AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 10: The Reagan Era – Democratic Rights/Free Speech

**Dun & Bradstreet, Inc. v. Greenmoss Builders, 472 U.S. 749** (1985)

*Dun & Bradstreet is a credit reporting agency, which provides confidential financial information to subscribers. In 1976, the agency reported to some of its subscribers that Greenmoss Builders had voluntarily entered into bankruptcy. That report turned out to be wrong, and Dun & Bradstreet issued a correction about a week later. Greenmoss Builders sued Duin & Bradstreet for defamation in state court. The trial revealed that Dun & Bradstreet had relied on the work of a high-school-aged employee and had not performed its normal checks, and a jury found for Greenmoss Builders and assigned presumed and punitive damages.*

*Dun & Bradstreet appealed the verdict, arguing that the judge’s instructions to the jury were inconsistent with the U.S. Supreme Court’s decision in* Gertz v. Robert Welch, Inc*. (1974) which required a showing of actual malice. The state supreme court held that* Gertz *did not apply to non-media companies like a credit reporting agency. In a 5-4 decision, the U.S. Supreme Court affirmed the Vermont courts on the different grounds that* Gertz *did not apply to private speech.*

JUSTICE POWELL delivered the opinion of the Court.

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In New York Times Co. v. Sullivan (1964) 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. . . .

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In Gertz v. Robert Welch, Inc. (1974), 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." 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." 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, we found that the State possessed a "strong and legitimate . . . interest in compensating private individuals for injury to reputation." . . .

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. . . .

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. It is speech on "matters of public concern'" that is "at the heart of the First Amendment's protection.". . .

In contrast, speech on matters of purely private concern is of less First Amendment concern. 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. . . .

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[The] credit report concerns no public issue. It was speech solely in the individual interest of the speaker and its specific business audience. 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. 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." 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."

In addition, the speech here, like advertising, is hardy and unlikely to be deterred by incidental state regulation. It is solely motivated by the desire for profit, which, we have noted, is a force less likely to be deterred than others. . . .

*Affirmed*.

CHIEF JUSTICE BURGER, concurring.

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JUSTICE WHITE, concurring.

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New York Times Co. 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. . . .

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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 contrary, 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. . . .

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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.

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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. . . .

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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. . . .

It might be suggested that courts, as organs of the government, cannot be trusted to discern what the truth is. 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 to obtain 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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JUSTICE BRENNAN, with whom JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS join, dissenting.

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Our cases since New York Times Co. 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. In this sense defamation law does not differ from state efforts to control obscenity, see Miller v. California, ensure loyalty, protect consumers, oversee professions, or pursue other public welfare goals through content-based regulation of speech.

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. . . . We protect the press to ensure the vitality of First Amendment guarantees. This solicitude implies no endorsement of the principle that speakers other than the press deserve lesser First Amendment protection. . . .

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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. *Joseph Burstyn, Inc. v. Wilson* (1952). . . . 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. *Bose Corp. v. Consumers Union of United States, Inc.* (1984).

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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.

. . . . [A]n 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 v. Alabama (1940), such a bankruptcy "in a single factory may have economic repercussions upon a whole region." And knowledge about solvency and the effect and prevalence of 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.

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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* (1945). The economic information Dun & Bradstreet disseminates in its credit reports makes an undoubted contribution to this private discourse essential to our wellbeing. . . .

. . . . 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.

. . . . 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. 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 damages awards on less than a showing of actual malice simply exacts too high a toll on First Amendment values. Accordingly, Greenmoss Builders 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. . . .

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