actions between private parties. I would leave this area of law to the wisdom of the several States.

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[14] The Court suggests that this approach would eliminate all constitutional protection for speech solely in the economic interests of speaker and audience. *Ante*, at 18, n. 7. This plainly is an exaggeration of my view. I would hold only that the speech here is entitled to *reduced* constitutional protection, not *no* constitutional protection. And the balance I would strike would retain the common law rules governing presumed and punitive damages in the special context of defamation cases—rules that have been applied repeatedly over hundreds of years. These rules do not allow for "unconstrained awards of presumed and punitive damages," *ante*, at 18, n. 7. See generally *Gertz*, *supra*, at 394–395 (WHITE, J., dissenting). If they did, the balance struck would have been very different.

06/22

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: _____

Recirculated: _____

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-18

DUN & BRADSTREET, INC., PETITIONERS *v.*
GREENMOSS BUILDERS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

[June ——, 1984]

JUSTICE POWELL, with whom JUSTICE REHNQUIST and JUSTICE O'CONNOR join, dissenting.

The Court today extends the constitutional rule of *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), far beyond its origins or its purpose. In that case, the Court for the first time held that the Constitution limits the reach of state laws of libel and slander in suits against media defendants. A constitutional role was needed in such cases, the Court held, to ensure that "debate on public issues . . . be uninhibited, robust, and wide-open." *Id.*, at 270. All of the Court's decisions since then that have considered the constitutional role in defamation law also have involved suits against a media defendant arising out of an article or broadcast on an issue of public concern and importance. The Court today goes beyond these precedents and ~~holds that the Constitution prevents the State of Vermont from applying its common law to~~ applies the same constitutional restrictions to a libel action between a construction company and a commercial credit reporting agency. In my view, this holding is not required by the First Amendment. Nor is it wise or ~~commanded by logic or~~ consistent with precedent.

I

The common law rules that the Court today repudiates are of ancient vintage. The rule that damages are presumed for libel was announced by Hale as early as 1670. *Restatement*

of Torts § 568, comment b, at 162 (1938). Punitive damages also long have been available in actions for defamation under a quite different standard than the one applied today. See, *e. g.*, C. McCormick, Law of Damages § 118, p. 431 (1935); M. Newell, Law of Defamation, Libel and Slander 842, 844–846 (1890) (citing cases). And since at least the early part of this century, a plaintiff in a garden-variety defamation suit could recover without showing any facts as to the state of mind of the defendant. W. Prosser, Law of Torts § 113, pp. 772–773 (4th ed. 1971) (hereinafter Prosser); Restatement (Second) of Torts § 580B, comment b (1977).[1] The common law recognized some privileges, but generally to recover for written expression harmful to reputation the ordinary citizen had to show only falsity and publication.

These rules have not gone unquestioned. This Court itself has limited their reach in certain situations of overriding need. But in jurisdiction after jurisdiction they have been reaffirmed repeatedly. Thus, for example, it is the judgment of history that "proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact." Prosser § 112, p. 765; accord, *Rowe* v. *Metz*, 195 Colo. 424, 425–426, 579 P. 2d 83, 84 (1978); Note, Developments in the Law—Defamation, 69 Harv. L. Rev. 875, 891–892 (1956). As a result, courts for centuries have allowed juries to presume that some damage occurred from many defamatory utterances and publications.

This accumulated learning is worthy of respect. Moreover, the common law rules were developed in an area of the law that, since the founding of our country, has been the

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province of the state courts.[2] Even if one disagrees with these centuries-old rules,[3] this Court should discard them only if they conflict with the rights guaranteed to the people by federal law. Thus, this Court has modified these rules only when their operation threatened the core values of the First Amendment. More specifically, we have done so only in cases in which state law placed at risk "freedom of expression upon public questions." *New York Times* v. *Sullivan*, 376 U. S., at 269. "The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth* v. *United States*, 354 U. S. 476, 484 (1957). "At the core of the First Amendment are certain basic conceptions about the manner in which political discussion in a representative democracy should proceed." *Brown* v. *Hartlage*, 456 U. S. 45, 52 (1982); accord *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 776 (1978) (discussion of "'matters of public concern'" is "at the heart of the First Amendment's protection"). There is nothing of these central interests in the situation before us today. The Court today extends these constitutional rules to nothing less than

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"[T]he law of defamation has been an integral part of the laws of England, the colonies and the states since time immemorial. So many actions have been maintained and judgments recovered under the various laws of libel that the Constitutional validity of libel actions could be denied only by a Court willing to hold all its predecessors were wrong in their interpretation of the First Amendment and that two hundred years of precedents should be overruled."

[3] As the Court notes, there is room to doubt the wisdom of state laws that permit ~~presumed and~~ punitive damages on liberal terms. *Ante*, at 9.

Dan - should it "presumed" be omitted here?

the entire field of libel and slander.[4] Henceforth, every action by a former employee complaining of a malicious negative recommendation by an employer,[5] every action by a dealer against a competitor who falsely reports bad service to the manufacturer,[6] every action by a spurned suitor for spreading false rumors about the reasons for his failure,[7] and numerous other actions arising out of back-fence gossip or commercial incompetence[8] will raise a constitutional ques-

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[4] Moreover, the Court's holding affects not only state laws. Congress, too, has provided for actions that after today may well not meet the new constitutional standards. For example, the Fair Credit Reporting Act provides that punitive damages may be awarded where a credit service willfully has reported *true* but obsolete information as to a consumer. 15 U. S. C. §§ 1681c, 1681n. For the Court to uphold this law, it would have to find the governmental interest in protecting a debtor from the circulation of such true information to be significantly greater than the interest in protecting damage to reputation by malicious lies. In addition, the Act provides other procedures to assure accuracy and fairness to consumers. Previously, such reasonable regulation precisely aimed at a perceived commercial evil would not have been susceptible to constitutional attack. See *Millstone* v. *O'Hanlon Reports, Inc.*, 528 F. 2d 829 (CA8 1976) (upholding Act). After today, every such regulation of private and economic speech may be constitutionally suspect unless it meets the ~~elaborate and~~ rigorous standards of *New York Times* and *Gertz*. See also *Brown* v. *Hartlage*, 456 U. S. 45, 53–54 (1982) (restrictions on communication of ideas to voters must be supported by a compelling state interest). Similarly, the provisions of the securities laws, many of which regulate speech, *e. g.*, 15 U. S. C. §§ 77k, 77*l*, 77o, 78r, will be subject to scrutiny under those standards. See also *infra*, at 7–8.

[5] *E. g.*, *Calero* v. *Del Chemical Corp.*, 68 Wis. 2d 487, 228 N. W. 2d 737 (1975); *Stuempges* v. *Parke, Davis & Co.*, 297 N. W. 2d 252 (Minn. 1980).

[6] *E. g.*, *Harley-Davidson Motorsports, Inc.* v. *Markley*, 279 Or. 361, 568 P. 2d 1359 (1977).

[7] *E. g.*, *Schomer* v. *Smidt*, 113 Cal. App. 3d 828, 170 Cal. Rptr. 662 (1980).

[8] Suits by disgruntled consumers against credit reporting agencies appear to be disquietingly common. *E. g.*, *Millstone* v. *O'Hanlon Reports, Inc.*, 528 F. 2d 829 (CA8 1976); *Retail Credit Co.* v. *Russell*, 234 Ga. 765, 218 S. E. 2d 54 (1975); *Hood* v. *Dun & Bradstreet, Inc.*, 486 F. 2d 25 (CA5 1973), cert. denied, 415 U. S. 985 (1974); *Grove* v. *Dun & Bradstreet, Inc.*,

tion. The Court believes that its decision is "squarely control[led]" by our opinion in *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974). *Ante*, at 11. This ~~result unnecessarily~~ repudiates the common law and trivializes the First Amendment.[9] There is nothing in *Gertz* that requires ~~it~~.

The facts in *Gertz* were very different from those here. *Gertz* was a libel suit against a media defendant: a magazine called American Opinion, the monthly outlet of the John Birch Society. The article in question discussed a question of undoubted public importance—whether the prosecution of a policeman was part of a Communist campaign to discredit local law enforcement agencies. The plaintiff was a lawyer tangentially involved in the prosecution who, the magazine alleged, was the chief architect of the "frame-up" of the police officer. The article spoke of the lawyer's alleged links to Communist activity. Like every other case in which this Court has considered the constitutional limits on state laws of defamation, *Gertz* involved a media article directly relevant to the effective operation of our system of democratic self-government.

In contrast, the case today is a purely private defamation action against a commercial credit reporting agency that falsely reported to respondent's creditors that respondent was bankrupt. A number of state courts, including the court below, have recognized that the role of the Constitution in

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438 F. 2d 433 (CA3), cert. denied, 404 U. S. 898 (1971). In enacting the Fair Credit Reporting Act, 15 U. S. C. §§ 1681–1681t, Congress specifically found that "[t]here is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy." *Id.*, § 1681(a)(4).

[9] As one commentator has remarked with respect to "the case of a commercial supplier of credit information that defames a person applying for credit"—the very case before us today—"If the first amendment requirements outlined in *Gertz* apply, there is something clearly wrong with the first amendment or with *Gertz*." Shiffrin, The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment, 78 Nw. L. Rev. 1212, 1268 (1983) [hereinafter Shiffrin].

regulating state libel law is far more limited when the concerns that activated *New York Times* and *Gertz* are absent. In such a case,

> "[t]here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-censorship by the press. The facts of the present case are wholly without the First Amendment concerns with which the Supreme Court of the United States has been struggling." *Harley-Davidson Motorsports, Inc.* v. *Markley*, 279 Or. 361, 366, 568 P. 2d 1359, 1363 (1977).

Accord, *Rowe* v. *Metz*, 195 Colo. 424, 426, 579 P. 2d 83, 84 (1978) (*Gertz* should not be "blindly applied to the case of a private plaintiff against a nonmedia defendant for a defamation which is essentially private in nature"); *Calero* v. *Del Chemical Corp.*, 68 Wis. 2d 487, 506, 228 N. W. 2d 737, 748 (1975) ("In 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"); *Denny* v. *Mertz*, 106 Wis. 2d 636, 661, 318 N. W. 2d 141, 153, cert. denied, 459 U. S. 883 (1982). I would agree generally with these courts, and hold that the common law rules of libel and slander do not violate the Constitution when applied to a case such as this.

II

This Court on many occasions has advanced the commonsense idea that certain kinds of speech are more central to the interests of the First Amendment than others. Obscene speech and "fighting words" have long been accorded no protection. *Roth* v. *United States*, 354 U. S., at 483; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942); see also *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697, 716 (1931) (publication of troop ship sailings during war time may be enjoined); *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 591–592

(1952) (advocating violent overthrow of the government is unprotected speech); *Seattle Times Co.* v. *Rhinehart*, —— U. S. ——, —— (1984). Similarly, "libelous utterances are not within the area of constitutionally protected speech." *Roth*, 354 U. S., at 483; accord, *Gertz*, *supra*, at 340 ("there is no constitutional value in false statements of fact"). In the area of protected speech, the most prominent example of reduced protection for certain kinds of speech concerns commercial speech. Such speech, we have noted, occupies a "subordinate position in the scale of First Amendment values." *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 456 (1978). It also is more easily verifiable and less likely to be deterred by proper regulation. *Virginia Pharmacy Bd.* v. *Virginia Consumer Council*, 425 U. S. 748, 771, n. 24 (1976). Accordingly, it may be regulated in ways that might be impermissible in the realm of noncommercial expression. *Ohralik*, *supra*, at 456; *Central Hudson Gas & Elec.* v. *Public Serv. Comm'n*, 447 U. S. 557, 562–563 (1980).

The Court concedes the above, but appears to believe that commercial speech—defined as advertising that does no more than propose a commercial transaction—is the only type of expression entitled to less than full First Amendment protection. See *ante*, at 18. Our cases suggest otherwise. In the area of defamation law itself, for example, some types of speech are entitled to broader protection than others: speech about public figures receives the full protection of the *New York Times* standards, while speech about private figures is entitled at most to the lesser standards of our opinion in *Gertz*.

Other areas of the law provide further examples. In *Ohralik* we noted that there are "[n]umerous examples . . . of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, . . . corporate proxy statements, . . . the exchange of price and production information among competitors, . . . and employers' threats of retaliation for the labor

activities of employees." 436 U. S., at 456 (citations omitted). Yet similar regulation of political speech is subject to the most rigorous scrutiny. See *Brown* v. *Hartlage*, 456 U. S. 45; *New York Times Co.* v. *Sullivan*, 376 U. S., at 279, n. 19; *Buckley* v. *Valeo*, 424 U. S. 1, 14 (1976). Likewise, while the power of the State to license lawyers, psychiatrists, public school teachers, and investment advisors—all of whom speak for a living—is unquestioned, this Court has held that a law requiring licensing of union organizers is unconstitutional under the First Amendment. *Thomas* v. *Collins*, 323 U. S. 516 (1945); see Shiffrin 1264. See also *Rosenbloom* v. *Metromedia*, 403 U. S. 29, 44 (1971) (opinion of BRENNAN, J.) ("the determinant whether the First Amendment applies to state libel actions is whether the utterance involved concerns an issue of public or general concern"); *Young* v. *American Mini Theatres*, 427 U. S. 50, 70 (1976) (opinion of STEVENS, J.) ("it is manifest that society's interest in protecting this type of expression [nonobscene erotic films] is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate").

III

I do not think it necessary or advisable to attempt completely to define what sorts of speech ~~safely can be left to regulation by state libel laws~~. Cf. *Rosenbloom*, *supra*, at 44–45. In accord with the state courts quoted *supra*, at 6, I think it clear that the speech at issue here implicates the First Amendment at most only tangentially. Petitioner's credit reporting is purely private. It does not appear in a newspaper or magazine of general and regular circulation nor on the broadcast media. See 15 U. S. C. § 80b–2(a)(11)(D) (Investment Advisers Act does not apply to "any bona fide newspaper, news magazine or business or financial publication of general and regular circulation"); cf. *Mills* v. *Alabama*, 384 U. S. 214, 219 (1966); *Saxbe* v. *Washington Post Co.*, 417 U. S. 843, 863–864 (1974) (POWELL, J., dissenting). ~~It~~ This sort of credit reporting is speech solely in the economic interests of the speaker

qualify for only reduced constitutional protection

In fact, petitioner's subscription agreement prevented its client from disseminating its information.

and audience. Cf. *Central Hudson Gas & Elec.*, 447 U. S., at 561.[10] These factors clearly placed petitioner's credit reporting in "a subordinate position in the scale of First Amendment values." *Ohralik*, 436 U. S., at 456.

In addition, the speech here, like advertising, is hardier and less likely to be deterred by state regulation. See *Virginia Pharmacy Board*, 425 U. S., at 771, n. 24. It is solely motivated by the desire for profit, which, we have noted, is a force less likely to be deterred than others. *Ibid.* Arguably, the reporting here also was more objectively verifiable than speech deserving of greater protection. See *ibid.* In any case, the market provides a powerful incentive to a credit reporting agency to be accurate, since false credit reporting is of no use to creditors. Thus, any incremental "chilling" effect of libel suits would be of decreased significance.[11]

Since the speech here does not involve any of the concerns that motivated the Court in *New York Times* and *Gertz*, I conclude that the First Amendment protection is substantially lessened.[12] This requires us to strike a new balance be-

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[10] In addition, as Shiffrin notes, "[t]he interests in individual self-expression, autonomy, and the like are not present here or are present in only an attenuated way." Shiffrin 1268.

[11] The Fifth Circuit Court of Appeals has noted that, while most States provide a qualified privilege against libel suits for commercial credit reporting agencies, in those States that do not there is a thriving credit reporting business and commercial credit transactions are not inhibited. *Hood* v. *Dun & Bradstreet, Inc.*, 486 F. 2d 25, 32 (1973), cert. denied, 415 U. S. 985 (1974). The court cited an empirical study comparing credit transactions in Boise, Idaho, where there is no privilege, with those in Spokane, Washington, where there is one. *Id.*, at 32, and n. 18.

[12] As indicated *supra*, I would not in this case attempt to define the precise boundaries of the realm in which ~~the common law of defamation may operate~~ various constitutional requirements apply. The lines will be difficult to draw in some cases. For example, reports of bankruptcies, stock quotations, and other financial items that appear in newspapers and newsletters of general circulation would involve different considerations. Nonetheless, as indicated in the text, the idea that certain kinds of speech are at the core of the First Amendment, while others are on the periphery, is not a new one to courts. See, *e. g.*, *Roth* v.

tween the interests of the speaker here and the state interest in providing a legal remedy for defamatory falsehood. That state interest, we have said, is "strong and legitimate." *Gertz*, 418 U. S., at 348. A State will not lightly be required to abandon this purpose,

> "for, as MR. JUSTICE STEWART, has reminded us, the individual's right to the protection of his own good name 'reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. . . .' *Rosenblatt* v. *Baer*, 383 U. S. 75, 92 (1966) (concurring opinion)."
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> *Id.*, at 341.

United States, 354 U. S. 476; *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447 (1978); *Brown* v. *Hartlage*, 456 U. S. 45; Prosser § 118, p. 822–823. And the lines between media and nonmedia, and between commercial speech and other speech, are not unfamiliar to judges, nor would they be difficult to draw. Certainly the state courts noted *supra*, at 6, have found little difficulty in drawing them. I do not think this common law approach is a return to the *ad hoc* resolution of the competing interests at stake in each particular case that we eschewed in *Gertz*. See 418 U. S., at 343–344, 346. Constitutional protections would apply identically to broad categories of speech, not to individual cases. This kind of broad categorization does not raise the same concerns of bias and the like that might be raised by judicial determinations of which particular articles or publications address issues of "general or public interest," cf. *id.*, at 346. See Shiffrin 1268, n. 327. Moreover, prophylactic rules—such as a direction to err on the side of constitutional protection—might be suggested that would ensure that speech of genuine concern was not restrained.

There is little reason for the Court's anxiety that "an immeasurable volume of litigation" would result from this approach, *ante*, at 13, n. 4. *New York Times* was decided 20 years ago. It left the states free to adhere to the common law in non-media cases. The "flood-gates" argument simply is not justified in light of this experience. Moreover, the blanket rejection of what has been the prevailing law of defamation is a high price indeed to pay for a bright-line rule that heretofore has never been considered necessary.

replace with Rider

As noted, the merit of imposing punitive and presumed damages reasonably may be doubted in some circumstances. In *Gertz*, we found that the state interest in awarding these remedies was not "substantial" in view of their effect on speech at the core of the First Amendment. 418 U. S., at 349.[13] But this case concerns speech of significantly less constitutional interest. The state interest in these remedies need not be compelling to support the incidental effect they may have on this kind of protected speech. As noted, the common law long ago concluded that requiring proof of damages incurred did not adequately compensate the plaintiff in many defamation cases. We should not lightly presume that

[13] There is language in *Gertz* that can be read broadly to the effect that presumed and punitive damages have no place in the law of defamation. It is necessary, however, to view this language in the context of the only issue before the Court. The suit was by a private person against a media defendant. It was the presence of the media defendant that primarily caused the Court in *Gertz* to limit recovery to "actual injury." *Gertz*, *supra*, at 349. Presumed and punitive damages were deemed—for the reasons first articulated in *New York Times*—to threaten the historic role of the media in a representative democracy. *Id.*, at 349–350. No such threat is present when one private party is libeled by another private party—at least where the libel is circulated in the course of, and is solely concerned with, both parties' businesses. In weighing the interests that may be at issue, it is well also to repeat that there is a significant public interest "in compensating private individuals for wrongful injury to reputation." *Gertz*, *supra*, at 348–349.

In considering generally the utility and appropriateness of punitive damages, it is well to bear in mind that the wisdom of imposing such damages reasonably may vary with the context in which the issue arises. Defamation actions are not comparable, for example, to personal injury litigation in which proof of substantial actual damages is commonplace. The role of punitive damages in addition to actual damages is not to compensate; rather it is to punish and deter—a role normally left to government. See *Smith* v. *Wade*, —— U. S. ——, —— (1983) (REHNQUIST, J., dissenting). In defamation cases, where proof of actual damages is difficult, punitive damages—in many cases—may be largely compensatory in purpose. See generally Prosser § 112, p. 765. Judge Friendly recognized this alternative purpose of punitive damages in *Roginsky* v. *Richardson-Merrell, Inc.*, 378 F. 2d 832, 838 (CA2 1967).

this judgment—a judgment respected and left to the States for 200 years—was erroneous. The state interest in providing a remedy for defamation surely includes ensuring that those remedies are effective. In light of the reduced constitutional value in the speech at issue here, I would hold that the state interest adequately supports the common law rules.[*]

IV

Constitutional principles retain force and respect only when they are applied sparingly where needed. A common-

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[*] The Court suggests that this approach would result in allowing the States "to accomplish indirectly what we have held cannot be accomplished directly—namely, the suppression of protected 'economic' speech." *Ante*, at 19, n. 7. We have never held that the incidental suppression of "economic" speech in furtherance of a substantial state interest such as protecting private reputation is prohibited. Quite to the contrary, we have held repeatedly that speech in the economic realm, "which occurs in an area traditionally subject to government regulation," *Ohralik*, 436 U. S., at 456, is entitled to only a limited measure of protection. *E. g.*, *ibid.*; *Central Hudson Gas & Elec.* v. *Public Serv. Comm'n*, 447 U. S. 557, 562–563 (1980). It may be banned even directly if the State asserts a substantial governmental interest. *Id.*, at 566. The Court does not dispute that the state interest in protecting reputation is a strong one. See *ante*, at 19, n. 8.

The Court also asserts that the state interest in affording a remedy to private persons for defamation by the media is at least as great as that in protecting them from defamation by credit reports. *Ibid.* This misses the point. I do not suggest that the state interest in remedying injury to reputation, considered alone, was less in *New York Times* and *Gertz* than it is here; the point is that the constitutional interest in protecting media speech from presumed and punitive damages is significantly greater than when, as here, the speech is both nonmedia and commercial in nature.

Finally, the Court suggests that I should detail precisely why the result in a case involving a bankruptcy report in the Wall Street Journal would be different from the result here. *Ante*, at 18, n. 7, 19, n. 8. I do not say it would be. That is a different case that may raise different considerations; it should be left for another day. There are instances—and I believe this difficult case presents one of them—when prudence strongly counsels against laying down rules to govern all cases rather than identifying the factors that govern the particular result. The Court's insistence on a

sense view of those spheres that are primarily of local concern persuades me that the Court should stay its hand in this case. As we have said in a related context, to require a parity of constitutional protection for the speech here and that in *Gertz* and *New York Times* "could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech." *Ohralik*, 436 U. S., at 456. The Court identifies no new or overriding societal interest that justifies constitutionalizing defamation actions between private parties. I would leave this area of law largely to the wisdom of the several States.

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bright-line rule that would reject entirely the rationale and experience of the common law is unnecessary and injudicious.

jen 06/22/84

RIDER "A," p. 10

Certainly the state courts noted supra, at 6, have found little difficulty in drawing them.

RIDER "B," p. 12

[14]The Court suggests that this approach would result in allowing the States "to accomplish indirectly what we have held cannot be accomplished directly--namely, the suppression of protected 'economic' speech." Ante, at 19, n. 7. We have never held that the incidental suppression of "economic" speech in furtherance of a substantial state interest such as protecting private reputation is prohibited. Quite to the contrary, we have held repeatedly that speech in the economic realm, "which occurs in an area traditionally subject to government regulation," Ohralik, 436 U.S., at 456, is entitled to only a limited measure of protection. E.g., ibid.; Central Hudson Gas & Elec. v. Public Serv. Comm'n, 447 U.S. 557, 562-563 (1980). It may be banned even directly if the State asserts a substantial governmental interest. Id., at 566. The Court does not dispute that the state interest in protecting reputation is a strong one. See ante, at 19, n. 8.

The Court also asserts that the state interest in affording a remedy to private persons for defamation by the media is at least as great as that in protecting them from defamation by credit reports. Ibid. This misses the point. I do not suggest that the state interest in remedying injury to reputation, considered alone, was less in New York Times and Gertz than it is here; the point is that the constitutional interest in protecting media

speech from presumed and punitive damages is significantly greater than when, as here, the speech is both nonmedia and commercial in nature.

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I reread Mon on 9/15 – some language changes would help. See 7, 12

CHANGES ON pp. 1, 10, 12-13.

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

LFP

From: **Justice Powell**

Circulated: _____

Recirculated: JUN 25 1984

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83–18

DUN & BRADSTREET, INC., PETITIONERS *v.* GREENMOSS BUILDERS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

[June ——, 1984]

JUSTICE POWELL, with whom JUSTICE REHNQUIST and JUSTICE O'CONNOR join, dissenting.

The Court today extends the constitutional rule of *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), far beyond its origins or its purpose. In that case, the Court for the first time held that the Constitution limits the reach of state laws of libel and slander in suits against media defendants. A constitutional rule was needed in such cases, the Court held, to ensure that "debate on public issues . . . be uninhibited, robust, and wide-open." *Id.*, at 270. All of the Court's decisions since then that have considered the constitutional role in defamation law also have involved suits against a media defendant arising out of an article or broadcast on an issue of public concern and importance. The Court today goes beyond these precedents and holds that the Constitution prevents the State of Vermont from applying its common law to a libel action between a construction company and a commercial credit reporting agency. In my view, this holding is not required by the First Amendment. Nor is it wise or commanded by logic or precedent.

I

The common law rules that the Court today repudiates are of ancient vintage. The rule that damages are presumed for libel was announced by Hale as early as 1670. *Restatement*

of Torts § 568, comment b, at 162 (1938). Punitive damages long have been available in actions for defamation, under a quite different standard than the one applied today. See, *e. g.*, C. McCormick, Law of Damages § 118, p. 431 (1935); M. Newell, Law of Defamation, Libel and Slander 842, 844–846 (1890) (citing cases). And since at least the early part of this century, a plaintiff in a garden-variety defamation suit could recover without showing any facts as to the state of mind of the defendant. W. Prosser, Law of Torts § 113, pp. 772–773 (4th ed. 1971) (hereinafter Prosser); Restatement (Second) of Torts § 580B, comment b (1977).[1] The common law recognized some privileges, but generally to recover for written expression harmful to reputation the ordinary citizen had to show only falsity and publication.

malice not required

These rules have not gone unquestioned. This Court itself has limited their reach in certain situations of overriding need. But in jurisdiction after jurisdiction they have been reaffirmed repeatedly. Thus, for example, it is the judgment of history that "proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact." Prosser § 112, p. 765; accord, *Rowe* v. *Metz*, 195 Colo. 424, 425–426, 579 P. 2d 83, 84 (1978); Note, Developments in the Law—Defamation, 69 Harv. L. Rev. 875, 891–892 (1956). As a result, courts for centuries have allowed juries to presume that some damage occurred from many defamatory utterances and publications.

This accumulated learning is worthy of respect. Moreover, the common law rules were developed in an area of the law that, since the founding of our country, has been the

[1] While the Court's opinion discusses only the questions of presumed and punitive damages, its effect is broader. The logic of the opinion apparently would require that the rule announced in *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 347 (1974), barring liability without fault in cases involving media discussion of public issues, be applied in all defamation actions.

province of the state courts.[2] Even if one disagrees with these centuries-old rules,[3] this Court should discard them only if they conflict with the rights guaranteed to the people by federal law. Thus, this Court has modified these rules only when their operation threatened the core values of the First Amendment. More specifically, we have done so only in cases in which state law placed at risk "freedom of expression upon public questions." *New York Times* v. *Sullivan*, 376 U. S., at 269. "The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth* v. *United States*, 354 U. S. 476, 484 (1957). "At the core of the First Amendment are certain basic conceptions about the manner in which political discussion in a representative democracy should proceed." *Brown* v. *Hartlage*, 456 U. S. 45, 52 (1982); accord *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 776 (1978) (discussion of "'matters of public concern'" is "at the heart of the First Amendment's protection"). There is nothing of these central interests in the situation before us today. The Court today extends these constitutional rules to nothing less than

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[2] The Framers were familiar with the common law of libel, which had been adopted by the American colonies. See *Gertz*, 418 U. S., at 380–384 (WHITE, J., dissenting); *Roth* v. *United States*, 354 U. S. 476, 482–483, and n. 11 (1957) (13 States allowed prosecution for libel in 1792); *Beauharnais* v. *Illinois*, 343 U. S. 250, 254–255 (1952). See also T. Cooley, Constitutional Limitations 602 (7th ed. 1903); Rutledge, The Law of Defamation: Recent Developments, 32 Alabama Lawyer 409, 410 (1971):

"[T]he law of defamation has been an integral part of the laws of England, the colonies and the states since time immemorial. So many actions have been maintained and judgments recovered under the various laws of libel that the Constitutional validity of libel actions could be denied only by a Court willing to hold all its predecessors were wrong in their interpretation of the First Amendment and that two hundred years of precedents should be overruled."

[3] As the Court notes, there is room to doubt the wisdom of state laws that permit presumed and punitive damages on liberal terms. *Ante*, at 9.

the entire field of libel and slander.[4] Henceforth, every action by a former employee complaining of a malicious negative recommendation by an employer,[5] every action by a dealer against a competitor who falsely reports bad service to the manufacturer,[6] every action by a spurned suitor for spreading false rumors about the reasons for his failure,[7] and numerous other actions arising out of back-fence gossip or commercial incompetence[8] will raise a constitutional ques-

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[4] Moreover, the Court's holding affects not only state laws. Congress, too, has provided for actions that after today may well not meet the new constitutional standards. For example, the Fair Credit Reporting Act provides that punitive damages may be awarded where a credit service willfully has reported *true* but obsolete information as to a consumer. 15 U. S. C. §§ 1681c, 1681n. For the Court to uphold this law, it would have to find the governmental interest in protecting a debtor from the circulation of such true information to be significantly greater than the interest in protecting damage to reputation by malicious lies. In addition, the Act provides other procedures to assure accuracy and fairness to consumers. Previously, such reasonable regulation precisely aimed at a perceived commercial evil would not have been susceptible to constitutional attack. See *Millstone* v. *O'Hanlon Reports, Inc.*, 528 F. 2d 829 (CA8 1976) (upholding Act). After today, every such regulation of private and economic speech may be constitutionally suspect unless it meets the elaborate and rigorous standards of *New York Times* and *Gertz*. See also *Brown* v. *Hartlage*, 456 U. S. 45, 53–54 (1982) (restrictions on communication of ideas to voters must be supported by a compelling state interest). Similarly, the provisions of the securities laws, many of which regulate speech, *e. g.*, 15 U. S. C. §§ 77k, 77*l*, 77o, 78r, will be subject to scrutiny under those standards. See also *infra*, at 7–8.

[5] *E. g.*, *Calero* v. *Del Chemical Corp.*, 68 Wis. 2d 487, 228 N. W. 2d 737 (1975); *Stuempges* v. *Parke, Davis & Co.*, 297 N. W. 2d 252 (Minn. 1980).

[6] *E. g.*, *Harley-Davidson Motorsports, Inc.* v. *Markley*, 279 Or. 361, 568 P. 2d 1359 (1977).

[7] *E. g.*, *Schomer* v. *Smidt*, 113 Cal. App. 3d 828, 170 Cal. Rptr. 662 (1980).

[8] Suits by disgruntled consumers against credit reporting agencies appear to be disquietingly common. *E. g.*, *Millstone* v. *O'Hanlon Reports, Inc.*, 528 F. 2d 829 (CA8 1976); *Retail Credit Co.* v. *Russell*, 234 Ga. 765, 218 S. E. 2d 54 (1975); *Hood* v. *Dun & Bradstreet, Inc.*, 486 F. 2d 25 (CA5 1973), cert. denied, 415 U. S. 985 (1974); *Grove* v. *Dun & Bradstreet, Inc.*,

tion. The Court believes that its decision is "squarely control[led]" by our opinion in *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974). *Ante*, at 11. This result unnecessarily repudiates the common law and trivializes the First Amendment.[9] There is nothing in *Gertz* that requires it.

The facts in *Gertz* were very different from those here. *Gertz* was a libel suit against a media defendant: a magazine called American Opinion, the monthly outlet of the John Birch Society. The article in question discussed a question of undoubted public importance—whether the prosecution of a policeman was part of a Communist campaign to discredit local law enforcement agencies. The plaintiff was a lawyer tangentially involved in the prosecution who, the magazine alleged, was the chief architect of the "frame-up" of the police officer. The article spoke of the lawyer's alleged links to Communist activity. Like every other case in which this Court has considered the constitutional limits on state laws of defamation, *Gertz* involved a media article directly relevant to the effective operation of our system of democratic self-government.

In contrast, the case today is a purely private defamation action against a commercial credit reporting agency that falsely reported to respondent's creditors that respondent was bankrupt. A number of state courts, including the court below, have recognized that the role of the Constitution in

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438 F. 2d 433 (CA3), cert. denied, 404 U. S. 898 (1971). In enacting the Fair Credit Reporting Act, 15 U. S. C. §§ 1681–1681t, Congress specifically found that "[t]here is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy." *Id.*, § 1681(a)(4).

[9] As one commentator has remarked with respect to "the case of a commercial supplier of credit information that defames a person applying for credit"—the very case before us today—"If the first amendment requirements outlined in *Gertz* apply, there is something clearly wrong with the first amendment or with *Gertz*." Shiffrin, The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment, 78 Nw. L. Rev. 1212, 1268 (1983) [hereinafter Shiffrin].

regulating state libel law is far more limited when the concerns that activated *New York Times* and *Gertz* are absent. In such a case,

> "[t]here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-censorship by the press. The facts of the present case are wholly without the First Amendment concerns with which the Supreme Court of the United States has been struggling." *Harley-Davidson Motorsports, Inc.* v. *Markley*, 279 Or. 361, 366, 568 P. 2d 1359, 1363 (1977).

Accord, *Rowe* v. *Metz*, 195 Colo. 424, 426, 579 P. 2d 83, 84 (1978) (*Gertz* should not be "blindly applied to the case of a private plaintiff against a nonmedia defendant for a defamation which is essentially private in nature"); *Calero* v. *Del Chemical Corp.*, 68 Wis. 2d 487, 506, 228 N. W. 2d 737, 748 (1975) ("In 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"); *Denny* v. *Mertz*, 106 Wis. 2d 636, 661, 318 N. W. 2d 141, 153, cert. denied, 459 U. S. 883 (1982). I would agree generally with these courts, and hold that the common law rules of libel and slander do not violate the Constitution when applied to a case such as this.

II

This Court on many occasions has advanced the commonsense idea that certain kinds of speech are more central to the interests of the First Amendment than others. Obscene speech and "fighting words" have long been accorded no protection. *Roth* v. *United States*, 354 U. S., at 483; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942); see also *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697, 716 (1931) (publication of troop ship sailings during war time may be enjoined); *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 591–592

(1952) (advocating violent overthrow of the government is unprotected speech); *Seattle Times Co.* v. *Rhinehart*, —— U. S. ——, —— (1984). Similarly, "libelous utterances are not within the area of constitutionally protected speech." *Roth*, 354 U. S., at 483; accord, *Gertz*, *supra*, at 340 ("there is no constitutional value in false statements of fact"). In the area of protected speech, the most prominent example of reduced protection for certain kinds of speech concerns commercial speech. Such speech, we have noted, occupies a "subordinate position in the scale of First Amendment values." *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 456 (1978). It also is more easily verifiable and less likely to be deterred by proper regulation. *Virginia Pharmacy Bd.* v. *Virginia Consumer Council*, 425 U. S. 748, 771, n. 24 (1976). Accordingly, it may be regulated in ways that might be impermissible in the realm of noncommercial expression. *Ohralik*, *supra*, at 456; *Central Hudson Gas & Elec.* v. *Public Serv. Comm'n*, 447 U. S. 557, 562–563 (1980).

The Court concedes the above, but appears to believe that commercial speech—defined as advertising that does no more than propose a commercial transaction—is the only type of expression entitled to less than full First Amendment protection. See *ante*, at 18. Our cases suggest otherwise. In the area of defamation law itself, for example, some types of speech are entitled to broader protection than others: speech about public figures receives the full protection of the *New York Times* standards, while speech about private figures is entitled at most to the lesser standards of our opinion in *Gertz*.

Other areas of the law provide further examples. In *Ohralik* we noted that there are "[n]umerous examples . . . of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, . . . corporate proxy statements, . . . the exchange of price and production information among competitors, . . . and employers' threats of retaliation for the labor

activities of employees." 436 U. S., at 456 (citations omitted). Yet similar regulation of political speech is subject to the most rigorous scrutiny. See *Brown* v. *Hartlage*, 456 U. S. 45; *New York Times Co.* v. *Sullivan*, 376 U. S., at 279, n. 19; *Buckley* v. *Valeo*, 424 U. S. 1, 14 (1976). Likewise, while the power of the State to license lawyers, psychiatrists, public school teachers, and investment advisors—all of whom speak for a living—is unquestioned, this Court has held that a law requiring licensing of union organizers is unconstitutional under the First Amendment. *Thomas* v. *Collins*, 323 U. S. 516 (1945); see Shiffrin 1264. See also *Rosenbloom* v. *Metromedia*, 403 U. S. 29, 44 (1971) (opinion of BRENNAN, J.) ("the determinant whether the First Amendment applies to state libel actions is whether the utterance involved concerns an issue of public or general concern"); *Young* v. *American Mini Theatres*, 427 U. S. 50, 70 (1976) (opinion of STEVENS, J.) ("it is manifest that society's interest in protecting this type of expression [nonobscene erotic films] is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate").

III

I do not think it necessary or advisable to attempt completely to define what sorts of speech safely can be left to regulation by state libel laws. Cf. *Rosenbloom*, *supra*, at 44–45. In accord with the state courts quoted *supra*, at 6, I think it clear that the speech at issue here implicates the First Amendment at most only tangentially. Petitioner's credit reporting is purely private. It does not appear in a newspaper or magazine of general and regular circulation nor on the broadcast media. See 15 U. S. C. § 80b–2(a)(11)(D) (Investment Advisers Act does not apply to "any bona fide newspaper, news magazine or business or financial publication of general and regular circulation"); cf. *Mills* v. *Alabama*, 384 U. S. 214, 219 (1966); *Saxbe* v. *Washington Post Co.*, 417 U. S. 843, 863–864 (1974) (POWELL, J., dissenting). It is speech solely in the economic interests of the speaker

and audience. Cf. *Central Hudson Gas & Elec.*, 447 U. S., at 561.[10] These factors clearly placed petitioner's credit reporting in "a subordinate position in the scale of First Amendment values." *Ohralik*, 436 U. S., at 456.

In addition, the speech here, like advertising, is hardier and less likely to be deterred by state regulation. See *Virginia Pharmacy Board*, 425 U. S., at 771, n. 24. It is solely motivated by the desire for profit, which, we have noted, is a force less likely to be deterred than others. *Ibid.* Arguably, the reporting here also was more objectively verifiable than speech deserving of greater protection. See *ibid.* In any case, the market provides a powerful incentive to a credit reporting agency to be accurate, since false credit reporting is of no use to creditors. Thus, any incremental "chilling" effect of libel suits would be of decreased significance.[11]

Since the speech here does not involve any of the concerns that motivated the Court in *New York Times* and *Gertz*, I conclude that the First Amendment protection is substantially lessened.[12] This requires us to strike a new balance be-

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[10] In addition, as Shiffrin notes, "[t]he interests in individual self-expression, autonomy, and the like are not present here or are present in only an attenuated way." Shiffrin 1268.

[11] The Fifth Circuit Court of Appeals has noted that, while most States provide a qualified privilege against libel suits for commercial credit reporting agencies, in those States that do not there is a thriving credit reporting business and commercial credit transactions are not inhibited. *Hood* v. *Dun & Bradstreet, Inc.*, 486 F. 2d 25, 32 (1973), cert. denied, 415 U. S. 985 (1974). The court cited an empirical study comparing credit transactions in Boise, Idaho, where there is no privilege, with those in Spokane, Washington, where there is one. *Id.*, at 32, and n. 18.

[12] As indicated *supra*, I would not in this case attempt to define the precise boundaries of the realm in which the common law of defamation may operate. The lines will be difficult to draw in some cases. For example, reports of bankruptcies, stock quotations, and other financial items that appear in newspapers and newsletters of general circulation would involve different considerations. Nonetheless, as indicated in the text, the idea that certain kinds of speech are at the core of the First Amendment, while others are on the periphery, is not a new one to courts. See, *e. g.*, *Roth* v.

tween the interests of the speaker here and the state interest in providing a legal remedy for defamatory falsehood. That state interest, we have said, is "strong and legitimate." *Gertz*, 418 U. S., at 348. A State will not lightly be required to abandon this purpose,

> "for, as MR. JUSTICE STEWART, has reminded us, the individual's right to the protection of his own good name 'reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. . . .' *Rosenblatt* v. *Baer*, 383 U. S. 75, 92 (1966) (concurring opinion)."
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> *Id.*, at 341.

United States, 354 U. S. 476; *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447 (1978); *Brown* v. *Hartlage*, 456 U. S. 45; Prosser § 118, p. 822–823. And the lines between media and nonmedia, and between commercial speech and other speech, are not unfamiliar to judges, nor would they be difficult to draw. Certainly the state courts noted *supra*, at 6, have found little difficulty in drawing them. I do not think this common law approach is a return to the *ad hoc* resolution of the competing interests at stake in each particular case that we eschewed in *Gertz*. See 418 U. S., at 343–344, 346. Constitutional protections would apply identically to broad categories of speech, not to individual cases. This kind of broad categorization does not raise the same concerns of bias and the like that might be raised by judicial determinations of which particular articles or publications address issues of "general or public interest," cf. *id.*, at 346. See Shiffrin 1268, n. 327. Moreover, prophylactic rules—such as a direction to err on the side of constitutional protection—might be suggested that would ensure that speech of genuine concern was not restrained.

There is little reason for the Court's anxiety that "an immeasurable volume of litigation" would result from this approach, *ante*, at 13, n. 4. *New York Times* was decided 20 years ago. It left the states free to adhere to the common law in non-media cases. The "flood-gates" argument simply is not justified in light of this experience. Moreover, the blanket rejection of what has been the prevailing law of defamation is a high price indeed to pay for a bright-line rule that heretofore has never been considered necessary.

As noted, the merit of imposing punitive and presumed damages reasonably may be doubted in some circumstances. In *Gertz*, we found that the state interest in awarding these remedies was not "substantial" in view of their effect on speech at the core of the First Amendment. 418 U. S., at 349.[13] But this case concerns speech of significantly less constitutional interest. The state interest in these remedies need not be compelling to support the incidental effect they may have on this kind of protected speech. As noted, the common law long ago concluded that requiring proof of damages incurred did not adequately compensate the plaintiff in many defamation cases. We should not lightly presume that

[13] There is language in *Gertz* that can be read broadly to the effect that presumed and punitive damages have no place in the law of defamation. It is necessary, however, to view this language in the context of the only issue before the Court. The suit was by a private person against a media defendant. It was the presence of the media defendant that primarily caused the Court in *Gertz* to limit recovery to "actual injury." *Gertz*, *supra*, at 349. Presumed and punitive damages were deemed—for the reasons first articulated in *New York Times*—to threaten the historic role of the media in a representative democracy. *Id.*, at 349–350. No such threat is present when one private party is libeled by another private party—at least where the libel is circulated in the course of, and is solely concerned with, both parties' businesses. In weighing the interests that may be at issue, it is well also to repeat that there is a significant public interest "in compensating private individuals for wrongful injury to reputation." *Gertz*, *supra*, at 348–349.

In considering generally the utility and appropriateness of punitive damages, it is well to bear in mind that the wisdom of imposing such damages reasonably may vary with the context in which the issue arises. Defamation actions are not comparable, for example, to personal injury litigation in which proof of substantial actual damages is commonplace. The role of punitive damages in addition to actual damages is not to compensate; rather it is to punish and deter—a role normally left to government. See *Smith* v. *Wade*, —— U. S. ——, —— (1983) (REHNQUIST, J., dissenting). In defamation cases, where proof of actual damages is difficult, punitive damages—in many cases—may be largely compensatory in purpose. See generally Prosser § 112, p. 765. Judge Friendly recognized this alternative purpose of punitive damages in *Roginsky* v. *Richardson-Merrell, Inc.*, 378 F. 2d 832, 838 (CA2 1967).

punative damages

this judgment—a judgment respected and left to the States for 200 years—was erroneous. The state interest in providing a remedy for defamation surely includes ensuring that those remedies are effective. In light of the reduced constitutional value in the speech at issue here, I would hold that the state interest adequately supports the common law rules.[14]

IV

Constitutional principles retain force and respect only when they are applied sparingly where needed. A common-

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[14]The Court suggests that this approach would result in allowing the States "to accomplish indirectly what we have held cannot be accomplished directly—namely, the suppression of protected 'economic' speech." *Ante*, at 19, n. 7. We have never held that the incidental suppression of "economic" speech in furtherance of a substantial state interest such as protecting private reputation is prohibited. Quite to the contrary, we have held repeatedly that speech in the economic realm, "which occurs in an area traditionally subject to government regulation," *Ohralik*, 436 U. S., at 456, is entitled to only a limited measure of protection. *E. g.*, *ibid.*; *Central Hudson Gas & Elec.* v. *Public Serv. Comm'n*, 447 U. S. 557, 562–563 (1980). It may be banned even directly if the State asserts a substantial governmental interest. *Id.*, at 566. The Court does not dispute that the state interest in protecting reputation is a strong one. See *ante*, at 19, n. 8.

The Court also asserts that the state interest in affording a remedy to private persons for defamation by the media is at least as great as that in protecting them from defamation by credit reports. *Ibid.* This misses the point. I do not suggest that the state interest in remedying injury to reputation, considered alone, was less in *New York Times* and *Gertz* than it is here; the point is that the constitutional interest in protecting media speech from presumed and punitive damages is significantly greater than when, as here, the speech is both nonmedia and commercial in nature.

Finally, the Court suggests that I should detail precisely why the result in a case involving a bankruptcy report in the Wall Street Journal would be different from the result here. *Ante*, at 18, n. 7, 19, n. 8. I do not say it would be. That is a different case that may raise different considerations; it should be left for another day. There are instances—and I believe this difficult case presents one of them—when prudence strongly counsels against laying down rules to govern all cases rather than identifying the factors that govern the particular result. The Court's insistence on a

sense view of those spheres that are primarily of local concern persuades me that the Court should stay its hand in this case. As we have said in a related context, to require a parity of constitutional protection for the speech here and that in *Gertz* and *New York Times* "could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech." *Ohralik*, 436 U. S., at 456. The Court identifies no new or overriding societal interest that justifies constitutionalizing defamation actions between private parties. I would leave this area of law to the wisdom of the several States.

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bright-line rule that would reject entirely the rationale and experience of the common law is unnecessary and injudicious.

06/22

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: _____

Recirculated: _____

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-18

DUN & BRADSTREET, INC., PETITIONERS *v.*
GREENMOSS BUILDERS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

[June ——, 1984]

JUSTICE POWELL, with whom JUSTICE REHNQUIST and JUSTICE O'CONNOR join, dissenting.

The Court today extends the constitutional rule of *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), far beyond its origins or its purpose. In that case, the Court for the first time held that the Constitution limits the reach of state laws of libel and slander in suits against media defendants. A constitutional role was needed in such cases, the Court held, to ensure that "debate on public issues . . . be uninhibited, robust, and wide-open." *Id.*, at 270. All of the Court's decisions since then that have considered the constitutional role in defamation law also have involved suits against a media defendant arising out of an article or broadcast on an issue of public concern and importance. The Court today goes beyond these precedents and ~~holds that the Constitution prevents the State of Vermont from applying its common law to~~ applies the same constitutional restrictions to a libel action between a construction company and a commercial credit reporting agency. In my view, this holding is not required by the First Amendment. Nor is it wise or ~~commanded by logic or~~ consistent with precedent.

I

The common law rules that the Court today repudiates are of ancient vintage. The rule that damages are presumed for libel was announced by Hale as early as 1670. *Restatement*

of Torts § 568, comment b, at 162 (1938). Punitive damages long have been available in actions for defamation under a quite different standard than the one applied today. See, *e. g.*, C. McCormick, Law of Damages § 118, p. 431 (1935); M. Newell, Law of Defamation, Libel and Slander 842, 844–846 (1890) (citing cases). And since at least the early part of this century, a plaintiff in a garden-variety defamation suit could recover without showing any facts as to the state of mind of the defendant. W. Prosser, Law of Torts § 113, pp. 772–773 (4th ed. 1971) (hereinafter Prosser); Restatement (Second) of Torts § 580B, comment b (1977).[1] The common law recognized some privileges, but generally to recover for written expression harmful to reputation the ordinary citizen had to show only falsity and publication.

These rules have not gone unquestioned. This Court itself has limited their reach in certain situations of overriding need. But in jurisdiction after jurisdiction they have been reaffirmed repeatedly. Thus, for example, it is the judgment of history that "proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact." Prosser § 112, p. 765; accord, *Rowe* v. *Metz*, 195 Colo. 424, 425–426, 579 P. 2d 83, 84 (1978); Note, Developments in the Law—Defamation, 69 Harv. L. Rev. 875, 891–892 (1956). As a result, courts for centuries have allowed juries to presume that some damage occurred from many defamatory utterances and publications.

This accumulated learning is worthy of respect. Moreover, the common law rules were developed in an area of the law that, since the founding of our country, has been the

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[1] While the Court's opinion discusses only the questions of presumed and punitive damages, its effect is broader. The logic of the opinion apparently would require that the rule announced in *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 347 (1974), barring liability without fault in cases involving media discussion of public issues, be applied in all defamation actions.

province of the state courts.[2] Even if one disagrees with these centuries-old rules,[3] this Court should discard them only if they conflict with the rights guaranteed to the people by federal law. Thus, this Court has modified these rules only when their operation threatened the core values of the First Amendment. More specifically, we have done so only in cases in which state law placed at risk "freedom of expression upon public questions." *New York Times* v. *Sullivan*, 376 U. S., at 269. "The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth* v. *United States*, 354 U. S. 476, 484 (1957). "At the core of the First Amendment are certain basic conceptions about the manner in which political discussion in a representative democracy should proceed." *Brown* v. *Hartlage*, 456 U. S. 45, 52 (1982); accord *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 776 (1978) (discussion of "'matters of public concern'" is "at the heart of the First Amendment's protection"). There is nothing of these central interests in the situation before us today. The Court today extends these constitutional rules to nothing less than

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[2] The Framers were familiar with the common law of libel, which had been adopted by the American colonies. See *Gertz*, 418 U. S., at 380–384 (WHITE, J., dissenting); *Roth* v. *United States*, 354 U. S. 476, 482–483, and n. 11 (1957) (13 States allowed prosecution for libel in 1792); *Beauharnais* v. *Illinois*, 343 U. S. 250, 254–255 (1952). See also T. Cooley, Constitutional Limitations 602 (7th ed. 1903); Rutledge, The Law of Defamation: Recent Developments, 32 Alabama Lawyer 409, 410 (1971):

"[T]he law of defamation has been an integral part of the laws of England, the colonies and the states since time immemorial. So many actions have been maintained and judgments recovered under the various laws of libel that the Constitutional validity of libel actions could be denied only by a Court willing to hold all its predecessors were wrong in their interpretation of the First Amendment and that two hundred years of precedents should be overruled."

[3] As the Court notes, there is room to doubt the wisdom of state laws that permit ~~presumed~~ and punitive damages on liberal terms. *Ante*, at 9.

Dan - should it "presumed" be omitted here?

the entire field of libel and slander.[4] Henceforth, every action by a former employee complaining of a malicious negative recommendation by an employer,[5] every action by a dealer against a competitor who falsely reports bad service to the manufacturer,[6] every action by a spurned suitor for spreading false rumors about the reasons for his failure,[7] and numerous other actions arising out of back-fence gossip or commercial incompetence[8] will raise a constitutional ques-

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[4] Moreover, the Court's holding affects not only state laws. Congress, too, has provided for actions that after today may well not meet the new constitutional standards. For example, the Fair Credit Reporting Act provides that punitive damages may be awarded where a credit service willfully has reported *true* but obsolete information as to a consumer. 15 U. S. C. §§ 1681c, 1681n. For the Court to uphold this law, it would have to find the governmental interest in protecting a debtor from the circulation of such true information to be significantly greater than the interest in protecting damage to reputation by malicious lies. In addition, the Act provides other procedures to assure accuracy and fairness to consumers. Previously, such reasonable regulation precisely aimed at a perceived commercial evil would not have been susceptible to constitutional attack. See *Millstone* v. *O'Hanlon Reports, Inc.*, 528 F. 2d 829 (CA8 1976) (upholding Act). After today, every such regulation of private and economic speech may be constitutionally suspect unless it meets the ~~elaborate and~~ rigorous standards of *New York Times* and *Gertz*. See also *Brown* v. *Hartlage*, 456 U. S. 45, 53–54 (1982) (restrictions on communication of ideas to voters must be supported by a compelling state interest). Similarly, the provisions of the securities laws, many of which regulate speech, *e. g.*, 15 U. S. C. §§ 77k, 77*l*, 77o, 78r, will be subject to scrutiny under those standards. See also *infra*, at 7–8.

[5] *E. g.*, *Calero* v. *Del Chemical Corp.*, 68 Wis. 2d 487, 228 N. W. 2d 737 (1975); *Stuempges* v. *Parke, Davis & Co.*, 297 N. W. 2d 252 (Minn. 1980).

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[8] Suits by disgruntled consumers against credit reporting agencies appear to be disquietingly common. *E. g.*, *Millstone* v. *O'Hanlon Reports, Inc.*, 528 F. 2d 829 (CA8 1976); *Retail Credit Co.* v. *Russell*, 234 Ga. 765, 218 S. E. 2d 54 (1975); *Hood* v. *Dun & Bradstreet, Inc.*, 486 F. 2d 25 (CA5 1973), cert. denied, 415 U. S. 985 (1974); *Grove* v. *Dun & Bradstreet, Inc.*,

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In contrast, the case today is a purely private defamation action against a commercial credit reporting agency that falsely reported to respondent's creditors that respondent was bankrupt. A number of state courts, including the court below, have recognized that the role of the Constitution in

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[9] As one commentator has remarked with respect to "the case of a commercial supplier of credit information that defames a person applying for credit"—the very case before us today—"If the first amendment requirements outlined in *Gertz* apply, there is something clearly wrong with the first amendment or with *Gertz*." Shiffrin, The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment, 78 Nw. L. Rev. 1212, 1268 (1983) [hereinafter Shiffrin].

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> "[t]here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-censorship by the press. The facts of the present case are wholly without the First Amendment concerns with which the Supreme Court of the United States has been struggling." *Harley-Davidson Motorsports, Inc.* v. *Markley*, 279 Or. 361, 366, 568 P. 2d 1359, 1363 (1977).

Accord, *Rowe* v. *Metz*, 195 Colo. 424, 426, 579 P. 2d 83, 84 (1978) (*Gertz* should not be "blindly applied to the case of a private plaintiff against a nonmedia defendant for a defamation which is essentially private in nature"); *Calero* v. *Del Chemical Corp.*, 68 Wis. 2d 487, 506, 228 N. W. 2d 737, 748 (1975) ("In 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"); *Denny* v. *Mertz*, 106 Wis. 2d 636, 661, 318 N. W. 2d 141, 153, cert. denied, 459 U. S. 883 (1982). I would agree generally with these courts, and hold that the common law rules of libel and slander do not violate the Constitution when applied to a case such as this.

II

This Court on many occasions has advanced the commonsense idea that certain kinds of speech are more central to the interests of the First Amendment than others. Obscene speech and "fighting words" have long been accorded no protection. *Roth* v. *United States*, 354 U. S., at 483; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942); see also *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697, 716 (1931) (publication of troop ship sailings during war time may be enjoined); *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 591–592

(1952) (advocating violent overthrow of the government is unprotected speech); *Seattle Times Co.* v. *Rhinehart*, —— U. S. ——, —— (1984). Similarly, "libelous utterances are not within the area of constitutionally protected speech." *Roth*, 354 U. S., at 483; accord, *Gertz*, *supra*, at 340 ("there is no constitutional value in false statements of fact"). In the area of protected speech, the most prominent example of reduced protection for certain kinds of speech concerns commercial speech. Such speech, we have noted, occupies a "subordinate position in the scale of First Amendment values." *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 456 (1978). It also is more easily verifiable and less likely to be deterred by proper regulation. *Virginia Pharmacy Bd.* v. *Virginia Consumer Council*, 425 U. S. 748, 771, n. 24 (1976). Accordingly, it may be regulated in ways that might be impermissible in the realm of noncommercial expression. *Ohralik*, *supra*, at 456; *Central Hudson Gas & Elec.* v. *Public Serv. Comm'n*, 447 U. S. 557, 562–563 (1980).

The Court concedes the above, but appears to believe that commercial speech—defined as advertising that does no more than propose a commercial transaction—is the only type of expression entitled to less than full First Amendment protection. See *ante*, at 18. Our cases suggest otherwise. In the area of defamation law itself, for example, some types of speech are entitled to broader protection than others: speech about public figures receives the full protection of the *New York Times* standards, while speech about private figures is entitled at most to the lesser standards of our opinion in *Gertz*.

Other areas of the law provide further examples. In *Ohralik* we noted that there are "[n]umerous examples . . . of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, . . . corporate proxy statements, . . . the exchange of price and production information among competitors, . . . and employers' threats of retaliation for the labor

activities of employees." 436 U. S., at 456 (citations omitted). Yet similar regulation of political speech is subject to the most rigorous scrutiny. See *Brown* v. *Hartlage*, 456 U. S. 45; *New York Times Co.* v. *Sullivan*, 376 U. S., at 279, n. 19; *Buckley* v. *Valeo*, 424 U. S. 1, 14 (1976). Likewise, while the power of the State to license lawyers, psychiatrists, public school teachers, and investment advisors—all of whom speak for a living—is unquestioned, this Court has held that a law requiring licensing of union organizers is unconstitutional under the First Amendment. *Thomas* v. *Collins*, 323 U. S. 516 (1945); see Shiffrin 1264. See also *Rosenbloom* v. *Metromedia*, 403 U. S. 29, 44 (1971) (opinion of BRENNAN, J.) ("the determinant whether the First Amendment applies to state libel actions is whether the utterance involved concerns an issue of public or general concern"); *Young* v. *American Mini Theatres*, 427 U. S. 50, 70 (1976) (opinion of STEVENS, J.) ("it is manifest that society's interest in protecting this type of expression [nonobscene erotic films] is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate").

III

I do not think it necessary or advisable to attempt completely to define what sorts of speech ~~safely can be left to regulation by state libel laws~~. Cf. *Rosenbloom*, *supra*, at 44–45. In accord with the state courts quoted *supra*, at 6, I think it clear that the speech at issue here implicates the First Amendment at most only tangentially. Petitioner's credit reporting is purely private. It does not appear in a newspaper or magazine of general and regular circulation nor on the broadcast media. See 15 U. S. C. § 80b–2(a)(11)(D) (Investment Advisers Act does not apply to "any bona fide newspaper, news magazine or business or financial publication of general and regular circulation"); cf. *Mills* v. *Alabama*, 384 U. S. 214, 219 (1966); *Saxbe* v. *Washington Post Co.*, 417 U. S. 843, 863–864 (1974) (POWELL, J., dissenting). It is speech solely in the economic interests of the speaker

qualify for only reduced constitutional protection

and audience. Cf. *Central Hudson Gas & Elec.*, 447 U. S., at 561.[10] These factors clearly placed petitioner's credit reporting in "a subordinate position in the scale of First Amendment values." *Ohralik*, 436 U. S., at 456.

In addition, the speech here, like advertising, is hardier and less likely to be deterred by state regulation. See *Virginia Pharmacy Board*, 425 U. S., at 771, n. 24. It is solely motivated by the desire for profit, which, we have noted, is a force less likely to be deterred than others. *Ibid.* Arguably, the reporting here also was more objectively verifiable than speech deserving of greater protection. See *ibid.* In any case, the market provides a powerful incentive to a credit reporting agency to be accurate, since false credit reporting is of no use to creditors. Thus, any incremental "chilling" effect of libel suits would be of decreased significance.[11]

Since the speech here does not involve any of the concerns that motivated the Court in *New York Times* and *Gertz*, I conclude that the First Amendment protection is substantially lessened.[12] This requires us to strike a new balance be-

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[10] In addition, as Shiffrin notes, "[t]he interests in individual self-expression, autonomy, and the like are not present here or are present in only an attenuated way." Shiffrin 1268.

[11] The Fifth Circuit Court of Appeals has noted that, while most States provide a qualified privilege against libel suits for commercial credit reporting agencies, in those States that do not there is a thriving credit reporting business and commercial credit transactions are not inhibited. *Hood* v. *Dun & Bradstreet, Inc.*, 486 F. 2d 25, 32 (1973), cert. denied, 415 U. S. 985 (1974). The court cited an empirical study comparing credit transactions in Boise, Idaho, where there is no privilege, with those in Spokane, Washington, where there is one. *Id.*, at 32, and n. 18.

[12] As indicated *supra*, I would not in this case attempt to define the precise boundaries of the realm in which ~~the common law of defamation may operate~~. The lines will be difficult to draw in some cases. For example, reports of bankruptcies, stock quotations, and other financial items that appear in newspapers and newsletters of general circulation would involve different considerations. Nonetheless, as indicated in the text, the idea that certain kinds of speech are at the core of the First Amendment, while others are on the periphery, is not a new one to courts. See, *e. g.*, *Roth* v.

tween the interests of the speaker here and the state interest in providing a legal remedy for defamatory falsehood. That state interest, we have said, is "strong and legitimate." *Gertz*, 418 U. S., at 348. A State will not lightly be required to abandon this purpose,

> "for, as MR. JUSTICE STEWART, has reminded us, the individual's right to the protection of his own good name 'reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. . . .' *Rosenblatt* v. *Baer*, 383 U. S. 75, 92 (1966) (concurring opinion)."
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> *Id.*, at 341.

United States, 354 U. S. 476; *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447 (1978); *Brown* v. *Hartlage*, 456 U. S. 45; Prosser § 118, p. 822–823. And the lines between media and nonmedia, and between commercial speech and other speech, are not unfamiliar to judges, nor would they be difficult to draw. Certainly the state courts noted *supra*, at 6, have found little difficulty in drawing them. I do not think this common law approach is a return to the *ad hoc* resolution of the competing interests at stake in each particular case that we eschewed in *Gertz*. See 418 U. S., at 343–344, 346. Constitutional protections would apply identically to broad categories of speech, not to individual cases. This kind of broad categorization does not raise the same concerns of bias and the like that might be raised by judicial determinations of which particular articles or publications address issues of "general or public interest," cf. *id.*, at 346. See Shiffrin 1268, n. 327. Moreover, prophylactic rules—such as a direction to err on the side of constitutional protection—might be suggested that would ensure that speech of genuine concern was not restrained.

There is little reason for the Court's anxiety that "an immeasurable volume of litigation" would result from this approach, *ante*, at 13, n. 4. *New York Times* was decided 20 years ago. It left the states free to adhere to the common law in non-media cases. The "flood-gates" argument simply is not justified in light of this experience. Moreover, the blanket rejection of what has been the prevailing law of defamation is a high price indeed to pay for a bright-line rule that heretofore has never been considered necessary.

Dan - Would a cite to Metromedia & its rejection in Gertz be appropriate here? WJB's opinion can be read as implying his views in Metromedia prevailed. They did not.

replace with Rider

As noted, the merit of imposing punitive and presumed damages reasonably may be doubted in some circumstances. In *Gertz*, we found that the state interest in awarding these remedies was not "substantial" in view of their effect on speech at the core of the First Amendment. 418 U. S., at 349.[13] But this case concerns speech of significantly less constitutional interest. The state interest in these remedies need not be compelling to support the incidental effect they may have on this kind of protected speech. As noted, the common law long ago concluded that requiring proof of damages incurred did not adequately compensate the plaintiff in many defamation cases. We should not lightly presume that

[13] There is language in *Gertz* that can be read broadly to the effect that presumed and punitive damages have no place in the law of defamation. It is necessary, however, to view this language in the context of the only issue before the Court. The suit was by a private person against a media defendant. It was the presence of the media defendant that primarily caused the Court in *Gertz* to limit recovery to "actual injury." *Gertz*, *supra*, at 349. Presumed and punitive damages were deemed—for the reasons first articulated in *New York Times*—to threaten the historic role of the media in a representative democracy. *Id.*, at 349–350. No such threat is present when one private party is libeled by another private party—at least where the libel is circulated in the course of, and is solely concerned with, both parties' businesses. In weighing the interests that may be at issue, it is well also to repeat that there is a significant public interest "in compensating private individuals for wrongful injury to reputation." *Gertz*, *supra*, at 348–349.

In considering generally the utility and appropriateness of punitive damages, it is well to bear in mind that the wisdom of imposing such damages reasonably may vary with the context in which the issue arises. Defamation actions are not comparable, for example, to personal injury litigation in which proof of substantial actual damages is commonplace. The role of punitive damages in addition to actual damages is not to compensate; rather it is to punish and deter—a role normally left to government. See *Smith* v. *Wade*, —— U. S. ——, —— (1983) (REHNQUIST, J., dissenting). In defamation cases, where proof of actual damages is difficult, punitive damages—in many cases—may be largely compensatory in purpose. See generally Prosser § 112, p. 765. Judge Friendly recognized this alternative purpose of punitive damages in *Roginsky* v. *Richardson-Merrell, Inc.*, 378 F. 2d 832, 838 (CA2 1967).

this judgment—a judgment respected and left to the States for 200 years—was erroneous. The state interest in providing a remedy for defamation surely includes ensuring that those remedies are effective. In light of the reduced constitutional value in the speech at issue here, I would hold that the state interest adequately supports the common law rules.[11]

IV

Constitutional principles retain force and respect only when they are applied sparingly where needed. A common-

[11] The Court suggests that this approach would result in allowing the States "to accomplish indirectly what we have held cannot be accomplished directly—namely, the suppression of protected 'economic' speech." *Ante*, at 19, n. 7. We have never held that the incidental suppression of "economic" speech in furtherance of a substantial state interest such as protecting private reputation is prohibited. Quite to the contrary, we have held repeatedly that speech in the economic realm, "which occurs in an area traditionally subject to government regulation," *Ohralik*, 436 U. S., at 456, is entitled to only a limited measure of protection. *E. g.*, *ibid.*; *Central Hudson Gas & Elec.* v. *Public Serv. Comm'n*, 447 U. S. 557, 562–563 (1980). It may be banned even directly if the State asserts a substantial governmental interest. *Id.*, at 566. The Court does not dispute that the state interest in protecting reputation is a strong one. See *ante*, at 19, n. 8.

The Court also asserts that the state interest in affording a remedy to private persons for defamation by the media is at least as great as that in protecting them from defamation by credit reports. *Ibid.* This misses the point. I do not suggest that the state interest in remedying injury to reputation, considered alone, was less in *New York Times* and *Gertz* than it is here; the point is that the constitutional interest in protecting media speech from presumed and punitive damages is significantly greater than when, as here, the speech is both nonmedia and commercial in nature.

Finally, the Court suggests that I should detail precisely why the result in a case involving a bankruptcy report in the Wall Street Journal would be different from the result here. *Ante*, at 18, n. 7, 19, n. 8. I do not say it would be. That is a different case that may raise different considerations; it should be left for another day. There are instances—and I believe this difficult case presents one of them—when prudence strongly counsels against laying down rules to govern all cases rather than identifying the factors that govern the particular result. The Court's insistence on a

sense view of those spheres that are primarily of local concern persuades me that the Court should stay its hand in this case. As we have said in a related context, to require a parity of constitutional protection for the speech here and that in *Gertz* and *New York Times* "could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech." *Ohralik*, 436 U. S., at 456. The Court identifies no new or overriding societal interest that justifies constitutionalizing defamation actions between private parties. I would leave this area of law largely to the wisdom of the several States.

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bright-line rule that would reject entirely the rationale and experience of the common law is unnecessary and injudicious.

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: _____

Recirculated: JUN 25 1984

CHANGES ON pp. 1, 10, 12-13.

At Conference on June 26, 1984, on a 5 to 4 vote on BRW's motion - this will be reargued next Term.

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83–18

DUN & BRADSTREET, INC., PETITIONERS *v.*
GREENMOSS BUILDERS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

[June ——, 1984]

JUSTICE POWELL, with whom JUSTICE REHNQUIST and JUSTICE O'CONNOR join, dissenting.

The Court today extends the constitutional rule of *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), far beyond its origins or its purpose. In that case, the Court for the first time held that the Constitution limits the reach of state laws of libel and slander in suits against media defendants. A constitutional role was needed in such cases, the Court held, to ensure that "debate on public issues . . . be uninhibited, robust, and wide-open." *Id.*, at 270. All of the Court's decisions since then that have considered the constitutional role in defamation law also have involved suits against a media defendant arising out of an article or broadcast on an issue of public concern and importance. The Court today goes beyond these precedents and holds that the Constitution prevents the State of Vermont from applying its common law to a libel action between a construction company and a commercial credit reporting agency. In my view, this holding is not required by the First Amendment. Nor is it wise or commanded by logic or precedent.

I

The common law rules that the Court today repudiates are of ancient vintage. The rule that damages are presumed for libel was announced by Hale as early as 1670. *Restatement*

of Torts § 568, comment b, at 162 (1938). Punitive damages long have been available in actions for defamation, under a quite different standard than the one applied today. See, *e. g.*, C. McCormick, Law of Damages § 118, p. 431 (1935); M. Newell, Law of Defamation, Libel and Slander 842, 844–846 (1890) (citing cases). And since at least the early part of this century, a plaintiff in a garden-variety defamation suit could recover without showing any facts as to the state of mind of the defendant. W. Prosser, Law of Torts § 113, pp. 772–773 (4th ed. 1971) (hereinafter Prosser); Restatement (Second) of Torts § 580B, comment b (1977).[1] The common law recognized some privileges, but generally to recover for written expression harmful to reputation the ordinary citizen had to show only falsity and publication.

These rules have not gone unquestioned. This Court itself has limited their reach in certain situations of overriding need. But in jurisdiction after jurisdiction they have been reaffirmed repeatedly. Thus, for example, it is the judgment of history that "proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact." Prosser § 112, p. 765; accord, *Rowe* v. *Metz*, 195 Colo. 424, 425–426, 579 P. 2d 83, 84 (1978); Note, Developments in the Law—Defamation, 69 Harv. L. Rev. 875, 891–892 (1956). As a result, courts for centuries have allowed juries to presume that some damage occurred from many defamatory utterances and publications.

This accumulated learning is worthy of respect. Moreover, the common law rules were developed in an area of the law that, since the founding of our country, has been the

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[1] While the Court's opinion discusses only the questions of presumed and punitive damages, its effect is broader. The logic of the opinion apparently would require that the rule announced in *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 347 (1974), barring liability without fault in cases involving media discussion of public issues, be applied in all defamation actions.

province of the state courts.[2] Even if one disagrees with these centuries-old rules,[3] this Court should discard them only if they conflict with the rights guaranteed to the people by federal law. Thus, this Court has modified these rules only when their operation threatened the core values of the First Amendment. More specifically, we have done so only in cases in which state law placed at risk "freedom of expression upon public questions." *New York Times* v. *Sullivan*, 376 U. S., at 269. "The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth* v. *United States*, 354 U. S. 476, 484 (1957). "At the core of the First Amendment are certain basic conceptions about the manner in which political discussion in a representative democracy should proceed." *Brown* v. *Hartlage*, 456 U. S. 45, 52 (1982); accord *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 776 (1978) (discussion of "'matters of public concern'" is "at the heart of the First Amendment's protection"). There is nothing of these central interests in the situation before us today. The Court today extends these constitutional rules to nothing less than

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[2] The Framers were familiar with the common law of libel, which had been adopted by the American colonies. See *Gertz*, 418 U. S., at 380–384 (WHITE, J., dissenting); *Roth* v. *United States*, 354 U. S. 476, 482–483, and n. 11 (1957) (13 States allowed prosecution for libel in 1792); *Beauharnais* v. *Illinois*, 343 U. S. 250, 254–255 (1952). See also T. Cooley, Constitutional Limitations 602 (7th ed. 1903); Rutledge, The Law of Defamation: Recent Developments, 32 Alabama Lawyer 409, 410 (1971):

"[T]he law of defamation has been an integral part of the laws of England, the colonies and the states since time immemorial. So many actions have been maintained and judgments recovered under the various laws of libel that the Constitutional validity of libel actions could be denied only by a Court willing to hold all its predecessors were wrong in their interpretation of the First Amendment and that two hundred years of precedents should be overruled."

[3] As the Court notes, there is room to doubt the wisdom of state laws that permit presumed and punitive damages on liberal terms. *Ante*, at 9.

the entire field of libel and slander.[4] Henceforth, every action by a former employee complaining of a malicious negative recommendation by an employer,[5] every action by a dealer against a competitor who falsely reports bad service to the manufacturer,[6] every action by a spurned suitor for spreading false rumors about the reasons for his failure,[7] and numerous other actions arising out of back-fence gossip or commercial incompetence[8] will raise a constitutional ques-

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[4] Moreover, the Court's holding affects not only state laws. Congress, too, has provided for actions that after today may well not meet the new constitutional standards. For example, the Fair Credit Reporting Act provides that punitive damages may be awarded where a credit service willfully has reported *true* but obsolete information as to a consumer. 15 U. S. C. §§ 1681c, 1681n. For the Court to uphold this law, it would have to find the governmental interest in protecting a debtor from the circulation of such true information to be significantly greater than the interest in protecting damage to reputation by malicious lies. In addition, the Act provides other procedures to assure accuracy and fairness to consumers. Previously, such reasonable regulation precisely aimed at a perceived commercial evil would not have been susceptible to constitutional attack. See *Millstone* v. *O'Hanlon Reports, Inc.*, 528 F. 2d 829 (CA8 1976) (upholding Act). After today, every such regulation of private and economic speech may be constitutionally suspect unless it meets the elaborate and rigorous standards of *New York Times* and *Gertz*. See also *Brown* v. *Hartlage*, 456 U. S. 45, 53–54 (1982) (restrictions on communication of ideas to voters must be supported by a compelling state interest). Similarly, the provisions of the securities laws, many of which regulate speech, *e. g.*, 15 U. S. C. §§ 77k, 77*l*, 77o, 78r, will be subject to scrutiny under those standards. See also *infra*, at 7–8.

[5] *E. g.*, *Calero* v. *Del Chemical Corp.*, 68 Wis. 2d 487, 228 N. W. 2d 737 (1975); *Stuempges* v. *Parke, Davis & Co.*, 297 N. W. 2d 252 (Minn. 1980).

[6] *E. g.*, *Harley-Davidson Motorsports, Inc.* v. *Markley*, 279 Or. 361, 568 P. 2d 1359 (1977).

[7] *E. g.*, *Schomer* v. *Smidt*, 113 Cal. App. 3d 828, 170 Cal. Rptr. 662 (1980).

[8] Suits by disgruntled consumers against credit reporting agencies appear to be disquietingly common. *E. g.*, *Millstone* v. *O'Hanlon Reports, Inc.*, 528 F. 2d 829 (CA8 1976); *Retail Credit Co.* v. *Russell*, 234 Ga. 765, 218 S. E. 2d 54 (1975); *Hood* v. *Dun & Bradstreet, Inc.*, 486 F. 2d 25 (CA5 1973), cert. denied, 415 U. S. 985 (1974); *Grove* v. *Dun & Bradstreet, Inc.*,

tion. The Court believes that its decision is "squarely control[led]" by our opinion in *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974). *Ante,* at 11. This result unnecessarily repudiates the common law and trivializes the First Amendment.[9] There is nothing in *Gertz* that requires it.

The facts in *Gertz* were very different from those here. *Gertz* was a libel suit against a media defendant: a magazine called American Opinion, the monthly outlet of the John Birch Society. The article in question discussed a question of undoubted public importance—whether the prosecution of a policeman was part of a Communist campaign to discredit local law enforcement agencies. The plaintiff was a lawyer tangentially involved in the prosecution who, the magazine alleged, was the chief architect of the "frame-up" of the police officer. The article spoke of the lawyer's alleged links to Communist activity. Like every other case in which this Court has considered the constitutional limits on state laws of defamation, *Gertz* involved a media article directly relevant to the effective operation of our system of democratic self-government.

In contrast, the case today is a purely private defamation action against a commercial credit reporting agency that falsely reported to respondent's creditors that respondent was bankrupt. A number of state courts, including the court below, have recognized that the role of the Constitution in

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438 F. 2d 433 (CA3), cert. denied, 404 U. S. 898 (1971). In enacting the Fair Credit Reporting Act, 15 U. S. C. §§ 1681–1681t, Congress specifically found that "[t]here is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy." *Id.*, § 1681(a)(4).

[9] As one commentator has remarked with respect to "the case of a commercial supplier of credit information that defames a person applying for credit"—the very case before us today—"If the first amendment requirements outlined in *Gertz* apply, there is something clearly wrong with the first amendment or with *Gertz*." Shiffrin, The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment, 78 Nw. L. Rev. 1212, 1268 (1983) [hereinafter Shiffrin].

regulating state libel law is far more limited when the concerns that activated *New York Times* and *Gertz* are absent. In such a case,

> "[t]here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-censorship by the press. The facts of the present case are wholly without the First Amendment concerns with which the Supreme Court of the United States has been struggling." *Harley-Davidson Motorsports, Inc.* v. *Markley*, 279 Or. 361, 366, 568 P. 2d 1359, 1363 (1977).

Accord, *Rowe* v. *Metz*, 195 Colo. 424, 426, 579 P. 2d 83, 84 (1978) (*Gertz* should not be "blindly applied to the case of a private plaintiff against a nonmedia defendant for a defamation which is essentially private in nature"); *Calero* v. *Del Chemical Corp.*, 68 Wis. 2d 487, 506, 228 N. W. 2d 737, 748 (1975) ("In 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"); *Denny* v. *Mertz*, 106 Wis. 2d 636, 661, 318 N. W. 2d 141, 153, cert. denied, 459 U. S. 883 (1982). I would agree generally with these courts, and hold that the common law rules of libel and slander do not violate the Constitution when applied to a case such as this.

II

This Court on many occasions has advanced the commonsense idea that certain kinds of speech are more central to the interests of the First Amendment than others. Obscene speech and "fighting words" have long been accorded no protection. *Roth* v. *United States*, 354 U. S., at 483; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942); see also *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697, 716 (1931) (publication of troop ship sailings during war time may be enjoined); *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 591–592

(1952) (advocating violent overthrow of the government is unprotected speech); *Seattle Times Co.* v. *Rhinehart*, —— U. S. ——, —— (1984). Similarly, "libelous utterances are not within the area of constitutionally protected speech." *Roth*, 354 U. S., at 483; accord, *Gertz*, *supra*, at 340 ("there is no constitutional value in false statements of fact"). In the area of protected speech, the most prominent example of reduced protection for certain kinds of speech concerns commercial speech. Such speech, we have noted, occupies a "subordinate position in the scale of First Amendment values." *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 456 (1978). It also is more easily verifiable and less likely to be deterred by proper regulation. *Virginia Pharmacy Bd.* v. *Virginia Consumer Council*, 425 U. S. 748, 771, n. 24 (1976). Accordingly, it may be regulated in ways that might be impermissible in the realm of noncommercial expression. *Ohralik*, *supra*, at 456; *Central Hudson Gas & Elec.* v. *Public Serv. Comm'n*, 447 U. S. 557, 562–563 (1980).

The Court concedes the above, but appears to believe that commercial speech—defined as advertising that does no more than propose a commercial transaction—is the only type of expression entitled to less than full First Amendment protection. See *ante*, at 18. Our cases suggest otherwise. In the area of defamation law itself, for example, some types of speech are entitled to broader protection than others: speech about public figures receives the full protection of the *New York Times* standards, while speech about private figures is entitled at most to the lesser standards of our opinion in *Gertz*.

Other areas of the law provide further examples. In *Ohralik* we noted that there are "[n]umerous examples . . . of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, . . . corporate proxy statements, . . . the exchange of price and production information among competitors, . . . and employers' threats of retaliation for the labor

activities of employees." 436 U. S., at 456 (citations omitted). Yet similar regulation of political speech is subject to the most rigorous scrutiny. See *Brown* v. *Hartlage*, 456 U. S. 45; *New York Times Co.* v. *Sullivan*, 376 U. S., at 279, n. 19; *Buckley* v. *Valeo*, 424 U. S. 1, 14 (1976). Likewise, while the power of the State to license lawyers, psychiatrists, public school teachers, and investment advisors—all of whom speak for a living—is unquestioned, this Court has held that a law requiring licensing of union organizers is unconstitutional under the First Amendment. *Thomas* v. *Collins*, 323 U. S. 516 (1945); see Shiffrin 1264. See also *Rosenbloom* v. *Metromedia*, 403 U. S. 29, 44 (1971) (opinion of BRENNAN, J.) ("the determinant whether the First Amendment applies to state libel actions is whether the utterance involved concerns an issue of public or general concern"); *Young* v. *American Mini Theatres*, 427 U. S. 50, 70 (1976) (opinion of STEVENS, J.) ("it is manifest that society's interest in protecting this type of expression [nonobscene erotic films] is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate").

III

I do not think it necessary or advisable to attempt completely to define what sorts of speech safely can be left to regulation by state libel laws. Cf. *Rosenbloom*, *supra*, at 44–45. In accord with the state courts quoted *supra*, at 6, I think it clear that the speech at issue here implicates the First Amendment at most only tangentially. Petitioner's credit reporting is purely private. It does not appear in a newspaper or magazine of general and regular circulation nor on the broadcast media. See 15 U. S. C. § 80b–2(a)(11)(D) (Investment Advisers Act does not apply to "any bona fide newspaper, news magazine or business or financial publication of general and regular circulation"); cf. *Mills* v. *Alabama*, 384 U. S. 214, 219 (1966); *Saxbe* v. *Washington Post Co.*, 417 U. S. 843, 863–864 (1974) (POWELL, J., dissenting). It is speech solely in the economic interests of the speaker

and audience. Cf. *Central Hudson Gas & Elec.*, 447 U. S., at 561.[10] These factors clearly placed petitioner's credit reporting in "a subordinate position in the scale of First Amendment values." *Ohralik*, 436 U. S., at 456.

In addition, the speech here, like advertising, is hardier and less likely to be deterred by state regulation. See *Virginia Pharmacy Board*, 425 U. S., at 771, n. 24. It is solely motivated by the desire for profit, which, we have noted, is a force less likely to be deterred than others. *Ibid.* Arguably, the reporting here also was more objectively verifiable than speech deserving of greater protection. See *ibid.* In any case, the market provides a powerful incentive to a credit reporting agency to be accurate, since false credit reporting is of no use to creditors. Thus, any incremental "chilling" effect of libel suits would be of decreased significance.[11]

Since the speech here does not involve any of the concerns that motivated the Court in *New York Times* and *Gertz*, I conclude that the First Amendment protection is substantially lessened.[12] This requires us to strike a new balance be-

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[10] In addition, as Shiffrin notes, "[t]he interests in individual self-expression, autonomy, and the like are not present here or are present in only an attenuated way." Shiffrin 1268.

[11] The Fifth Circuit Court of Appeals has noted that, while most States provide a qualified privilege against libel suits for commercial credit reporting agencies, in those States that do not there is a thriving credit reporting business and commercial credit transactions are not inhibited. *Hood* v. *Dun & Bradstreet, Inc.*, 486 F. 2d 25, 32 (1973), cert. denied, 415 U. S. 985 (1974). The court cited an empirical study comparing credit transactions in Boise, Idaho, where there is no privilege, with those in Spokane, Washington, where there is one. *Id.*, at 32, and n. 18.

[12] As indicated *supra*, I would not in this case attempt to define the precise boundaries of the realm in which the common law of defamation may operate. The lines will be difficult to draw in some cases. For example, reports of bankruptcies, stock quotations, and other financial items that appear in newspapers and newsletters of general circulation would involve different considerations. Nonetheless, as indicated in the text, the idea that certain kinds of speech are at the core of the First Amendment, while others are on the periphery, is not a new one to courts. See, *e. g.*, *Roth* v.

tween the interests of the speaker here and the state interest in providing a legal remedy for defamatory falsehood. That state interest, we have said, is "strong and legitimate." *Gertz*, 418 U. S., at 348. A State will not lightly be required to abandon this purpose,

> "for, as MR. JUSTICE STEWART, has reminded us, the individual's right to the protection of his own good name 'reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. . . .' *Rosenblatt* v. *Baer*, 383 U. S. 75, 92 (1966) (concurring opinion)."

Id., at 341.

United States, 354 U. S. 476; *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447 (1978); *Brown* v. *Hartlage*, 456 U. S. 45; Prosser § 118, p. 822–823. And the lines between media and nonmedia, and between commercial speech and other speech, are not unfamiliar to judges, nor would they be difficult to draw. Certainly the state courts noted *supra*, at 6, have found little difficulty in drawing them. I do not think this common law approach is a return to the *ad hoc* resolution of the competing interests at stake in each particular case that we eschewed in *Gertz*. See 418 U. S., at 343–344, 346. Constitutional protections would apply identically to broad categories of speech, not to individual cases. This kind of broad categorization does not raise the same concerns of bias and the like that might be raised by judicial determinations of which particular articles or publications address issues of "general or public interest," cf. *id.*, at 346. See Shiffrin 1268, n. 327. Moreover, prophylactic rules—such as a direction to err on the side of constitutional protection—might be suggested that would ensure that speech of genuine concern was not restrained.

There is little reason for the Court's anxiety that "an immeasurable volume of litigation" would result from this approach, *ante*, at 13, n. 4. *New York Times* was decided 20 years ago. It left the states free to adhere to the common law in non-media cases. The "flood-gates" argument simply is not justified in light of this experience. Moreover, the blanket rejection of what has been the prevailing law of defamation is a high price indeed to pay for a bright-line rule that heretofore has never been considered necessary.

As noted, the merit of imposing punitive and presumed damages reasonably may be doubted in some circumstances. In *Gertz*, we found that the state interest in awarding these remedies was not "substantial" in view of their effect on speech at the core of the First Amendment. 418 U. S., at 349.[13] But this case concerns speech of significantly less constitutional interest. The state interest in these remedies need not be compelling to support the incidental effect they may have on this kind of protected speech. As noted, the common law long ago concluded that requiring proof of damages incurred did not adequately compensate the plaintiff in many defamation cases. We should not lightly presume that

[13] There is language in *Gertz* that can be read broadly to the effect that presumed and punitive damages have no place in the law of defamation. It is necessary, however, to view this language in the context of the only issue before the Court. The suit was by a private person against a media defendant. It was the presence of the media defendant that primarily caused the Court in *Gertz* to limit recovery to "actual injury." *Gertz*, *supra*, at 349. Presumed and punitive damages were deemed—for the reasons first articulated in *New York Times*—to threaten the historic role of the media in a representative democracy. *Id.*, at 349–350. No such threat is present when one private party is libeled by another private party—at least where the libel is circulated in the course of, and is solely concerned with, both parties' businesses. In weighing the interests that may be at issue, it is well also to repeat that there is a significant public interest "in compensating private individuals for wrongful injury to reputation." *Gertz*, *supra*, at 348–349.

In considering generally the utility and appropriateness of punitive damages, it is well to bear in mind that the wisdom of imposing such damages reasonably may vary with the context in which the issue arises. Defamation actions are not comparable, for example, to personal injury litigation in which proof of substantial actual damages is commonplace. The role of punitive damages in addition to actual damages is not to compensate; rather it is to punish and deter—a role normally left to government. See *Smith* v. *Wade*, —— U. S. ——, —— (1983) (REHNQUIST, J., dissenting). In defamation cases, where proof of actual damages is difficult, punitive damages—in many cases—may be largely compensatory in purpose. See generally Prosser § 112, p. 765. Judge Friendly recognized this alternative purpose of punitive damages in *Roginsky* v. *Richardson-Merrell, Inc.*, 378 F. 2d 832, 838 (CA2 1967).

this judgment—a judgment respected and left to the States for 200 years—was erroneous. The state interest in providing a remedy for defamation surely includes ensuring that those remedies are effective. In light of the reduced constitutional value in the speech at issue here, I would hold that the state interest adequately supports the common law rules.[14]

IV

Constitutional principles retain force and respect only when they are applied sparingly where needed. A common-

[14]The Court suggests that this approach would result in allowing the States "to accomplish indirectly what we have held cannot be accomplished directly—namely, the suppression of protected 'economic' speech." *Ante*, at 19, n. 7. We have never held that the incidental suppression of "economic" speech in furtherance of a substantial state interest such as protecting private reputation is prohibited. Quite to the contrary, we have held repeatedly that speech in the economic realm, "which occurs in an area traditionally subject to government regulation," *Ohralik*, 436 U. S., at 456, is entitled to only a limited measure of protection. *E. g.*, *ibid.*; *Central Hudson Gas & Elec.* v. *Public Serv. Comm'n*, 447 U. S. 557, 562–563 (1980). It may be banned even directly if the State asserts a substantial governmental interest. *Id.*, at 566. The Court does not dispute that the state interest in protecting reputation is a strong one. See *ante*, at 19, n. 8.

The Court also asserts that the state interest in affording a remedy to private persons for defamation by the media is at least as great as that in protecting them from defamation by credit reports. *Ibid.* This misses the point. I do not suggest that the state interest in remedying injury to reputation, considered alone, was less in *New York Times* and *Gertz* than it is here; the point is that the constitutional interest in protecting media speech from presumed and punitive damages is significantly greater than when, as here, the speech is both nonmedia and commercial in nature.

Finally, the Court suggests that I should detail precisely why the result in a case involving a bankruptcy report in the Wall Street Journal would be different from the result here. *Ante*, at 18, n. 7, 19, n. 8. I do not say it would be. That is a different case that may raise different considerations; it should be left for another day. There are instances—and I believe this difficult case presents one of them—when prudence strongly counsels against laying down rules to govern all cases rather than identifying the factors that govern the particular result. The Court's insistence on a

sense view of those spheres that are primarily of local concern persuades me that the Court should stay its hand in this case. As we have said in a related context, to require a parity of constitutional protection for the speech here and that in *Gertz* and *New York Times* "could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech." *Ohralik*, 436 U. S., at 456. The Court identifies no new or overriding societal interest that justifies constitutionalizing defamation actions between private parties. I would leave this area of law to the wisdom of the several States.

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bright-line rule that would reject entirely the rationale and experience of the common law is unnecessary and injudicious.

06/22

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: _____

Recirculated: _____

Master
11/13/84

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-18

DUN & BRADSTREET, INC., PETITIONERS *v.*
GREENMOSS BUILDERS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

[June ——, 1984]

JUSTICE POWELL, with whom JUSTICE REHNQUIST and JUSTICE O'CONNOR join, dissenting.

The Court today extends the constitutional rule of *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), far beyond its origins or its purpose. In that case, the Court for the first time held that the Constitution limits the reach of state laws of libel and slander in suits against media defendants. A constitutional role was needed in such cases, the Court held, to ensure that "debate on public issues . . . be uninhibited, robust, and wide-open." *Id.*, at 270. All of the Court's decisions since then that have considered the constitutional role in defamation law also have involved suits against a media defendant arising out of an article or broadcast on an issue of public concern and importance. The Court today goes beyond these precedents and ~~holds that the Constitution prevents the State of Vermont from applying its common law to~~ applies the same constitutional restrictions to such a sweeping a libel action between a construction company and a commercial credit reporting agency. In my view, this holding is not required by the First Amendment. Nor is it wise or ~~commanded by logic or~~ consistent with precedent.

I

The common law rules that the Court today repudiates are of ancient vintage. The rule that damages are presumed for libel was announced by Hale as early as 1670. *Restatement*

of Torts § 568, comment b, at 162 (1938). Punitive damages also long have been available in actions for defamation, under a quite different standard than the one applied today. See, *e. g.*, C. McCormick, Law of Damages § 118, p. 431 (1935); M. Newell, Law of Defamation, Libel and Slander 842, 844–846 (1890) (citing cases). And since at least the early part of this century, a plaintiff in a garden-variety defamation suit could recover without showing any facts as to the state of mind of the defendant. W. Prosser, Law of Torts § 113, pp. 772–773 (4th ed. 1971) (hereinafter Prosser); Restatement (Second) of Torts § 580B, comment b (1977).[1] The common law recognized some privileges, but generally to recover for written expression harmful to reputation the ordinary citizen had to show only falsity and publication.

These rules have not gone unquestioned. This Court itself has limited their reach in certain situations of overriding need. But in jurisdiction after jurisdiction they have been reaffirmed repeatedly. Thus, for example, it is the judgment of history that "proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact." Prosser § 112, p. 765; accord, *Rowe* v. *Metz*, 195 Colo. 424, 425–426, 579 P. 2d 83, 84 (1978); Note, Developments in the Law—Defamation, 69 Harv. L. Rev. 875, 891–892 (1956). As a result, courts for centuries have allowed juries to presume that some damage occurred from many defamatory utterances and publications.

This accumulated learning is worthy of respect. Moreover, the common law rules were developed in an area of the law that, since the founding of our country, has been the

[1] While the Court's opinion discusses only the questions of presumed and punitive damages, its effect is broader. The logic of the opinion apparently would require that the rule announced in *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 347 (1974), barring liability without fault in cases involving media discussion of public issues, be applied in all defamation actions.

province of the state courts.[1] Even if one disagrees with these centuries-old rules,[2] this Court should discard them only if they conflict with the rights guaranteed to the people by federal law. Thus, this Court has modified these rules only when their operation threatened the core values of the First Amendment. More specifically, we have done so only in cases in which state law placed at risk "freedom of expression upon public questions." *New York Times* v. *Sullivan*, 376 U. S., at 269. "The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth* v. *United States*, 354 U. S. 476, 484 (1957). "At the core of the First Amendment are certain basic conceptions about the manner in which political discussion in a representative democracy should proceed." *Brown* v. *Hartlage*, 456 U. S. 45, 52 (1982); accord *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 776 (1978) (discussion of "'matters of public concern'" is "at the heart of the First Amendment's protection"). There is nothing of these central interests in the situation before us today. The Court today extends these constitutional rules to nothing less than

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[1] The Framers were familiar with the common law of libel, which had been adopted by the American colonies. See *Gertz*, 418 U. S., at 380–384 (WHITE, J., dissenting); *Roth* v. *United States*, 354 U. S. 476, 482–483, and n. 11 (1957) (13 States allowed prosecution for libel in 1792); *Beauharnais* v. *Illinois*, 343 U. S. 250, 254–255 (1952). See also T. Cooley, Constitutional Limitations 602 (7th ed. 1903); Rutledge, The Law of Defamation: Recent Developments, 32 Alabama Lawyer 409, 410 (1971):

"[T]he law of defamation has been an integral part of the laws of England, the colonies and the states since time immemorial. So many actions have been maintained and judgments recovered under the various laws of libel that the Constitutional validity of libel actions could be denied only by a Court willing to hold all its predecessors were wrong in their interpretation of the First Amendment and that two hundred years of precedents should be overruled."

[2] As the Court notes, there is room to doubt the wisdom of state laws that permit ~~presumed and~~ punitive damages on liberal terms. *Ante*, at 8.

the entire field of libel and slander.[1] Henceforth, every action by a former employee complaining of a ~~malicious~~ negative recommendation by an employer,[3] every action by a dealer against a competitor who falsely reports bad service to the manufacturer,[4] every action by a spurned suitor for spreading false rumors about the reasons for his failure,[5] and numerous other actions arising out of back-fence gossip or commercial incompetence[6] will raise a ~~constitutional~~ question.

[1] Moreover, the Court's holding affects not only state laws. Congress, too, has provided for actions that after today may well not meet the new constitutional standards. For example, the Fair Credit Reporting Act provides that punitive damages may be awarded where a credit service willfully has reported *true* but obsolete information as to a consumer. 15 U. S. C. §§ 1681c, 1681n. For the Court to uphold this law, it would have to find the governmental interest in protecting a debtor from the circulation of such true information to be significantly greater than the interest in protecting damage to reputation by malicious lies. In addition, the Act provides other procedures to assure accuracy and fairness to consumers. Previously, such reasonable regulation precisely aimed at a perceived commercial evil would not have been susceptible to constitutional attack. See *Millstone* v. *O'Hanlon Reports, Inc.*, 528 F. 2d 829 (CA8 1976) (upholding Act). After today, every such regulation of private and economic speech may be constitutionally suspect unless it meets the ~~elaborate and~~ rigorous standards of *New York Times* and *Gertz*. See also *Brown* v. *Hartlage*, 456 U. S. 45, 53–54 (1982) (restrictions on communication of ideas to voters must be supported by a compelling state interest). Similarly, the provisions of the securities laws, many of which regulate speech, *e. g.*, 15 U. S. C. §§ 77k, 77*l*, 77o, 78r, will be subject to scrutiny under those standards. See also *infra*, at 7–8.

[3] *E. g.*, *Calero* v. *Del Chemical Corp.*, 68 Wis. 2d 487, 228 N. W. 2d 737 (1975); *Stuempges* v. *Parke, Davis & Co.*, 297 N. W. 2d 252 (Minn. 1980).

[4] *E. g.*, *Harley-Davidson Motorsports, Inc.* v. *Markley*, 279 Or. 361, 568 P. 2d 1359 (1977).

[5] *E. g.*, *Schomer* v. *Smidt*, 113 Cal. App. 3d 828, 170 Cal. Rptr. 662 (1980).

[6] Suits by disgruntled consumers against credit reporting agencies appear to be disquietingly common. *E. g.*, *Millstone* v. *O'Hanlon Reports, Inc.*, 528 F. 2d 829 (CA8 1976); *Retail Credit Co.* v. *Russell*, 234 Ga. 765, 218 S. E. 2d 54 (1975); *Hood* v. *Dun & Bradstreet, Inc.*, 486 F. 2d 25 (CA5 1973), cert. denied, 415 U. S. 985 (1974); *Grove* v. *Dun & Bradstreet, Inc.*,

libelous

First Amendment

Do you want to retain this footnote? Right now the opinion says that common law punitives are invalid and suggests that statutory multiple damages are ok. Statutory punitive damages fall in the middle. Strictly speaking, your own opinion now, not only Justice Brennan's, throws the Fair Reporting Act's punitive damages provision into some question. I would recommend dropping the footnote and leaving the status of statutory punitives unclear.

Dave Good point. Omit n 4

tion. The Court believes that its decision is "squarely control[led]" by our opinion in *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974). *Ante*, at 11. This result unnecessarily repudiates the common law and trivializes the First Amendment.[7] There is nothing in *Gertz* that requires it.

The facts in *Gertz* were very different from those here. *Gertz* was a libel suit against a media defendant: a magazine called American Opinion, the monthly outlet of the John Birch Society. The article in question discussed a question of undoubted public importance—whether the prosecution of a policeman was part of a Communist campaign to discredit local law enforcement agencies. The plaintiff was a lawyer tangentially involved in the prosecution who, the magazine alleged, was the chief architect of the "frame-up" of the police officer. The article spoke of the lawyer's alleged links to Communist activity. Like every other case in which this Court has considered the constitutional limits on state laws of defamation, *Gertz* involved a media article directly relevant to the effective operation of our system of democratic self-government.

In contrast, the case today is a purely private defamation action against a commercial credit reporting agency that falsely reported to respondent's creditors that respondent was bankrupt. A number of state courts, including the court below, have recognized that the role of the Constitution in

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438 F. 2d 433 (CA3), cert. denied, 404 U. S. 898 (1971). In enacting the Fair Credit Reporting Act, 15 U. S. C. §§ 1681–1681t, Congress specifically found that "[t]here is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy." *Id.*, § 1681(a)(4).

7 As one commentator has remarked with respect to "the case of a commercial supplier of credit information that defames a person applying for credit"—the very case before us today—"If the first amendment requirements outlined in *Gertz* apply, there is something clearly wrong with the first amendment or with *Gertz*." Shiffrin, The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment, 78 Nw. L. Rev. 1212, 1268 (1983) [hereinafter Shiffrin].

regulating state libel law is far more limited when the concerns that activated *New York Times* and *Gertz* are absent. In such a case,

> "[t]here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-censorship by the press. The facts of the present case are wholly without the First Amendment concerns with which the Supreme Court of the United States has been struggling." *Harley-Davidson Motorsports, Inc.* v. *Markley*, 279 Or. 361, 366, 568 P. 2d 1359, 1363 (1977).

Accord, *Rowe* v. *Metz*, 195 Colo. 424, 426, 579 P. 2d 83, 84 (1978) (*Gertz* should not be "blindly applied to the case of a private plaintiff against a nonmedia defendant for a defamation which is essentially private in nature"); *Calero* v. *Del Chemical Corp.*, 68 Wis. 2d 487, 506, 228 N. W. 2d 737, 748 (1975) ("In 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"); *Denny* v. *Mertz*, 106 Wis. 2d 636, 661, 318 N. W. 2d 141, 153, cert. denied, 459 U. S. 883 (1982). I would agree generally with these courts, and hold that the common law rules of libel and slander do not violate the Constitution when applied to a case such as this.

II

This Court on many occasions has advanced the commonsense idea that certain kinds of speech are more central to the interests of the First Amendment than others. Obscene speech and "fighting words" have long been accorded no protection. *Roth* v. *United States*, 354 U. S., at 483; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942); see also *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697, 716 (1931) (publication of troop ship sailings during war time may be enjoined); *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 591–592

(1952) (advocating violent overthrow of the government is unprotected speech); *Seattle Times Co.* v. *Rhinehart*, —— U. S. ——, —— (1984). Similarly, "libelous utterances are not within the area of constitutionally protected speech." *Roth*, 354 U. S., at 483; accord, *Gertz*, *supra*, at 340 ("there is no constitutional value in false statements of fact"). In the area of protected speech, the most prominent example of reduced protection for certain kinds of speech concerns commercial speech. Such speech, we have noted, occupies a "subordinate position in the scale of First Amendment values." *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 456 (1978). It also is more easily verifiable and less likely to be deterred by proper regulation. *Virginia Pharmacy Bd.* v. *Virginia Consumer Council*, 425 U. S. 748, 771, n. 24 (1976). Accordingly, it may be regulated in ways that might be impermissible in the realm of noncommercial expression. *Ohralik*, *supra*, at 456; *Central Hudson Gas & Elec.* v. *Public Serv. Comm'n*, 447 U. S. 557, 562–563 (1980).

The Court concedes the above, but appears to believe that commercial speech—defined as advertising that does no more than propose a commercial transaction—is the only type of expression entitled to less than full First Amendment protection. See *ante*, at 18. Our cases suggest otherwise. In the area of defamation law itself, for example, some types of speech are entitled to broader protection than others: speech about public figures receives the full protection of the *New York Times* standards, while speech about private figures is entitled at most to the lesser standards of our opinion in *Gertz*.

Other areas of the law provide further examples. In *Ohralik* we noted that there are "[n]umerous examples . . . of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, . . . corporate proxy statements, . . . the exchange of price and production information among competitors, . . . and employers' threats of retaliation for the labor

activities of employees." 436 U. S., at 456 (citations omitted). Yet similar regulation of political speech is subject to the most rigorous scrutiny. See *Brown* v. *Hartlage*, 456 U. S. 45; *New York Times Co.* v. *Sullivan*, 376 U. S., at 279, n. 19; *Buckley* v. *Valeo*, 424 U. S. 1, 14 (1976). Likewise, while the power of the State to license lawyers, psychiatrists, public school teachers, and investment advisors—all of whom speak for a living—is unquestioned, this Court has held that a law requiring licensing of union organizers is unconstitutional under the First Amendment. *Thomas* v. *Collins*, 323 U. S. 516 (1945); see Shiffrin 1264. See also *Rosenbloom* v. *Metromedia*, 403 U. S. 29, 44 (1971) (opinion of BRENNAN, J.) ("the determinant whether the First Amendment applies to state libel actions is whether the utterance involved concerns an issue of public or general concern"); *Young* v. *American Mini Theatres*, 427 U. S. 50, 70 (1976) (opinion of STEVENS, J.) ("it is manifest that society's interest in protecting this type of expression [nonobscene erotic films] is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate").

completely

III

I do not think it necessary or advisable to attempt ~~completely~~ to define what sorts of speech ~~safely can be left to regulation by state libel laws.~~ qualify for reduced constitutional protection. Cf. *Rosenbloom*, *supra*, at 44–45. In accord with the state courts quoted *supra*, at 6, I think it clear that the speech at issue here implicates the First Amendment at most only tangentially. Petitioner's credit reporting is purely private. It does not appear in a newspaper or magazine of general and regular circulation nor on the broadcast media. See 15 U. S. C. § 80b–2(a)(11)(D) (Investment Advisers Act does not apply to "any bona fide newspaper, news magazine or business or financial publication of general and regular circulation"); cf. *Mills* v. *Alabama*, 384 U. S. 214, 219 (1966); *Saxbe* v. *Washington Post Co.*, 417 U. S. 843, 863–864 (1974) (POWELL, J., dissenting). It is speech solely in the economic interests of the speaker

In fact, petitioner's subscription agreement prevented its clients from disseminating its credit information. This sort of credit reporting

and audience. Cf. *Central Hudson Gas & Elec.*, 447 U. S., at 561.[8] These factors clearly placed petitioner's credit reporting in "a subordinate position in the scale of First Amendment values." *Ohralik*, 436 U. S., at 456.

In addition, the speech here, like advertising, is hardier and less likely to be deterred by state regulation. See *Virginia Pharmacy Board*, 425 U. S., at 771, n. 24. It is solely motivated by the desire for profit, which, we have noted, is a force less likely to be deterred than others. *Ibid.* Arguably, the reporting here also was more objectively verifiable than speech deserving of greater protection. See *ibid.* In any case, the market provides a powerful incentive to a credit reporting agency to be accurate, since false credit reporting is of no use to creditors. Thus, any incremental "chilling" effect of libel suits would be of decreased significance.[9]

Since the speech here does not involve any of the concerns that motivated the Court in *New York Times* and *Gertz*, I conclude that the First Amendment protection is substantially lessened.[10] This requires us to strike a new balance be-

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[8] In addition, as Shiffrin notes, "[t]he interests in individual self-expression, autonomy, and the like are not present here or are present in only an attenuated way." Shiffrin 1268.

[9] The Fifth Circuit Court of Appeals has noted that, while most States provide a qualified privilege against libel suits for commercial credit reporting agencies, in those States that do not there is a thriving credit reporting business and commercial credit transactions are not inhibited. *Hood* v. *Dun & Bradstreet, Inc.*, 486 F. 2d 25, 32 (1973), cert. denied, 415 U. S. 985 (1974). The court cited an empirical study comparing credit transactions in Boise, Idaho, where there is no privilege, with those in Spokane, Washington, where there is one. *Id.*, at 32, and n. 18.

[10] As indicated *supra*, I would not in this case attempt to define the precise boundaries of the realm in which the common law of defamation may operate. The lines will be difficult to draw in some cases. For example, reports of bankruptcies, stock quotations, and other financial items that appear in newspapers and newsletters of general circulation would involve different considerations. Nonetheless, as indicated in the text, the idea that certain kinds of speech are at the core of the First Amendment, while others are on the periphery, is not a new one to courts. See, *e. g.*, *Roth* v.

tween the interests of the speaker here and the state interest in providing a legal remedy for defamatory falsehood. That state interest, we have said, is "strong and legitimate." *Gertz*, 418 U. S., at 348. A State will not lightly be required to abandon this purpose,

> "for, as MR. JUSTICE STEWART, has reminded us, the individual's right to the protection of his own good name 'reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. . . .' *Rosenblatt* v. *Baer*, 383 U. S. 75, 92 (1966) (concurring opinion)."
>
> *Id.*, at 341.

United States, 354 U. S. 476; *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447 (1978); *Brown* v. *Hartlage*, 456 U. S. 45; Prosser § 118, p. 822–823. And the lines between media and nonmedia, and between commercial speech and other speech, are not unfamiliar to judges, nor would they be difficult to draw. Certainly the state courts noted *supra*, at 6, have found little difficulty in drawing them. I do not think this common law approach is a return to the *ad hoc* resolution of the competing interests at stake in each particular case that we eschewed in *Gertz*. See 418 U. S., at 343–344, 346. Constitutional protections would apply identically to broad categories of speech, not to individual cases. This kind of broad categorization does not raise the same concerns of bias and the like that might be raised by judicial determinations of which particular articles or publications address issues of "general or public interest," cf. *id.*, at 346. See Shiffrin 1268, n. 327. Moreover, prophylactic rules—such as a direction to err on the side of constitutional protection—might be suggested that would ensure that speech of genuine concern was not restrained.

There is little reason for the Court's anxiety that "an immeasurable volume of litigation" would result from this approach, *ante*, at 13, n. 4. *New York Times* was decided 20 years ago. It left the states free to adhere to the common law in non-media cases. The "flood-gates" argument simply is not justified in light of this experience. Moreover, the blanket rejection of what has been the prevailing law of defamation is a high price indeed to pay for a bright-line rule that heretofore has never been considered necessary.

Nor have the state and federal courts found great difficulty in drawing similar lines, like those between public and private figures, that the First Amendment requires. Gertz, supra.

As noted, the merit of imposing punitive and presumed damages reasonably may be doubted in some circumstances. In *Gertz*, we found that the state interest in awarding these remedies was not "substantial" in view of their effect on speech at the core of the First Amendment. 418 U. S., at 349.[13] But this case concerns speech of significantly less constitutional interest. The state interest in these remedies need not be compelling to support the incidental effect they may have on this kind of protected speech. As noted, the common law long ago concluded that requiring proof of damages incurred did not adequately compensate the plaintiff in many defamation cases. We should not lightly presume that

[13] There is language in *Gertz* that can be read broadly to the effect that presumed and punitive damages have no place in the law of defamation. It is necessary, however, to view this language in the context of the only issue before the Court. The suit was by a private person against a media defendant. It was the presence of the media defendant that primarily caused the Court in *Gertz* to limit recovery to "actual injury." *Gertz*, *supra*, at 349. Presumed and punitive damages were deemed—for the reasons first articulated in *New York Times*—to threaten the historic role of the media in a representative democracy. *Id.*, at 349–350. No such threat is present when one private party is libeled by another private party—at least where the libel is circulated in the course of, and is solely concerned with, both parties' businesses. In weighing the interests that may be at issue, it is well also to repeat that there is a significant public interest "in compensating private individuals for wrongful injury to reputation." *Gertz*, *supra*, at 348–349.

In considering generally the utility and appropriateness of punitive damages, it is well to bear in mind that the wisdom of imposing such damages reasonably may vary with the context in which the issue arises. Defamation actions are not comparable, for example, to personal injury litigation in which proof of substantial actual damages is commonplace. The role of punitive damages in addition to actual damages is not to compensate; rather it is to punish and deter—a role normally left to government. See *Smith* v. *Wade*, —— U. S. ——, —— (1983) (REHNQUIST, J., dissenting). In defamation cases, where proof of actual damages is difficult, punitive damages—in many cases—may be largely compensatory in purpose. See generally Prosser § 112, p. 765. Judge Friendly recognized this alternative purpose of punitive damages in *Roginsky* v. *Richardson-Merrell, Inc.*, 378 F. 2d 832, 838 (CA2 1967).

this judgment—a judgment respected and left to the States for 200 years—was erroneous. The state interest in providing a remedy for defamation surely includes ensuring that those remedies are effective. In light of the reduced constitutional value in the speech at issue here, I would hold that the state interest adequately supports the common law rules.[14]

IV V

Constitutional principles retain force and respect only when they are applied sparingly where needed. A common-

[14] The Court suggests that this approach would result in allowing the States "to accomplish indirectly what we have held cannot be accomplished directly—namely, the suppression of protected 'economic' speech." *Ante*, at 19, n. 7. We have never held that the incidental suppression of "economic" speech in furtherance of a substantial state interest such as protecting private reputation is prohibited. Quite to the contrary, we have held repeatedly that speech in the economic realm, "which occurs in an area traditionally subject to government regulation," *Ohralik*, 436 U. S., at 456, is entitled to only a limited measure of protection. *E. g.*, *ibid.*; *Central Hudson Gas & Elec.* v. *Public Serv. Comm'n*, 447 U. S. 557, 562–563 (1980). It may be banned even directly if the State asserts a substantial governmental interest. *Id.*, at 566. The Court does not dispute that the state interest in protecting reputation is a strong one. See *ante*, at 19, n. 8.

The Court also asserts that the state interest in affording a remedy to private persons for defamation by the media is at least as great as that in protecting them from defamation by credit reports. *Ibid.* This misses the point. I do not suggest that the state interest in remedying injury to reputation, considered alone, was less in *New York Times* and *Gertz* than it is here; the point is that the constitutional interest in protecting media speech from presumed and punitive damages is significantly greater than when, as here, the speech is both nonmedia and commercial in nature.

Finally, the Court suggests that I should detail precisely why the result in a case involving a bankruptcy report in the Wall Street Journal would be different from the result here. *Ante*, at 18, n. 7, 19, n. 8. I do not say it would be. That is a different case that may raise different considerations; it should be left for another day. There are instances—and I believe this difficult case presents one of them—when prudence strongly counsels against laying down rules to govern all cases rather than identifying the factors that govern the particular result. The Court's insistence on a

sense view of those spheres that are primarily of local concern persuades me that the Court should stay its hand in this case. As we have said in a related context, to require a parity of constitutional protection for the speech here and that in *Gertz* and *New York Times* "could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech." *Ohralik*, 436 U. S., at 456. The Court identifies no new or overriding societal interest that justifies constitutionalizing defamation actions between private parties. I would leave this area of law to the wisdom of the several States.

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bright-line rule that would reject entirely the rationale and experience of the common law is unnecessary and injudicious.

Rider

Renewed
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At the same time, however, it is necessary to recognize the scope of ~~this~~ the state interest. Its purpose, we have noted, "is the compensation of individuals for the harm inflicted on them by defamatory falsehood." Id., at 349. It does not aim to reward victims of falsehood with damages in excess of the harm they have suffered, for the legitimate "state interest extends no further than compensation for actual injury." Id., at 349. It is with this in mind that the new balance ~~must~~ should be struck.

A

Punitive damages are not intended to compensate the tort victim, but rather to punish the tortfeasor and to deter him and others from similar behavior. City of Newport v. Facts Concerts, Inc., 453 U.S. 247, 266-267 (1981); International Brotherhood of Electrical Workers v.

Foust, 442 U.S. 41, 48 (1979); Gertz v. Robert Welch, Inc., 418 U.S., at 350. In essence, they are "private fines levied by civil juries to punish reprehensible conduct and to deter its future occurence."[1] Ibid. The most remarkable feature of this punishment is that the jury is given no real standard in setting it. Guided only by their own notion of what is an appropriate penalty, the jurors are told they are free to award whatever amount

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[1]In levying these penalties, moreover, courts do not have to observe the procedural safeguards that the Fourth, Fifth, Sixth, and Fourteenth Amendments require in criminal proceedings--whose function it is normally to punish and deter. It is only in civil tort cases that juries ~~may~~ have been permitted to impose punishment without any of these constitutional protections. Even in civil penalty proceedings brought by the government, the courts must afford the defendant some of these elementary protections. United States v. United States Coin & Currency, 401 U.S. 715 (1971); One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965). Because it guards against wrongful and arbitrary punishments, the Due Process Clause is a constitutional protection no less necessary and vital to our civil liberties than is the First Amendment.

Dan - I believe there is one - possibly more - law review articles that support this note

Dan - excellent note but agree it merits moving to text.

Dan - in a case J. Marshall wrote (I don't know case & think) he spoke of the "windfall" It may be Foust.

Moreover, the plaintiff is given a windfall that he does not deserve. (citation

they deem sufficient to punish and deter. As a result, their awards often bear no rational relationship to the injury suffered and can reflect more the jury's unguided prejudices than any legitimate punitive interest. As we noted in Gertz:

> "In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. And they remain free to use their discretion selectively to punish expressions of unpopular views." Ibid.

In recognition of these dangers, many American jurisdictions have modified the traditional common law rule. Under it, a jury can award punitive damages to a plaintiff who has shown that the defendant acted with a high degree of culpability. Smith v. Wade, ___ U.S. ___, ___ - ___ (1983) (canvassing nineteenth century cases).

Courts and commentators have long criticized this rule because of the dangers it poses to due process concerns. E.g., Stewart v. Maddox, 63 Ind. 51, 57 (1879); Fay v. Parker, 53 N.H. 342, 390 (1872). "Punitive damages," one court has remarked, "destroy every constitutional safeguard within their reach." Id., at 397. Recognizing these dangers, many jurisdictions have restricted punitive damages or abolished them entirely. At least six states and the Commonwealth of Puerto Rico refuse to allow them in most tort actions. See, e.g., Murphy v. Hobbs, 7 Colo. 541, 5 P. 119 (1884); Ricard v. State, 390 So.2d 882, 884 (La. 1980); Burt v. Advertiser Newspaper Co., 154 Mass. 238, 28 N.E. 1 (1891) (Holmes, J.); Prather v. Eisenmann, 200 Neb. 1, 11, 261 N.W.2d 766, 772 (1978); Vratsenes v. New Hampshire Auto, Inc., 112 N.H. 71, 289 A.2d 66, 68

(1972); Rivera Santos v. Rossi, 64 P.R.R. 683, 686 (1945); Maki v. Aluminum Building Products, 73 Wash. 2d 23, 436 P.2d 186, 187. Several other states allow them only insofar as they compensate for intangible injury, e.g., Wise v. Daniel, 221 Mich. 229, 190 N.W. 746 (1922), or litigation costs, e.g., Triangle Sheer Metal Works, Inc. v. Silver, 154 Conn. 116, 222 A.2d 220 (1966), and one state allows them only when the defendant's conduct cannot be punished as a crime, e.g., Koerner v. Oberly, 56 Ind. 284 (1877). The federal courts have also refused to award punitive damages in certain actions arising under federal law. See International Brotherhood of Electrical Workers v. Foust, 442 U.S. 41 (1979) (labor law). But see Smith v. Wade, ___ U.S. ___ (1983) (allowing punitive damages in §1983 actions).

In Great Britain, the traditional common law rule has undergone a similar evolution. Prior to 1964, a plaintiff could recover punitive damages when the defendant had acted in "contumelious disregard of the plaintiff's rights," particularly when the defendant had injured the plaintiff's dignity and feelings. Cassell & Co. v. Broome, [1972] 1 All E.R. 801, 821-822 (H.L.) (Hailsham, L.C.) (quoting Mayne & MacGregor, Damages ¶¶207-212 (12th ed. 1961)). In Rookes v. Barnard, [1964] 1 All E.R. 367 (H.L.), however, the House of Lords greatly restricted such damages. Instead of allowing juries to award them whenever a defendant has acted oppressively towards the plaintiff, the House of Lords confined these damages to three narrow situations: (i) when government officers act oppressively, arbitrarily, or

A.C.

Dan: Do the Lords have this authority as Law Lords sitting as a Court? Or is that body legislating? - & w/o Parliament?

unconstitutionally, (ii) when the defendant's conduct has been calculated by him to make a profit ~~which~~ that may well exceed the compensation payable to plaintiff, and (iii) when such damages are expressly authorized by statute. Id., at 410-411 (Devlin, L.). That House has not hesitated to apply these limitations to common law libel actions. Cassell & Co. v. Broome, supra. ~~I would follow~~ It is time we followed these ~~courts'~~ over-due development of the law. In view of the ~~serious~~ due process concerns, ~~the narrow compensatory aim~~ basis of the State's interest, ~~and the admitted, though limited, First Amendment value of commercial speech,~~ I would hold that ~~the~~ a State may not permit recovery of punitive damages in a libel action.[2]

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[2]Statutory multiple damages, such as treble damages under the antitrust laws, 15 U.S.C. §15, do not pose most

Footnote continued on next page.

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STREET9 SALLY-POW

In most circumstances, the law requires the tort plaintiff to prove the fact and the amount of loss. The damages proved are compensatory. In libel actions, however, even injury - in the normal sense - may not be proveble and a finite amount of loss almost never can be proved. As noted above, it long has been recognized that "proof of actual damages [in a libel action] will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact." Supra, at ____. "[C]ourts and legislatures literally for centuries have thought that in the generality of cases, libel plaintiffs will be serious

shortchanged if they must prove the extent of the injury to their reputations". Gertz v. Robert Welch, Inc., 418 U.S., at 393 (White, J., dissenting).

For these reasons, the common law since the time of Lord Hale has allowed juries in libel actions to presume damages for the fact of a libelous publication. Such damages were not intended to replace compensatory damages when they could be proved. Rather, the purpose of the presumption in a libel case is to ensure compensation when injury has occurred but was not susceptible of the type of proof and measurement commonplace, for example, in tort damage suit cases.

A

the law requires the tort plaintiff to prove the fact and amount of loss. This is appropriate, for most often the plaintiff can prove actual injury, if it exists, and offer definite evidence of the extent of his loss. In some tort actions, however, injury and the amount of loss cannot be proved with certainty. In these situations, applying the ordinary standard and burden of proof would effectively deny the plaintiff full compensation. "[C]ourts and legislatures literally for centuries have thought that in the generality of cases, libeled plaintiffs will be seriously shortchanged if they must prove the extent of the injury to their reputations." Gertz v. Robert Welch, Inc., 418 U.S., at 393 (WHITE, J., dissenting).

Recognizing this danger, the common law has allowed juries in libel actions to presume damages from

the fact of publication. These damages were never intended to replace actual damages when actual damages were adequate. Rather, their purpose was to ensure compensation when injury had likely occurred but was not susceptible of definite proof and certain measurement. Thus, we have noted, presumed damages are appropriate only in situations where both the likelihood of injury and the difficulty of proving it are great. Carey v. Piphus, 435 U.S. 247, 264 (1978).

Properly understood, the doctrine of presumed damages serves only to shift the traditional allocation of proof. Allowing the jury to presume damages does not imply that it is free to set them at whatever level it believes appropriate. As in any tort action, the jury is bound to follow the evidence. If the defendant proves

damages
[for presuming further
there would be no basis
that injury did not occur or that it was limited, ~~the jury~~
~~is bound to find in his favor~~. Presumed damages, then,
in libel cases
shift some of the risk of uncertainty from plaintiff to
defendant, and, since the jury can presume damages only
after the plaintiff has established liability, this
reallocation of proof is not unreasonable. It merely
~~makes~~ requires the defendant to bear some of the risk of the
tortious
uncertainty created by his own actions. Accordingly, I
would hold that in a libel action a jury may award
presumed damages against a non-media defendant--even
without proof of actual malice.

If I would affirm the judgment of the Supreme Court of Vermont as to presumed damages but would reverse its award of punitive damages.

lfp/ss 11/13/84 Rider A, p. 9 typed draft (D&B)

STREET9 SALLY-POW

In most circumstances, the law requires the tort plaintiff to prove the fact and the amount of loss. The damages proved are compensatory. In libel actions, however, even injury - in the normal sense - may not be proveble and a finite amount of loss almost never can be proved. As noted above, it long has been recognized that "proof of actual damages [in a libel action] will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact." Supra, at ____. "[C]ourts and legislatures literally for centuries have thought that in the generality of cases, libel plaintiffs will be serious

shortchanged if they must prove the extent of the injury to their reputations". Gertz v. Robert Welch, Inc., 418 U.S., at 393 (White, J., dissenting).

For these reasons, the common law since the time of Lord Hale has allowed juries in libel actions to presume damages for the fact of a libelous publication. Such damages were not intended to replace compensatory damages when they could be proved. Rather, the purpose of the presumption in a libel case is to ensure compensation when injury has occurred but was not susceptible of the type of proof and measurement commonplace, for example, in tort damage suit cases.

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

L. F. P.
Renewal & adopted 11/17

From: **Justice Powell**

Circulated: _____

Recirculated: _____

3rd CHAMBERS DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-18

DUN & BRADSTREET, INC., PETITIONERS *v.*
GREENMOSS BUILDERS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

[November ——, 1984]

JUSTICE POWELL, dissenting.

The Court today extends the constitutional rule of *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), far beyond its origins or its purpose. In that case, the Court for the first time held that the Constitution limits the reach of state laws of libel and slander in suits against media defendants. Limits are needed in such cases, the Court held, to ensure that "debate on public issues . . . be uninhibited, robust, and wide-open." *Id.*, at 270. All of the Court's decisions since then that have considered the constitutional role in defamation law also have involved suits against a media defendant arising out of an article or broadcast on an issue of public concern and importance. The Court today goes beyond these precedents and applies the same constitutional restrictions to a libel action between a construction company and a commercial credit reporting agency. In my view, such a sweeping holding is not required by the First Amendment. Nor is it wise or consistent with precedent.

I

The common law rules that the Court today repudiates are of ancient vintage. The rule that damages are presumed for libel was announced by Hale as early as 1670. *Restatement of Torts* § 568, comment b, at 162 (1938). Punitive damages also long have been available in actions for defamation under

a quite different standard than the one applied today. See, *e. g.*, C. McCormick, Law of Damages § 118, p. 431 (1935); M. Newell, Law of Defamation, Libel and Slander 842, 844–846 (1890) (citing cases). And since at least the early part of this century, a plaintiff in a garden-variety defamation suit could recover without showing any facts as to the state of mind of the defendant. W. Prosser, Law of Torts § 113, pp. 772–773 (4th ed. 1971) (hereinafter Prosser); Restatement (Second) of Torts § 580B, comment b (1977). The common law recognized some privileges, but generally to recover for written expression harmful to reputation the ordinary citizen had to show only falsity and publication.

These rules have not gone unquestioned. This Court itself has limited their reach in certain situations of overriding need. But in jurisdiction after jurisdiction they have been reaffirmed repeatedly. Thus, for example, it is the judgment of history that "proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact." Prosser § 112, p. 765; accord, *Rowe* v. *Metz*, 195 Colo. 424, 425–426, 579 P. 2d 83, 84 (1978); Note, Developments in the Law—Defamation, 69 Harv. L. Rev. 875, 891–892 (1956). As a result, courts for centuries have allowed juries to presume that some damage occurred from many defamatory utterances and publications.

This accumulated learning is worthy of respect. Moreover, the common law rules were developed in an area of the law that, since the founding of our country, has been the province of the state courts.[1] Even if one disagrees with

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[1] The Framers were familiar with the common law of libel, which had been adopted by the American colonies. See *Gertz*, 418 U. S., at 380–384 (WHITE, J., dissenting); *Roth* v. *United States*, 354 U. S. 476, 482–483, and n. 11 (1957) (13 States allowed prosecution for libel in 1792); *Beauharnais* v. *Illinois*, 343 U. S. 250, 254–255 (1952). See also T. Cooley, Constitu-

Rider A, p. 3 (D&B)

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DB3 SALLY-POW

The libel at issue in this case neither threatens the press nor involves any public figure or public issue. The Court today, contrary to history and precedent, indiscriminately extends the constitutional rule of New York Times and Gertz to nothing less than the entire field of libel and slander.

...is Court should discard them ...e rights guaranteed to the people ...his Court has modified these rules ...ion threatened the core values of the First ... More specifically, we have done so only in cases ... ...ate law placed at risk "freedom of expression upon pu... questions." *New York Times* v. *Sullivan*, 376 U. S., at 269. "The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth* v. *United States*, 354 U. S. 476, 484 (1957). "At the core of the First Amendment are certain basic conceptions about the manner in which political discussion in a representative democracy should proceed." *Brown* v. *Hartlage*, 456 U. S. 45, 52 (1982); accord *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 776 (1978) (discussion of "'matters of public concern'" is "at the heart of the First Amendment's protection"). There is nothing of these central interests in the situation before us today. The Court today indiscriminately extends these constitutional rules to nothing less than the entire field of libel and slander. Henceforth, every action by a former employee complaining of a libelous negative recommendation by an employer,[3] every action by a dealer against a competitor who falsely re-

freedom of the press guaranteed by

Rider A

The libel at issue in this case neither threatens the press nor involves any public figure or public issue.

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tional Limitations 602 (7th ed. 1903); Rutledge, The Law of Defamation: Recent Developments, 32 Alabama Lawyer 409, 410 (1971):

"[T]he law of defamation has been an integral part of the laws of England, the colonies and the states since time immemorial. So many actions have been maintained and judgments recovered under the various laws of libel

ports bad service to the manufacturer,[4] every action by a spurned suitor for spreading false rumors about the reasons for his failure,[5] and numerous other actions arising out of back-fence gossip or commercial incompetence[6] will be subject to the same protections as speech upon matters of public concern. The Court believes that its decision is "squarely control[led]" by our opinion in *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974). *Ante*, at 11. This view unnecessarily repudiates the common law and trivializes the First Amendment.[7] There is nothing in *Gertz* that requires this.

The facts in *Gertz* were very different from those here. *Gertz* was a libel suit against a media defendant: a magazine called American Opinion, the monthly outlet of the John Birch Society. The article in question discussed a question of undoubted public importance—whether the prosecution of a policeman was part of a Communist campaign to discredit local law enforcement agencies. The plaintiff was a lawyer tangentially involved in the prosecution who, the magazine

[4] *E. g.*, *Harley-Davidson Motorsports, Inc.* v. *Markley*, 279 Or. 361, 568 P. 2d 1359 (1977).

[5] *E. g.*, *Schomer* v. *Smidt*, 113 Cal. App. 3d 828, 170 Cal. Rptr. 662 (1980).

[6] Suits by disgruntled consumers against credit reporting agencies appear to be disquietingly common. *E. g.*, *Millstone* v. *O'Hanlon Reports, Inc.*, 528 F. 2d 829 (CA8 1976); *Retail Credit Co.* v. *Russell*, 234 Ga. 765, 218 S. E. 2d 54 (1975); *Hood* v. *Dun & Bradstreet, Inc.*, 486 F. 2d 25 (CA5 1973), cert. denied, 415 U. S. 985 (1974); *Grove* v. *Dun & Bradstreet, Inc.*, 438 F. 2d 433 (CA3), cert. denied, 404 U. S. 898 (1971). In enacting the Fair Credit Reporting Act, 15 U. S. C. §§ 1681–1681t, Congress specifically found that "[t]here is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy." *Id.*, § 1681(a)(4).

[7] As one commentator has remarked with respect to "the case of a commercial supplier of credit information that defames a person applying for credit"—the very case before us today—"If the first amendment requirements outlined in *Gertz* apply, there is something clearly wrong with the first amendment or with *Gertz*." Shiffrin, The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment, 78 Nw. L. Rev. 1212, 1268 (1983) [hereinafter Shiffrin].

alleged, was the chief architect of the "frame-up" of the police officer. The article spoke of the lawyer's alleged links to Communist activity. Like every other case in which this Court has considered the constitutional limits on state laws of defamation, *Gertz* involved a media article directly relevant to the effective operation of our system of democratic self-government.

In contrast, the case today is a purely private defamation action against a commercial credit reporting agency that falsely reported to respondent's creditors that respondent was bankrupt. A number of state courts, including the court below, have recognized that the role of the Constitution in regulating state libel law is far more limited when the concerns that activated *New York Times* and *Gertz* are absent. In such a case,

> "[t]here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-censorship by the press. The facts of the present case are wholly without the First Amendment concerns with which the Supreme Court of the United States has been struggling." *Harley-Davidson Motorsports, Inc.* v. *Markley*, 279 Or. 361, 366, 568 P. 2d 1359, 1363 (1977).

Accord, *Rowe* v. *Metz*, 195 Colo. 424, 426, 579 P. 2d 83, 84 (1978) (*Gertz* should not be "blindly applied to the case of a private plaintiff against a nonmedia defendant for a defamation which is essentially private in nature"); *Calero* v. *Del Chemical Corp.*, 68 Wis. 2d 487, 506, 228 N. W. 2d 737, 748 (1975) ("In 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"); *Denny* v. *Mertz*, 106 Wis. 2d 636, 661, 318 N. W. 2d 141, 153, cert. denied, 459 U. S. 883 (1982).

II

This Court on many occasions has ~~advanced the common-sense idea~~ recognized that certain kinds of speech are more central to the interests of the First Amendment than others. Obscene speech and "fighting words" have long been accorded no protection. *Roth* v. *United States*, 354 U. S., at 483; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942); see also *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697, 716 (1931) (publication of troop ship sailings during war time may be enjoined); *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 591–592 (1952) (advocating violent overthrow of the government is unprotected speech); *Seattle Times Co.* v. *Rhinehart*, —— U. S. ——, —— (1984). Similarly, "libelous utterances are not within the area of constitutionally protected speech." *Roth*, 354 U. S., at 483; accord, *Gertz*, *supra*, at 340 ("there is no constitutional value in false statements of fact"). In the area of protected speech, the most prominent example of reduced protection for certain kinds of speech concerns commercial speech. Such speech, we have noted, occupies a "subordinate position in the scale of First Amendment values." *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 456 (1978). It also is more easily verifiable and less likely to be deterred by proper regulation. *Virginia Pharmacy Bd.* v. *Virginia Consumer Council*, 425 U. S. 748, 771, n. 24 (1976). Accordingly, it may be regulated in ways that might be impermissible in the realm of noncommercial expression. *Ohralik*, *supra*, at 456; *Central Hudson Gas & Elec.* v. *Public Serv. Comm'n*, 447 U. S. 557, 562–563 (1980).

The Court concedes the above, but appears to believe that commercial speech—defined as advertising that does no more than propose a commercial transaction—is the only type of expression entitled to less than full First Amendment protection. See *ante*, at 18. Our cases suggest otherwise. In the area of defamation law itself, for example, some types of speech are entitled to broader protection than others: speech about public figures receives the full protection of the *New*

York Times standards, while speech about private figures is entitled at most to the lesser standards of our opinion in *Gertz*.

Other areas of the law provide further examples. In *Ohralik* we noted that there are "[n]umerous examples . . . of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, . . . corporate proxy statements, . . . the exchange of price and production information among competitors, . . . and employers' threats of retaliation for the labor activities of employees." 436 U. S., at 456 (citations omitted). Yet similar regulation of political speech is subject to the most rigorous scrutiny. See *Brown* v. *Hartlage*, 456 U. S. 45; *New York Times Co.* v. *Sullivan*, 376 U. S., at 279, n. 19; *Buckley* v. *Valeo*, 424 U. S. 1, 14 (1976). Likewise, while the power of the State to license lawyers, psychiatrists, public school teachers, and investment advisors—all of whom speak for a living—is unquestioned, this Court has held that a law requiring licensing of union organizers is unconstitutional under the First Amendment. *Thomas* v. *Collins*, 323 U. S. 516 (1945); see Shiffrin 1264. See also *Rosenbloom* v. *Metromedia*, 403 U. S. 29, 44 (1971) (opinion of BRENNAN, J.) ("the determinant whether the First Amendment applies to state libel actions is whether the utterance involved concerns an issue of public or general concern"); *Young* v. *American Mini Theatres*, 427 U. S. 50, 70 (1976) (opinion of STEVENS, J.) ("it is manifest that society's interest in protecting this type of expression [nonobscene erotic films] is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate").

III

I do not think it necessary or advisable to attempt to define completely what sorts of speech qualify for reduced constitutional protection. Cf. *Rosenbloom*, *supra*, at 44–45. In accord with the state courts quoted *supra*, at 5, I think it clear that the speech at issue here implicates the First Amend-

ment at most only tangentially. Petitioner's credit reporting is purely private. It does not appear in a newspaper or magazine of general and regular circulation nor on the broadcast media. See 15 U. S. C. § 80b–2(a)(11)(D) (Investment Advisers Act does not apply to "any bona fide newspaper, news magazine or business or financial publication of general and regular circulation"); cf. *Mills* v. *Alabama*, 384 U. S. 214, 219 (1966); *Saxbe* v. *Washington Post Co.*, 417 U. S. 843, 863–864 (1974) (POWELL, J., dissenting). In fact, petitioner's subscription agreement prevented its clients from disseminating its credit information. This sort of credit reporting is speech solely in the economic interests of the speaker and its business audience, Cf. *Central Hudson Gas & Elec.*, 447 U. S., at 561.[8] These factors clearly placed petitioner's credit reporting in "a subordinate position in the scale of First Amendment values." *Ohralik*, 436 U. S., at 456.

In addition, the speech here, like advertising, is hardier and less likely to be deterred by state regulation. See *Virginia Pharmacy Board*, 425 U. S., at 771, n. 24. It is solely motivated by the desire for profit, which, we have noted, is a force less likely to be deterred than others. *Ibid.* Arguably, the reporting here also was more objectively verifiable than speech deserving of greater protection. See *ibid.* In any case, the market provides a powerful incentive to a credit reporting agency to be accurate, since false credit reporting is of no use to creditors. Thus, any incremental "chilling" effect of libel suits would be of decreased significance.[9]

Dun - is cite to Central Hudson relevant here? It cited above.

And their interest justifies no special protection when — as in this case — it is wholly false and clearly damaging to respondent's reputation. ~~and indeed to business~~

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[8] In addition, as Shiffrin notes, "[t]he interests in individual self-expression, autonomy, and the like are not present here or are present in only an attenuated way." Shiffrin, *supra*, at 1268.

[9] The Fifth Circuit Court of Appeals has noted that, while most States provide a qualified privilege against libel suits for commercial credit reporting agencies, in those States that do not there is a thriving credit reporting business and commercial credit transactions are not inhibited. *Hood* v. *Dun & Bradstreet, Inc.*, 486 F. 2d 25, 32 (1973), cert. denied, 415 U. S. 985 (1974). The court cited an empirical study comparing credit

IV

Since the speech here does not involve any of the concerns that motivated the Court in *New York Times* and *Gertz*, I conclude that the First Amendment protection is substantially lessened.[10] This requires us to strike a new balance be-

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transactions in Boise, Idaho, where there is no privilege, with those in Spokane, Washington, where there is one. *Id.*, at 32, and n. 18.

[10] As indicated *supra*, I would not in this case attempt to define the precise boundaries of the realm in which the common law of defamation may operate. The lines will be difficult to draw in some cases. For example, reports of bankruptcies, stock quotations, and other financial items that appear in newspapers and newsletters of general circulation would involve different considerations. Nonetheless, as indicated in the text, the idea that certain kinds of speech are at the core of the First Amendment, while others are on the periphery, is not a new one to courts. See, *e. g.*, *Roth* v. *United States*, 354 U. S. 476; *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447 (1978); *Brown* v. *Hartlage*, 456 U. S. 45; Prosser § 118, p. 822–823. And the lines between media and nonmedia, and between commercial speech and other speech, are not unfamiliar to judges, nor would they be difficult to draw. Certainly the state courts noted *supra*, at 6, have found little difficulty in drawing them. Nor have state and federal courts found great difficulty in drawing similar lines, like the one between public and private figures, that the First Amendment requires. *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974).

I do not think this common law approach is a return to the *ad hoc* resolution of the competing interests at stake in each particular case that we eschewed in *Gertz*. See *supra*, at 343–344, 346. Constitutional protections would apply identically to broad categories of speech, not to individual cases. This kind of broad categorization does not raise the same concerns of bias and the like that might be raised by judicial determinations of which particular articles or publications address issues of "general or public interest," cf. *id.*, at 346. See Shiffrin 1268, n. 327. Moreover, prophylactic rules—such as a direction to err on the side of constitutional protection—might be suggested that would ensure that speech of genuine concern was not restrained.

There is little reason for the Court's anxiety that "an immeasurable volume of litigation" would result from this approach, *ante*, at 13, n. 4. *New York Times* was decided 20 years ago. It left the states free to adhere to the common law in non-media cases. The "flood-gates" argument simply is not justified in light of this experience. Moreover, the blanket rejection of what has been the prevailing law of defamation is a high price indeed to

tween the interests of the speaker here and the state interest in providing a legal remedy for defamatory falsehood. That state interest, we have said, is "strong and legitimate." *Gertz*, 418 U. S., at 348. A State will not lightly be required to abandon this purpose,

> "for, as MR. JUSTICE STEWART has reminded us, the individual's right to the protection of his own good name
>
> 'reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. . . .' *Rosenblatt* v. *Baer*, 383 U. S. 75, 92 (1966) (concurring opinion)."
>
> *Id.*, at 341.

At the same time, however, it is necessary to recognize the scope of the state interest. Its purpose, we have noted, "is the compensation of individuals for the harm inflicted on them by defamatory falsehood." *Id.*, at 341. It does not aim to reward victims of falsehood with damages in excess of the harm they have suffered, for the legitimate "state interest extends no further than compensation for actual injury." *Id.*, at 349. It is with this in mind that the new balance should be struck.

A

Punitive damages are not intended to compensate the tort victim, but rather to punish the tortfeasor and to deter him and others from similar behavior. *Newport* v. *Fact Concerts, Inc.*, 453 U. S. 247, 266–267 (1981); *Electrical Workers* v. *Foust*, 442 U. S. 42, 48 (1979); *Gertz* v. *Robert Welch, Inc.*, 418 U. S., at 350. In essence, they are "private fines levied by civil juries to punish reprehensible conduct and to deter

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pay for a bright-line rule that heretofore has never been considered necessary.

its future occurrence." *Ibid.* In levying these penalties, moreover, courts do not have to observe the procedural safeguards that the Fourth, Fifth, Sixth, and Fourteenth Amendments require in criminal proceedings—the process through which the state normally seeks to punish and deter. It is only in civil tort cases that juries have been permitted to impose punishment without any of these constitutional protections. Even in civil penalty proceedings brought by the government, the courts must afford the defendant some of these fundamental protections whenever the purpose is punishment. *United States* v. *United States Coin & Currency*, 401 U. S. 715 (1971); *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U. S. 693 (1965); *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, 165–167 (1963); see Wheeler, The Constitutional Case for Reforming Punitive Damages Procedures, 69 Va. L. Rev. 269, 322–351 (1983). Because it guards against wrongful and arbitrary punishments, the Due Process Clause is a constitutional protection no less necessary and vital to our civil liberties than is the First Amendment.

The most remarkable feature of this punishment is that the jury is given no real standard in setting it. Guided only by their own notion of what is an appropriate penalty, the jurors are told they are free to award whatever amount they deem sufficient to punish and deter. As a result, their awards often bear no rational relationship to the injury suffered and can reflect more the jury's unguided prejudices than any legitimate punitive interest. They represent "windfall recoveries," *Electrical Workers* v. *Foust*, *supra*, at 50, which, by definition, provide monetary relief "in excess of . . . actual loss," *Scott* v. *Donald*, 165 U. S. 58, 86 (1897). We noted in *Gertz*:

> "In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. And they

remain free to use their discretion selectively to punish expressions of unpopular views." 418 U. S., at 350.

In recognition of these dangers, many American jurisdictions have modified the traditional common law rule. Under it, a jury can award punitive damages to a plaintiff who has shown that the defendant acted with a high degree of culpability. *Smith* v. *Wade*, 461 U. S. 30, 39–48 (1983) (discussing nineteenth century and present law). Courts and commentators have long criticized this rule because of the dangers it poses to due process concerns. *E. g.*, *Murphy* v. *Hobbs*, 7 Colo. 541, 5 P. 119 (1884); *Stewart* v. *Maddox*, 63 Ind. 51, 57 (1878); *Fay* v. *Parker*, 53 N. H. 342, 390, 16 Am. Rep. 270, 329–330 (1873); 1 J. Bouvier, Law Dictionary, Damages, p. 467 (15th ed. 1883). "Punitive damages," one court has remarked, "destroy every constitutional safeguard within their reach." *Fay* v. *Parker*, *supra*, at 397, 16 Am. Rep., at 338. Recognizing these dangers, many jurisdictions have restricted punitive damages or abolished them entirely. At least five states and the Commonwealth of Puerto Rico refuse to allow them in most tort actions. *E. g.*, *Killebrew* v. *Abbott Laboratories*, 359 So. 2d 1275, 1278 (La. 1978); *Burt* v. *Advertiser Newspaper Co.*, 154 Mass. 238, 245, 28 N. E. 1, 5 (1891) (Holmes, J.); *Abel* v. *Conover*, 170 Neb. 926, 929, 104 N. W. 2d 684, 688 (1960); *Vratsenes* v. *N. H. Auto, Inc.*, 112 N. H. 71, 73, 289 A. 2d 66, 68 (1972); *Rivera Santos* v. *Rossi*, 64 P. R. R. 683, 686 (1945); *Maki* v. *Aluminum Building Products*, 73 Wash. 2d 23, 25, 436 P. 2d 186, 187 (1968). Several other states allow them only insofar as they compensate for intangible injury, *Wise* v. *Daniel*, 221 Mich. 229, 233–234, 190 N. W. 746, 747–748 (1922), or litigation costs, *Triangle Sheet Metal Works, Inc.* v. *Silver*, 154 Conn. 116, 127, 222 A. 2d 220, 225 (1966), and one state allows them only when the defendant's conduct cannot be punished as a crime, *Koerner* v. *Oberly*, 56 Ind. 284, 287, 26 Am. Rep. 34, 36 (1877). The federal courts also have refused to award punitive damages in certain actions arising under federal law.

Electrical Workers v. *Foust*, *supra* (labor law). But see *Smith* v. *Wade*, *supra* (allowing punitive damages in § 1983 actions).

In England, the traditional common law rule has undergone a similar evolution. Prior to 1964, a plaintiff could recover punitive damages when the defendant had acted in "contumelious disregard of the plaintiff's rights," particularly when the defendant had injured the plaintiff's dignity and feelings. *Cassell & Co.* v. *Broome*, [1972] A.C. 1027, 1068 (Hailsham, L.C.) (quoting Mayne & McGregor, *Damages* ¶207 (12th ed. 1961)). In *Rookes* v. *Barnard*, [1964] A. C. 1129, the House of Lords, sitting as England's court of last resort, greatly restricted such damages. Instead of allowing juries to award them whenever a defendant has acted oppressively towards the plaintiff, the House of Lords confined these damages to three narrow situations: (i) when government officers act oppressively, arbitrarily, or unconstitutionally, (ii) when the defendant's conduct has been calculated by him to make a profit that may well exceed the compensation payable to plaintiff, and (iii) when such damages are expressly authorized by statute. *Id.*, at 1226–1227. The law lords have not hesitated to apply these limitations to common law libel actions. *Cassell & Co.* v. *Broome*, *supra*.

It is time we follow these overdue developments. In view of the serious constitutional concerns that punitive damages pose and the absence of any legitimate state interest in providing windfalls to libel plaintiffs, I would hold that a State may not permit recovery of punitive damages in a libel action.[11]

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[11] Statutory multiple damages, such as treble damages under the antitrust laws, 15 U. S. C. § 15(a), do not pose most of these concerns. Unlike common law punitive damages, they are governed by defined standards, limit jury discretion, are subject to effective review on appeal, and are strictly proportionate to the injury suffered. They do not implicate serious due process concerns.

B

Presumed damages stand on a different footing. Unlike punitive damages, their purpose is to compensate, not to punish or deter. C. McCormick, Damages § 116 (1935); 4 J. Berryman, Sutherland on Damages § 1206 (4th ed. 1916); Restatement of Torts § 621 and comment a (1938). Thus, they do serve the State's legitimate interest[12] and may be necessary in order for the State to compensate where actual damages cannot adequately be proved. In most circumstances, the law requires the tort plaintiff to prove the fact and amount of loss. The damages proved are compensatory. In libel actions, however, even injury—in the normal sense—may not be provable and the amount of loss can almost never be proved with certainty. As noted above, it long has been recognized that "proof of actual damages [in a libel action] will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact." *Supra*, at 2. "[C]ourts and legislatures literally for centuries have thought that in the generality of cases, libeled plaintiffs will be seriously shortchanged if they must prove the extent of the injury to their reputations." *Gertz* v. *Robert Welch, Inc.*, 418 U. S., at 393 (WHITE, J. dissenting).

For these reasons, the common law since the time of Hale has allowed juries in libel actions to presume damages from the fact of libelous publication. Such damages are not intended to replace actual damages when these can be proved. Rather, the purpose of this presumption in libel cases is to ensure compensation when injury has occurred but is not susceptible of the type of proof and measurement required in most other tort damage suits. Thus, we have noted, pre-

[12] British courts have approved presumed damages, called "at large" damages, in the same cases in which they have restricted punitive damages. *Cassell & Co.* v. *Broome*, [1972] A.C. 1027, 1073 (Hailsham, L. C.) (libel action); see 28 Hailsham, Halsbury's Laws of England 10 (4th ed. 1979).

Rider A
R. 15

"[L]ibelous utterances are not within the area of constitutionally protected speech."

Roth, supra, at 483; Gertz, supra, at 340.

sumed damages are appropriate only in situations where both the likelihood of injury and the difficulty of proving it are great. *Carey* v. *Piphus*, 435 U. S. 247, 264 (1978).

Properly understood, the doctrine of presumed damages serves only to shift the traditional allocation of proof. Allowing the jury to presume damages does not imply that it is free to set them at whatever level it believes appropriate. As in any tort action, the jury is duty-bound to follow the evidence in accord with the court's instructions. If the defendant proves that injury did not occur or that it was ~~limited~~, there is no basis for presuming further damages. Presumed damages, then, shift some of the risk of uncertainty in libel cases from the plaintiff to the defendant, and since the jury can presume damages only after the plaintiff has established liability, this reallocation of proof is not unreasonable. It merely requires the defendant to bear some of the risk of the uncertainty created by his own tortious actions. Accordingly, I would hold that in a libel action a jury may award presumed damages against a non-media defendant—even without proof of actual malice.[13]

V

I would affirm the judgment of the Supreme Court of Vermont as to presumed damages but would reverse its award of punitive damages. Such a course, unlike today's decision, follows salutory developments in the common law. It also respects fundamental constitutional values while remaining faithful to the ~~core~~ concern of common law damages: compensation. By contrast, the Court's decision is both too broad and too narrow to further either of these aims. By unnecessarily abrogating the common law of presumed damages, it withholds a remedy ~~sometimes~~ necessary to compensate the libel victim fully. At the same time, at least in the context of non-media defendants, ~~it fails to promote any significant~~ First Amendment interest. On the other hand, by allowing punitive damages in some libel cases, the Court ne-

13. In view of the constitutional guarantee of freedom of the press, I would adhere to the New York Times and Gertz malice requirement with respect to recovery of presumed damages from a media defendant.

Dun - I think a summary is desirable. What I have written below needs to be rewritten with greater care and precision.

glects important constitutional concerns ~~which~~ that can be protected without harming the State's legitimate interest in compensation. The Court identifies no new or overriding societal interest justifying ~~such a result.~~ ~~Accordingly, I respectfully dissent.~~

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the results it reaches in the case.

Revise

~~Accordingly~~, In sum, I dissent from the decision of the ~~Court~~ Court constitutionalizing the law of ~~defamation~~ defamation in non-media cases both with respect to presumed and punitive damages. ~~I decline~~ I also disagree with Court's ~~decision~~ adherence ~~to~~ - even when malice is shown - to the allowing of punitive damages against media as well as non-media defendants. I would allow ~~no~~ presumed damages against non-media defendants without requiring a showing of malice at the common-law has consistently for more than three centuries.

~~For these~~ In light of these views I would affirm in part & reverse in part.

lfp/ss 11/17/84 Rider A, p. 3 (D&B)

DB3 SALLY-POW

The libel at issue in this case neither threatens the press nor involves any public figure or public issue. The Court, contrary to history and precedent, indiscriminately extends the constitutional rule of New York Times and Gertz to nothing less than the entire field of libel and slander.

lfp/ss 12/17/84 Rider A, p. (Dun & Bradstreet)

DBBLANK SALLY-POW

2nd draft

My opinion for the Court in Gertz, as the Court did not distinguishbetween presumed and punitive damages in libel suits against media defendants. Ante, at n. 5, p. 15. Upon more mature reflection, required today when the Court constitutionalizes the entire law of libel, I find both historic and logical reasons for the distinction I now make. The purpose of presumed damages essentially is compensatory.

I have noted in the text above, they are appropriate where it is clear from the nature of the libel that injury occurred and where proving a dollar amount for the injury often is impossible. This compensatory rationale for allowing presumed damages is wholly different from allowing a private litigant to punish a defendant by awarding punitive damages without due process of any kind.

11/19

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: _____

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83–18

DUN & BRADSTREET, INC., PETITIONERS *v.* GREENMOSS BUILDERS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

[November ——, 1984]

JUSTICE POWELL, dissenting.

The Court today extends the constitutional rule of *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), far beyond its origins or its purpose. In that case, the Court for the first time held that the Constitution limits the reach of state laws of libel and slander in suits against media defendants. Limits are needed in such cases, the Court held, to ensure that "debate on public issues . . . be uninhibited, robust, and wide-open." *Id.*, at 270. All of the Court's decisions since then that have considered the constitutional role in defamation law also have involved suits against a media defendant arising out of an article or broadcast on an issue of public concern and importance. The Court today goes beyond these precedents and applies the same constitutional restrictions to a libel action between a construction company and a commercial credit reporting agency. In my view, such a sweeping holding is not required by the First Amendment. Nor is it wise or consistent with precedent.

I

The common law rules that the Court today repudiates are of ancient vintage. The rule that damages are presumed for libel was announced by Hale as early as 1670. *Restatement of Torts* § 568, comment b, at 162 (1938). Punitive damages also long have been available in actions for defamation under

a quite different standard than the one applied today. See, *e. g.*, C. McCormick, Law of Damages § 118, p. 431 (1935); M. Newell, Law of Defamation, Libel and Slander 842, 844–846 (1890) (citing cases). And since at least the early part of this century, a plaintiff in a garden-variety defamation suit could recover without showing any facts as to the state of mind of the defendant. W. Prosser, Law of Torts § 113, pp. 772–773 (4th ed. 1971) (hereinafter Prosser); Restatement (Second) of Torts § 580B, comment b (1977). The common law recognized some privileges, but generally to recover for written expression harmful to reputation the ordinary citizen had to show only falsity and publication.

The rationale of the common law rules has been the experience and judgment of history that "proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact." Prosser § 112, p. 765; accord, *Rowe* v. *Metz*, 195 Colo. 424, 425–426, 579 P. 2d 83, 84 (1978); Note, Developments in the Law—Defamation, 69 Harv. L. Rev. 875, 891–892 (1956). As a result, courts for centuries have allowed juries to presume that some damage occurred from many defamatory utterances and publications.

This accumulated learning is worthy of respect. Moreover, the common law rules were developed in an area of the law that, since the founding of our country, has been the province of the state courts.[1] Even if one disagrees with

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[1] The Framers were familiar with the common law of libel, which had been adopted by the American colonies. See *Gertz*, 418 U. S., at 380–384 (WHITE, J., dissenting); *Roth* v. *United States*, 354 U. S. 476, 482–483, and n. 11 (1957) (13 States allowed prosecution for libel in 1792); *Beauharnais* v. *Illinois*, 343 U. S. 250, 254–255 (1952). See also T. Cooley, Constitutional Limitations 602 (7th ed. 1903); Rutledge, The Law of Defamation: Recent Developments, 32 Alabama Lawyer 409, 410 (1971):

"[T]he law of defamation has been an integral part of the laws of England, the colonies and the states since time immemorial. So many actions have been maintained and judgments recovered under the various laws of libel

these centuries-old rules,[2] this Court should discard them only if they conflict with the rights guaranteed to the people by federal law. Thus, this Court has modified these rules only when their operation threatened freedom of the press guaranteed by the First Amendment. More specifically, we have done so only in cases in which state law placed at risk "freedom of expression upon public questions." *New York Times* v. *Sullivan*, 376 U. S., at 269. "The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth* v. *United States*, 354 U. S. 476, 484 (1957). "At the core of the First Amendment are certain basic conceptions about the manner in which political discussion in a representative democracy should proceed." *Brown* v. *Hartlage*, 456 U. S. 45, 52 (1982); accord *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 776 (1978) (discussion of "'matters of public concern'" is "at the heart of the First Amendment's protection").

The libel at issue in this case neither threatened the press nor involved any public figure or public issue. The Court today, contrary to history and precedent, indiscriminately extends the constitutional rule of *New York Times* and *Gertz* to nothing less than the entire field of libel and slander. Henceforth, every action by a former employee complaining of a libelous negative recommendation by an employer,[3] every action by a dealer against a competitor who falsely re-

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that the Constitutional validity of libel actions could be denied only by a Court willing to hold all its predecessors were wrong in their interpretation of the First Amendment and that two hundred years of precedents should be overruled."

[2] As the Court notes, there is room to doubt the wisdom of state laws that permit punitive damages on liberal terms. *Ante*, at 9; see Part IV, *infra*.

[3] *E. g.*, *Calero* v. *Del Chemical Corp.*, 68 Wis. 2d 487, 228 N. W. 2d 737 (1975); *Stuempges* v. *Parke, Davis & Co.*, 297 N. W. 2d 252 (Minn. 1980).

ports bad service to the manufacturer,[4] every action by a spurned suitor for spreading false rumors about the reasons for his failure,[5] and numerous other actions arising out of back-fence gossip or commercial incompetence[6] will be subject to the same constitutional protections as speech upon matters of the greatest public concern. The Court believes that its decision is "squarely control[led]" by our opinion in *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974). *Ante*, at 11. This view unnecessarily repudiates the common law and trivializes the First Amendment.[7]

There is nothing in *Gertz* that requires this. The facts in that case were very different from those here. *Gertz* was a libel suit against a media defendant: a magazine called American Opinion, the monthly outlet of the John Birch Society. The article in question discussed a question of undoubted public importance—whether the prosecution of a policeman was part of a Communist campaign to discredit local law enforcement agencies. The plaintiff was a lawyer tangentially

[4] *E. g.*, *Harley-Davidson Motorsports, Inc.* v. *Markley*, 279 Or. 361, 568 P. 2d 1359 (1977).

[5] *E. g.*, *Schomer* v. *Smidt*, 113 Cal. App. 3d 828, 170 Cal. Rptr. 662 (1980).

[6] Suits by disgruntled consumers against credit reporting agencies appear to be disquietingly common. *E. g.*, *Millstone* v. *O'Hanlon Reports, Inc.*, 528 F. 2d 829 (CA8 1976); *Retail Credit Co.* v. *Russell*, 234 Ga. 765, 218 S. E. 2d 54 (1975); *Hood* v. *Dun & Bradstreet, Inc.*, 486 F. 2d 25 (CA5 1973), cert. denied, 415 U. S. 985 (1974); *Grove* v. *Dun & Bradstreet, Inc.*, 438 F. 2d 433 (CA3), cert. denied, 404 U. S. 898 (1971). In enacting the Fair Credit Reporting Act, 15 U. S. C. §§ 1681–1681t, Congress specifically found that "[t]here is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy." *Id.*, § 1681(a)(4).

[7] As one commentator has remarked with respect to "the case of a commercial supplier of credit information that defames a person applying for credit"—the very case before us today—"If the first amendment requirements outlined in *Gertz* apply, there is something clearly wrong with the first amendment or with *Gertz*." Shiffrin, The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment, 78 Nw. L. Rev. 1212, 1268 (1983) [hereinafter Shiffrin].

involved in the prosecution who, the magazine alleged, was the chief architect of the "frame-up" of the police officer. The article spoke of the lawyer's alleged links to Communist activity. Like every other case in which this Court has considered the constitutional limits on state laws of defamation, *Gertz* involved a media article directly relevant to the effective operation of our system of democratic self-government.

In contrast, the case today is a purely private defamation action against a commercial credit reporting agency that falsely reported to respondent's creditors that respondent was bankrupt. A number of state courts, including the court below, have recognized that the role of the Constitution in regulating state libel law is far more limited when the concerns that activated *New York Times* and *Gertz* are absent. In such a case,

> "[t]here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-censorship by the press. The facts of the present case are wholly without the First Amendment concerns with which the Supreme Court of the United States has been struggling." *Harley-Davidson Motorsports, Inc.* v. *Markley*, 279 Or. 361, 366, 568 P. 2d 1359, 1363 (1977).

Accord, *Rowe* v. *Metz*, 195 Colo. 424, 426, 579 P. 2d 83, 84 (1978) (*Gertz* should not be "blindly applied to the case of a private plaintiff against a nonmedia defendant for a defamation which is essentially private in nature"); *Calero* v. *Del Chemical Corp.*, 68 Wis. 2d 487, 506, 228 N. W. 2d 737, 748 (1975) ("In 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"); *Denny* v. *Mertz*, 106 Wis. 2d 636, 661, 318 N. W. 2d 141, 153, cert. denied, 459 U. S. 883 (1982).

II

This Court on many occasions has recognized that certain kinds of speech are more central to the interests of the First Amendment than others. Obscene speech and "fighting words" have long been accorded no protection. *Roth* v. *United States*, 354 U. S., at 483; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942); see also *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697, 716 (1931) (publication of troop ship sailings during war time may be enjoined); *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 591–592 (1952) (advocating violent overthrow of the government is unprotected speech); *Seattle Times Co.* v. *Rhinehart*, —— U. S. ——, —— (1984). Similarly, "libelous utterances are not within the area of constitutionally protected speech." *Roth*, 354 U. S., at 483; accord, *Gertz*, *supra*, at 340 ("there is no constitutional value in false statements of fact"). In the area of protected speech, the most prominent example of reduced protection for certain kinds of speech concerns commercial speech. Such speech, we have noted, occupies a "subordinate position in the scale of First Amendment values." *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 456 (1978). It also is more easily verifiable and less likely to be deterred by proper regulation. *Virginia Pharmacy Bd.* v. *Virginia Consumer Council*, 425 U. S. 748, 771, n. 24 (1976). Accordingly, it may be regulated in ways that might be impermissible in the realm of noncommercial expression. *Ohralik*, *supra*, at 456; *Central Hudson Gas & Elec.* v. *Public Serv. Comm'n*, 447 U. S. 557, 562–563 (1980).

The Court concedes the above, but appears to believe that commercial speech—defined as advertising that does no more than propose a commercial transaction—is the only type of expression entitled to less than full First Amendment protection. See *ante*, at 18. Our cases suggest otherwise. In the area of defamation law itself, for example, some types of speech are entitled to broader protection than others: speech about public figures receives the full protection of the *New*

York Times standards, while speech about private figures is entitled at most to the lesser standards of our opinion in *Gertz*.

Other areas of the law provide further examples. In *Ohralik* we noted that there are "[n]umerous examples . . . of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, . . . corporate proxy statements, . . . the exchange of price and production information among competitors, . . . and employers' threats of retaliation for the labor activities of employees." 436 U. S., at 456 (citations omitted). Yet similar regulation of political speech is subject to the most rigorous scrutiny. See *Brown* v. *Hartlage*, 456 U. S. 45; *New York Times Co.* v. *Sullivan*, 376 U. S., at 279, n. 19; *Buckley* v. *Valeo*, 424 U. S. 1, 14 (1976). Likewise, while the power of the State to license lawyers, psychiatrists, public school teachers, and investment advisors—all of whom speak for a living—is unquestioned, this Court has held that a law requiring licensing of union organizers is unconstitutional under the First Amendment. *Thomas* v. *Collins*, 323 U. S. 516 (1945); see Shiffrin 1264. See also *Rosenbloom* v. *Metromedia*, 403 U. S. 29, 44 (1971) (opinion of BRENNAN, J.) ("the determinant whether the First Amendment applies to state libel actions is whether the utterance involved concerns an issue of public or general concern"); *Young* v. *American Mini Theatres*, 427 U. S. 50, 70 (1976) (opinion of STEVENS, J.) ("it is manifest that society's interest in protecting this type of expression [nonobscene erotic films] is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate").

III

I do not think it necessary or advisable to attempt to define completely what sorts of speech qualify for reduced constitutional protection. Cf. *Rosenbloom*, *supra*, at 44–45. In accord with the state courts quoted *supra*, at 5, I think it clear that the libelous speech at issue here implicates the First

Amendment at most only tangentially. Petitioner's credit reporting is purely private. It does not appear in a newspaper or magazine of general and regular circulation nor on the broadcast media. See 15 U. S. C. § 80b–2(a)(11)(D) (Investment Advisers Act does not apply to "any bona fide newspaper, news magazine or business or financial publication of general and regular circulation"); cf. *Mills* v. *Alabama*, 384 U. S. 214, 219 (1966); *Saxbe* v. *Washington Post Co.*, 417 U. S. 843, 863–864 (1974) (POWELL, J., dissenting). In fact, petitioner's subscription agreement prevented its clients from disseminating its credit information. This sort of credit reporting is speech solely in the economic interest of the speaker and its business audience, cf. *Central Hudson Gas & Elec.*, 447 U. S., at 561,[8] and this interest justifies no special protection when—as in this case—the speech is wholly false and clearly damaging to the victim's reputation. These factors clearly placed petitioner's credit reporting in "a subordinate position in the scale of First Amendment values." *Ohralik*, 436 U. S., at 456.

In addition, the speech here, like advertising, is hardier and less likely to be deterred by state regulation. See *Virginia Pharmacy Board*, 425 U. S., at 771, n. 24. It is solely motivated by the desire for profit, which, we have noted, is a force less likely to be deterred than others. *Ibid.* Arguably, the reporting here also was more objectively verifiable than speech deserving of greater protection. See *ibid.* In any case, the market provides a powerful incentive to a credit reporting agency to be accurate, since false credit reporting is of no use to creditors. Thus, any incremental "chilling" effect of libel suits would be of decreased significance.[9]

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[8] In addition, as Shiffrin notes, "[t]he interests in individual self-expression, autonomy, and the like are not present here or are present in only an attenuated way." Shiffrin 1268.

[9] The Fifth Circuit Court of Appeals has noted that, while most States provide a qualified privilege against libel suits for commercial credit reporting agencies, in those States that do not there is a thriving credit

IV

Since the speech here does not involve any of the concerns that motivated the Court in *New York Times* and *Gertz*, I conclude that the First Amendment protection is substantially lessened.[10] This requires us to strike a new balance

reporting business and commercial credit transactions are not inhibited. *Hood* v. *Dun & Bradstreet, Inc.*, 486 F. 2d 25, 32 (1973), cert. denied, 415 U. S. 985 (1974). The court cited an empirical study comparing credit transactions in Boise, Idaho, where there is no privilege, with those in Spokane, Washington, where there is one. *Id.*, at 32, and n. 18.

[10] As indicated *supra*, I would not in this case attempt to define the precise boundaries of the realm in which the common law of defamation may operate. The lines will be difficult to draw in some cases. For example, reports of bankruptcies, stock quotations, and other financial items that appear in newspapers and newsletters of general circulation would involve different considerations. Nonetheless, as indicated in the text, the idea that certain kinds of speech are at the core of the First Amendment, while others are on the periphery, is not a new one to courts. See, *e. g.*, *Roth* v. *United States*, 354 U. S. 476; *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447 (1978); *Brown* v. *Hartlage*, 456 U. S. 45; Prosser § 118, p. 822–823. And the lines between media and nonmedia, and between commercial speech and other speech, are not unfamiliar to judges, nor would they be difficult to draw. Certainly the state courts noted *supra*, at 6, have found little difficulty in drawing them. Nor have state and federal courts found great difficulty in drawing similar lines, like the one between public and private figures, that the First Amendment requires. *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974).

I do not think this common law approach is a return to the *ad hoc* resolution of the competing interests at stake in each particular case that we eschewed in *Gertz*. See *supra*, at 343–344, 346. Constitutional protections would apply identically to broad categories of speech, not to individual cases. This kind of broad categorization does not raise the same concerns of bias and the like that might be raised by judicial determinations of which particular articles or publications address issues of "general or public interest," cf. *id.*, at 346. See Shiffrin 1268, n. 327. Moreover, prophylactic rules—such as a direction to err on the side of constitutional protection—might be suggested that would ensure that speech of genuine concern was not restrained.

There is little reason for the Court's anxiety that "an immeasurable volume of litigation" would result from this approach, *ante*, at 13, n. 4. *New York Times* was decided 20 years ago. It left the states free to adhere to

between the interests of the speaker here and the state interest in providing a legal remedy for defamatory falsehood. That state interest, we have said, is "strong and legitimate." *Gertz*, 418 U. S., at 348. A State should not lightly be required to abandon this purpose,

> "for, as MR. JUSTICE STEWART has reminded us, the individual's right to the protection of his own good name 'reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. . . .' *Rosenblatt* v. *Baer*, 383 U. S. 75, 92 (1966) (concurring opinion)." *Id.*, at 341.

At the same time, however, it is necessary to recognize the scope of the state interest. Its purpose, we have noted, "is the compensation of individuals for the harm inflicted on them by defamatory falsehood." *Ibid.* It does not aim to reward victims of falsehood with damages in excess of the harm they have suffered, for the legitimate "state interest extends no further than compensation for actual injury." *Id.*, at 349. It is with this in mind that the new balance should be struck.

A

Punitive damages, unlike presumed damages, are not intended to compensate the tort victim, but rather to punish the tortfeasor and to deter him and others from similar behavior. *Newport* v. *Fact Concerts, Inc.*, 453 U. S. 247, 266–267 (1981); *Electrical Workers* v. *Foust*, 442 U. S. 42, 48 (1979); *Gertz* v. *Robert Welch, Inc.*, 418 U. S., at 350. In

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the common law in nonmedia cases. The "flood-gates" argument simply is not justified in light of this experience. Moreover, the blanket rejection of what has been the prevailing law of defamation is a high price indeed to pay for a bright-line rule that heretofore has never been considered necessary.

essence, punitive damages are "private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." *Ibid.* It is the responsibility of the state, not ~~the individual~~, to impose punishment in criminal proceedings pursuant to the rule of law. In levying fines under the name of punitive damages, neither courts nor juries ~~are required~~ to observe the procedural safeguards that the Fourth, Fifth, Sixth, and Fourteenth Amendments require ~~in criminal~~ proceedings. It is only in civil tort cases that juries have been permitted to impose punishment without any of these constitutional protections. Even in civil penalty proceedings brought by the government, the courts must afford the defendant some of these fundamental protections whenever the purpose is punishment. *United States* v. *United States Coin & Currency*, 401 U. S. 715 (1971); *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U. S. 693 (1965); *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, 165–167 (1963); see Wheeler, The Constitutional Case for Reforming Punitive Damages Procedures, 69 Va. L. Rev. 269, 322–351 (1983). Because it guards against wrongful and arbitrary punishments, the Due Process Clause is a constitutional protection no less necessary and vital to our civil liberties than is the First Amendment.

The most remarkable feature of punitive damages is that the jury is given no real standard in setting them. Guided only by their own notion of what is an appropriate penalty, the jurors are told they are free to award whatever amount they deem sufficient to punish and deter. As a result, their awards often bear no rational relationship to the injury suffered and can reflect more the jury's unguided prejudices than any legitimate punitive interest. They represent "windfall recoveries," *Electrical Workers* v. *Foust*, *supra*, at 50, which, by definition, provide monetary relief "in excess of . . . actual loss," *Scott* v. *Donald*, 165 U. S. 58, 86 (1897). We noted in *Gertz*:

civil juries

Dan - Do you think to Fourth Amend is relevant here? 9th? 9th focuses on searches & seizures - not process & procedure. Of course, the 4th is relevant to evidence admissable in a crim. case

Old cases - still law
in those states?
Bouvier Dictionary?

Holmes?
Text books on label?
L/Rs other than Va?

> "In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. And they remain free to use their discretion selectively to punish expressions of unpopular views." 418 U. S., at 350.

In recognition of these dangers, many American jurisdictions have modified the traditional common law rule. Under the traditional rule, a jury can award punitive damages to a plaintiff who has shown that the defendant acted with a high degree of culpability. *Smith* v. *Wade*, 461 U. S. 30, 39–48 (1983) (discussing nineteenth century and present law). State courts and commentators have harshly criticized punitive damages because of the dangers they pose to due process concerns. *E. g.*, *Murphy* v. *Hobbs*, 7 Colo. 541, 5 P. 119 (1884); *Stewart* v. *Maddox*, 63 Ind. 51, 57 (1878); *Fay* v. *Parker*, 53 N. H. 342, 390, 16 Am. Rep. 270, 329–330 (1873); Wheeler, *supra;* 1 J. Bouvier, Law Dictionary, Damages, p. 467 (15th ed. 1883). "Punitive damages," one court has remarked, "destroy every constitutional safeguard within their reach." *Fay* v. *Parker, supra*, at 397, 16 Am. Rep., at 338. Recognizing these dangers, ~~many~~ a number of jurisdictions have restricted punitive damages or abolished them entirely. At least five states and the Commonwealth of Puerto Rico refuse to allow them in most tort actions. *E. g.*, *Killebrew* v. *Abbott Laboratories*, 359 So. 2d 1275, 1278 (La. 1978); *Burt* v. *Advertiser Newspaper Co.*, 154 Mass. 238, 245, 28 N. E. 1, 5 (1891) (Holmes, J.); *Abel* v. *Conover*, 170 Neb. 926, 929, 104 N. W. 2d 684, 688 (1960); *Vratsenes* v. *N. H. Auto, Inc.*, 112 N. H. 71, 73, 289 A. 2d 66, 68 (1972); *Rivera Santos* v. *Rossi*, 64 P. R. R. 683, 686 (1945); *Maki* v. *Aluminum Building Products*, 73 Wash. 2d 23, 25, 436 P. 2d 186, 187 (1968). Several other states allow them only insofar as they compensate for intangible injury, *Wise* v. *Daniel*, 221 Mich. 229, 233–234, 190 N. W. 746, 747–748 (1922), or litigation costs,

what did Holmes say? Is it good law? Is many case still the law?

Dan - have you read these cases in their full text? They are substantial authority for our position. I have not read any of them.

Triangle Sheet Metal Works, Inc. v. *Silver*, 154 Conn. 116, 127, 222 A. 2d 220, 225 (1966), and one state allows them only when the defendant's conduct cannot be punished as a crime, *Koerner* v. *Oberly*, 56 Ind. 284, 287, 26 Am. Rep. 34, 36 (1877). The federal courts also have refused to award punitive damages in certain actions arising under federal law. *Electrical Workers* v. *Foust*, *supra* (labor law). But see *Smith* v. *Wade*, *supra* (allowing punitive damages in § 1983 actions).

In England, the traditional common law rule has undergone a similar evolution. Prior to 1964, a plaintiff could recover punitive damages when the defendant had acted in "contumelious disregard of the plaintiff's rights," particularly when the defendant had injured the plaintiff's dignity and feelings. *Cassell & Co.* v. *Broome*, [1972] A. C. 1027, 1068 (Hailsham, L. C.) (quoting Mayne & McGregor, *Damages* ¶207 (12th ed. 1961)). In *Rookes* v. *Barnard*, [1964] A. C. 1129, the House of Lords, sitting as England's court of last resort, greatly restricted such damages. Instead of allowing juries to award them whenever a defendant has acted oppressively towards the plaintiff, the House of Lords confined these damages to three narrow situations: (i) when government officers act oppressively, arbitrarily, or unconstitutionally, (ii) when the defendant's conduct has been calculated by him to make a profit that may well exceed the compensation payable to plaintiff, and (iii) when such damages are expressly authorized by statute. *Id.*, at 1226–1227. The law lords have not hesitated to apply these limitations to common law libel actions. *Cassell & Co.* v. *Broome*, *supra*.

It is time we follow these overdue developments. In view of the serious constitutional concerns that punitive damages pose and the absence of any legitimate state interest in providing windfalls to libel plaintiffs, I would hold that a State may not permit recovery of punitive damages in a libel

action.[11]

B

Presumed damages stand on a different footing. Unlike punitive damages, their purpose is to compensate, not to punish or deter. C. McCormick, Damages § 116 (1935); 4 J. Berryman, Sutherland on Damages § 1206 (4th ed. 1916); Restatement of Torts § 621 and comment a (1938). Thus, they do serve the State's legitimate interest[12] and may be necessary in order for the State to compensate where actual damages cannot adequately be proved. In most circumstances, the law requires the tort plaintiff to prove the fact and amount of loss. The damages proved are compensatory. In libel actions, however, even injury—in the normal sense—may not be provable and the amount of loss can almost never be proved with certainty. As noted above, it long has been recognized that "proof of actual damages [in a libel action] will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact." *Supra*, at 2. "[C]ourts and legislatures literally for centuries have thought that in the generality of cases, libeled plaintiffs will be seriously shortchanged if they must prove the extent of the injury to their reputations." *Gertz* v. *Robert Welch, Inc.*, 418 U. S., at 393 (WHITE, J., dissenting).

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[11] Statutory multiple damages, such as treble damages under the antitrust laws, 15 U. S. C. § 15(a), do not pose most of these concerns. Unlike common law punitive damages, they are governed by defined standards, limit jury discretion, are subject to effective review on appeal, and are strictly proportionate to the injury suffered. They do not implicate serious due process concerns.

[12] British courts have approved presumed damages, called "at large" damages, in the same cases in which they have restricted punitive damages. *E. g., Cassell & Co.* v. *Broome*, [1972] A.C.1027, 1073 (Hailsham, L. C.) (libel action); see 28 Hailsham, Halsbury's Laws of England 10 (4th ed. 1979).

For these reasons, the common law since the time of Hale has allowed juries in libel actions to presume damages from the fact of libelous publication. Such damages are not intended to replace actual damages when these can be proved. Rather, the purpose of this presumption in libel cases is to ensure compensation when injury has occurred but is not susceptible of the type of proof and measurement required in most other tort damage suits. Thus, we have noted, presumed damages are appropriate only in situations where both the likelihood of injury and the difficulty of proving it are great. *Carey* v. *Piphus*, 435 U. S. 247, 264 (1978).[13]

Properly understood, the doctrine of presumed damages serves only to shift the traditional allocation of proof. Allowing the jury to presume damages does not imply that it is free to set them at whatever level it believes appropriate. As in any tort action, the jury is duty-bound to follow the evidence in accord with the court's instructions. If the defendant proves that injury did not occur or that it was nominal, there is no basis for presuming damages. Presumed damages, then, shift some of the burden of proof in libel cases from the plaintiff to the defendant, and since the jury can presume damages only after the plaintiff has established liability, this reallocation is not unreasonable. It merely requires the defendant to bear some of the risk of the uncertainty created by his own tortious actions. Accordingly, I would hold that in a libel action a jury may award presumed

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[13] Many libeled persons suffer losses of reputation that extend long into the future—even into the history books. The truth often never overtakes a published falsehood, and quantifying the extent of the injury and resulting damages presents a unique problem of proof. For the reasons I have stated, permitting a jury—in the absence of standards of any kind—to award punitive damages is an unprincipled answer to this problem. But presumed compensatory damages are a necessary, though imperfect, means of resolving it. A person injured by a libelous utterance—whether by a media or nonmedia defendant—should not go remediless any more than one who suffers a tortious physical injury.

damages against a nonmedia defendant—even without proof of actual malice.[14]

V

I would affirm the judgment of the Supreme Court of Vermont as to presumed damages but would reverse its award of punitive damages. Such a course, unlike today's decision, follows salutory developments in the common law. It also respects fundamental constitutional values while remaining faithful to the central concern of common law damages: compensation. By contrast, the Court's decision is both too broad and too narrow to further either of these aims. By unnecessarily abrogating the common law of presumed damages, it withholds a remedy frequently necessary to compensate the libel victim fully. At the same time, at least in the context of commercial speech by nonmedia defendants, the Court promotes no significant First Amendment interest. On the other hand, by allowing punitive damages in some libel cases, the Court neglects important constitutional concerns that can be protected without harming the State's legitimate interest in compensation. The Court identifies no new or overriding societal interest justifying the result it reaches in this case.

In sum, I dissent from the Court's decision both to abrogate the common law of presumed damages and to allow punitive damages against media and nonmedia defendants when actual malice is proved. I would follow the consistent course of the common law for at least three centuries and allow presumed damages against nonmedia defendants without proof of actual malice. I would also follow the evolution of the common law and prohibit punitive damages against any libel defendant.

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[14] In view of the great protection the First Amendment extends to certain kinds of speech, I would adhere to the "actual malice" requirement of *New York Times* and *Gertz* with respect to recovery of presumed damages from media defendants.

In light of these views, I would affirm in part and reverse in part.

DB4A SALLY-POW

The Court's ruling today unnecessarily repudiates the common law and trivializes the First Amendment.[7] This decision is said to be "squarely controll[ed]" by our opinion in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). This is a mischaracterization of that case, as the facts in it were quite different from those here. Gertz was a

lfp/ss 11/20/84 Rider A, p. 16 (D&B)

DB16 SALLY-POW

At the same time, the Court promotes no significant First Amendment interest. As stated in Gertz, supra, at 340, "there is no constitutional value in false statements of fact."

lfp/ss 11/20/84 Rider A, p. 16 (D&B)

DB16 SALLY-POW

At the same time, the Court promotes no significant First Amendment interest. As stated in Gertz, supra, at 340, "there is no constitutional value in false statements of fact."

11/20

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SUPREME COURT OF THE UNITED STATES

No. 83-18

DUN & BRADSTREET, INC., PETITIONERS *v.*
GREENMOSS BUILDERS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF VERMONT

[November ——, 1984]

JUSTICE POWELL, dissenting. affirming in part and reversing in part

The Court today extends the constitutional rule of *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), far beyond its origins or its purpose. In that case, the Court for the first time held that the Constitution limits the reach of state laws of libel and slander in suits against media defendants. Limits are needed in such cases, the Court held, to ensure that "debate on public issues . . . be uninhibited, robust, and wide-open." *Id.*, at 270. All of the Court's decisions since then that have considered the constitutional role in defamation law also have involved suits against a media defendant arising out of an article or broadcast on an issue of public concern and importance. The Court today goes beyond these precedents and applies the same constitutional restrictions to a libel action between a construction company and a commercial credit reporting agency. In my view, such a sweeping holding is not required by the First Amendment. Nor is it wise or consistent with precedent.

I

The common law rules that the Court today repudiates are of ancient vintage. The rule that damages are presumed for libel was announced by Hale as early as 1670. *Restatement of Torts* § 568, comment b, at 162 (1938). Punitive damages also long have been available in actions for defamation under

a quite different standard than the one applied today. See, *e. g.*, C. McCormick, Law of Damages § 118, p. 431 (1935); M. Newell, Law of Defamation, Libel and Slander 842, 844–846 (1890) (citing cases). And since at least the early part of this century, a plaintiff in a garden-variety defamation suit could recover without showing any facts as to the state of mind of the defendant. W. Prosser, Law of Torts § 113, pp. 772–773 (4th ed. 1971) (hereinafter Prosser); Restatement (Second) of Torts § 580B, comment b (1977). The common law recognized some privileges, but generally to recover for written expression harmful to reputation the ordinary citizen had to show only falsity and publication.

The rationale of the common law rules has been the experience and judgment of history that "proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact." Prosser § 112, p. 765; accord, *Rowe* v. *Metz*, 195 Colo. 424, 425–426, 579 P. 2d 83, 84 (1978); Note, Developments in the Law—Defamation, 69 Harv. L. Rev. 875, 891–892 (1956). As a result, courts for centuries have allowed juries to presume that some damage occurred from many defamatory utterances and publications.

This accumulated learning is worthy of respect. Moreover, the common law rules were developed in an area of the law that, since the founding of our country, has been the province of the state courts.[1] Even if one disagrees with

[1]The Framers were familiar with the common law of libel, which had been adopted by the American colonies. See *Gertz*, 418 U. S., at 380–384 (WHITE, J., dissenting); *Roth* v. *United States*, 354 U. S. 476, 482–483, and n. 11 (1957) (13 States allowed prosecution for libel in 1792); *Beauharnais* v. *Illinois*, 343 U. S. 250, 254–255 (1952). See also T. Cooley, Constitutional Limitations 602 (7th ed. 1903); Rutledge, The Law of Defamation: Recent Developments, 32 Alabama Lawyer 409, 410 (1971):

"[T]he law of defamation has been an integral part of the laws of England, the colonies and the states since time immemorial. So many actions have been maintained and judgments recovered under the various laws of libel

these centuries-old rules,[2] this Court should discard them only if they conflict with the rights guaranteed to the people by federal law. Thus, this Court has modified these rules when their operation threatened freedom of the press guaranteed by the First Amendment. More specifically, we have done so in cases in which state law placed at risk "freedom of expression upon public questions." *New York Times* v. *Sullivan*, 376 U. S., at 269. "The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth* v. *United States*, 354 U. S. 476, 484 (1957). "At the core of the First Amendment are certain basic conceptions about the manner in which political discussion in a representative democracy should proceed." *Brown* v. *Hartlage*, 456 U. S. 45, 52 (1982); accord *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 776 (1978) (discussion of "'matters of public concern'" is "at the heart of the First Amendment's protection"). The libel at issue in this case neither threatened the press nor involved any public figure or public issue.

The Court today, contrary to history and precedent, indiscriminately extends the constitutional rule of *New York Times* and *Gertz* to nothing less than the entire field of libel and slander. Henceforth, every action by a former employee complaining of a libelous negative recommendation by an employer,[3] every action by a dealer against a competitor

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that the Constitutional validity of libel actions could be denied only by a Court willing to hold all its predecessors were wrong in their interpretation of the First Amendment and that two hundred years of precedents should be overruled."

[2] As the Court notes, there is room to doubt the wisdom of state laws that permit punitive damages on liberal terms. *Ante*, at 9; see Part IV, *infra*.

[3] *E. g.*, *Calero* v. *Del Chemical Corp.*, 68 Wis. 2d 487, 228 N. W. 2d 737 (1975); *Stuempges* v. *Parke, Davis & Co.*, 297 N. W. 2d 252 (Minn. 1980).

who falsely reports bad service to the manufacturer,[4] every action by a spurned suitor for spreading false rumors about the reasons for his failure,[5] and numerous other actions arising out of back-fence gossip or commercial incompetence[6] will be subject to the same constitutional protections as speech upon matters of the greatest public concern. The Court's ruling today unnecessarily repudiates the common law and trivializes the First Amendment.[7] This decision is said to be "squarely control[led]" by our opinion in *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974). This mischaracterizes that case, as the facts in it were very different from those here. *Gertz* was a libel suit against a media defendant: a magazine called American Opinion, the monthly outlet of the John Birch Society. The article in question discussed a question of undoubted public importance—whether the prosecution of a policeman was part of a Communist campaign to discredit local law enforcement agencies. The plaintiff was a lawyer tangentially involved in the prosecution

[4] *E. g.*, *Harley-Davidson Motorsports, Inc.* v. *Markley*, 279 Or. 361, 568 P. 2d 1359 (1977).

[5] *E. g.*, *Schomer* v. *Smidt*, 113 Cal. App. 3d 828, 170 Cal. Rptr. 662 (1980).

[6] Suits by disgruntled consumers against credit reporting agencies appear to be disquietingly common. *E. g.*, *Millstone* v. *O'Hanlon Reports, Inc.*, 528 F. 2d 829 (CA8 1976); *Retail Credit Co.* v. *Russell*, 234 Ga. 765, 218 S. E. 2d 54 (1975); *Hood* v. *Dun & Bradstreet, Inc.*, 486 F. 2d 25 (CA5 1973), cert. denied, 415 U. S. 985 (1974); *Grove* v. *Dun & Bradstreet, Inc.*, 438 F. 2d 433 (CA3), cert. denied, 404 U. S. 898 (1971). In enacting the Fair Credit Reporting Act, 15 U. S. C. §§ 1681–1681t, Congress specifically found that "[t]here is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy." *Id.*, § 1681(a)(4).

[7] As one commentator has remarked with respect to "the case of a commercial supplier of credit information that defames a person applying for credit"—the very case before us today—"If the first amendment requirements outlined in *Gertz* apply, there is something clearly wrong with the first amendment or with *Gertz*." Shiffrin, The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment, 78 Nw. L. Rev. 1212, 1268 (1983) [hereinafter Shiffrin].

who, the magazine alleged, was the chief architect of the "frame-up" of the police officer. The article spoke of the lawyer's alleged links to Communist activity. Like every other case in which this Court has considered the constitutional limits on state laws of defamation, *Gertz* involved a media article directly relevant to the effective operation of our system of democratic self-government.

In contrast, the case today is a purely private defamation action against a commercial credit reporting agency that falsely reported to respondent's creditors that respondent was bankrupt. A number of state courts, including the court below, have recognized that the role of the Constitution in regulating state libel law is far more limited when the concerns that activated *New York Times* and *Gertz* are absent. In such a case,

> "[t]here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-censorship by the press. The facts of the present case are wholly without the First Amendment concerns with which the Supreme Court of the United States has been struggling." *Harley-Davidson Motorsports, Inc.* v. *Markley*, 279 Or. 361, 366, 568 P. 2d 1359, 1363 (1977).

Accord, *Rowe* v. *Metz*, 195 Colo. 424, 426, 579 P. 2d 83, 84 (1978) (*Gertz* should not be "blindly applied to the case of a private plaintiff against a nonmedia defendant for a defamation which is essentially private in nature"); *Calero* v. *Del Chemical Corp.*, 68 Wis. 2d 487, 506, 228 N. W. 2d 737, 748 (1975) ("In 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"); *Denny* v. *Mertz*, 106 Wis. 2d 636, 661, 318 N. W. 2d 141, 153, cert. denied, 459 U. S. 883 (1982).

II

This Court on many occasions has recognized that certain kinds of speech are more central to the interests of the First Amendment than others. Obscene speech and "fighting words" have long been accorded no protection. *Roth* v. *United States*, 354 U. S., at 483; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942); see also *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697, 716 (1931) (publication of troop ship sailings during war time may be enjoined); *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 591–592 (1952) (advocating violent overthrow of the government is unprotected speech); *Seattle Times Co.* v. *Rhinehart*, —— U. S. ——, —— (1984). Similarly, "libelous utterances are not within the area of constitutionally protected speech." *Roth*, 354 U. S., at 483; accord, *Gertz*, *supra*, at 340 ("there is no constitutional value in false statements of fact"). In the area of protected speech, the most prominent example of reduced protection for certain kinds of speech concerns commercial speech. Such speech, we have noted, occupies a "subordinate position in the scale of First Amendment values." *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 456 (1978). It also is more easily verifiable and less likely to be deterred by proper regulation. *Virginia Pharmacy Bd.* v. *Virginia Consumer Council*, 425 U. S. 748, 771, n. 24 (1976). Accordingly, it may be regulated in ways that might be impermissible in the realm of noncommercial expression. *Ohralik*, *supra*, at 456; *Central Hudson Gas & Elec.* v. *Public Serv. Comm'n*, 447 U. S. 557, 562–563 (1980).

The Court concedes the above, but appears to believe that commercial speech—defined as advertising that does no more than propose a commercial transaction—is the only type of expression entitled to less than full First Amendment protection. See *ante*, at 18. Our cases suggest otherwise. In the area of defamation law itself, for example, some types of speech are entitled to broader protection than others: speech about public figures receives the full protection of the *New*

York Times standards, while speech about private figures is entitled at most to the lesser standards of our opinion in *Gertz*.

Other areas of the law provide further examples. In *Ohralik* we noted that there are "[n]umerous examples . . . of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, . . . corporate proxy statements, . . . the exchange of price and production information among competitors, . . . and employers' threats of retaliation for the labor activities of employees." 436 U. S., at 456 (citations omitted). Yet similar regulation of political speech is subject to the most rigorous scrutiny. See *Brown* v. *Hartlage*, 456 U. S. 45; *New York Times Co.* v. *Sullivan*, 376 U. S., at 279, n. 19; *Buckley* v. *Valeo*, 424 U. S. 1, 14 (1976). Likewise, while the power of the State to license lawyers, psychiatrists, public school teachers, and investment advisors—all of whom speak for a living—is unquestioned, this Court has held that a law requiring licensing of union organizers is unconstitutional under the First Amendment. *Thomas* v. *Collins*, 323 U. S. 516 (1945); see Shiffrin 1264. See also *Rosenbloom* v. *Metromedia*, 403 U. S. 29, 44 (1971) (opinion of BRENNAN, J.) ("the determinant whether the First Amendment applies to state libel actions is whether the utterance involved concerns an issue of public or general concern"); *Young* v. *American Mini Theatres*, 427 U. S. 50, 70 (1976) (opinion of STEVENS, J.) ("it is manifest that society's interest in protecting this type of expression [nonobscene erotic films] is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate").

III

I do not think it necessary or advisable to attempt to define completely what sorts of speech qualify for reduced constitutional protection. Cf. *Rosenbloom*, *supra*, at 44–45. In accord with the state courts quoted *supra*, at 5, I think it clear that the libelous speech at issue here implicates the First

Amendment at most only tangentially. Petitioner's credit reporting is purely private. It does not appear in a newspaper or magazine of general and regular circulation nor on the broadcast media. See 15 U. S. C. §80b–2(a)(11)(D) (Investment Advisers Act does not apply to "any bona fide newspaper, news magazine or business or financial publication of general and regular circulation"); cf. *Mills* v. *Alabama*, 384 U. S. 214, 219 (1966); *Saxbe* v. *Washington Post Co.*, 417 U. S. 843, 863–864 (1974) (POWELL, J., dissenting). In fact, petitioner's subscription agreement prevented its clients from disseminating its credit information. This sort of credit reporting is speech solely in the economic interest of the speaker and its business audience, cf. *Central Hudson Gas & Elec.*, 447 U. S., at 561,[8] and this interest justifies no special protection when—as in this case—the speech is wholly false and clearly damaging to the victim's reputation. These factors clearly placed petitioner's credit reporting in "a subordinate position in the scale of First Amendment values." *Ohralik*, 436 U. S., at 456.

In addition, the speech here, like advertising, is hardier and less likely to be deterred by state regulation. See *Virginia Pharmacy Board*, 425 U. S., at 771, n. 24. It is solely motivated by the desire for profit, which, we have noted, is a force less likely to be deterred than others. *Ibid.* Arguably, the reporting here also was more objectively verifiable than speech deserving of greater protection. See *ibid.* In any case, the market provides a powerful incentive to a credit reporting agency to be accurate, since false credit reporting is of no use to creditors. Thus, any incremental "chilling" effect of libel suits would be of decreased significance.[9]

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[8] In addition, as Shiffrin notes, "[t]he interests in individual self-expression, autonomy, and the like are not present here or are present in only an attenuated way." Shiffrin 1268.

[9] The Fifth Circuit Court of Appeals has noted that, while most States provide a qualified privilege against libel suits for commercial credit reporting agencies, in those States that do not there is a thriving credit

IV

Since the speech here does not involve any of the concerns that motivated the Court in *New York Times* and *Gertz*, I conclude that the First Amendment protection is substantially lessened.[10] This requires us to strike a new balance

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reporting business and commercial credit transactions are not inhibited. *Hood* v. *Dun & Bradstreet, Inc.*, 486 F. 2d 25, 32 (1973), cert. denied, 415 U. S. 985 (1974). The court cited an empirical study comparing credit transactions in Boise, Idaho, where there is no privilege, with those in Spokane, Washington, where there is one. *Id.*, at 32, and n. 18.

[10] As indicated *supra*, I would not in this case attempt to define the precise boundaries of the realm in which the common law of defamation may operate. The lines will be difficult to draw in some cases. For example, reports of bankruptcies, stock quotations, and other financial items that appear in newspapers and newsletters of general circulation would involve different considerations. Nonetheless, as indicated in the text, the idea that certain kinds of speech are at the core of the First Amendment, while others are on the periphery, is not a new one to courts. See, *e. g.*, *Roth* v. *United States*, 354 U. S. 476; *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447 (1978); *Brown* v. *Hartlage*, 456 U. S. 45; Prosser § 118, p. 822–823. And the lines between media and nonmedia, and between commercial speech and other speech, are not unfamiliar to judges, nor would they be difficult to draw. Certainly the state courts noted *supra*, at 6, have found little difficulty in drawing them. Nor have state and federal courts found great difficulty in drawing similar lines, like the one between public and private figures, that the First Amendment requires. *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974).

I do not think this common law approach is a return to the *ad hoc* resolution of the competing interests at stake in each particular case that we eschewed in *Gertz*. See *supra*, at 343–344, 346. Constitutional protections would apply identically to broad categories of speech, not to individual cases. This kind of broad categorization does not raise the same concerns of bias and the like that might be raised by judicial determinations of which particular articles or publications address issues of "general or public interest," cf. *id.*, at 346. See Shiffrin 1268, n. 327. Moreover, prophylactic rules—such as a direction to err on the side of constitutional protection—might be suggested that would ensure that speech of genuine concern was not restrained.

There is little reason for the Court's anxiety that "an immeasurable volume of litigation" would result from this approach, *ante*, at 13, n. 4. *New York Times* was decided 20 years ago. It left the states free to adhere to

between the interests of the speaker here and the state interest in providing a legal remedy for defamatory falsehood. That state interest, we have said, is "strong and legitimate." *Gertz*, 418 U. S., at 348. A State should not lightly be required to abandon this purpose,

> "for, as MR. JUSTICE STEWART has reminded us, the individual's right to the protection of his own good name 'reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. . . .' *Rosenblatt* v. *Baer*, 383 U. S. 75, 92 (1966) (concurring opinion)." *Id.*, at 341.

At the same time, however, it is necessary to recognize the scope of the state interest. Its purpose, we have noted, "is the compensation of individuals for the harm inflicted on them by defamatory falsehood." *Ibid.* It does not aim to reward victims of falsehood with damages in excess of the harm they have suffered, for the legitimate "state interest extends no further than compensation for actual injury." *Id.*, at 349. It is with this in mind that the new balance should be struck.

A

Punitive damages, unlike presumed damages, are not intended to compensate the tort victim, but rather to punish the tortfeasor and to deter him and others from similar behavior. *Newport* v. *Fact Concerts, Inc.*, 453 U. S. 247, 266–267 (1981); *Electrical Workers* v. *Foust*, 442 U. S. 42, 48 (1979); *Gertz* v. *Robert Welch, Inc.*, 418 U. S., at 350. In

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the common law in nonmedia cases. The "flood-gates" argument simply is not justified in light of this experience. Moreover, the blanket rejection of what has been the prevailing law of defamation is a high price indeed to pay for a bright-line rule that heretofore has never been considered necessary.

essence, punitive damages are "private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." *Ibid.* It is the responsibility of the state, not civil juries, to impose punishment in criminal proceedings pursuant to the rule of law. In levying fines under the name of punitive damages, neither courts nor juries are required to observe the procedural safeguards that the Fifth, Sixth, and Fourteenth Amendments require in criminal proceedings. It is only in civil tort cases that juries have been permitted to impose punishment without any of these constitutional protections. Even in civil penalty proceedings brought by the government, the courts must afford the defendant some of these fundamental protections whenever the purpose is punishment. *United States* v. *United States Coin & Currency*, 401 U. S. 715 (1971); *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U. S. 693 (1965); *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, 165–167 (1963); see Wheeler, The Constitutional Case for Reforming Punitive Damages Procedures, 69 Va. L. Rev. 269, 322–351 (1983). Because it guards against wrongful and arbitrary punishments, the Due Process Clause is a constitutional protection no less necessary and vital to our civil liberties than is the First Amendment.

The most remarkable feature of punitive damages is that the jury is given no real standard in setting them. Guided only by their own notion of what is an appropriate penalty, the jurors are told they are free to award whatever amount they deem sufficient to punish and deter. As a result, their awards often bear no rational relationship to the injury suffered and can reflect more the jury's unguided prejudices than any legitimate punitive interest. They represent "windfall recoveries," *Electrical Workers* v. *Foust*, *supra*, at 50, which, by definition, provide monetary relief "in excess of . . . actual loss," *Scott* v. *Donald*, 165 U. S. 58, 86 (1897). We noted in *Gertz*:

> "In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not

> be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. And they remain free to use their discretion selectively to punish expressions of unpopular views." 418 U. S., at 350.

In recognition of these dangers, many American jurisdictions have modified the traditional common law rule. Under the traditional rule, a jury can award punitive damages to a plaintiff who has shown that the defendant acted with a high degree of culpability. *Smith* v. *Wade*, 461 U. S. 30, 39–48 (1983) (discussing nineteenth century and present law). State courts and commentators have harshly criticized punitive damages because of the dangers they pose to due process concerns. *E. g.*, *Murphy* v. *Hobbs*, 7 Colo. 541, 5 P. 119 (1884); *Stewart* v. *Maddox*, 63 Ind. 51, 57 (1878); *Fay* v. *Parker*, 53 N. H. 342, 390, 16 Am. Rep. 270, 329–330 (1873); 1 J. Bouvier, Law Dictionary, Damages, p. 467 (15th ed. 1883); J. Ghiardi & J. Kircher, Punitive Damages: Law and Practice §§2.12–3.05 (1984); Long, Punitive Damages: An Unsettled Doctrine, 25 Drake L. Rev. 870, 883–889 (1976); Wheeler, *supra*. "Punitive damages," one court has remarked, "destroy every constitutional safeguard within their reach." *Fay* v. *Parker*, *supra*, at 397, 16 Am. Rep., at 338. Recognizing these dangers, a number of jurisdictions have restricted punitive damages or abolished them entirely. At least five states and the Commonwealth of Puerto Rico refuse to allow them in most tort actions. *E. g.*, *Killebrew* v. *Abbott Laboratories*, 359 So. 2d 1275, 1278 (La. 1978); *International Fidelity Insurance Co.* v. *Wilson*, 387 Mass. 841, 856 n. 20, 443 N. E. 2d 1308, 1317 n. 20 (1983); *Burt* v. *Advertiser Newspaper Co.*, 154 Mass. 238, 245, 28 N. E. 1, 5 (1891) (Holmes, J.); *Abel* v. *Conover*, 170 Neb. 926, 929, 104 N. W. 2d 684, 688 (1960); *Vratsenes* v. *N. H. Auto, Inc.*, 112 N. H. 71, 73, 289 A. 2d 66, 68 (1972); *Rivera Santos* v. *Rossi*, 64 P. R. R. 683, 686 (1945); *Maki* v. *Aluminum Building Products*, 73 Wash. 2d 23, 25, 436 P. 2d 186, 187 (1968). Several

other states allow them only insofar as they compensate for intangible injury, *Wise* v. *Daniel*, 221 Mich. 229, 233–234, 190 N. W. 746, 747–748 (1922); *Peisner* v. *Detroit Free Press, Inc.*, 68 Mich. App. 360, 371–373, 242 N. W. 2d 775, 780 (1976), or litigation costs, *Triangle Sheet Metal Works, Inc.* v. *Silver*, 154 Conn. 116, 127, 222 A. 2d 220, 225 (1966), and one state allows them only when the defendant's conduct cannot be punished as a crime, *Koerner* v. *Oberly*, 56 Ind. 284, 287, 26 Am. Rep. 34, 36 (1877); *Glissman* v. *Rutt*, 175 Ind. App. 493, 372 N. E. 2d 1188 (1978). The federal courts also have refused to award punitive damages in certain actions arising under federal law. *Electrical Workers* v. *Foust*, *supra* (labor law). But see *Smith* v. *Wade*, *supra* (allowing punitive damages in § 1983 actions).

In England, the traditional common law rule has undergone a similar evolution. Prior to 1964, a plaintiff could recover punitive damages when the defendant had acted in "contumelious disregard of the plaintiff's rights," particularly when the defendant had injured the plaintiff's dignity and feelings. *Cassell & Co.* v. *Broome*, [1972] A. C. 1027, 1068 (Hailsham, L. C.) (quoting Mayne & McGregor, *Damages* ¶207 (12th ed. 1961)). In *Rookes* v. *Barnard*, [1964] A. C. 1129, the House of Lords, sitting as England's court of last resort, greatly restricted such damages. Instead of allowing juries to award them whenever a defendant has acted oppressively towards the plaintiff, the House of Lords confined these damages to three narrow situations: (i) when government officers act oppressively, arbitrarily, or unconstitutionally, (ii) when the defendant's conduct has been calculated by him to make a profit that may well exceed the compensation payable to plaintiff, and (iii) when such damages are expressly authorized by statute. *Id.*, at 1226–1227. The law lords have not hesitated to apply these limitations to common law libel actions. *Cassell & Co.* v. *Broome*, *supra*.

It is time we follow these overdue developments. In view of the serious constitutional concerns that punitive damages

pose and the absence of any legitimate state interest in providing windfalls to libel plaintiffs, I would hold that a State may not permit recovery of punitive damages in a libel action.[11]

B

Presumed damages stand on a different footing. Unlike punitive damages, their purpose is to compensate, not to punish or deter. C. McCormick, Damages § 116 (1935); 4 J. Berryman, Sutherland on Damages § 1206 (4th ed. 1916); Restatement of Torts § 621 and comment a (1938). Thus, they do serve the State's legitimate interest[12] and may be necessary in order for the State to compensate where actual damages cannot adequately be proved. In most circumstances, the law requires the tort plaintiff to prove the fact and amount of loss. The damages proved are compensatory. In libel actions, however, even injury—in the normal sense—may not be provable and the amount of loss can almost never be proved with certainty. As noted above, it long has been recognized that "proof of actual damages [in a libel action] will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact." *Supra*, at 2. "[C]ourts and legislatures literally for centuries have thought that in the generality of cases, libeled plaintiffs will be seriously shortchanged if they must prove the extent of the injury to their reputations." *Gertz* v.

[11] Statutory multiple damages, such as treble damages under the antitrust laws, 15 U. S. C. § 15(a), do not pose most of these concerns. Unlike common law punitive damages, they are governed by defined standards, limit jury discretion, are subject to effective review on appeal, and are strictly proportionate to the injury suffered. They do not implicate serious due process concerns.

[12] British courts have approved presumed damages, called "at large" damages, in the same cases in which they have restricted punitive damages. *E. g.*, *Cassell & Co.* v. *Broome*, [1972] A. C. 1027, 1073 (Hailsham, L. C.) (libel action); see 28 Hailsham, Halsbury's Laws of England 10 (4th ed. 1979).

Robert Welch, Inc., 418 U. S., at 393 (WHITE, J., dissenting).

For these reasons, the common law since the time of Hale has allowed juries in libel actions to presume damages from the fact of libelous publication. Such damages are not intended to replace actual damages when these can be proved. Rather, the purpose of this presumption in libel cases is to ensure compensation when injury has occurred but is not susceptible of the type of proof and measurement required in most other tort damage suits. Thus, we have noted, presumed damages are appropriate only in situations where both the likelihood of injury and the difficulty of proving it are great. *Carey* v. *Piphus*, 435 U. S. 247, 264 (1978).[13]

Properly understood, the doctrine of presumed damages serves only to shift the traditional allocation of proof. Allowing the jury to presume damages does not imply that it is free to set them at whatever level it believes appropriate. As in any tort action, the jury is duty-bound to follow the evidence in accord with the court's instructions. If the defendant proves that injury did not occur or that it was nominal, there is no basis for presuming damages. Presumed damages, then, shift some of the burden of proof in libel cases from the plaintiff to the defendant, and since the jury can presume damages only after the plaintiff has established liability, this reallocation is not unreasonable. It merely requires the defendant to bear some of the risk of the uncertainty created by his own tortious actions. Accordingly, I

[13] Many libeled persons suffer losses of reputation that extend long into the future—even into the history books. The truth often never overtakes a published falsehood, and quantifying the extent of the injury and resulting damages presents a unique problem of proof. For the reasons I have stated, permitting a jury—in the absence of standards of any kind—to award punitive damages is an unprincipled answer to this problem. But presumed compensatory damages are a necessary, though imperfect, means of resolving it. A person injured by a libelous utterance—whether by a media or nonmedia defendant—should not go remediless any more than one who suffers a tortious physical injury.

In light of these views, I would affirm in part and reverse in part.

Rider (to go on pp. 11-12)

At the same time, however, it is necessary to recognize the scope of this interest. Its purpose, we have noted, "is the compensation of individuals for the harm inflicted on them by defamatory falsehood." Id., at 349. It does not aim to reward victims of falsehood with damages in excess of the ~~amount of~~ harm they have suffered, for the legitimate "state interest extends no further than compensation for actual injury." Id., at 349. It is with this in mind that the new balance must be struck.

Dan - let's talk about this replacement to "actual injury." This can be viewed as a stricter standard than presumed injury.

Punitive damages ~~do not aim~~ are not intended to compensate the tort victim, but rather to punish the tortfeasor and to deter him and others from similar behavior. City of Newport v. Facts Concerts, Inc., 453 U.S. 247, 266-267 (1981); International Brotherhood of Electrical Workers v. Foust, 442 U.S. 41, 48 (1979); Gertz v. Robert Welch,

Inc., 418 U.S., at 350. In essence, they are "private fines levied by civil juries to punish reprehensible conduct and to deter its future occurence." Ibid. The most remarkable feature of this ~~levy~~ punishment is that the jury is given no real standard in setting it. Guided only by their own notion of what is ~~fair and~~ an appropriate (penalty, penalty), the jurors are told they are free to award an amount deemed sufficient to punish and deter. As a result, their awards often bear no ~~recognizable~~ rational relationship to the injury suffered and can reflect more the jury's unguided prejudices than any legitimate punitive interest.[1] As we noted in Gertz:

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[1]Recognizing these dangers, many jurisdictions have restricted punitive damages or abolished them entirely. At least six states and the Commonwealth of Puerto Rico refuse to allow them in most tort actions. See, e.g., Murphy v. Hobbs, 7 Colo. 541, 5 P. 119 (1884); Ricard v. State, 390 So.2d 882, 884 (La. 1980); Burt v. Advertiser Newspaper Co., 154 Mass. 238, 28 N.E. 1 (1891) (Holmes, J.); Prather v. Eisenmann, 200 Neb. 1, 11, 261 N.W.2d 766,

Footnote continued on next page.

"In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. [And they remain free to use their discretion selectively to punish expressions of unpopular views]." Ibid.

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772 (1978); Vratsenes v. New Hampshire Auto, Inc., 112 N.H. 71, 289 A.2d 66, 68 (1972); Rivera Santos v. Rossi, 64 P.R.R. 683, 686 (1945); Maki v. Aluminum Building Products, 73 Wash. 2d 23, 436 P.2d 186, 187. Several other states allow them only insofar as they compensate for intangible injury, e.g., Wise v. Daniel, 221 Mich. 229, 190 N.W. 746 (1922), or litigation costs, e.g., Triangle Sheer Metal Works, Inc. v. Silver, 154 Conn. 116, 222 A.2d 220 (1966), and Indiana allows them only when the defendant's conduct cannot be punished as a crime, e.g., Koerner v. Oberly, 56 Ind. 284 (1877). The federal courts have also refused to award punitive damages in certain actions arising under federal law. See International Brotherhood of Electrical Workers v. Foust, 442 U.S. 41 (1979) (labor law). But see Smith v. Wade, ___ U.S. ___ (1983) (allowing punitive damages in §1983 actions). Similarly, Great Britain denies punitive damages in all but a few limited situations. Rookes v. Barnard, [1964] 1 All E.R. 367 (H.L.); Cassell & Co. v. Broome, [1972] 1 All E.R. 801 (H.L.); 12 Hailsham, Halsbury's Laws of England ¶1190 (4th ed. 1975).

Statutory multiple damages, such as treble damages under the antitrust laws, 15 U.S.C. §15, do not pose most of these dangers. Unlike common law punitive damages, they are governed by defined standards, give the jury little discretion, are subject to effective review on appeal, and are strictly proportionate to the injury suffered. They do not implicate serious due process concerns.

Dan - expand this. As Parts I & II emphasize common law, draft a paragraph that refers back to the common law and notes that it has now been modified as to punitive damages but retained as to presumed (if this is true). If there is an Eng. case that is relevant, cite & quote.

In view of these due process concerns, the ~~narrow~~ compensatory ~~aim~~ basis of the State's interest, and the admitted, though limited, First Amendment value of commercial speech, I would hold that the State may not permit recovery of common law punitive damages in a libel suit unless the plaintiff proves actual malice.

Dave - let's talk about this.

Presumed damages stand on a different footing. Unlike punitive damages, ~~they aim~~ their purpose is to compensate, not to punish - a function normally confined to the criminal law and its safeguards. ~~or deter~~.[2] McCormick, Damages §116 (1935); 4

One need not necessarily approve the outcome

[2]The jury instructions in this case make this difference clear. The judge instructed the jury on presumed damages as follows:

> "[Y]ou must consider the question of damages; where, as in this case there is a libel per se, damages are presumed and actual damages may not be proven, you must determine the amount of compensatory damages to be awarded. In determining the amount of compensatory damages to award, you may consider such items as lost profits and expenditures proximately caused by any wrong doing on the part of the Defendant. Although the law presumes damages in some amount in a case of libel per se and therefore relieves

Footnote continued on next page.

Sutherland, Damages §1206 (4th ed. 1916); Restatement of

> the Plaintiff of the burden of establishing by specific proof that damages have occurred, the law does not compel you to return a verdict of substantial damages unless you are persuaded by a preponderance of the evidence that substantial damages have in fact occurred. It is proper, if, in your judgment you deem it to be correct, even in a case of libel per se, for you to return a verdict of nominal damges such as One Dollar, or damages in such other amount as you feel is fair and just compensation to the Plaintiff for the damages actually caused by the Defendant." Jt. App. 19 (emphasis added).

Their compensatory aim is unmistakeable. The judge then proceeded to instruct the jury on punitive damages:

> "Now a word or two about punitive damages. If you find that Defendant's conduct was not privileged, and if you also find, on the basis of clear and convincing evidence, that the Defendant acted with actual malice in publishing the article in question, then you may award Plaintiff punitive or exemplary damages in addition to the actual damages assessed. Punitive damages are designed to punish the offender and serve as an example to others. Whether or not to award such damages and to the amount thereof are matters confided solely to you for decision. In considering whether Defendant acted with actual malice so as to support an award of punitive damages, you may consider the conduct of the Defendant both before and after the publication of the Erroneous Report. In considering whether or not to award punitive damages, you may take into account whether Defendant took any steps to mitigate or reduce the injury to the Plaintiff. If you find the Defendant attempted to mitigate

Footnote continued on next page.

Torts §621 (1938). Thus, ideally at least, they serve the State's legitimate interest. They do, however, also share some of the problems of punitive damages. In Gertz, we recognized that their lack of definite standards could "invit[e] juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact." 418 U.S., at 349. We noted, in fact, that presumed damages might sometimes exceed the scope of the State's interest by "securing for plaintiffs ... gratuitous awards of money damages far in excess of any actual injury." Ibid. It was for these reasons that we held a jury could not award presumed

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damages, you must lessen your award of damages to the extent that you believe appropriate under the circumstances." Ibid., at 20 (emphasis added).

damages against a media defendant unless actual malice were shown.

Despite these dangers, presumed damages are sometimes a necessary alternative to actual damages. In most circumstances, of course, the law requires the plaintiff to prove the fact and amount of loss. This is appropriate, for most often the plaintiff can prove actual injury if it exists and offer definite evidence of the extent of his loss. In some tort actions, however, injury and the amount of loss often cannot be proved with certainty. In these situations, applying the ordinary standard of proof would effectively deny the plaintiff full compensation. "[C]ourts and legislatures literally for centuries have thought that in the generality of cases, libeled plaintiffs will be seriously shortchanged

if they must prove the extent of the injury to their reputations." Gertz v. Robert Welch, Inc., 418 U.S., at 393 (WHITE, J., dissenting). Recognizing this danger, the common law allowed juries in libel actions to presume damages from the fact of publication. Presumed damages were never intended to replace actual damages when these damages were adequate. Rather their purpose was to ensure compensation when injury had likely occurred but was not susceptible of definite proof and certain measurement. Recognizing this purpose, we have noted that presumed damages are appropriate only in situations where both the likelihood of injury and the difficulty of proving it are great. Carey v. Piphus, 435 U.S. 247, 264 (1978).

Gertz itself recognized these difficulties of proof in libel actions. Although we held there that a

jury could award only actual damages against a media defendant unless actual malice were shown, we also held that a jury could be given much discretion in setting the amount of damages: "[J]uries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar amount to the injury." 418 U.S., at 350 (emphasis added). Gertz, then, represents a compromise between presumed and actual damages. While it requires actual proof of injury, it allows the jury to presume the amount of loss.[3] When,

[3]Several procedural safeguards protect defendants from unreasonable awards. For one thing, insofar as damages exceed the amount a jury could reasonably have awarded, the trial court may order a remittitur or a new trial. For another, a defendant may always offer competent evidence of lack of injury and of the amount of damages. In this respect, allowing the jury to presume damages merely allocates some of the burden of proof to the

Footnote continued on next page.

as here, the speech is entitled to reduced First Amendment protection, this balance further shifts in the plaintiff's favor. Accordingly, I would hold that a jury may award presumed damages against a non-media defendant without proof of actual malice.[14]

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defendant. Since the jury can presume damages only after the plaintiff has established liability,making the defendant bear some of the risk of the uncertainty resulting from his actions is not unreasonable.

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: NOV 2 3 1984

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-18

DUN & BRADSTREET, INC., PETITIONERS *v.*
GREENMOSS BUILDERS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

[November ——, 1984]

JUSTICE POWELL, affirming in part and reversing in part.

The Court today extends the constitutional rule of *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), far beyond its origins or its purpose. In that case, the Court for the first time held that the Constitution limits the reach of state laws of libel and slander in suits against media defendants. Limits are needed in such cases, the Court held, to ensure that "debate on public issues . . . be uninhibited, robust, and wide-open." *Id.*, at 270. All of the Court's decisions since then that have considered the constitutional role in defamation law also have involved suits against a media defendant arising out of an article or broadcast on an issue of public concern and importance. The Court today goes beyond these precedents and applies the same constitutional restrictions to a libel action between a construction company and a commercial credit reporting agency. In my view, such a sweeping holding is not required by the First Amendment. Nor is it wise or consistent with precedent.

I

The common law rules that the Court today repudiates are of ancient vintage. The rule that damages are presumed for libel was announced by Hale as early as 1670. *Restatement of Torts* § 568, comment b, at 162 (1938). Punitive damages also long have been available in actions for defamation under

a quite different standard than the one applied today. See, *e. g.*, C. McCormick, Law of Damages § 118, p. 431 (1935); M. Newell, Law of Defamation, Libel and Slander 842, 844–846 (1890) (citing cases). And since at least the early part of this century, a plaintiff in a garden-variety defamation suit could recover without showing any facts as to the state of mind of the defendant. W. Prosser, Law of Torts § 113, pp. 772–773 (4th ed. 1971) (hereinafter Prosser); Restatement (Second) of Torts § 580B, comment b (1977). The common law recognized some privileges, but generally to recover for written expression harmful to reputation the ordinary citizen had to show only falsity and publication.

The rationale of the common law rules has been the experience and judgment of history that "proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact." Prosser § 112, p. 765; accord, *Rowe* v. *Metz*, 195 Colo. 424, 425–426, 579 P. 2d 83, 84 (1978); Note, Developments in the Law—Defamation, 69 Harv. L. Rev. 875, 891–892 (1956). As a result, courts for centuries have allowed juries to presume that some damage occurred from many defamatory utterances and publications.

This accumulated learning is worthy of respect. Moreover, the common law rules were developed in an area of the law that, since the founding of our country, has been the province of the state courts.[1] Even if one disagrees with

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[1]The Framers were familiar with the common law of libel, which had been adopted by the American colonies. See *Gertz*, 418 U. S., at 380–384 (WHITE, J., dissenting); *Roth* v. *United States*, 354 U. S. 476, 482–483, and n. 11 (1957) (13 States allowed prosecution for libel in 1792); *Beauharnais* v. *Illinois*, 343 U. S. 250, 254–255 (1952). See also T. Cooley, Constitutional Limitations 602 (7th ed. 1903); Rutledge, The Law of Defamation: Recent Developments, 32 Alabama Lawyer 409, 410 (1971):

"[T]he law of defamation has been an integral part of the laws of England, the colonies and the states since time immemorial. So many actions have been maintained and judgments recovered under the various laws of libel

these centuries-old rules,[2] this Court should discard them only if they conflict with the rights guaranteed to the people by federal law. Thus, this Court has modified these rules when their operation threatened freedom of the press guaranteed by the First Amendment. More specifically, we have done so in cases in which state law placed at risk "freedom of expression upon public questions." *New York Times* v. *Sullivan*, 376 U. S., at 269. "The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth* v. *United States*, 354 U. S. 476, 484 (1957). "At the core of the First Amendment are certain basic conceptions about the manner in which political discussion in a representative democracy should proceed." *Brown* v. *Hartlage*, 456 U. S. 45, 52 (1982); accord *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 776 (1978) (discussion of "'matters of public concern'" is "at the heart of the First Amendment's protection"). The libel at issue in this case neither threatened the press nor involved any public figure or public issue.

The Court today, contrary to history and precedent, indiscriminately extends the constitutional rule of *New York Times* and *Gertz* to nothing less than the entire field of libel and slander. Henceforth, every action by a former employee complaining of a libelous negative recommendation by an employer,[3] every action by a dealer against a competitor

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that the Constitutional validity of libel actions could be denied only by a Court willing to hold all its predecessors were wrong in their interpretation of the First Amendment and that two hundred years of precedents should be overruled."

[2] As the Court notes, there is room to doubt the wisdom of state laws that permit punitive damages on liberal terms. *Ante*, at 9; see Part IV, *infra*.

[3] *E. g.*, *Calero* v. *Del Chemical Corp.*, 68 Wis. 2d 487, 228 N. W. 2d 737 (1975); *Stuempges* v. *Parke, Davis & Co.*, 297 N. W. 2d 252 (Minn. 1980).

who falsely reports bad service to the manufacturer,[4] every action by a spurned suitor for spreading false rumors about the reasons for his failure,[5] and numerous other actions arising out of back-fence gossip or commercial incompetence[6] will be subject to the same constitutional protections as speech upon matters of the greatest public concern.

The Court's ruling today unnecessarily repudiates the common law and trivializes the First Amendment.[7] This decision is said to be "squarely control[led]" by our opinion in *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974). This mischaracterizes that case, as the facts in it were very different from those here. *Gertz* was a libel suit against a media defendant: a magazine called American Opinion, the monthly outlet of the John Birch Society. The article in question discussed a question of undoubted public importance—whether the prosecution of a policeman was part of a Communist campaign to discredit local law enforcement agencies. The plaintiff was a lawyer tangentially involved in the prosecution

[4] *E. g.*, *Harley-Davidson Motorsports, Inc.* v. *Markley*, 279 Or. 361, 568 P. 2d 1359 (1977).

[5] *E. g.*, *Schomer* v. *Smidt*, 113 Cal. App. 3d 828, 170 Cal. Rptr. 662 (1980).

[6] Suits by disgruntled consumers against credit reporting agencies appear to be disquietingly common. *E. g.*, *Millstone* v. *O'Hanlon Reports, Inc.*, 528 F. 2d 829 (CA8 1976); *Retail Credit Co.* v. *Russell*, 234 Ga. 765, 218 S. E. 2d 54 (1975); *Hood* v. *Dun & Bradstreet, Inc.*, 486 F. 2d 25 (CA5 1973), cert. denied, 415 U. S. 985 (1974); *Grove* v. *Dun & Bradstreet, Inc.*, 438 F. 2d 433 (CA3), cert. denied, 404 U. S. 898 (1971). In enacting the Fair Credit Reporting Act, 15 U. S. C. §§ 1681–1681t, Congress specifically found that "[t]here is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy." *Id.*, § 1681(a)(4).

[7] As one commentator has remarked with respect to "the case of a commercial supplier of credit information that defames a person applying for credit"—the very case before us today—"If the first amendment requirements outlined in *Gertz* apply, there is something clearly wrong with the first amendment or with *Gertz*." Shiffrin, The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment, 78 Nw. L. Rev. 1212, 1268 (1983) [hereinafter Shiffrin].

who, the magazine alleged, was the chief architect of the "frame-up" of the police officer. The article spoke of the lawyer's alleged links to Communist activity. Like every other case in which this Court has considered the constitutional limits on state laws of defamation, *Gertz* involved a media article directly relevant to the effective operation of our system of democratic self-government.

In contrast, the case today is a purely private defamation action against a commercial credit reporting agency that falsely reported to respondent's creditors that respondent was bankrupt. A number of state courts, including the court below, have recognized that the role of the Constitution in regulating state libel law is far more limited when the concerns that activated *New York Times* and *Gertz* are absent. In such a case,

> "[t]here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-censorship by the press. The facts of the present case are wholly without the First Amendment concerns with which the Supreme Court of the United States has been struggling." *Harley-Davidson Motorsports, Inc.* v. *Markley*, 279 Or. 361, 366, 568 P. 2d 1359, 1363 (1977).

Accord, *Rowe* v. *Metz*, 195 Colo. 424, 426, 579 P. 2d 83, 84 (1978) (*Gertz* should not be "blindly applied to the case of a private plaintiff against a nonmedia defendant for a defamation which is essentially private in nature"); *Calero* v. *Del Chemical Corp.*, 68 Wis. 2d 487, 506, 228 N. W. 2d 737, 748 (1975) ("In 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"); *Denny* v. *Mertz*, 106 Wis. 2d 636, 661, 318 N. W. 2d 141, 153, cert. denied, 459 U. S. 883 (1982).

II

This Court on many occasions has recognized that certain kinds of speech are more central to the interests of the First Amendment than others. Obscene speech and "fighting words" have long been accorded no protection. *Roth* v. *United States*, 354 U. S., at 483; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942); see also *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697, 716 (1931) (publication of troop ship sailings during war time may be enjoined); *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 591–592 (1952) (advocating violent overthrow of the government is unprotected speech); *Seattle Times Co.* v. *Rhinehart*, —— U. S. ——, —— (1984). Similarly, "libelous utterances are not within the area of constitutionally protected speech." *Roth*, 354 U. S., at 483; accord, *Gertz*, *supra*, at 340 ("there is no constitutional value in false statements of fact"). In the area of protected speech, the most prominent example of reduced protection for certain kinds of speech concerns commercial speech. Such speech, we have noted, occupies a "subordinate position in the scale of First Amendment values." *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 456 (1978). It also is more easily verifiable and less likely to be deterred by proper regulation. *Virginia Pharmacy Bd.* v. *Virginia Consumer Council*, 425 U. S. 748, 771, n. 24 (1976). Accordingly, it may be regulated in ways that might be impermissible in the realm of noncommercial expression. *Ohralik*, *supra*, at 456; *Central Hudson Gas & Elec.* v. *Public Serv. Comm'n*, 447 U. S. 557, 562–563 (1980).

The Court concedes the above, but appears to believe that commercial speech—defined as advertising that does no more than propose a commercial transaction—is the only type of expression entitled to less than full First Amendment protection. See *ante*, at 18. Our cases suggest otherwise. In the area of defamation law itself, for example, some types of speech are entitled to broader protection than others: speech about public figures receives the full protection of the *New*

York Times standards, while speech about private figures is entitled at most to the lesser standards of our opinion in *Gertz*.

Other areas of the law provide further examples. In *Ohralik* we noted that there are "[n]umerous examples . . . of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, . . . corporate proxy statements, . . . the exchange of price and production information among competitors, . . . and employers' threats of retaliation for the labor activities of employees." 436 U. S., at 456 (citations omitted). Yet similar regulation of political speech is subject to the most rigorous scrutiny. See *Brown* v. *Hartlage*, 456 U. S. 45; *New York Times Co.* v. *Sullivan*, 376 U. S., at 279, n. 19; *Buckley* v. *Valeo*, 424 U. S. 1, 14 (1976). Likewise, while the power of the State to license lawyers, psychiatrists, public school teachers, and investment advisors—all of whom speak for a living—is unquestioned, this Court has held that a law requiring licensing of union organizers is unconstitutional under the First Amendment. *Thomas* v. *Collins*, 323 U. S. 516 (1945); see Shiffrin 1264. See also *Rosenbloom* v. *Metromedia*, 403 U. S. 29, 44 (1971) (opinion of BRENNAN, J.) ("the determinant whether the First Amendment applies to state libel actions is whether the utterance involved concerns an issue of public or general concern"); *Young* v. *American Mini Theatres*, 427 U. S. 50, 70 (1976) (opinion of STEVENS, J.) ("it is manifest that society's interest in protecting this type of expression [nonobscene erotic films] is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate").

III

I do not think it necessary or advisable to attempt to define completely what sorts of speech qualify for reduced constitutional protection. Cf. *Rosenbloom*, *supra*, at 44–45. In accord with the state courts quoted *supra*, at 5, I think it clear that the libelous speech at issue here implicates the First

Amendment at most only tangentially. Petitioner's credit reporting is purely private. It does not appear in a newspaper or magazine of general and regular circulation nor on the broadcast media. See 15 U. S. C. § 80b–2(a)(11)(D) (Investment Advisers Act does not apply to "any bona fide newspaper, news magazine or business or financial publication of general and regular circulation"); cf. *Mills* v. *Alabama*, 384 U. S. 214, 219 (1966); *Saxbe* v. *Washington Post Co.*, 417 U. S. 843, 863–864 (1974) (POWELL, J., dissenting). In fact, petitioner's subscription agreement prevented its clients from disseminating its credit information. This sort of credit reporting is speech solely in the economic interest of the speaker and its business audience, cf. *Central Hudson Gas & Elec.*, 447 U. S., at 561,[8] and this interest justifies no special protection when—as in this case—the speech is wholly false and clearly damaging to the victim's reputation. These factors clearly placed petitioner's credit reporting in "a subordinate position in the scale of First Amendment values." *Ohralik*, 436 U. S., at 456.

In addition, the speech here, like advertising, is hardier and less likely to be deterred by state regulation. See *Virginia Pharmacy Board*, 425 U. S., at 771, n. 24. It is solely motivated by the desire for profit, which, we have noted, is a force less likely to be deterred than others. *Ibid.* Arguably, the reporting here also was more objectively verifiable than speech deserving of greater protection. See *ibid.* In any case, the market provides a powerful incentive to a credit reporting agency to be accurate, since false credit reporting is of no use to creditors. Thus, any incremental "chilling" effect of libel suits would be of decreased significance.[9]

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[8] In addition, as Shiffrin notes, "[t]he interests in individual self-expression, autonomy, and the like are not present here or are present in only an attenuated way." Shiffrin 1268.

[9] The Fifth Circuit Court of Appeals has noted that, while most States provide a qualified privilege against libel suits for commercial credit reporting agencies, in those States that do not there is a thriving credit

IV

Since the speech here does not involve any of the concerns that motivated the Court in *New York Times* and *Gertz*, I conclude that the First Amendment protection is substantially lessened.[10] This requires us to strike a new balance

reporting business and commercial credit transactions are not inhibited. *Hood* v. *Dun & Bradstreet, Inc.*, 486 F. 2d 25, 32 (1973), cert. denied, 415 U. S. 985 (1974). The court cited an empirical study comparing credit transactions in Boise, Idaho, where there is no privilege, with those in Spokane, Washington, where there is one. *Id.*, at 32, and n. 18.

[10] As indicated *supra*, I would not in this case attempt to define the precise boundaries of the realm in which the common law of defamation may operate. The lines will be difficult to draw in some cases. For example, reports of bankruptcies, stock quotations, and other financial items that appear in newspapers and newsletters of general circulation would involve different considerations. Nonetheless, as indicated in the text, the idea that certain kinds of speech are at the core of the First Amendment, while others are on the periphery, is not a new one to courts. See, *e. g.*, *Roth* v. *United States*, 354 U. S. 476; *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447 (1978); *Brown* v. *Hartlage*, 456 U. S. 45; Prosser § 118, p. 822–823. And the lines between media and nonmedia, and between commercial speech and other speech, are not unfamiliar to judges, nor would they be difficult to draw. Certainly the state courts noted *supra*, at 6, have found little difficulty in drawing them. Nor have state and federal courts found great difficulty in drawing similar lines, like the one between public and private figures, that the First Amendment requires. *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974).

I do not think this common law approach is a return to the *ad hoc* resolution of the competing interests at stake in each particular case that we eschewed in *Gertz*. See *supra*, at 343–344, 346. Constitutional protections would apply identically to broad categories of speech, not to individual cases. This kind of broad categorization does not raise the same concerns of bias and the like that might be raised by judicial determinations of which particular articles or publications address issues of "general or public interest," cf. *id.*, at 346. See Shiffrin 1268, n. 327. Moreover, prophylactic rules—such as a direction to err on the side of constitutional protection—might be suggested that would ensure that speech of genuine concern was not restrained.

There is little reason for the Court's anxiety that "an immeasurable volume of litigation" would result from this approach, *ante*, at 13, n. 4. *New York Times* was decided 20 years ago. It left the states free to adhere to

between the interests of the speaker here and the state interest in providing a legal remedy for defamatory falsehood. That state interest, we have said, is "strong and legitimate." *Gertz*, 418 U. S., at 348. A State should not lightly be required to abandon this purpose,

> "for, as MR. JUSTICE STEWART has reminded us, the individual's right to the protection of his own good name 'reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. . . .' *Rosenblatt* v. *Baer*, 383 U. S. 75, 92 (1966) (concurring opinion)." *Id.*, at 341.

At the same time, however, it is necessary to recognize the scope of the state interest. Its purpose, we have noted, "is the compensation of individuals for the harm inflicted on them by defamatory falsehood." *Ibid.* It does not aim to reward victims of falsehood with damages in excess of the harm they have suffered, for the legitimate "state interest extends no further than compensation for actual injury." *Id.*, at 349. It is with this in mind that the new balance should be struck.

A

Punitive damages, unlike presumed damages, are not intended to compensate the tort victim, but rather to punish the tortfeasor and to deter him and others from similar behavior. *Newport* v. *Fact Concerts, Inc.*, 453 U. S. 247, 266–267 (1981); *Electrical Workers* v. *Foust*, 442 U. S. 42, 48 (1979); *Gertz* v. *Robert Welch, Inc.*, 418 U. S., at 350. In

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the common law in nonmedia cases. The "flood-gates" argument simply is not justified in light of this experience. Moreover, the blanket rejection of what has been the prevailing law of defamation is a high price indeed to pay for a bright-line rule that heretofore has never been considered necessary.

essence, punitive damages are "private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." *Ibid.* It is the responsibility of the state, not civil juries, to impose punishment in criminal proceedings pursuant to the rule of law. In levying fines under the name of punitive damages, neither courts nor juries are required to observe the procedural safeguards that the Fifth, Sixth, and Fourteenth Amendments require in criminal proceedings. It is only in civil tort cases that juries have been permitted to impose punishment without any of these constitutional protections. Even in civil penalty proceedings brought by the government, the courts must afford the defendant some of these fundamental protections whenever the purpose is punishment. *United States* v. *United States Coin & Currency*, 401 U. S. 715 (1971); *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U. S. 693 (1965); *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, 165–167 (1963); see Wheeler, The Constitutional Case for Reforming Punitive Damages Procedures, 69 Va. L. Rev. 269, 322–351 (1983). Because it guards against wrongful and arbitrary punishments, the Due Process Clause is a constitutional protection no less necessary and vital to our civil liberties than is the First Amendment.

The most remarkable feature of punitive damages is that the jury is given no real standard in setting them. Guided only by their own notion of what is an appropriate penalty, the jurors are told they are free to award whatever amount they deem sufficient to punish and deter. As a result, their awards often bear no rational relationship to the injury suffered and can reflect more the jury's unguided prejudices than any legitimate punitive interest. They represent "windfall recoveries," *Electrical Workers* v. *Foust*, *supra*, at 50, which, by definition, provide monetary relief "in excess of . . . actual loss," *Scott* v. *Donald*, 165 U. S. 58, 86 (1897). We noted in *Gertz*:

> "In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not

> be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. And they remain free to use their discretion selectively to punish expressions of unpopular views." 418 U. S., at 350.

In recognition of these dangers, many American jurisdictions have modified the traditional common law rule. Under the traditional rule, a jury can award punitive damages to a plaintiff who has shown that the defendant acted with a high degree of culpability. *Smith* v. *Wade*, 461 U. S. 30, 39–48 (1983) (discussing nineteenth century and present law). State courts and commentators have harshly criticized punitive damages because of the dangers they pose to due process concerns. *E. g.*, *Murphy* v. *Hobbs*, 7 Colo. 541, 5 P. 119 (1884); *Stewart* v. *Maddox*, 63 Ind. 51, 57 (1878); *Fay* v. *Parker*, 53 N. H. 342, 390, 16 Am. Rep. 270, 329–330 (1873); 1 J. Bouvier, Law Dictionary, Damages, p. 467 (15th ed. 1883); J. Ghiardi & J. Kircher, Punitive Damages: Law and Practice §§2.12–3.05 (1984); Long, Punitive Damages: An Unsettled Doctrine, 25 Drake L. Rev. 870, 883–889 (1976); Wheeler, *supra*. "Punitive damages," one court has remarked, "destroy every constitutional safeguard within their reach." *Fay* v. *Parker*, *supra*, at 397, 16 Am. Rep., at 338. Recognizing these dangers, a number of jurisdictions have restricted punitive damages or abolished them entirely. At least five states and the Commonwealth of Puerto Rico refuse to allow them in most tort actions. *E. g.*, *Killebrew* v. *Abbott Laboratories*, 359 So. 2d 1275, 1278 (La. 1978); *International Fidelity Insurance Co.* v. *Wilson*, 387 Mass. 841, 856 n. 20, 443 N. E. 2d 1308, 1317 n. 20 (1983); *Burt* v. *Advertiser Newspaper Co.*, 154 Mass. 238, 245, 28 N. E. 1, 5 (1891) (Holmes, J.); *Abel* v. *Conover*, 170 Neb. 926, 929, 104 N. W. 2d 684, 688 (1960); *Vratsenes* v. *N. H. Auto, Inc.*, 112 N. H. 71, 73, 289 A. 2d 66, 68 (1972); *Rivera Santos* v. *Rossi*, 64 P. R. R. 683, 686 (1945); *Maki* v. *Aluminum Building Products*, 73 Wash. 2d 23, 25, 436 P. 2d 186, 187 (1968). Several

other states allow them only insofar as they compensate for intangible injury, *Wise* v. *Daniel*, 221 Mich. 229, 233–234, 190 N. W. 746, 747–748 (1922); *Peisner* v. *Detroit Free Press, Inc.*, 68 Mich. App. 360, 371–373, 242 N. W. 2d 775, 780 (1976), or litigation costs, *Triangle Sheet Metal Works, Inc.* v. *Silver*, 154 Conn. 116, 127, 222 A. 2d 220, 225 (1966), and one state allows them only when the defendant's conduct cannot be punished as a crime, *Koerner* v. *Oberly*, 56 Ind. 284, 287, 26 Am. Rep. 34, 36 (1877); *Glissman* v. *Rutt*, 175 Ind. App. 493, 372 N. E. 2d 1188 (1978). The federal courts also have refused to award punitive damages in certain actions arising under federal law. *Electrical Workers* v. *Foust*, *supra* (labor law). But see *Smith* v. *Wade*, *supra* (allowing punitive damages in § 1983 actions).

In England, the traditional common law rule has undergone a similar evolution. Prior to 1964, a plaintiff could recover punitive damages when the defendant had acted in "contumelious disregard of the plaintiff's rights," particularly when the defendant had injured the plaintiff's dignity and feelings. *Cassell & Co.* v. *Broome*, [1972] A. C. 1027, 1068 (Hailsham, L. C.) (quoting Mayne & McGregor, *Damages* ¶207 (12th ed. 1961)). In *Rookes* v. *Barnard*, [1964] A. C. 1129, the House of Lords, sitting as England's court of last resort, greatly restricted such damages. Instead of allowing juries to award them whenever a defendant has acted oppressively towards the plaintiff, the House of Lords confined these damages to three narrow situations: (i) when government officers act oppressively, arbitrarily, or unconstitutionally, (ii) when the defendant's conduct has been calculated by him to make a profit that may well exceed the compensation payable to plaintiff, and (iii) when such damages are expressly authorized by statute. *Id.*, at 1226–1227. The law lords have not hesitated to apply these limitations to common law libel actions. *Cassell & Co.* v. *Broome*, *supra*.

It is time we follow these overdue developments. In view of the serious constitutional concerns that punitive damages

pose and the absence of any legitimate state interest in providing windfalls to libel plaintiffs, I would hold that a State may not permit recovery of punitive damages in a libel action.[11]

B

Presumed damages stand on a different footing. Unlike punitive damages, their purpose is to compensate, not to punish or deter. C. McCormick, Damages § 116 (1935); 4 J. Berryman, Sutherland on Damages § 1206 (4th ed. 1916); Restatement of Torts § 621 and comment a (1938). Thus, they do serve the State's legitimate interest[12] and may be necessary in order for the State to compensate where actual damages cannot adequately be proved. In most circumstances, the law requires the tort plaintiff to prove the fact and amount of loss. The damages proved are compensatory. In libel actions, however, even injury—in the normal sense—may not be provable and the amount of loss can almost never be proved with certainty. As noted above, it long has been recognized that "proof of actual damages [in a libel action] will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact." *Supra*, at 2. "[C]ourts and legislatures literally for centuries have thought that in the generality of cases, libeled plaintiffs will be seriously shortchanged if they must prove the extent of the injury to their reputations." *Gertz* v.

[11] Statutory multiple damages, such as treble damages under the antitrust laws, 15 U. S. C. § 15(a), do not pose most of these concerns. Unlike common law punitive damages, they are governed by defined standards, limit jury discretion, are subject to effective review on appeal, and are strictly proportionate to the injury suffered. They do not implicate serious due process concerns.

[12] British courts have approved presumed damages, called "at large" damages, in the same cases in which they have restricted punitive damages. *E. g., Cassell & Co.* v. *Broome*, [1972] A. C. 1027, 1073 (Hailsham, L. C.) (libel action); see 28 Hailsham, Halsbury's Laws of England 10 (4th ed. 1979).

Robert Welch, Inc., 418 U. S., at 393 (WHITE, J., dissenting).

For these reasons, the common law since the time of Hale has allowed juries in libel actions to presume damages from the fact of libelous publication. Such damages are not intended to replace actual damages when these can be proved. Rather, the purpose of this presumption in libel cases is to ensure compensation when injury has occurred but is not susceptible of the type of proof and measurement required in most other tort damage suits. Thus, we have noted, presumed damages are appropriate only in situations where both the likelihood of injury and the difficulty of proving it are great. *Carey* v. *Piphus*, 435 U. S. 247, 264 (1978).[13]

Properly understood, the doctrine of presumed damages serves only to shift the traditional allocation of proof. Allowing the jury to presume damages does not imply that it is free to set them at whatever level it believes appropriate. As in any tort action, the jury is duty-bound to follow the evidence in accord with the court's instructions. If the defendant proves that injury did not occur or that it was nominal, there is no basis for presuming damages. Presumed damages, then, shift some of the burden of proof in libel cases from the plaintiff to the defendant, and since the jury can presume damages only after the plaintiff has established liability, this reallocation is not unreasonable. It merely requires the defendant to bear some of the risk of the uncertainty created by his own tortious actions. Accordingly, I

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[13] Many libeled persons suffer losses of reputation that extend long into the future—even into the history books. The truth often never overtakes a published falsehood, and quantifying the extent of the injury and resulting damages presents a unique problem of proof. For the reasons I have stated, permitting a jury—in the absence of standards of any kind—to award punitive damages is an unprincipled answer to this problem. But presumed compensatory damages are a necessary, though imperfect, means of resolving it. A person injured by a libelous utterance—whether by a media or nonmedia defendant—should not go remediless any more than one who suffers a tortious physical injury.

would hold that in a libel action a jury may award presumed damages against a nonmedia defendant—even without proof of actual malice.[14]

V

I would affirm the judgment of the Supreme Court of Vermont as to presumed damages but would reverse its award of punitive damages. Such a course, unlike today's decision, follows salutory developments in the common law. It also respects fundamental constitutional values while remaining faithful to the central concern of common law damages: compensation. By contrast, the Court's decision is both too broad and too narrow to further either of these aims. By unnecessarily abrogating the common law of presumed damages, it withholds a remedy frequently necessary to compensate the libel victim fully. At the same time, the Court promotes no significant First Amendment interest. As stated in *Gertz*, *supra*, at 340, "there is no constitutional value in false statements of fact." On the other hand, by allowing punitive damages in some libel cases, the Court neglects important constitutional interests that can be protected without harming the State's legitimate interest in compensation. The Court identifies no new or overriding societal interest justifying the result it reaches in this case.

In sum, I dissent from the Court's decision both to abrogate the common law of presumed damages and to allow punitive damages against media and nonmedia defendants when actual malice is proved. I would follow the consistent course of the common law for at least three centuries and allow presumed damages against nonmedia defendants without proof of actual malice. I would also follow the evolution of the common law and prohibit punitive damages against any libel defendant.

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[14] In view of the special protection the First Amendment extends to certain kinds of speech, I would adhere to the "actual malice" requirement of *New York Times* and *Gertz* with respect to recovery of presumed damages from media defendants.

In light of these views, I would affirm in part and reverse in part.

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SUPREME COURT OF THE UNITED STATES

No. 83-18

DUN & BRADSTREET, INC., PETITIONERS *v.*
GREENMOSS BUILDERS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF VERMONT

[~~November~~ December —, 1984]

JUSTICE POWELL, affirming in part and reversing in part.

The Court today extends the constitutional rule of *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), far beyond its origins or its purpose. In that case, the Court for the first time held that the Constitution limits the reach of state laws of libel and slander in suits ~~against~~ media ~~defendants.~~ Limits are needed in such cases, the Court held, to ensure that "debate on public issues . . . be uninhibited, robust, and wide-open." *Id.*, at 270. All of the ~~Court's decisions~~ since then ~~that have~~ considered the constitutional role in defamation law also have involved ~~suits against a media defendant arising out of an article or broadcast~~ public expression on an issue of public concern and importance. The Court today goes beyond these precedents and applies the same constitutional restrictions to a libel action between a construction company and a commercial credit reporting agency. In my view, such a sweeping holding is not required by the First Amendment. Nor is it wise or consistent with precedent.

involving — expression
cases
in which the Court has
involving private expression

I

The common law rules that the Court today repudiates are of ancient vintage. The rule that damages are presumed for libel was announced by Hale as early as 1670. *Restatement of Torts* § 568, comment b, at 162 (1938). Punitive damages also long have been available in actions for defamation under

a quite different standard than the one applied today. See, *e. g.*, C. McCormick, Law of Damages § 118, p. 431 (1935); M. Newell, Law of Defamation, Libel and Slander 842, 844–846 (1890) (citing cases). And since at least the early part of this century, a plaintiff in a garden-variety defamation suit could recover without showing any facts as to the state of mind of the defendant. W. Prosser, Law of Torts § 113, pp. 772–773 (4th ed. 1971) (hereinafter Prosser); Restatement (Second) of Torts § 580B, comment b (1977). The common law recognized some privileges, but generally to recover for written expression harmful to reputation the ordinary citizen had to show only falsity and publication.

The rationale of the common law rules has been the experience and judgment of history that "proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact." Prosser § 112, p. 765; accord, *Rowe* v. *Metz*, 195 Colo. 424, 425–426, 579 P. 2d 83, 84 (1978); Note, Developments in the Law—Defamation, 69 Harv. L. Rev. 875, 891–892 (1956). As a result, courts for centuries have allowed juries to presume that some damage occurred from many defamatory utterances and publications.

This accumulated learning is worthy of respect. Moreover, the common law rules were developed in an area of the law that, since the founding of our country, has been the province of the state courts.[1] Even if one disagrees with

[1] The Framers were familiar with the common law of libel, which had been adopted by the American colonies. See *Gertz*, 418 U. S., at 380–384 (WHITE, J., dissenting); *Roth* v. *United States*, 354 U. S. 476, 482–483, and n. 11 (1957) (13 States allowed prosecution for libel in 1792); *Beauharnais* v. *Illinois*, 343 U. S. 250, 254–255 (1952). See also T. Cooley, Constitutional Limitations 602 (7th ed. 1903); Rutledge, The Law of Defamation: Recent Developments, 32 Alabama Lawyer 409, 410 (1971):

"[T]he law of defamation has been an integral part of the laws of England, the colonies and the states since time immemorial. So many actions have been maintained and judgments recovered under the various laws of libel

these centuries-old rules,[2] this Court should discard them only if they conflict with the rights guaranteed to the people by federal law. Thus, this Court has modified these rules when their operation threatened freedom of the press guaranteed by the First Amendment. More specifically, we have done so in cases in which state law placed at risk "freedom of expression upon public questions." *New York Times* v. *Sullivan*, 376 U. S., at 269. "The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth* v. *United States*, 354 U. S. 476, 484 (1957). "At the core of the First Amendment are certain basic conceptions about the manner in which political discussion in a representative democracy should proceed." *Brown* v. *Hartlage*, 456 U. S. 45, 52 (1982); accord *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 776 (1978) (discussion of "'matters of public concern'" is "at the heart of the First Amendment's protection"). The libel at issue in this case neither threatened ~~the press~~ nor involved any public figure or public issue.

The Court today, contrary to history and precedent, indiscriminately extends the constitutional rule of *New York Times* and *Gertz* to nothing less than the entire field of libel and slander. Henceforth, every action by a former employee complaining of a libelous negative recommendation by an employer,[3] every action by a dealer against a competitor

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that the Constitutional validity of libel actions could be denied only by a Court willing to hold all its predecessors were wrong in their interpretation of the First Amendment and that two hundred years of precedents should be overruled."

[2] As the Court notes, there is room to doubt the wisdom of state laws that permit punitive damages on liberal terms. *Ante*, at 9; see Part IV, *infra*.

[3] *E. g.*, *Calero* v. *Del Chemical Corp.*, 68 Wis. 2d 487, 228 N. W. 2d 737 (1975); *Stuempges* v. *Parke, Davis & Co.*, 297 N. W. 2d 252 (Minn. 1980).

who falsely reports bad service to the manufacturer,[4] every action by a spurned suitor for spreading false rumors about the reasons for his failure,[5] and numerous other actions arising out of back-fence gossip or commercial incompetence[6] will be subject to the same constitutional protections as speech upon matters of the greatest public concern.

The Court's ruling today unnecessarily repudiates the common law and trivializes the First Amendment.[7] This decision is said to be "squarely control[led]" by our opinion in *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974). This mischaracterizes that case, as the facts in it were very different from those here. *Gertz* was a libel suit ~~against a media defendant~~ appearing in a magazine called American Opinion, the monthly outlet of the John Birch Society. The article in question discussed a question of undoubted public importance—whether the prosecution of a policeman was part of a Communist campaign to discredit local law enforcement agencies. The plaintiff was a lawyer tangentially involved in the prosecution

[4] *E. g.*, *Harley-Davidson Motorsports, Inc.* v. *Markley*, 279 Or. 361, 568 P. 2d 1359 (1977).

[5] *E. g.*, *Schomer* v. *Smidt*, 113 Cal. App. 3d 828, 170 Cal. Rptr. 662 (1980).

[6] Suits by disgruntled consumers against credit reporting agencies appear to be disquietingly common. *E. g.*, *Millstone* v. *O'Hanlon Reports, Inc.*, 528 F. 2d 829 (CA8 1976); *Retail Credit Co.* v. *Russell*, 234 Ga. 765, 218 S. E. 2d 54 (1975); *Hood* v. *Dun & Bradstreet, Inc.*, 486 F. 2d 25 (CA5 1973), cert. denied, 415 U. S. 985 (1974); *Grove* v. *Dun & Bradstreet, Inc.*, 438 F. 2d 433 (CA3), cert. denied, 404 U. S. 898 (1971). In enacting the Fair Credit Reporting Act, 15 U. S. C. §§ 1681–1681t, Congress specifically found that "[t]here is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy." *Id.*, § 1681(a)(4).

[7] As one commentator has remarked with respect to "the case of a commercial supplier of credit information that defames a person applying for credit"—the very case before us today—"If the first amendment requirements outlined in *Gertz* apply, there is something clearly wrong with the first amendment or with *Gertz*." Shiffrin, The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment, 78 Nw. L. Rev. 1212, 1268 (1983) [hereinafter Shiffrin].

who, the magazine alleged, was the chief architect of the "frame-up" of the police officer. The article spoke of the lawyer's alleged links to Communist activity. Like every other case in which this Court has considered the constitutional limits on state laws of defamation, *Gertz* involved ~~a media article~~ public expression directly relevant to the effective operation of our system of democratic self-government.

In contrast, the case today is a purely private defamation action against a commercial credit reporting agency that falsely reported to respondent's creditors that respondent was bankrupt. A number of state courts, including the court below, have recognized that the role of the Constitution in regulating state libel law is far more limited when the concerns that activated *New York Times* and *Gertz* are absent.[8] In such a case,

> "[t]here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-censorship by the press. The facts of the present case are wholly without the First Amendment concerns with which the Supreme Court of the United States has been struggling." *Harley-Davidson Motorsports, Inc.* v. *Markley*, 279 Or. 361, 366, 568 P. 2d 1359, 1363 (1977).

Accord, *Rowe* v. *Metz*, 195 Colo. 424, 426, 579 P. 2d 83, 84 (1978) (*Gertz* should not be "blindly applied to the case of a private plaintiff against a nonmedia defendant for a defamation which is essentially private in nature"); *Calero* v. *Del Chemical Corp.*, 68 Wis. 2d 487, 506, 228 N. W. 2d 737, 748 (1975) ("In 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"); *Denny* v. *Mertz*, 106 Wis. 2d 636, 661, 318 N. W. 2d 141, 153, cert. denied, 459 U. S. 883 (1982).

[8] – footnote 8 is what used to be footnote 7 on previous page

II

This Court on many occasions has recognized that certain kinds of speech are more central to the interests of the First Amendment than others. Obscene speech and "fighting words" have long been accorded no protection. *Roth* v. *United States*, 354 U. S., at 483; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942); see also *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697, 716 (1931) (publication of troop ship sailings during war time may be enjoined); *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 591–592 (1952) (advocating violent overthrow of the government is unprotected speech); *Seattle Times Co.* v. *Rhinehart*, —— U. S. ——, —— (1984). Similarly, "libelous utterances are not within the area of constitutionally protected speech." *Roth*, 354 U. S., at 483; accord, *Gertz*, *supra*, at 340 ("there is no constitutional value in false statements of fact"). In the area of protected speech, the most prominent example of reduced protection for certain kinds of speech concerns commercial speech. Such speech, we have noted, occupies a "subordinate position in the scale of First Amendment values." *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 456 (1978). It also is more easily verifiable and less likely to be deterred by proper regulation. *Virginia Pharmacy Bd.* v. *Virginia Consumer Council*, 425 U. S. 748, 771, n. 24 (1976). Accordingly, it may be regulated in ways that might be impermissible in the realm of noncommercial expression. *Ohralik*, *supra*, at 456; *Central Hudson Gas & Elec.* v. *Public Serv. Comm'n*, 447 U. S. 557, 562–563 (1980).

The Court concedes the above, but appears to believe that commercial speech—defined as advertising that does no more than propose a commercial transaction—is the only type of expression entitled to less than full First Amendment protection. See *ante*, at 18. Our cases suggest otherwise. In the area of defamation law itself, for example, some types of speech are entitled to broader protection than others: speech about public figures receives the full protection of the *New*

York Times standards, while speech about private figures is entitled at most to the lesser standards of our opinion in *Gertz*.

Other areas of the law provide further examples. In *Ohralik* we noted that there are "[n]umerous examples . . . of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, . . . corporate proxy statements, . . . the exchange of price and production information among competitors, . . . and employers' threats of retaliation for the labor activities of employees." 436 U. S., at 456 (citations omitted). Yet similar regulation of political speech is subject to the most rigorous scrutiny. See *Brown* v. *Hartlage*, 456 U. S. 45; *New York Times Co.* v. *Sullivan*, 376 U. S., at 279, n. 19; *Buckley* v. *Valeo*, 424 U. S. 1, 14 (1976). Likewise, while the power of the State to license lawyers, psychiatrists, public school teachers, and investment advisors—all of whom speak for a living—is unquestioned, this Court has held that a law requiring licensing of union organizers is unconstitutional under the First Amendment. *Thomas* v. *Collins*, 323 U. S. 516 (1945); see Shiffrin 1264. See also *Rosenbloom* v. *Metromedia*, 403 U. S. 29, 44 (1971) (opinion of BRENNAN, J.) ("the determinant whether the First Amendment applies to state libel actions is whether the utterance involved concerns an issue of public or general concern"); *Young* v. *American Mini Theatres*, 427 U. S. 50, 70 (1976) (opinion of STEVENS, J.) ("it is manifest that society's interest in protecting this type of expression [nonobscene erotic films] is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate").

III

I do not think it necessary or advisable to attempt to define completely what sorts of speech qualify for reduced constitutional protection. Cf. *Rosenbloom*, *supra*, at 44–45. In accord with the state courts quoted *supra*, at 5, I think it clear that the libelous speech at issue here implicates the First

Amendment at most only tangentially. Petitioner's credit reporting is purely private. It does not appear in a newspaper or magazine of general and regular circulation nor on the broadcast media. See 15 U. S. C. § 80b–2(a)(11)(D) (Investment Advisers Act does not apply to "any bona fide newspaper, news magazine or business or financial publication of general and regular circulation"); cf. *Mills* v. *Alabama*, 384 U. S. 214, 219 (1966); *Saxbe* v. *Washington Post Co.*, 417 U. S. 843, 863–864 (1974) (POWELL, J., dissenting). In fact, petitioner's subscription agreement prevented its clients from disseminating its credit information. This sort of credit reporting is speech solely in the economic interest of the speaker and its business audience, cf. *Central Hudson Gas & Elec.*, 447 U. S., at 561,[9] and this interest justifies no special protection when—as in this case—the speech is wholly false and clearly damaging to the victim's reputation. These factors clearly placed petitioner's credit reporting in "a subordinate position in the scale of First Amendment values." *Ohralik*, 436 U. S., at 456.

In addition, the speech here, like advertising, is hardier and less likely to be deterred by state regulation. See *Virginia Pharmacy Board*, 425 U. S., at 771, n. 24. It is solely motivated by the desire for profit, which, we have noted, is a force less likely to be deterred than others. *Ibid.* Arguably, the reporting here also was more objectively verifiable than speech deserving of greater protection. See *ibid.* In any case, the market provides a powerful incentive to a credit reporting agency to be accurate, since false credit reporting is of no use to creditors. Thus, any incremental "chilling" effect of libel suits would be of decreased significance.[10]

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[9] In addition, as Shiffrin notes, "[t]he interests in individual self-expression, autonomy, and the like are not present here or are present in only an attenuated way." Shiffrin 1268.

[10] The Fifth Circuit Court of Appeals has noted that, while most States provide a qualified privilege against libel suits for commercial credit reporting agencies, in those States that do not there is a thriving credit

IV

Since the speech here does not involve any of the concerns that motivated the Court in *New York Times* and *Gertz*, I conclude that the First Amendment protection is substantially lessened.[10] This requires us to strike a new balance

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reporting business and commercial credit transactions are not inhibited. *Hood* v. *Dun & Bradstreet, Inc.*, 486 F. 2d 25, 32 (1973), cert. denied, 415 U. S. 985 (1974). The court cited an empirical study comparing credit transactions in Boise, Idaho, where there is no privilege, with those in Spokane, Washington, where there is one. *Id.*, at 32, and n. 18.

[10] As indicated *supra*, I would not in this case attempt to define the precise boundaries of the realm in which the common law of defamation may operate. The lines will be difficult to draw in some cases. For example, reports of bankruptcies, stock quotations, and other financial items that appear in newspapers and newsletters of general circulation would involve different considerations. Nonetheless, as indicated in the text, the idea that certain kinds of speech are at the core of the First Amendment, while others are on the periphery, is not a new one to courts. See, *e. g.*, *Roth* v. *United States*, 354 U. S. 476; *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447 (1978); *Brown* v. *Hartlage*, 456 U. S. 45; Prosser § 118, p. 822–823. And the lines between ~~media~~ and ~~nonmedia~~, and between commercial speech and other speech, are not unfamiliar to judges, nor would they be difficult to draw. Certainly the state courts noted *supra*, at 6, have found little difficulty in drawing them. Nor have state and federal courts found great difficulty in drawing similar lines, like the one between public and private figures, that the First Amendment requires. *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974).

I do not think this common law approach is a return to the *ad hoc* resolution of the competing interests at stake in each particular case that we eschewed in *Gertz*. See *supra*, at 343–344, 346. Constitutional protections would apply identically to broad categories of speech, not to individual cases. This kind of broad categorization does not raise the same concerns of bias and the like that might be raised by judicial determinations of which particular articles or publications address issues of "general or public interest," cf. *id.*, at 346. See Shiffrin 1268, n. 327. Moreover, prophylactic rules—such as a direction to err on the side of constitutional protection—might be suggested that would ensure that speech of genuine concern was not restrained.

There is little reason for the Court's anxiety that "an immeasurable volume of litigation" would result from this approach, *ante*, at 13, n. 4. *New York Times* was decided 20 years ago. It left the states free to adhere to

between the interests of the speaker here and the state interest in providing a legal remedy for defamatory falsehood. That state interest, we have said, is "strong and legitimate." *Gertz*, 418 U. S., at 348. A State should not lightly be required to abandon this purpose,

> "for, as MR. JUSTICE STEWART has reminded us, the individual's right to the protection of his own good name 'reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. . . .' *Rosenblatt* v. *Baer*, 383 U. S. 75, 92 (1966) (concurring opinion)." *Id.*, at 341.

At the same time, however, it is necessary to recognize the scope of the state interest. Its purpose, we have noted, "is the compensation of individuals for the harm inflicted on them by defamatory falsehood." *Ibid.* It does not aim to reward victims of falsehood with damages in excess of the harm they have suffered, for the legitimate "state interest extends no further than compensation for actual injury." *Id.*, at 349. It is with this in mind that the new balance should be struck.

A

Punitive damages, unlike presumed damages, are not intended to compensate the tort victim, but rather to punish the tortfeasor and to deter him and others from similar behavior. *Newport* v. *Fact Concerts, Inc.*, 453 U. S. 247, 266–267 (1981); *Electrical Workers* v. *Foust*, 442 U. S. 42, 48 (1979); *Gertz* v. *Robert Welch, Inc.*, 418 U. S., at 350. In

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the common law in ~~nonmedia~~ cases. The "flood-gates" argument simply is not justified in light of this experience. Moreover, the blanket rejection of what has been the prevailing law of defamation is a high price indeed to pay for a bright-line rule that heretofore has never been considered necessary.

involving private expression

essence, punitive damages are "private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." *Ibid.* It is the responsibility of the state, not civil juries, to impose punishment in criminal proceedings pursuant to the rule of law. In levying fines under the name of punitive damages, neither courts nor juries are required to observe the procedural safeguards that the Fifth, Sixth, and Fourteenth Amendments require in criminal proceedings. It is only in civil tort cases that juries have been permitted to impose punishment without any of these constitutional protections. Even in civil penalty proceedings brought by the government, the courts must afford the defendant some of these fundamental protections whenever the purpose is punishment. *United States* v. *United States Coin & Currency*, 401 U. S. 715 (1971); *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U. S. 693 (1965); *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, 165–167 (1963); see Wheeler, The Constitutional Case for Reforming Punitive Damages Procedures, 69 Va. L. Rev. 269, 322–351 (1983). Because it guards against wrongful and arbitrary punishments, the Due Process Clause is a constitutional protection no less necessary and vital to our civil liberties than is the First Amendment.

The most remarkable feature of punitive damages is that the jury is given no real standard in setting them. Guided only by their own notion of what is an appropriate penalty, the jurors are told they are free to award whatever amount they deem sufficient to punish and deter. As a result, their awards often bear no rational relationship to the injury suffered and can reflect more the jury's unguided prejudices than any legitimate punitive interest. They represent "windfall recoveries," *Electrical Workers* v. *Foust*, *supra*, at 50, which, by definition, provide monetary relief "in excess of . . . actual loss," *Scott* v. *Donald*, 165 U. S. 58, 86 (1897).[12] We noted in *Gertz*:

> "In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not

[12] The material for footnote 12 is Rider B in file DUNBRADA.

> be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. And they remain free to use their discretion selectively to punish expressions of unpopular views." 418 U. S., at 350.

In recognition of these dangers, many American jurisdictions have modified the traditional common law rule. Under the traditional rule, a jury can award punitive damages to a plaintiff who has shown that the defendant acted with a high degree of culpability. *Smith* v. *Wade*, 461 U. S. 30, 39–48 (1983) (discussing nineteenth century and present law). State courts and commentators have harshly criticized punitive damages because of the dangers they pose to due process concerns. *E. g.*, *Murphy* v. *Hobbs*, 7 Colo. 541, 5 P. 119 (1884); *Stewart* v. *Maddox*, 63 Ind. 51, 57 (1878); *Fay* v. *Parker*, 53 N. H. 342, 390, 16 Am. Rep. 270, 329–330 (1873); 1 J. Bouvier, Law Dictionary, Damages, p. 467 (15th ed. 1883); J. Ghiardi & J. Kircher, Punitive Damages: Law and Practice §§ 2.12–3.05 (1984); Long, Punitive Damages: An Unsettled Doctrine, 25 Drake L. Rev. 870, 883–889 (1976); Wheeler, *supra*. "Punitive damages," one court has remarked, "destroy every constitutional safeguard within their reach." *Fay* v. *Parker*, *supra*, at 397, 16 Am. Rep., at 338. Recognizing these dangers, a number of jurisdictions have restricted punitive damages or abolished them entirely. At least five states and the Commonwealth of Puerto Rico refuse to allow them in most tort actions. *E. g.*, *Killebrew* v. *Abbott Laboratories*, 359 So. 2d 1275, 1278 (La. 1978); *International Fidelity Insurance Co.* v. *Wilson*, 387 Mass. 841, 856 n. 20, 443 N. E. 2d 1308, 1317 n. 20 (1983); *Burt* v. *Advertiser Newspaper Co.*, 154 Mass. 238, 245, 28 N. E. 1, 5 (1891) (Holmes, J.); *Abel* v. *Conover*, 170 Neb. 926, 929, 104 N. W. 2d 684, 688 (1960); *Vratsenes* v. *N. H. Auto, Inc.*, 112 N. H. 71, 73, 289 A. 2d 66, 68 (1972); *Rivera Santos* v. *Rossi*, 64 P. R. R. 683, 686 (1945); *Maki* v. *Aluminum Building Products*, 73 Wash. 2d 23, 25, 436 P. 2d 186, 187 (1968). Several

other states allow them only insofar as they compensate for intangible injury, *Wise* v. *Daniel*, 221 Mich. 229, 233–234, 190 N. W. 746, 747–748 (1922); *Peisner* v. *Detroit Free Press, Inc.*, 68 Mich. App. 360, 371–373, 242 N. W. 2d 775, 780 (1976), or litigation costs, *Triangle Sheet Metal Works, Inc.* v. *Silver*, 154 Conn. 116, 127, 222 A. 2d 220, 225 (1966), and one state allows them only when the defendant's conduct cannot be punished as a crime, *Koerner* v. *Oberly*, 56 Ind. 284, 287, 26 Am. Rep. 34, 36 (1877); *Glissman* v. *Rutt*, 175 Ind. App. 493, 372 N. E. 2d 1188 (1978). The federal courts also have refused to award punitive damages in certain actions arising under federal law. *Electrical Workers* v. *Foust*, *supra* (labor law). But see *Smith* v. *Wade*, *supra* (allowing punitive damages in § 1983 actions).

In England, the traditional common law rule has undergone a similar evolution. Prior to 1964, a plaintiff could recover punitive damages when the defendant had acted in "contumelious disregard of the plaintiff's rights," particularly when the defendant had injured the plaintiff's dignity and feelings. *Cassell & Co.* v. *Broome*, [1972] A. C. 1027, 1068 (Hailsham, L. C.) (quoting Mayne & McGregor, *Damages* ¶207 (12th ed. 1961)). In *Rookes* v. *Barnard*, [1964] A. C. 1129, the House of Lords, sitting as England's court of last resort, greatly restricted such damages. Instead of allowing juries to award them whenever a defendant has acted oppressively towards the plaintiff, the House of Lords confined these damages to three narrow situations: (i) when government officers act oppressively, arbitrarily, or unconstitutionally, (ii) when the defendant's conduct has been calculated by him to make a profit that may well exceed the compensation payable to plaintiff, and (iii) when such damages are expressly authorized by statute. *Id.*, at 1226–1227. The law lords have not hesitated to apply these limitations to common law libel actions. *Cassell & Co.* v. *Broome*, *supra*.

It is time we follow these overdue developments. In view of the serious constitutional concerns that punitive damages

pose and the absence of any legitimate state interest in providing windfalls to libel plaintiffs, I would hold that a State may not permit recovery of punitive damages in a libel action.[13]

B

Presumed damages stand on a different footing. Unlike punitive damages, their purpose is to compensate, not to punish or deter. C. McCormick, Damages § 116 (1935); 4 J. Berryman, Sutherland on Damages § 1206 (4th ed. 1916); Restatement of Torts § 621 and comment a (1938). Thus, they do serve the State's legitimate interest[14] and may be necessary in order for the State to compensate where actual damages cannot adequately be proved. In most circumstances, the law requires the tort plaintiff to prove the fact and amount of loss. The damages proved are compensatory. In libel actions, however, even injury—in the normal sense—may not be provable and the amount of loss can almost never be proved with certainty. As noted above, it long has been recognized that "proof of actual damages [in a libel action] will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact." *Supra*, at 2. "[C]ourts and legislatures literally for centuries have thought that in the generality of cases, libeled plaintiffs will be seriously shortchanged if they must prove the extent of the injury to their reputations." *Gertz* v.

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[13] Statutory multiple damages, such as treble damages under the antitrust laws, 15 U. S. C. § 15(a), do not pose most of these concerns. Unlike common law punitive damages, they are governed by defined standards, limit jury discretion, are subject to effective review on appeal, and are strictly proportionate to the injury suffered. They do not implicate serious due process concerns.

[14] British courts have approved presumed damages, called "at large" damages, in the same cases in which they have restricted punitive damages. *E. g., Cassell & Co.* v. *Broome*, [1972] A. C. 1027, 1073 (Hailsham, L. C.) (libel action); see 28 Hailsham, Halsbury's Laws of England 10 (4th ed. 1979).

Robert Welch, Inc., 418 U. S., at 393 (WHITE, J., dissenting).[15]

For these reasons, the common law since the time of Hale has allowed juries in libel actions to presume damages from the fact of libelous publication. Such damages are not intended to replace actual damages when these can be proved. Rather, the purpose of this presumption in libel cases is to ensure compensation when injury has occurred but is not susceptible of the type of proof and measurement required in most other tort damage suits. Thus, we have noted, presumed damages are appropriate only in situations where both the likelihood of injury and the difficulty of proving it are great. *Carey* v. *Piphus*, 435 U. S. 247, 264 (1978).[16]

Properly understood, the doctrine of presumed damages serves only to shift the traditional allocation of proof. Allowing the jury to presume damages does not imply that it is free to set them at whatever level it believes appropriate. As in any tort action, the jury is duty-bound to follow the evidence in accord with the court's instructions. If the defendant proves that injury did not occur or that it was nominal, there is no basis for presuming damages. Presumed damages, then, shift some of the burden of proof in libel cases from the plaintiff to the defendant, and since the jury can presume damages only after the plaintiff has established liability, this reallocation is not unreasonable. It merely requires the defendant to bear some of the risk of the uncertainty created by his own tortious actions. Accordingly, I

[16] Many libeled persons suffer losses of reputation that extend long into the future—even into the history books. The truth often never overtakes a published falsehood, and quantifying the extent of the injury and resulting damages presents a unique problem of proof. For the reasons I have stated, permitting a jury—in the absence of standards of any kind—to award punitive damages is an unprincipled answer to this problem. But presumed compensatory damages are a necessary, though imperfect, means of resolving it. A person injured by a libelous utterance—whether by a media or nonmedia defendant—should not go remediless any more than one who suffers a tortious physical injury.

Material for footnote 15 appears in Rider C in file DUNBRADA.

would hold that in a libel action involving private expression a jury may award presumed damages ~~against a nonmedia defendant~~—even without proof of actual malice.[17]

V

I would affirm the judgment of the Supreme Court of Vermont as to presumed damages but would reverse its award of punitive damages. Such a course, unlike today's decision, follows salutary developments in the common law. It also respects fundamental constitutional values while remaining faithful to the central concern of common law damages: compensation. By contrast, the Court's decision is both too broad and too narrow to further either of these aims. By unnecessarily abrogating the common law of presumed damages, it withholds a remedy frequently necessary to compensate the libel victim fully. At the same time, the Court promotes no significant First Amendment interest. As stated in *Gertz*, *supra*, at 340, "there is no constitutional value in false statements of fact." On the other hand, by allowing punitive damages in some libel cases, the Court neglects important constitutional interests that can be protected without harming the State's legitimate interest in compensation. The Court identifies no new or overriding societal interest justifying the result it reaches in this case.

In sum, I dissent from the Court's decision both to abrogate the common law of presumed damages and to allow punitive damages ~~against media and nonmedia defendants~~ when actual malice is proved. I would follow the consistent course of the common law for at least three centuries and allow presumed damages in cases involving private expression ~~against nonmedia defendants~~ without proof of actual malice. I would also follow the evolution of the common law and prohibit punitive damages against any libel defendant.

[17] In view of the special protection the First Amendment extends to certain kinds of speech, I would adhere to the "actual malice" requirement of *New York Times* and *Gertz* with respect to recovery of presumed damages ~~from media defendants~~ in cases involving public expression.

In light of these views, I would affirm in part and reverse in part.

File

lfp/ss 12/20/84 Rider A, p. 4 (Dun & Brandstreet)

DUN4 SALLY-POW

Dan: Perhaps we can make the reply to WJB's "string cite" of cases (p. 22, n. 10) somewhat more specific than your draft of our new note 7, p. 4. Here is a rough try.

The Court, commenting on my dissent, argues that its decision does not "unnecessarily" burden[] the libel laws of the states. It says that "35 of the 42 states that have considered the issue have not distinguished between 'media' and 'non-media' defendants . . ." Ante, n. 10, p. 22. An examination of the state court decisions cited makes clear that they lend support only tangentially - if at all - to the Court's statement. Gertz was decided June 24, 1974. A majority of the cases cited by the Court

rest on state court interpretation of that decision. These cases indicate at most what the state courts believed the federal Constitution require, not what the common law would have required prior to Gertz.

Moreover, though not invariably clear, these cases involved public expression pertaining to "public questions". See New York Times v. Sullivan, 764 U.S. at 269. This is a critical distinction. The case before us today involves libel per se by one private party against another on a subject of no interest whatever to "political discussion" in a representative democracy." Brown v. Hartlage, 456 U.S., at 52. The Court's decision therefore does seriously and unnecessarily burden the libel laws of most states.

Note to Dan: If the foregoing is substantially accurate as to the cases WJB cites, it is a forceful response. But I do not wish to make an unfair response. Please review this in mind, and also feel free to clarify the language as you think best.

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12/19

4, 12, 17 Dan Ortiz x. 3073
26 copies
new footnote 7 is in file
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N.B. Don't worry about the red lines marked on the sides, as below. There were for my own use.
—Dan

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: _____

Recirculated: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83–18

DUN & BRADSTREET, INC., PETITIONERS *v.*
GREENMOSS BUILDERS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

[December ——, 1984]

JUSTICE POWELL, affirming in part and reversing in part.

The Court today extends the constitutional rule of *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), far beyond its origins or its purpose. In that case, the Court for the first time held that the Constitution limits the reach of state laws of libel and slander in suits involving media expression. Limits are needed in such cases, the Court held, to ensure that "debate on public issues . . . be uninhibited, robust, and wide-open." *Id.*, at 270. All of the cases since then in which the Court has considered the constitutional role in defamation law also have involved public expression on an issue of public concern and importance. The Court today goes beyond these precedents and applies the same constitutional restrictions to a libel action involving private expression between a construction company and a commercial credit reporting agency. In my view, such a sweeping holding is not required by the First Amendment. Nor is it wise or consistent with precedent.

I

The common law rules that the Court today repudiates are of ancient vintage. The rule that damages are presumed for libel was announced by Hale as early as 1670. *Restatement of Torts* § 568, comment b, at 162 (1938). Punitive damages also long have been available in actions for defamation under

15, 16, 17, 18

1, 3, 4, 5, 8, 9, 10, 12,

a quite different standard than the one applied today. See, *e. g.*, C. McCormick, Law of Damages § 118, p. 431 (1935); M. Newell, Law of Defamation, Libel and Slander 842, 844–846 (1890) (citing cases). And since at least the early part of this century, a plaintiff in a garden-variety defamation suit could recover without showing any facts as to the state of mind of the defendant. W. Prosser, Law of Torts § 113, pp. 772–773 (4th ed. 1971) (hereinafter Prosser); Restatement (Second) of Torts § 580B, comment b (1977). The common law recognized some privileges, but generally to recover for written expression harmful to reputation the ordinary citizen had to show only falsity and publication.

The rationale of the common law rules has been the experience and judgment of history that "proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact." Prosser § 112, p. 765; accord, *Rowe* v. *Metz*, 195 Colo. 424, 425–426, 579 P. 2d 83, 84 (1978); Note, Developments in the Law—Defamation, 69 Harv. L. Rev. 875, 891–892 (1956). As a result, courts for centuries have allowed juries to presume that some damage occurred from many defamatory utterances and publications.

This accumulated learning is worthy of respect. Moreover, the common law rules were developed in an area of the law that, since the founding of our country, has been the province of the state courts.[1] Even if one disagrees with

[1] The Framers were familiar with the common law of libel, which had been adopted by the American colonies. See *Gertz*, 418 U. S., at 380–384 (WHITE, J., dissenting); *Roth* v. *United States*, 354 U. S. 476, 482–483, and n. 11 (1957) (13 States allowed prosecution for libel in 1792); *Beauharnais* v. *Illinois*, 343 U. S. 250, 254–255 (1952). See also T. Cooley, Constitutional Limitations 602 (7th ed. 1903); Rutledge, The Law of Defamation: Recent Developments, 32 Alabama Lawyer 409, 410 (1971):

"[T]he law of defamation has been an integral part of the laws of England, the colonies and the states since time immemorial. So many actions have been maintained and judgments recovered under the various laws of libel

these centuries-old rules,[2] this Court should discard them only if they conflict with the rights guaranteed to the people by federal law. Thus, this Court has modified these rules when their operation threatened freedom of speech and of the press guaranteed by the First Amendment. More specifically, we have done so in cases in which state law placed at risk "freedom of expression upon public questions." *New York Times* v. *Sullivan*, 376 U. S., at 269. "The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth* v. *United States*, 354 U. S. 476, 484 (1957). "At the core of the First Amendment are certain basic conceptions about the manner in which political discussion in a representative democracy should proceed." *Brown* v. *Hartlage*, 456 U. S. 45, 52 (1982); accord *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 776 (1978) (discussion of "'matters of public concern'" is "at the heart of the First Amendment's protection"). The libel at issue in this case neither threatened public expression nor involved any public figure or public issue.

The Court today, contrary to history and precedent, indiscriminately extends the constitutional rule of *New York Times* and *Gertz* to nothing less than the entire field of libel and slander. Henceforth, every action by a former employee complaining of a libelous negative recommendation by an employer,[3] every action by a dealer against a competitor

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that the Constitutional validity of libel actions could be denied only by a Court willing to hold all its predecessors were wrong in their interpretation of the First Amendment and that two hundred years of precedents should be overruled."

[2] As the Court notes, there is room to doubt the wisdom of state laws that permit punitive damages on liberal terms. *Ante*, at 9; see Part IV, *infra*.

[3] *E. g.*, *Calero* v. *Del Chemical Corp.*, 68 Wis. 2d 487, 228 N. W. 2d 737 (1975); *Stuempges* v. *Parke, Davis & Co.*, 297 N. W. 2d 252 (Minn. 1980).

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7/1 The Court, commenting on my dissent, argues that its decision does not "unnecessarily" burde[n] the libel laws of the states. Ante, at 22 n. 10. It says that "35 of the 42 states that have considered the issue have not distinguished between 'media' and 'non-media' defendants ...." Ibid. An examination of the state court decisions cited makes clear that they lend support only tangentially--if at all--to the Court's statement. Gertz was decided on June 25, 1974 and New York Times on March 9, 1964. A majority of the cases cited by the Court rest on state court interpretation of those decisions. These state cases indicate at most what the state courts believed the federal Constitution requires, not what the common law would have required prior to New York Times and Gertz.

Moreover, though not invariably clear, these cases involved public expression on "public questions". See New York Times Co. v. Sullivan, 376 U.S., at 269. This is a critical distinction. The case before us today involves a privately communicated libel by one private party against another on a subject of little First Amendment concern. The Court's decision, therefore, does seriously and unnecessarily burden the libel laws of most states.

who falsely reports bad service to the manufacturer,[4] every action by a spurned suitor for spreading false rumors about the reasons for his failure,[5] and numerous other actions arising out of back-fence gossip or commercial incompetence[6] will be subject to the same constitutional protections as speech upon matters of the greatest public concern.

The Court's ruling today unnecessarily repudiates the common law and trivializes the First Amendment.[7] This decision is said to be "squarely control[led]" by our opinion in *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974). This mischaracterizes that case, as the facts in it were very different from those here. *Gertz* was a libel suit appearing in a magazine called American Opinion, the monthly outlet of the John Birch Society. The article in question discussed a question of undoubted public importance—whether the prosecution of a policeman was part of a Communist campaign to discredit local law enforcement agencies. The plaintiff was a lawyer tangentially involved in the prosecution who, the magazine

concerning an article

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[4] *E. g.*, *Harley-Davidson Motorsports, Inc.* v. *Markley*, 279 Or. 361, 568 P. 2d 1359 (1977).

[5] *E. g.*, *Schomer* v. *Smidt*, 113 Cal. App. 3d 828, 170 Cal. Rptr. 662 (1980).

[6] Suits by disgruntled consumers against credit reporting agencies appear to be disquietingly common. *E. g.*, *Millstone* v. *O'Hanlon Reports, Inc.*, 528 F. 2d 829 (CA8 1976); *Retail Credit Co.* v. *Russell*, 234 Ga. 765, 218 S. E. 2d 54 (1975); *Hood* v. *Dun & Bradstreet, Inc.*, 486 F. 2d 25 (CA5 1973), cert. denied, 415 U. S. 985 (1974); *Grove* v. *Dun & Bradstreet, Inc.*, 438 F. 2d 433 (CA3), cert. denied, 404 U. S. 898 (1971). In enacting the Fair Credit Reporting Act, 15 U. S. C. §§ 1681–1681t, Congress specifically found that "[t]here is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy." *Id.*, § 1681(a)(4).

[7] The Court argues that its decision does not abrogate the common law. *Ante*, at 22 n. 10. Its numerous authorities, however, concern public, not private, expression, and nearly all of them rest on state court interpretations of *Gertz*. They indicate at most what these state courts believe the federal Constitution requires, not what the common law would require had it not been abrogated.

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alleged, was the chief architect of the "frame-up" of the police officer. The article spoke of the lawyer's alleged links to Communist activity. Like every other case in which this Court has considered the constitutional limits on state laws of defamation, *Gertz* involved public expression directly relevant to the effective operation of our system of democratic self-government.

In contrast, the case today is a purely private defamation action against a commercial credit reporting agency that falsely reported to respondent's creditors that respondent was bankrupt. A number of state courts, including the court below, have recognized that the role of the Constitution in regulating state libel law is far more limited when the concerns that activated *New York Times* and *Gertz* are absent.[8] In such a case,

> "[t]here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-censorship by the press. The facts of the present case are wholly without the First Amendment concerns with which the Supreme Court of the United States has been struggling." *Harley-Davidson Motorsports, Inc.* v. *Markley*, 279 Or. 361, 366, 568 P. 2d 1359, 1363 (1977).

Accord, *Rowe* v. *Metz*, 195 Colo. 424, 426, 579 P. 2d 83, 84 (1978) (*Gertz* should not be "blindly applied to the case of a private plaintiff against a nonmedia defendant for a defamation which is essentially private in nature"); *Calero* v. *Del Chemical Corp.*, 68 Wis. 2d 487, 506, 228 N. W. 2d 737, 748

[8] As one commentator has remarked with respect to "the case of a commercial supplier of credit information that defames a person applying for credit"—the very case before us today—"If the first amendment requirements outlined in *Gertz* apply, there is something clearly wrong with the first amendment or with *Gertz*." Shiffrin, The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment, 78 Nw. L. Rev. 1212, 1268 (1983) [hereinafter Shiffrin].

(1975) ("In 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"); *Denny* v. *Mertz*, 106 Wis. 2d 636, 661, 318 N. W. 2d 141, 153, cert. denied, 459 U. S. 883 (1982).

II

This Court on many occasions has recognized that certain kinds of speech are more central to the interests of the First Amendment than others. Obscene speech and "fighting words" have long been accorded no protection. *Roth* v. *United States*, 354 U. S., at 483; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942); see also *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697, 716 (1931) (publication of troop ship sailings during war time may be enjoined); *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 591–592 (1952) (advocating violent overthrow of the government is unprotected speech); *Seattle Times Co.* v. *Rhinehart*, —— U. S. ——, —— (1984). Similarly, "libelous utterances are not within the area of constitutionally protected speech." *Roth*, 354 U. S., at 483; accord, *Gertz*, *supra*, at 340 ("there is no constitutional value in false statements of fact"). In the area of protected speech, the most prominent example of reduced protection for certain kinds of speech concerns commercial speech. Such speech, we have noted, occupies a "subordinate position in the scale of First Amendment values." *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 456 (1978). It also is more easily verifiable and less likely to be deterred by proper regulation. *Virginia Pharmacy Bd.* v. *Virginia Consumer Council*, 425 U. S. 748, 771, n. 24 (1976). Accordingly, it may be regulated in ways that might be impermissible in the realm of noncommercial expression. *Ohralik*, *supra*, at 456; *Central Hudson Gas & Elec.* v. *Public Serv. Comm'n*, 447 U. S. 557, 562–563 (1980).

The Court concedes the above, but appears to believe that commercial speech—defined as advertising that does no more

than propose a commercial transaction—is the only type of expression entitled to less than full First Amendment protection. See *ante*, at 18. Our cases suggest otherwise. In the area of defamation law itself, for example, some types of speech are entitled to broader protection than others: speech about public figures receives the full protection of the *New York Times* standards, while speech about private figures is entitled at most to the lesser standards of our opinion in *Gertz*.

Other areas of the law provide further examples. In *Ohralik* we noted that there are "[n]umerous examples . . . of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, . . . corporate proxy statements, . . . the exchange of price and production information among competitors, . . . and employers' threats of retaliation for the labor activities of employees." 436 U. S., at 456 (citations omitted). Yet similar regulation of political speech is subject to the most rigorous scrutiny. See *Brown* v. *Hartlage*, 456 U. S. 45; *New York Times Co.* v. *Sullivan*, 376 U. S., at 279, n. 19; *Buckley* v. *Valeo*, 424 U. S. 1, 14 (1976). Likewise, while the power of the State to license lawyers, psychiatrists, public school teachers, and investment advisors—all of whom speak for a living—is unquestioned, this Court has held that a law requiring licensing of union organizers is unconstitutional under the First Amendment. *Thomas* v. *Collins*, 323 U. S. 516 (1945); see Shiffrin 1264. See also *Rosenbloom* v. *Metromedia*, 403 U. S. 29, 44 (1971) (opinion of BRENNAN, J.) ("the determinant whether the First Amendment applies to state libel actions is whether the utterance involved concerns an issue of public or general concern"); *Young* v. *American Mini Theatres*, 427 U. S. 50, 70 (1976) (opinion of STEVENS, J.) ("it is manifest that society's interest in protecting this type of expression [nonobscene erotic films] is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate").

III

I do not think it necessary or advisable to attempt to define completely what sorts of speech qualify for reduced constitutional protection. Cf. *Rosenbloom*, *supra*, at 44–45. In accord with the state courts quoted *supra*, at 5, I think it clear that the libelous speech at issue here implicates the First Amendment at most only tangentially. Petitioner's credit reporting is purely private expression. It does not appear in a newspaper or magazine of general and regular circulation nor on the broadcast media. See 15 U. S. C. § 80b–2(a)(11)(D) (Investment Advisers Act does not apply to "any bona fide newspaper, news magazine or business or financial publication of general and regular circulation"); cf. *Mills* v. *Alabama*, 384 U. S. 214, 219 (1966); *Saxbe* v. *Washington Post Co.*, 417 U. S. 843, 863–864 (1974) (POWELL, J., dissenting). In fact, petitioner's subscription agreement prevented its clients from disseminating its credit information. This sort of credit reporting is speech solely in the economic interest of the speaker and its business audience, cf. *Central Hudson Gas & Elec.*, 447 U. S., at 561,[9] and this interest justifies no special protection when—as in this case—the speech is wholly false and clearly damaging to the victim's reputation. These factors clearly placed petitioner's credit reporting in "a subordinate position in the scale of First Amendment values." *Ohralik*, 436 U. S., at 456.

In addition, the speech here, like advertising, is hardier and less likely to be deterred by state regulation. See *Virginia Pharmacy Board*, 425 U. S., at 771, n. 24. It is solely motivated by the desire for profit, which, we have noted, is a force less likely to be deterred than others. *Ibid.* Arguably, the reporting here also was more objectively verifiable than speech deserving of greater protection. See *ibid.* In any case, the market provides a powerful incentive to a credit

[9] In addition, as Shiffrin notes, "[t]he interests in individual self-expression, autonomy, and the like are not present here or are present in only an attenuated way." Shiffrin 1268.

reporting agency to be accurate, since false credit reporting is of no use to creditors. Thus, any incremental "chilling" effect of libel suits would be of decreased significance.[10]

IV

Since the speech here does not involve any of the concerns that motivated the Court in *New York Times* and *Gertz*, I conclude that the First Amendment protection is substantially lessened.[11] This requires us to strike a new balance

[10] The Fifth Circuit Court of Appeals has noted that, while most States provide a qualified privilege against libel suits for commercial credit reporting agencies, in those States that do not there is a thriving credit reporting business and commercial credit transactions are not inhibited. *Hood* v. *Dun & Bradstreet, Inc.*, 486 F. 2d 25, 32 (1973), cert. denied, 415 U. S. 985 (1974). The court cited an empirical study comparing credit transactions in Boise, Idaho, where there is no privilege, with those in Spokane, Washington, where there is one. *Id.*, at 32, and n. 18.

[11] As indicated *supra*, I would not in this case attempt to define the precise boundaries of the realm in which the common law of defamation may operate. The lines will be difficult to draw in some cases. For example, reports of bankruptcies, stock quotations, and other financial items that appear in newspapers and newsletters of general circulation would involve different considerations. Nonetheless, as indicated in the text, the idea that certain kinds of speech are at the core of the First Amendment, while others are on the periphery, is not a new one to courts. See, *e. g.*, *Roth* v. *United States*, 354 U. S. 476; *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447 (1978); *Brown* v. *Hartlage*, 456 U. S. 45; Prosser § 118, p. 822–823. And the lines between public and private expression, and between commercial speech and other speech, are not unfamiliar to judges, nor would they be difficult to draw. Certainly the state courts noted *supra*, at 6, have found little difficulty in drawing them. Nor have state and federal courts found great difficulty in drawing similar lines, like the one between public and private figures, that the First Amendment requires. *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974).

I do not think this common law approach is a return to the *ad hoc* resolution of the competing interests at stake in each particular case that we eschewed in *Gertz*. See *supra*, at 343–344, 346. Constitutional protections would apply identically to broad categories of speech, not to individual cases. This kind of broad categorization does not raise the same concerns of bias and the like that might be raised by judicial determinations of which particular articles or publications address issues of "general or public

between the interests of the speaker here and the state interest in providing a legal remedy for defamatory falsehood. That state interest, we have said, is "strong and legitimate." *Gertz*, 418 U. S., at 348. A State should not lightly be required to abandon this purpose,

> "for, as MR. JUSTICE STEWART has reminded us, the individual's right to the protection of his own good name 'reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. . . .' *Rosenblatt* v. *Baer*, 383 U. S. 75, 92 (1966) (concurring opinion)." *Id.*, at 341.

At the same time, however, it is necessary to recognize the scope of the state interest. Its purpose, we have noted, "is the compensation of individuals for the harm inflicted on them by defamatory falsehood." *Ibid.* It does not aim to reward victims of falsehood with damages in excess of the harm they have suffered, for the legitimate "state interest extends no further than compensation for actual injury." *Id.*, at 349. It is with this in mind that the new balance should be struck.

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interest," cf. *id.*, at 346. See Shiffrin 1268, n. 327. Moreover, prophylactic rules—such as a direction to err on the side of constitutional protection—might be suggested that would ensure that speech of genuine concern was not restrained.

There is little reason for the Court's anxiety that "an immeasurable volume of litigation" would result from this approach, *ante*, at 13, n. 4. *New York Times* was decided 20 years ago. It left the states free to adhere to the common law in cases involving private expression. The "flood-gates" argument simply is not justified in light of this experience. Moreover, the blanket rejection of what has been the prevailing law of defamation is a high price indeed to pay for a bright-line rule that heretofore has never been considered necessary.

A

Punitive damages, unlike presumed damages, are not intended to compensate the tort victim, but rather to punish the tortfeasor and to deter him and others from similar behavior. *Newport* v. *Fact Concerts, Inc.*, 453 U. S. 247, 266–267 (1981); *Electrical Workers* v. *Foust*, 442 U. S. 42, 48 (1979); *Gertz* v. *Robert Welch, Inc.*, 418 U. S., at 350. In essence, punitive damages are "private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." *Ibid.* It is the responsibility of the state, not civil juries, to impose punishment in criminal proceedings pursuant to the rule of law. In levying fines under the name of punitive damages, neither courts nor juries are required to observe the procedural safeguards that the Fifth, Sixth, and Fourteenth Amendments require in criminal proceedings. It is only in civil tort cases that juries have been permitted to impose punishment without any of these constitutional protections. Even in civil penalty proceedings brought by the government, the courts must afford the defendant some of these fundamental protections whenever the purpose is punishment. *United States* v. *United States Coin & Currency*, 401 U. S. 715 (1971); *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U. S. 693 (1965); *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, 165–167 (1963); see Wheeler, The Constitutional Case for Reforming Punitive Damages Procedures, 69 Va. L. Rev. 269, 322–351 (1983). Because it guards against wrongful and arbitrary punishments, the Due Process Clause is a constitutional protection no less necessary and vital to our civil liberties than is the First Amendment.

The most remarkable feature of punitive damages is that the jury is given no real standard in setting them. Guided only by their own notion of what is an appropriate penalty, the jurors are told they are free to award whatever amount they deem sufficient to punish and deter. As a result, their

awards often bear no rational relationship to the injury suffered and can reflect more the jury's unguided prejudices than any legitimate punitive interest.[12] They represent "windfall recoveries," *Electrical Workers* v. *Foust*, *supra*, at 50, which, by definition, provide monetary relief "in excess of . . . actual loss," *Scott* v. *Donald*, 165 U. S. 58, 86 (1897). We noted in *Gertz*:

> "In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. And they remain free to use their discretion selectively to punish expressions of unpopular views." 418 U. S., at 350.

In recognition of these dangers, many American jurisdictions have modified the traditional common law rule. Under the traditional rule, a jury can award punitive damages to a plaintiff who has shown that the defendant acted with a high degree of culpability. *Smith* v. *Wade*, 461 U. S. 30, 39–48 (1983) (discussing nineteenth century and present law). State courts and commentators have harshly criticized punitive damages because of the dangers they pose to due process concerns. *E. g.*, *Murphy* v. *Hobbs*, 7 Colo. 541, 5 P. 119 (1884); *Stewart* v. *Maddox*, 63 Ind. 51, 57 (1878); *Fay* v. *Parker*, 53 N. H. 342, 390, 16 Am. Rep. 270, 329–330 (1873); 1 J. Bouvier, Law Dictionary, Damages, p. 467 (15th ed.

[12] In a recent case, for example, a jury awarded compensatory damages of $1,510,000 and punitive damages of $25,025,000 against an author and the publisher of Penthouse magazine. *Pring* v. *Penthouse International, Ltd.*, No. C-79–351B (Wyo., Feb. 20, 1981). The plaintiff, a former Miss Wyoming, claimed that a fanciful article describing her training for and competition at the Miss America pageant had injured her reputation. After reviewing the record, the District Court reduced the award of punitive damages to $12,500,000. *Id.* (April 20, 1981). The Court of Appeals reversed, holding that an obviously fictional account of the pageant could not be libelous under the narrow theory argued by plaintiff. 695 F. 2d 438 (CA10 1982), cert. denied, —— U. S. —— (1983).

1883); J. Ghiardi & J. Kircher, Punitive Damages: Law and Practice §§ 2.12–3.05 (1984); Long, Punitive Damages: An Unsettled Doctrine, 25 Drake L. Rev. 870, 883–889 (1976); Wheeler, *supra*. "Punitive damages," one court has remarked, "destroy every constitutional safeguard within their reach." *Fay* v. *Parker*, *supra*, at 397, 16 Am. Rep., at 338. Recognizing these dangers, a number of jurisdictions have restricted punitive damages or abolished them entirely. At least five states and the Commonwealth of Puerto Rico refuse to allow them in most tort actions. *E. g.*, *Killebrew* v. *Abbott Laboratories*, 359 So. 2d 1275, 1278 (La. 1978); *International Fidelity Insurance Co.* v. *Wilson*, 387 Mass. 841, 856 n. 20, 443 N. E. 2d 1308, 1317 n. 20 (1983); *Burt* v. *Advertiser Newspaper Co.*, 154 Mass. 238, 245, 28 N. E. 1, 5 (1891) (Holmes, J.); *Abel* v. *Conover*, 170 Neb. 926, 929, 104 N. W. 2d 684, 688 (1960); *Vratsenes* v. *N. H. Auto, Inc.*, 112 N. H. 71, 73, 289 A. 2d 66, 68 (1972); *Rivera Santos* v. *Rossi*, 64 P. R. R. 683, 686 (1945); *Maki* v. *Aluminum Building Products*, 73 Wash. 2d 23, 25, 436 P. 2d 186, 187 (1968). Several other states allow them only insofar as they compensate for intangible injury, *Wise* v. *Daniel*, 221 Mich. 229, 233–234, 190 N. W. 746, 747–748 (1922); *Peisner* v. *Detroit Free Press, Inc.*, 68 Mich. App. 360, 371–373, 242 N. W. 2d 775, 780 (1976), or litigation costs, *Triangle Sheet Metal Works, Inc.* v. *Silver*, 154 Conn. 116, 127, 222 A. 2d 220, 225 (1966), and one state allows them only when the defendant's conduct cannot be punished as a crime, *Koerner* v. *Oberly*, 56 Ind. 284, 287, 26 Am. Rep. 34, 36 (1877); *Glissman* v. *Rutt*, 175 Ind. App. 493, 372 N. E. 2d 1188 (1978). The federal courts also have refused to award punitive damages in certain actions arising under federal law. *Electrical Workers* v. *Foust*, *supra* (labor law). But see *Smith* v. *Wade*, *supra* (allowing punitive damages in § 1983 actions).

In England, the traditional common law rule has undergone a similar evolution. Prior to 1964, a plaintiff could recover punitive damages when the defendant had acted in

"contumelious disregard of the plaintiff's rights," particularly when the defendant had injured the plaintiff's dignity and feelings. *Cassell & Co.* v. *Broome*, [1972] A. C. 1027, 1068 (Hailsham, L. C.) (quoting Mayne & McGregor, *Damages* ¶207 (12th ed. 1961)). In *Rookes* v. *Barnard*, [1964] A. C. 1129, the House of Lords, sitting as England's court of last resort, greatly restricted such damages. Instead of allowing juries to award them whenever a defendant has acted oppressively towards the plaintiff, the House of Lords confined these damages to three narrow situations: (i) when government officers act oppressively, arbitrarily, or unconstitutionally, (ii) when the defendant's conduct has been calculated by him to make a profit that may well exceed the compensation payable to plaintiff, and (iii) when such damages are expressly authorized by statute. *Id.*, at 1226–1227. The law lords have not hesitated to apply these limitations to common law libel actions. *Cassell & Co.* v. *Broome*, *supra*.

It is time we follow these overdue developments. In view of the serious constitutional concerns that punitive damages pose and the absence of any legitimate state interest in providing windfalls to libel plaintiffs, I would hold that a State may not permit recovery of punitive damages in a libel action.[13]

B

Presumed damages stand on a different footing. Unlike punitive damages, their purpose is to compensate, not to punish or deter. C. McCormick, Damages § 116 (1935); 4 J. Berryman, Sutherland on Damages § 1206 (4th ed. 1916); Restatement of Torts § 621 and comment a (1938). Thus, they

[13] Statutory multiple damages, such as treble damages under the antitrust laws, 15 U. S. C. § 15(a), do not pose most of these concerns. Unlike common law punitive damages, they are governed by defined standards, limit jury discretion, are subject to effective review on appeal, and are strictly proportionate to the injury suffered. They do not implicate serious due process concerns.

do serve the State's legitimate interest[14] and may be necessary in order for the State to compensate where actual damages cannot adequately be proved. In most circumstances, the law requires the tort plaintiff to prove the fact and amount of loss. The damages proved are compensatory. In libel actions, however, even injury—in the normal sense—may not be provable and the amount of loss can almost never be proved with certainty. As noted above, it long has been recognized that "proof of actual damages [in a libel action] will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact." *Supra*, at 2. "[C]ourts and legislatures literally for centuries have thought that in the generality of cases, libeled plaintiffs will be seriously shortchanged if they must prove the extent of the injury to their reputations." *Gertz* v. *Robert Welch, Inc.*, 418 U. S., at 393 (WHITE, J., dissenting).[15]

For these reasons, the common law since the time of Hale has allowed juries in libel actions to presume damages from the fact of libelous publication. Such damages are not in-

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[14] British courts have approved presumed damages, called "at large" damages, in the same cases in which they have restricted punitive damages. *E. g., Cassell & Co.* v. *Broome*, [1972] A. C. 1027, 1073 (Hailsham, L. C.) (libel action); see 28 Hailsham, Halsbury's Laws of England 10 (4th ed. 1979).

[15] My opinion for the Court in *Gertz*, as the Court today notes, did not distinguish between presumed and punitive damages in libel suits involving public expression. *Ante*, at 15 n. 5. Upon the more mature reflection required by the Court's constitutionalization of the entire law of libel, I find both historic and logical reasons for the distinction I now make.

The purpose of presumed damages is essentially compensatory. As I have noted, *supra* at 14–15, they are appropriate when it is clear from the nature of the libel that injury occurred and that measuring the damages precisely is impossible. This compensatory rationale for allowing presumed damages is wholly different from allowing a private litigant to punish a defendant by awarding punitive damages without due process of any kind.

tended to replace actual damages when these can be proved. Rather, the purpose of this presumption in libel cases is to ensure compensation when injury has occurred but is not susceptible of the type of proof and measurement required in most other tort damage suits. Thus, we have noted, presumed damages are appropriate only in situations where both the likelihood of injury and the difficulty of proving it are great. *Carey* v. *Piphus*, 435 U. S. 247, 264 (1978).[16]

Properly understood, the doctrine of presumed damages serves only to shift the traditional allocation of proof. Allowing the jury to presume damages does not imply that it is free to set them at whatever level it believes appropriate. As in any tort action, the jury is duty-bound to follow the evidence in accord with the court's instructions. If the defendant proves that injury did not occur or that it was nominal, there is no basis for presuming damages. Presumed damages, then, shift some of the burden of proof in libel cases from the plaintiff to the defendant, and since the jury can presume damages only after the plaintiff has established liability, this reallocation is not unreasonable. It merely requires the defendant to bear some of the risk of the uncertainty created by his own tortious actions. Accordingly, I would hold that in a libel action involving private expression a jury may award presumed damages—even without proof of actual malice.[17]

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[16] Many libeled persons suffer losses of reputation that extend long into the future—even into the history books. The truth often never overtakes a published falsehood, and quantifying the extent of the injury and resulting damages presents a unique problem of proof. For the reasons I have stated, permitting a jury—in the absence of standards of any kind—to award punitive damages is an unprincipled answer to this problem. But presumed compensatory damages are a necessary, though imperfect, means of resolving it. A person injured by a libelous utterance—whether by a media or nonmedia defendant—should not go remediless any more than one who suffers a tortious physical injury.

[17] In view of the special protection the First Amendment extends to certain kinds of speech, I would adhere to the "actual malice" requirement of

V

I would affirm the judgment of the Supreme Court of Vermont as to presumed damages but would reverse its award of punitive damages. Such a course, unlike today's decision, follows salutary developments in the common law. It also respects fundamental constitutional values while remaining faithful to the central concern of common law damages: compensation. By contrast, the Court's decision is both too broad and too narrow to further either of these aims. By unnecessarily abrogating the common law of presumed damages, it withholds a remedy frequently necessary to compensate the libel victim fully. At the same time, the Court promotes no significant First Amendment interest. As stated in *Gertz*, *supra*, at 340, "there is no constitutional value in false statements of fact." On the other hand, by allowing punitive damages in some libel cases, the Court neglects important constitutional interests that can be protected without harming the State's legitimate interest in compensation. The Court identifies no new or overriding societal interest justifying the result it reaches in this case.

In sum, I dissent from the Court's decision both to abrogate the common law of presumed damages and to allow punitive damages when actual malice is proved. I would follow the consistent course of the common law for at least three centuries and allow presumed damages in cases involving private expression, without proof of actual malice. I would also follow the evolution of the common law, and prohibit punitive damages against any libel defendant.

In light of these views, I would affirm in part and reverse in part.

New York Times and *Gertz* with respect to recovery of presumed damages in cases involving public expression.

12/20

changes
1, 3-5, 8-10, 12, 15-18

This is the draft you liked best
-De

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-18

DUN & BRADSTREET, INC., PETITIONERS *v.*
GREENMOSS BUILDERS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

[December ——, 1984]

JUSTICE POWELL, affirming in part and reversing in part.

The Court today extends the constitutional rule of *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), far beyond its origins or its purpose. In that case, the Court for the first time held that the Constitution limits the reach of state laws of libel and slander in suits involving media expression. Limits are needed in such cases, the Court held, to ensure that "debate on public issues . . . be uninhibited, robust, and wide-open." *Id.*, at 270. All of the cases since then in which the Court has considered the constitutional role in defamation law also have involved public expression on an issue of public concern and importance. The Court today goes beyond these precedents and applies the same constitutional restrictions to a libel action involving private expression between a construction company and a commercial credit reporting agency. In my view, such a sweeping holding is not required by the First Amendment. Nor is it wise or consistent with precedent.

I

The common law rules that the Court today repudiates are of ancient vintage. The rule that damages are presumed for libel was announced by Hale as early as 1670. *Restatement of Torts* § 568, comment b, at 162 (1938). Punitive damages also long have been available in actions for defamation under

a quite different standard than the one applied today. See, *e. g.*, C. McCormick, Law of Damages § 118, p. 431 (1935); M. Newell, Law of Defamation, Libel and Slander 842, 844–846 (1890) (citing cases). And since at least the early part of this century, a plaintiff in a garden-variety defamation suit could recover without showing any facts as to the state of mind of the defendant. W. Prosser, Law of Torts § 113, pp. 772–773 (4th ed. 1971) (hereinafter Prosser); Restatement (Second) of Torts § 580B, comment b (1977). The common law recognized some privileges, but generally to recover for written expression harmful to reputation the ordinary citizen had to show only falsity and publication.

The rationale of the common law rules has been the experience and judgment of history that "proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact." Prosser § 112, p. 765; accord, *Rowe* v. *Metz*, 195 Colo. 424, 425–426, 579 P. 2d 83, 84 (1978); Note, Developments in the Law—Defamation, 69 Harv. L. Rev. 875, 891–892 (1956). As a result, courts for centuries have allowed juries to presume that some damage occurred from many defamatory utterances and publications.

This accumulated learning is worthy of respect. Moreover, the common law rules were developed in an area of the law that, since the founding of our country, has been the province of the state courts.[1] Even if one disagrees with

[1] The Framers were familiar with the common law of libel, which had been adopted by the American colonies. See *Gertz*, 418 U. S., at 380–384 (WHITE, J., dissenting); *Roth* v. *United States*, 354 U. S. 476, 482–483, and n. 11 (1957) (13 States allowed prosecution for libel in 1792); *Beauharnais* v. *Illinois*, 343 U. S. 250, 254–255 (1952). See also T. Cooley, Constitutional Limitations 602 (7th ed. 1903); Rutledge, The Law of Defamation: Recent Developments, 32 Alabama Lawyer 409, 410 (1971):

"[T]he law of defamation has been an integral part of the laws of England, the colonies and the states since time immemorial. So many actions have been maintained and judgments recovered under the various laws of libel

these centuries-old rules,[2] this Court should discard them only if they conflict with the rights guaranteed to the people by federal law. Thus, this Court has modified these rules when their operation threatened freedom of speech and of the press guaranteed by the First Amendment. More specifically, we have done so in cases in which state law placed at risk "freedom of expression upon public questions." *New York Times* v. *Sullivan*, 376 U. S., at 269. "The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth* v. *United States*, 354 U. S. 476, 484 (1957). "At the core of the First Amendment are certain basic conceptions about the manner in which political discussion in a representative democracy should proceed." *Brown* v. *Hartlage*, 456 U. S. 45, 52 (1982); accord *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 776 (1978) (discussion of "'matters of public concern'" is "at the heart of the First Amendment's protection"). The libel at issue in this case neither threatened public expression nor involved any public figure or public issue.

The Court today, contrary to history and precedent, indiscriminately extends the constitutional rule of *New York Times* and *Gertz* to nothing less than the entire field of libel and slander. Henceforth, every action by a former employee complaining of a libelous negative recommendation by an employer,[3] every action by a dealer against a competitor

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that the Constitutional validity of libel actions could be denied only by a Court willing to hold all its predecessors were wrong in their interpretation of the First Amendment and that two hundred years of precedents should be overruled."

[2] As the Court notes, there is room to doubt the wisdom of state laws that permit punitive damages on liberal terms. *Ante*, at 9; see Part IV, *infra*.

[3] *E. g.*, *Calero* v. *Del Chemical Corp.*, 68 Wis. 2d 487, 228 N. W. 2d 737 (1975); *Stuempges* v. *Parke, Davis & Co.*, 297 N. W. 2d 252 (Minn. 1980).

who falsely reports bad service to the manufacturer,[4] every action by a spurned suitor for spreading false rumors about the reasons for his failure,[5] and numerous other actions arising out of back-fence gossip or commercial incompetence[6] will be subject to the same constitutional protections as speech upon matters of the greatest public concern.

The Court's ruling today unnecessarily repudiates the common law and trivializes the First Amendment.[7] This deci-

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[4] *E. g., Harley-Davidson Motorsports, Inc.* v. *Markley*, 279 Or. 361, 568 P. 2d 1359 (1977).

[5] *E. g., Schomer* v. *Smidt*, 113 Cal. App. 3d 828, 170 Cal. Rptr. 662 (1980).

[6] Suits by disgruntled consumers against credit reporting agencies appear to be disquietingly common. *E. g., Millstone* v. *O'Hanlon Reports, Inc.*, 528 F. 2d 829 (CA8 1976); *Retail Credit Co.* v. *Russell*, 234 Ga. 765, 218 S. E. 2d 54 (1975); *Hood* v. *Dun & Bradstreet, Inc.*, 486 F. 2d 25 (CA5 1973), cert. denied, 415 U. S. 985 (1974); *Grove* v. *Dun & Bradstreet, Inc.*, 438 F. 2d 433 (CA3), cert. denied, 404 U. S. 898 (1971). In enacting the Fair Credit Reporting Act, 15 U. S. C. §§ 1681–1681t, Congress specifically found that "[t]here is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy." *Id.*, § 1681(a)(4).

[7] The Court, commenting on my dissent, argues that its decision does not "unnecessarily burde[n] the libel laws of the states." *Ante*, at 22 n. 10. It says that "35 of the 42 states that have considered the issue have not distinguished between 'media' and 'non-media' defendants . . . ." *Ibid.* An examination of the state court decisions cited makes clear that they lend support only tangentially—if at all—to the Court's statement. *Gertz* was decided on June 25, 1974 and *New York Times* on March 9, 1964. A majority of the cases cited by the Court rest on state court interpretation of those decisions. These state cases indicate at most what the state courts believed the federal Constitution requires, not what the common law would have required prior to *New York Times* and *Gertz*.

Moreover, though not invariably clear, these cases involved *public* expression on "public questions." See *New York Times Co.* v. *Sullivan*, 376 U. S., at 269. This is a critical distinction. The case before us today involves a privately communicated libel by one private party against another on a subject of little First Amendment concern. The Court's decision, therefore, *does* seriously and unnecessarily burden the libel laws of most states.

sion is said to be "squarely control[led]" by our opinion in *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974). This mischaracterizes that case, as the facts in it were very different from those here. *Gertz* was a libel suit concerning an article appearing in a magazine called American Opinion, the monthly outlet of the John Birch Society. The article in question discussed a question of undoubted public importance—whether the prosecution of a policeman was part of a Communist campaign to discredit local law enforcement agencies. The plaintiff was a lawyer tangentially involved in the prosecution who, the magazine alleged, was the chief architect of the "frame-up" of the police officer. The article spoke of the lawyer's alleged links to Communist activity. Like every other case in which this Court has considered the constitutional limits on state laws of defamation, *Gertz* involved public expression directly relevant to the effective operation of our system of democratic self-government.

In contrast, the case today is a purely private defamation action against a commercial credit reporting agency that falsely reported to respondent's creditors that respondent was bankrupt. A number of state courts, including the court below, have recognized that the role of the Constitution in regulating state libel law is far more limited when the concerns that activated *New York Times* and *Gertz* are absent.[8] In such a case,

> "[t]here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-

[8] As one commentator has remarked with respect to "the case of a commercial supplier of credit information that defames a person applying for credit"—the very case before us today—"If the first amendment requirements outlined in *Gertz* apply, there is something clearly wrong with the first amendment or with *Gertz*." Shiffrin, The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment, 78 Nw. L. Rev. 1212, 1268 (1983) [hereinafter Shiffrin].

> censorship by the press. The facts of the present case are wholly without the First Amendment concerns with which the Supreme Court of the United States has been struggling." *Harley-Davidson Motorsports, Inc.* v. *Markley*, 279 Or. 361, 366, 568 P. 2d 1359, 1363 (1977).

Accord, *Rowe* v. *Metz*, 195 Colo. 424, 426, 579 P. 2d 83, 84 (1978) (*Gertz* should not be "blindly applied to the case of a private plaintiff against a nonmedia defendant for a defamation which is essentially private in nature"); *Calero* v. *Del Chemical Corp.*, 68 Wis. 2d 487, 506, 228 N. W. 2d 737, 748 (1975) ("In 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"); *Denny* v. *Mertz*, 106 Wis. 2d 636, 661, 318 N. W. 2d 141, 153, cert. denied, 459 U. S. 883 (1982).

II

This Court on many occasions has recognized that certain kinds of speech are more central to the interests of the First Amendment than others. Obscene speech and "fighting words" have long been accorded no protection. *Roth* v. *United States*, 354 U. S., at 483; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942); see also *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697, 716 (1931) (publication of troop ship sailings during war time may be enjoined); *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 591–592 (1952) (advocating violent overthrow of the government is unprotected speech); *Seattle Times Co.* v. *Rhinehart*, —— U. S. ——, —— (1984). Similarly, "libelous utterances are not within the area of constitutionally protected speech." *Roth*, 354 U. S., at 483; accord, *Gertz*, *supra*, at 340 ("there is no constitutional value in false statements of fact"). In the area of protected speech, the most prominent example of reduced protection for certain kinds of speech concerns commercial speech. Such speech, we have noted, occupies a "subordinate position in the scale of First Amendment values." *Ohralik* v. *Ohio State Bar*

Assn., 436 U. S. 447, 456 (1978). It also is more easily verifiable and less likely to be deterred by proper regulation. *Virginia Pharmacy Bd.* v. *Virginia Consumer Council*, 425 U. S. 748, 771, n. 24 (1976). Accordingly, it may be regulated in ways that might be impermissible in the realm of noncommercial expression. *Ohralik*, *supra*, at 456; *Central Hudson Gas & Elec.* v. *Public Serv. Comm'n*, 447 U. S. 557, 562–563 (1980).

The Court concedes the above, but appears to believe that commercial speech—defined as advertising that does no more than propose a commercial transaction—is the only type of expression entitled to less than full First Amendment protection. See *ante*, at 18. Our cases suggest otherwise. In the area of defamation law itself, for example, some types of speech are entitled to broader protection than others: speech about public figures receives the full protection of the *New York Times* standards, while speech about private figures is entitled at most to the lesser standards of our opinion in *Gertz*.

Other areas of the law provide further examples. In *Ohralik* we noted that there are "[n]umerous examples . . . of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, . . . corporate proxy statements, . . . the exchange of price and production information among competitors, . . . and employers' threats of retaliation for the labor activities of employees." 436 U. S., at 456 (citations omitted). Yet similar regulation of political speech is subject to the most rigorous scrutiny. See *Brown* v. *Hartlage*, 456 U. S. 45; *New York Times Co.* v. *Sullivan*, 376 U. S., at 279, n. 19; *Buckley* v. *Valeo*, 424 U. S. 1, 14 (1976). Likewise, while the power of the State to license lawyers, psychiatrists, public school teachers, and investment advisors—all of whom speak for a living—is unquestioned, this Court has held that a law requiring licensing of union organizers is unconstitutional under the First Amendment. *Thomas* v. *Collins*, 323 U. S. 516

(1945); see Shiffrin 1264. See also *Rosenbloom* v. *Metromedia*, 403 U. S. 29, 44 (1971) (opinion of BRENNAN, J.) ("the determinant whether the First Amendment applies to state libel actions is whether the utterance involved concerns an issue of public or general concern"); *Young* v. *American Mini Theatres*, 427 U. S. 50, 70 (1976) (opinion of STEVENS, J.) ("it is manifest that society's interest in protecting this type of expression [nonobscene erotic films] is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate").

III

I do not think it necessary or advisable to attempt to define completely what sorts of speech qualify for reduced constitutional protection. Cf. *Rosenbloom*, *supra*, at 44–45. In accord with the state courts quoted *supra*, at 5, I think it clear that the libelous speech at issue here implicates the First Amendment at most only tangentially. Petitioner's credit reporting is purely private expression. It does not appear in a newspaper or magazine of general and regular circulation nor on the broadcast media. See 15 U. S. C. § 80b–2(a)(11)(D) (Investment Advisers Act does not apply to "any bona fide newspaper, news magazine or business or financial publication of general and regular circulation"); cf. *Mills* v. *Alabama*, 384 U. S. 214, 219 (1966); *Saxbe* v. *Washington Post Co.*, 417 U. S. 843, 863–864 (1974) (POWELL, J., dissenting). In fact, petitioner's subscription agreement prevented its clients from disseminating its credit information. This sort of credit reporting is speech solely in the economic interest of the speaker and its business audience, cf. *Central Hudson Gas & Elec.*, 447 U. S., at 561,[9] and this interest justifies no special protection when—as in this case—the speech is wholly false and clearly damaging to the victim's reputation. These factors clearly placed petitioner's

[9] In addition, as Shiffrin notes, "[t]he interests in individual self-expression, autonomy, and the like are not present here or are present in only an attenuated way." Shiffrin 1268.

credit reporting in "a subordinate position in the scale of First Amendment values." *Ohralik*, 436 U. S., at 456.

In addition, the speech here, like advertising, is hardier and less likely to be deterred by state regulation. See *Virginia Pharmacy Board*, 425 U. S., at 771, n. 24. It is solely motivated by the desire for profit, which, we have noted, is a force less likely to be deterred than others. *Ibid.* Arguably, the reporting here also was more objectively verifiable than speech deserving of greater protection. See *ibid.* In any case, the market provides a powerful incentive to a credit reporting agency to be accurate, since false credit reporting is of no use to creditors. Thus, any incremental "chilling" effect of libel suits would be of decreased significance.[10]

IV

Since the speech here does not involve any of the concerns that motivated the Court in *New York Times* and *Gertz*, I conclude that the First Amendment protection is substantially lessened.[11] This requires us to strike a new balance

[10] The Fifth Circuit Court of Appeals has noted that, while most States provide a qualified privilege against libel suits for commercial credit reporting agencies, in those States that do not there is a thriving credit reporting business and commercial credit transactions are not inhibited. *Hood* v. *Dun & Bradstreet, Inc.*, 486 F. 2d 25, 32 (1973), cert. denied, 415 U. S. 985 (1974). The court cited an empirical study comparing credit transactions in Boise, Idaho, where there is no privilege, with those in Spokane, Washington, where there is one. *Id.*, at 32, and n. 18.

[11] As indicated *supra*, I would not in this case attempt to define the precise boundaries of the realm in which the common law of defamation may operate. The lines will be difficult to draw in some cases. For example, reports of bankruptcies, stock quotations, and other financial items that appear in newspapers and newsletters of general circulation would involve different considerations. Nonetheless, as indicated in the text, the idea that certain kinds of speech are at the core of the First Amendment, while others are on the periphery, is not a new one to courts. See, *e. g.*, *Roth* v. *United States*, 354 U. S. 476; *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447 (1978); *Brown* v. *Hartlage*, 456 U. S. 45; Prosser § 118, p. 822–823. And the lines between public and private expression, and between commercial speech and other speech, are not unfamiliar to judges, nor would

between the interests of the speaker here and the state interest in providing a legal remedy for defamatory falsehood. That state interest, we have said, is "strong and legitimate." *Gertz*, 418 U. S., at 348. A State should not lightly be required to abandon this purpose,

> "for, as MR. JUSTICE STEWART has reminded us, the individual's right to the protection of his own good name 'reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. . . .' *Rosenblatt* v. *Baer*, 383 U. S. 75, 92 (1966) (concurring opinion)." *Id.*, at 341.

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they be difficult to draw. Certainly the state courts noted *supra*, at 6, have found little difficulty in drawing them. Nor have state and federal courts found great difficulty in drawing similar lines, like the one between public and private figures, that the First Amendment requires. *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974).

I do not think this common law approach is a return to the *ad hoc* resolution of the competing interests at stake in each particular case that we eschewed in *Gertz*. See *supra*, at 343–344, 346. Constitutional protections would apply identically to broad categories of speech, not to individual cases. This kind of broad categorization does not raise the same concerns of bias and the like that might be raised by judicial determinations of which particular articles or publications address issues of "general or public interest," cf. *id.*, at 346. See Shiffrin 1268, n. 327. Moreover, prophylactic rules—such as a direction to err on the side of constitutional protection—might be suggested that would ensure that speech of genuine concern was not restrained.

There is little reason for the Court's anxiety that "an immeasurable volume of litigation" would result from this approach, *ante*, at 13, n. 4. *New York Times* was decided 20 years ago. It left the states free to adhere to the common law in cases involving private expression. The "flood-gates" argument simply is not justified in light of this experience. Moreover, the blanket rejection of what has been the prevailing law of defamation is a high price indeed to pay for a bright-line rule that heretofore has never been considered necessary.

At the same time, however, it is necessary to recognize the scope of the state interest. Its purpose, we have noted, "is the compensation of individuals for the harm inflicted on them by defamatory falsehood." *Ibid.* It does not aim to reward victims of falsehood with damages in excess of the harm they have suffered, for the legitimate "state interest extends no further than compensation for actual injury." *Id.*, at 349. It is with this in mind that the new balance should be struck.

A

Punitive damages, unlike presumed damages, are not intended to compensate the tort victim, but rather to punish the tortfeasor and to deter him and others from similar behavior. *Newport* v. *Fact Concerts, Inc.*, 453 U. S. 247, 266–267 (1981); *Electrical Workers* v. *Foust*, 442 U. S. 42, 48 (1979); *Gertz* v. *Robert Welch, Inc.*, 418 U. S., at 350. In essence, punitive damages are "private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." *Ibid.* It is the responsibility of the state, not civil juries, to impose punishment in criminal proceedings pursuant to the rule of law. In levying fines under the name of punitive damages, neither courts nor juries are required to observe the procedural safeguards that the Fifth, Sixth, and Fourteenth Amendments require in criminal proceedings. It is only in civil tort cases that juries have been permitted to impose punishment without any of these constitutional protections. Even in civil penalty proceedings brought by the government, the courts must afford the defendant some of these fundamental protections whenever the purpose is punishment. *United States* v. *United States Coin & Currency*, 401 U. S. 715 (1971); *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U. S. 693 (1965); *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, 165–167 (1963); see Wheeler, The Constitutional Case for Reforming Punitive Damages Procedures, 69 Va. L. Rev. 269, 322–351 (1983). Because it guards against wrongful and arbitrary punishments, the Due Process Clause

is a constitutional protection no less necessary and vital to our civil liberties than is the First Amendment.

The most remarkable feature of punitive damages is that the jury is given no real standard in setting them. Guided only by their own notion of what is an appropriate penalty, the jurors are told they are free to award whatever amount they deem sufficient to punish and deter. As a result, their awards often bear no rational relationship to the injury suffered and can reflect more the jury's unguided prejudices than any legitimate punitive interest.[12] They represent "windfall recoveries," *Electrical Workers* v. *Foust*, *supra*, at 50, which, by definition, provide monetary relief "in excess of . . . actual loss," *Scott* v. *Donald*, 165 U. S. 58, 86 (1897). We noted in *Gertz*:

> "In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. And they remain free to use their discretion selectively to punish expressions of unpopular views." 418 U. S., at 350.

In recognition of these dangers, many American jurisdictions have modified the traditional common law rule. Under the traditional rule, a jury can award punitive damages to a plaintiff who has shown that the defendant acted with a high degree of culpability. *Smith* v. *Wade*, 461 U. S. 30, 39–48

[12] In a recent case, for example, a jury awarded compensatory damages of $1,510,000 and punitive damages of $25,025,000 against an author and the publisher of Penthouse magazine. *Pring* v. *Penthouse International, Ltd.*, No. C-79-351B (Wyo., Feb. 20, 1981). The plaintiff, a former Miss Wyoming, claimed that a fanciful article describing her training for and competition at the Miss America pageant had injured her reputation. After reviewing the record, the District Court reduced the award of punitive damages to $12,500,000. *Id.* (April 20, 1981). The Court of Appeals reversed, holding that an obviously fictional account of the pageant could not be libelous under the narrow theory argued by plaintiff. 695 F. 2d 438 (CA10 1982), cert. denied, —— U. S. —— (1983).

(1983) (discussing nineteenth century and present law). State courts and commentators have harshly criticized punitive damages because of the dangers they pose to due process concerns. *E. g.*, *Murphy* v. *Hobbs*, 7 Colo. 541, 5 P. 119 (1884); *Stewart* v. *Maddox*, 63 Ind. 51, 57 (1878); *Fay* v. *Parker*, 53 N. H. 342, 390, 16 Am. Rep. 270, 329–330 (1873); 1 J. Bouvier, Law Dictionary, Damages, p. 467 (15th ed. 1883); J. Ghiardi & J. Kircher, Punitive Damages: Law and Practice §§ 2.12–3.05 (1984); Long, Punitive Damages: An Unsettled Doctrine, 25 Drake L. Rev. 870, 883–889 (1976); Wheeler, *supra*. "Punitive damages," one court has remarked, "destroy every constitutional safeguard within their reach." *Fay* v. *Parker*, *supra*, at 397, 16 Am. Rep., at 338. Recognizing these dangers, a number of jurisdictions have restricted punitive damages or abolished them entirely. At least five states and the Commonwealth of Puerto Rico refuse to allow them in most tort actions. *E. g.*, *Killebrew* v. *Abbott Laboratories*, 359 So. 2d 1275, 1278 (La. 1978); *International Fidelity Insurance Co.* v. *Wilson*, 387 Mass. 841, 856 n. 20, 443 N. E. 2d 1308, 1317 n. 20 (1983); *Burt* v. *Advertiser Newspaper Co.*, 154 Mass. 238, 245, 28 N. E. 1, 5 (1891) (Holmes, J.); *Abel* v. *Conover*, 170 Neb. 926, 929, 104 N. W. 2d 684, 688 (1960); *Vratsenes* v. *N. H. Auto, Inc.*, 112 N. H. 71, 73, 289 A. 2d 66, 68 (1972); *Rivera Santos* v. *Rossi*, 64 P. R. R. 683, 686 (1945); *Maki* v. *Aluminum Building Products*, 73 Wash. 2d 23, 25, 436 P. 2d 186, 187 (1968). Several other states allow them only insofar as they compensate for intangible injury, *Wise* v. *Daniel*, 221 Mich. 229, 233–234, 190 N. W. 746, 747–748 (1922); *Peisner* v. *Detroit Free Press, Inc.*, 68 Mich. App. 360, 371–373, 242 N. W. 2d 775, 780 (1976), or litigation costs, *Triangle Sheet Metal Works, Inc.* v. *Silver*, 154 Conn. 116, 127, 222 A. 2d 220, 225 (1966), and one state allows them only when the defendant's conduct cannot be punished as a crime, *Koerner* v. *Oberly*, 56 Ind. 284, 287, 26 Am. Rep. 34, 36 (1877); *Glissman* v. *Rutt*, 175 Ind. App. 493, 372 N. E. 2d 1188 (1978). The federal courts also

have refused to award punitive damages in certain actions arising under federal law. *Electrical Workers* v. *Foust*, *supra* (labor law). But see *Smith* v. *Wade*, *supra* (allowing punitive damages in § 1983 actions).

In England, the traditional common law rule has undergone a similar evolution. Prior to 1964, a plaintiff could recover punitive damages when the defendant had acted in "contumelious disregard of the plaintiff's rights," particularly when the defendant had injured the plaintiff's dignity and feelings. *Cassell & Co.* v. *Broome*, [1972] A. C. 1027, 1068 (Hailsham, L. C.) (quoting Mayne & McGregor, *Damages* ¶207 (12th ed. 1961)). In *Rookes* v. *Barnard*, [1964] A. C. 1129, the House of Lords, sitting as England's court of last resort, greatly restricted such damages. Instead of allowing juries to award them whenever a defendant has acted oppressively towards the plaintiff, the House of Lords confined these damages to three narrow situations: (i) when government officers act oppressively, arbitrarily, or unconstitutionally, (ii) when the defendant's conduct has been calculated by him to make a profit that may well exceed the compensation payable to plaintiff, and (iii) when such damages are expressly authorized by statute. *Id.*, at 1226–1227. The law lords have not hesitated to apply these limitations to common law libel actions. *Cassell & Co.* v. *Broome*, *supra*.

It is time we follow these overdue developments. In view of the serious constitutional concerns that punitive damages pose and the absence of any legitimate state interest in providing windfalls to libel plaintiffs, I would hold that a State may not permit recovery of punitive damages in a libel action.[13]

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[13] Statutory multiple damages, such as treble damages under the antitrust laws, 15 U. S. C. § 15(a), do not pose most of these concerns. Unlike common law punitive damages, they are governed by defined standards, limit jury discretion, are subject to effective review on appeal, and are strictly proportionate to the injury suffered. They do not implicate serious due process concerns.

B

Presumed damages stand on a different footing. Unlike punitive damages, their purpose is to compensate, not to punish or deter. C. McCormick, Damages § 116 (1935); 4 J. Berryman, Sutherland on Damages § 1206 (4th ed. 1916); Restatement of Torts § 621 and comment a (1938). Thus, they do serve the State's legitimate interest[14] and may be necessary in order for the State to compensate where actual damages cannot adequately be proved. In most circumstances, the law requires the tort plaintiff to prove the fact and amount of loss. The damages proved are compensatory. In libel actions, however, even injury—in the normal sense—may not be provable and the amount of loss can almost never be proved with certainty. As noted above, it long has been recognized that "proof of actual damages [in a libel action] will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact." *Supra*, at 2. "[C]ourts and legislatures literally for centuries have thought that in the generality of cases, libeled plaintiffs will be seriously shortchanged if they must prove the extent of the injury to their reputations." *Gertz* v. *Robert Welch, Inc.*, 418 U. S., at 393 (WHITE, J., dissenting).[15]

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[14] British courts have approved presumed damages, called "at large" damages, in the same cases in which they have restricted punitive damages. *E. g., Cassell & Co.* v. *Broome*, [1972] A. C. 1027, 1073 (Hailsham, L. C.) (libel action); see 28 Hailsham, Halsbury's Laws of England 10 (4th ed. 1979).

[15] My opinion for the Court in *Gertz*, as the Court today notes, did not distinguish between presumed and punitive damages in libel suits involving public expression. *Ante*, at 15 n. 5. Upon the more mature reflection required by the Court's constitutionalization of the entire law of libel, I find both historic and logical reasons for the distinction I now make.

The purpose of presumed damages is essentially compensatory. As I have noted, *supra* at 14–15, they are appropriate when it is clear from the nature of the libel that injury occurred and that measuring the damages

For these reasons, the common law since the time of Hale has allowed juries in libel actions to presume damages from the fact of libelous publication. Such damages are not intended to replace actual damages when these can be proved. Rather, the purpose of this presumption in libel cases is to ensure compensation when injury has occurred but is not susceptible of the type of proof and measurement required in most other tort damage suits. Thus, we have noted, presumed damages are appropriate only in situations where both the likelihood of injury and the difficulty of proving it are great. *Carey* v. *Piphus*, 435 U. S. 247, 264 (1978).[16]

Properly understood, the doctrine of presumed damages serves only to shift the traditional allocation of proof. Allowing the jury to presume damages does not imply that it is free to set them at whatever level it believes appropriate. As in any tort action, the jury is duty-bound to follow the evidence in accord with the court's instructions. If the defendant proves that injury did not occur or that it was nominal, there is no basis for presuming damages. Presumed damages, then, shift some of the burden of proof in libel cases from the plaintiff to the defendant, and since the jury can presume damages only after the plaintiff has established liability, this reallocation is not unreasonable. It merely

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precisely is impossible. This compensatory rationale for allowing presumed damages is wholly different from allowing a private litigant to punish a defendant by awarding punitive damages without due process of any kind.

[16] Many libeled persons suffer losses of reputation that extend long into the future—even into the history books. The truth often never overtakes a published falsehood, and quantifying the extent of the injury and resulting damages presents a unique problem of proof. For the reasons I have stated, permitting a jury—in the absence of standards of any kind—to award punitive damages is an unprincipled answer to this problem. But presumed compensatory damages are a necessary, though imperfect, means of resolving it. A person injured by a libelous utterance—whether by a media or nonmedia defendant—should not go remediless any more than one who suffers a tortious physical injury.

requires the defendant to bear some of the risk of the uncertainty created by his own tortious actions. Accordingly, I would hold that in a libel action involving private expression a jury may award presumed damages—even without proof of actual malice.[17]

V

I would affirm the judgment of the Supreme Court of Vermont as to presumed damages but would reverse its award of punitive damages. Such a course, unlike today's decision, follows salutary developments in the common law. It also respects fundamental constitutional values while remaining faithful to the central concern of common law damages: compensation. By contrast, the Court's decision is both too broad and too narrow to further either of these aims. By unnecessarily abrogating the common law of presumed damages, it withholds a remedy frequently necessary to compensate the libel victim fully. At the same time, the Court promotes no significant First Amendment interest. As stated in *Gertz*, *supra*, at 340, "there is no constitutional value in false statements of fact." On the other hand, by allowing punitive damages in some libel cases, the Court neglects important constitutional interests that can be protected without harming the State's legitimate interest in compensation. The Court identifies no new or overriding societal interest justifying the result it reaches in this case.

In sum, I dissent from the Court's decision both to abrogate the common law of presumed damages and to allow punitive damages when actual malice is proved. I would follow the consistent course of the common law for at least three centuries and allow presumed damages in cases involving private expression—even without proof of actual malice. I would also follow the evolution of the common law, and hold

[17] In view of the special protection the First Amendment extends to certain kinds of speech, I would adhere to the "actual malice" requirement of *New York Times* and *Gertz* with respect to recovery of presumed damages in cases involving public expression.

that the Constitution prohibits punitive damages against any libel defendant.

In light of these views, I would affirm in part and reverse in part.

Changes on

1, 3, 4, 6, 8, 9, 17

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: _____

Recirculated: _____

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83–18

DUN & BRADSTREET, INC., PETITIONERS *v.*
GREENMOSS BUILDERS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

[February ——, 1985]

JUSTICE POWELL, affirming in part and reversing in part.

The Court today extends the constitutional rule of *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), far beyond its origins or its purpose. In that case, the Court for the first time held that the Constitution limits the reach of state laws of libel and slander in suits involving ~~public~~ expression on a question of public importance. Limits are needed in such cases, the Court held, to ensure that "debate on public issues . . . be uninhibited, robust, and wide-open." *Id.*, at 270. All of the cases since then in which the Court has considered the constitutional role in defamation law also have involved public expression on an issue of public concern and importance. The Court today goes beyond these precedents and applies the same constitutional restrictions to a libel action involving private expression between a construction company and a commercial credit reporting agency on an issue of purely private concern. In my view, such a sweeping holding is not required by the First Amendment. Nor is it wise or consistent with precedent.

by public figures

I

The common law rules that the Court today repudiates are of ancient vintage. The rule that damages are presumed for libel was announced by Hale as early as 1670. *Restatement of Torts* § 568, comment b, at 162 (1938). Punitive damages

also long have been available in actions for defamation under a quite different standard than the one applied today. See, *e. g.*, C. McCormick, Law of Damages § 118, p. 431 (1935); M. Newell, Law of Defamation, Libel and Slander 842, 844–846 (1890) (citing cases). And since at least the early part of this century, a plaintiff in a garden-variety defamation suit could recover without showing any facts as to the state of mind of the defendant. W. Prosser, Law of Torts § 113, pp. 772–773 (4th ed. 1971) (hereinafter Prosser); Restatement (Second) of Torts § 580B, comment b (1977). The common law recognized some privileges, but generally to recover for written expression harmful to reputation the ordinary citizen had to show only falsity and publication.

The rationale of the common law rules has been the experience and judgment of history that "proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact." Prosser § 112, p. 765; accord, *Rowe* v. *Metz*, 195 Colo. 424, 425–426, 579 P. 2d 83, 84 (1978); Note, Developments in the Law—Defamation, 69 Harv. L. Rev. 875, 891–892 (1956). As a result, courts for centuries have allowed juries to presume that some damage occurred from many defamatory utterances and publications.

This accumulated learning is worthy of respect. Moreover, the common law rules were developed in an area of the law that, since the founding of our country, has been the province of the state courts.[1] Even if one disagrees with

[1] The Framers were familiar with the common law of libel, which had been adopted by the American colonies. See *Gertz*, 418 U. S., at 380–384 (WHITE, J., dissenting); *Roth* v. *United States*, 354 U. S. 476, 482–483, and n. 11 (1957) (13 States allowed prosecution for libel in 1792); *Beauharnais* v. *Illinois*, 343 U. S. 250, 254–255 (1952). See also T. Cooley, Constitutional Limitations 602 (7th ed. 1903); Rutledge, The Law of Defamation: Recent Developments, 32 Alabama Lawyer 409, 410 (1971):

"[T]he law of defamation has been an integral part of the laws of England, the colonies and the states since time immemorial. So many actions have

these centuries-old rules,[2] this Court should discard them only if they conflict with the rights guaranteed to the people by federal law. Thus, this Court has modified these rules when their operation threatened freedom of speech and of the press guaranteed by the First Amendment. More specifically, we have done so in cases in which state law placed at risk "freedom of expression upon public questions." *New York Times* v. *Sullivan*, 376 U. S., at 269. "The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth* v. *United States*, 354 U. S. 476, 484 (1957). "At the core of the First Amendment are certain basic conceptions about the manner in which political discussion in a representative democracy should proceed." *Brown* v. *Hartlage*, 456 U. S. 45, 52 (1982); accord *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 776 (1978) (discussion of "'matters of public concern'" is "at the heart of the First Amendment's protection"). The libel at issue in this case neither threatened public expression on such matters nor involved any public figure or public issue.

The Court today, contrary to history and precedent, indiscriminately extends the constitutional rule of *New York Times* and *Gertz* to nothing less than the entire field of libel and slander. Henceforth, every action by a former employee complaining of a libelous negative recommendation by an employer,[3] every action by a dealer against a competitor

This equates the absence of a public issue with absence of public figure or official

been maintained and judgments recovered under the various laws of libel that the Constitutional validity of libel actions could be denied only by a Court willing to hold all its predecessors were wrong in their interpretation of the First Amendment and that two hundred years of precedents should be overruled."

[2] As the Court notes, there is room to doubt the wisdom of state laws that permit punitive damages on liberal terms. *Ante*, at 9; see Part IV, *infra*.

[3] *E. g.*, *Calero* v. *Del Chemical Corp.*, 68 Wis. 2d 487, 228 N. W. 2d 737 (1975); *Stuempges* v. *Parke, Davis & Co.*, 297 N. W. 2d 252 (Minn. 1980).

who falsely reports bad service to the manufacturer,[4] every action by a spurned suitor for spreading false rumors about the reasons for his failure,[5] and numerous other actions arising out of back-fence gossip or commercial incompetence[6] will be subject to the same constitutional protections as speech upon matters of the greatest public concern.

The Court's ruling today unnecessarily repudiates the common law and trivializes the First Amendment.[7] This deci-

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[4] *E. g., Harley-Davidson Motorsports, Inc.* v. *Markley*, 279 Or. 361, 568 P. 2d 1359 (1977).

[5] *E. g., Schomer* v. *Smidt*, 113 Cal. App. 3d 828, 170 Cal. Rptr. 662 (1980).

[6] Suits by disgruntled consumers against credit reporting agencies appear to be disquietingly common. *E. g., Millstone* v. *O'Hanlon Reports, Inc.*, 528 F. 2d 829 (CA8 1976); *Retail Credit Co.* v. *Russell*, 234 Ga. 765, 218 S. E. 2d 54 (1975); *Hood* v. *Dun & Bradstreet, Inc.*, 486 F. 2d 25 (CA5 1973), cert. denied, 415 U. S. 985 (1974); *Grove* v. *Dun & Bradstreet, Inc.*, 438 F. 2d 433 (CA3), cert. denied, 404 U. S. 898 (1971). In enacting the Fair Credit Reporting Act, 15 U. S. C. §§ 1681–1681t, Congress specifically found that "[t]here is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy." *Id.*, § 1681(a)(4).

[7] The Court, commenting on my dissent, argues that its decision does not "unnecessarily burde[n] the libel laws of the states." *Ante*, at 22 n. 10. It says that "35 of the 42 states that have considered the issue have not distinguished between 'media' and 'non-media' defendants . . . ." *Ibid.* An examination of the state court decisions cited makes clear that they lend support only tangentially—if at all—to the Court's statement. *Gertz* was decided on June 25, 1974 and *New York Times* on March 9, 1964. A majority of the cases cited by the Court rest on state court interpretation of those decisions. These state cases indicate at most what the state courts believed the federal Constitution requires, not what the common law would have required prior to *New York Times* and *Gertz*.

Moreover, though not invariably clear, these cases do involve public expression on "public questions." See *New York Times Co.* v. *Sullivan*, 376 U. S., at 269. This, not a defendant's media or non-media status, is the critical distinction. The case before us today involves a privately communicated libel by one private party against another on a subject of little First Amendment concern. The Court's decision, therefore, does seriously and unnecessarily burden the libel laws of most states.

sion is said to be "squarely control[led]" by our opinion in *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974). This mischaracterizes that case, as the facts in it were very different from those here. *Gertz* was a libel suit concerning an article appearing in a magazine called American Opinion, the monthly outlet of the John Birch Society. The article in question discussed a question of undoubted public importance—whether the prosecution of a policeman was part of a Communist campaign to discredit local law enforcement agencies. The plaintiff was a lawyer tangentially involved in the prosecution who, the magazine alleged, was the chief architect of the "frame-up" of the police officer. The article spoke of the lawyer's alleged links to Communist activity. Like every other case in which this Court has considered the constitutional limits on state laws of defamation, *Gertz* involved public expression directly relevant to the effective operation of our system of democratic self-government.

In contrast, the case today is a purely private defamation action against a commercial credit reporting agency that falsely reported to respondent's creditors that respondent was bankrupt. A number of state courts, including the court below, have recognized that the role of the Constitution in regulating state libel law is far more limited when the concerns that activated *New York Times* and *Gertz* are absent.[8] In such a case,

> "[t]here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-

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[8] As one commentator has remarked with respect to "the case of a commercial supplier of credit information that defames a person applying for credit"—the very case before us today—"If the first amendment requirements outlined in *Gertz* apply, there is something clearly wrong with the first amendment or with *Gertz*." Shiffrin, The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment, 78 Nw. L. Rev. 1212, 1268 (1983) [hereinafter Shiffrin].

censorship by the press. The facts of the present case are wholly without the First Amendment concerns with which the Supreme Court of the United States has been struggling." *Harley-Davidson Motorsports, Inc.* v. *Markley*, 279 Or. 361, 366, 568 P. 2d 1359, 1363 (1977).

Accord, *Rowe* v. *Metz*, 195 Colo. 424, 426, 579 P. 2d 83, 84 (1978); *Calero* v. *Del Chemical Corp.*, 68 Wis. 2d 487, 506, 228 N. W. 2d 737, 748 (1975); *Denny* v. *Mertz*, 106 Wis. 2d 636, 661, 318 N. W. 2d 141, 153, cert. denied, 459 U. S. 883 (1982).

I omitted parenthetical which might have upset Justice White

II

This Court on many occasions has recognized that certain kinds of speech are more central to the interests of the First Amendment than others. Obscene speech and "fighting words" have long been accorded no protection. *Roth* v. *United States*, 354 U. S., at 483; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942); see also *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697, 716 (1931) (publication of troop ship sailings during war time may be enjoined); *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 591–592 (1952) (advocating violent overthrow of the government is unprotected speech); *Seattle Times Co.* v. *Rhinehart*, —— U. S. ——, —— (1984). Similarly, "libelous utterances are not within the area of constitutionally protected speech." *Roth*, 354 U. S., at 483; accord, *Gertz*, *supra*, at 340 ("there is no constitutional value in false statements of fact"). In the area of protected speech, the most prominent example of reduced protection for certain kinds of speech concerns commercial speech. Such speech, we have noted, occupies a "subordinate position in the scale of First Amendment values." *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 456 (1978). It also is more easily verifiable and less likely to be deterred by proper regulation. *Virginia Pharmacy Bd.* v. *Virginia Consumer Council*, 425 U. S. 748, 771, n. 24 (1976). Accordingly, it may be regulated in ways that might be impermissible in the realm of noncommercial expression. *Ohralik*, *supra*, at 456; *Central*

Hudson Gas & Elec. v. *Public Serv. Comm'n*, 447 U. S. 557, 562–563 (1980).

The Court concedes the above, but appears to believe that commercial speech—defined as advertising that does no more than propose a commercial transaction—is the only type of expression entitled to less than full First Amendment protection. See *ante*, at 18. Our cases suggest otherwise. In the area of defamation law itself, for example, some types of speech are entitled to broader protection than others: speech about public figures receives the full protection of the *New York Times* standards, while speech about private figures is entitled at most to the lesser standards of our opinion in *Gertz*.

Other areas of the law provide further examples. In *Ohralik* we noted that there are "[n]umerous examples . . . of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, . . . corporate proxy statements, . . . the exchange of price and production information among competitors, . . . and employers' threats of retaliation for the labor activities of employees." 436 U. S., at 456 (citations omitted). Yet similar regulation of political speech is subject to the most rigorous scrutiny. See *Brown* v. *Hartlage*, 456 U. S. 45; *New York Times Co.* v. *Sullivan*, 376 U. S., at 279, n. 19; *Buckley* v. *Valeo*, 424 U. S. 1, 14 (1976). Likewise, while the power of the State to license lawyers, psychiatrists, public school teachers, and investment advisors—all of whom speak for a living—is unquestioned, this Court has held that a law requiring licensing of union organizers is unconstitutional under the First Amendment. *Thomas* v. *Collins*, 323 U. S. 516 (1945); see Shiffrin 1264. See also *Rosenbloom* v. *Metromedia*, 403 U. S. 29, 44 (1971) (opinion of BRENNAN, J.) ("the determinant whether the First Amendment applies to state libel actions is whether the utterance involved concerns an issue of public or general concern"); *Young* v. *American Mini Theatres*, 427 U. S. 50, 70 (1976) (opinion of STEVENS, J.) ("it

is manifest that society's interest in protecting this type of expression [nonobscene erotic films] is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate").

III

In this case there is no need to define precisely what constitutes public expression upon matters of public concern or importance. Cf. *Rosenbloom*, *supra*, at 44–45 (opinion of BRENNAN, J.). In accord with the state courts quoted *supra*, at 5, I think it is clear that the libelous speech at issue here implicates the First Amendment at most only tangentially. Petitioner's credit reporting is not directed at subjects related to government or other matters of general public concern. There is no credible argument that this sort of speech requires special protection to ensure that "debate on public issues [will] be uninhibited, robust, and wide-open." *New York Times Co.* v. *Sullivan*, 376 U. S., at 270. Furthermore, petitioner's subscription agreement itself prevented clients from disseminating the credit information they received. The speech thus constituted private expression insofar as the public had no access to its content. This sort of credit reporting is speech solely in the economic interest of the speaker and its business audience, cf. *Central Hudson Gas & Elec.*, 447 U. S., at 561,[9] and this interest warrants no special protection when—as in this case—the speech is wholly false and clearly damaging to the victim's reputation. These factors clearly placed petitioner's credit reporting in "a subordinate position in the scale of First Amendment values." *Ohralik*, 436 U. S., at 456.

In addition, the speech here, like advertising, is hardier and less likely to be deterred by state regulation. See *Virginia Pharmacy Board*, 425 U. S., at 771, n. 24. It is solely motivated by the desire for profit, which, we have noted, is a

[9] In addition, as Shiffrin notes, "[t]he interests in individual self-expression, autonomy, and the like are not present here or are present in only an attenuated way." Shiffrin 1268.

force less likely to be deterred than others. *Ibid.* Arguably, the reporting here also was more objectively verifiable than speech deserving of greater protection. See *ibid.* In any case, the market provides a powerful incentive to a credit reporting agency to be accurate, since false credit reporting is of no use to creditors. Thus, any incremental "chilling" effect of libel suits would be of decreased significance.[10]

IV

Since the speech here does not involve any of the concerns that motivated the Court in *New York Times* and *Gertz*, I conclude that the First Amendment protection is substantially lessened.[11] This requires us to strike a new balance

[10] The Fifth Circuit Court of Appeals has noted that, while most States provide a qualified privilege against libel suits for commercial credit reporting agencies, in those States that do not there is a thriving credit reporting business and commercial credit transactions are not inhibited. *Hood* v. *Dun & Bradstreet, Inc.*, 486 F. 2d 25, 32 (1973), cert. denied, 415 U. S. 985 (1974). The court cited an empirical study comparing credit transactions in Boise, Idaho, where there is no privilege, with those in Spokane, Washington, where there is one. *Id.*, at 32, and n. 18.

[11] As indicated *supra*, I would not in this case attempt to define the precise boundaries of the realm in which the common law of defamation may operate. The lines will be difficult to draw in some cases. For example, reports of bankruptcies, stock quotations, and other financial items that appear in newspapers and newsletters of general circulation would involve different considerations. Nonetheless, as indicated in the text, the idea that certain kinds of speech are at the core of the First Amendment, while others are on the periphery, is not a new one to courts. See, *e. g.*, *Roth* v. *United States*, 354 U. S. 476; *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447 (1978); *Brown* v. *Hartlage*, 456 U. S. 45; Prosser § 118, p. 822–823. And the lines between public and private expression, and between matters of public and private concern, are not unfamiliar to judges, nor would they be difficult to draw. Certainly the state courts noted *supra*, at 6, have found little difficulty in drawing them. Nor have state and federal courts found great difficulty in drawing similar lines, like the one between public and private figures, that the First Amendment requires. *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974).

I do not think this common law approach is a return to the *ad hoc* resolution of the competing interests at stake in each particular case that we

between the interests of the speaker here and the state interest in providing a legal remedy for defamatory falsehood. That state interest, we have said, is "strong and legitimate." *Gertz*, 418 U. S., at 348. A State should not lightly be required to abandon this purpose,

> "for, as MR. JUSTICE STEWART has reminded us, the individual's right to the protection of his own good name 'reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. . . .' *Rosenblatt* v. *Baer*, 383 U. S. 75, 92 (1966) (concurring opinion)." *Id.*, at 341.

At the same time, however, it is necessary to recognize the scope of the state interest. Its purpose, we have noted, "is the compensation of individuals for the harm inflicted on them by defamatory falsehood." *Ibid.* It does not aim to reward victims of falsehood with damages in excess of the harm they have suffered, for the legitimate "state interest

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eschewed in *Gertz*. See *supra*, at 343–344, 346. Constitutional protections would apply identically to broad categories of speech, not to individual cases. This kind of broad categorization does not raise the same concerns of bias and the like that might be raised by judicial determinations of which particular articles or publications address issues of "general or public interest," cf. *id.*, at 346. See Shiffrin 1268, n. 327. Moreover, prophylactic rules—such as a direction to err on the side of constitutional protection—might be suggested that would ensure that speech of genuine concern was not restrained.

There is little reason for the Court's anxiety that "an immeasurable volume of litigation" would result from this approach, *ante*, at 13, n. 4. *New York Times* was decided 20 years ago. It left the states free to adhere to the common law in cases involving private expression. The "flood-gates" argument simply is not justified in light of this experience. Moreover, the blanket rejection of what has been the prevailing law of defamation is a high price indeed to pay for a bright-line rule that heretofore has never been considered necessary.

extends no further than compensation for actual injury." *Id.*, at 349. It is with this in mind that the new balance should be struck.

A

Punitive damages, unlike presumed damages, are not intended to compensate the tort victim, but rather to punish the tortfeasor and to deter him and others from similar behavior. *Newport* v. *Fact Concerts, Inc.*, 453 U. S. 247, 266–267 (1981); *Electrical Workers* v. *Foust*, 442 U. S. 42, 48 (1979); *Gertz* v. *Robert Welch, Inc.*, 418 U. S., at 350. In essence, punitive damages are "private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." *Ibid.* It is the responsibility of the state, not civil juries, to impose punishment in criminal proceedings pursuant to the rule of law. In levying fines under the name of punitive damages, neither courts nor juries are required to observe the procedural safeguards that the Fifth, Sixth, and Fourteenth Amendments require in criminal proceedings. It is only in civil tort cases that juries have been permitted to impose punishment without any of these constitutional protections. Even in civil penalty proceedings brought by the government, the courts must afford the defendant some of these fundamental protections whenever the purpose is punishment. *United States* v. *United States Coin & Currency*, 401 U. S. 715 (1971); *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U. S. 693 (1965); *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, 165–167 (1963); see Wheeler, The Constitutional Case for Reforming Punitive Damages Procedures, 69 Va. L. Rev. 269, 322–351 (1983). Because it guards against wrongful and arbitrary punishments, the Due Process Clause is a constitutional protection no less necessary and vital to our civil liberties than is the First Amendment.

The most remarkable feature of punitive damages is that the jury is given no real standard in setting them. Guided only by their own notion of what is an appropriate penalty, the jurors are told they are free to award whatever amount

they deem sufficient to punish and deter. As a result, their awards often bear no rational relationship to the injury suffered and can reflect more the jury's unguided prejudices than any legitimate punitive interest.[12] They represent "windfall recoveries," *Electrical Workers* v. *Foust*, *supra*, at 50, which, by definition, provide monetary relief "in excess of . . . actual loss," *Scott* v. *Donald*, 165 U. S. 58, 86 (1897). We noted in *Gertz*:

> "In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. And they remain free to use their discretion selectively to punish expressions of unpopular views." 418 U. S., at 350.

In recognition of these dangers, many American jurisdictions have modified the traditional common law rule. Under the traditional rule, a jury can award punitive damages to a plaintiff who has shown that the defendant acted with a high degree of culpability. *Smith* v. *Wade*, 461 U. S. 30, 39–48 (1983) (discussing nineteenth century and present law). State courts and commentators have harshly criticized punitive damages because of the dangers they pose to due process concerns. *E. g.*, *Murphy* v. *Hobbs*, 7 Colo. 541, 5 P. 119 (1884); *Stewart* v. *Maddox*, 63 Ind. 51, 57 (1878); *Fay* v. *Parker*, 53 N. H. 342, 390, 16 Am. Rep. 270, 329–330 (1873);

[12] In a recent case, for example, a jury awarded compensatory damages of $1,510,000 and punitive damages of $25,025,000 against an author and the publisher of Penthouse magazine. *Pring* v. *Penthouse International, Ltd.*, No. C–79–351B (Wyo., Feb. 20, 1981). The plaintiff, a former Miss Wyoming, claimed that a fanciful article describing her training for and competition at the Miss America pageant had injured her reputation. After reviewing the record, the District Court reduced the award of punitive damages to $12,500,000. *Id.* (April 20, 1981). The Court of Appeals reversed, holding that an obviously fictional account of the pageant could not be libelous under the narrow theory argued by plaintiff. 695 F. 2d 438 (CA10 1982), cert. denied, —— U. S. —— (1983).

1 J. Bouvier, Law Dictionary, Damages, p. 467 (15th ed. 1883); J. Ghiardi & J. Kircher, Punitive Damages: Law and Practice §§ 2.12–3.05 (1984); Long, Punitive Damages: An Unsettled Doctrine, 25 Drake L. Rev. 870, 883–889 (1976); Wheeler, *supra*. "Punitive damages," one court has remarked, "destroy every constitutional safeguard within their reach." *Fay* v. *Parker*, *supra*, at 397, 16 Am. Rep., at 338. Recognizing these dangers, a number of jurisdictions have restricted punitive damages or abolished them entirely. At least five states and the Commonwealth of Puerto Rico refuse to allow them in most tort actions. *E. g.*, *Killebrew* v. *Abbott Laboratories*, 359 So. 2d 1275, 1278 (La. 1978); *International Fidelity Insurance Co.* v. *Wilson*, 387 Mass. 841, 856 n. 20, 443 N. E. 2d 1308, 1317 n. 20 (1983); *Burt* v. *Advertiser Newspaper Co.*, 154 Mass. 238, 245, 28 N. E. 1, 5 (1891) (Holmes, J.); *Abel* v. *Conover*, 170 Neb. 926, 929, 104 N. W. 2d 684, 688 (1960); *Vratsenes* v. *N. H. Auto, Inc.*, 112 N. H. 71, 73, 289 A. 2d 66, 68 (1972); *Rivera Santos* v. *Rossi*, 64 P. R. R. 683, 686 (1945); *Maki* v. *Aluminum Building Products*, 73 Wash. 2d 23, 25, 436 P. 2d 186, 187 (1968). Several other states allow them only insofar as they compensate for intangible injury, *Wise* v. *Daniel*, 221 Mich. 229, 233–234, 190 N. W. 746, 747–748 (1922); *Peisner* v. *Detroit Free Press, Inc.*, 68 Mich. App. 360, 371–373, 242 N. W. 2d 775, 780 (1976), or litigation costs, *Triangle Sheet Metal Works, Inc.* v. *Silver*, 154 Conn. 116, 127, 222 A. 2d 220, 225 (1966), and one state allows them only when the defendant's conduct cannot be punished as a crime, *Koerner* v. *Oberly*, 56 Ind. 284, 287, 26 Am. Rep. 34, 36 (1877); *Glissman* v. *Rutt*, 175 Ind. App. 493, 372 N. E. 2d 1188 (1978). The federal courts also have refused to award punitive damages in certain actions arising under federal law. *Electrical Workers* v. *Foust*, *supra* (labor law). But see *Smith* v. *Wade*, *supra* (allowing punitive damages in § 1983 actions).

In England, the traditional common law rule has undergone a similar evolution. Prior to 1964, a plaintiff could

recover punitive damages when the defendant had acted in "contumelious disregard of the plaintiff's rights," particularly when the defendant had injured the plaintiff's dignity and feelings. *Cassell & Co.* v. *Broome*, [1972] A. C. 1027, 1068 (Hailsham, L. C.) (quoting Mayne & McGregor, *Damages* ¶207 (12th ed. 1961)). In *Rookes* v. *Barnard*, [1964] A. C. 1129, the House of Lords, sitting as England's court of last resort, greatly restricted such damages. Instead of allowing juries to award them whenever a defendant has acted oppressively towards the plaintiff, the House of Lords confined these damages to three narrow situations: (i) when government officers act oppressively, arbitrarily, or unconstitutionally, (ii) when the defendant's conduct has been calculated by him to make a profit that may well exceed the compensation payable to plaintiff, and (iii) when such damages are expressly authorized by statute. *Id.*, at 1226–1227. The law lords have not hesitated to apply these limitations to common law libel actions. *Cassell & Co.* v. *Broome*, *supra*.

It is time we follow these overdue developments. In view of the serious constitutional concerns that punitive damages pose and the absence of any legitimate state interest in providing windfalls to libel plaintiffs, I would hold that a State may not permit recovery of punitive damages in a libel action.[13]

B

Presumed damages stand on a different footing. Unlike punitive damages, their purpose is to compensate, not to punish or deter. C. McCormick, Damages § 116 (1935); 4 J. Berryman, Sutherland on Damages § 1206 (4th ed. 1916); Restatement of Torts § 621 and comment a (1938). Thus, they

[13] Statutory multiple damages, such as treble damages under the antitrust laws, 15 U. S. C. § 15(a), do not pose most of these concerns. Unlike common law punitive damages, they are governed by defined standards, limit jury discretion, are subject to effective review on appeal, and are strictly proportionate to the injury suffered. They do not implicate serious due process concerns.

do serve the State's legitimate interest[14] and may be necessary in order for the State to compensate where actual damages cannot adequately be proved. In most circumstances, the law requires the tort plaintiff to prove the fact and amount of loss. The damages proved are compensatory. In libel actions, however, even injury—in the normal sense—may not be provable and the amount of loss can almost never be proved with certainty. As noted above, it long has been recognized that "proof of actual damages [in a libel action] will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact." *Supra*, at 2. "[C]ourts and legislatures literally for centuries have thought that in the generality of cases, libeled plaintiffs will be seriously shortchanged if they must prove the extent of the injury to their reputations." *Gertz* v. *Robert Welch, Inc.*, 418 U. S., at 393 (WHITE, J., dissenting).[15]

For these reasons, the common law since the time of Hale has allowed juries in libel actions to presume damages from the fact of libelous publication. Such damages are not in-

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[14] British courts have approved presumed damages, called "at large" damages, in the same cases in which they have restricted punitive damages. *E. g., Cassell & Co.* v. *Broome*, [1972] A. C. 1027, 1073 (Hailsham, L. C.) (libel action); see 28 Hailsham, Halsbury's Laws of England 10 (4th ed. 1979).

[15] My opinion for the Court in *Gertz*, as the Court today notes, did not distinguish between presumed and punitive damages in libel suits involving public expression. *Ante*, at 15 n. 5. Upon the more mature reflection required by the Court's constitutionalization of the entire law of libel, I find both historic and logical reasons for the distinction I now make.

The purpose of presumed damages is essentially compensatory. As I have noted, *supra* at 14–15, they are appropriate when it is clear from the nature of the libel that injury occurred and that measuring the damages precisely is impossible. This compensatory rationale for allowing presumed damages is wholly different from allowing a private litigant to punish a defendant by awarding punitive damages without due process of any kind.

tended to replace actual damages when these can be proved. Rather, the purpose of this presumption in libel cases is to ensure compensation when injury has occurred but is not susceptible of the type of proof and measurement required in most other tort damage suits. Thus, we have noted, presumed damages are appropriate only in situations where both the likelihood of injury and the difficulty of proving it are great. *Carey* v. *Piphus*, 435 U. S. 247, 264 (1978).[16]

Properly understood, the doctrine of presumed damages serves only to shift the traditional allocation of proof. Allowing the jury to presume damages does not imply that it is free to set them at whatever level it believes appropriate. As in any tort action, the jury is duty-bound to follow the evidence in accord with the court's instructions. If the defendant proves that injury did not occur or that it was nominal, there is no basis for presuming damages. Presumed damages, then, shift some of the burden of proof in libel cases from the plaintiff to the defendant, and since the jury can presume damages only after the plaintiff has established liability, this reallocation is not unreasonable. It merely requires the defendant to bear some of the risk of the uncertainty created by his own tortious actions. Accordingly, I would hold that in a libel action involving private expression a jury may award presumed damages—even without proof of actual malice.[17]

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[16] Many libeled persons suffer losses of reputation that extend long into the future—even into the history books. The truth often never overtakes a published falsehood, and quantifying the extent of the injury and resulting damages presents a unique problem of proof. For the reasons I have stated, permitting a jury—in the absence of standards of any kind—to award punitive damages is an unprincipled answer to this problem. But presumed compensatory damages are a necessary, though imperfect, means of resolving it. A person injured by a libelous utterance—whether by a media or nonmedia defendant—should not go remediless any more than one who suffers a tortious physical injury.

[17] In view of the special protection the First Amendment extends to certain kinds of speech, I would adhere to the "actual malice" requirement

V

I would affirm the judgment of the Supreme Court of Vermont as to presumed damages but would reverse its award of punitive damages. Such a course, unlike today's decision, follows salutary developments in the common law. It also respects fundamental constitutional values while remaining faithful to the central concern of common law damages: compensation. By contrast, the Court's decision is both too broad and too narrow to further either of these aims. By unnecessarily abrogating the common law of presumed damages, it withholds a remedy frequently necessary to compensate the libel victim fully. At the same time, the Court promotes no significant First Amendment interest. As stated in *Gertz*, *supra*, at 340, "there is no constitutional value in false statements of fact." On the other hand, by allowing punitive damages in some libel cases, the Court neglects important constitutional interests that can be protected without harming the State's legitimate interest in compensation. The Court identifies no new or overriding societal interest justifying the result it reaches in this case.

In sum, I dissent from the Court's decision both to abrogate the common law of presumed damages and to allow punitive damages when actual malice is proved. I would follow the consistent course of the common law for at least three centuries and allow presumed damages in cases involving private expression—even without proof of actual malice. I would also follow the evolution of the common law, and hold that the Constitution prohibits punitive damages against any libel defendant.

In light of these views, I would affirm in part and reverse in part.

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of *New York Times* and *Gertz* with respect to recovery of presumed damages in cases involving public expression on issues of public concern or importance.

02/13

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

L.F.P. 2/15

From: **Justice Powell**

Circulated: _____

Recirculated: _____

changes: (some deletions)
1, 3, 4, 8, 9, 17

3rd DRAFT) 2d version

SUPREME COURT OF THE UNITED STATES

No. 83-18

DUN & BRADSTREET, INC., PETITIONERS *v.*
GREENMOSS BUILDERS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

[February ——, 1985]

JUSTICE POWELL, affirming in part and reversing in part.

The Court today extends the constitutional rule of *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), far beyond its origins or its purpose. In that case, the Court for the first time held that the Constitution limits the reach of state laws of libel and slander in suits involving public expression on matters of public concern. Limits are needed in such cases, the Court held, to ensure that "debate on public issues . . . be uninhibited, robust, and wide-open." *Id.*, at 270. All of the cases since then in which the Court has considered the constitutional role in defamation law also have involved public expression on such matters. The Court today goes beyond these precedents and applies the same constitutional restrictions to a libel action involving private expression between a construction company and a commercial credit reporting agency on an issue of purely private concern. In my view, such a sweeping holding is not required by the First Amendment. Nor is it wise or consistent with precedent.

I

The common law rules that the Court today repudiates are of ancient vintage. The rule that damages are presumed for libel was announced by Hale as early as 1670. *Restatement of Torts* § 568, comment b, at 162 (1938). Punitive damages also long have been available in actions for defamation under

a quite different standard than the one applied today. See, *e. g.*, C. McCormick, Law of Damages § 118, p. 431 (1935); M. Newell, Law of Defamation, Libel and Slander 842, 844–846 (1890) (citing cases). And since at least the early part of this century, a plaintiff in a garden-variety defamation suit could recover without showing any facts as to the state of mind of the defendant. W. Prosser, Law of Torts § 113, pp. 772–773 (4th ed. 1971) (hereinafter Prosser); Restatement (Second) of Torts § 580B, comment b (1977). The common law recognized some privileges, but generally to recover for written expression harmful to reputation the ordinary citizen had to show only falsity and publication.

The rationale of the common law rules has been the experience and judgment of history that "proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact." Prosser § 112, p. 765; accord, *Rowe* v. *Metz*, 195 Colo. 424, 425–426, 579 P. 2d 83, 84 (1978); Note, Developments in the Law—Defamation, 69 Harv. L. Rev. 875, 891–892 (1956). As a result, courts for centuries have allowed juries to presume that some damage occurred from many defamatory utterances and publications.

This accumulated learning is worthy of respect. Moreover, the common law rules were developed in an area of the law that, since the founding of our country, has been the province of the state courts.[1] Even if one disagrees with

[1] The Framers were familiar with the common law of libel, which had been adopted by the American colonies. See *Gertz*, 418 U. S., at 380–384 (WHITE, J., dissenting); *Roth* v. *United States*, 354 U. S. 476, 482–483, and n. 11 (1957) (13 States allowed prosecution for libel in 1792); *Beauharnais* v. *Illinois*, 343 U. S. 250, 254–255 (1952). See also T. Cooley, Constitutional Limitations 602 (7th ed. 1903); Rutledge, The Law of Defamation: Recent Developments, 32 Alabama Lawyer 409, 410 (1971):

"[T]he law of defamation has been an integral part of the laws of England, the colonies and the states since time immemorial. So many actions have been maintained and judgments recovered under the various laws of libel

these centuries-old rules,[2] this Court should discard them only if they conflict with the rights guaranteed to the people by federal law. Thus, this Court has modified these rules when their operation threatened freedom of speech and of the press guaranteed by the First Amendment. More specifically, we have done so in cases in which state law placed at risk "freedom of expression upon public questions." *New York Times* v. *Sullivan*, 376 U. S., at 269. "The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth* v. *United States*, 354 U. S. 476, 484 (1957). "At the core of the First Amendment are certain basic conceptions about the manner in which political discussion in a representative democracy should proceed." *Brown* v. *Hartlage*, 456 U. S. 45, 52 (1982); accord *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 776 (1978) (discussion of "'matters of public concern'" is "at the heart of the First Amendment's protection"). The libel at issue in this case involved purely private expression on a matter of private concern.

The Court today, contrary to history and precedent, indiscriminately extends the constitutional rule of *New York Times* and *Gertz* to nothing less than the entire field of libel and slander. Henceforth, every action by a former employee complaining of a libelous negative recommendation by an employer,[3] every action by a dealer against a competitor

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that the Constitutional validity of libel actions could be denied only by a Court willing to hold all its predecessors were wrong in their interpretation of the First Amendment and that two hundred years of precedents should be overruled."

[2] As the Court notes, there is room to doubt the wisdom of state laws that permit punitive damages on liberal terms. *Ante*, at 9; see Part IV, *infra*.

[3] *E. g.*, *Calero* v. *Del Chemical Corp.*, 68 Wis. 2d 487, 228 N. W. 2d 737 (1975); *Stuempges* v. *Parke, Davis & Co.*, 297 N. W. 2d 252 (Minn. 1980).

who falsely reports bad service to the manufacturer,[4] every action by a spurned suitor for spreading false rumors about the reasons for his failure,[5] and numerous other actions arising out of back-fence gossip or commercial incompetence[6] will be subject to the same constitutional protections as speech upon matters of the greatest public concern.

The Court's ruling today unnecessarily repudiates the common law and trivializes the First Amendment.[7] This deci-

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[4] *E. g., Harley-Davidson Motorsports, Inc.* v. *Markley*, 279 Or. 361, 568 P. 2d 1359 (1977).

[5] *E. g., Schomer* v. *Smidt*, 113 Cal. App. 3d 828, 170 Cal. Rptr. 662 (1980).

[6] Suits by disgruntled consumers against credit reporting agencies appear to be disquietingly common. *E. g., Millstone* v. *O'Hanlon Reports, Inc.*, 528 F. 2d 829 (CA8 1976); *Retail Credit Co.* v. *Russell*, 234 Ga. 765, 218 S. E. 2d 54 (1975); *Hood* v. *Dun & Bradstreet, Inc.*, 486 F. 2d 25 (CA5 1973), cert. denied, 415 U. S. 985 (1974); *Grove* v. *Dun & Bradstreet, Inc.*, 438 F. 2d 433 (CA3), cert. denied, 404 U. S. 898 (1971). In enacting the Fair Credit Reporting Act, 15 U. S. C. §§ 1681–1681t, Congress specifically found that "[t]here is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy." *Id.*, § 1681(a)(4).

[7] The Court, commenting on my dissent, argues that its decision does not "unnecessarily burde[n] the libel laws of the states." *Ante*, at 22 n. 10. It says that "35 of the 42 states that have considered the issue have not distinguished between 'media' and 'non-media' defendants . . . ." *Ibid.* An examination of the state court decisions cited makes clear that they lend support only tangentially—if at all—to the Court's statement. *Gertz* was decided on June 25, 1974 and *New York Times* on March 9, 1964. A majority of the cases cited by the Court rest on state court interpretation of those decisions. These state cases indicate at most what the state courts believed the federal Constitution requires, not what the common law would have required prior to *New York Times* and *Gertz*.

Moreover, though not invariably clear, these cases do not involve private expression on essentially private matters. This, not a defendant's media or non-media status, is the critical distinction. The case before us today involves a privately communicated libel by one private party against another on a subject of little First Amendment concern. The Court's decision, therefore, does seriously and unnecessarily burden the libel laws of most states.

sion is said to be "squarely control[led]" by our opinion in *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974). This mischaracterizes that case, as the facts in it were very different from those here. *Gertz* was a libel suit concerning an article appearing in a magazine called American Opinion, the monthly outlet of the John Birch Society. The article in question discussed a question of undoubted public importance—whether the prosecution of a policeman was part of a Communist campaign to discredit local law enforcement agencies. The plaintiff was a lawyer tangentially involved in the prosecution who, the magazine alleged, was the chief architect of the "frame-up" of the police officer. The article spoke of the lawyer's alleged links to Communist activity. Like every other case in which this Court has considered the constitutional limits on state laws of defamation, *Gertz* involved public expression directly relevant to the effective operation of our system of democratic self-government.

In contrast, the case today is a purely private defamation action against a commercial credit reporting agency that falsely reported to respondent's creditors that respondent was bankrupt. A number of state courts, including the court below, have recognized that the role of the Constitution in regulating state libel law is far more limited when the concerns that activated *New York Times* and *Gertz* are absent.[8] In such a case,

> "[t]here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-

[8] As one commentator has remarked with respect to "the case of a commercial supplier of credit information that defames a person applying for credit"—the very case before us today—"If the first amendment requirements outlined in *Gertz* apply, there is something clearly wrong with the first amendment or with *Gertz*." Shiffrin, The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment, 78 Nw. L. Rev. 1212, 1268 (1983) [hereinafter Shiffrin].

> censorship by the press. The facts of the present case are wholly without the First Amendment concerns with which the Supreme Court of the United States has been struggling." *Harley-Davidson Motorsports, Inc.* v. *Markley*, 279 Or. 361, 366, 568 P. 2d 1359, 1363 (1977).

Accord, *Rowe* v. *Metz*, 195 Colo. 424, 426, 579 P. 2d 83, 84 (1978); *Calero* v. *Del Chemical Corp.*, 68 Wis. 2d 487, 506, 228 N. W. 2d 737, 748 (1975); *Denny* v. *Mertz*, 106 Wis. 2d 636, 661, 318 N. W. 2d 141, 153, cert. denied, 459 U. S. 883 (1982).

II

This Court on many occasions has recognized that certain kinds of speech are more central to the interests of the First Amendment than others. Obscene speech and "fighting words" have long been accorded no protection. *Roth* v. *United States*, 354 U. S., at 483; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942); see also *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697, 716 (1931) (publication of troop ship sailings during war time may be enjoined); *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 591–592 (1952) (advocating violent overthrow of the government is unprotected speech); *Seattle Times Co.* v. *Rhinehart*, —— U. S. ——, —— (1984). Similarly, "libelous utterances are not within the area of constitutionally protected speech." *Roth*, 354 U. S., at 483; accord, *Gertz*, *supra*, at 340 ("there is no constitutional value in false statements of fact"). In the area of protected speech, the most prominent example of reduced protection for certain kinds of speech concerns commercial speech. Such speech, we have noted, occupies a "subordinate position in the scale of First Amendment values." *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 456 (1978). It also is more easily verifiable and less likely to be deterred by proper regulation. *Virginia Pharmacy Bd.* v. *Virginia Consumer Council*, 425 U. S. 748, 771, n. 24 (1976). Accordingly, it may be regulated in ways that might be impermissible in the realm of noncommercial expression. *Ohralik*, *supra*, at 456;

Central Hudson Gas & Elec. v. *Public Serv. Comm'n*, 447 U. S. 557, 562–563 (1980).

The Court concedes the above, but appears to believe that commercial speech—defined as advertising that does no more than propose a commercial transaction—is the only type of expression entitled to less than full First Amendment protection. See *ante*, at 18. Our cases suggest otherwise. In the area of defamation law itself, for example, some types of speech are entitled to broader protection than others: speech about public figures receives the full protection of the *New York Times* standards, while speech about private figures is entitled at most to the lesser standards of our opinion in *Gertz*.

Other areas of the law provide further examples. In *Ohralik* we noted that there are "[n]umerous examples . . . of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, . . . corporate proxy statements, . . . the exchange of price and production information among competitors, . . . and employers' threats of retaliation for the labor activities of employees." 436 U. S., at 456 (citations omitted). Yet similar regulation of political speech is subject to the most rigorous scrutiny. See *Brown* v. *Hartlage*, 456 U. S. 45; *New York Times Co.* v. *Sullivan*, 376 U. S., at 279, n. 19; *Buckley* v. *Valeo*, 424 U. S. 1, 14 (1976). Likewise, while the power of the State to license lawyers, psychiatrists, public school teachers, and investment advisors—all of whom speak for a living—is unquestioned, this Court has held that a law requiring licensing of union organizers is unconstitutional under the First Amendment. *Thomas* v. *Collins*, 323 U. S. 516 (1945); see Shiffrin 1264. See also *Rosenbloom* v. *Metromedia*, 403 U. S. 29, 44 (1971) (opinion of BRENNAN, J.) ("the determinant whether the First Amendment applies to state libel actions is whether the utterance involved concerns an issue of public or general concern"); *Young* v. *American Mini Theatres*, 427 U. S. 50, 70 (1976) (opinion of STEVENS, J.) ("it

is manifest that society's interest in protecting this type of expression [nonobscene erotic films] is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate").

III

In this case there is no need to define precisely what constitutes private expression on matters of private concern—the type of speech subject to reduced constitutional protection. Cf. *Rosenbloom, supra*, at 44–45 (opinion of BRENNAN, J.,). In accord with the state courts quoted *supra*, at 5, ~~I think~~ it is clear that the libelous speech at issue here implicates the First Amendment at most only tangentially. Petitioner's credit report is purely private expression. It was distributed to only five subscribers, who were not allowed under the subscription agreement to disseminate it any further. The public simply had no access to the report. Furthermore, this sort of credit reporting is a matter of private concern. There is no credible argument that it requires special protection to ensure that "debate on public issues [will] be uninhibited, robust, and wide-open." *New York Times Co.* v. *Sullivan*, 376 U. S., at 270. It is speech solely in the economic interest of the speaker and its business audience, cf. *Central Hudson Gas & Elec.*, 447 U. S., at 561,[9] and this interest warrants no special protection when—as in this case—the speech is wholly false and clearly damaging to the victim's reputation. These factors clearly placed petitioner's credit reporting in "a subordinate position in the scale of First Amendment values." *Ohralik*, 436 U. S., at 456.

In addition, the speech here, like advertising, is hardier and less likely to be deterred by state regulation. See *Virginia Pharmacy Board*, 425 U. S., at 771, n. 24. It is solely motivated by the desire for profit, which, we have noted, is a force less likely to be deterred than others. *Ibid.* Argu-

[9] In addition, as Shiffrin notes, "[t]he interests in individual self-expression, autonomy, and the like are not present here or are present in only an attenuated way." Shiffrin 1268.

ably, the reporting here also was more objectively verifiable than speech deserving of greater protection. See *ibid.* In any case, the market provides a powerful incentive to a credit reporting agency to be accurate, since false credit reporting is of no use to creditors. Thus, any incremental "chilling" effect of libel suits would be of decreased significance.[10]

IV

Since the speech here does not involve any of the concerns that motivated the Court in *New York Times* and *Gertz*, I conclude that the First Amendment protection is substantially lessened.[11] This requires us to strike a new balance

[10] The Fifth Circuit Court of Appeals has noted that, while most States provide a qualified privilege against libel suits for commercial credit reporting agencies, in those States that do not there is a thriving credit reporting business and commercial credit transactions are not inhibited. *Hood* v. *Dun & Bradstreet, Inc.*, 486 F. 2d 25, 32 (1973), cert. denied, 415 U. S. 985 (1974). The court cited an empirical study comparing credit transactions in Boise, Idaho, where there is no privilege, with those in Spokane, Washington, where there is one. *Id.*, at 32, and n. 18.

[11] As indicated *supra*, I would not in this case attempt to define the precise boundaries of the realm in which the common law of defamation may operate. The lines will be difficult to draw in some cases. For example, reports of bankruptcies, stock quotations, and other financial items that appear in newspapers and newsletters of general circulation would involve different considerations. Nonetheless, as indicated in the text, the idea that certain kinds of speech are at the core of the First Amendment, while others are on the periphery, is not a new one to courts. See, *e. g.*, *Roth* v. *United States*, 354 U. S. 476; *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447 (1978); *Brown* v. *Hartlage*, 456 U. S. 45; Prosser § 118, p. 822–823. And the lines between public and private expression, and between matters of private and more general concern, are not unfamiliar to judges, nor would they be difficult to draw. Certainly the state courts noted *supra*, at 6, have found little difficulty in drawing them. Nor have state and federal courts found great difficulty in drawing similar lines, like the one between public and private figures, that the First Amendment requires. *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974).

I do not think this common law approach is a return to the *ad hoc* resolution of the competing interests at stake in each particular case that we eschewed in *Gertz*. See *supra*, at 343–344, 346. Constitutional protec-

between the interests of the speaker here and the state interest in providing a legal remedy for defamatory falsehood. That state interest, we have said, is "strong and legitimate." *Gertz*, 418 U. S., at 348. A State should not lightly be required to abandon this purpose,

> "for, as MR. JUSTICE STEWART has reminded us, the individual's right to the protection of his own good name 'reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. . . .' *Rosenblatt* v. *Baer*, 383 U. S. 75, 92 (1966) (concurring opinion)." *Id.*, at 341.

At the same time, however, it is necessary to recognize the scope of the state interest. Its purpose, we have noted, "is the compensation of individuals for the harm inflicted on them by defamatory falsehood." *Ibid.* It does not aim to reward victims of falsehood with damages in excess of the harm they have suffered, for the legitimate "state interest

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tions would apply identically to broad categories of speech, not to individual cases. This kind of broad categorization does not raise the same concerns of bias and the like that might be raised by judicial determinations of which particular articles or publications address issues of "general or public interest," cf. *id.*, at 346. See Shiffrin 1268, n. 327. Moreover, prophylactic rules—such as a direction to err on the side of constitutional protection—might be suggested that would ensure that speech of genuine concern was not restrained.

There is little reason for the Court's anxiety that "an immeasurable volume of litigation" would result from this approach, *ante*, at 13, n. 4. *New York Times* was decided 20 years ago. It left the states free to adhere to the common law in cases involving private expression. The "flood-gates" argument simply is not justified in light of this experience. Moreover, the blanket rejection of what has been the prevailing law of defamation is a high price indeed to pay for a bright-line rule that heretofore has never been considered necessary.

extends no further than compensation for actual injury." *Id.*, at 349. It is with this in mind that the new balance should be struck.

A

Punitive damages, unlike presumed damages, are not intended to compensate the tort victim, but rather to punish the tortfeasor and to deter him and others from similar behavior. *Newport* v. *Fact Concerts, Inc.*, 453 U. S. 247, 266–267 (1981); *Electrical Workers* v. *Foust*, 442 U. S. 42, 48 (1979); *Gertz* v. *Robert Welch, Inc.*, 418 U. S., at 350. In essence, punitive damages are "private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." *Ibid.* It is the responsibility of the state, not civil juries, to impose punishment in criminal proceedings pursuant to the rule of law. In levying fines under the name of punitive damages, neither courts nor juries are required to observe the procedural safeguards that the Fifth, Sixth, and Fourteenth Amendments require in criminal proceedings. It is only in civil tort cases that juries have been permitted to impose punishment without any of these constitutional protections. Even in civil penalty proceedings brought by the government, the courts must afford the defendant some of these fundamental protections whenever the purpose is punishment. *United States* v. *United States Coin & Currency*, 401 U. S. 715 (1971); *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U. S. 693 (1965); *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, 165–167 (1963); see Wheeler, The Constitutional Case for Reforming Punitive Damages Procedures, 69 Va. L. Rev. 269, 322–351 (1983). Because it guards against wrongful and arbitrary punishments, the Due Process Clause is a constitutional protection no less necessary and vital to our civil liberties than is the First Amendment.

The most remarkable feature of punitive damages is that the jury is given no real standard in setting them. Guided only by their own notion of what is an appropriate penalty, the jurors are told they are free to award whatever amount

they deem sufficient to punish and deter. As a result, their awards often bear no rational relationship to the injury suffered and can reflect more the jury's unguided prejudices than any legitimate punitive interest.[12] They represent "windfall recoveries," *Electrical Workers* v. *Foust, supra,* at 50, which, by definition, provide monetary relief "in excess of . . . actual loss," *Scott* v. *Donald,* 165 U. S. 58, 86 (1897). We noted in *Gertz*:

> "In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. And they remain free to use their discretion selectively to punish expressions of unpopular views." 418 U. S., at 350.

In recognition of these dangers, many American jurisdictions have modified the traditional common law rule. Under the traditional rule, a jury can award punitive damages to a plaintiff who has shown that the defendant acted with a high degree of culpability. *Smith* v. *Wade,* 461 U. S. 30, 39–48 (1983) (discussing nineteenth century and present law). State courts and commentators have harshly criticized punitive damages because of the dangers they pose to due process concerns. *E. g., Murphy* v. *Hobbs,* 7 Colo. 541, 5 P. 119 (1884); *Stewart* v. *Maddox,* 63 Ind. 51, 57 (1878); *Fay* v. *Parker,* 53 N. H. 342, 390, 16 Am. Rep. 270, 329–330 (1873);

[12] In a recent case, for example, a jury awarded compensatory damages of $1,510,000 and punitive damages of $25,025,000 against an author and the publisher of Penthouse magazine. *Pring* v. *Penthouse International, Ltd.,* No. C–79–351B (Wyo., Feb. 20, 1981). The plaintiff, a former Miss Wyoming, claimed that a fanciful article describing her training for and competition at the Miss America pageant had injured her reputation. After reviewing the record, the District Court reduced the award of punitive damages to $12,500,000. *Id.* (April 20, 1981). The Court of Appeals reversed, holding that an obviously fictional account of the pageant could not be libelous under the narrow theory argued by plaintiff. 695 F. 2d 438 (CA10 1982), cert. denied, —— U. S. —— (1983).

1 J. Bouvier, Law Dictionary, Damages, p. 467 (15th ed. 1883); J. Ghiardi & J. Kircher, Punitive Damages: Law and Practice §§2.12–3.05 (1984); Long, Punitive Damages: An Unsettled Doctrine, 25 Drake L. Rev. 870, 883–889 (1976); Wheeler, *supra*. "Punitive damages," one court has remarked, "destroy every constitutional safeguard within their reach." *Fay* v. *Parker*, *supra*, at 397, 16 Am. Rep., at 338. Recognizing these dangers, a number of jurisdictions have restricted punitive damages or abolished them entirely. At least five states and the Commonwealth of Puerto Rico refuse to allow them in most tort actions. *E. g.*, *Killebrew* v. *Abbott Laboratories*, 359 So. 2d 1275, 1278 (La. 1978); *International Fidelity Insurance Co.* v. *Wilson*, 387 Mass. 841, 856 n. 20, 443 N. E. 2d 1308, 1317 n. 20 (1983); *Burt* v. *Advertiser Newspaper Co.*, 154 Mass. 238, 245, 28 N. E. 1, 5 (1891) (Holmes, J.); *Abel* v. *Conover*, 170 Neb. 926, 929, 104 N. W. 2d 684, 688 (1960); *Vratsenes* v. *N. H. Auto, Inc.*, 112 N. H. 71, 73, 289 A. 2d 66, 68 (1972); *Rivera Santos* v. *Rossi*, 64 P. R. R. 683, 686 (1945); *Maki* v. *Aluminum Building Products*, 73 Wash. 2d 23, 25, 436 P. 2d 186, 187 (1968). Several other states allow them only insofar as they compensate for intangible injury, *Wise* v. *Daniel*, 221 Mich. 229, 233–234, 190 N. W. 746, 747–748 (1922); *Peisner* v. *Detroit Free Press, Inc.*, 68 Mich. App. 360, 371–373, 242 N. W. 2d 775, 780 (1976), or litigation costs, *Triangle Sheet Metal Works, Inc.* v. *Silver*, 154 Conn. 116, 127, 222 A. 2d 220, 225 (1966), and one state allows them only when the defendant's conduct cannot be punished as a crime, *Koerner* v. *Oberly*, 56 Ind. 284, 287, 26 Am. Rep. 34, 36 (1877); *Glissman* v. *Rutt*, 175 Ind. App. 493, 372 N. E. 2d 1188 (1978). The federal courts also have refused to award punitive damages in certain actions arising under federal law. *Electrical Workers* v. *Foust*, *supra* (labor law). But see *Smith* v. *Wade*, *supra* (allowing punitive damages in § 1983 actions).

In England, the traditional common law rule has undergone a similar evolution. Prior to 1964, a plaintiff could

recover punitive damages when the defendant had acted in "contumelious disregard of the plaintiff's rights," particularly when the defendant had injured the plaintiff's dignity and feelings. *Cassell & Co.* v. *Broome*, [1972] A. C. 1027, 1068 (Hailsham, L. C.) (quoting Mayne & McGregor, *Damages* ¶207 (12th ed. 1961)). In *Rookes* v. *Barnard*, [1964] A. C. 1129, the House of Lords, sitting as England's court of last resort, greatly restricted such damages. Instead of allowing juries to award them whenever a defendant has acted oppressively towards the plaintiff, the House of Lords confined these damages to three narrow situations: (i) when government officers act oppressively, arbitrarily, or unconstitutionally, (ii) when the defendant's conduct has been calculated by him to make a profit that may well exceed the compensation payable to plaintiff, and (iii) when such damages are expressly authorized by statute. *Id.*, at 1226–1227. The law lords have not hesitated to apply these limitations to common law libel actions. *Cassell & Co.* v. *Broome*, *supra*.

It is time we follow these overdue developments. In view of the serious constitutional concerns that punitive damages pose and the absence of any legitimate state interest in providing windfalls to libel plaintiffs, I would hold that a State may not permit recovery of punitive damages in a libel action.[13]

B

Presumed damages stand on a different footing. Unlike punitive damages, their purpose is to compensate, not to punish or deter. C. McCormick, Damages § 116 (1935); 4 J. Berryman, Sutherland on Damages § 1206 (4th ed. 1916); Restatement of Torts § 621 and comment a (1938). Thus, they

[13] Statutory multiple damages, such as treble damages under the antitrust laws, 15 U. S. C. § 15(a), do not pose most of these concerns. Unlike common law punitive damages, they are governed by defined standards, limit jury discretion, are subject to effective review on appeal, and are strictly proportionate to the injury suffered. They do not implicate serious due process concerns.

do serve the State's legitimate interest[14] and may be necessary in order for the State to compensate where actual damages cannot adequately be proved. In most circumstances, the law requires the tort plaintiff to prove the fact and amount of loss. The damages proved are compensatory. In libel actions, however, even injury—in the normal sense—may not be provable and the amount of loss can almost never be proved with certainty. As noted above, it long has been recognized that "proof of actual damages [in a libel action] will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact." *Supra*, at 2. "[C]ourts and legislatures literally for centuries have thought that in the generality of cases, libeled plaintiffs will be seriously shortchanged if they must prove the extent of the injury to their reputations." *Gertz* v. *Robert Welch, Inc.*, 418 U. S., at 393 (WHITE, J., dissenting).[15]

For these reasons, the common law since the time of Hale has allowed juries in libel actions to presume damages from the fact of libelous publication. Such damages are not in-

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[14] British courts have approved presumed damages, called "at large" damages, in the same cases in which they have restricted punitive damages. *E. g.*, *Cassell & Co.* v. *Broome*, [1972] A. C. 1027, 1073 (Hailsham, L. C.) (libel action); see 28 Hailsham, Halsbury's Laws of England 10 (4th ed. 1979).

[15] My opinion for the Court in *Gertz*, as the Court today notes, did not distinguish between presumed and punitive damages in libel suits involving public expression. *Ante*, at 15 n. 5. Upon the more mature reflection required by the Court's constitutionalization of the entire law of libel, I find both historic and logical reasons for the distinction I now make.

The purpose of presumed damages is essentially compensatory. As I have noted, *supra* at 14–15, they are appropriate when it is clear from the nature of the libel that injury occurred and that measuring the damages precisely is impossible. This compensatory rationale for allowing presumed damages is wholly different from allowing a private litigant to punish a defendant by awarding punitive damages without due process of any kind.

tended to replace actual damages when these can be proved. Rather, the purpose of this presumption in libel cases is to ensure compensation when injury has occurred but is not susceptible of the type of proof and measurement required in most other tort damage suits. Thus, we have noted, presumed damages are appropriate only in situations where both the likelihood of injury and the difficulty of proving it are great. *Carey* v. *Piphus*, 435 U. S. 247, 264 (1978).[16]

Properly understood, the doctrine of presumed damages serves only to shift the traditional allocation of proof. Allowing the jury to presume damages does not imply that it is free to set them at whatever level it believes appropriate. As in any tort action, the jury is duty-bound to follow the evidence in accord with the court's instructions. If the defendant proves that injury did not occur or that it was nominal, there is no basis for presuming damages. Presumed damages, then, shift some of the burden of proof in libel cases from the plaintiff to the defendant, and since the jury can presume damages only after the plaintiff has established liability, this reallocation is not unreasonable. It merely requires the defendant to bear some of the risk of the uncertainty created by his own tortious actions. Accordingly, I would hold that in a libel action involving private expression a jury may award presumed damages—even without proof of actual malice.[17]

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[16] Many libeled persons suffer losses of reputation that extend long into the future—even into the history books. The truth often never overtakes a published falsehood, and quantifying the extent of the injury and resulting damages presents a unique problem of proof. For the reasons I have stated, permitting a jury—in the absence of standards of any kind—to award punitive damages is an unprincipled answer to this problem. But presumed compensatory damages are a necessary, though imperfect, means of resolving it. A person injured by a libelous utterance—whether by a media or nonmedia defendant—should not go remediless any more than one who suffers a tortious physical injury.

[17] In view of the special protection the First Amendment extends to certain kinds of speech, I would adhere to the "actual malice" requirement

V

I would affirm the judgment of the Supreme Court of Vermont as to presumed damages but would reverse its award of punitive damages. Such a course, unlike today's decision, follows salutary developments in the common law. It also respects fundamental constitutional values while remaining faithful to the central concern of common law damages: compensation. By contrast, the Court's decision is both too broad and too narrow to further either of these aims. By unnecessarily abrogating the common law of presumed damages, it withholds a remedy frequently necessary to compensate the libel victim fully. At the same time, the Court promotes no significant First Amendment interest. As stated in *Gertz*, *supra*, at 340, "there is no constitutional value in false statements of fact." On the other hand, by allowing punitive damages in some libel cases, the Court neglects important constitutional interests that can be protected without harming the State's legitimate interest in compensation. The Court identifies no new or overriding societal interest justifying the result it reaches in this case.

In sum, I dissent from the Court's decision both to abrogate the common law of presumed damages and to allow punitive damages when actual malice is proved. I would follow the consistent course of the common law for at least three centuries and allow presumed damages in cases involving private expression—even without proof of actual malice. I would also follow the evolution of the common law, and hold that the Constitution prohibits punitive damages against any libel defendant.

In light of these views, I would affirm in part and reverse in part.

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of *New York Times* and *Gertz* with respect to recovery of presumed damages in cases not involving private expression on matters of private concern.

02/15

See n 11 p 9 for the Wall St. Journal type case D. Here would be a media D. But it D & B took circulated to 1000 customers it would not be media

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: _____

Recirculated: _____

changes:
1, 7-8, 10-11

Noted
copy sent to SDO'C 2/16

changes later were made to accomodate WHR

3rd DRAFT, 3rd version

SUPREME COURT OF THE UNITED STATES

No. 83–18

DUN & BRADSTREET, INC., PETITIONERS *v.*
GREENMOSS BUILDERS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

[February —, 1985]

JUSTICE POWELL, dissenting.

The Court today extends the constitutional rule of *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), far beyond its origins or its purpose. In that case, the Court for the first time held that the Constitution limits the reach of state laws of libel and slander in suits involving public expression on matters of public concern. Limits are needed in such cases, the Court held, to ensure that "debate on public issues . . . be uninhibited, robust, and wide-open." *Id.*, at 270. All of the cases since then in which the Court has considered the constitutional role in defamation law also have involved public expression on such matters. The Court today goes beyond these precedents and applies the same constitutional restrictions to a libel action involving private expression between a construction company and a commercial credit reporting agency on an issue of purely private concern. In my view, such a sweeping holding is not required by the First Amendment. Nor is it wise or consistent with precedent.

I

The common law rules that the Court today repudiates are of ancient vintage. The rule that damages are presumed for libel was announced by Hale as early as 1670. *Restatement of Torts* § 568, comment b, at 162 (1938). Punitive damages also long have been available in actions for defamation under

a quite different standard than the one applied today. See, *e. g.*, C. McCormick, Law of Damages § 118, p. 431 (1935); M. Newell, Law of Defamation, Libel and Slander 842, 844–846 (1890) (citing cases). And since at least the early part of this century, a plaintiff in a garden-variety defamation suit could recover without showing any facts as to the state of mind of the defendant. W. Prosser, Law of Torts § 113, pp. 772–773 (4th ed. 1971) (hereinafter Prosser); Restatement (Second) of Torts § 580B, comment b (1977). The common law recognized some privileges, but generally to recover for written expression harmful to reputation the ordinary citizen had to show only falsity and publication.

The rationale of the common law rules has been the experience and judgment of history that "proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact." Prosser § 112, p. 765; accord, *Rowe* v. *Metz*, 195 Colo. 424, 425–426, 579 P. 2d 83, 84 (1978); Note, Developments in the Law—Defamation, 69 Harv. L. Rev. 875, 891–892 (1956). As a result, courts for centuries have allowed juries to presume that some damage occurred from many defamatory utterances and publications.

This accumulated learning is worthy of respect. Moreover, the common law rules were developed in an area of the law that, since the founding of our country, has been the province of the state courts.[1] Even if one disagrees with

[1] The Framers were familiar with the common law of libel, which had been adopted by the American colonies. See *Gertz*, 418 U. S., at 380–384 (WHITE, J., dissenting); *Roth* v. *United States*, 354 U. S. 476, 482–483, and n. 11 (1957) (13 States allowed prosecution for libel in 1792); *Beauharnais* v. *Illinois*, 343 U. S. 250, 254–255 (1952). See also T. Cooley, Constitutional Limitations 602 (7th ed. 1903); Rutledge, The Law of Defamation: Recent Developments, 32 Alabama Lawyer 409, 410 (1971):

"[T]he law of defamation has been an integral part of the laws of England, the colonies and the states since time immemorial. So many actions have been maintained and judgments recovered under the various laws of libel

these centuries-old rules,[2] this Court should discard them only if they conflict with the rights guaranteed to the people by federal law. Thus, this Court has modified these rules when their operation threatened freedom of speech and of the press guaranteed by the First Amendment. More specifically, we have done so in cases in which state law placed at risk "freedom of expression upon public questions." *New York Times* v. *Sullivan*, 376 U. S., at 269. "The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth* v. *United States*, 354 U. S. 476, 484 (1957). "At the core of the First Amendment are certain basic conceptions about the manner in which political discussion in a representative democracy should proceed." *Brown* v. *Hartlage*, 456 U. S. 45, 52 (1982); accord *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 776 (1978) (discussion of "'matters of public concern'" is "at the heart of the First Amendment's protection"). The libel at issue in this case involved purely private expression on a matter of private concern.

The Court today, contrary to history and precedent, indiscriminately extends the constitutional rule of *New York Times* and *Gertz* to nothing less than the entire field of libel and slander. Henceforth, every action by a former employee complaining of a libelous negative recommendation by an employer,[3] every action by a dealer against a competitor

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that the Constitutional validity of libel actions could be denied only by a Court willing to hold all its predecessors were wrong in their interpretation of the First Amendment and that two hundred years of precedents should be overruled."

[2] As the Court notes, there is room to doubt the wisdom of state laws that permit punitive damages on liberal terms. *Ante*, at 9; see Part IV, *infra*.

[3] *E. g.*, *Calero* v. *Del Chemical Corp.*, 68 Wis. 2d 487, 228 N. W. 2d 737 (1975); *Stuempges* v. *Parke, Davis & Co.*, 297 N. W. 2d 252 (Minn. 1980).

who falsely reports bad service to the manufacturer,[4] every action by a spurned suitor for spreading false rumors about the reasons for his failure,[5] and numerous other actions arising out of back-fence gossip or commercial incompetence[6] will be subject to the same constitutional protections as speech upon matters of the greatest public concern.

The Court's ruling today unnecessarily repudiates the common law and trivializes the First Amendment.[7] This deci-

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[4] *E. g.*, *Harley-Davidson Motorsports, Inc.* v. *Markley*, 279 Or. 361, 568 P. 2d 1359 (1977).

[5] *E. g.*, *Schomer* v. *Smidt*, 113 Cal. App. 3d 828, 170 Cal. Rptr. 662 (1980).

[6] Suits by disgruntled consumers against credit reporting agencies appear to be disquietingly common. *E. g.*, *Millstone* v. *O'Hanlon Reports, Inc.*, 528 F. 2d 829 (CA8 1976); *Retail Credit Co.* v. *Russell*, 234 Ga. 765, 218 S. E. 2d 54 (1975); *Hood* v. *Dun & Bradstreet, Inc.*, 486 F. 2d 25 (CA5 1973), cert. denied, 415 U. S. 985 (1974); *Grove* v. *Dun & Bradstreet, Inc.*, 438 F. 2d 433 (CA3), cert. denied, 404 U. S. 898 (1971). In enacting the Fair Credit Reporting Act, 15 U. S. C. §§ 1681–1681t, Congress specifically found that "[t]here is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy." *Id.*, § 1681(a)(4).

[7] The Court, commenting on my dissent, argues that its decision does not "unnecessarily burde[n] the libel laws of the states." *Ante*, at 22 n. 10. It says that "35 of the 42 states that have considered the issue have not distinguished between 'media' and 'non-media' defendants . . . ." *Ibid.* An examination of the state court decisions cited makes clear that they lend support only tangentially—if at all—to the Court's statement. *Gertz* was decided on June 25, 1974 and *New York Times* on March 9, 1964. A majority of the cases cited by the Court rest on state court interpretation of those decisions. These state cases indicate at most what the state courts believed the federal Constitution requires, not what the common law would have required prior to *New York Times* and *Gertz*.

Moreover, though not invariably clear, these cases do not involve private expression on essentially private matters. This, not a defendant's media or non-media status, is the critical distinction. The case before us today involves a privately communicated libel by one private party against another on a subject of little First Amendment concern. The Court's decision, therefore, does seriously and unnecessarily burden the libel laws of most states.

Why not leave all of this except

This is omitted from Dan's draft of 3/7

sion is said to be "squarely control[led]" by our opinion in *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974). This mischaracterizes that case, as the facts in it were very different from those here. *Gertz* was a libel suit concerning an article appearing in a magazine called American Opinion, the monthly outlet of the John Birch Society. The article in question discussed a question of undoubted public importance—whether the prosecution of a policeman was part of a Communist campaign to discredit local law enforcement agencies. The plaintiff was a lawyer tangentially involved in the prosecution who, the magazine alleged, was the chief architect of the "frame-up" of the police officer. The article spoke of the lawyer's alleged links to Communist activity. Like every other case in which this Court has considered the constitutional limits on state laws of defamation, *Gertz* involved public expression directly relevant to the effective operation of our system of democratic self-government.

In contrast, the case today is a purely private defamation action against a commercial credit reporting agency that falsely reported to respondent's creditors that respondent was bankrupt. A number of state courts, including the court below, have recognized that the role of the Constitution in regulating state libel law is far more limited when the concerns that activated *New York Times* and *Gertz* are absent.[8] In such a case,

> "[t]here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-

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[8] As one commentator has remarked with respect to "the case of a commercial supplier of credit information that defames a person applying for credit"—the very case before us today—"If the first amendment requirements outlined in *Gertz* apply, there is something clearly wrong with the first amendment or with *Gertz*." Shiffrin, The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment, 78 Nw. L. Rev. 1212, 1268 (1983) [hereinafter Shiffrin].

> censorship by the press. The facts of the present case are wholly without the First Amendment concerns with which the Supreme Court of the United States has been struggling." *Harley-Davidson Motorsports, Inc.* v. *Markley*, 279 Or. 361, 366, 568 P. 2d 1359, 1363 (1977).

Accord, *Rowe* v. *Metz*, 195 Colo. 424, 426, 579 P. 2d 83, 84 (1978); *Calero* v. *Del Chemical Corp.*, 68 Wis. 2d 487, 506, 228 N. W. 2d 737, 748 (1975); *Denny* v. *Mertz*, 106 Wis. 2d 636, 661, 318 N. W. 2d 141, 153, cert. denied, 459 U. S. 883 (1982).

II

This Court on many occasions has recognized that certain kinds of speech are more central to the interests of the First Amendment than others. Obscene speech and "fighting words" have long been accorded no protection. *Roth* v. *United States*, 354 U. S., at 483; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942); see also *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697, 716 (1931) (publication of troop ship sailings during war time may be enjoined); *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 591–592 (1952) (advocating violent overthrow of the government is unprotected speech); *Seattle Times Co.* v. *Rhinehart*, —— U. S. ——, —— (1984). Similarly, "libelous utterances are not within the area of constitutionally protected speech." *Roth*, 354 U. S., at 483; accord, *Gertz*, *supra*, at 340 ("there is no constitutional value in false statements of fact"). In the area of protected speech, the most prominent example of reduced protection for certain kinds of speech concerns commercial speech. Such speech, we have noted, occupies a "subordinate position in the scale of First Amendment values." *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 456 (1978). It also is more easily verifiable and less likely to be deterred by proper regulation. *Virginia Pharmacy Bd.* v. *Virginia Consumer Council*, 425 U. S. 748, 771, n. 24 (1976). Accordingly, it may be regulated in ways that might be impermissible in the realm of noncommercial expression. *Ohralik*, *supra*, at 456; *Central*

Hudson Gas & Elec. v. *Public Serv. Comm'n*, 447 U. S. 557, 562–563 (1980).

The Court concedes the above, but appears to believe that commercial speech—defined as advertising that does no more than propose a commercial transaction—is the only type of expression entitled to less than full First Amendment protection. See *ante*, at 18. Our cases suggest otherwise. In the area of defamation law itself, for example, some types of speech are entitled to broader protection than others: speech about public figures receives the full protection of the *New York Times* standards, while speech about private figures is entitled at most to the lesser standards of our opinion in *Gertz*.

Other areas of the law provide further examples. In *Ohralik* we noted that there are "[n]umerous examples . . . of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, . . . corporate proxy statements, . . . the exchange of price and production information among competitors, . . . and employers' threats of retaliation for the labor activities of employees." 436 U. S., at 456 (citations omitted). Yet similar regulation of political speech is subject to the most rigorous scrutiny. See *Brown* v. *Hartlage*, 456 U. S. 45; *New York Times Co.* v. *Sullivan*, 376 U. S., at 279, n. 19; *Buckley* v. *Valeo*, 424 U. S. 1, 14 (1976). Likewise, while the power of the State to license lawyers, psychiatrists, and public school teachers—all of whom speak for a living—is unquestioned, this Court has held that a law requiring licensing of union organizers is unconstitutional under the First Amendment. *Thomas* v. *Collins*, 323 U. S. 516 (1945); see Shiffrin 1264. See also *Rosenbloom* v. *Metromedia*, 403 U. S. 29, 44 (1971) (opinion of BRENNAN, J.) ("the determinant whether the First Amendment applies to state libel actions is whether the utterance involved concerns an issue of public or general concern"); *Young* v. *American Mini Theatres*, 427 U. S. 50, 70 (1976) (opinion of STEVENS, J.) ("it is manifest that

society's interest in protecting this type of expression [nonobscene erotic films] is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate").

III

In this case there is no need to define precisely what constitutes private expression on matters of private concern—the type of speech subject to reduced constitutional protection. Cf. *Rosenbloom*, *supra*, at 44–45 (opinion of BRENNAN, J.). In accord with the state courts quoted *supra*, at 5, it is clear that the libelous speech at issue here implicates the First Amendment at most only tangentially. Petitioner's credit report is purely private expression. It was distributed to only five subscribers, who were not allowed under the subscription agreement to disseminate it any further. The public simply had no access to the report. Furthermore, this sort of credit reporting is a matter of private concern. There is no credible argument that it requires special protection to ensure that "debate on public issues [will] be uninhibited, robust, and wide-open." *New York Times Co.* v. *Sullivan*, 376 U. S., at 270. It is speech solely in the economic interest of the speaker and its business audience, cf. *Central Hudson Gas & Elec.*, 447 U. S., at 561,[9] and this interest warrants no special protection when—as in this case—the speech is wholly false and clearly damaging to the victim's reputation. These factors clearly placed petitioner's credit reporting in "a subordinate position in the scale of First Amendment values." *Ohralik*, 436 U. S., at 456.

In addition, the speech here, like advertising, is hardier and less likely to be deterred by state regulation. See *Virginia Pharmacy Board*, 425 U. S., at 771, n. 24. It is solely motivated by the desire for profit, which, we have noted, is a force less likely to be deterred than others. *Ibid.* Argu-

[9] In addition, as Shiffrin notes, "[t]he interests in individual self-expression, autonomy, and the like are not present here or are present in only an attenuated way." Shiffrin 1268.

ably, the reporting here also was more objectively verifiable than speech deserving of greater protection. See *ibid.* In any case, the market provides a powerful incentive to a credit reporting agency to be accurate, since false credit reporting is of no use to creditors. Thus, any incremental "chilling" effect of libel suits would be of decreased significance.[10]

Since the speech here does not involve any of the concerns that motivated the Court in *New York Times* and *Gertz*, I conclude that the First Amendment protection is substantially lessened.[11] This requires us to strike a new balance be-

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[10] The Fifth Circuit Court of Appeals has noted that, while most States provide a qualified privilege against libel suits for commercial credit reporting agencies, in those States that do not there is a thriving credit reporting business and commercial credit transactions are not inhibited. *Hood* v. *Dun & Bradstreet, Inc.*, 486 F. 2d 25, 32 (1973), cert. denied, 415 U. S. 985 (1974). The court cited an empirical study comparing credit transactions in Boise, Idaho, where there is no privilege, with those in Spokane, Washington, where there is one. *Id.*, at 32, and n. 18.

[11] As indicated *supra*, I would not in this case attempt to define the precise boundaries of the realm in which the common law of defamation may operate. The lines will be difficult to draw in some cases. For example, reports of bankruptcies, stock quotations, and other financial items that appear in newspapers and newsletters of general circulation would involve different considerations. Nonetheless, as indicated in the text, the idea that certain kinds of speech are at the core of the First Amendment, while others are on the periphery, is not a new one to courts. See, *e. g.*, *Roth* v. *United States*, 354 U. S. 476; *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447 (1978); *Brown* v. *Hartlage*, 456 U. S. 45; Prosser § 118, p. 822–823. And the lines between public and private expression, and between matters of private and more general concern, are not unfamiliar to judges, nor would they be difficult to draw. Certainly the state courts noted *supra*, at 6, have found little difficulty in drawing them. Nor have state and federal courts found great difficulty in drawing similar lines, like the one between public and private figures, that the First Amendment requires. *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974).

I do not think this common law approach is a return to the *ad hoc* resolution of the competing interests at stake in each particular case that we eschewed in *Gertz*. See *supra*, at 343–344, 346. Constitutional protections would apply identically to categories of speech, not to individual cases. Moreover, prophylactic rules—such as a direction to err on the side of con-

tween the interests of the speaker here and the state interest in providing a legal remedy for defamatory falsehood. That state interest, we have said, is "strong and legitimate." *Gertz*, 418 U. S., at 348. A State should not lightly be required to abandon this purpose,

> "for, as MR. JUSTICE STEWART has reminded us, the individual's right to the protection of his own good name 'reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. . . .' *Rosenblatt* v. *Baer*, 383 U. S. 75, 92 (1966) (concurring opinion)." *Id.*, at 341.

As noted, the merit of imposing punitive and presumed damages reasonably may be doubted in some circumstances. In *Gertz*, we found that the state interest in awarding these particular remedies was not "substantial" in view of their effect on speech at the core of First Amendment concern. 418 U. S., at 349.[12] But this case concerns speech of significantly

stitutional protection—might be suggested that would ensure that speech of genuine concern was not restrained.

There is little reason for the Court's anxiety that "an immeasurable volume of litigation" would result from this approach, *ante*, at 13, n. 4. *New York Times* was decided 20 years ago. It left the states free to adhere to the common law in cases involving private expression. The "flood-gates" argument simply is not justified in light of this experience. Moreover, the blanket rejection of what has been the prevailing law of defamation is a high price indeed to pay for a bright-line rule that heretofore has never been considered necessary.

[12] There is language in *Gertz* that can be read broadly to the effect that presumed and punitive damages have no place in the law of defamation. It is necessary, however, to view this language in the context of the only issue before the Court in that case. The suit was brought by a private person for a publicly circulated libel on an issue of general concern. It was the public nature of the libel and its circulation that primarily led the Court to limit recovery to "actual injury." *Gertz*, *supra*, at 349. Presumed and

less constitutional interest. The state interest in these remedies need not be compelling to support the incidental effect they may have on this kind of protected speech. As noted, the common law long ago concluded that requiring proof of damages incurred did not adequately compensate the plaintiff in many defamation cases. We should not lightly presume that this judgment—a judgment respected and left to the States for 200 years—was erroneous. The state interest in providing a remedy for defamation surely includes ensuring that those remedies are effective. In light of the reduced constitutional value in the speech at issue here, I would hold that the state interest adequately supports the common law rules.

IV

Constitutional principles retain force and respect only when they are applied sparingly where needed. A commonsense view of those spheres that are primarily of local concern persuades me that the Court should stay its hand in this case. As we have said in a related context, to require a parity of constitutional protection for the speech here and that in *Gertz* and *New York Times* "could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech." *Ohralik*, 436 U. S., at 456. The Court identifies no new or overriding societal interest that justifies constitutionalizing defamation actions involving private expression on matters of private concern. I would leave this area of law to the wisdom of the several States.

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punitive damages were deemed—for the reasons first articulated in *New York Times*—to threaten public expression of matters of general concern. *Id.*, at 349–350. No such threat is present when one party privately libels another by stating that it has filed for bankruptcy. In weighing the interests that may be at issue, it is well also to repeat that there is a significant public interest "in compensating private individuals for wrongful injury to reputation." *Gertz*, *supra*, at 348–349.

02/21

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: _____

Recirculated: FEB 22 1985

Changes:
1, 3-4, 6-11

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-18

DUN & BRADSTREET, INC., PETITIONERS *v.*
GREENMOSS BUILDERS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

[February ——, 1985]

JUSTICE POWELL, dissenting.

The Court today extends the constitutional rule of *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), far beyond its origins or its purpose. In that case, the Court for the first time held that the Constitution limits the reach of state laws of libel and slander in suits involving public expression on matters of public concern. Limits are needed in such cases, the Court held, to ensure that "debate on public issues . . . be uninhibited, robust, and wide-open." *Id.*, at 270. All of the cases since then in which the Court has considered the constitutional role in defamation law also have involved public expression on such matters. The Court today goes beyond these precedents and applies the same constitutional restrictions to a libel action involving private expression between a construction company and a commercial credit reporting agency on an issue of purely private concern. In my view, such a sweeping holding is not required by the First Amendment. Nor is it wise or consistent with precedent.

I

The common law rules that the Court today repudiates are of ancient vintage. The rule that damages are presumed for libel was announced by Hale as early as 1670. *Restatement of Torts* § 568, comment b, at 162 (1938). Punitive damages also long have been available in actions for defamation under

a quite different standard than the one applied today. See, *e. g.*, C. McCormick, Law of Damages § 118, p. 431 (1935); M. Newell, Law of Defamation, Libel and Slander 842, 844–846 (1890) (citing cases). And since at least the early part of this century, a plaintiff in a garden-variety defamation suit could recover without showing any facts as to the state of mind of the defendant. W. Prosser, Law of Torts § 113, pp. 772–773 (4th ed. 1971) (hereinafter Prosser); Restatement (Second) of Torts § 580B, comment b (1977). The common law recognized some privileges, but generally to recover for written expression harmful to reputation the ordinary citizen had to show only falsity and publication.

The rationale of the common law rules has been the experience and judgment of history that "proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact." Prosser § 112, p. 765; accord, *Rowe* v. *Metz*, 195 Colo. 424, 425–426, 579 P. 2d 83, 84 (1978); Note, Developments in the Law—Defamation, 69 Harv. L. Rev. 875, 891–892 (1956). As a result, courts for centuries have allowed juries to presume that some damage occurred from many defamatory utterances and publications.

This accumulated learning is worthy of respect. Moreover, the common law rules were developed in an area of the law that, since the founding of our country, has been the province of the state courts.[1] Even if one disagrees with

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these centuries-old rules,[2] this Court should discard them only if they conflict with the rights guaranteed to the people by federal law. Thus, this Court has modified these rules when their operation threatened freedom of speech and of the press guaranteed by the First Amendment. More specifically, we have done so in cases in which state law placed at risk "freedom of expression upon public questions." *New York Times* v. *Sullivan*, 376 U. S., at 269. "The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth* v. *United States*, 354 U. S. 476, 484 (1957). "At the core of the First Amendment are certain basic conceptions about the manner in which political discussion in a representative democracy should proceed." *Brown* v. *Hartlage*, 456 U. S. 45, 52 (1982); accord *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 776 (1978) (discussion of "'matters of public concern'" is "at the heart of the First Amendment's protection"). The libel at issue in this case involved purely private expression on a matter of private concern.

The Court today, contrary to history and precedent, indiscriminately extends the constitutional rule of *New York Times* and *Gertz* to nothing less than the entire field of libel and slander. Henceforth, every action by a former employee complaining of a libelous negative recommendation by an employer,[3] every action by a dealer against a competitor

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that the Constitutional validity of libel actions could be denied only by a Court willing to hold all its predecessors were wrong in their interpretation of the First Amendment and that two hundred years of precedents should be overruled."

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who falsely reports bad service to the manufacturer,[4] every action by a spurned suitor for spreading false rumors about the reasons for his failure,[5] and numerous other actions arising out of back-fence gossip or commercial incompetence[6] will be subject to the same constitutional protections as speech upon matters of the greatest public concern.

The Court's ruling today unnecessarily repudiates the common law and trivializes the First Amendment.[7] This deci-

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[7] The Court, commenting on my dissent, argues that its decision does not "unnecessarily burde[n] the libel laws of the states." *Ante*, at 22 n. 10. It says that "35 of the 42 states that have considered the issue have not distinguished between 'media' and 'non-media' defendants . . . ." *Ibid.* An examination of the state court decisions cited makes clear that they lend support only tangentially—if at all—to the Court's statement. *Gertz* was decided on June 25, 1974 and *New York Times* on March 9, 1964. A majority of the cases cited by the Court rest on state court interpretation of those decisions. These state cases indicate at most what the state courts believed the federal Constitution requires, not what the common law would have required prior to *New York Times* and *Gertz*.

Moreover, though not invariably clear, these cases do not involve private expression on essentially private matters. This, not a defendant's media or non-media status, is the critical distinction. The case before us today involves a privately communicated libel by one private party against another on a subject of little First Amendment concern. The Court's decision, therefore, does seriously and unnecessarily burden the libel laws of most states.

sion is said to be "squarely control[led]" by our opinion in *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974). This mischaracterizes that case, as the facts in it were very different from those here. *Gertz* was a libel suit concerning an article appearing in a magazine called American Opinion, the monthly outlet of the John Birch Society. The article in question discussed a question of undoubted public importance—whether the prosecution of a policeman was part of a Communist campaign to discredit local law enforcement agencies. The plaintiff was a lawyer tangentially involved in the prosecution who, the magazine alleged, was the chief architect of the "frame-up" of the police officer. The article spoke of the lawyer's alleged links to Communist activity. Like every other case in which this Court has considered the constitutional limits on state laws of defamation, *Gertz* involved public expression directly relevant to the effective operation of our system of democratic self-government.

In contrast, the case today is a purely private defamation action against a commercial credit reporting agency that falsely reported to respondent's creditors that respondent was bankrupt. A number of state courts, including the court below, have recognized that the role of the Constitution in regulating state libel law is far more limited when the concerns that activated *New York Times* and *Gertz* are absent.[8] In such a case,

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[8] As one commentator has remarked with respect to "the case of a commercial supplier of credit information that defames a person applying for credit"—the very case before us today—"If the first amendment requirements outlined in *Gertz* apply, there is something clearly wrong with the first amendment or with *Gertz*." Shiffrin, The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment, 78 Nw. L. Rev. 1212, 1268 (1983) [hereinafter Shiffrin].

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II

This Court on many occasions has recognized that certain kinds of speech are more central to the interests of the First Amendment than others. Obscene speech and "fighting words" have long been accorded no protection. *Roth* v. *United States*, 354 U. S., at 483; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942); see also *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697, 716 (1931) (publication of troop ship sailings during war time may be enjoined); *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 591–592 (1952) (advocating violent overthrow of the government is unprotected speech); *Seattle Times Co.* v. *Rhinehart*, —— U. S. ——, —— (1984). Similarly, "libelous utterances are not within the area of constitutionally protected speech." *Roth*, 354 U. S., at 483; accord, *Gertz*, *supra*, at 340 ("there is no constitutional value in false statements of fact"). In the area of protected speech, the most prominent example of reduced protection for certain kinds of speech concerns commercial speech. Such speech, we have noted, occupies a "subordinate position in the scale of First Amendment values." *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 456 (1978). It also is more easily verifiable and less likely to be deterred by proper regulation. *Virginia Pharmacy Bd.* v. *Virginia Consumer Council*, 425 U. S. 748, 771, n. 24 (1976). Accordingly, it may be regulated in ways that might be impermissible in the realm of noncommercial expression. *Ohralik*, *supra*, at 456; *Central*

Hudson Gas & Elec. v. *Public Serv. Comm'n*, 447 U. S. 557, 562–563 (1980).

The Court concedes the above, but appears to believe that commercial speech—defined as advertising that does no more than propose a commercial transaction—is the only type of expression entitled to less than full First Amendment protection. See *ante*, at 18. Our cases suggest otherwise. In the area of defamation law itself, for example, some types of speech are entitled to broader protection than others: speech about public figures receives the full protection of the *New York Times* standards, while speech about private figures is entitled at most to the lesser standards of our opinion in *Gertz*.

Other areas of the law provide further examples. In *Ohralik* we noted that there are "[n]umerous examples . . . of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, . . . corporate proxy statements, . . . the exchange of price and production information among competitors, . . . and employers' threats of retaliation for the labor activities of employees." 436 U. S., at 456 (citations omitted). Yet similar regulation of political speech is subject to the most rigorous scrutiny. See *Brown* v. *Hartlage*, 456 U. S. 45; *New York Times Co.* v. *Sullivan*, 376 U. S., at 279, n. 19; *Buckley* v. *Valeo*, 424 U. S. 1, 14 (1976). Likewise, while the power of the State to license lawyers, psychiatrists, and public school teachers—all of whom speak for a living—is unquestioned, this Court has held that a law requiring licensing of union organizers is unconstitutional under the First Amendment. *Thomas* v. *Collins*, 323 U. S. 516 (1945); see Shiffrin 1264. See also *Rosenbloom* v. *Metromedia*, 403 U. S. 29, 44 (1971) (opinion of BRENNAN, J.) ("the determinant whether the First Amendment applies to state libel actions is whether the utterance involved concerns an issue of public or general concern"); *Young* v. *American Mini Theatres*, 427 U. S. 50, 70 (1976) (opinion of STEVENS, J.) ("it is manifest that

society's interest in protecting this type of expression [nonobscene erotic films] is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate").

III

In this case there is no need to define precisely what constitutes private expression on matters of private concern—the type of speech subject to reduced constitutional protection. Cf. *Rosenbloom, supra*, at 44–45 (opinion of BRENNAN, J.). In accord with the state courts quoted *supra*, at 5, it is clear that the libelous speech at issue here implicates the First Amendment at most only tangentially. Petitioner's credit report is purely private expression. It was distributed to only five subscribers, who were not allowed under the subscription agreement to disseminate it any further. The public simply had no access to the report. Furthermore, this sort of credit reporting is a matter of private concern. There is no credible argument that it requires special protection to ensure that "debate on public issues [will] be uninhibited, robust, and wide-open." *New York Times Co.* v. *Sullivan*, 376 U. S., at 270. It is speech solely in the economic interest of the speaker and its business audience, cf. *Central Hudson Gas & Elec.*, 447 U. S., at 561,[9] and this interest warrants no special protection when—as in this case—the speech is wholly false and clearly damaging to the victim's reputation. These factors clearly placed petitioner's credit reporting in "a subordinate position in the scale of First Amendment values." *Ohralik*, 436 U. S., at 456.

In addition, the speech here, like advertising, is hardier and less likely to be deterred by state regulation. See *Virginia Pharmacy Board*, 425 U. S., at 771, n. 24. It is solely motivated by the desire for profit, which, we have noted, is a force less likely to be deterred than others. *Ibid.* Argu-

[9] In addition, as Shiffrin notes, "[t]he interests in individual self-expression, autonomy, and the like are not present here or are present in only an attenuated way." Shiffrin 1268.

ably, the reporting here also was more objectively verifiable than speech deserving of greater protection. See *ibid.* In any case, the market provides a powerful incentive to a credit reporting agency to be accurate, since false credit reporting is of no use to creditors. Thus, any incremental "chilling" effect of libel suits would be of decreased significance.[10]

Since the speech here does not involve any of the concerns that motivated the Court in *New York Times* and *Gertz*, I conclude that the First Amendment protection is substantially lessened.[11] This requires us to strike a new balance be-

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[10] The Fifth Circuit Court of Appeals has noted that, while most States provide a qualified privilege against libel suits for commercial credit reporting agencies, in those States that do not there is a thriving credit reporting business and commercial credit transactions are not inhibited. *Hood* v. *Dun & Bradstreet, Inc.*, 486 F. 2d 25, 32 (1973), cert. denied, 415 U. S. 985 (1974). The court cited an empirical study comparing credit transactions in Boise, Idaho, where there is no privilege, with those in Spokane, Washington, where there is one. *Id.*, at 32, and n. 18.

[11] As indicated *supra*, I would not in this case attempt to define the precise boundaries of the realm in which the common law of defamation may operate. The lines will be difficult to draw in some cases. For example, reports of bankruptcies, stock quotations, and other financial items that appear in newspapers and newsletters of general circulation would involve different considerations. Nonetheless, as indicated in the text, the idea that certain kinds of speech are at the core of the First Amendment, while others are on the periphery, is not a new one to courts. See, *e. g.*, *Roth* v. *United States*, 354 U. S. 476; *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447 (1978); *Brown* v. *Hartlage*, 456 U. S. 45; Prosser § 118, p. 822–823. And the lines between public and private expression, and between matters of private and more general concern, are not unfamiliar to judges, nor would they be difficult to draw. Certainly state and federal courts have found little difficulty in drawing similar lines, like the one between public and private figures, that the First Amendment requires. *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974).

I do not think this common law approach is a return to the *ad hoc* resolution of the competing interests at stake in each particular case that we eschewed in *Gertz*. See *supra*, at 343–344, 346. Constitutional protections would apply identically to categories of speech, not to individual cases. Moreover, prophylactic rules—such as a direction to err on the side of con-

tween the interests of the speaker here and the state interest in providing a legal remedy for defamatory falsehood. That state interest, we have said, is "strong and legitimate." *Gertz*, 418 U. S., at 348. A State should not lightly be required to abandon this purpose,

> "for, as MR. JUSTICE STEWART has reminded us, the individual's right to the protection of his own good name 'reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. . . .' *Rosenblatt* v. *Baer*, 383 U. S. 75, 92 (1966) (concurring opinion)." *Id.*, at 341.

As noted, the merit of imposing punitive and presumed damages reasonably may be doubted in some circumstances. In *Gertz*, we found that the state interest in awarding these particular remedies was not "substantial" in view of their effect on speech at the core of First Amendment concern. 418 U. S., at 349.[12] But this case concerns speech of significantly

stitutional protection—might be suggested that would ensure that speech of genuine concern was not restrained.

There is little reason for the Court's anxiety that "an immeasurable volume of litigation" would result from this approach, *ante*, at 13, n. 4. *New York Times* was decided 20 years ago. It left the states free to adhere to the common law in cases involving private expression. The "flood-gates" argument simply is not justified in light of this experience. Moreover, the blanket rejection of what has been the prevailing law of defamation is a high price indeed to pay for a bright-line rule that heretofore has never been considered necessary.

[12] There is language in *Gertz* that can be read broadly to the effect that presumed and punitive damages have no place in the law of defamation. It is necessary, however, to view this language in the context of the only issue before the Court in that case. The suit was brought by a private person for a publicly circulated libel on an issue of general concern. It was the public nature of the libel and its circulation that primarily led the Court to limit recovery to "actual injury." *Gertz*, *supra*, at 349. Presumed and

less constitutional interest. The state interest in these remedies need not be compelling to support the incidental effect they may have on this kind of protected speech. As noted, the common law long ago concluded that requiring proof of damages incurred did not adequately compensate the plaintiff in many defamation cases. We should not lightly presume that this judgment—a judgment respected and left to the States for 200 years—was erroneous. The state interest in providing a remedy for defamation surely includes ensuring that those remedies are effective. In light of the reduced constitutional value in the speech at issue here, I would hold that the state interest adequately supports the common law rules.

IV

Constitutional principles retain force and respect only when they are applied sparingly where needed. A commonsense view of those spheres that are primarily of local concern persuades me that the Court should stay its hand in this case. As we have said in a related context, to require a parity of constitutional protection for the speech here and that in *Gertz* and *New York Times* "could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech." *Ohralik*, 436 U. S., at 456. The Court identifies no new or overriding societal interest that justifies constitutionalizing defamation actions involving private expression on matters of private concern. I would leave this area of law to the wisdom of the several States.

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punitive damages were deemed—for the reasons first articulated in *New York Times*—to threaten public expression of matters of general concern. *Id.*, at 349–350. No such threat is present when one party privately libels another by stating that it has filed for bankruptcy. In weighing the interests that may be at issue, it is well also to repeat that there is a significant public interest "in compensating private individuals for wrongful injury to reputation." *Gertz, supra*, at 348–349.

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

changes:
1, 3–11

From: **Justice Powell**

Circulated: _____

Recirculated: MAR 13 1985

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-18

DUN & BRADSTREET, INC., PETITIONERS *v.*
GREENMOSS BUILDERS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

[March ——, 1985]

JUSTICE POWELL, dissenting.

The Court today extends the constitutional rule of *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), far beyond its origins or its purpose. In that case, the Court for the first time held that the Constitution limits the reach of state laws of libel and slander in suits involving public expression on matters of public concern. Limits are needed in such cases, the Court held, to ensure that "debate on public issues . . . be uninhibited, robust, and wide-open." *Id.*, at 270. All of the cases since then in which the Court has considered the constitutional role in defamation law also have involved public expression on such matters. The Court today goes beyond these precedents and applies the same constitutional restrictions to a libel action between a construction company and a commercial credit reporting agency on an issue of purely private concern. In my view, such a sweeping holding is not required by the First Amendment. Nor is it wise or consistent with precedent. — omission

I

The common law rules that the Court today repudiates are of ancient vintage. The rule that damages are presumed for libel was announced by Hale as early as 1670. *Restatement of Torts* § 568, comment b, at 162 (1938). Punitive damages also long have been available in actions for defamation under

a quite different standard than the one applied today. See, *e. g.*, C. McCormick, Law of Damages § 118, p. 431 (1935); M. Newell, Law of Defamation, Libel and Slander 842, 844–846 (1890) (citing cases). And since at least the early part of this century, a plaintiff in a garden-variety defamation suit could recover without showing any facts as to the state of mind of the defendant. W. Prosser, Law of Torts § 113, pp. 772–773 (4th ed. 1971) (hereinafter Prosser); Restatement (Second) of Torts § 580B, comment b (1977). The common law recognized some privileges, but generally to recover for written expression harmful to reputation the ordinary citizen had to show only falsity and publication.

The rationale of the common law rules has been the experience and judgment of history that "proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact." Prosser § 112, p. 765; accord, *Rowe* v. *Metz*, 195 Colo. 424, 425–426, 579 P. 2d 83, 84 (1978); Note, Developments in the Law—Defamation, 69 Harv. L. Rev. 875, 891–892 (1956). As a result, courts for centuries have allowed juries to presume that some damage occurred from many defamatory utterances and publications.

This accumulated learning is worthy of respect. Moreover, the common law rules were developed in an area of the law that, since the founding of our country, has been the province of the state courts.[1] Even if one disagrees with

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The Court's ruling today unnecessarily repudiates the common law and trivializes the First Amendment. This decision is said to be "squarely control[led]" by our opinion in *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974). This mischaracterizes that case, as the facts in it were very different from those here. *Gertz* was a libel suit concerning an article appearing in a magazine called American Opinion, the monthly outlet of the John Birch Society. The article in question discussed a question of undoubted public importance—whether the prosecution of a policeman was part of a Communist campaign to discredit local law enforcement agencies. The plaintiff, neither a public figure nor a public official, was a lawyer tangentially involved in the prosecution who, the magazine alleged, was the chief architect of the "frame-up" of the police officer. The article spoke of the lawyer's alleged links to Communist activity. Like every other case in which this Court has considered the constitu-

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United States, 354 U. S., at 483; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942); see also *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697, 716 (1931) (publication of troop ship sailings during war time may be enjoined); *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 591–592 (1952) (advocating violent overthrow of the government is unprotected speech); *Seattle Times Co.* v. *Rhinehart*, —— U. S. ——, —— (1984). In the area of protected speech, the most prominent example of reduced protection for certain kinds of speech concerns commercial speech. Such speech, we have noted, occupies a "subordinate position in the scale of First Amendment values." *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 456 (1978). It also is more easily verifiable and less likely to be deterred by proper regulation. *Virginia Pharmacy Bd.* v. *Virginia Consumer Council*, 425 U. S. 748, 771, n. 24 (1976). Accordingly, it may be regulated in ways that might be impermissible in the realm of noncommercial expression. *Ohralik*, *supra*, at 456; *Central Hudson Gas & Elec.* v. *Public Serv. Comm'n*, 447 U. S. 557, 562–563 (1980).

The Court concedes the above, but appears to believe that commercial speech—defined as advertising that does no more than propose a commercial transaction—is the only type of expression entitled to less than full First Amendment protection. See *ante*, at 18. Our cases suggest otherwise. In the area of defamation law itself, for example, some types of speech are entitled to broader protection than others: speech about public officials and public figures receives the full protection of the *New York Times* standards, while speech about private figures is entitled at most to the lesser standards of our opinion in *Gertz*.

Other areas of the law provide further examples. In *Ohralik* we noted that there are "[n]umerous examples . . . of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, . . . corporate proxy statements, . . . the exchange of price and production information among competitors, . . .

and employers' threats of retaliation for the labor activities of employees." 436 U. S., at 456 (citations omitted). Yet similar regulation of political speech is subject to the most rigorous scrutiny. See *Brown* v. *Hartlage*, 456 U. S. 45; *New York Times Co.* v. *Sullivan*, 376 U. S., at 279, n. 19; *Buckley* v. *Valeo*, 424 U. S. 1, 14 (1976). Likewise, while the power of the State to license lawyers, psychiatrists, and public school teachers—all of whom speak for a living—is unquestioned, this Court has held that a law requiring licensing of union organizers is unconstitutional under the First Amendment. *Thomas* v. *Collins*, 323 U. S. 516 (1945); see Shiffrin 1264. See also *Rosenbloom* v. *Metromedia*, 403 U. S. 29, 44 (1971) (opinion of BRENNAN, J.) ("the determinant whether the First Amendment applies to state libel actions is whether the utterance involved concerns an issue of public or general concern"); *Young* v. *American Mini Theatres*, 427 U. S. 50, 70 (1976) (opinion of STEVENS, J.) ("it is manifest that society's interest in protecting this type of expression [nonobscene erotic films] is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate").

III

In this case there is no need to define precisely what constitutes expression on matters of private concern—the type of speech subject to reduced constitutional protection. Cf. *Rosenbloom*, *supra*, at 44–45 (opinion of BRENNAN, J.). In accord with the state courts quoted *supra*, at 5, it is clear that the libelous speech at issue here implicates the First Amendment at most only tangentially. Petitioner's credit reporting is a matter of private concern, for it is speech solely in the individual economic interest of the speaker and its specific business audience.[8] Cf. *Central Hudson Gas & Elec.* v.

[8] Unlike those cases in which we have held that the First Amendment protects speech concerning "purely economic" interests, *e. g.*, *Virginia Pharmacy Bd.* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S., at 762, the present case does not involve any "strong interest in the free flow

Public Service Comm., 447 U. S., at 561. This interest warrants no special protection when—as in this case—the speech is wholly false and clearly damaging to the victim's reputation.[9] There is no credible argument that this type of credit reporting requires special protection to ensure that "debate on public issues [will] be uninhibited, robust, and wide-open." *New York Times Co.* v. *Sullivan*, 376 U. S., at 270. These factors clearly placed petitioner's credit reporting in "a subordinate position in the scale of First Amendment values." *Ohralik*, 436 U. S., at 456.

In addition, the speech here, like advertising, is hardier and less likely to be deterred by state regulation. See *Virginia Pharmacy Board*, 425 U. S., at 771, n. 24. It is solely motivated by the desire for profit, which, we have noted, is a force less likely to be deterred than others. *Ibid.* Arguably, the reporting here also was more objectively verifiable than speech deserving of greater protection. See *ibid.* In any case, the market provides a powerful incentive to a credit reporting agency to be accurate, since false credit reporting is of no use to creditors. Thus, any incremental "chilling" effect of libel suits would be of decreased significance.[10]

Since the speech here does not involve any of the concerns that motivated the Court in *New York Times* and *Gertz*, I

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of commercial information . . . ." *Id.*, at 764. The particular information contained in the disputed credit report, for example, was made available to only five business subscribers, who, under the terms of the subscription agreement, could not disseminate it any further.

[9] In addition, as Shiffrin notes, "[t]he interests in individual self-expression, autonomy, and the like are not present here or are present in only an attenuated way." Shiffrin 1268.

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conclude that the First Amendment protection is substantially lessened.[11] This requires us to strike a new balance between the interests of the speaker here and the state interest in providing a legal remedy for defamatory falsehood. That state interest, we have said, is "strong and legitimate." *Gertz*, 418 U. S., at 348. A State should not lightly be required to abandon this purpose,

> "for, as MR. JUSTICE STEWART has reminded us, the individual's right to the protection of his own good name 'reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of

[11] As indicated *supra*, I would not in this case attempt to define the precise boundaries of the realm in which the common law of defamation may operate. The lines may be difficult to draw in some cases. For example, commercial reporting disseminated in the general public interest would involve different considerations. Nonetheless, as indicated in the text, the idea that certain kinds of speech are at the core of the First Amendment, while others are on the periphery, is not a new one to courts. See, *e. g.*, *Roth* v. *United States*, 354 U. S. 476; *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447 (1978); *Brown* v. *Hartlage*, 456 U. S. 45; Prosser § 118, p. 822–823. And the line between matters of private and general public concern is not unfamiliar to judges, nor would it be difficult to draw. Certainly state and federal courts have found little difficulty in drawing similar lines, like the one between public and private figures, that the First Amendment requires. *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974).

This common law approach is not a return to the *ad hoc* resolution of the competing interests at stake in each particular case that we eschewed in *Gertz*. See *supra*, at 343–344, 346. Constitutional protections would apply identically to categories of speech, not to individual cases.

There is little reason for the Court's anxiety that "an immeasurable volume of litigation" would result from this approach, *ante*, at 13, n. 4. *New York Times* was decided 20 years ago. It left the states free to adhere to the common law in cases involving private expression. The "flood-gates" argument simply is not justified in light of this experience. Moreover, the blanket rejection of what has been the prevailing law of defamation is a high price indeed to pay for a bright-line rule that heretofore has never been considered necessary.

life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. . . .' *Rosenblatt* v. *Baer*, 383 U. S. 75, 92 (1966) (concurring opinion)." *Id.*, at 341.

As noted, the merit of imposing punitive and presumed damages reasonably may be doubted in some circumstances. In *Gertz*, we found that the state interest in awarding these particular remedies was not "substantial" in view of their effect on speech at the core of First Amendment concern. 418 U. S., at 349.[12] But this case concerns speech of significantly less constitutional interest. The state interest in these remedies need not be compelling to support the incidental effect they may have on this kind of protected speech. As noted, the common law long ago concluded that requiring proof of damages incurred did not adequately compensate the plaintiff in many defamation cases. We should not lightly presume that this judgment—a judgment respected and left to the States for 200 years—was erroneous. The state interest in providing a remedy for defamation surely includes ensuring that those remedies are effective. In light of the reduced constitutional value in the speech at issue here, I would hold that the state interest adequately supports the common law rules.

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[12] There is language in *Gertz* that can be read broadly to the effect that presumed and punitive damages have no place in the law of defamation. It is necessary, however, to view this language in the context of the only issue before the Court in that case. The suit was brought by a private person for a publicly circulated libel on an issue of general concern. It was the public nature of the libel and its circulation that primarily led the Court to limit recovery to "actual injury." *Gertz*, *supra*, at 349. Presumed and punitive damages were deemed—for the reasons first articulated in *New York Times*—to threaten expression on matters of general public concern. *Id.*, at 349–350. No such threat is present when one party privately libels another by stating that it has filed for bankruptcy. In weighing the interests that may be at issue, it is well also to repeat that there is a significant public interest "in compensating private individuals for wrongful injury to reputation." *Gertz*, *supra*, at 348–349.

IV

Constitutional principles retain force and respect only when they are applied sparingly where needed. A commonsense view of those spheres that are primarily of local concern persuades me that the Court should stay its hand in this case. As we have said in a related context, to require a parity of constitutional protection for the speech here and that in *Gertz* and *New York Times* "could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech." *Ohralik*, 436 U. S., at 456. This case involves only the defamation of a private party on a matter of private concern. The Court's opinion sweeps far beyond the case before us and in effect constitutionalizes the law of defamation. It identifies no new or overriding societal interest that justifies this radical departure from history and precedent. At least where the libel is a matter of only private concern, I would leave this area of law to the wisdom of the several States.

03/19

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: _____

Recirculated: MAR 20 1985

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83–18

DUN & BRADSTREET, INC., PETITIONERS *v.* GREENMOSS BUILDERS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

[March ——, 1985]

JUSTICE POWELL, with whom JUSTICE REHNQUIST and JUSTICE O'CONNOR join, dissenting.

The Court today extends the constitutional rule of *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), far beyond its origins or its purpose. In that case, the Court for the first time held that the Constitution limits the reach of state laws of libel and slander in suits involving public expression on matters of public concern. Limits are needed in such cases, the Court held, to ensure that "debate on public issues . . . be uninhibited, robust, and wide-open." *Id.*, at 270. All of the cases since then in which the Court has considered the constitutional role in defamation law also have involved public expression on such matters. The Court today goes beyond these precedents and applies the same constitutional restrictions to a libel action between a construction company and a commercial credit reporting agency on an issue of purely private concern. In my view, such a sweeping holding is not required by the First Amendment. Nor is it wise or consistent with precedent.

I

The common law rules that the Court today repudiates are of ancient vintage. The rule that damages are presumed for libel was announced by Hale as early as 1670. *Restatement of Torts* § 568, comment b, at 162 (1938). Punitive damages

also long have been available in actions for defamation under a quite different standard than the one applied today. See, *e. g.*, C. McCormick, Law of Damages § 118, p. 431 (1935); M. Newell, Law of Defamation, Libel and Slander 842, 844–846 (1890) (citing cases). And since at least the early part of this century, a plaintiff in a garden-variety defamation suit could recover without showing any facts as to the state of mind of the defendant. W. Prosser, Law of Torts § 113, pp. 772–773 (4th ed. 1971) (hereinafter Prosser); Restatement (Second) of Torts § 580B, comment b (1977). The common law recognized some privileges, but generally to recover for written expression harmful to reputation the ordinary citizen had to show only falsity and publication.

The rationale of the common law rules has been the experience and judgment of history that "proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact." Prosser § 112, p. 765; accord, *Rowe* v. *Metz*, 195 Colo. 424, 425–426, 579 P. 2d 83, 84 (1978); Note, Developments in the Law—Defamation, 69 Harv. L. Rev. 875, 891–892 (1956). As a result, courts for centuries have allowed juries to presume that some damage occurred from many defamatory utterances and publications.

This accumulated learning is worthy of respect. Moreover, the common law rules were developed in an area of the law that, since the founding of our country, has been the province of the state courts.[1] Even if one disagrees with

[1] The Framers were familiar with the common law of libel, which had been adopted by the American colonies. See *Gertz*, 418 U. S., at 380–384 (WHITE, J., dissenting); *Roth* v. *United States*, 354 U. S. 476, 482–483, and n. 11 (1957) (13 States allowed prosecution for libel in 1792); *Beauharnais* v. *Illinois*, 343 U. S. 250, 254–255 (1952). See also T. Cooley, Constitutional Limitations 602 (7th ed. 1903); Rutledge, The Law of Defamation: Recent Developments, 32 Alabama Lawyer 409, 410 (1971):

"[T]he law of defamation has been an integral part of the laws of England, the colonies and the states since time immemorial. So many actions have

these centuries-old rules,[2] this Court should discard them only if they conflict with the rights guaranteed to the people by federal law. Thus, this Court has modified these rules when their operation threatened freedom of speech and of the press guaranteed by the First Amendment. More specifically, we have done so in cases in which state law placed at risk "freedom of expression upon public questions." *New York Times* v. *Sullivan*, 376 U. S., at 269. "The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth* v. *United States*, 354 U. S. 476, 484 (1957). "At the core of the First Amendment are certain basic conceptions about the manner in which political discussion in a representative democracy should proceed." *Brown* v. *Hartlage*, 456 U. S. 45, 52 (1982); accord *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 776 (1978) (discussion of "'matters of public concern'" is "at the heart of the First Amendment's protection"). The libel at issue in this case involved expression on a matter of purely private concern.

The Court today, contrary to history and precedent, indiscriminately extends the constitutional rule of *New York Times* and *Gertz* to nothing less than the entire field of libel and slander. Henceforth, every action by a former employee complaining of a libelous negative recommendation by an employer,[3] every action by a dealer against a competitor

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been maintained and judgments recovered under the various laws of libel that the Constitutional validity of libel actions could be denied only by a Court willing to hold all its predecessors were wrong in their interpretation of the First Amendment and that two hundred years of precedents should be overruled."

[2] As the Court notes, there is room to doubt the wisdom of state laws that permit punitive damages on liberal terms. *Ante*, at 9; see Part IV, *infra*.

[3] *E. g.*, *Calero* v. *Del Chemical Corp.*, 68 Wis. 2d 487, 228 N. W. 2d 737 (1975); *Stuempges* v. *Parke, Davis & Co.*, 297 N. W. 2d 252 (Minn. 1980).

who falsely reports bad service to the manufacturer,[4] every action by a spurned suitor for spreading false rumors about the reasons for his failure,[5] and numerous other actions arising out of back-fence gossip or commercial incompetence[6] will be subject to the same constitutional protections as speech upon matters of the greatest public concern.

The Court's ruling today unnecessarily repudiates the common law and trivializes the First Amendment. This decision is said to be "squarely control[led]" by our opinion in *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974). This mischaracterizes that case, as the facts in it were very different from those here. *Gertz* was a libel suit concerning an article appearing in a magazine called American Opinion, the monthly outlet of the John Birch Society. The article in question discussed a question of undoubted public importance—whether the prosecution of a policeman was part of a Communist campaign to discredit local law enforcement agencies. The plaintiff, neither a public figure nor a public official, was a lawyer tangentially involved in the prosecution who, the magazine alleged, was the chief architect of the "frame-up" of the police officer. The article spoke of the lawyer's alleged links to Communist activity. Like every other case in which this Court has considered the constitu-

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[4] *E. g.*, *Harley-Davidson Motorsports, Inc.* v. *Markley*, 279 Or. 361, 568 P. 2d 1359 (1977).

[5] *E. g.*, *Schomer* v. *Smidt*, 113 Cal. App. 3d 828, 170 Cal. Rptr. 662 (1980).

[6] Suits by disgruntled consumers against credit reporting agencies appear to be disquietingly common. *E. g.*, *Millstone* v. *O'Hanlon Reports, Inc.*, 528 F. 2d 829 (CA8 1976); *Retail Credit Co.* v. *Russell*, 234 Ga. 765, 218 S. E. 2d 54 (1975); *Hood* v. *Dun & Bradstreet, Inc.*, 486 F. 2d 25 (CA5 1973), cert. denied, 415 U. S. 985 (1974); *Grove* v. *Dun & Bradstreet, Inc.*, 438 F. 2d 433 (CA3), cert. denied, 404 U. S. 898 (1971). In enacting the Fair Credit Reporting Act, 15 U. S. C. §§ 1681–1681t, Congress specifically found that "[t]here is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy." *Id.*, § 1681(a)(4).

tional limits on state laws of defamation, *Gertz* involved expression directly relevant to the effective operation of our system of democratic self-government.

In contrast, the case today is a defamation action against a commercial credit reporting agency that falsely reported to respondent's creditors that respondent was bankrupt. A number of state courts, including the court below, have recognized that the role of the Constitution in regulating state libel law is far more limited when the concerns that activated *New York Times* and *Gertz* are absent.[7] In such a case,

> "[t]here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-censorship by the press. The facts of the present case are wholly without the First Amendment concerns with which the Supreme Court of the United States has been struggling." *Harley-Davidson Motorsports, Inc.* v. *Markley*, 279 Or. 361, 366, 568 P. 2d 1359, 1363 (1977).

Accord, *Rowe* v. *Metz*, 195 Colo. 424, 426, 579 P. 2d 83, 84 (1978); *Calero* v. *Del Chemical Corp.*, 68 Wis. 2d 487, 506, 228 N. W. 2d 737, 748 (1975); *Denny* v. *Mertz*, 106 Wis. 2d 636, 661, 318 N. W. 2d 141, 153, cert. denied, 459 U. S. 883 (1982).

II

This Court on many occasions has recognized that certain kinds of speech are more central to the interests of the First Amendment than others. Obscene speech and "fighting words" have long been accorded no protection. *Roth* v.

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Public Service Comm., 447 U. S., at 561. This interest warrants no special protection when—as in this case—the speech is wholly false and clearly damaging to the victim's reputation.[9] There is no credible argument that this type of credit reporting requires special protection to ensure that "debate on public issues [will] be uninhibited, robust, and wide-open." *New York Times Co.* v. *Sullivan*, 376 U. S., at 270. These factors clearly placed petitioner's credit reporting in "a subordinate position in the scale of First Amendment values." *Ohralik*, 436 U. S., at 456.

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[11] As indicated *supra*, I would not in this case attempt to define the precise boundaries of the realm in which the common law of defamation may operate. The lines may be difficult to draw in some cases. For example, commercial reporting disseminated in the general public interest would involve different considerations. Nonetheless, as indicated in the text, the idea that certain kinds of speech are at the core of the First Amendment, while others are on the periphery, is not a new one to courts. See, *e. g.*, *Roth* v. *United States*, 354 U. S. 476; *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447 (1978); *Brown* v. *Hartlage*, 456 U. S. 45; Prosser § 118, p. 822–823. And the line between matters of private and general public concern is not unfamiliar to judges, nor would it be difficult to draw. Certainly state and federal courts have found little difficulty in drawing similar lines, like the one between public and private figures, that the First Amendment requires. *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974).

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There is little reason for the Court's anxiety that "an immeasurable volume of litigation" would result from this approach, *ante*, at 13, n. 4. *New York Times* was decided 20 years ago. It left the states free to adhere to the common law in cases involving private expression. The "flood-gates" argument simply is not justified in light of this experience. Moreover, the blanket rejection of what has been the prevailing law of defamation is a high price indeed to pay for a bright-line rule that heretofore has never been considered necessary.

> life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. . . .' *Rosenblatt* v. *Baer*, 383 U. S. 75, 92 (1966) (concurring opinion)." *Id.*, at 341.

As noted, the merit of imposing punitive and presumed damages reasonably may be doubted in some circumstances. In *Gertz*, we found that the state interest in awarding these particular remedies was not "substantial" in view of their effect on speech at the core of First Amendment concern. 418 U. S., at 349.[12] But this case concerns speech of significantly less constitutional interest. The state interest in these remedies need not be compelling to support the incidental effect they may have on this kind of protected speech. As noted, the common law long ago concluded that requiring proof of damages incurred did not adequately compensate the plaintiff in many defamation cases. We should not lightly presume that this judgment—a judgment respected and left to the States for 200 years—was erroneous. The state interest in providing a remedy for defamation surely includes ensuring that those remedies are effective. In light of the reduced constitutional value in the speech at issue here, I would hold that the state interest adequately supports the common law rules.

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[12] There is language in *Gertz* that can be read broadly to the effect that presumed and punitive damages have no place in the law of defamation. It is necessary, however, to view this language in the context of the only issue before the Court in that case. The suit was brought by a private person for a publicly circulated libel on an issue of general concern. It was the public nature of the libel and its circulation that primarily led the Court to limit recovery to "actual injury." *Gertz*, *supra*, at 349. Presumed and punitive damages were deemed—for the reasons first articulated in *New York Times*—to threaten expression on matters of general public concern. *Id.*, at 349–350. No such threat is present when one party privately libels another by stating that it has filed for bankruptcy. In weighing the interests that may be at issue, it is well also to repeat that there is a significant public interest "in compensating private individuals for wrongful injury to reputation." *Gertz*, *supra*, at 348–349.

IV

Constitutional principles retain force and respect only when they are applied sparingly where needed. A commonsense view of those spheres that are primarily of local concern persuades me that the Court should stay its hand in this case. As we have said in a related context, to require a parity of constitutional protection for the speech here and that in *Gertz* and *New York Times* "could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech." *Ohralik*, 436 U. S., at 456. This case involves only the defamation of a private party on a matter of private concern. The Court's opinion sweeps far beyond the case before us and in effect constitutionalizes the law of defamation. It identifies no new or overriding societal interest that justifies this radical departure from history and precedent. At least where the libel is a matter of only private concern, I would leave this area of law to the wisdom of the several States.

04/01

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

changes:
4, 5, 9, 10

From: **Justice Powell**

Circulated: _____

Recirculated: APR 1 1985

6th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-18

DUN & BRADSTREET, INC., PETITIONERS *v.*
GREENMOSS BUILDERS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

[March ——, 1985]

JUSTICE POWELL, with whom JUSTICE REHNQUIST and JUSTICE O'CONNOR join, dissenting.

The Court today extends the constitutional rule of *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), far beyond its origins or its purpose. In that case, the Court for the first time held that the Constitution limits the reach of state laws of libel and slander in suits involving public expression on matters of public concern. Limits are needed in such cases, the Court held, to ensure that "debate on public issues . . . be uninhibited, robust, and wide-open." *Id.*, at 270. All of the cases since then in which the Court has considered the constitutional role in defamation law also have involved public expression on such matters. The Court today goes beyond these precedents and applies the same constitutional restrictions to a libel action between a construction company and a commercial credit reporting agency on an issue of purely private concern. In my view, such a sweeping holding is not required by the First Amendment. Nor is it wise or consistent with precedent.

I

The common law rules that the Court today repudiates are of ancient vintage. The rule that damages are presumed for libel was announced by Hale as early as 1670. *Restatement of Torts* § 568, comment b, at 162 (1938). Punitive damages

also long have been available in actions for defamation under a quite different standard than the one applied today. See, *e. g.*, C. McCormick, Law of Damages § 118, p. 431 (1935); M. Newell, Law of Defamation, Libel and Slander 842, 844–846 (1890) (citing cases). And since at least the early part of this century, a plaintiff in a garden-variety defamation suit could recover without showing any facts as to the state of mind of the defendant. W. Prosser, Law of Torts § 113, pp. 772–773 (4th ed. 1971) (hereinafter Prosser); Restatement (Second) of Torts § 580B, comment b (1977). The common law recognized some privileges, but generally to recover for written expression harmful to reputation the ordinary citizen had to show only falsity and publication.

The rationale of the common law rules has been the experience and judgment of history that "proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact." Prosser § 112, p. 765; accord, *Rowe* v. *Metz*, 195 Colo. 424, 425–426, 579 P. 2d 83, 84 (1978); Note, Developments in the Law—Defamation, 69 Harv. L. Rev. 875, 891–892 (1956). As a result, courts for centuries have allowed juries to presume that some damage occurred from many defamatory utterances and publications.

This accumulated learning is worthy of respect. Moreover, the common law rules were developed in an area of the law that, since the founding of our country, has been the province of the state courts.[1] Even if one disagrees with

[1] The Framers were familiar with the common law of libel, which had been adopted by the American colonies. See *Gertz*, 418 U. S., at 380–384 (WHITE, J., dissenting); *Roth* v. *United States*, 354 U. S. 476, 482–483, and n. 11 (1957) (13 States allowed prosecution for libel in 1792); *Beauharnais* v. *Illinois*, 343 U. S. 250, 254–255 (1952). See also T. Cooley, Constitutional Limitations 602 (7th ed. 1903); Rutledge, The Law of Defamation: Recent Developments, 32 Alabama Lawyer 409, 410 (1971):

"[T]he law of defamation has been an integral part of the laws of England, the colonies and the states since time immemorial. So many actions have

these centuries-old rules,[2] this Court should discard them only if they conflict with the rights guaranteed to the people by federal law. Thus, this Court has modified these rules when their operation threatened freedom of speech and of the press guaranteed by the First Amendment. More specifically, we have done so in cases in which state law placed at risk "freedom of expression upon public questions." *New York Times* v. *Sullivan*, 376 U. S., at 269. "The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth* v. *United States*, 354 U. S. 476, 484 (1957). "At the core of the First Amendment are certain basic conceptions about the manner in which political discussion in a representative democracy should proceed." *Brown* v. *Hartlage*, 456 U. S. 45, 52 (1982); accord *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 776 (1978) (discussion of "'matters of public concern'" is "at the heart of the First Amendment's protection"). The libel at issue in this case involved expression on a matter of purely private concern.

The Court today, contrary to history and precedent, indiscriminately extends the constitutional rule of *New York Times* and *Gertz* to nothing less than the entire field of libel and slander. Henceforth, every action by a former employee complaining of a libelous negative recommendation by an employer,[3] every action by a dealer against a competitor

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been maintained and judgments recovered under the various laws of libel that the Constitutional validity of libel actions could be denied only by a Court willing to hold all its predecessors were wrong in their interpretation of the First Amendment and that two hundred years of precedents should be overruled."

[2] As the Court notes, there is room to doubt the wisdom of state laws that permit punitive damages on liberal terms. *Ante*, at 9; see Part IV, *infra*.

[3] *E. g.*, *Calero* v. *Del Chemical Corp.*, 68 Wis. 2d 487, 228 N. W. 2d 737 (1975); *Stuempges* v. *Parke, Davis & Co.*, 297 N. W. 2d 252 (Minn. 1980).

who falsely reports bad service to the manufacturer,[4] every action by a spurned suitor for spreading false rumors about the reasons for his failure,[5] and numerous other actions arising out of back-fence gossip or commercial incompetence[6] will be subject to the same constitutional protections as speech upon matters of the greatest public concern.

The Court's ruling today unnecessarily repudiates the common law and trivializes the First Amendment.[7] In stating that our opinion in *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323

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[4] *E. g., Harley-Davidson Motorsports, Inc.* v. *Markley*, 279 Or. 361, 568 P. 2d 1359 (1977).

[5] *E. g., Schomer* v. *Smidt*, 113 Cal. App. 3d 828, 170 Cal. Rptr. 662 (1980).

[6] Suits by disgruntled consumers against credit reporting agencies appear to be disquietingly common. *E. g., Millstone* v. *O'Hanlon Reports, Inc.*, 528 F. 2d 829 (CA8 1976); *Retail Credit Co.* v. *Russell*, 234 Ga. 765, 218 S. E. 2d 54 (1975); *Hood* v. *Dun & Bradstreet, Inc.*, 486 F. 2d 25 (CA5 1973), cert. denied, 415 U. S. 985 (1974); *Grove* v. *Dun & Bradstreet, Inc.*, 438 F. 2d 433 (CA3), cert. denied, 404 U. S. 898 (1971). In enacting the Fair Credit Reporting Act, 15 U. S. C. §§ 1681–1681t, Congress specifically found that "[t]here is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy." *Id.*, § 1681(a)(4).

[7] The Court, commenting on my dissent, argues that "today's decision does not repudiate the common law" because "[t]hirty-five of the 42 states to have considered the issue have applied *Gertz* comprehensively to all libel actions . . . ." *Ante*, at 19, n. 5. An examination of the state court decisions cited makes clear that they lend support only tangentially—if at all—to the Court's statement. *Gertz* was decided on June 25, 1974 and *New York Times* on March 9, 1964. Most of the cases cited by the Court rest on state court interpretation of those decisions. These state cases indicate at most what the state courts believed the federal Constitution requires, not what the common law would have required prior to *New York Times* and *Gertz*.

Moreover, though not invariably clear, these cases involved speech on "public questions." See *New York Times Co.* v. *Sullivan*, 376 U. S., at 269. This is a critical factor. By extending the *New York Times* rule to cases, like this one, that involve speech of little First Amendment concern, the Court *does* seriously and unnecessarily burden the libel laws of most states.

(1974), "set forth a constitutional rule . . . [that applies] in *any* libel action," *ante*, at 14 (emphasis added), the Court mischaracterizes that case and mistakes its holding. *Gertz* was a libel suit concerning an article appearing in a magazine called American Opinion, the monthly outlet of the John Birch Society. The article in question discussed a question of undoubted public importance—whether the prosecution of a policeman was part of a Communist campaign to discredit local law enforcement agencies. The plaintiff, neither a public figure nor a public official, was a lawyer tangentially involved in the prosecution who, the magazine alleged, was the chief architect of the "frame-up" of the police officer. The article spoke of the lawyer's alleged links to Communist activity. Like every other case in which this Court has found constitutional limits on state laws of defamation, *Gertz* involved expression directly relevant to the effective operation of our system of democratic self-government.

In contrast, the case today is a defamation action against a commercial credit reporting agency that falsely reported to respondent's creditors that respondent was bankrupt. A number of state courts, including the court below, have recognized that the role of the Constitution in regulating state libel law is far more limited when the concerns that activated *New York Times* and *Gertz* are absent.[8] In such a case,

> "[t]here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-censorship by the press. The facts of the present case

[8] As one commentator has remarked with respect to "the case of a commercial supplier of credit information that defames a person applying for credit"—the very case before us today—"If the first amendment requirements outlined in *Gertz* apply, there is something clearly wrong with the first amendment or with *Gertz*." Shiffrin, The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment, 78 Nw. L. Rev. 1212, 1268 (1983) [hereinafter Shiffrin].

> are wholly without the First Amendment concerns with which the Supreme Court of the United States has been struggling." *Harley-Davidson Motorsports, Inc.* v. *Markley*, 279 Or. 361, 366, 568 P. 2d 1359, 1363 (1977).

Accord, *Rowe* v. *Metz*, 195 Colo. 424, 426, 579 P. 2d 83, 84 (1978); *Calero* v. *Del Chemical Corp.*, 68 Wis. 2d 487, 506, 228 N. W. 2d 737, 748 (1975); *Denny* v. *Mertz*, 106 Wis. 2d 636, 661, 318 N. W. 2d 141, 153, cert. denied, 459 U. S. 883 (1982).

II

This Court on many occasions has recognized that certain kinds of speech are more central to the interests of the First Amendment than others. Obscene speech and "fighting words" have long been accorded no protection. *Roth* v. *United States*, 354 U. S., at 483; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942); see also *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697, 716 (1931) (publication of troop ship sailings during war time may be enjoined); *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 591–592 (1952) (advocating violent overthrow of the government is unprotected speech); *Seattle Times Co.* v. *Rhinehart*, —— U. S. ——, —— (1984). In the area of protected speech, the most prominent example of reduced protection for certain kinds of speech concerns commercial speech. Such speech, we have noted, occupies a "subordinate position in the scale of First Amendment values." *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 456 (1978). It also is more easily verifiable and less likely to be deterred by proper regulation. *Virginia Pharmacy Bd.* v. *Virginia Consumer Council*, 425 U. S. 748, 771, n. 24 (1976). Accordingly, it may be regulated in ways that might be impermissible in the realm of noncommercial expression. *Ohralik*, *supra*, at 456; *Central Hudson Gas & Elec.* v. *Public Serv. Comm'n*, 447 U. S. 557, 562–563 (1980).

The Court concedes the above, but appears to believe that commercial speech—defined as advertising that does no more than propose a commercial transaction—is the only type of

expression entitled to less than full First Amendment protection. See *ante*, at 18. Our cases suggest otherwise. In the area of defamation law itself, for example, some types of speech are entitled to broader protection than others: speech about public officials and public figures receives the full protection of the *New York Times* standards, while speech about private figures is entitled at most to the lesser standards of our opinion in *Gertz*.

Other areas of the law provide further examples. In *Ohralik* we noted that there are "[n]umerous examples . . . of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, . . . corporate proxy statements, . . . the exchange of price and production information among competitors, . . . and employers' threats of retaliation for the labor activities of employees." 436 U. S., at 456 (citations omitted). Yet similar regulation of political speech is subject to the most rigorous scrutiny. See *Brown* v. *Hartlage*, 456 U. S. 45; *New York Times Co.* v. *Sullivan*, 376 U. S., at 279, n. 19; *Buckley* v. *Valeo*, 424 U. S. 1, 14 (1976). Likewise, while the power of the State to license lawyers, psychiatrists, and public school teachers—all of whom speak for a living—is unquestioned, this Court has held that a law requiring licensing of union organizers is unconstitutional under the First Amendment. *Thomas* v. *Collins*, 323 U. S. 516 (1945); see Shiffrin 1264. See also *Rosenbloom* v. *Metromedia*, 403 U. S. 29, 44 (1971) (opinion of BRENNAN, J.) ("the determinant whether the First Amendment applies to state libel actions is whether the utterance involved concerns an issue of public or general concern"); *Young* v. *American Mini Theatres*, 427 U. S. 50, 70 (1976) (opinion of STEVENS, J.) ("it is manifest that society's interest in protecting this type of expression [nonobscene erotic films] is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate").

III

In this case there is no need to define precisely what constitutes expression on matters of private concern—the type of speech subject to reduced constitutional protection. Cf. *Rosenbloom*, *supra*, at 44–45 (opinion of BRENNAN, J.). In accord with the state courts quoted *supra*, at 5, it is clear that the libelous speech at issue here implicates the First Amendment at most only tangentially. Petitioner's credit reporting is a matter of private concern, for it is speech solely in the individual economic interest of the speaker and its specific business audience.[9] Cf. *Central Hudson Gas & Elec.* v. *Public Service Comm.*, 447 U. S., at 561. This interest warrants no special protection when—as in this case—the speech is wholly false and clearly damaging to the victim's reputation.[10] There is no credible argument that this type of credit reporting requires special protection to ensure that "debate on public issues [will] be uninhibited, robust, and wide-open." *New York Times Co.* v. *Sullivan*, 376 U. S., at 270. These factors clearly placed petitioner's credit reporting in "a subordinate position in the scale of First Amendment values." *Ohralik*, 436 U. S., at 456.

In addition, the speech here, like advertising, is hardier and less likely to be deterred by state regulation. See *Virginia Pharmacy Board*, 425 U. S., at 771, n. 24. It is solely motivated by the desire for profit, which, we have noted, is a force less likely to be deterred than others. *Ibid.* Argu-

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[9] Unlike those cases in which we have held that the First Amendment protects speech concerning "purely economic" interests, *e. g.*, *Virginia Pharmacy Bd.* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S., at 762, the present case does not involve any "strong interest in the free flow of commercial information . . . ." *Id.*, at 764. The particular information contained in the disputed credit report, for example, was made available to only five business subscribers, who, under the terms of the subscription agreement, could not disseminate it any further.

[10] In addition, as Shiffrin notes, "[t]he interests in individual self-expression, autonomy, and the like are not present here or are present in only an attenuated way." Shiffrin 1268.

ably, the reporting here also was more objectively verifiable than speech deserving of greater protection. See *ibid.* In any case, the market provides a powerful incentive to a credit reporting agency to be accurate, since false credit reporting is of no use to creditors. Thus, any incremental "chilling" effect of libel suits would be of decreased significance.[11]

Since the speech here does not involve any of the concerns that motivated the Court in *New York Times* and *Gertz*, I conclude that the First Amendment protection is substantially lessened.[12] This requires us to strike a new balance between the interests of the speaker here and the state interest in providing a legal remedy for defamatory falsehood.[13] That

[11] The Fifth Circuit Court of Appeals has noted that, while most States provide a qualified privilege against libel suits for commercial credit reporting agencies, in those States that do not there is a thriving credit reporting business and commercial credit transactions are not inhibited. *Hood* v. *Dun & Bradstreet, Inc.*, 486 F. 2d 25, 32 (1973), cert. denied, 415 U. S. 985 (1974). The court cited an empirical study comparing credit transactions in Boise, Idaho, where there is no privilege, with those in Spokane, Washington, where there is one. *Id.*, at 32, and n. 18.

[12] Since I would not abrogate state libel rules when applied to matters of purely private concern, the Court suggests that I believe such matters have *no* First Amendment value. *Ante*, at 26–27. This mistakes my position. As our prior cases make clear, such matters do have *some* constitutional value. Their value is outweighed, however, by the substantial state interest in compensating individuals for injury to their reputations. *Gertz* v. *Robert Welch, Inc.*, 418 U. S., at 341–342, 348–349.

[13] As indicated *supra*, I would not in this case attempt to define the precise boundaries of the realm in which the common law of defamation may operate. The lines may be difficult to draw in some cases. For example, commercial reporting disseminated in the general public interest would involve different considerations. Nonetheless, as indicated in the text, the idea that certain kinds of speech are at the core of the First Amendment, while others are on the periphery, is not a new one to courts. See, *e. g.*, *Roth* v. *United States*, 354 U. S. 476; *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447 (1978); *Brown* v. *Hartlage*, 456 U. S. 45; Prosser § 118, p. 822–823. And the line between matters of private and general public concern is not unfamiliar to judges, nor would it be difficult to draw. Certainly state and federal courts have found little difficulty in drawing similar lines, like the one between public and private figures, that the First

state interest, we have said, is "strong and legitimate." *Gertz*, 418 U. S., at 348. A State should not lightly be required to abandon this purpose,

> "for, as MR. JUSTICE STEWART has reminded us, the individual's right to the protection of his own good name 'reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. . . .' *Rosenblatt* v. *Baer*, 383 U. S. 75, 92 (1966) (concurring opinion)." *Id.*, at 341.

As noted, the merit of imposing punitive and presumed damages reasonably may be doubted in some circumstances. In *Gertz*, we found that the state interest in awarding these particular remedies was not "substantial" in view of their effect on speech at the core of First Amendment concern. 418 U. S., at 349.[14] But this case concerns speech of significantly

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Amendment requires. *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974). This common law approach is not a return to the *ad hoc* resolution of the competing interests at stake in each particular case that we eschewed in *Gertz*. See *supra*, at 343–344, 346. Constitutional protections would apply identically to categories of speech, not to individual cases.

omission

[14] There is language in *Gertz* that can be read broadly to the effect that presumed and punitive damages have no place in the law of defamation. It is necessary, however, to view this language in the context of the only issue before the Court in that case. The suit was brought by a private person for a publicly circulated libel on an issue of general concern. It was the public nature of the libel and its circulation that primarily led the Court to limit recovery to "actual injury." *Gertz*, *supra*, at 349. Presumed and punitive damages were deemed—for the reasons first articulated in *New York Times*—to threaten expression on matters of general public concern. *Id.*, at 349–350. No such threat is present when one party privately libels another by stating that it has filed for bankruptcy. In weighing the interests that may be at issue, it is well also to repeat that there is a significant public interest "in compensating private individuals for wrongful injury to reputation." *Gertz*, *supra*, at 348–349.

less constitutional interest. The state interest in these remedies need not be compelling to support the incidental effect they may have on this kind of protected speech. As noted, the common law long ago concluded that requiring proof of damages incurred did not adequately compensate the plaintiff in many defamation cases. We should not lightly presume that this judgment—a judgment respected and left to the States for 200 years—was erroneous. The state interest in providing a remedy for defamation surely includes ensuring that those remedies are effective. In light of the reduced constitutional value in the speech at issue here, I would hold that the state interest adequately supports the common law rules.

IV

Constitutional principles retain force and respect only when they are applied sparingly where needed. A commonsense view of those spheres that are primarily of local concern persuades me that the Court should stay its hand in this case. As we have said in a related context, to require a parity of constitutional protection for the speech here and that in *Gertz* and *New York Times* "could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech." *Ohralik*, 436 U. S., at 456. This case involves only the defamation of a private party on a matter of private concern. The Court's opinion sweeps far beyond the case before us and in effect constitutionalizes the law of defamation. It identifies no new or overriding societal interest that justifies this radical departure from history and precedent. At least where the libel is a matter of only private concern, I would leave this area of law to the wisdom of the several States.

L.F.P.
4/5

Dan - This is a fine version of our dissent. My editing is largely stylistic. Release on Comick had not occurred to me.

dro May 4, 1985

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,

No. 83-18.

Dan - reframe this sentence to describe Gertz more specifically

JUSTICE POWELL announced the judgment of the Court and an opinion in which THE CHIEF JUSTICE (?), JUSTICE REHNQUIST, and JUSTICE O'CONNOR join.

involving a matter of public interest,

In Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), in a suit against a media defendant, we held that the First Amendment prohibits awards of presumed and punitive damages for false and defamatory statements unless the plaintiff shows "actual malice,"

* Dan - I think we probably should omit the CJ on the 1st Draft. I hope he joins 100% after he sees this but he is not easy to persuade.

that is, knowledge of falsity or reckless disregard for the truth. The question presented in this case is whether this rule of Gertz applies when the false and defamatory statements do not involve matters of public concern.

I

Petitioner Dun & Bradstreet, a credit reporting agency, provides subscribers with financial and related information about corporations. All the information is confidential; under the terms of the subscription agreement the subscribers cannot reveal it to anyone else. On July 26, 1976, petitioner sent a report to five subscribers indicating that respondent, a construction contractor, had filed a voluntary petition for bankruptcy.

Dam. I think D & B can provide info about any business - whether or not a corp.

This report was false and grossly misrepresented respondent's assets and liabilities. That same day, while discussing the possibility of future financing with its principal creditor, respondent's president learned of the report. He immediately contacted petitioner's regional office, explained the error, and asked for a correction. In addition, he requested the names of those creditors who had received the false report in order to assure them that the company was solvent. Petitioner promised to look into the matter but refused to divulge the names of creditors who had received the report.

Wasn't it next's bank?

After determining that its report was indeed false, petitioner issued a corrective notice on or about August 3, 1976 to the five subscribers who had received the initial report. The notice stated that one of

respondent's former employees, not respondent itself, had filed for bankruptcy and that respondent "continued in business as usual." Respondent told petitioner that it was dissatisfied with the notice and it again asked for a list of subscribers who had seen the initial report. Again petitioner refused to divulge their names.

Respondent then brought this defamation action in Vermont state court. It alleged that the false report had injured its reputation and sought both compensatory and punitive damages. The trial established that the error in petitioner's report had been caused when one of its employees, a seventeen year old high school student paid to review Vermont bankruptcy pleadings, had inadvertently attributed a bankruptcy petition filed by one of respondent's former employees to respondent itself.

Although petitioner's representative testified that it was routine practice to check the accuracy of such reports with the businesses themselves, it did not try to verify the information in the present case before reporting it.

After trial, the jury returned a verdict in favor of respondent and awarded $50,000 in compensatory or presumed damages and $300,000 in punitive damages. Petitioner ~~then~~ moved for a new trial. It noted that in Gertz v. Robert Welch, Inc., supra, at 349, this Court had held "that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth," and it argued that the judge's instructions in this case permitted the jury to award such damages on a lesser showing. The trial court indicated some doubt as

to whether Gertz applied to "non-media cases," but granted a new trial "[b]ecause of ... dissatisfaction with its charge and ... conviction that the interests of justice require[d]" it. App. 26.

The Vermont Supreme Court reversed. 461 A.2d 414 (1983). Although recognizing that "in certain instances the distinction between media and nonmedia defendants may be difficult to draw," the court stated that "no such difficulty is presented with credit reporting agencies, which are in the business of selling financial information to a limited number of subscribers who have paid substantial fees for their services." Id., at 417. Relying on this distinguishing characteristic of credit reporting firms, the court concluded that such firms are not "the type of media worthy of First Amendment

protection as contemplated by New York Times [Co. v. Sullivan, 376 U.S. 254 (1964),] and its progeny." 461 A. 2d, at 417-418. It held that the balance between a private plaintiff's right to recover presumed and punitive damages without a showing of special fault and the First Amendment rights of "nonmedia" speakers "must be struck in favor of the private plaintiff defamed by a nonmedia defendant." Id., at 418. Accordingly, the court held "that as a matter of federal constitutional law, the media protections outlined in Gertz are inapplicable to nonmedia defamation actions." Ibid.

Recognizing confusion among the lower courts about when the protections of Gertz apply,[1] we granted

[1]Compare Denny v. Mertz, 106 Wis. 2d 636, 318 N.W.2d 141, cert. denied, 459 U.S. 883 (1982) (Gertz inapplicable

Footnote continued on next page.

certiorari. ___ U.S. ___ (1983). We now affirm although for different reasons than those offered by the Vermont Supreme Court.

II

As an initial matter, respondent contends that we need not determine whether Gertz applies in this case because the instructions, taken as a whole, required the jury to find "actual malice" before awarding presumed or

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to private figure suits against nonmedia defendants), Stuempges v. Parke, Davis & Co., 297 N.W.2d 252 (Minn. 1980) (same), Rowe v. Metz, 195 Colo. 424, 579 P.2d 83 (1978) (same), and Harley-Davidson Motorsports, Inc. v. Markley, 279 Or. 361, 568 P.2d 1359 (1977) (same), with Rodriguez v. Nishiki, 653 P.2d 1145, 1150 (Hawaii 1982) (Gertz applicable in such situations), Antwerp Diamond Exchange v. Better Business Bureau, 130 Ariz. 523, 637 P.2d 733 (1981) (same), Jacron Sales Co. v. Sindorf, 276 Md. 580, 350 A.2d 688 (1976) (same).

punitive damages.[2] The trial court instructed the jury that because the report was libelous per se, respondent was not required "to prove actual damages ... since damage and loss [are] conclusively presumed." App. 17; accord, id., at 19. It also instructed the jury that it could award punitive damages only if it found "actual malice." Id., at 20. Its only other relevant instruction was that liability could not be established unless respondent showed "malice or lack of good faith on the part of the Defendant." Id., at 18. Respondent contends that these references to "malice," "lack of good faith," and "actual

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[2]Respondent also argues that petitioner did not seek the protections outlined in Gertz before the jury instructions were given and that the issue therefore was not preserved for review. Since the Vermont Supreme Court considered the federal constitutional issue properly presented and decided it, there is no bar to our review. See Orr v. Orr, 440 U.S. 268, 274-275 (1979).

malice" ~~prevented~~ required the jury ~~from awarding either presumed or punitive damages without first~~ to finding knowledge of falsity or reckless disregard for the truth--the "actual malice" of New York Times before it awarded presumed & punative damages.

We reject this claim because the trial court failed to define any of these terms adequately. It ~~never~~ did not, for example, ~~offered~~ provide the jury with any definition of the term "actual malice." In fact, the only relevant term it defined was simple "malice."[3] And its definitions of this

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[3]The full instruction on malice reads as follows:

> "If you find that the Defendant acted in a bad faith towards the Plaintiff in publishing the Erroneous Report, or that Defendant intended to injure the Plaintiff in its business, or that it acted in a willful, wanton or reckless disregard of the rights and interests of the Plaintiff, the Defendant has acted maliciously and the privilege is destroyed. Further, if the Report was made with reckless disregard of the possible consequences, or if it was made with the knowledge that it was false or with reckless disregard of its truth or falsity, it was made

Footnote continued on next page.

term included not only the New York Times formulation but also other concepts such as "bad faith" and "reckless disregard of the [statement's] possible consequences." The instructions thus permitted the jury to award presumed and punitive damages on a lesser showing than "actual malice." Consequently, the trial court's conclusion that the instructions did not satisfy Gertz was correct and the Vermont Supreme Court's determination that Gertz was inapplicable was necessary to its decision that the trial court erred in granting the motion for a new trial. We therefore must consider whether Gertz applies to the case before us.

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with malice." App. 18-19 (emphasis added).

III

In New York Times Co. v. Sullivan, supra, the Court for the first time held that the First Amendment limits the reach of state defamation laws. That case concerned a public official's recovery of damages for the publication of an advertisement criticizing police conduct in a civil rights demonstration. As the Court noted, the advertisement concerned "one of the major public issues of our time." Id., at 271. Noting that "freedom of expression upon public questions is secured by the First Amendment," id., at 269 (emphasis added), and that "debate upon public issues should be uninhibited, robust, and wide-open," id., at 270 (emphasis added), the Court held that a public official cannot recover presumed and

punitive damages for defamatory falsehood unless he proves that the false statement was made with "'actual malice'--that is, with knowledge that it was false or with reckless disregard of whether it was false or not." Id., at 280. In later cases, all involving public issues, the Court extended this same constitutional protection to libels of public figures, e.g., Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), and in one case suggested in a plurality opinion that this constitutional rule should extend to libels of any individual so long as the defamatory statements involved a "matter of public or general interest," Rosenbloom v. Metromedia, Inc. 403 U.S. 29, 44 (1971) (opinion of BRENNAN, J.).

In Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), we held that the protections of New York Times did not

extend as far as Rosenbloom suggested. Gertz concerned a libelous article appearing in a magazine called American Opinion, the monthly outlet of the John Birch Society. The article in question discussed whether the prosecution of a policeman in Chicago was part of a Communist campaign to discredit local law enforcement agencies. The plaintiff, Gertz, neither a public official nor a public figure, was a lawyer tangentially involved in the prosecution, who the magazine alleged, he was the chief architect of the "frame-up" of the police officer, and linked him ~~The article spoke of the lawyer's alleged links~~ to Communist activity. ~~Like~~ As in every other case in which this Court has found constitutional limits to state defamation laws, Gertz involved expression on a matter of undoubted public concern.

In Gertz, we held that the fact that expression concerned a public issue did not by itself entitle the libel defendant to the constitutional protections of New York Times. These protections, we found, were not "justified solely by reference to the interest of the press and broadcast media in immunity from liability." Id., at 343. Rather, they represented "an accommodation between [First Amendment] concern[s] and the limited state interest present in the context of libel actions brought by public persons." Ibid. In libel actions brought by private persons we found the competing interests different. Largely because private persons generally lack effective opportunities for rebutting defamatory statements and have not voluntarily exposed themselves to increased risk of injury from them, id., at 345, we found

that the State possessed a "strong and legitimate ... interest in compensating private individuals for injury to their reputations." Id., at 348. Balancing this stronger state interest against the same First Amendment interest at stake in New York Times, we held that a State still could not allow recovery of presumed and punitive damages absent a showing of "actual malice." Nothing in our opinion indicated that this same balance would be struck regardless of the type of speech involved.

IV

We have never considered whether the Gertz accommodation obtains when the defamatory statements involve no issue of public concern. To make this

determination, we must employ the approach approved in Gertz and balance the State's interest in compensating private individuals for injury to their reputation against the First Amendment interest in protecting this type of expression. This state interest is identical to the one weighed in Gertz. There we found that it was "strong and legitimate." 418 U.S., at 348. A State should not lightly be required to abandon it,

> "for, as Mr. Justice Stewart has reminded us, the individual's right to the protection of his own good name 'reflects no more than our basic concept of the essential dignity and worth of every human being--a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments ....' Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (concurring opinion)." 418 U.S., at 341.

The First Amendment interest, on the other hand, is less important than the one weighed in Gertz. We have long recognized that not all speech is of equal First

Amendment importance.[4] It is speech on "'matters of

[4]This Court has on many occasions recognized that certain kinds of speech are less central to the interests of the First Amendment than others. Obscene speech and "fighting words" have long been accorded no protection. Roth v. United States, 354 U.S., at 483; Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); see also Near v. Minnesota ex rel. Olson, 283 U.S. 697, 716 (1931) (publication of troop ship sailings during war time may be enjoined); Harisiades v. Shaughnessy, 342 U.S. 580, 591-592 (1952) (advocating violent overthrow of the government is unprotected speech); Seattle Times Co. v. Rhinehart, ___ U.S. ___, ___ (1984). In the area of protected speech, the most prominent example of reduced protection for certain kinds of speech concerns commercial speech. Such speech, we have noted, occupies a "subordinate position in the scale of First Amendment values." Ohralik v. Ohio State Bar Assn., 436 U.S. 447, 456 (1978). It also is more easily verifiable and less likely to be deterred by proper regulation. Virginia Pharmacy Bd. v. Virginia Consumer Council, 425 U.S. 748, 771, n.24 (1976). Accordingly, it may be regulated in ways that might be impermissible in the realm of noncommercial expression. Ohralik, supra, at 456; Central Hudson Gas & Elec. v. Public Serv. Comm'n, 447 U.S. 557, 562-563 (1980).

Other areas of the law provide further examples. In Ohralik we noted that there are "[n]umerous examples . . . of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, . . . corporate proxy statements, . . . the exchange of price and production information among competitors, . . . and employers' threats of retaliation for the labor activities of employees." 436 U.S., at 456 (citations omitted). Yet similar regulation of political speech is subject to the most rigorous scrutiny. See Brown v. Hartlage, 456 U.S. 45; New York Times Co. v. Sullivan, 376 U.S., at 279, n. 19; Buckley v. Valeo, 424 U.S. 1, 14 (1976). Likewise, while the power of the State

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public concern'" that is "at the heart of First Amendment protection." First National Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978), quoting Thornhill v. Alabama, 310 U.S. 88, 101 (1940). As we stated in Connick v. Myers, 461 U.S. 138, 145 (1983), this "special concern [for speech on public issues] ... is no mystery":

> "The First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' Roth v. United States, 354 U.S. 476, 484 (1957) (1957); New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964). '[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.' Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964). Accordingly, the Court has frequently reaffirmed that speech on public issues occupies the '"highest rung of the heirarchy of First Amendment values,"' and is

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to license lawyers, psychiatrists, and public school teachers--all of whom speak for a living--is unquestioned, this Court has held that a law requiring licensing of union organizers is unconstitutional under the First Amendment. Thomas v. Collins, 323 U.S. 516 (1945); see also Rosenbloom v. Metromedia, 403 U.S. 29, 44 (1971) (opinion of BRENNAN, J.) ("the determinant whether the First Amendment applies to state libel actions is whether the utterance involved concerns an issue of public or general concern").

> entitled to special protection. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982); Carey v. Brown, 447 U.S. 455, 467 (1980)."

Accordingly, speech on matters of purely private concern is of less First Amendment ~~interest~~ concern. 461 U.S., at 146-147. As a number of state courts, including the court below, have recognized, the role of the Constitution in regulating state libel law is far more limited when the concerns that activated New York Times and Gertz are absent.[5] In such a case,

> "[t]here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-censorship by the press. The facts of the present case are wholly without the First

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[5] As one commentator has remarked with respect to "the case of a commercial supplier of credit information that defames a person applying for credit"--the ~~very~~ case before us today--"If the first amendment requirements outlined in Gertz apply, there is something clearly wrong with the first amendment or with Gertz." Shiffrin, The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment, 78 Nw. L. Rev. 1212, 1268 (1983).

> Amendment concerns with which the Supreme Court of the United States has been struggling." Harley-Davidson Motorsports, Inc. v. Markley, 279 Or. 361, 366, 568 P. 2d 1359, 1363 (1977).

Accord, Rowe v. Metz, 195 Colo. 424, 426, 579 P. 2d 83, 84 (1978); Calero v. Del Chemical Corp., 68 Wis. 2d 487, 506, 228 N.W. 2d 737, 748 (1975); Denny v. Mertz, 106 Wis. 2d 636, 661, 318 N.W. 2d 141, 153, cert. denied, 459 U.S. 883 (1982).

While such speech is not totally unprotected by the First Amendment, see Connick v. Myers, 461 U.S., at 147, its protections are ~~weakened~~ less stringent. In Gertz, we found that the state interest in awarding presumed and punitive damages was not "substantial" in view of their effect on speech at the core of First Amendment concern. 418 U.S., at 349. ~~But the state~~ This is interest ~~in these remedies need not be as~~ substantial, lower relation to ~~in order to support~~ the incidental effect they may have on speech of significantly less remedies

Dan - I find this sentence unclear. I'm not sure I'm reframing it

constitutional interest. As the common law long ago concluded, requiring proof of damages actually incurred by a defamed individual often will not adequately compensate the victim.[6] We should not lightly presume that this

Substitute Prosser for this

[6]Presumed and punitive damages are of ancient vintage. The rule that damages are presumed for libel was announced by Hale as early as 1670. Restatement of Torts §568, comment b, at 162 (1938). Punitive damages also long have been available in actions for defamation under lesser standards than "actual malice." See, e.g., C. McCormick, Law of Damages §118, p. 431 (1935); M.Newell, Law of Defamation, Libel and Slander 842, 844-846 (1890) (citing cases). And since at least the early part of this century, a plaintiff in a garden-variety defamation suit could recover presumed damages without showing any facts as to the state of mind of the defendant. W. Prosser, Law of Torts §113, pp. 772-773 (4th ed. 1971) (hereinafter Prosser); Restatement (Second) of Torts §580B, comment b (1977). The common law recognized some privileges, but generally to recover for written expression harmful to reputation the ordinary citizen had to show only falsity and publication.

Dam - 9'd put him in the text. It fits his case, Prosser is a respected authority, + her statement is much stronger than the first sentence on this page

The rationale of the common law rules has been the experience and judgment of history that "proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact." Prosser §112, p. 765; accord, Rowe v. Metz, 195 Colo. 424, 425-426, 579 P. 2d 83, 84 (1978); Note, Developments in the Law--Defamation, 69 Harv. L. Rev. 875, 891-892 (1956). As a result, courts for centuries have allowed juries to presume that some

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judgment--a judgment respected and left to the States for 200 years--was erroneous. The state interest in providing remedies for defamation ~~surely~~ includes ensuring that those remedies are effective. In light of the reduced constitutional value of speech involving no matters of public concern, we hold that the state interest adequately supports the award of presumed and punitive damages--even absent a showing of "actual malice."

V

The only remaining issue is whether petitioner's credit report involved a matter of public concern. In a

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damage occurred from many defamatory utterances and publications.

related context, we have held that "[w]hether ... speech adresses a matter of public concern must be determined by [the expression's] content, form, and context ... as revealed by the whole record." Connick v. Myers, 461 U.S., at 147-148. These factors indicate that petitioner's credit report concerns no public issue. It was speech solely in the individual interest of the speaker and its specific business audience. Cf. Central Hudson Gas & Elec. v. Public Service Comm., 447 U.S. 557, 561 (1980). This particular interest warrants no special protection when--as in this case--the speech is wholly false and clearly damaging to the victim's business reputation. Cf. Id., at 566; Virginia Pharmacy Board, 425 U.S., at 771-772. Moreover, since the credit report was made available to only five subscribers, who, under the

terms of the subscription agreement, could not disseminate it any further, it cannot be said that the report involves any "strong interest in the free flow of commercial information ...," Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc., supra, at 425 U.S. 748, 764 (1976). There is simply no credible argument that this type of credit reporting requires special protection to ensure that "debate on public issues [will] be uninhibited, robust, and wide-open." New York Times Co. v. Sullivan, 376 U.S., at 270.

In addition, the speech here, like advertising, is hardy and unlikely to be deterred by incidental state regulation. See Virginia Pharmacy Board, supra 425 U.S., at 771, n.24. It is solely motivated by the desire for profit, which, we have noted, is a force less likely to be

deterred than others. Ibid. Arguably, the reporting here was also more objectively verifiable than speech deserving of greater protection. See ibid. In any case, the market provides a powerful incentive to a credit reporting agency to be accurate, since false credit reporting is of no use to creditors. Thus, any incremental "chilling" effect of libel suits would be of decreased significance.[7]

VI

[7]The Fifth Circuit Court of Appeals has noted that, while most States provide a qualified privilege against libel suits for commercial credit reporting agencies, in those States that do not there is a thriving credit reporting business and commercial credit transactions are not inhibited. Hood v. Dun & Bradstreet, Inc., 486 F. 2d 25, 32 (1973), cert. denied, 415 U.S. 985 (1974). The court cited an empirical study comparing credit transactions in Boise, Idaho, where there is no privilege, with those in Spokane, Washington, where there is one. Id., at 32, and n. 18.

We conclude that permitting recovery of presumed and punitive damages in defamation cases absent a showing of "actual malice" does not violate the First Amendment when the defamatory statements do not involve matters of public concern. Accordingly, we affirm the judgment of the Vermont Supreme Court.

It is so ordered.

2nd Draft

L.F.P

Reviewed 5/6

dro May 6, 1985

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,

No. 83-18.

JUSTICE POWELL announced the judgment of the Court and an opinion in which JUSTICE REHNQUIST and JUSTICE O'CONNOR join.

In Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), we ~~held~~ found that the First Amendment restricts the damages that a private individual may obtain from a publisher for a libel involving a matter of public concern. More

would "ruled" be better than "found"? - latter sounds like a DC

specifically, we held that in these circumstances the First Amendment prohibits awards of presumed and punitive damages for false and defamatory statements unless the plaintiff shows "actual malice," that is, knowledge of falsity or reckless disregard for the truth. The question presented in this case is whether this rule of Gertz applies when the false and defamatory statements do not involve matters of public concern.

I

Petitioner Dun & Bradstreet, a credit reporting agency, provides subscribers with financial and related information about businesses. All the information is confidential; under the terms of the subscription

agreement the subscribers ~~cannot~~ may not reveal it to anyone else. On July 26, 1976, petitioner sent a report to five subscribers indicating that respondent, a construction contractor, had filed a voluntary petition for bankruptcy. This report was false and grossly misrepresented respondent's assets and liabilities. That same day, while discussing the possibility of future financing with its bank, respondent's president learned of the report. He immediately contacted petitioner's regional office, explained the error, and asked for a correction. In addition, he requested the names of those firms who had received the false report in order to assure them that the company was solvent. Petitioner promised to look into the matter but refused to divulge the names of those who had received the report.

After determining that its report was indeed false, petitioner issued a corrective notice on or about August 3, 1976 to the five subscribers who had received the initial report. The notice stated that one of respondent's former employees, not respondent itself, had filed for bankruptcy and that respondent "continued in business as usual." Respondent told petitioner that it was dissatisfied with the notice and it again asked for a list of subscribers who had seen the initial report. Again petitioner refused to divulge their names.

Respondent then brought this defamation action in Vermont state court. It alleged that the false report had injured its reputation and sought both compensatory and punitive damages. The trial established that the error in petitioner's report had been caused when one of its

employees, a seventeen-year-old high school student paid to review Vermont bankruptcy pleadings, had inadvertently attributed to respondent a bankruptcy petition filed by one of respondent's former employees. ~~to respondent itself.~~ Although petitioner's representative testified that it was routine practice to check the accuracy of such reports with the businesses themselves, it did not try to verify the information about respondent ~~in the present case~~ before reporting it.

After trial, the jury returned a verdict in favor of respondent and awarded $50,000 in compensatory or presumed damages and $300,000 in punitive damages. Petitioner moved for a new trial. It noted that in Gertz v. Robert Welch, Inc., supra, at 349, this Court had held "that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing

of knowledge of falsity or reckless disregard for the truth," and it argued that the judge's instructions in this case permitted the jury to award such damages on a lesser showing. The trial court indicated some doubt as to whether Gertz applied to "non-media cases," but granted a new trial "[b]ecause of ... dissatisfaction with its charge and ... conviction that the interests of justice require[d]" it. App. 26.

The Vermont Supreme Court reversed. 461 A.2d 414 (1983). Although recognizing that "in certain instances the distinction between media and nonmedia defendants may be difficult to draw," the court stated that "no such difficulty is presented with credit reporting agencies, which are in the business of selling financial information to a limited number of subscribers who have paid

substantial fees for their services." Id., at 417. Relying on this distinguishing characteristic of credit reporting firms, the court concluded that such firms are not "the type of media worthy of First Amendment protection as contemplated by New York Times Co. v. Sullivan, 376 U.S. 254 (1964),] and its progeny." 461 A. 2d, at 417-418. It held that the balance between a private plaintiff's right to recover presumed and punitive damages without a showing of special fault and the First Amendment rights of "nonmedia" speakers "must be struck in favor of the private plaintiff defamed by a nonmedia defendant." Id., at 418. Accordingly, the court held "that as a matter of federal constitutional law, the media protections outlined in Gertz are inapplicable to nonmedia defamation actions." Ibid.

Recognizing confusion among the lower courts about when the protections of Gertz apply,[1] we granted certiorari. ___ U.S. ___ (1983). We now affirm, although for reasons different from those relied upon by the Vermont Supreme Court.

II

As an initial matter, respondent contends that we

[1]Compare Denny v. Mertz, 106 Wis. 2d 636, 318 N.W.2d 141, cert. denied, 459 U.S. 883 (1982) (Gertz inapplicable to private figure suits against nonmedia defendants), Stuempges v. Parke, Davis & Co., 297 N.W.2d 252 (Minn. 1980) (same); Rowe v. Metz, 195 Colo. 424, 579 P.2d 83 (1978) (same); and Harley-Davidson Motorsports, Inc. v. Markley, 279 Or. 361, 568 P.2d 1359 (1977) (same), with Rodriguez v. Nishiki, 653 P.2d 1145, 1150 (Hawaii 1982) (Gertz applicable in such situations); Antwerp Diamond Exchange v. Better Business Bureau, 130 Ariz. 523, 637 P.2d 733 (1981) (same); and Jacron Sales Co. v. Sindorf, 276 Md. 580, 350 A.2d 688 (1976) (same).

need not determine whether Gertz applies in this case because the instructions, taken as a whole, required the jury to find "actual malice" before awarding presumed or punitive damages.[2] The trial court instructed the jury that because the report was libelous per se, respondent was not required "to prove actual damages ... since damage and loss [are] conclusively presumed." App. 17; accord, id., at 19. It also instructed the jury that it could award punitive damages only if it found "actual malice." Id., at 20. Its only other relevant instruction was that liability could not be established unless respondent

[2]Respondent also argues that petitioner did not seek the protections outlined in Gertz before the jury instructions were given and that the issue therefore was not preserved for review. Since the Vermont Supreme Court considered the federal constitutional issue properly presented and decided it, there is no bar to our review. See Orr v. Orr, 440 U.S. 268, 274-275 (1979).

showed "malice or lack of good faith on the part of the Defendant." Id., at 18. Respondent contends that these references to "malice," "lack of good faith," and "actual malice" required the jury to find knowledge of falsity or reckless disregard for the truth--the "actual malice" of New York Times--before it awarded presumed or punitive damages.

We reject this claim because the trial court failed to define any of these terms adequately. It did not, for example, provide the jury with any definition of the term "actual malice." In fact, the only relevant term it defined was simple "malice."[3] And its definitions of this

[3]The full instruction on malice reads as follows:

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Footnote continued on next page.

term included not only the New York Times formulation but also other concepts such as "bad faith" and "reckless disregard of the [statement's] possible consequences." (Id., at 19.) The instructions thus permitted the jury to award presumed and punitive damages on a lesser showing than "actual malice." Consequently, the trial court's conclusion that the instructions did not satisfy Gertz was correct, and the Vermont Supreme Court's determination that Gertz was inapplicable was necessary to its decision that the trial court erred in granting the motion for a new trial. We

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injure the Plaintiff in its business, or that it acted in a willful, wanton or reckless disregard of the rights and interests of the Plaintiff, the Defendant has acted maliciously and the privilege is destroyed. Further, if the Report was made with reckless disregard of the possible consequences, or if it was made with the knowledge that it was false or with reckless disregard of its truth or falsity, it was made with malice." App. 18-19 (emphasis added).

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III

In New York Times Co. v. Sullivan, supra, the Court for the first time held that the First Amendment limits the reach of state defamation laws. That case concerned a public official's recovery of damages for the publication of an advertisement criticizing police conduct in a civil rights demonstration. As the Court noted, the advertisement concerned "one of the major public issues of our time." Id., at 271. Noting that "freedom of expression upon public questions is secured by the First Amendment," id., at 269 (emphasis added), and that "debate

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necessary b/c of reference to N.Y. Times?

reverse order of sentence parts? Seems more logical to put "exposure" to defamatory statements before "opportunity to rebut," once exposed.

effective opportunities for rebutting defamatory statements and have not voluntarily exposed themselves to increased risk of injury from them, id., at 345, we found that the State possessed a "strong and legitimate ... interest in compensating private individuals for injury to ~~their~~ reputations." Id., at 348. Balancing this stronger state interest against the same First Amendment interest at stake in New York Times, we held that a State still could not allow recovery of presumed and punitive damages absent a showing of "actual malice." Nothing in our opinion indicated that this same balance would be struck regardless of the type of speech involved.

IV

not entirely clear to me what "accommodation" refers to

We have never considered whether the Gertz accommodation obtains when the defamatory statements involve no issue of public concern. To make this determination, we must employ the approach approved in Gertz and balance the State's interest in compensating private individuals for injury to their reputation against the First Amendment interest in protecting this type of expression. This state interest is identical to the one weighed in Gertz. There we found that it was "strong and legitimate." 418 U.S., at 348. A State should not lightly be required to abandon it,

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The First Amendment interest, on the other hand, is less important than the one weighed in Gertz. We have long recognized that not all speech is of equal First Amendment importance.[4] It is speech on "'matters of

[4]This Court on many occasions has recognized that certain kinds of speech are less central to the interests of the First Amendment than others. Obscene speech and "fighting words" long have been accorded no protection. Roth v. United States, 354 U.S. at 483; Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); see also Near v. Minnesota ex rel. Olson, 283 U.S. 697, 716 (1931) (publication of troop ship sailings during war time may be enjoined); Harisiades v. Shaughnessy, 342 U.S. 580, 591-592 (1952) (advocating violent overthrow of the government is unprotected speech); Seattle Times Co. v. Rhinehart, ___ U.S. ___, ___ (1984). In the area of protected speech, the most prominent example of reduced protection for certain kinds of speech concerns commercial speech. Such speech, we have noted, occupies a "subordinate position in the scale of First Amendment values." Ohralik v. Ohio State Bar Assn., 436 U.S. 447, 456 (1978). It also is more easily verifiable and less likely to be deterred by proper regulation. Virginia Pharmacy Bd. v. Virginia Consumer Council, 425 U.S. 748, 771, n.24 (1976). Accordingly, it may be regulated in ways that might be impermissible in the realm of noncommercial expression. Ohralik, supra, at 456; Central Hudson Gas & Elec. v. Public Serv. Comm'n, 447 U.S. 557, 562-563 (1980).

Other areas of the law provide further examples. In Ohralik we noted that there are "[n]umerous examples . . . of communications that are regulated without offending the First Amendment, such as the exchange of information about

Footnote continued on next page.

public concern'" that is "at the heart of First Amendment protection." First National Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978), quoting Thornhill v. Alabama, 310 U.S. 88, 101 (1940). As we stated in Connick v. Myers, 461 U.S. 138, 145 (1983), this "special concern [for speech on public issues] ... is no mystery":

> "The First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' Roth v. United States, 354 U.S.

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securities, . . . corporate proxy statements, . . . the exchange of price and production information among competitors, . . . and employers' threats of retaliation for the labor activities of employees." 436 U.S., at 456 (citations omitted). Yet similar regulation of political speech is subject to the most rigorous scrutiny. See Brown v. Hartlage, 456 U.S. 45; New York Times Co. v. Sullivan, 376 U.S. at 279, n. 19; Buckley v. Valeo, 424 U.S. 1, 14 (1976). Likewise, while the power of the State to license lawyers, psychiatrists, and public school teachers--all of whom speak for a living--is unquestioned, this Court has held that a law requiring licensing of union organizers is unconstitutional under the First Amendment. Thomas v. Collins, 323 U.S. 516 (1945); see also Rosenbloom v. Metromedia, 403 U.S. 29, 44 (1971) (opinion of BRENNAN, J.) ("the determinant whether the First Amendment applies to state libel actions is whether the utterance involved concerns an issue of public or general concern").

> 476, 484 ~~(1957)~~ (1957); New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964). '[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.' Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964). Accordingly, the Court has frequently reaffirmed that speech on public issues occupies the '"highest rung of the heirarchy [sic] of First Amendment values,"' and is entitled to special protection. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982); Carey v. Brown, 447 U.S. 455, 467 (1980)."

In contrast, ~~Accordingly,~~ speech on matters of purely private concern is of less First Amendment concern. 461 U.S., at 146-147. As a number of state courts, including the court below, have recognized, the role of the Constitution in regulating state libel law is far more limited when the concerns that activated New York Times and Gertz are absent.[5] In such a case,

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[5]As one commentator has remarked with respect to "the case of a commercial supplier of credit information that defames a person applying for credit"--the case before us today--"If the first amendment requirements outlined in Gertz apply, there is something clearly wrong with the first amendment or with Gertz." Shiffrin, The First

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> "[t]here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-censorship by the press. The facts of the present case are wholly without the First Amendment concerns with which the Supreme Court of the United States has been struggling." Harley-Davidson Motorsports, Inc. v. Markley, 279 Or. 361, 366, 568 P. 2d 1359, 1363 (1977).

Accord, Rowe v. Metz, 195 Colo. 424, 426, 579 P. 2d 83, 84 (1978); Calero v. Del Chemical Corp., 68 Wis. 2d 487, 506, 228 N.W. 2d 737, 748 (1975); Denny v. Mertz, 106 Wis. 2d 636, 661, 318 N.W. 2d 141, 153, cert. denied, 459 U.S. 883 (1982).

reverse order of Wisc. cases?

While such speech is not totally unprotected by the First Amendment, see Connick v. Myers, 461 U.S., at 147, ~~its~~ the protections due it is ~~are~~ less stringent. In Gertz, we found that the state interest in awarding presumed and punitive

"its protections" seems awkward, but I'm not sure my suggestion is any better.

Amendment and Economic Regulation: Away From a General Theory of the First Amendment, 78 Nw. L. Rev. 1212, 1268 (1983).

damages was not "substantial" in view of their effect on speech at the core of First Amendment concern. 418 U.S., at 349. This interest, however, is "substantial" in relation to the incidental effect these remedies may have on speech of significantly less constitutional interest. The rationale of the common law rules has been the experience and judgment of history that "proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact." Prosser §112, p. 765; accord, Rowe v. Metz, supra, at 425-426, 579 P. 2d, at 84; Note, Developments in the Law--Defamation, 69 Harv. L. Rev. 875, 891-892 (1956). As a result, courts for centuries have allowed juries to presume that some

add emphasis?

damage occurred from many defamatory utterances and publications. We should not lightly presume that this judgment--a judgment respected and left to the States for 200 years--was erroneous. The state interest in providing remedies for defamation ~~includes~~ ensuring that those remedies are effective. In light of the reduced constitutional value of speech involving no matters of public concern, we hold that the state interest adequately supports ~~the~~ award of presumed and punitive damages--even absent a showing of "actual malice."

V

The only remaining issue is whether petitioner's credit report involved a matter of public concern. In a

related context, we have held that "[w]hether ... speech addresses a matter of public concern must be determined by [the expression's] content, form, and context ... as revealed by the whole record." Connick v. Myers, 461 U.S., at 147-148. These factors indicate that petitioner's credit report concerns no public issue. It was speech solely in the individual interest of the speaker and its specific business audience. Cf. Central Hudson Gas & Elec. v. Public Service Comm., 447 U.S. 557, 561 (1980). This particular interest warrants no special protection when--as in this case--the speech is wholly false and clearly damaging to the victim's business reputation. Cf. Id., at 566; Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748, at 771-772 (1976). Moreover, since the credit report was made available to only five subscribers, who, under the

terms of the subscription agreement, could not disseminate it ~~any~~ further, it cannot be said that the report involves any "strong interest in the free flow of commercial information." Id., at 764. There is simply no credible argument that this type of credit reporting requires special protection to ensure that "debate on public issues [will] be uninhibited, robust, and wide-open." New York Times Co. v. Sullivan, 376 U.S., at 270.

In addition, the speech here, like advertising, is hardy and unlikely to be deterred by incidental state regulation. See Virginia Pharmacy Board v. Virginia Consumer Council, supra, at 771, n.24. It is solely motivated by the desire for profit, which, we have noted, is a force less likely to be deterred than others. Ibid. Arguably, the reporting here was also more objectively verifiable than speech deserving

771-772 ?.

of greater protection. See ibid. In any case, the market provides a powerful incentive to a credit reporting agency to be accurate, since false credit reporting is of no use to creditors. Thus, any incremental "chilling" effect of libel suits would be of decreased significance.[6]

VI

We conclude that permitting recovery of presumed and punitive damages in defamation cases absent a showing of

[6]The Fifth Circuit Court of Appeals has noted that, while most States provide a qualified privilege against libel suits for commercial credit reporting agencies, in those States that do not there is a thriving credit reporting business and commercial credit transactions are not inhibited. Hood v. Dun & Bradstreet, Inc., 486 F. 2d 25, 32 (1973), cert. denied, 415 U.S. 985 (1974). The court cited an empirical study comparing credit transactions in Boise, Idaho, where there is no privilege, with those in Spokane, Washington, where there is one. Id., at 32, and n. 18.

"actual malice" does not violate the First Amendment when the defamatory statements do not involve matters of public concern. Accordingly, we affirm the judgment of the Vermont Supreme Court.

It is so ordered.

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: MAY 10 1985

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-18

DUN & BRADSTREET, INC., PETITIONERS *v.*
GREENMOSS BUILDERS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

[May ——, 1985]

JUSTICE POWELL announced the judgment of the Court and an opinion in which JUSTICE REHNQUIST and JUSTICE O'CONNOR join.

In *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974), we held that the First Amendment restricted the damages that a private individual could obtain from a publisher for a libel that involved a matter of public concern. More specifically, we held that in these circumstances the First Amendment prohibited awards of presumed and punitive damages for false and defamatory statements unless the plaintiff shows "actual malice," that is, knowledge of falsity or reckless disregard for the truth. The question presented in this case is whether this rule of *Gertz* applies when the false and defamatory statements do not involve matters of public concern.

I

Petitioner Dun & Bradstreet, a credit reporting agency, provides subscribers with financial and related information about businesses. All the information is confidential; under the terms of the subscription agreement the subscribers may not reveal it to anyone else. On July 26, 1976, petitioner sent a report to five subscribers indicating that respondent, a construction contractor, had filed a voluntary petition for bankruptcy. This report was false and grossly misrepresented respondent's assets and liabilities. That same day,

while discussing the possibility of future financing with its bank, respondent's president learned of the report. He immediately contacted petitioner's regional office, explained the error, and asked for a correction. In addition, he requested the names of those firms who had received the false report in order to assure them that the company was solvent. Petitioner promised to look into the matter but refused to divulge the names of those who had received the report.

After determining that its report was indeed false, petitioner issued a corrective notice on or about August 3, 1976 to the five subscribers who had received the initial report. The notice stated that one of respondent's former employees, not respondent itself, had filed for bankruptcy and that respondent "continued in business as usual." Respondent told petitioner that it was dissatisfied with the notice and it again asked for a list of subscribers who had seen the initial report. Again petitioner refused to divulge their names.

Respondent then brought this defamation action in Vermont state court. It alleged that the false report had injured its reputation and sought both compensatory and punitive damages. The trial established that the error in petitioner's report had been caused when one of its employees, a seventeen year old high school student paid to review Vermont bankruptcy pleadings, had inadvertently attributed to respondent a bankruptcy petition filed by one of respondent's former employees. Although petitioner's representative testified that it was routine practice to check the accuracy of such reports with the businesses themselves, it did not try to verify the information about respondent before reporting it.

After trial, the jury returned a verdict in favor of respondent and awarded $50,000 in compensatory or presumed damages and $300,000 in punitive damages. Petitioner moved for a new trial. It noted that in *Gertz* v. *Robert Welch, Inc.*, *supra*, at 349, this Court had held "that the States may not permit recovery of presumed or punitive damages, at least

when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth," and it argued that the judge's instructions in this case permitted the jury to award such damages on a lesser showing. The trial court indicated some doubt as to whether *Gertz* applied to "nonmedia cases," but granted a new trial "[b]ecause of . . . dissatisfaction with its charge and . . . conviction that the interests of justice require[d]" it. App. 26.

The Vermont Supreme Court reversed. 461 A. 2d 414 (1983). Although recognizing that "in certain instances the distinction between media and nonmedia defendants may be difficult to draw," the court stated that "no such difficulty is presented with credit reporting agencies, which are in the business of selling financial information to a limited number of subscribers who have paid substantial fees for their services." *Id.*, at 417. Relying on this distinguishing characteristic of credit reporting firms, the court concluded that such firms are not "the type of media worthy of First Amendment protection as contemplated by *New York Times* [*Co.* v. *Sullivan*, 376 U. S. 254 (1964),] and its progeny." 461 A. 2d, at 417–418. It held that the balance between a private plaintiff's right to recover presumed and punitive damages without a showing of special fault and the First Amendment rights of "nonmedia" speakers "must be struck in favor of the private plaintiff defamed by a nonmedia defendant." *Id.*, at 418. Accordingly, the court held "that as a matter of federal constitutional law, the media protections outlined in *Gertz* are inapplicable to nonmedia defamation actions." *Ibid.*

Recognizing confusion among the lower courts about when the protections of *Gertz* apply,[1] we granted certiorari.

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[1] Compare *Denny* v. *Mertz*, 106 Wis. 2d 636, 318 N. W. 2d 141, cert. denied, 459 U. S. 883 (1982) (*Gertz* inapplicable to private figure suits against nonmedia defendants); *Stuempges* v. *Parke, Davis & Co.*, 297 N. W. 2d 252 (Minn. 1980) (same); *Rowe* v. *Metz*, 195 Colo. 424, 579 P. 2d 83 (1978) (same); and *Harley-Davidson Motorsports, Inc.* v. *Markley*, 279 Or. 361, 568 P. 2d 1359 (1977) (same); with *Antwerp Diamond Exchange* v. *Better*

U. S. —— (1983). We now affirm, although for reasons different from those relied upon by the Vermont Supreme Court.

II

As an initial matter, respondent contends that we need not determine whether *Gertz* applies in this case because the instructions, taken as a whole, required the jury to find "actual malice" before awarding presumed or punitive damages.[2] The trial court instructed the jury that because the report was libelous per se, respondent was not required "to prove actual damages . . . since damage and loss [are] conclusively presumed." App. 17; accord, *id.*, at 19. It also instructed the jury that it could award punitive damages only if it found "actual malice." *Id.*, at 20. Its only other relevant instruction was that liability could not be established unless respondent showed "malice or lack of good faith on the part of the Defendant." *Id.*, at 18. Respondent contends that these references to "malice," "lack of good faith," and "actual malice" required the jury to find knowledge of falsity or reckless disregard for the truth—the "actual malice" of *New York Times*—before it awarded presumed or punitive damages.

We reject this claim because the trial court failed to define any of these terms adequately. It did not, for example, provide the jury with any definition of the term "actual malice." In fact, the only relevant term it defined was simple "malice."[3] And its definitions of this term included not only the

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Business Bureau, 130 Ariz. 523, 637 P. 2d 733 (1981) (*Gertz* applicable in such situations); and *Jacron Sales Co.* v. *Sindorf*, 276 Md. 580, 350 A. 2d 688 (1976) (same).

[2] Respondent also argues that petitioner did not seek the protections outlined in *Gertz* before the jury instructions were given and that the issue therefore was not preserved for review. Since the Vermont Supreme Court considered the federal constitutional issue properly presented and decided it, there is no bar to our review. See *Orr* v. *Orr*, 440 U. S. 268, 274–275 (1979).

[3] The full instruction on malice reads as follows:

New York Times formulation but also other concepts such as "bad faith" and "reckless disregard of the [statement's] possible consequences." *Id.*, at 19. The instructions thus permitted the jury to award presumed and punitive damages on a lesser showing than "actual malice." Consequently, the trial court's conclusion that the instructions did not satisfy *Gertz* was correct, and the Vermont Supreme Court's determination that *Gertz* was inapplicable was necessary to its decision that the trial court erred in granting the motion for a new trial. We therefore must consider whether *Gertz* applies to the case before us.

III

In *New York Times Co.* v. *Sullivan*, *supra*, the Court for the first time held that the First Amendment limits the reach of state defamation laws. That case concerned a public official's recovery of damages for the publication of an advertisement criticizing police conduct in a civil rights demonstration. As the Court noted, the advertisement concerned "one of the major public issues of our time." *Id.*, at 271. Noting that "freedom of expression *upon public questions* is secured by the First Amendment," *id.*, at 269 (emphasis added), and that "debate *on public issues* should be uninhibited, robust, and wide-open," *id.*, at 270 (emphasis added), the Court held that a public official cannot recover presumed and punitive damages for defamatory falsehood unless he proves that the false statement was made with "'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not," *id.*, at 280. In later cases, all

"If you find that the Defendant acted in a bad faith towards the Plaintiff in publishing the Erroneous Report, *or* that Defendant intended to injure the Plaintiff in its business, *or* that it acted in a willful, wanton or reckless disregard of the rights and interests of the Plaintiff, the Defendant has acted maliciously and the privilege is destroyed. *Further*, if the Report was made with reckless disregard of the possible consequences, *or* if it was made with the knowledge that it was false *or* with reckless disregard of its truth or falsity, it was made with malice." App. 18–19 (emphasis added).

involving public issues, the Court extended this same constitutional protection to libels of public figures, *e. g.*, *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130 (1967), and in one case suggested in a plurality opinion that this constitutional rule should extend to libels of any individual so long as the defamatory statements involved a "matter of public or general interest," *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29, 44 (1971) (opinion of BRENNAN, J.).

In *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974), we held that the protections of *New York Times* did not extend as far as *Rosenbloom* suggested. *Gertz* concerned a libelous article appearing in a magazine called American Opinion, the monthly outlet of the John Birch Society. The article in question discussed whether the prosecution of a policeman in Chicago was part of a Communist campaign to discredit local law enforcement agencies. The plaintiff, Gertz, neither a public official nor a public figure, was a lawyer tangentially involved in the prosecution. The magazine alleged that he was the chief architect of the "frame-up" of the police officer and linked him to Communist activity. Like every other case in which this Court has found constitutional limits to state defamation laws, *Gertz* involved expression on a matter of undoubted public concern.

In *Gertz*, we held that the fact that expression concerned a public issue did not by itself entitle the libel defendant to the constitutional protections of *New York Times*. These protections, we found, were not "justified solely by reference to the interest of the press and broadcast media in immunity from liability." 418 U. S., at 343. Rather, they represented "an accommodation between [First Amendment] concern[s] and the limited state interest present in the context of libel actions brought by public persons." *Ibid.* In libel actions brought by private persons we found the competing interests different. Largely because private persons have not voluntarily exposed themselves to increased risk of injury from defamatory statements and because they generally lack

effective opportunities for rebutting such statements, *id.*, at 345, we found that the State possessed a "strong and legitimate . . . interest in compensating private individuals for injury to reputation." *Id.*, at 348–349. Balancing this stronger state interest against the same First Amendment interest at stake in *New York Times*, we held that a State still could not allow recovery of presumed and punitive damages absent a showing of "actual malice." Nothing in our opinion, however, indicated that this same balance would be struck regardless of the type of speech involved.

IV

We have never considered whether the *Gertz* balance obtains when the defamatory statements involve no issue of public concern. To make this determination, we must employ the approach approved in *Gertz* and balance the State's interest in compensating private individuals for injury to their reputation against the First Amendment interest in protecting this type of expression. This state interest is identical to the one weighed in *Gertz*. There we found that it was "strong and legitimate." 418 U. S., at 348. A State should not lightly be required to abandon it,

> "for, as Mr. Justice Stewart has reminded us, the individual's right to the protection of his own good name 'reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. . . .' *Rosenblatt* v. *Baer*, 383 U. S. 75, 92 (1966) (concurring opinion)." 418 U. S., at 341.

The First Amendment interest, on the other hand, is less important than the one weighed in *Gertz*. We have long recognized that not all speech is of equal First Amendment im-

portance.[4] It is speech on "'matters of public concern'" that is "at the heart of the First Amendment's protection." *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 776 (1978), quoting *Thornhill* v. *Alabama*, 310 U. S. 88, 101

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[4]This Court on many occasions has recognized that certain kinds of speech are less central to the interests of the First Amendment than others. Obscene speech and "fighting words" long have been accorded no protection. *Roth* v. *United States*, 354 U. S. 476, 483 (1957); *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571–572 (1942); cf. *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 591–592 (1952) (advocating violent overthrow of the government is unprotected speech); *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697, 716 (1931) (publication of troop ship sailings during war time may be enjoined). In the area of protected speech, the most prominent example of reduced protection for certain kinds of speech concerns commercial speech. Such speech, we have noted, occupies a "subordinate position in the scale of First Amendment values." *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 456 (1978). It also is more easily verifiable and less likely to be deterred by proper regulation. *Virginia Pharmacy Bd.* v. *Virginia Consumer Council*, 425 U. S. 748, 771–772 (1976). Accordingly, it may be regulated in ways that might be impermissible in the realm of noncommercial expression. *Ohralik*, *supra*, at 456; *Central Hudson Gas & Elec.* v. *Public Serv. Comm'n*, 447 U. S. 557, 562–563 (1980).

Other areas of the law provide further examples. In *Ohralik* we noted that there are "[n]umerous examples . . . of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, . . . corporate proxy statements, . . . the exchange of price and production information among competitors, . . . and employers' threats of retaliation for the labor activities of employees." 436 U. S., at 456 (citations omitted). Yet similar regulation of political speech is subject to the most rigorous scrutiny. See *Brown* v. *Hartlage*, 456 U. S. 45, 52–53 (1982); *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 279, n. 19 (1964); *Buckley* v. *Valeo*, 424 U. S. 1, 14 (1976). Likewise, while the power of the State to license lawyers, psychiatrists, and public school teachers—all of whom speak for a living—is unquestioned, this Court has held that a law requiring licensing of union organizers is unconstitutional under the First Amendment. *Thomas* v. *Collins*, 323 U. S. 516 (1945); see also *Rosenbloom* v. *Metromedia*, 403 U. S. 29, 44 (1971) (opinion of BRENNAN, J.) ("the determinant whether the First Amendment applies to state libel actions is whether the utterance involved concerns an issue of public or general concern").

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> "The First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' *Roth* v. *United States*, 354 U. S. 476, 484 (1957); *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 269 (1964). '[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.' *Garrison* v. *Louisiana*, 379 U. S. 64, 74–75 (1964). Accordingly, the Court has frequently reaffirmed that speech on public issues occupies the "'highest rung of the hierarchy of First Amendment values,'" and is entitled to special protection. *NAACP* v. *Claiborne Hardware Co.*, 458 U. S. 886, 913 (1982); *Carey* v. *Brown*, 447 U. S. 455, 467 (1980)."

In contrast, speech on matters of purely private concern is of less First Amendment concern. 461 U. S., at 146–147. As a number of state courts, including the court below, have recognized, the role of the Constitution in regulating state libel law is far more limited when the concerns that activated *New York Times* and *Gertz* are absent.[5] In such a case,

> "[t]here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-censorship by the press. The facts of the present case are wholly without the First Amendment concerns with

[5] As one commentator has remarked with respect to "the case of a commercial supplier of credit information that defames a person applying for credit"—the case before us today—"If the first amendment requirements outlined in *Gertz* apply, there is something clearly wrong with the first amendment or with *Gertz*." Shiffrin, The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment, 78 Nw. L. Rev. 1212, 1268 (1983).

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Accord, *Rowe* v. *Metz*, 195 Colo. 424, 426, 579 P. 2d 83, 84 (1978); *Denny* v. *Mertz*, 106 Wis. 2d 636, 661, 318 N. W. 2d 141, 153, cert. denied, 459 U. S. 883 (1982).

While such speech is not totally unprotected by the First Amendment, see *Connick* v. *Myers*, 461 U. S., at 147, its protections are less stringent. In *Gertz*, we found that the state interest in awarding presumed and punitive damages was not "substantial" in view of their effect on speech at the core of First Amendment concern. 418 U. S., at 349. This interest, however, *is* "substantial" relative to the incidental effect these remedies may have on speech of significantly less constitutional interest. The rationale of the common law rules has been the experience and judgment of history that "proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact." W. Prosser, Law of Torts § 112, p. 765 (4th ed. 1971); accord, *Rowe* v. *Metz*, *supra*, 425–426, 579 P. 2d, at 84; Note, Developments in the Law—Defamation, 69 Harv. L. Rev. 875, 891–892 (1956). As a result, courts for centuries have allowed juries to presume that some damage occurred from many defamatory utterances and publications. This rule furthers the state interest in providing remedies for defamation by ensuring that those remedies are effective. In light of the reduced constitutional value of speech involving no matters of public concern, we hold that the state interest adequately supports the award of presumed and punitive damages—even absent a showing of "actual malice."

V

The only remaining issue is whether petitioner's credit report involved a matter of public concern. In a related context, we have held that "[w]hether . . . speech addresses a

matter of public concern must be determined by [the expression's] content, form, and context . . . as revealed by the whole record." *Connick* v. *Myers*, 461 U. S., at 147–148. These factors indicate that petitioner's credit report concerns no public issue. It was speech solely in the individual interest of the speaker and its specific business audience. Cf. *Central Hudson Gas & Elec.* v. *Public Service Comm.*, 447 U. S. 557, 561 (1980). This particular interest warrants no special protection when—as in this case—the speech is wholly false and clearly damaging to the victim's business reputation. Cf. *id.*, at 566; *Virginia Pharmacy Board* v. *Virginia Consumer Council*, 425 U. S. 748, 771–772 (1976). Moreover, since the credit report was made available to only five subscribers, who, under the terms of the subscription agreement, could not disseminate it further, it cannot be said that the report involves any "strong interest in the free flow of commercial information." *Id.*, at 764. There is simply no credible argument that this type of credit reporting requires special protection to ensure that "debate on public issues [will] be uninhibited, robust, and wide-open." *New York Times Co.* v. *Sullivan*, 376 U. S., at 270.

In addition, the speech here, like advertising, is hardy and unlikely to be deterred by incidental state regulation. See *Virginia Pharmacy Board* v. *Virginia Consumer Council*, *supra*, at 771–772. It is solely motivated by the desire for profit, which, we have noted, is a force less likely to be deterred than others. *Ibid.* Arguably, the reporting here was also more objectively verifiable than speech deserving of greater protection. See *ibid.* In any case, the market provides a powerful incentive to a credit reporting agency to be accurate, since false credit reporting is of no use to creditors. Thus, any incremental "chilling" effect of libel suits would be of decreased significance.[6]

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[6]The Fifth Circuit Court of Appeals has noted that, while most States provide a qualified privilege against libel suits for commercial credit reporting agencies, in those States that do not there is a thriving credit

VI

We conclude that permitting recovery of presumed and punitive damages in defamation cases absent a showing of "actual malice" does not violate the First Amendment when the defamatory statements do not involve matters of public concern. Accordingly, we affirm the judgment of the Vermont Supreme Court.

It is so ordered.

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reporting business and commercial credit transactions are not inhibited. *Hood* v. *Dun & Bradstreet, Inc.*, 486 F. 2d 25, 32 (1973), cert. denied, 415 U. S. 985 (1974). The court cited an empirical study comparing credit transactions in Boise, Idaho, where there is no privilege, with those in Spokane, Washington, where there is one. *Id.*, at 32, and n. 18.

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To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

changes: 2,3,10

From: **Justice Powell**

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83–18

DUN & BRADSTREET, INC., PETITIONERS *v.* GREENMOSS BUILDERS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

[May ——, 1985]

JUSTICE POWELL announced the judgment of the Court and an opinion in which JUSTICE REHNQUIST and JUSTICE O'CONNOR join.

In *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974), we held that the First Amendment restricted the damages that a private individual could obtain from a publisher for a libel that involved a matter of public concern. More specifically, we held that in these circumstances the First Amendment prohibited awards of presumed and punitive damages for false and defamatory statements unless the plaintiff shows "actual malice," that is, knowledge of falsity or reckless disregard for the truth. The question presented in this case is whether this rule of *Gertz* applies when the false and defamatory statements do not involve matters of public concern.

I

Petitioner Dun & Bradstreet, a credit reporting agency, provides subscribers with financial and related information about businesses. All the information is confidential; under the terms of the subscription agreement the subscribers may not reveal it to anyone else. On July 26, 1976, petitioner sent a report to five subscribers indicating that respondent, a construction contractor, had filed a voluntary petition for bankruptcy. This report was false and grossly misrepresented respondent's assets and liabilities. That same day,

while discussing the possibility of future financing with its bank, respondent's president was told that the bank had received the defamatory report. He immediately called petitioner's regional office, explained the error, and asked for a correction. In addition, he requested the names of the firms that had received the false report in order to assure them that the company was solvent. Petitioner promised to look into the matter but refused to divulge the names of those who had received the report.

After determining that its report was indeed false, petitioner issued a corrective notice on or about August 3, 1976 to the five subscribers who had received the initial report. The notice stated that one of respondent's former employees, not respondent itself, had filed for bankruptcy and that respondent "continued in business as usual." Respondent told petitioner that it was dissatisfied with the notice and it again asked for a list of subscribers who had seen the initial report. Again petitioner refused to divulge their names.

Respondent then brought this defamation action in Vermont state court. It alleged that the false report had injured its reputation and sought both compensatory and punitive damages. The trial established that the error in petitioner's report had been caused when one of its employees, a seventeen year old high school student paid to review Vermont bankruptcy pleadings, had inadvertently attributed to respondent a bankruptcy petition filed by one of respondent's former employees. Although petitioner's representative testified that it was routine practice to check the accuracy of such reports with the businesses themselves, it did not try to verify the information about respondent before reporting it.

After trial, the jury returned a verdict in favor of respondent and awarded $50,000 in compensatory or presumed damages and $300,000 in punitive damages. Petitioner moved for a new trial. It argued that in *Gertz* v. *Robert Welch, Inc.*, *supra*, at 349, this Court had ruled broadly "that the

States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth," and it argued that the judge's instructions in this case permitted the jury to award such damages on a lesser showing. The trial court indicated some doubt as to whether *Gertz* applied to "non-media cases," but granted a new trial "[b]ecause of . . . dissatisfaction with its charge and . . . conviction that the interests of justice require[d]" it. App. 26.

The Vermont Supreme Court reversed. 461 A. 2d 414 (1983). Although recognizing that "in certain instances the distinction between media and nonmedia defendants may be difficult to draw," the court stated that "no such difficulty is presented with credit reporting agencies, which are in the business of selling financial information to a limited number of subscribers who have paid substantial fees for their services." *Id.*, at 417. Relying on this distinguishing characteristic of credit reporting firms, the court concluded that such firms are not "the type of media worthy of First Amendment protection as contemplated by *New York Times* [*Co.* v. *Sullivan*, 376 U. S. 254 (1964),] and its progeny." 461 A. 2d, at 417–418. It held that the balance between a private plaintiff's right to recover presumed and punitive damages without a showing of special fault and the First Amendment rights of "nonmedia" speakers "must be struck in favor of the private plaintiff defamed by a nonmedia defendant." *Id.*, at 418. Accordingly, the court held "that as a matter of federal constitutional law, the media protections outlined in *Gertz* are inapplicable to nonmedia defamation actions." *Ibid.*

Recognizing disagreement among the lower courts about when the protections of *Gertz* apply,[1] we granted certiorari.

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[1] Compare *Denny* v. *Mertz*, 106 Wis. 2d 636, 318 N. W. 2d 141, cert. denied, 459 U. S. 883 (1982) (*Gertz* inapplicable to private figure suits against nonmedia defendants); *Stuempges* v. *Parke, Davis & Co.*, 297 N. W. 2d 252 (Minn. 1980) (same); *Rowe* v. *Metz*, 195 Colo. 424, 579 P. 2d 83 (1978) (same); and *Harley-Davidson Motorsports, Inc.* v. *Markley*, 279 Or. 361,

—— U. S. —— (1983). We now affirm, although for reasons different from those relied upon by the Vermont Supreme Court.

II

As an initial matter, respondent contends that we need not determine whether *Gertz* applies in this case because the instructions, taken as a whole, required the jury to find "actual malice" before awarding presumed or punitive damages.[2] The trial court instructed the jury that because the report was libelous per se, respondent was not required "to prove actual damages . . . since damage and loss [are] conclusively presumed." App. 17; accord, *id.*, at 19. It also instructed the jury that it could award punitive damages only if it found "actual malice." *Id.*, at 20. Its only other relevant instruction was that liability could not be established unless respondent showed "malice or lack of good faith on the part of the Defendant." *Id.*, at 18. Respondent contends that these references to "malice," "lack of good faith," and "actual malice" required the jury to find knowledge of falsity or reckless disregard for the truth—the "actual malice" of *New York Times*—before it awarded presumed or punitive damages.

We reject this claim because the trial court failed to define any of these terms adequately. It did not, for example, provide the jury with any definition of the term "actual malice." In fact, the only relevant term it defined was simple "mal-

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568 P. 2d 1359 (1977) (same); with *Antwerp Diamond Exchange* v. *Better Business Bureau*, 130 Ariz. 523, 637 P. 2d 733 (1981) (*Gertz* applicable in such situations); and *Jacron Sales Co.* v. *Sindorf*, 276 Md. 580, 350 A. 2d 688 (1976) (same).

[2] Respondent also argues that petitioner did not seek the protections outlined in *Gertz* before the jury instructions were given and that the issue therefore was not preserved for review. Since the Vermont Supreme Court considered the federal constitutional issue properly presented and decided it, there is no bar to our review. See *Orr* v. *Orr*, 440 U. S. 268, 274–275 (1979).

ice."[3] And its definitions of this term included not only the *New York Times* formulation but also other concepts such as "bad faith" and "reckless disregard of the [statement's] possible consequences." *Id.*, at 19. The instructions thus permitted the jury to award presumed and punitive damages on a lesser showing than "actual malice." Consequently, the trial court's conclusion that the instructions did not satisfy *Gertz* was correct, and the Vermont Supreme Court's determination that *Gertz* was inapplicable was necessary to its decision that the trial court erred in granting the motion for a new trial. We therefore must consider whether *Gertz* applies to the case before us.

III

In *New York Times Co.* v. *Sullivan*, *supra*, the Court for the first time held that the First Amendment limits the reach of state defamation laws. That case concerned a public official's recovery of damages for the publication of an advertisement criticizing police conduct in a civil rights demonstration. As the Court noted, the advertisement concerned "one of the major public issues of our time." *Id.*, at 271. Noting that "freedom of expression *upon public questions* is secured by the First Amendment," *id.*, at 269 (emphasis added), and that "debate *on public issues* should be uninhibited, robust, and wide-open," *id.*, at 270 (emphasis added), the Court held that a public official cannot recover presumed and punitive damages for defamatory falsehood unless he proves that the false statement was made with "'actual malice'—that is, with

[3] The full instruction on malice reads as follows:

"If you find that the Defendant acted in a bad faith towards the Plaintiff in publishing the Erroneous Report, *or* that Defendant intended to injure the Plaintiff in its business, *or* that it acted in a willful, wanton or reckless disregard of the rights and interests of the Plaintiff, the Defendant has acted maliciously and the privilege is destroyed. *Further*, if the Report was made with reckless disregard of the possible consequences, *or* if it was made with the knowledge that it was false *or* with reckless disregard of its truth or falsity, it was made with malice." App. 18–19 (emphasis added).

knowledge that it was false or with reckless disregard of whether it was false or not," *id.*, at 280. In later cases, all involving public issues, the Court extended this same constitutional protection to libels of public figures, *e. g.*, *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130 (1967), and in one case suggested in a plurality opinion that this constitutional rule should extend to libels of any individual so long as the defamatory statements involved a "matter of public or general interest," *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29, 44 (1971) (opinion of BRENNAN, J.).

In *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974), we held that the protections of *New York Times* did not extend as far as *Rosenbloom* suggested. *Gertz* concerned a libelous article appearing in a magazine called American Opinion, the monthly outlet of the John Birch Society. The article in question discussed whether the prosecution of a policeman in Chicago was part of a Communist campaign to discredit local law enforcement agencies. The plaintiff, Gertz, neither a public official nor a public figure, was a lawyer tangentially involved in the prosecution. The magazine alleged that he was the chief architect of the "frame-up" of the police officer and linked him to Communist activity. Like every other case in which this Court has found constitutional limits to state defamation laws, *Gertz* involved expression on a matter of undoubted public concern.

In *Gertz*, we held that the fact that expression concerned a public issue did not by itself entitle the libel defendant to the constitutional protections of *New York Times*. These protections, we found, were not "justified solely by reference to the interest of the press and broadcast media in immunity from liability." 418 U. S., at 343. Rather, they represented "an accommodation between [First Amendment] concern[s] and the limited state interest present in the context of libel actions brought by public persons." *Ibid.* In libel actions brought by private persons we found the competing interests different. Largely because private persons have

not voluntarily exposed themselves to increased risk of injury from defamatory statements and because they generally lack effective opportunities for rebutting such statements, *id.*, at 345, we found that the State possessed a "strong and legitimate . . . interest in compensating private individuals for injury to reputation." *Id.*, at 348–349. Balancing this stronger state interest against the same First Amendment interest at stake in *New York Times*, we held that a State still could not allow recovery of presumed and punitive damages absent a showing of "actual malice." Nothing in our opinion, however, indicated that this same balance would be struck regardless of the type of speech involved.

IV

We have never considered whether the *Gertz* balance obtains when the defamatory statements involve no issue of public concern. To make this determination, we must employ the approach approved in *Gertz* and balance the State's interest in compensating private individuals for injury to their reputation against the First Amendment interest in protecting this type of expression. This state interest is identical to the one weighed in *Gertz*. There we found that it was "strong and legitimate." 418 U. S., at 348. A State should not lightly be required to abandon it,

> "for, as Mr. Justice Stewart has reminded us, the individual's right to the protection of his own good name 'reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. . . .' *Rosenblatt* v. *Baer*, 383 U. S. 75, 92 (1966) (concurring opinion)." 418 U. S., at 341.

The First Amendment interest, on the other hand, is less important than the one weighed in *Gertz*. We have long rec-

ognized that not all speech is of equal First Amendment importance.[4] It is speech on "'matters of public concern'" that is "at the heart of the First Amendment's protection." *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 776

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[4]This Court on many occasions has recognized that certain kinds of speech are less central to the interests of the First Amendment than others. Obscene speech and "fighting words" long have been accorded no protection. *Roth* v. *United States*, 354 U. S. 476, 483 (1957); *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571–572 (1942); cf. *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 591–592 (1952) (advocating violent overthrow of the government is unprotected speech); *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697, 716 (1931) (publication of troop ship sailings during war time may be enjoined). In the area of protected speech, the most prominent example of reduced protection for certain kinds of speech concerns commercial speech. Such speech, we have noted, occupies a "subordinate position in the scale of First Amendment values." *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 456 (1978). It also is more easily verifiable and less likely to be deterred by proper regulation. *Virginia Pharmacy Bd.* v. *Virginia Consumer Council*, 425 U. S. 748, 771–772 (1976). Accordingly, it may be regulated in ways that might be impermissible in the realm of noncommercial expression. *Ohralik*, *supra*, at 456; *Central Hudson Gas & Elec.* v. *Public Serv. Comm'n*, 447 U. S. 557, 562–563 (1980).

Other areas of the law provide further examples. In *Ohralik* we noted that there are "[n]umerous examples . . . of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, . . . corporate proxy statements, . . . the exchange of price and production information among competitors, . . . and employers' threats of retaliation for the labor activities of employees." 436 U. S., at 456 (citations omitted). Yet similar regulation of political speech is subject to the most rigorous scrutiny. See *Brown* v. *Hartlage*, 456 U. S. 45, 52–53 (1982); *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 279, n. 19 (1964); *Buckley* v. *Valeo*, 424 U. S. 1, 14 (1976). Likewise, while the power of the State to license lawyers, psychiatrists, and public school teachers—all of whom speak for a living—is unquestioned, this Court has held that a law requiring licensing of union organizers is unconstitutional under the First Amendment. *Thomas* v. *Collins*, 323 U. S. 516 (1945); see also *Rosenbloom* v. *Metromedia*, 403 U. S. 29, 44 (1971) (opinion of BRENNAN, J.) ("the determinant whether the First Amendment applies to state libel actions is whether the utterance involved concerns an issue of public or general concern").

(1978), quoting *Thornhill* v. *Alabama*, 310 U. S. 88, 101 (1940). As we stated in *Connick* v. *Myers*, 461 U. S. 138, 145 (1983), this "special concern [for speech on public issues] . . . is no mystery":

> "The First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' *Roth* v. *United States*, 354 U. S. 476, 484 (1957); *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 269 (1964). '[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.' *Garrison* v. *Louisiana*, 379 U. S. 64, 74–75 (1964). Accordingly, the Court has frequently reaffirmed that speech on public issues occupies the "'highest rung of the hierarchy of First Amendment values,'" and is entitled to special protection. *NAACP* v. *Claiborne Hardware Co.*, 458 U. S. 886, 913 (1982); *Carey* v. *Brown*, 447 U. S. 455, 467 (1980)."

In contrast, speech on matters of purely private concern is of less First Amendment concern. 461 U. S., at 146–147. As a number of state courts, including the court below, have recognized, the role of the Constitution in regulating state libel law is far more limited when the concerns that activated *New York Times* and *Gertz* are absent.[5] In such a case,

> "[t]here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-censorship by the press. The facts of the present case

[5] As one commentator has remarked with respect to "the case of a commercial supplier of credit information that defames a person applying for credit"—the case before us today—"If the first amendment requirements outlined in *Gertz* apply, there is something clearly wrong with the first amendment or with *Gertz*." Shiffrin, The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment, 78 Nw. L. Rev. 1212, 1268 (1983).

> are wholly without the First Amendment concerns with which the Supreme Court of the United States has been struggling." *Harley-Davidson Motorsports, Inc.* v. *Markley*, 279 Or. 361, 366, 568 P. 2d 1359, 1363 (1977).

Accord, *Rowe* v. *Metz*, 195 Colo. 424, 426, 579 P. 2d 83, 84 (1978); *Denny* v. *Mertz*, 106 Wis. 2d 636, 661, 318 N. W. 2d 141, 153, cert. denied, 459 U. S. 883 (1982).

While such speech is not totally unprotected by the First Amendment, see *Connick* v. *Myers*, 461 U. S., at 147, its protections are less stringent. In *Gertz*, we found that the state interest in awarding presumed and punitive damages was not "substantial" in view of their effect on speech at the core of First Amendment concern. 418 U. S., at 349. This interest, however, *is* "substantial" relative to the incidental effect these remedies may have on speech of significantly less constitutional interest. The rationale of the common law rules has been the experience and judgment of history that "proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact." W. Prosser, Law of Torts § 112, p. 765 (4th ed. 1971); accord, *Rowe* v. *Metz*, *supra*, 425–426, 579 P. 2d, at 84; Note, Developments in the Law—Defamation, 69 Harv. L. Rev. 875, 891–892 (1956). As a result, courts for centuries have allowed juries to presume that some damage occurred from many defamatory utterances and publications. Restatement of Torts § 568, comment b, at 162 (1938) (noting that Hale announced that damages were to be presumed for libel as early as 1670). This rule furthers the state interest in providing remedies for defamation by ensuring that those remedies are effective. In light of the reduced constitutional value of speech involving no matters of public concern, we hold that the state interest adequately supports the award of presumed and punitive damages—even absent a showing of "actual malice."

V

The only remaining issue is whether petitioner's credit report involved a matter of public concern. In a related context, we have held that "[w]hether . . . speech addresses a matter of public concern must be determined by [the expression's] content, form, and context . . . as revealed by the whole record." *Connick* v. *Myers*, 461 U. S., at 147–148. These factors indicate that petitioner's credit report concerns no public issue. It was speech solely in the individual interest of the speaker and its specific business audience. Cf. *Central Hudson Gas & Elec.* v. *Public Service Comm.*, 447 U. S. 557, 561 (1980). This particular interest warrants no special protection when—as in this case—the speech is wholly false and clearly damaging to the victim's business reputation. Cf. *id.*, at 566; *Virginia Pharmacy Board* v. *Virginia Consumer Council*, 425 U. S. 748, 771–772 (1976). Moreover, since the credit report was made available to only five subscribers, who, under the terms of the subscription agreement, could not disseminate it further, it cannot be said that the report involves any "strong interest in the free flow of commercial information." *Id.*, at 764. There is simply no credible argument that this type of credit reporting requires special protection to ensure that "debate on public issues [will] be uninhibited, robust, and wide-open." *New York Times Co.* v. *Sullivan*, 376 U. S., at 270.

In addition, the speech here, like advertising, is hardy and unlikely to be deterred by incidental state regulation. See *Virginia Pharmacy Board* v. *Virginia Consumer Council*, *supra*, at 771–772. It is solely motivated by the desire for profit, which, we have noted, is a force less likely to be deterred than others. *Ibid.* Arguably, the reporting here was also more objectively verifiable than speech deserving of greater protection. See *ibid.* In any case, the market provides a powerful incentive to a credit reporting agency to be accurate, since false credit reporting is of no use to creditors.

Thus, any incremental "chilling" effect of libel suits would be of decreased significance.[6]

VI

We conclude that permitting recovery of presumed and punitive damages in defamation cases absent a showing of "actual malice" does not violate the First Amendment when the defamatory statements do not involve matters of public concern. Accordingly, we affirm the judgment of the Vermont Supreme Court.

It is so ordered.

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[6] The Fifth Circuit Court of Appeals has noted that, while most States provide a qualified privilege against libel suits for commercial credit reporting agencies, in those States that do not there is a thriving credit reporting business and commercial credit transactions are not inhibited. *Hood* v. *Dun & Bradstreet, Inc.*, 486 F. 2d 25, 32 (1973), cert. denied, 415 U. S. 985 (1974). The court cited an empirical study comparing credit transactions in Boise, Idaho, where there is no privilege, with those in Spokane, Washington, where there is one. *Id.*, at 32, and n. 18.

06/17

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I

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After trial, the jury returned a verdict in favor of respondent and awarded $50,000 in compensatory or presumed damages and $300,000 in punitive damages. Petitioner moved for a new trial. It argued that in *Gertz* v. *Robert Welch*,

Inc., *supra*, at 349, this Court had ruled broadly "that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth," and it argued that the judge's instructions in this case permitted the jury to award such damages on a lesser showing.[1] The trial court indicated some doubt as to whether *Gertz* applied to "non-media cases," but granted a new trial "[b]ecause of . . . dissatisfaction with its charge and . . . conviction that the interests of justice require[d]" it. App. 26.

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[1] Petitioner challenged the award of presumed and punitive damages only on First Amendment grounds. Because it raised no other constitutional claims against the award, we express no opinion as to whether the award meets other constitutional requirements.

Recognizing disagreement among the lower courts about when the protections of *Gertz* apply,[2] we granted certiorari. —— U. S. —— (1983). We now affirm, although for reasons different from those relied upon by the Vermont Supreme Court.

II

As an initial matter, respondent contends that we need not determine whether *Gertz* applies in this case because the instructions, taken as a whole, required the jury to find "actual malice" before awarding presumed or punitive damages.[3] The trial court instructed the jury that because the report was libelous per se, respondent was not required "to prove actual damages . . . since damage and loss [are] conclusively presumed." App. 17; accord, *id.*, at 19. It also instructed the jury that it could award punitive damages only if it found "actual malice." *Id.*, at 20. Its only other relevant instruction was that liability could not be established unless respondent showed "malice or lack of good faith on the part of the Defendant." *Id.*, at 18. Respondent contends that these references to "malice," "lack of good faith," and "actual malice" required the jury to find knowledge of falsity or reck-

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[3] Respondent also argues that petitioner did not seek the protections outlined in *Gertz* before the jury instructions were given and that the issue therefore was not preserved for review. Since the Vermont Supreme Court considered the federal constitutional issue properly presented and decided it, there is no bar to our review. See *Orr* v. *Orr*, 440 U. S. 268, 274–275 (1979).

less disregard for the truth—the "actual malice" of *New York Times*—before it awarded presumed or punitive damages.

We reject this claim because the trial court failed to define any of these terms adequately. It did not, for example, provide the jury with any definition of the term "actual malice." In fact, the only relevant term it defined was simple "malice."[4] And its definitions of this term included not only the *New York Times* formulation but also other concepts such as "bad faith" and "reckless disregard of the [statement's] possible consequences." *Id.*, at 19. The instructions thus permitted the jury to award presumed and punitive damages on a lesser showing than "actual malice." Consequently, the trial court's conclusion that the instructions did not satisfy *Gertz* was correct, and the Vermont Supreme Court's determination that *Gertz* was inapplicable was necessary to its decision that the trial court erred in granting the motion for a new trial. We therefore must consider whether *Gertz* applies to the case before us.

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In *New York Times Co.* v. *Sullivan*, *supra*, the Court for the first time held that the First Amendment limits the reach of state defamation laws. That case concerned a public official's recovery of damages for the publication of an advertisement criticizing police conduct in a civil rights demonstration. As the Court noted, the advertisement concerned "one of the major public issues of our time." *Id.*, at 271. Noting that "freedom of expression *upon public questions* is secured by

[4] The full instruction on malice reads as follows:

"If you find that the Defendant acted in a bad faith towards the Plaintiff in publishing the Erroneous Report, *or* that Defendant intended to injure the Plaintiff in its business, or that it acted in a willful, wanton or reckless disregard of the rights and interests of the Plaintiff, the Defendant has acted maliciously and the privilege is destroyed. *Further*, if the Report was made with reckless disregard of the possible consequences, *or* if it was made with the knowledge that it was false *or* with reckless disregard of its truth or falsity, it was made with malice." App. 18–19 (emphasis added).

the First Amendment," *id.*, at 269 (emphasis added), and that "debate *on public issues* should be uninhibited, robust, and wide-open," *id.*, at 270 (emphasis added), the Court held that a public official cannot recover damages for defamatory falsehood unless he proves that the false statement was made with "'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not," *id.*, at 280. In later cases, all involving public issues, the Court extended this same constitutional protection to libels of public figures, *e. g.*, *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130 (1967), and in one case suggested in a plurality opinion that this constitutional rule should extend to libels of any individual so long as the defamatory statements involved a "matter of public or general interest," *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29, 44 (1971) (opinion of BRENNAN, J.).

In *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974), we held that the protections of *New York Times* did not extend as far as *Rosenbloom* suggested. *Gertz* concerned a libelous article appearing in a magazine called American Opinion, the monthly outlet of the John Birch Society. The article in question discussed whether the prosecution of a policeman in Chicago was part of a Communist campaign to discredit local law enforcement agencies. The plaintiff, Gertz, neither a public official nor a public figure, was a lawyer tangentially involved in the prosecution. The magazine alleged that he was the chief architect of the "frame-up" of the police officer and linked him to Communist activity. Like every other case in which this Court has found constitutional limits to state defamation laws, *Gertz* involved expression on a matter of undoubted public concern.

In *Gertz*, we held that the fact that expression concerned a public issue did not by itself entitle the libel defendant to the constitutional protections of *New York Times*. These protections, we found, were not "justified solely by reference to the interest of the press and broadcast media in immunity

from liability." 418 U. S., at 343. Rather, they represented "an accommodation between [First Amendment] concern[s] and the limited state interest present in the context of libel actions brought by public persons." *Ibid.* In libel actions brought by private persons we found the competing interests different. Largely because private persons have not voluntarily exposed themselves to increased risk of injury from defamatory statements and because they generally lack effective opportunities for rebutting such statements, *id.*, at 345, we found that the State possessed a "strong and legitimate . . . interest in compensating private individuals for injury to reputation." *Id.*, at 348–349. Balancing this stronger state interest against the same First Amendment interest at stake in *New York Times*, we held that a State could not allow recovery of presumed and punitive damages absent a showing of "actual malice." Nothing in our opinion, however, indicated that this same balance would be struck regardless of the type of speech involved.[5]

[5] The dissent states that "[a]t several points the Court in *Gertz* makes perfectly clear [that] the restrictions of presumed and punitive damages were to apply in all cases." *Post*, at 12, n. 11. Given the context of *Gertz*, however, the Court could have made "perfectly clear" only that these restrictions applied in cases involving *public speech*. In fact, the dissent itself concedes that "*Gertz* . . . focused largely on defining the circumstances under which protection of the central First Amendment value of robust debate of *public issues* should mandate plaintiffs to show actual malice to obtain a judgment and actual damages . . . ." *Post*, at 3 (original emphasis).

The dissent also incorrectly states that *Gertz* "specifically held," *post*, at 6, 20, both "that the award of presumed and punitive damages on less than a showing of actual malice is not a narrowly tailored means to achieve the legitimate state purpose of protecting the reputation of private persons . . .," *id.*, at 6, and that "unrestrained presumed and punitive damages were 'unnecessarily' broad . . . in relation to the legitimate state interests," *id.*, at 20. Although the Court made both statements, it did so only within the context of public speech. Neither statement controls here. What was "not . . . narrowly tailored" or was " 'unnecessarily' broad" with respect to public speech is not necessarily so with respect to the speech now at issue. Properly understood, *Gertz* is consistent with the result we reach today.

IV

We have never considered whether the *Gertz* balance obtains when the defamatory statements involve no issue of public concern. To make this determination, we must employ the approach approved in *Gertz* and balance the State's interest in compensating private individuals for injury to their reputation against the First Amendment interest in protecting this type of expression. This state interest is identical to the one weighed in *Gertz*. There we found that it was "strong and legitimate." 418 U. S., at 348. A State should not lightly be required to abandon it,

> "for, as Mr. Justice Stewart has reminded us, the individual's right to the protection of his own good name 'reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. . . .' *Rosenblatt* v. *Baer*, 383 U. S. 75, 92 (1966) (concurring opinion)." 418 U. S., at 341.

The First Amendment interest, on the other hand, is less important than the one weighed in *Gertz*. We have long recognized that not all speech is of equal First Amendment importance.[6] It is speech on "'matters of public concern'" that

[6] This Court on many occasions has recognized that certain kinds of speech are less central to the interests of the First Amendment than others. Obscene speech and "fighting words" long have been accorded no protection. *Roth* v. *United States*, 354 U. S. 476, 483 (1957); *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571–572 (1942); cf. *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 591–592 (1952) (advocating violent overthrow of the government is unprotected speech); *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697, 716 (1931) (publication of troop ship sailings during war time may be enjoined). In the area of protected speech, the most prominent example of reduced protection for certain kinds of speech concerns commercial speech. Such speech, we have noted, occupies a "subordinate position in the scale of First Amendment values." *Ohralik* v. *Ohio*

is "at the heart of the First Amendment's protection." *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 776 (1978), quoting *Thornhill* v. *Alabama*, 310 U. S. 88, 101 (1940). As we stated in *Connick* v. *Myers*, 461 U. S. 138, 145 (1983), this "special concern [for speech on public issues] . . . is no mystery":

> "The First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' *Roth* v. *United States*, 354 U. S. 476, 484 (1957); *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 269 (1964). '[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.' *Garrison* v. *Louisiana*, 379 U. S. 64, 74–75 (1964). Accord-

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State Bar Assn., 436 U. S. 447, 456 (1978). It also is more easily verifiable and less likely to be deterred by proper regulation. *Virginia Pharmacy Bd.* v. *Virginia Consumer Council*, 425 U. S. 748, 771–772 (1976). Accordingly, it may be regulated in ways that might be impermissible in the realm of noncommercial expression. *Ohralik*, *supra*, at 456; *Central Hudson Gas & Elec.* v. *Public Serv. Comm'n*, 447 U. S. 557, 562–563 (1980).

Other areas of the law provide further examples. In *Ohralik* we noted that there are "[n]umerous examples . . . of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, . . . corporate proxy statements, . . . the exchange of price and production information among competitors, . . . and employers' threats of retaliation for the labor activities of employees." 436 U. S., at 456 (citations omitted). Yet similar regulation of political speech is subject to the most rigorous scrutiny. See *Brown* v. *Hartlage*, 456 U. S. 45, 52–53 (1982); *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 279, n. 19 (1964); *Buckley* v. *Valeo*, 424 U. S. 1, 14 (1976). Likewise, while the power of the State to license lawyers, psychiatrists, and public school teachers—all of whom speak for a living—is unquestioned, this Court has held that a law requiring licensing of union organizers is unconstitutional under the First Amendment. *Thomas* v. *Collins*, 323 U. S. 516 (1945); see also *Rosenbloom* v. *Metromedia*, 403 U. S. 29, 44 (1971) (opinion of BRENNAN, J.) ("the determinant whether the First Amendment applies to state libel actions is whether the utterance involved concerns an issue of public or general concern").

> ingly, the Court has frequently reaffirmed that speech on public issues occupies the "'highest rung of the hierarchy of First Amendment values,'" and is entitled to special protection. *NAACP* v. *Claiborne Hardware Co.*, 458 U. S. 886, 913 (1982); *Carey* v. *Brown*, 447 U. S. 455, 467 (1980)."

In contrast, speech on matters of purely private concern is of less First Amendment concern. 461 U. S., at 146–147. As a number of state courts, including the court below, have recognized, the role of the Constitution in regulating state libel law is far more limited when the concerns that activated *New York Times* and *Gertz* are absent.[7] In such a case,

> "[t]here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-censorship by the press. The facts of the present case are wholly without the First Amendment concerns with which the Supreme Court of the United States has been struggling." *Harley-Davidson Motorsports, Inc.* v. *Markley*, 279 Or. 361, 366, 568 P. 2d 1359, 1363 (1977).

Accord, *Rowe* v. *Metz*, 195 Colo. 424, 426, 579 P. 2d 83, 84 (1978); *Denny* v. *Mertz*, 106 Wis. 2d 636, 661, 318 N. W. 2d 141, 153, cert. denied, 459 U. S. 883 (1982).

While such speech is not totally unprotected by the First Amendment, see *Connick* v. *Myers*, 461 U. S., at 147, its protections are less stringent. In *Gertz*, we found that the state interest in awarding presumed and punitive damages was not "substantial" in view of their effect on speech at the

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[7] As one commentator has remarked with respect to "the case of a commercial supplier of credit information that defames a person applying for credit"—the case before us today—"If the first amendment requirements outlined in *Gertz* apply, there is something clearly wrong with the first amendment or with *Gertz*." Shiffrin, The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment, 78 Nw. L. Rev. 1212, 1268 (1983).

core of First Amendment concern. 418 U. S., at 349. This interest, however, *is* "substantial" relative to the incidental effect these remedies may have on speech of significantly less constitutional interest. The rationale of the common law rules has been the experience and judgment of history that "proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact." W. Prosser, Law of Torts § 112, p. 765 (4th ed. 1971); accord, *Rowe* v. *Metz*, *supra*, 425–426, 579 P. 2d, at 84; Note, Developments in the Law—Defamation, 69 Harv. L. Rev. 875, 891–892 (1956). As a result, courts for centuries have allowed juries to presume that some damage occurred from many defamatory utterances and publications. Restatement of Torts § 568, comment b, at 162 (1938) (noting that Hale announced that damages were to be presumed for libel as early as 1670). This rule furthers the state interest in providing remedies for defamation by ensuring that those remedies are effective. In light of the reduced constitutional value of speech involving no matters of public concern, we hold that the state interest adequately supports awards of presumed and punitive damages—even absent a showing of "actual malice."[8]

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[8] 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*. *Post*, at 12. Its "balance," however, rests on a misinterpretation. In particular, the dissent finds language in *Gertz* that, it believes, shows the State's interest to be "irrelevant." See *post*, at 20. It is then an easy step for the dissent to say that the State's interest is outweighed by even the reduced First Amendment interest in private speech. *Gertz*, however, did not say that the state interest was "irrelevant" in absolute terms. Indeed, such a statement is belied by *Gertz* itself, for it held that presumed and punitive damages were available under some circumstances. 418 U. S., at 349. Rather, what the *Gertz* language indicates is that the State's interest is not substantial relative to the First Amendment interest in public speech. This language is thus irrelevant to today's decision.

V

The only remaining issue is whether petitioner's credit report involved a matter of public concern. In a related context, we have held that "[w]hether . . . speech addresses a matter of public concern must be determined by [the expression's] content, form, and context . . . as revealed by the whole record." *Connick* v. *Myers*, 461 U. S., at 147–148. These factors indicate that petitioner's credit report concerns no public issue.[9] It was speech solely in the individual interest of the speaker and its specific business audience. Cf. *Central Hudson Gas & Elec.* v. *Public Service Comm.*, 447 U. S. 557, 561 (1980). This particular interest warrants no special protection when—as in this case—the speech is wholly false and clearly damaging to the victim's business reputation. Cf. *id.*, at 566; *Virginia Pharmacy Board* v. *Virginia Consumer Council*, 425 U. S. 748, 771–772 (1976). Moreover, since the credit report was made available to only five subscribers, who, under the terms of the subscription agreement, could not disseminate it further, it cannot be said that the report involves any "strong interest in the free flow

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The dissent's "balance," moreover, would lead to the protection of all libels—no matter how attenuated their constitutional interest. If the dissent were the law, a woman of impeccable character who was branded a "whore" by a jealous neighbor would have no effective recourse unless she could prove "actual malice" by clear and convincing evidence. This is not malice in the ordinary sense, ~~moreover~~, but in the more demanding sense of *New York Times*. The dissent would, in effect, constitutionalize the entire common law of libel.

[9] The dissent suggests that our holding today leaves all credit reporting subject to reduced First Amendment protection. This is ~~untrue~~. The protection to be accorded a particular credit report depends on whether the report's "content, form, and context" indicate that it concerns a public matter. We also do not hold, as the dissent suggests we do, *post*, at 13–19, that the report is subject to reduced constitutional protection because it constitutes economic or commercial speech. We discuss such speech, along with advertising, only to show how many of the same concerns that argue in favor of reduced constitutional protection in those areas apply here as well.

of commercial information." *Id.*, at 764. There is simply no credible argument that this type of credit reporting requires special protection to ensure that "debate on public issues [will] be uninhibited, robust, and wide-open." *New York Times Co.* v. *Sullivan*, 376 U. S., at 270.

In addition, the speech here, like advertising, is hardy and unlikely to be deterred by incidental state regulation. See *Virginia Pharmacy Board* v. *Virginia Consumer Council*, *supra*, at 771–772. It is solely motivated by the desire for profit, which, we have noted, is a force less likely to be deterred than others. *Ibid.* Arguably, the reporting here was also more objectively verifiable than speech deserving of greater protection. See *ibid.* In any case, the market provides a powerful incentive to a credit reporting agency to be accurate, since false credit reporting is of no use to creditors. Thus, any incremental "chilling" effect of libel suits would be of decreased significance.[10]

VI

We conclude that permitting recovery of presumed and punitive damages in defamation cases absent a showing of "actual malice" does not violate the First Amendment when the defamatory statements do not involve matters of public concern. Accordingly, we affirm the judgment of the Vermont Supreme Court.

It is so ordered.

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[10] The Fifth Circuit Court of Appeals has noted that, while most States provide a qualified privilege against libel suits for commercial credit reporting agencies, in those States that do not there is a thriving credit reporting business and commercial credit transactions are not inhibited. *Hood* v. *Dun & Bradstreet, Inc.*, 486 F. 2d 25, 32 (1973), cert. denied, 415 U. S. 985 (1974). The court cited an empirical study comparing credit transactions in Boise, Idaho, where there is no privilege, with those in Spokane, Washington, where there is one. *Id.*, at 32, and n. 18.

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: _____

Recirculated: JUN 19 1985

notes
4, 7, and 8 added

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83–18

DUN & BRADSTREET, INC., PETITIONERS *v.* GREENMOSS BUILDERS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

[June ——, 1985]

JUSTICE POWELL announced the judgment of the Court and an opinion in which JUSTICE REHNQUIST and JUSTICE O'CONNOR join.

In *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974), we held that the First Amendment restricted the damages that a private individual could obtain from a publisher for a libel that involved a matter of public concern. More specifically, we held that in these circumstances the First Amendment prohibited awards of presumed and punitive damages for false and defamatory statements unless the plaintiff shows "actual malice," that is, knowledge of falsity or reckless disregard for the truth. The question presented in this case is whether this rule of *Gertz* applies when the false and defamatory statements do not involve matters of public concern.

I

Petitioner Dun & Bradstreet, a credit reporting agency, provides subscribers with financial and related information about businesses. All the information is confidential; under the terms of the subscription agreement the subscribers may not reveal it to anyone else. On July 26, 1976, petitioner sent a report to five subscribers indicating that respondent, a construction contractor, had filed a voluntary petition for bankruptcy. This report was false and grossly misrepresented respondent's assets and liabilities. That same day,

while discussing the possibility of future financing with its bank, respondent's president was told that the bank had received the defamatory report. He immediately called petitioner's regional office, explained the error, and asked for a correction. In addition, he requested the names of the firms that had received the false report in order to assure them that the company was solvent. Petitioner promised to look into the matter but refused to divulge the names of those who had received the report.

After determining that its report was indeed false, petitioner issued a corrective notice on or about August 3, 1976 to the five subscribers who had received the initial report. The notice stated that one of respondent's former employees, not respondent itself, had filed for bankruptcy and that respondent "continued in business as usual." Respondent told petitioner that it was dissatisfied with the notice and it again asked for a list of subscribers who had seen the initial report. Again petitioner refused to divulge their names.

Respondent then brought this defamation action in Vermont state court. It alleged that the false report had injured its reputation and sought both compensatory and punitive damages. The trial established that the error in petitioner's report had been caused when one of its employees, a seventeen year old high school student paid to review Vermont bankruptcy pleadings, had inadvertently attributed to respondent a bankruptcy petition filed by one of respondent's former employees. Although petitioner's representative testified that it was routine practice to check the accuracy of such reports with the businesses themselves, it did not try to verify the information about respondent before reporting it.

After trial, the jury returned a verdict in favor of respondent and awarded $50,000 in compensatory or presumed damages and $300,000 in punitive damages. Petitioner moved for a new trial. It argued that in *Gertz* v. *Robert Welch, Inc.*, *supra*, at 349, this Court had ruled broadly "that the

States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth," and it argued that the judge's instructions in this case permitted the jury to award such damages on a lesser showing. The trial court indicated some doubt as to whether *Gertz* applied to "non-media cases," but granted a new trial "[b]ecause of . . . dissatisfaction with its charge and . . . conviction that the interests of justice require[d]" it. App. 26.

The Vermont Supreme Court reversed. 461 A. 2d 414 (1983). Although recognizing that "in certain instances the distinction between media and nonmedia defendants may be difficult to draw," the court stated that "no such difficulty is presented with credit reporting agencies, which are in the business of selling financial information to a limited number of subscribers who have paid substantial fees for their services." *Id.*, at 417. Relying on this distinguishing characteristic of credit reporting firms, the court concluded that such firms are not "the type of media worthy of First Amendment protection as contemplated by *New York Times* [*Co.* v. *Sullivan*, 376 U. S. 254 (1964),] and its progeny." 461 A. 2d, at 417–418. It held that the balance between a private plaintiff's right to recover presumed and punitive damages without a showing of special fault and the First Amendment rights of "nonmedia" speakers "must be struck in favor of the private plaintiff defamed by a nonmedia defendant." *Id.*, at 418. Accordingly, the court held "that as a matter of federal constitutional law, the media protections outlined in *Gertz* are inapplicable to nonmedia defamation actions." *Ibid.*

Recognizing disagreement among the lower courts about when the protections of *Gertz* apply,[1] we granted certiorari.

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[1] Compare *Denny* v. *Mertz*, 106 Wis. 2d 636, 318 N. W. 2d 141, cert. denied, 459 U. S. 883 (1982) (*Gertz* inapplicable to private figure suits against nonmedia defendants); *Stuempges* v. *Parke, Davis & Co.*, 297 N. W. 2d 252 (Minn. 1980) (same); *Rowe* v. *Metz*, 195 Colo. 424, 579 P. 2d 83 (1978) (same); and *Harley-Davidson Motorsports, Inc.* v. *Markley*, 279 Or. 361,

—— U. S. —— (1983). We now affirm, although for reasons different from those relied upon by the Vermont Supreme Court.

II

As an initial matter, respondent contends that we need not determine whether *Gertz* applies in this case because the instructions, taken as a whole, required the jury to find "actual malice" before awarding presumed or punitive damages.[2] The trial court instructed the jury that because the report was libelous per se, respondent was not required "to prove actual damages . . . since damage and loss [are] conclusively presumed." App. 17; accord, *id.*, at 19. It also instructed the jury that it could award punitive damages only if it found "actual malice." *Id.*, at 20. Its only other relevant instruction was that liability could not be established unless respondent showed "malice or lack of good faith on the part of the Defendant." *Id.*, at 18. Respondent contends that these references to "malice," "lack of good faith," and "actual malice" required the jury to find knowledge of falsity or reckless disregard for the truth—the "actual malice" of *New York Times*—before it awarded presumed or punitive damages.

We reject this claim because the trial court failed to define any of these terms adequately. It did not, for example, provide the jury with any definition of the term "actual malice." In fact, the only relevant term it defined was simple "mal-

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568 P. 2d 1359 (1977) (same); with *Antwerp Diamond Exchange* v. *Better Business Bureau*, 130 Ariz. 523, 637 P. 2d 733 (1981) (*Gertz* applicable in such situations); and *Jacron Sales Co.* v. *Sindorf*, 276 Md. 580, 350 A. 2d 688 (1976) (same).

[2] Respondent also argues that petitioner did not seek the protections outlined in *Gertz* before the jury instructions were given and that the issue therefore was not preserved for review. Since the Vermont Supreme Court considered the federal constitutional issue properly presented and decided it, there is no bar to our review. See *Orr* v. *Orr*, 440 U. S. 268, 274–275 (1979).

ice."[3] And its definitions of this term included not only the *New York Times* formulation but also other concepts such as "bad faith" and "reckless disregard of the [statement's] possible consequences." *Id.*, at 19. The instructions thus permitted the jury to award presumed and punitive damages on a lesser showing than "actual malice." Consequently, the trial court's conclusion that the instructions did not satisfy *Gertz* was correct, and the Vermont Supreme Court's determination that *Gertz* was inapplicable was necessary to its decision that the trial court erred in granting the motion for a new trial. We therefore must consider whether *Gertz* applies to the case before us.

III

In *New York Times Co. v. Sullivan*, *supra*, the Court for the first time held that the First Amendment limits the reach of state defamation laws. That case concerned a public official's recovery of damages for the publication of an advertisement criticizing police conduct in a civil rights demonstration. As the Court noted, the advertisement concerned "one of the major public issues of our time." *Id.*, at 271. Noting that "freedom of expression *upon public questions* is secured by the First Amendment," *id.*, at 269 (emphasis added), and that "debate *on public issues* should be uninhibited, robust, and wide-open," *id.*, at 270 (emphasis added), the Court held that a public official cannot recover damages for defamatory falsehood unless he proves that the false statement was made with "'actual malice'—that is, with knowledge that it was

[3] The full instruction on malice reads as follows:

"If you find that the Defendant acted in a bad faith towards the Plaintiff in publishing the Erroneous Report, *or* that Defendant intended to injure the Plaintiff in its business, *or* that it acted in a willful, wanton or reckless disregard of the rights and interests of the Plaintiff, the Defendant has acted maliciously and the privilege is destroyed. *Further*, if the Report was made with reckless disregard of the possible consequences, *or* if it was made with the knowledge that it was false *or* with reckless disregard of its truth or falsity, it was made with malice." App. 18–19 (emphasis added).

false or with reckless disregard of whether it was false or not," *id.*, at 280. In later cases, all involving public issues, the Court extended this same constitutional protection to libels of public figures, *e. g.*, *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130 (1967), and in one case suggested in a plurality opinion that this constitutional rule should extend to libels of any individual so long as the defamatory statements involved a "matter of public or general interest," *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29, 44 (1971) (opinion of BRENNAN, J.).

In *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974), we held that the protections of *New York Times* did not extend as far as *Rosenbloom* suggested. *Gertz* concerned a libelous article appearing in a magazine called American Opinion, the monthly outlet of the John Birch Society. The article in question discussed whether the prosecution of a policeman in Chicago was part of a Communist campaign to discredit local law enforcement agencies. The plaintiff, Gertz, neither a public official nor a public figure, was a lawyer tangentially involved in the prosecution. The magazine alleged that he was the chief architect of the "frame-up" of the police officer and linked him to Communist activity. Like every other case in which this Court has found constitutional limits to state defamation laws, *Gertz* involved expression on a matter of undoubted public concern.

In *Gertz*, we held that the fact that expression concerned a public issue did not by itself entitle the libel defendant to the constitutional protections of *New York Times*. These protections, we found, were not "justified solely by reference to the interest of the press and broadcast media in immunity from liability." 418 U. S., at 343. Rather, they represented "an accommodation between [First Amendment] concern[s] and the limited state interest present in the context of libel actions brought by public persons." *Ibid.* In libel actions brought by private persons we found the competing interests different. Largely because private persons have

not voluntarily exposed themselves to increased risk of injury from defamatory statements and because they generally lack effective opportunities for rebutting such statements, *id.*, at 345, we found that the State possessed a "strong and legitimate . . . interest in compensating private individuals for injury to reputation." *Id.*, at 348–349. Balancing this stronger state interest against the same First Amendment interest at stake in *New York Times*, we held that a State could not allow recovery of presumed and punitive damages absent a showing of "actual malice." Nothing in our opinion, however, indicated that this same balance would be struck regardless of the type of speech involved.[4]

IV

We have never considered whether the *Gertz* balance obtains when the defamatory statements involve no issue of public concern. To make this determination, we must employ the approach approved in *Gertz* and balance the State's

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The dissent also incorrectly states that *Gertz* "specifically held," *post*, at 6, 20, both "that the award of presumed and punitive damages on less than a showing of actual malice is not a narrowly tailored means to achieve the legitimate state purpose of protecting the reputation of private persons . . .," *id.*, at 6, and that "unrestrained presumed and punitive damages were 'unnecessarily' broad . . . in relation to the legitimate state interests," *id.*, at 20. Although the Court made both statements, it did so only within the context of public speech. Neither statement controls here. What was "not . . . narrowly tailored" or was "'unnecessarily' broad" with respect to public speech is not necessarily so with respect to the speech now at issue. Properly understood, *Gertz* is consistent with the result we reach today.

interest in compensating private individuals for injury to their reputation against the First Amendment interest in protecting this type of expression. This state interest is identical to the one weighed in *Gertz*. There we found that it was "strong and legitimate." 418 U. S., at 348. A State should not lightly be required to abandon it,

> "for, as Mr. Justice Stewart has reminded us, the individual's right to the protection of his own good name 'reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. . . .' *Rosenblatt* v. *Baer*, 383 U. S. 75, 92 (1966) (concurring opinion)." 418 U. S., at 341.

The First Amendment interest, on the other hand, is less important than the one weighed in *Gertz*. We have long recognized that not all speech is of equal First Amendment importance.[5] It is speech on "'matters of public concern'" that

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[5] This Court on many occasions has recognized that certain kinds of speech are less central to the interests of the First Amendment than others. Obscene speech and "fighting words" long have been accorded no protection. *Roth* v. *United States*, 354 U. S. 476, 483 (1957); *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571–572 (1942); cf. *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 591–592 (1952) (advocating violent overthrow of the government is unprotected speech); *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697, 716 (1931) (publication of troop ship sailings during war time may be enjoined). In the area of protected speech, the most prominent example of reduced protection for certain kinds of speech concerns commercial speech. Such speech, we have noted, occupies a "subordinate position in the scale of First Amendment values." *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 456 (1978). It also is more easily verifiable and less likely to be deterred by proper regulation. *Virginia Pharmacy Bd.* v. *Virginia Consumer Council*, 425 U. S. 748, 771–772 (1976). Accordingly, it may be regulated in ways that might be impermissible in the realm of noncommercial expression. *Ohralik*, *supra*, at 456; *Central*

is "at the heart of the First Amendment's protection." *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 776 (1978), quoting *Thornhill* v. *Alabama*, 310 U. S. 88, 101 (1940). As we stated in *Connick* v. *Myers*, 461 U. S. 138, 145 (1983), this "special concern [for speech on public issues] . . . is no mystery":

> "The First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' *Roth* v. *United States*, 354 U. S. 476, 484 (1957); *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 269 (1964). '[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.' *Garrison* v. *Louisiana*, 379 U. S. 64, 74–75 (1964). Accordingly, the Court has frequently reaffirmed that speech on public issues occupies the "'highest rung of the hierarchy of First Amendment values,'" and is entitled to special protection. *NAACP* v. *Claiborne Hardware Co.*,

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Other areas of the law provide further examples. In *Ohralik* we noted that there are "[n]umerous examples . . . of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, . . . corporate proxy statements, . . . the exchange of price and production information among competitors, . . . and employers' threats of retaliation for the labor activities of employees." 436 U. S., at 456 (citations omitted). Yet similar regulation of political speech is subject to the most rigorous scrutiny. See *Brown* v. *Hartlage*, 456 U. S. 45, 52–53 (1982); *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 279, n. 19 (1964); *Buckley* v. *Valeo*, 424 U. S. 1, 14 (1976). Likewise, while the power of the State to license lawyers, psychiatrists, and public school teachers—all of whom speak for a living—is unquestioned, this Court has held that a law requiring licensing of union organizers is unconstitutional under the First Amendment. *Thomas* v. *Collins*, 323 U. S. 516 (1945); see also *Rosenbloom* v. *Metromedia*, 403 U. S. 29, 44 (1971) (opinion of BRENNAN, J.) ("the determinant whether the First Amendment applies to state libel actions is whether the utterance involved concerns an issue of public or general concern").

> 458 U. S. 886, 913 (1982); *Carey* v. *Brown*, 447 U. S. 455, 467 (1980)."

In contrast, speech on matters of purely private concern is of less First Amendment concern. 461 U. S., at 146–147. As a number of state courts, including the court below, have recognized, the role of the Constitution in regulating state libel law is far more limited when the concerns that activated *New York Times* and *Gertz* are absent.[6] In such a case,

> "[t]here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-censorship by the press. The facts of the present case are wholly without the First Amendment concerns with which the Supreme Court of the United States has been struggling." *Harley-Davidson Motorsports, Inc.* v. *Markley*, 279 Or. 361, 366, 568 P. 2d 1359, 1363 (1977).

Accord, *Rowe* v. *Metz*, 195 Colo. 424, 426, 579 P. 2d 83, 84 (1978); *Denny* v. *Mertz*, 106 Wis. 2d 636, 661, 318 N. W. 2d 141, 153, cert. denied, 459 U. S. 883 (1982).

While such speech is not totally unprotected by the First Amendment, see *Connick* v. *Myers*, 461 U. S., at 147, its protections are less stringent. In *Gertz*, we found that the state interest in awarding presumed and punitive damages was not "substantial" in view of their effect on speech at the core of First Amendment concern. 418 U. S., at 349. This interest, however, *is* "substantial" relative to the incidental effect these remedies may have on speech of significantly less constitutional interest. The rationale of the common law

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[6] As one commentator has remarked with respect to "the case of a commercial supplier of credit information that defames a person applying for credit"—the case before us today—"If the first amendment requirements outlined in *Gertz* apply, there is something clearly wrong with the first amendment or with *Gertz*." Shiffrin, The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment, 78 Nw. L. Rev. 1212, 1268 (1983).

rules has been the experience and judgment of history that "proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact." W. Prosser, Law of Torts § 112, p. 765 (4th ed. 1971); accord, *Rowe* v. *Metz*, *supra*, 425–426, 579 P. 2d, at 84; Note, Developments in the Law—Defamation, 69 Harv. L. Rev. 875, 891–892 (1956). As a result, courts for centuries have allowed juries to presume that some damage occurred from many defamatory utterances and publications. Restatement of Torts § 568, comment b, at 162 (1938) (noting that Hale announced that damages were to be presumed for libel as early as 1670). This rule furthers the state interest in providing remedies for defamation by ensuring that those remedies are effective. In light of the reduced constitutional value of speech involving no matters of public concern, we hold that the state interest adequately supports awards of presumed and punitive damages—even absent a showing of "actual malice."[7]

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[7] 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*. *Post*, at 12. Its "balance," however, rests on a misinterpretation. In particular, the dissent finds language in *Gertz* that, it believes, shows the State's interest to be "irrelevant." See *post*, at 20. It is then an easy step for the dissent to say that the State's interest is outweighed by even the reduced First Amendment interest in private speech. *Gertz*, however, did not say that the state interest was "irrelevant" in absolute terms. Indeed, such a statement is belied by *Gertz* itself, for it held that presumed and punitive damages were available under some circumstances. 418 U. S., at 349. Rather, what the *Gertz* language indicates is that the State's interest is not substantial relative to the First Amendment interest in *public speech*. This language is thus irrelevant to today's decision.

The dissent's "balance," moreover, would lead to the protection of all libels—no matter how attenuated their constitutional interest. If the dissent were the law, a woman of impeccable character who was branded a "whore" by a jealous neighbor would have no effective recourse unless she could prove "actual malice" by clear and convincing evidence. This is not

V

The only remaining issue is whether petitioner's credit report involved a matter of public concern. In a related context, we have held that "[w]hether . . . speech addresses a matter of public concern must be determined by [the expression's] content, form, and context . . . as revealed by the whole record." *Connick* v. *Myers*, 461 U. S., at 147–148. These factors indicate that petitioner's credit report concerns no public issue.[8] It was speech solely in the individual interest of the speaker and its specific business audience. Cf. *Central Hudson Gas & Elec.* v. *Public Service Comm.*, 447 U. S. 557, 561 (1980). This particular interest warrants no special protection when—as in this case—the speech is wholly false and clearly damaging to the victim's business reputation. Cf. *id.*, at 566; *Virginia Pharmacy Board* v. *Virginia Consumer Council*, 425 U. S. 748, 771–772 (1976). Moreover, since the credit report was made available to only five subscribers, who, under the terms of the subscription agreement, could not disseminate it further, it cannot be said that the report involves any "strong interest in the free flow of commercial information." *Id.*, at 764. There is simply no credible argument that this type of credit reporting requires special protection to ensure that "debate on public issues

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malice in the ordinary sense, but in the more demanding sense of *New York Times*. The dissent would, in effect, constitutionalize the entire common law of libel.

[8] The dissent suggests that our holding today leaves all credit reporting subject to reduced First Amendment protection. This is incorrect. The protection to be accorded a particular credit report depends on whether the report's "content, form, and context" indicate that it concerns a public matter. We also do not hold, as the dissent suggests we do, *post*, at 13–19, that the report is subject to reduced constitutional protection because it constitutes economic or commercial speech. We discuss such speech, along with advertising, only to show how many of the same concerns that argue in favor of reduced constitutional protection in those areas apply here as well.

[will] be uninhibited, robust, and wide-open." *New York Times Co.* v. *Sullivan*, 376 U. S., at 270.

In addition, the speech here, like advertising, is hardy and unlikely to be deterred by incidental state regulation. See *Virginia Pharmacy Board* v. *Virginia Consumer Council*, *supra*, at 771–772. It is solely motivated by the desire for profit, which, we have noted, is a force less likely to be deterred than others. *Ibid.* Arguably, the reporting here was also more objectively verifiable than speech deserving of greater protection. See *ibid.* In any case, the market provides a powerful incentive to a credit reporting agency to be accurate, since false credit reporting is of no use to creditors. Thus, any incremental "chilling" effect of libel suits would be of decreased significance.[9]

VI

We conclude that permitting recovery of presumed and punitive damages in defamation cases absent a showing of "actual malice" does not violate the First Amendment when the defamatory statements do not involve matters of public concern. Accordingly, we affirm the judgment of the Vermont Supreme Court.

It is so ordered.

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[9] The Fifth Circuit Court of Appeals has noted that, while most States provide a qualified privilege against libel suits for commercial credit reporting agencies, in those States that do not there is a thriving credit reporting business and commercial credit transactions are not inhibited. *Hood* v. *Dun & Bradstreet, Inc.*, 486 F. 2d 25, 32 (1973), cert. denied, 415 U. S. 985 (1974). The court cited an empirical study comparing credit transactions in Boise, Idaho, where there is no privilege, with those in Spokane, Washington, where there is one. *Id.*, at 32, and n. 18.

SUPREME COURT OF THE UNITED STATES

No. 83–18

DUN & BRADSTREET, INC., PETITIONERS *v.* GREENMOSS BUILDERS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

[June ——, 1985]

JUSTICE POWELL announced the judgment of the Court and delivered an opinion, in which JUSTICE REHNQUIST and JUSTICE O'CONNOR joined.

In *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974), we held that the First Amendment restricted the damages that a private individual could obtain from a publisher for a libel that involved a matter of public concern. More specifically, we held that in these circumstances the First Amendment prohibited awards of presumed and punitive damages for false and defamatory statements unless the plaintiff shows "actual malice," that is, knowledge of falsity or reckless disregard for the truth. The question presented in this case is whether this rule of *Gertz* applies when the false and defamatory statements do not involve matters of public concern.

I

Petitioner Dun & Bradstreet, a credit reporting agency, provides subscribers with financial and related information about businesses. All the information is confidential; under the terms of the subscription agreement the subscribers may not reveal it to anyone else. On July 26, 1976, petitioner sent a report to five subscribers indicating that respondent, a construction contractor, had filed a voluntary petition for bankruptcy. This report was false and grossly misrepresented respondent's assets and liabilities. That same day,

while discussing the possibility of future financing with its bank, respondent's president was told that the bank had received the defamatory report. He immediately called petitioner's regional office, explained the error, and asked for a correction. In addition, he requested the names of the firms that had received the false report in order to assure them that the company was solvent. Petitioner promised to look into the matter but refused to divulge the names of those who had received the report.

After determining that its report was indeed false, petitioner issued a corrective notice on or about August 3, 1976 to the five subscribers who had received the initial report. The notice stated that one of respondent's former employees, not respondent itself, had filed for bankruptcy and that respondent "continued in business as usual." Respondent told petitioner that it was dissatisfied with the notice and it again asked for a list of subscribers who had seen the initial report. Again petitioner refused to divulge their names.

Respondent then brought this defamation action in Vermont state court. It alleged that the false report had injured its reputation and sought both compensatory and punitive damages. The trial established that the error in petitioner's report had been caused when one of its employees, a seventeen year old high school student paid to review Vermont bankruptcy pleadings, had inadvertently attributed to respondent a bankruptcy petition filed by one of respondent's former employees. Although petitioner's representative testified that it was routine practice to check the accuracy of such reports with the businesses themselves, it did not try to verify the information about respondent before reporting it.

After trial, the jury returned a verdict in favor of respondent and awarded $50,000 in compensatory or presumed damages and $300,000 in punitive damages. Petitioner moved for a new trial. It argued that in *Gertz* v. *Robert Welch, Inc.*, *supra*, at 349, this Court had ruled broadly "that the

States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth," and it argued that the judge's instructions in this case permitted the jury to award such damages on a lesser showing. The trial court indicated some doubt as to whether *Gertz* applied to "non-media cases," but granted a new trial "[b]ecause of . . . dissatisfaction with its charge and . . . conviction that the interests of justice require[d]" it. App. 26.

The Vermont Supreme Court reversed. 143 Vt. 66, 461 A. 2d 414 (1983). Although recognizing that "in certain instances the distinction between media and nonmedia defendants may be difficult to draw," the court stated that "no such difficulty is presented with credit reporting agencies, which are in the business of selling financial information to a limited number of subscribers who have paid substantial fees for their services." *Id.*, at 73, 461 A. 2d, at 417. Relying on this distinguishing characteristic of credit reporting firms, the court concluded that such firms are not "the type of media worthy of First Amendment protection as contemplated by *New York Times* [*Co.* v. *Sullivan*, 376 U. S. 254 (1964),] and its progeny." 143 Vt., at 73–74, 461 A. 2d, at 417–418. It held that the balance between a private plaintiff's right to recover presumed and punitive damages without a showing of special fault and the First Amendment rights of "nonmedia" speakers "must be struck in favor of the private plaintiff defamed by a nonmedia defendant." *Id.*, at 75, 461 A. 2d, at 418. Accordingly, the court held "that as a matter of federal constitutional law, the media protections outlined in *Gertz* are inapplicable to nonmedia defamation actions." *Ibid.*, 461 A. 2d, at 75.

Recognizing disagreement among the lower courts about when the protections of *Gertz* apply,[1] we granted certiorari.

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[1] Compare *Denny* v. *Mertz*, 106 Wis. 2d 636, 318 N. W. 2d 141, cert. denied, 459 U. S. 883 (1982) (*Gertz* inapplicable to private figure suits against nonmedia defendants); *Stuempges* v. *Parke, Davis & Co.*, 297 N. W. 2d

—— U. S. —— (1983). We now affirm, although for reasons different from those relied upon by the Vermont Supreme Court.

II

As an initial matter, respondent contends that we need not determine whether *Gertz* applies in this case because the instructions, taken as a whole, required the jury to find "actual malice" before awarding presumed or punitive damages.[2] The trial court instructed the jury that because the report was libelous per se, respondent was not required "to prove actual damages . . . since damage and loss [are] conclusively presumed." App. 17; accord, *id.*, at 19. It also instructed the jury that it could award punitive damages only if it found "actual malice." *Id.*, at 20. Its only other relevant instruction was that liability could not be established unless respondent showed "malice or lack of good faith on the part of the Defendant." *Id.*, at 18. Respondent contends that these references to "malice," "lack of good faith," and "actual malice" required the jury to find knowledge of falsity or reckless disregard for the truth—the "actual malice" of *New York Times*—before it awarded presumed or punitive damages.

We reject this claim because the trial court failed to define any of these terms adequately. It did not, for example, provide the jury with any definition of the term "actual malice." In fact, the only relevant term it defined was simple "mal-

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252 (Minn. 1980) (same); *Rowe* v. *Metz*, 195 Colo. 424, 579 P. 2d 83 (1978) (same); and *Harley-Davidson Motorsports, Inc.* v. *Markley*, 279 Or. 361, 568 P. 2d 1359 (1977) (same); with *Antwerp Diamond Exchange* v. *Better Business Bureau*, 130 Ariz. 523, 637 P. 2d 733 (1981) (*Gertz* applicable in such situations); and *Jacron Sales Co.* v. *Sindorf*, 276 Md. 580, 350 A. 2d 688 (1976) (same).

[2] Respondent also argues that petitioner did not seek the protections outlined in *Gertz* before the jury instructions were given and that the issue therefore was not preserved for review. Since the Vermont Supreme Court considered the federal constitutional issue properly presented and decided it, there is no bar to our review. See *Orr* v. *Orr*, 440 U. S. 268, 274–275 (1979).

ice."[3] And its definitions of this term included not only the *New York Times* formulation but also other concepts such as "bad faith" and "reckless disregard of the [statement's] possible consequences." *Id.*, at 19. The instructions thus permitted the jury to award presumed and punitive damages on a lesser showing than "actual malice." Consequently, the trial court's conclusion that the instructions did not satisfy *Gertz* was correct, and the Vermont Supreme Court's determination that *Gertz* was inapplicable was necessary to its decision that the trial court erred in granting the motion for a new trial. We therefore must consider whether *Gertz* applies to the case before us.

III

In *New York Times Co.* v. *Sullivan*, *supra*, the Court for the first time held that the First Amendment limits the reach of state defamation laws. That case concerned a public official's recovery of damages for the publication of an advertisement criticizing police conduct in a civil rights demonstration. As the Court noted, the advertisement concerned "one of the major public issues of our time." *Id.*, at 271. Noting that "freedom of expression *upon public questions* is secured by the First Amendment," *id.*, at 269 (emphasis added), and that "debate *on public issues* should be uninhibited, robust, and wide-open," *id.*, at 270 (emphasis added), the Court held that a public official cannot recover damages for defamatory falsehood unless he proves that the false statement was made with "'actual malice'—that is, with knowledge that it was

[3] The full instruction on malice reads as follows:

"If you find that the Defendant acted in a bad faith towards the Plaintiff in publishing the Erroneous Report, *or* that Defendant intended to injure the Plaintiff in its business, *or* that it acted in a willful, wanton or reckless disregard of the rights and interests of the Plaintiff, the Defendant has acted maliciously and the privilege is destroyed. *Further*, if the Report was made with reckless disregard of the possible consequences, *or* if it was made with the knowledge that it was false *or* with reckless disregard of its truth or falsity, it was made with malice." App. 18–19 (emphasis added).

false or with reckless disregard of whether it was false or not," *id.*, at 280. In later cases, all involving public issues, the Court extended this same constitutional protection to libels of public figures, *e. g.*, *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130 (1967), and in one case suggested in a plurality opinion that this constitutional rule should extend to libels of any individual so long as the defamatory statements involved a "matter of public or general interest," *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29, 44 (1971) (opinion of BRENNAN, J.).

In *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974), we held that the protections of *New York Times* did not extend as far as *Rosenbloom* suggested. *Gertz* concerned a libelous article appearing in a magazine called American Opinion, the monthly outlet of the John Birch Society. The article in question discussed whether the prosecution of a policeman in Chicago was part of a Communist campaign to discredit local law enforcement agencies. The plaintiff, Gertz, neither a public official nor a public figure, was a lawyer tangentially involved in the prosecution. The magazine alleged that he was the chief architect of the "frame-up" of the police officer and linked him to Communist activity. Like every other case in which this Court has found constitutional limits to state defamation laws, *Gertz* involved expression on a matter of undoubted public concern.

In *Gertz*, we held that the fact that expression concerned a public issue did not by itself entitle the libel defendant to the constitutional protections of *New York Times*. These protections, we found, were not "justified solely by reference to the interest of the press and broadcast media in immunity from liability." 418 U. S., at 343. Rather, they represented "an accommodation between [First Amendment] concern[s] and the limited state interest present in the context of libel actions brought by public persons." *Ibid.* In libel actions brought by private persons we found the competing interests different. Largely because private persons have

not voluntarily exposed themselves to increased risk of injury from defamatory statements and because they generally lack effective opportunities for rebutting such statements, *id.*, at 345, we found that the State possessed a "strong and legitimate . . . interest in compensating private individuals for injury to reputation." *Id.*, at 348–349. Balancing this stronger state interest against the same First Amendment interest at stake in *New York Times*, we held that a State could not allow recovery of presumed and punitive damages absent a showing of "actual malice." Nothing in our opinion, however, indicated that this same balance would be struck regardless of the type of speech involved.[4]

IV

We have never considered whether the *Gertz* balance obtains when the defamatory statements involve no issue of public concern. To make this determination, we must employ the approach approved in *Gertz* and balance the State's

[4] The dissent states that "[a]t several points the Court in *Gertz* makes perfectly clear [that] the restrictions of presumed and punitive damages were to apply in all cases." *Post*, at 12, n. 11. Given the context of *Gertz*, however, the Court could have made "perfectly clear" only that these restrictions applied in cases involving *public speech*. In fact, the dissent itself concedes that "*Gertz* . . . focused largely on defining the circumstances under which protection of the central First Amendment value of robust debate of *public issues* should mandate plaintiffs to show actual malice to obtain a judgment and actual damages . . . ." *Post*, at 3 (original emphasis).

The dissent also incorrectly states that *Gertz* "specifically held," *post*, at 6, 20, both "that the award of presumed and punitive damages on less than a showing of actual malice is not a narrowly tailored means to achieve the legitimate state purpose of protecting the reputation of private persons . . .," *id.*, at 6, and that "unrestrained presumed and punitive damages were 'unnecessarily' broad . . . in relation to the legitimate state interests," *id.*, at 20. Although the Court made both statements, it did so only within the context of public speech. Neither statement controls here. What was "not . . . narrowly tailored" or was "'unnecessarily' broad" with respect to public speech is not necessarily so with respect to the speech now at issue. Properly understood, *Gertz* is consistent with the result we reach today.

interest in compensating private individuals for injury to their reputation against the First Amendment interest in protecting this type of expression. This state interest is identical to the one weighed in *Gertz*. There we found that it was "strong and legitimate." 418 U. S., at 348. A State should not lightly be required to abandon it,

> "for, as Mr. Justice Stewart has reminded us, the individual's right to the protection of his own good name 'reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. . . .' *Rosenblatt* v. *Baer*, 383 U. S. 75, 92 (1966) (concurring opinion)." 418 U. S., at 341.

The First Amendment interest, on the other hand, is less important than the one weighed in *Gertz*. We have long recognized that not all speech is of equal First Amendment importance.[5] It is speech on "'matters of public concern'" that

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[5] This Court on many occasions has recognized that certain kinds of speech are less central to the interests of the First Amendment than others. Obscene speech and "fighting words" long have been accorded no protection. *Roth* v. *United States*, 354 U. S. 476, 483 (1957); *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571–572 (1942); cf. *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 591–592 (1952) (advocating violent overthrow of the government is unprotected speech); *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697, 716 (1931) (publication of troop ship sailings during war time may be enjoined). In the area of protected speech, the most prominent example of reduced protection for certain kinds of speech concerns commercial speech. Such speech, we have noted, occupies a "subordinate position in the scale of First Amendment values." *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 456 (1978). It also is more easily verifiable and less likely to be deterred by proper regulation. *Virginia Pharmacy Bd.* v. *Virginia Consumer Council*, 425 U. S. 748, 771–772 (1976). Accordingly, it may be regulated in ways that might be impermissible in the realm of noncommercial expression. *Ohralik*, *supra*, at 456; *Central*

is "at the heart of the First Amendment's protection." *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 776 (1978), quoting *Thornhill* v. *Alabama*, 310 U. S. 88, 101 (1940). As we stated in *Connick* v. *Myers*, 461 U. S. 138, 145 (1983), this "special concern [for speech on public issues] . . . is no mystery":

> "The First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' *Roth* v. *United States*, 354 U. S. 476, 484 (1957); *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 269 (1964). '[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.' *Garrison* v. *Louisiana*, 379 U. S. 64, 74–75 (1964). Accordingly, the Court has frequently reaffirmed that speech on public issues occupies the "'highest rung of the hierarchy of First Amendment values,'" and is entitled to special protection. *NAACP* v. *Claiborne Hardware Co.*,

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> "[t]here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-censorship by the press. The facts of the present case are wholly without the First Amendment concerns with which the Supreme Court of the United States has been struggling." *Harley-Davidson Motorsports, Inc.* v. *Markley*, 279 Or. 361, 366, 568 P. 2d 1359, 1363 (1977).

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While such speech is not totally unprotected by the First Amendment, see *Connick* v. *Myers*, 461 U. S., at 147, its protections are less stringent. In *Gertz*, we found that the state interest in awarding presumed and punitive damages was not "substantial" in view of their effect on speech at the core of First Amendment concern. 418 U. S., at 349. This interest, however, *is* "substantial" relative to the incidental effect these remedies may have on speech of significantly less constitutional interest. The rationale of the common law

[6] As one commentator has remarked with respect to "the case of a commercial supplier of credit information that defames a person applying for credit"—the case before us today—"If the first amendment requirements outlined in *Gertz* apply, there is something clearly wrong with the first amendment or with *Gertz*." Shiffrin, The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment, 78 Nw. L. Rev. 1212, 1268 (1983).

rules has been the experience and judgment of history that "proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact." W. Prosser, Law of Torts § 112, p. 765 (4th ed. 1971); accord, *Rowe* v. *Metz*, *supra*, 425–426, 579 P. 2d, at 84; Note, Developments in the Law—Defamation, 69 Harv. L. Rev. 875, 891–892 (1956). As a result, courts for centuries have allowed juries to presume that some damage occurred from many defamatory utterances and publications. Restatement of Torts § 568, comment b, at 162 (1938) (noting that Hale announced that damages were to be presumed for libel as early as 1670). This rule furthers the state interest in providing remedies for defamation by ensuring that those remedies are effective. In light of the reduced constitutional value of speech involving no matters of public concern, we hold that the state interest adequately supports awards of presumed and punitive damages—even absent a showing of "actual malice."[7]

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[7] 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*. *Post*, at 12. Its "balance," however, rests on a misinterpretation. In particular, the dissent finds language in *Gertz* that, it believes, shows the State's interest to be "irrelevant." See *post*, at 20. It is then an easy step for the dissent to say that the State's interest is outweighed by even the reduced First Amendment interest in private speech. *Gertz*, however, did not say that the state interest was "irrelevant" in absolute terms. Indeed, such a statement is belied by *Gertz* itself, for it held that presumed and punitive damages were available under some circumstances. 418 U. S., at 349. Rather, what the *Gertz* language indicates is that the State's interest is not substantial relative to the First Amendment interest in *public speech*. This language is thus irrelevant to today's decision.

The dissent's "balance," moreover, would lead to the protection of all libels—no matter how attenuated their constitutional interest. If the dissent were the law, a woman of impeccable character who was branded a "whore" by a jealous neighbor would have no effective recourse unless she could prove "actual malice" by clear and convincing evidence. This is not

V

The only remaining issue is whether petitioner's credit report involved a matter of public concern. In a related context, we have held that "[w]hether . . . speech addresses a matter of public concern must be determined by [the expression's] content, form, and context . . . as revealed by the whole record." *Connick* v. *Myers*, 461 U. S., at 147–148. These factors indicate that petitioner's credit report concerns no public issue.[8] It was speech solely in the individual interest of the speaker and its specific business audience. Cf. *Central Hudson Gas & Elec.* v. *Public Service Comm.*, 447 U. S. 557, 561 (1980). This particular interest warrants no special protection when—as in this case—the speech is wholly false and clearly damaging to the victim's business reputation. Cf. *id.*, at 566; *Virginia Pharmacy Board* v. *Virginia Consumer Council*, 425 U. S. 748, 771–772 (1976). Moreover, since the credit report was made available to only five subscribers, who, under the terms of the subscription agreement, could not disseminate it further, it cannot be said that the report involves any "strong interest in the free flow of commercial information." *Id.*, at 764. There is simply no credible argument that this type of credit reporting requires special protection to ensure that "debate on public issues

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malice in the ordinary sense, but in the more demanding sense of *New York Times*. The dissent would, in effect, constitutionalize the entire common law of libel.

[8] The dissent suggests that our holding today leaves all credit reporting subject to reduced First Amendment protection. This is incorrect. The protection to be accorded a particular credit report depends on whether the report's "content, form, and context" indicate that it concerns a public matter. We also do not hold, as the dissent suggests we do, *post*, at 13–19, that the report is subject to reduced constitutional protection because it constitutes economic or commercial speech. We discuss such speech, along with advertising, only to show how many of the same concerns that argue in favor of reduced constitutional protection in those areas apply here as well.

[will] be uninhibited, robust, and wide-open." *New York Times Co.* v. *Sullivan*, 376 U. S., at 270.

In addition, the speech here, like advertising, is hardy and unlikely to be deterred by incidental state regulation. See *Virginia Pharmacy Board* v. *Virginia Consumer Council*, *supra*, at 771–772. It is solely motivated by the desire for profit, which, we have noted, is a force less likely to be deterred than others. *Ibid.* Arguably, the reporting here was also more objectively verifiable than speech deserving of greater protection. See *ibid.* In any case, the market provides a powerful incentive to a credit reporting agency to be accurate, since false credit reporting is of no use to creditors. Thus, any incremental "chilling" effect of libel suits would be of decreased significance.[9]

VI

We conclude that permitting recovery of presumed and punitive damages in defamation cases absent a showing of "actual malice" does not violate the First Amendment when the defamatory statements do not involve matters of public concern. Accordingly, we affirm the judgment of the Vermont Supreme Court.

It is so ordered.

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[9] The Fifth Circuit Court of Appeals has noted that, while most States provide a qualified privilege against libel suits for commercial credit reporting agencies, in those States that do not there is a thriving credit reporting business and commercial credit transactions are not inhibited. *Hood* v. *Dun & Bradstreet, Inc.*, 486 F. 2d 25, 32 (1973), cert. denied, 415 U. S. 985 (1974). The court cited an empirical study comparing credit transactions in Boise, Idaho, where there is no privilege, with those in Spokane, Washington, where there is one. *Id.*, at 32, and n. 18.