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## NOTES

### **EIGHT YEARS AFTER *MILKOVICH*: APPLYING A CONSTITUTIONAL PRIVILEGE FOR OPINIONS UNDER THE WRONG CONSTITUTION**

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#### INTRODUCTION

The First Amendment's guarantee of free speech and a free press are fundamental rights of the Constitution.<sup>1</sup> These freedoms allow Americans to voice their concerns and opinions on the operation of government and other issues affecting public interests.<sup>2</sup> They are, as stated by Professor Laurence Tribe, "among the most broadly enjoyed and universally enforced principles of our Constitution—pair of the political bedrock on which the republic was built."<sup>3</sup>

This national commitment to free expression, however, often clashes with the states' interest in providing redress for reputational harms in tort for defamation.<sup>4</sup>

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1. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

2. See, e.g., *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U.S. 287, 301-02 (1941) (Black, J., dissenting) (stating that "the freedom to speak and write about public questions is as important to the life our government as is the heart to the human body."); Hon. Robert I. Berdon, *Freedom of the Press and the Connecticut Constitution*, 26 CONN. L. REV. 659, 659 (1994) (freedom of speech "gives us the right to question our government, express our concerns, speak our minds, and even criticize public figures over public issues. . .").

3. LAURENCE H. TRIBE, *CONSTITUTIONAL CHOICES* 189-90 (1985).

4. Defamation includes the twin torts of libel (written defamatory comments) and slander (spoken defamatory comments). W. PAGE KEETON ET AL., *PROSSER AND KEETON ON TORTS* § 111, at 771 (5th ed. 1984) [hereinafter *PROSSER AND KEETON*]. Although there are differences between the two under state tort law, the Supreme Court has not distinguished between the two and has referred to them collectively as defamation. This Note will do the same.

All states recognize an action for defamation under their common law. Additionally, many states specifically provide in their constitutions that harm to one's reputation shall be redressed in their courts. See ALA. CONST. art. I, § 13; ARK. CONST. art. II, §§ 2, 13; DEL. CONST. art. I, § 9; IDAHO CONST. art. I, § 18; ILL. CONST. art. I, § 12; IND. CONST. art. I, § 12; KAN. CONST. Bill of

Although not specifically enumerated in the Constitution, the Supreme Court has stated on numerous occasions that “[t]he right of a man to the protection of his reputation from unjustified invasion and wrongful hurt 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.”<sup>5</sup> With such lofty values placed on both good name and freedom of expression, it is not surprising that federal and state courts experience difficulty in balancing these rights, especially in distinguishing statements of fact from opinion.

In 1990, the Supreme Court case of *Milkovich v. Lorain Journal Co.*<sup>6</sup> attempted to clarify the enigmatic distinction between non-actionable opinions and actionable assertions of fact. Prior to the decision, most courts provided absolute constitutional protection for statements of opinion based on dicta in *Gertz v. Robert Welch, Inc.*,<sup>7</sup> in which the Court suggested that there were no false ideas under the First Amendment.<sup>8</sup> *Milkovich*, however, rejected the artificial dichotomy between fact and opinion and held existing constitutional protections sufficiently protected opinions. These existing safeguards included the requirements that statements be objectively provable as false and cannot be “reasonably interpreted as stating actual facts.”<sup>9</sup> Unfortunately, in reaching this conclusion, the Court did not establish whether several contextual tests

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Rights, § 18; KY. CONST. Bill of Rights, § 14; LA. CONST. art. I, § 22; ME. CONST. art. I, § 19; MASS. CONST. pt. I, art. XI; MINN. CONST. art. I, § 8; MISS. CONST. art. III, § 24; MO. CONST. art. I, § 14; MONT. CONST. art. II, § 16; NEB. CONST. art. I, § 13; N.H. CONST. pt. I, art. XIV; N.C. CONST. art. I, § 18; N.D. CONST. art. I, § 9; OHIO CONST. art. I, § 16; OKLA. CONST. art. II, § 6; OR. CONST. art. I, § 10; PA. CONST. art. I, § 11; R.I. CONST. art. I, § 5; S.D. CONST. art. VI, § 20; TEX. CONST. art. I, § 13; UTAH CONST. art. I, § 11; VT. CONST. ch. I, art. IV; W. VA. CONST. art. III, § 17; WIS. CONST. art. I, § 9. For an extensive discussion of various state constitutional provisions that protect reputation, see *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1398 (1982).

5. *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring). The Court cites this passage often in cases where it limits the perceived scope of First Amendment protections for defamatory speech. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 757-58 (1985); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 773 (1986).

6. 497 U.S. 1 (1990).

7. 418 U.S. 323 (1974).

8. *Id.* at 339. Although the statement was dictum, many courts and commentators responded to the decision by creating several context-based tests to distinguish fact from opinion. As will be discussed *infra*, most courts employed one of two tests. First, many courts relying on *Ollman v. Evans*, 950 F.2d 970 (D.C. Cir. 1984), used a “totality of circumstances” test which focused on a statement’s context (i.e., surrounding sentences and format) and factual verifiability. See discussion *infra* Part I.C. Other courts found statements to be protected opinion if the underlying facts of the alleged defamatory statement were present, a test which was formulated in the *Restatement (Second) of Torts* § 566 (1977). See discussion *infra* Part I.C.

9. *Id.* at 19-20.

developed by lower courts were still applicable.<sup>10</sup> As a result, judicial interpretations of *Milkovich* vary widely.

A vast majority of courts conclude that *Milkovich*, while focusing on factual verifiability, does not affect the underlying fact/opinion dichotomy; it merely repudiates the terminology.<sup>11</sup> This interpretation wrongly assumes that *Milkovich* absolutely protects subjective assertions or evaluations. Instead, the focus is whether a reasonable reader or listener would interpret the statement as factual in nature. If they could, then a jury should determine whether it is an assertion of fact and whether the plaintiff met his burden. But, this is not to say that critical evaluations are left unprotected. On the contrary, these types of assertions receive constitutional protections under pre-existing constitutional fault requirements. Further, opinions in general can be absolutely protected under each state's common law and constitution.

As a backdrop for this discussion, Part I of this Note will trace the constitutional underpinnings of *Milkovich*, including the development of the fact/opinion dichotomy by lower courts. Part II will examine the holding of *Milkovich* and analyze how lower courts treat opinions after the decision. It will also comment on several distinctions between the analysis required by *Milkovich* and that used prior to the decision. Part III will suggest the application of state constitutional and common law privileges for opinions.

#### I. EARLY FIRST AMENDMENT PROTECTIONS AND THE OPINION PRIVILEGE

Traditionally, defamatory remarks did not fall within the protections of the First Amendment.<sup>12</sup> However, beginning in 1964 with *New York Times Co. v. Sullivan*,<sup>13</sup> the Supreme Court placed several constitutional restrictions on state

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10. One commentator criticized *Milkovich* for merely "perpetuat[ing] the uncertainty that currently pervades the opinion privilege." *The Supreme Court, 1989 Term—Leading Cases*, 104 HARV. L. REV. 129, 219 (1990).

11. See, e.g., Nat Stern, *Defamation, Epistemology, and the Erosion (but Not Destruction) of the Opinion Privilege*, 57 TENN. L. REV. 595, 595 (1990) (*Milkovich* read as a whole does not necessitate a revision of existing contextual approaches); ROBERT D. SACK & SANDRA S. BARON, LIBEL, SLANDER, AND RELATED PROBLEMS § 4.2.3.1., at 208-10 (2d ed. 1994) (*Milkovich* does not change the underlying fact/opinion dichotomy); BRUCE W. SANFORD, LIBEL AND PRIVACY § 5.3.2 (2d ed. Supp. 1997) (instead of emphasizing the *a priori* classifications, *Milkovich* uses an objectivity and verifiability approach like some of the better reasoned *Ollman* analyses).

12. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573-74 (1942); *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952). Under the common law, a statement was defamatory if it tended "to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." RESTATEMENT (SECOND) OF TORTS § 566 cmt. a (1977). Although generally a speaker of an alleged defamatory statement could prove truth as a defense, liability could not be avoided by demonstrating a lack of fault. *Id.* The tort was essentially one of strict liability.

13. 376 U.S. 254 (1964).

defamation law.<sup>14</sup> These limitations are of two broad types: (1) plaintiffs must prove some level of culpability depending on his private or public status, and (2) plaintiffs must prove falsity if the alleged defamatory speech is of public concern. These restrictions, however, are not wholesale privileges under the Constitution. In each case, the Court balanced the interests of free speech and reputation by closely examining the public or private nature of both the speech and the plaintiff. The more private the speech and plaintiff, the less likely the Court is willing to provide First Amendment protections.

### A. Culpability Requirements

In *New York Times*, the Court granted certiorari to decide whether a “public official” plaintiff could successfully claim defamation without proof of culpability.<sup>15</sup> After recognizing a national commitment to “uninhibited, robust, and wide-open” public speech,<sup>16</sup> the Court stated that free speech requires sufficient “breathing space” for the inevitable erroneous statements in public debate.<sup>17</sup> To protect this interest, media defendants are only liable for disseminating false and defamatory information with “‘actual malice’—that is, with knowledge that the statements were false or with reckless disregard of whether they were false or not.”<sup>18</sup> Three years later, in *Curtis Publishing Co. v. Butts*,<sup>19</sup> the Supreme Court further explored the issue of culpability when it addressed whether public figures needed to show actual malice.<sup>20</sup> Like public

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14. Many of the Court’s decisions concerning First Amendment restrictions on defamation law hint that there may be a distinction between media and non-media defendants. See, e.g., *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776-77 (1986) (the majority opinion stated that private plaintiffs must show falsity when media defendant are involved). Although this position has its critics, see *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 783-84 (1985) (Brennan, J., dissenting) (at least six Justices agree that there is no media/non-media distinction for the purposes of First Amendment protections), this Note will attempt to limit its focus to media defendants.

15. The public official plaintiff in this case was the Commissioner of the Police Department in Montgomery, Alabama. *New York Times Co.*, 376 U.S. at 258. Although the Court has not specifically defined “public official,” the term is defined fairly broad to include at the very least “those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.” *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966).

16. *New York Times Co.*, 376 U.S. at 270.

17. *Id.* at 271-72 (citations omitted).

18. *Id.* at 279-80.

19. 388 U.S. 130 (1967).

20. Public figure was defined as a person “intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.” *Id.* at 164 (Warren, J., concurring). In *Curtis Publishing*, a football coach at a major university was a public figure for the purposes of defamation law. In subsequent cases, however, the Court added the element that plaintiffs must “voluntarily expose[] themselves to increased risk of injury from

officials, public figures enter the public arena on their own volition. They command a substantial amount of public interest, and because of their status, they can correct falsehoods through other media sources.<sup>21</sup> Finding no rational distinction between public figures and officials, the Court extended the actual malice and proof of falsity requirements to public figures.

In *Gertz v. Robert Welch, Inc.*,<sup>22</sup> however, the Court made clear that not all speech was as deserving of First Amendment protection.<sup>23</sup> In *Gertz*, the Court refused to extend the actual malice standard to private plaintiffs.<sup>24</sup> Unlike private plaintiffs, public figures and officials “voluntarily expose themselves to increased risk of injury from defamatory falsehood[s].”<sup>25</sup> Further, they “enjoy significantly greater access to channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals enjoy.”<sup>26</sup> The Court concluded that the appropriate balance required private plaintiffs only to prove some level of culpability to be determined by each state.<sup>27</sup> Nonetheless, it recognized that if private plaintiffs claim punitive damages, they must prove actual malice in order to prevent excessive damage awards caused by negligent conduct.<sup>28</sup>

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defamatory falsehood” by assuming a “public” position. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974).

21. *Butts*, 388 U.S. at 154-55 (quotations and citations omitted).

22. 418 U.S. 323 (1974).

23. Prior to *Gertz*, many lower courts extended the actual malice requirements to private plaintiffs based on dictum in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971). Justice Brennan, writing for a plurality in *Rosenbloom*, stated:

If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual does not voluntarily choose to become involved. . . . We honor the commitment to robust debate on public issues, which is embodied in the First Amendment, by extending constitutional protection to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous.

*Id.* at 43-44 (quotations and citations omitted).

24. The term private figure has not been specifically defined by the Court. However, in contrast to public figures, the distinction between the two may be that private figures do not voluntarily expose themselves to the public. See *Gertz*, 418 U.S. at 345. Additionally, private figures do not have the means to correct defamatory falsehoods. *Id.* For a thorough discussion of the many distinctions between private and public plaintiffs, and their relative burden of proof in defamation cases, see SACK & BARON, *supra* note 11, at 248-73; SANFORD, *supra* note 11, § 7.

25. *Gertz*, 418 U.S. at 344-45.

26. *Id.* at 344 (footnote omitted).

27. *Id.* at 347.

28. *Id.* at 350.

### B. Falsity Requirements

Beyond the varying culpability requirements, cases interpreting the First Amendment also require plaintiffs to prove falsity. For public figures and officials, proof of falsity is required implicitly by *New York Times* and *Butts*; otherwise, how could one prove reckless disregard of the truth. It was not until 1986, in *Philadelphia Newspapers, Inc. v. Hepps*,<sup>29</sup> that the Court addressed whether private plaintiffs also needed to prove falsity. It answered the question affirmatively.

In *Hepps*, the defendant published stories alleging that the private plaintiff Hepps utilized ties with organized crime to influence state legislators. The trial court instructed the jury that the statements were presumptively false, and based on this instruction, the jury found the paper liable. In reversing, the Supreme Court stated that “the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern.”<sup>30</sup> Because the speech concerned state legislative processes, it clearly was of public concern.<sup>31</sup> Thus, the case was remanded so that Hepps could attempt to prove falsity.<sup>32</sup>

Another type of falsity protection is for statements that cannot reasonably be interpreted as stating actual facts.<sup>33</sup> In *Greenbelt Cooperative Publishing Ass’n v. Bresler*,<sup>34</sup> the public figure plaintiff engaged in strong-arm negotiating tactics with local city councilmen for zoning variances. The newspaper accurately reported the substantive details of various city council meetings and stated that many citizens described his proposals as “blackmail.” Bresler then successfully sued for libel in state court because he was not engaging in the criminal activity of blackmail. The Supreme Court reversed because “even the most careless reader must have perceived that the word [blackmail] was no more than hyperbole, a vigorous epithet used by those who considered Bresler’s negotiating position extremely unreasonable.”<sup>35</sup>

In *Old Dominion Branch No. 496, National Association of Letter Carriers*

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29. 475 U.S. 767 (1986).

30. *Id.* at 777.

31. There has been considerable debate as to what constitutes speech of public concern. For a detailed examination of modern-day components of this subject, see Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601, 667-79 (1990).

32. *Id.* at 776.

33. The Supreme Court never drew a distinction in *Hepps* between its falsity analysis and the reasonable interpretation analysis of the forthcoming cases. Nonetheless, the distinction between the two types of falsity was drawn in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990). Therefore, this Note will analyze the two protections as distinct types of falsity requirements.

34. 398 U.S. 6 (1970).

35. *Id.* at 14.

*v. Austin*,<sup>36</sup> the Court held that a newsletter containing the names of several non-union employees under a “List of Scabs,” was not actionable. In sum, the newsletter defined “scab,” as a “a traitor to his God, his country, his family and his class.”<sup>37</sup> Like *Greenbelt*, the use of “traitor” did not impute criminal activity. It was nothing more than “rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members towards those who refuse to join.”<sup>38</sup> Because no one would reasonably believe that non-union workers were being charged with treason, the Court held that it was constitutionally protected free speech.

Finally, in the 1988 *Hustler Magazine, Inc. v. Falwell*<sup>39</sup> decision, the Court extended the First Amendment privilege to parody. Hustler printed a parody cartoon depicting the public figure Reverend Jerry Falwell as saying that his “first time” was a drunken incestuous rendezvous with his mother. In finding for Hustler, the Court reiterated the fundamental principle that public figures voluntarily subject themselves to “vehement, caustic, and sometimes unpleasantly sharp attacks.”<sup>40</sup> Even though this cartoon lacked much social value, toleration of such speech was necessary to prevent an undue chill on First Amendment rights.<sup>41</sup>

### C. Full Constitutional Protection for Opinions

Despite being limited to the requisite fault for private plaintiffs, many lower courts interpreted *Gertz* as providing absolute immunity for statements of opinion.<sup>42</sup> In dicta, Justice Powell writing for the majority stated:

We begin with the common ground. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. . . .<sup>43</sup>

The notion that there was “no such thing as a false idea” caused many lower

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36. 418 U.S. 264 (1974).

37. *Id.* at 268.

38. *Id.* at 285-86.

39. 485 U.S. 46 (1988).

40. *Id.* at 51 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

41. *Id.* at 56 (quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 (1985)).

42. Judge Friendly of the Second Circuit Court of Appeals observed that this passage “has become the opening salvo in all arguments for protection from defamation actions on the ground of opinion, even though the case did not remotely concern the question.” *Cianci v. New Times Publ’g Co.*, 639 F.2d 54, 61 (2d Cir. 1980). See also SACK & BARON, *supra* note 11, § 4.2.3.1., at 208-10 & nn.34-35 (By 1990, every federal circuit and courts in at least thirty-six states and the District of Columbia held that *Gertz* required constitutional protection for opinions.).

43. *Gertz*, 418 U.S. at 339-40.

courts to create a constitutional privilege for opinions because opinions by their nature were mere ideas or subjective viewpoints. But, the opinion doctrine also included statements which could not be interpreted as stating actual facts.<sup>44</sup> Of the many tests used for distinguishing non-actionable opinions from actionable statements of fact, two tests became widely popular: the “pure” opinion analysis under the *Restatement (Second) of Torts* § 566 and the four-factor “totality of circumstances” test of *Ollman v. Evans*,<sup>45</sup> or some combination of the two.

One popular opinion privilege test was the *Restatement (Second) of Torts* § 566.<sup>46</sup> Under the ALI’s second *Restatement*, opinions could be “pure” or “mixed.” A pure opinion occurs when the speaker either states the facts upon which his viewpoint is based or the facts are otherwise known to all parties involved in the communication.<sup>47</sup> On the other hand, a mixed opinion is based on neither disclosed facts nor facts assumed to exist by the parties.<sup>48</sup> The distinction between pure and mixed opinion has constitutional significance under *Gertz* because a pure opinion “is not itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how

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44. On the same day it decided *Gertz*, the Court also handed down *National Ass’n of Letter Carriers v. Austin*, 418 U.S. 264 (1974). In *Letter Carriers*, the Court concluded that the word “scab” was merely rhetorical hyperbole. *Id.* at 286. In reaching this conclusion, the Court quoted the “no false idea” language of *Gertz*. Read together, *Gertz* and *Letter Carriers* appear to create an absolute constitutional privilege for a wide-class of statements which are not provable as true or false, either because of their interpretive nature or because of their ambiguity.

45. 750 F.2d 970 (D.C. Cir. 1984).

46. See *Dunn v. Gannett New York Newspapers, Inc.*, 833 F.2d 446 (3d Cir. 1987) (statements alleging that a mayor had embezzled funds were non-actionable “pure” opinion because the underlying facts were disclosed); *Falls v. Sporting News Publ’g Co.*, 834 F.2d 611 (6th Cir. 1987) (statements that implied undisclosed defamatory facts were actionable); *National Ass’n of Gov’t Employees, Inc. v. Central Broad. Corp.*, 396 N.E.2d 996 (Mass. 1979) (being called “communist” was protected because the underlying facts for the opinion were disclosed), *cert. denied*, 446 U.S. 935 (1980). See also Gregory A. Moore, Note, *Yancy v. Hamilton: Kentucky Adopts the Restatement Test in Fact-Opinion Libel Law*, 17 N. KY. L. REV. 599 (1990) (discussing the state’s acceptance of the *Restatement* and its benefits over the *Ollman* test).

47. RESTATEMENT (SECOND) OF TORTS § 566, cmt. b (1977). As an example of “pure” opinion, the ALI states:

A writes to B about his neighbor C: ‘He moved in six months ago. He works downtown, and I have seen him during that time only twice, in his backyard around 5:30 seated in a deck chair with a portable radio listening to a news broadcast, and with a drink in his hand. I think he must be an alcoholic.

This is an example of pure opinion because the author discloses the underlying facts of his statement, which allows B to make his own conclusion as to C’s drinking habit. *Id.* § 566, cmt. c, illus. 4 (1977).

48. *Id.* The ALI illustrates “mixed” opinion by stating that if “A writes to B about his neighbor C” and states, “I think he must be an alcoholic,” then this is a mixed opinion because A does not disclose his factual predicate for making such a statement, and B must assume that A has facts to verify the statement. *Id.* § 566, cmt. c, illus. 3 (1977).



derogatory it is.”<sup>49</sup> However, if the opinion “implies the allegation of undisclosed defamatory facts as the basis for the opinion,” then it is subject to an action of defamation.<sup>50</sup> In other words, in order for an opinion to be defamatory under the First Amendment, it must fail to disclose its underlying facts or state false facts as the premise for the author’s opinion.

Another popular fact/opinion test was the “totality of circumstances” test created by *Ollman v. Evans*.<sup>51</sup> In *Ollman*, plaintiff Bertel Ollman, a professor of political science at New York University, sued defendants Rowland Evans and Robert Novak for defamation when they published several opinion-editorials in the *Washington Post*. In substance, these columns attacked his communist background and questioned the propriety of him running a political science department at a major university.<sup>52</sup>

To analyze whether the statements were constitutionally protected opinion, the *Ollman* court determined that four factors should be reviewed: (1) “the common usage or meaning of the specific language of the challenged statement itself”—whether the statement has a common understanding or is ambiguous or uncertain;<sup>53</sup> (2) “the statement’s verifiability”—whether the statement can be provable as true or false;<sup>54</sup> (3) “the full context of the statement—the entire article or column, for example”—whether the context of the article would suggest that the statement is an opinion;<sup>55</sup> and (4) “the broader context or setting in which the statement appears”—whether the type of magazine, paper, or television broadcast would cause the reader to deem the alleged defamatory comment as a statement of opinion.<sup>56</sup>

The *Ollman* court first analyzed the context of the articles. It noted that the articles were in an opinion-editorial format. Further, the defendants never alleged to have “first-hand knowledge” that Ollman was not a scholar.<sup>57</sup> In fact, the words within the text of the articles suggested that the defendants considered

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49. RESTATEMENT (SECOND) OF TORTS § 566, cmt. c (1977).

50. *Id.* § 566.

51. 750 F.2d 970 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985). For courts that later applied *Ollman*’s “totality of circumstances test,” see *Potomac Valve & Fitting, Inc. v. Crawford Fitting Co.*, 829 F.2d 1280 (4th Cir. 1987); *Brown & Williamson Tobacco Corp. v. Jacobson*, 827 F.2d 1119 (7th Cir. 1987), *cert. denied sub nom.* *CBS v. Brown & Williamson Tobacco Corp.*, 485 U.S. 993 (1988); *Information Control Corp. v. Genesis One Computer Corp.*, 611 F.2d 781 (9th Cir. 1980).

52. Specifically, the articles stated that Ollman was a Marxist scholar and “political activist” with “no academic standing.” Furthermore, they said that he would use his “classroom as an instrument for preparing what he calls ‘the revolution.’” *Ollman*, 750 F.2d at 971.

53. *Id.* at 979 (citing *Buckley v. Littell*, 539 F.2d 882, 895 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977)).

54. *Id.* (citing *Hotchner v. Castillo-Puche*, 551 F.2d 910, 913 (2d Cir.), *cert. denied*, 443 U.S. 834 (1977)).

55. *Id.* (citing *Greenbelt Coop. Publ’g Ass’n v. Bresler*, 398 U.S. 6 (1970)).

56. *Id.* (citing *National Ass’n of Letter Carriers v. Austin*, 418 U.S. 264 (1974)).

57. *Id.* at 983.

Ollman a scholar, just not the right person to chair a political science department at a major university.<sup>58</sup> The court concluded that these factors would lead a reasonable reader to believe the writers were only espousing their opinions.<sup>59</sup> Next, the court examined whether the articles were sufficiently factual to overcome their status as opinion. The accusation of a crime was one example of a statement “with a well-defined meaning,” which would give “rise to clear factual implications.”<sup>60</sup> Such well-defined terms are subject to defamation regardless of their form.<sup>61</sup> Although the majority found “troublesome” the statement that Ollman had “no status within the profession,”<sup>62</sup> it nevertheless held that the statements were non-actionable opinions because the “confluence of factors” outweighed the factual implications of the statement.<sup>63</sup>

## II. *MILKOVICH*: DEATH OF THE OPINION PRIVILEGE?

By 1990, a vast majority of state and federal courts recognized an absolute constitutional privilege for opinions.<sup>64</sup> However, some courts and commentators questioned its validity and suggested abandoning the privilege.<sup>65</sup> In fact, as early as 1982, two Supreme Court Justices stated that lower courts were misconstruing the *Gertz* dictum.<sup>66</sup> The Court addressed this issue in *Milkovich v. Lorain Journal Co.*<sup>67</sup>

### A. *The Majority's Decision and Justice Brennan's Dissent*

In 1974, plaintiff Milkovich and his wrestling team were involved in a fight with a rival high school, Maple Heights. The Ohio High School Athletic

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58. *Id.*

59. *Id.* at 982.

60. *Id.* at 980 (quoting *Cianci v. New Times Publ'g Co.*, 639 F.2d 54, 63 (2d Cir. 1980)).

61. *Id.* at 985.

62. *Id.* at 989.

63. *Id.* at 990.

64. See SACK & BARON, *supra* note 11, § 4.2.3.1., at 208-10 & nn.34-35 (stating that by 1990, every federal circuit court and courts in at least thirty-six states and the District of Columbia held that statements of opinion were constitutionally protected because of *Gertz*).

65. See Marc A. Franklin & Daniel J. Bussel, *The Plaintiff's Burden in Defamation: Awareness and Falsity*, 25 WM. & MARY L. REV. 825, 870-75 (1984) (stating that the dichotomy between facts and opinion was unnecessary); Alfred Hill, *Defamation and Privacy Under the First Amendment*, COLUM. L. REV. 1205, 1239 (1976) (the *Restatement's* formulation of the opinion privilege based on dictum in *Gertz* ignores the rich common law history of fair comments).

66. In *Miskovsky v. Oklahoma Publishing Co.*, 459 U.S. 923 (1982), Justices Rehnquist and White dissented from the Court's denial of certiorari on the basis that the Oklahoma Supreme Court had mistakenly relied on the dictum in *Gertz* for a constitutional opinion privilege. *Id.* at 924-25. See also Justice Rehnquist and Chief Justice Burger's dissent from the Court's denial of certiorari in *Ollman v. Evans*, 471 U.S. 1127 (1985) (stating that “no false idea” language of *Gertz* was dictum and was not a constitutional basis for upholding summary judgment).

67. 497 U.S. 1 (1990).

Association (OHSAA) conducted a hearing in which Milkovich testified, and his team received probation. Several parents then contested the ruling in state court, and Milkovich again testified about the brawl. The trial court found that the OHSAA hearing violated due process and overturned the order of probation.<sup>68</sup> The next day defendant Diadiun wrote an opinion-editorial article in the sports section of a local newspaper concerning the court's ruling. Under the heading "Maple beat the law with the 'big lie,'" the article alleged that Milkovich lied at trial in order for the court to reverse the OHSAA's ruling.<sup>69</sup> After Milkovich initiated a defamation suit in the Ohio state courts, the Ohio Supreme Court held in 1984 that the article was a defamatory assertion of fact because Milkovich was neither a "public official" nor a "public figure" under *New York Times* and *Butts*.<sup>70</sup> In 1989, the case went back to the Ohio Supreme Court, and this time, it found the speech to be constitutionally protected opinion under *Ollman* and *Gertz* because the opinion-editorial context of the article was sufficient to indicate "to even the most gullible reader that the article was, in fact, opinion."<sup>71</sup> The Supreme Court granted certiorari in 1990 and reversed in a 7-2 decision.

The Court's analysis began by reviewing *New York Times* and its progeny. After noting that many lower courts provided absolute protection for opinions under *Gertz*, it flatly rejected this proposition by stating, "*Gertz* was [not] intended to create a wholesale defamation exemption for anything that might be labeled 'opinion' because it would 'ignore the fact that expressions of 'opinion' may often imply an assertion of objective fact.'"<sup>72</sup> Instead, opinions received sufficient protection under existing constitutional safeguards.<sup>73</sup> First and foremost, the opinions are protected under *Philadelphia Newspapers, Inc. v. Hepps*, which requires a private plaintiff involved in matters of public concern to prove falsity.<sup>74</sup> This ensures that media defendants, who write opinions on public issues, will not be put in the impossible position of proving an opinion which is objectively undeterminable.<sup>75</sup> Second, the cases of *Greenbelt, Letter*

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68. *Id.* at 4.

69. Specifically, the article stated: "If you're successful enough, and powerful enough, and can sound sincere enough, you stand an excellent chance of making the lie stand up, regardless of what really happened." "The teachers responsible were mainly head Maple wrestling coach, Mike Milkovich, and former superintendent of schools H. Donald Scott." "Anyone who attended the meet. . . knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth." *Id.* at 4-5 (quoting *Milkovich v. News-Herald*, 545 N.E.2d 1320, 1321-22 (Ohio Ct. App. 1989)).

70. *Id.* at 8 (quoting an earlier case in the litigation, *Milkovich v. News-Herald*, 473 N.E.2d 1191, 1193-97 (Ohio 1984)). For a discussion of *New York Times* and *Butts*, see discussion *supra* Part I.A.

71. *Milkovich*, 497 U.S. at 9.

72. *Id.* at 18.

73. *Id.* at 19.

74. *Id.* at 19-20.

75. *Id.* at 20.

*Carriers*, and *Hustler* protect those statements that cannot be “reasonably interpreted as stating actual facts about an individual.”<sup>76</sup> The third level of constitutional protection is the culpability requirements of *New York Times*, *Butts*, and *Gertz*.<sup>77</sup> Finally, *Bose Corp. v. Consumers Union of United States, Inc.*<sup>78</sup> requires an appellate court to make “an independent examination of the whole record.”<sup>79</sup>

In analyzing the facts of *Milkovich*, the majority wrote that the dispositive question was “whether a reasonable fact finder could conclude that the statements in the *Diadun* columns imply an assertion that the petitioner *Milkovich* perjured himself in a judicial proceeding.”<sup>80</sup> The Court answered this question affirmatively. The impact of the article suggested that *Milkovich* lied under oath, which was sufficiently factual to be proven true or false.<sup>81</sup> Further, the “general tenor” of the article did not negate this impression because the language was not the “loose, figurative” speech of *Bresler*, *Letter Carriers*, or *Falwell*.<sup>82</sup> Without further justification, it noted that the decision held true the balance between First Amendment rights and society’s “strong interest in preventing and redressing attacks upon reputation.”<sup>83</sup> The Court remanded the case so that *Milkovich* could prove the falsity and culpability as set forth in the opinion.<sup>84</sup>

In the dissent, Justices Brennan and Marshall agreed that there was no “opinion privilege wholly in addition to the protections we [the Court] have already found to be guaranteed by the First Amendment.”<sup>85</sup> However, in analyzing whether the articles were sufficiently factual to be defamatory, Justice Brennan thought that courts could rely on the “same indicia” used prior to *Milkovich*. These indicia included “the type of language used, the meaning of the statement in context, whether the statement is verifiable, and the broader social circumstances in which the statement was made.”<sup>86</sup>

The dissent argued that *Diadun*’s statements were merely “conjecture,” which is a hypothesis or speculation as to what occurred in an event. Like rhetorical hyperbole, it is factually incapable of being proven true or false.<sup>87</sup> The dissent reasoned that the article never asserted first-hand knowledge of *Milkovich*’s testimony at trial; it merely speculated as to what must have

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76. *Id.* (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988)).

77. *Id.* at 20.

78. 466 U.S. 485 (1984).

79. *Milkovich*, 497 U.S. at 21 (quoting *Bose Corp.*, 466 U.S. at 499).

80. *Id.*

81. *Id.* (citations omitted).

82. *Id.*

83. *Id.* at 22-23 (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966)).

84. *Id.* at 23.

85. *Id.* at 23-24.

86. *Id.* at 24 (citing *Ollman v. Evans*, 750 F.2d 970 (1984)).

87. *Id.* at 28 n.5.

occurred in order for Milkovich to win.<sup>88</sup> Further, the article's opinion-editorial format would alert a reasonable reader that the column was merely conjecture or opinion.<sup>89</sup> These factors outweighed any factual inference made by the articles.

*B. The Application of Milkovich by Lower Courts: A Return to the Status Quo*

The *Milkovich* decision is unremarkable and its holding is quite clear: in analyzing First Amendment limitations on defamation law, the Court reaffirmed all of its pre-existing precedent, less one opinion privilege created by lower courts. These courts, however, seem reluctant to abandon pre-*Milkovich* fact-opinion analysis. Indeed, it appears that most courts accept Justice Brennan's position that the same contextual indicia are applicable.<sup>90</sup>

Many post-*Milkovich* cases continue to apply a contextual analysis reminiscent of *Ollman v. Evans* and the second *Restatement*, or some combination of the two. For example, in *NBC Subsidiary (KCNC-TV), Inc. v. Living Will Center*,<sup>91</sup> the Colorado Supreme Court held that *Milkovich* did not change the need for "fact vs. opinion" analysis.<sup>92</sup> In *KCNC-TV*, the television defendant aired a newscast claiming that the plaintiff's product was a "scam" and that purchasers of the product "were being taken."<sup>93</sup> The court wrote, "in determining whether a statement is actionable, a court must examine the phrasing of the statement, the context in which it appears, the medium through which it is disseminated, the circumstances surrounding its publication, and a determination of whether the statement implies the existence of undisclosed facts which support it."<sup>94</sup> Under this analysis, the court first noted that the broadcaster simply expressed his viewpoint on the worth of the product.<sup>95</sup> Further, because the newscast was "based on facts disclosed to the viewer," the viewers "were free to evaluate Marsh's [defendant's] views, and were free to form [their own] judgment."<sup>96</sup> The court reversed the appellate court and reinstated the trial court's summary judgment in favor of the defendant.

In *Phantom Touring, Inc. v. Affiliated Publications*,<sup>97</sup> the First Circuit addressed the constitutional protections for theater reviews that disclosed their

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88. *Id.* at 28-30.

89. *Id.* (quoting *Ollman*, 750 F.2d at 986).

90. For an in depth discussion of different and diverse applications of *Milkovich*, see Kathryn Dix Sowle, *A Matter of Opinion: Milkovich Four Years Later*, 3 WM. & MARY BILL OF RIGHTS J. 467, 498-552 (1994) (concludes that there are eight different applications of *Milkovich* by the lower courts).

91. 879 P.2d 6 (Colo. 1994).

92. *Id.* at 10-11.

93. *Id.* at 7-8.

94. *Id.* at 11 (quoting *Milkovich*, 497 U.S. at 20).

95. *Id.* at 11-12.

96. *Id.* at 12.

97. 953 F.2d 724 (1st Cir.), *cert. denied*, 504 U.S. 974 (1992).

underlying facts. In *Phantom Touring*, plaintiff produced a version of “Phantom of the Opera” that was not the famous Andrew Lloyd-Webber production. The *Boston Globe* wrote in its theater review that ticket buyers should be wary of the “Fake Phantom,” and that the show was a “rip-off, a fraud, a scandal, a snake-oil job.” In examining these statements, the First Circuit determined that *Milkovich*:

unquestionably excludes from defamation liability not only statements of rhetorical hyperbole—the type of speech at issue in the *Bresler-Letter Carriers-Falwell* cases—but also statements clearly recognizable as pure opinion because their factual premises are revealed. Both types of assertions have an identical impact on the readers—neither reasonably appearing factual—and hence are protected equally under the principle espoused in *Milkovich*.<sup>98</sup>

The court determined the article’s status as a “theater column” and its “vituperative language” were sufficient to allow the reasonable reader to conclude that the reviews were non-factual.

In another post-*Milkovich* case, *Partington v. Bugliosi*,<sup>99</sup> the Ninth Circuit examined whether the plaintiff’s book defamed an attorney by implying that he was incompetent.<sup>100</sup> As a threshold matter, the court stated that *Milkovich* required courts to determine “whether a reasonable factfinder could conclude the contested statement implies an assertion of objective fact.”<sup>101</sup> This determination could be made by analyzing “the work as a whole, the specific context in which the statements were made, and the statements themselves. . . .”<sup>102</sup> It upheld summary judgment for the defendant because “lawyers who write popular books, and particularly trial lawyers, are not known for their modesty; one would generally expect such authors to have a higher opinion of their performance than of the professional abilities exhibited by other counsel.”<sup>103</sup>

Although a majority of courts use contextual analysis for determining falsity, some courts focus strictly on factual verifiability—that is, whether the statement, taken literally, can be proven true or false. For example, in *Unelko Corp. v. Rooney*,<sup>104</sup> the Ninth Circuit found actionable Andy Rooney’s statement that plaintiff’s product “Rain-X” did not work.<sup>105</sup> In reaching this conclusion, the court determined that *Milkovich* “effectively overruled” the opinion privilege and shifted the focus to factual verifiability.<sup>106</sup> Under this standard, Rooney’s statement, “it didn’t work,” was sufficiently factual to be proven true or false

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98. *Id.* at 729.

99. 56 F.3d 1147 (9th Cir. 1994).

100. *Id.* at 1150.

101. *Id.* at 1153 (citing *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1053 (9th Cir. 1990)) (citations omitted).

102. *Id.*

103. *Id.* at 1154.

104. 912 F.2d 1049 (9th Cir. 1990).

105. *Id.* at 1050-51.

106. *Id.* at 1053.

because “[w]hether Rain-X repels rain, facilitates window cleaning, and increases visibility are all capable of being proved true or false.”<sup>107</sup> Further, Rooney’s comment is not like the satirical account of “a drunken incestuous rendezvous [between plaintiff and] and his mother,” like that exhibited in *Falwell*.<sup>108</sup> Nonetheless, it upheld the trial court’s summary judgment because Unelko failed to prove falsity under *Hepps*.

In another post-*Milkovich* case, *Kolegas v. Heftel Broadcasting Corp.*,<sup>109</sup> the Supreme Court of Illinois took the view that the *Milkovich* test “is a restrictive one,” and only protects those statements that cannot be objectively proven true or false. Kolegas, a promoter and producer of a classic cartoon festival for charity, called the defendant’s radio station and spoke with two disc jockeys while they were on the air. During the conversation, one of the disc jockeys stated that Kolegas was “scamming” them, that his business was “not for real,” and that “there was no such show as the classic cartoon festival.”<sup>110</sup> The court found that statements to be sufficiently factual to be proved true or false, even though the defendants testified they were only joking.<sup>111</sup> The question of whether the audience understood their comments as jokes was a triable issue of fact.<sup>112</sup>

Finally, in *Gill v. Hughes*,<sup>113</sup> an appellate court in California held that an assertion that a physician was incompetent could be actionable because it “implies a knowledge of facts which lead to this conclusion and further is susceptible of being proved true or false.”<sup>114</sup> However, because the truth of the statement had been determined in a separate proceeding, the defendant’s verdict was affirmed.<sup>115</sup>

Some courts, in applying *Milkovich*, have used a questionable construction in analyzing the scope of constitutional protections. For example, in *Spence v. Flynt*,<sup>116</sup> the plaintiff Spence represented Andrea Dworkin, a well-known activist for the National Organization of Women, in another lawsuit against Larry Flynt. Spence initiated his own suit against *Hustler* after it named him “Asshole of the Month,” and stated, in part, that attorneys like him are “shameless shitholes (whose main allegiance is to money) [and] are eager to sell out their personal values, truth, justice and our hard-won freedoms for a chance to fatten their wallets.”<sup>117</sup>

After briefly citing *Milkovich*, the court first concluded that whether Spence sold out his personal values for a large fee may be a false statement of fact

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107. *Id.* at 1055.

108. *Id.* (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 48 (1988)).

109. 607 N.E.2d 201 (Ill. 1992).

110. *Id.* at 205.

111. *Id.* at 208.

112. *Id.* at 209.

113. 278 Cal. Rptr. 306 (Ct. App. 1991).

114. *Id.* at 311.

115. *Id.*

116. 816 P.2d 771 (Wyo. 1991), *cert. denied*, 503 U.S. 984 (1992).

117. *Id.* at 773.

because Spence may be able to prove that he stands to gain nothing personally.<sup>118</sup> Further, the *Hustler Magazine, Inc. v. Falwell* decision, which allowed First Amendment protections for “satirical” and outrageous humor, was not dispositive because Spence was not a public figure.<sup>119</sup> Thus, it concluded that the statements were actionable under *Chaplinsky v. New Hampshire*<sup>120</sup> because of their “grossly defamatory” nature.<sup>121</sup>

In another interesting case, *Moldea v. New York Times*,<sup>122</sup> the Appellate Court for the District of Columbia examined a book review for possible defamation. In this case, the defendant *New York Times*, in one of its book reviews, stated that the plaintiff author’s work was “sloppy journalism” and contained “warmed over” material. In analyzing the case, the court applied a very strict *Milkovich* analysis by first looking at the alleged defamatory statements, which they thought that “sloppy journalism” was sufficiently factual to be proven true or false. Thereafter, the court determined that none of the existing constitutional protections—*Bresler-Letter Carriers-Falwell*—were applicable. Therefore, the review was found actionable.

However, upon rehearing in *Moldea II*, Judge Edwards admitted that he erred by not considering the broader context of the book review.<sup>123</sup> The context of a book review suggests to the average reader that statements therein are nothing more than the author’s opinion.<sup>124</sup> But, the court also said that not all book reviews were protected. They are protected only if the author’s statements are a “supportable interpretation” of the disclosed facts.<sup>125</sup>

### C. A Critical Analysis of Post-Milkovich Decisions

To understand the effects of *Milkovich* on First Amendment analysis of defamation, the decision must be placed within the backdrop of Supreme Court jurisprudence limiting state defamation law. In all of the cases decided by the Court, it struck a balance between the constitutional interest in free speech and the state interest in reputation by creating different standards of protection for private/public plaintiffs and public or private speech. It also protects certain classes of speech which are not reasonably interpretable as stating actual facts. These protections, however, are limited so that states can adequately protect

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118. *Id.* at 776.

119. *Id.* at 774-76.

120. 315 U.S. 568 (1942).

121. 816 P.2d at 780 (quoting *Chaplinsky*, 315 U.S. at 571-72, for the proposition that grossly defamatory statements are actionable because they 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.”).

122. 15 F.3d 1137 (D.C. Cir.) [hereinafter *Moldea I*], *modified on rehearing*, 22 F.3d 310 (D.C. Cir.) [hereinafter *Moldea II*], *cert. denied*, 513 U.S. 875 (1994).

123. *Moldea II*, 22 F.3d at 313.

124. *Id.* at 317.

125. *Id.* at 313.



reputation through their common law and constitutions.

The Court explicitly continued this trend in *Milkovich* by rejecting a constitutional privilege for opinions and reaffirming all of its past precedents. It made clear that the heart of constitutional inquiries into falsity requires defamatory statements to “contain a provably false factual connotation,”<sup>126</sup> which requires the statement to be objectively verifiable—i.e., whether the statement is capable of being proven false. It illustrated this point by comparing the assertion, “In my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin,” with the assertion, “Mayor Jones is a liar.”<sup>127</sup> Unlike the former statement, which is not actionable, whether the mayor lied is capable of objective proof, and thus, is actionable.<sup>128</sup> Likewise, the Court stressed in its conclusion that the article was actionable because whether Milkovich “lied in this instance can be made on a *core of objective evidence*.”<sup>129</sup> Thus, the factual verifiability prong necessarily makes two inquiries: (1) whether the allegedly defamatory statement is of the *type* that can be proven as false—that is, a meaning or common usage which lends itself to proof of falsity; and (2) whether the statement is *objectively provable* as false by way of evidence presented by the plaintiff.

The second prong of *Milkovich* requires allegedly defamatory statements to be reasonably interpretable as stating actual facts under *Greenbelt Cooperative Publishing Association v. Bresler*,<sup>130</sup> *National Association of Letter Carriers v. Austin*,<sup>131</sup> and *Hustler Magazine, Inc. v. Falwell*.<sup>132</sup> These cases protect hyperbole, epithets, and other invective communications by analyzing the statement’s context—i.e., where the statement was said, its format, and other surrounding circumstances. In sum, the question is whether the statement can be construed literally by a reasonable listener or reader.<sup>133</sup>

These two prongs taken together are quite similar to the *Ollman* analysis. Like *Ollman*’s “totality of circumstances test,”<sup>134</sup> *Milkovich* requires courts to look at factual verifiability and context. Indeed, as stated by Justice Brennan’s dissent, the “same indicia” are applicable in post-*Milkovich* cases. It should be recognized, however, the shift to factual verifiability substantially changes the outcome of the analysis in several respects and also leaves unanswered several interesting questions.

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126. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990).

127. *Id.* at 20 (citations omitted).

128. *Id.*

129. *Id.* at 21 (emphasis added). The core of objective evidence in this case could be gathered by comparing Milkovich’s testimony during the OHSAA proceeding and his testimony at the due process hearing in the trial court. *Id.* at 21-22.

130. 398 U.S. 6 (1970).

131. 418 U.S. 264 (1974).

132. 485 U.S. 46 (1988).

133. Jerry J. Phillips, *Opinion and Defamation: The Camel in the Tent*, 57 TENN. L. REV. 647, 660 (1990).

134. See *supra* notes 51-63 and accompanying text.

First, subjective assertions or evaluations are not granted wholesale immunity under the Constitution, even if the speaker states the underlying facts for his viewpoint. Contrary to Justice Brennan's dissent and the *Restatement (Second) of Torts* § 566, the relevant inquiry under *Milkovich* is not whether the author believes what he is saying, but instead focuses solely on whether a reasonable reader could interpret the statement as factual in nature.<sup>135</sup> The majority makes this explicitly clear:

If a speaker says, "In my opinion John Jones is a liar," he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. *Even if the speaker states the facts upon which he bases his opinion*, if those facts are either incorrect or incomplete, or *if his assessment of them is erroneous*, the statement may still imply a false assertion of fact.<sup>136</sup>

The clear import of this passage is that falsity analysis under the First Amendment is not concerned with whether the author actually holds a certain viewpoint or whether he discloses his factual predicate. Instead, subjective assertions are actionable under the Constitution if there is objective evidence which demonstrates that the statement is false.

This is not to say that no constitutional protections exist for subjective evaluations. These types of statements receive protection under the culpability requirements of *New York Times*, *Butts*, and *Gertz*.<sup>137</sup> In sum, the culpability requirements add reasonableness to the equation, which varies based on the public or private nature of the plaintiff. For example, if a newspaper columnist writes a story about a criminal suspect and concludes that he committed murder, this statement is clearly a factual assertion and can be interpreted as stating an actual fact. Whether the paper is liable for defamation depends on whether the author's interpretation of the facts is reasonable. For an accusation against a public official or figure, the author is liable only if he acted with knowledge or reckless disregard for the truth, which would be very difficult to prove unless the story is entirely fabricated. On the other hand, if the suspect is a private plaintiff, then liability attaches if the author acted at least negligently in analyzing the facts.

Analyzing subjective assertions based on a fault standard certainly comports

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135. A comparison of the majority's holding and Justice Brennan's dissent illustrates this point. Justice Brennan argued that the statements should receive protection because the author disclosed his underlying facts; therefore, reasonable readers would know that the statement were merely subjective assertions (or conjecture) of the author. *Milkovich*, 497 U.S. at 28. The majority, however, did not discuss the column's disclosure of underlying facts. It focused on whether the connotation that Milkovich lied could be proven true or false. *Id.* at 21.

136. *Milkovich*, 497 U.S. at 18-19 (emphasis added).

137. One commentator states, "[i]f underlying facts is the basis for making an opinion actionable, the opinion rule becomes very similar to the constitutional basis for imposing liability for misstatement of facts under *Gertz* and *New York Times Co. v. Sullivan*." Phillips, *supra* note 133, at 650 (citations omitted).

with the conclusion of *Milkovich*. The Court never held that the newspaper was liable; it merely remanded the case so that a jury could determine whether the statements were false and the defendant acted with the requisite level of fault. In analyzing the falsity issue, the jury would examine whether Milkovich lied at the trial. This analysis would focus strictly on the objective evidence. But, on the fault requirement, one of the relevant factors to be considered is whether Diadiun acted negligently in analyzing the facts upon which he based his assertion.

Additionally, requiring reasonableness is supported by other Supreme Court cases. In *Masson v. New Yorker Magazine, Inc.*,<sup>138</sup> *Bose Corp. v. Consumer Union of United States*,<sup>139</sup> and *Time, Inc. v. Pape*,<sup>140</sup> the Court addressed the evidence necessary to establish “actual malice” under the First Amendment. In *Pape*, the Court held that even if the specific language of the article conveyed a false meaning, actual malice does not exist when the chosen language was “one of a number of possible rational interpretations of a document that bristled with ambiguities.”<sup>141</sup> The Court in *Masson*, however, refused to extend the “rational interpretation” test to cases where the author deliberately altered quoted materials. Instead, it determined that the relevant inquiry was whether the quotations, as altered, were substantially false.<sup>142</sup> If they are, then actual malice is established. These cases demonstrate that when a plaintiff attempts to show actual malice or fault, they may do so if the interpretation was unreasonable or is substantially false. In essence, the reasonableness of an author’s interpretation may be shown by the requisite fault.<sup>143</sup>

Using fault analysis to determine the actionability of subjective assertions also holds true the balance between free speech and reputation. Analysis of culpability, unlike falsity analysis, provides varying degrees of protection based on the private or public nature of the plaintiff and the speech.<sup>144</sup> It necessarily provides a greater level of protection for evaluative criticisms of public figures and officials so that speech concerning public matters will remain “uninhibited, robust, and wide-open.”<sup>145</sup> But, more importantly, it recognizes that subjective assertions about private individuals are subject to lower levels of protection.

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138. 501 U.S. 496 (1991).

139. 466 U.S. 485 (1984).

140. 401 U.S. 279 (1971).

141. *Pape*, 401 U.S. at 290.

142. *Masson*, 501 U.S. at 519 (quoting *Pape*, 401 U.S. at 285).

143. This analysis is hardly distinguishable from the approach taken by Judge Edwards in the second *Moldea v. New York Times Co.* case. In *Moldea II*, Judge Edwards granted First Amendment protection for a book review because it was a “supportable interpretation” of the thing being reviewed. 22 F.3d 310, 315-16 (D.C. Cir. 1994). The problem with Judge Edwards’ analysis is that he used the supportable interpretation test as a basis for showing falsity rather than fault. Nonetheless, *Moldea II* at least demonstrates that subjective interpretations are not absolutely protected; instead, their protection depends, in part, on the reasonableness of the interpretation.

144. See discussion *supra* Part I.A.

145. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

This is so because private plaintiffs do not voluntarily subject themselves to such damaging criticism and states have a greater interest in providing redress for reputational harm. Thus, by using fault requirements, the Court in *Milkovich* reiterated the long standing principle that “not all speech is of equal First Amendment importance.”<sup>146</sup>

Second, *Milkovich* requires more cases to be decided by juries. Prior to *Milkovich*, most courts held that determinations of fact and opinion were a question of law for the court.<sup>147</sup> In this endeavor, lower courts determined the ultimate legal question of whether a reasonable reader would view the statement as constitutionally protected opinion or actionable assertions of fact.<sup>148</sup> *Milkovich*, however, shifts the focus of the analysis to fact versus non-fact. The relevant inquiry is whether the statements are “sufficiently factual to be susceptible of being proved true or false,”<sup>149</sup> which is a threshold question and not an ultimate legal determination. Thereafter, courts must analyze whether the context of the statement prevents a reasonable juror from interpreting it as a statement of actual fact. If a reasonable juror “could conclude that” a statement is factual, then the jury should decide the issue.<sup>150</sup>

A few post-*Milkovich* cases recognize the importance of allowing juries the opportunity to interpret the factualness. For example, the decision in *Kolegas v. Heftel Broadcasting Corp.* presented the proper balancing test between free speech and reputational interests by not overturing the jury’s factual interpretation of a statement. Because the jury reasonably interpreted that the defendant made factual assertions about the plaintiff, the court did not consider the abusive talk-radio format in which the statements were made.

However, most post-*Milkovich* courts do not allow juries to interpret factual verifiability if the statement is sufficiently factual to be proven true or false. For

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146. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988) (quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 (1985)).

147. *Potomac Valve & Fitting, Inc. v. Crawford Fitting Co.*, 829 F.2d 1280, 1285 n.12 (4th Cir. 1987); *Woods v. Evansville Press Co.*, 791 F.2d 480, 487 (7th Cir. 1986); *Mr. Chow of New York v. Ste. Jour Azur S.A.*, 759 F.2d 219, 224 (2d Cir. 1985); *Ollman v. Evans*, 750 F.2d 970, 978 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985); *Information Control Corp. v. Genesis One Computer Corp.*, 611 F.2d 781, 783 (9th Cir. 1980); *Orr v. Argus-Press*, 586 F.2d 1108, 1114 (6th Cir.), *cert. denied*, 440 U.S. 960 (1979); *Rinaldi v. Holdt, Rinehart & Winston, Inc.*, 366 N.E.2d 1299, 1306 (N.Y. 1977); *Baker v. Los Angeles Herald Examiner*, 721 P.2d 87 (Cal.), *cert. denied*, 479 U.S. 1032 (1987). For a thorough analysis of this topic, see Stern, *supra* note 11, at 631-38 (questioning why courts are better equipped than a jury in determining the meaning of a statement).

148. *Information Control Corp.*, 611 F.2d at 783 (citations omitted); *Gregory v. McDonnell Douglas Corp.*, 552 P.2d 425, 428 (Cal. 1976) (citing *National Ass’n of Letter Carriers v. Austin*, 418 U.S. 264 (1974)); *Greenbelt Coop. Publ’g Assn. v. Bresler*, 398 U.S. 6 (1970); *Emde v. San Joaquin County*, 143 P.2d 20 (Cal. 1943)).

149. *Milkovich*, 497 U.S. at 21 (emphasis added).

150. One commentator aptly states: “A panel that presumably includes at least some representatives of the expected audience would appear more capable than a court of ascertaining what meaning the context communicated to that audience.” Stern, *supra* note 11, at 634.

instance, in *Partington v. Bugliosi*,<sup>151</sup> the Ninth Circuit examined whether the plaintiff's book defamed the plaintiff attorney by implying that he was incompetent in representing his client. Based on the contextual factor that "lawyers who write popular books, and particularly trial lawyers, are not known for their modesty,"<sup>152</sup> it could not reasonably be interpreted as stating an actual fact.<sup>153</sup> This question should have been left to the jury. By suggesting that reasonable readers know lawyers, especially trial lawyers, are braggarts, the court in *Partington* usurped the jury's role in determining whether these statements could be interpreted as factual statements.

One interesting question that remains unanswered by *Milkovich* is whether First Amendment limitations apply to cases involving private plaintiffs on matters of private concern. Prior to *Milkovich*, most courts failed to distinguish between private and public plaintiffs because opinions "cannot, under *Gertz*, be 'false.'"<sup>154</sup> However, with the Court's rejection of the opinion privilege and its focus on the threshold question of factual verifiability, *Milkovich* sustains the possibility of removing constitutional protections for speech concerning private persons in private matters. Although the Court did not address this issue definitively, the case of *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,<sup>155</sup> illustrates the Court's unwillingness to protect speech on purely private matters.

In *Dun & Bradstreet*, a plurality of the Court held that private plaintiffs need not prove actual malice to recover punitive damages under *Gertz*, if the speech is of private concern.<sup>156</sup> The Court reasoned that while speech on matters of public concern is "'at the heart of the First Amendment's protection,'" speech on purely private concerns is less important because "[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."<sup>157</sup> Certainly, if the Court is unwilling to apply the *Gertz* requirements to matters of private concern, it is plausible that all First Amendment protections are inapplicable against private plaintiffs when the speech concerns private matters.

The Court's denial of certiorari in *Spence v. Flynt*<sup>159</sup> is indicative of this

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151. 56 F.3d 1147 (9th Cir. 1994).

152. *Id.* at 1154.

153. *Id.*

154. *Lewis v. Time, Inc.*, 710 F.2d 549 (9th Cir. 1983); *see also Ollman v. Evans*, 750 F.2d 970, 975 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985).

155. 472 U.S. 749 (1985).

156. The holding was supported by five justices with only three concurring in the plurality decision. *Id.* at 751. The other two concurring justices held that First Amendment requirements of falsity did not apply to any private plaintiffs, and thus, would have overruled *Gertz*. *Id.* at 764 (Burger, C.J., concurring), at 767 (White, J., concurring).

157. *Id.* at 758-59 (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978)).

158. *Id.* at 760 (quoting *Harley-Davidson Motorsports, Inc. v. Markley*, 568 P.2d 1359, 1363 (Ore. 1977)).

159. 816 P.2d 771 (Wyo. 1991), *cert. denied*, 503 U.S. 984 (1992).

point. The *Spence* case is remarkably similar to *Hustler Magazine, Inc. v. Falwell* because it involved abusive language and outrageous comments. The magazine stated that Spence, among other things, sold out his values to represent Andrea Dworkin in her suit against Larry Flynt. The Wyoming Supreme Court determined that this case was distinguishable from *Hustler* in that Spence was a private plaintiff and the speech concerned a private matter (his personal values). Therefore, it concluded that First Amendment protections were inapplicable and applied the “grossly defamatory statement” doctrine of *Chaplinsky v. New Hampshire*.<sup>160</sup> For obvious reasons, the Court’s denial of certiorari does not absolutely mean that the decision is correct or incorrect. It does suggest, however, that speech of purely private concern is unprotected by the First Amendment.

### III. STATE-CREATED PRIVILEGES FOR OPINION

In response to the perceived limitations of *Milkovich*, many state courts are interpreting their own common law and constitutions to provide absolute protection for opinions. Generally, these protections are based on either the *Restatement* “pure opinion” analysis or *Ollman*’s “totality of circumstances” test.

#### A. *Rebirth of the Absolute Privilege for Opinions Under the Common Law*

In recent years, some courts have expanded their common law doctrine of fair comment to include a privilege for opinions based on the *Restatement* or *Ollman*.<sup>161</sup> For example, in *Lyons v. Globe Newspaper Co.*,<sup>162</sup> the Supreme Judicial Court of Massachusetts held that a “pure” opinion under the second *Restatement* was protected under their common law. In *Lyons*, the plaintiff alleged defamation due to a report that he picketed a political convention.<sup>163</sup> Although the report was not entirely accurate, the court held that Massachusetts “adopted the principles governing expression of opinion set forth in § 566 of *Restatement (Second) of Torts* (1977).”<sup>164</sup> Since the underlying facts were disclosed for the author’s opinion, the article was non-actionable opinion.<sup>165</sup>

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160. 315 U.S. 568 (1942).

161. See, e.g., *Milsap v. Journal/Sentinel, Inc.*, 100 F.3d 1265, 1268 (7th Cir. 1996) (applying Wisconsin law, which does not protect statements merely phrased as opinions or beliefs, the Seventh Circuit found actionable the defendant’s comment that plaintiff reneged on paying people); *Colodny v. Iverson, Yoakum, Papiano & Hatch*, 936 F. Supp. 917, 927 (M.D. Fla. 1996) (court held that the fair comment privilege allows an “interested person to make a ‘fair comment’ on a public matter relating to an individual who has voluntarily made himself newsworthy.”); *Yancey v. Hamilton*, 1989 LEXIS 67, 36 K.L.S. No. 10 (Ky. 1989) (Supreme Court of Kentucky adopted the “pure” opinion analysis as their common law approach to defamatory opinions).

162. 612 N.E.2d 1158 (Mass. 1993).

163. *Id.* at 1160-61.

164. *Id.* at 1160 (citing *National Ass’n of Gov’t Employees, Inc. v. Central Broad. Corp.*, 396 N.E.2d 996 (Mass. 1979), *cert. denied*, 446 U.S. 935 (1980)).

165. *Id.* at 1163.

Likewise, in *Hiner v. Daily Gazette Co.*,<sup>166</sup> the Supreme Court of West Virginia used the second *Restatement* analysis for their “fair comment” privilege. In *Hiner*, the defendant newspaper alleged that the plaintiff attorney was under investigation for “unscrupulous” conduct and overcharging indigent clients.<sup>167</sup> Even though these statements were admittedly false, the defendant asserted a privilege of fair comment for editorial opinions.<sup>168</sup> The court agreed that its common law protected “sharp, vituperative and biting criticism,” but it also stated that “[u]nless an opinion, no matter how scurrilous, implies undisclosed defamatory facts, we protect it.”<sup>169</sup> Because the author failed to accurately disclose his underlying facts, the court found the statements to be actionable.

*B. Rebirth of the Absolute Privilege for Opinions Under State Constitutions*

Like the use of a common law defenses for opinions, many states analyze their state constitutions to protect opinions. The first case to use such an approach, *Immuno AG. v. Moor-Jankowski*,<sup>170</sup> used a four factor analysis based on *Ollman* to provide greater protection for statements of opinion. In *Immuno*, a letter was written to the editorial column of the defendant’s science journal, in which the plaintiff Immuno, a biological product manufacturer, was criticized for its research methods.<sup>171</sup> Specifically, the author’s letter alleged that Immuno used non-captive chimpanzees, an endangered species, for product experimentation and research.<sup>172</sup> Although the letter was printed in the magazine’s editorial section with a preface that noted Immuno’s disapproval of the allegations, Immuno sued the editor for defamation.<sup>173</sup>

Originally, the New York Court of Appeals dismissed the libel suit as absolutely protected opinion under *Gertz*.<sup>174</sup> However, the Supreme Court vacated this decision and remanded the case for further consideration in light of *Milkovich*.<sup>175</sup> On remand, New York’s highest court was unsure of the limits imposed by *Milkovich* and it developed a dual analysis based on separate federal and state constitutional grounds. Under the federal standard, the court determined that the statements were sufficiently factual to be proven true; however, the court dismissed on the grounds that Immuno failed to meet the *Hepps* proof of falsity standard.<sup>176</sup>

Additionally, to prevent the case from going back to the Supreme Court, it

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166. 423 S.E.2d 560 (W. Va. 1992).

167. *Id.* at 565-69.

168. *Id.* at 577.

169. *Id.*

170. 567 N.E.2d 1270 (N.Y.), *cert. denied*, 500 U.S. 954 (1991).

171. *Id.* at 1272.

172. *Id.*

173. *Id.* at 1272-73.

174. *Immuno AG. v. Moor-Jankowski*, 549 N.E.2d 129 (N.Y. 1989).

175. 497 U.S. 1021, 1021 (1990).

176. *Immuno*, 567 N.E.2d at 1275-77.

also addressed *Immuno* on state constitutional grounds. The court of appeals first noted that its state constitution afforded enhanced protection for speech based on case precedents and the tradition of special reverence for freedom of expression espoused by the residents of New York.<sup>177</sup> By using state constitutional analysis, the court better “assure[s] that—with due regard for the protection of individual reputation—the cherished constitutional guarantee of free speech is preserved.”<sup>178</sup> To meet these aims, the court adopted *Ollman*’s “totality of circumstances” test as its constitutional standard for distinguishing fact from opinion. After examining the context of the article and the editor’s disclaimer, the court concluded that even if the language was serious and restrained, the average reader of the journal would view the statements as an expression of opinion.<sup>179</sup> Therefore, the letter was protected under New York’s constitution.

Since *Immuno*, several other states have protected opinion based on their constitutions.<sup>180</sup> In *West v. Thomson Newspapers*,<sup>181</sup> the Utah Supreme Court interpreted its state constitution to provide a privilege for statements of opinion. In *West*, the defendant newspaper asserted the mayor changed his position concerning a hotly contested public issue after being elected.<sup>182</sup> Although the trial court found the statements provable as true or false under *Milkovich*, the Utah Supreme Court reversed on the grounds that their state constitution provided greater protection than the federal Constitution. In the court’s analysis, it concluded that “expressions of pure opinion fuel the marketplace of ideas and because such expressions are incapable of being verified, they cannot serve as the basis for defamation liability.”<sup>183</sup> Like *Immuno*, the court adopted the *Ollman* four factor analysis as the basis for distinguishing fact and opinion.<sup>184</sup>

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177. *Id.* at 1277-79 (citing *Steinhilber v. Aphonse*, 501 N.E.2d 550, 553 (N.Y. 1986) (cited for the principle that the test for determining if a statement is opinion or fact is whether the reasonable reader believes the statements contained defamatory facts about the plaintiff based on the whole communication, its tone, and its apparent purpose)).

178. *Id.*

179. *Id.*

180. *See Vail v. Plain Dealer Publ’g Co.*, 649 N.E.2d 182 (Ohio 1995) (stating that the Ohio state constitution provides for a protection of opinion based on the four factor analysis of *Ollman*, regardless of the holding in *Milkovich*); *Lyons v. Globe Newspaper Co.*, 612 N.E.2d 1158, 1162-65 (Mass. 1993); *People for the Ethical Treatment of Animals v. Berosini*, 895 P.2d 1269 (Nev. 1995) (Nevada Constitution protects opinions). *See also Hickey v. Capital Cities/ABC, Inc.*, 792 F. Supp. 1195 (D. Or. 1992) (Oregon’s Constitution protects strong opinions).

181. 872 P.2d 999 (Utah 1994).

182. *Id.* at 1001.

183. *Id.* at 1015.

184. *Id.* at 1018. The four factors used by the court included: “(i) the common usage or meaning of the words used; (ii) whether the statement is capable of being objectively verified as true or false; (iii) the full context of the statement. . .; and (iv) the broader setting in which the statement appears.” *Id.*



*C. Legitimacy of State Constitutional Analysis*

The decision in *Milkovich* is more than a limitation of First Amendment protection for opinions. It represents the Court's considered judgment that states are in a better position to determine the appropriate balance between protection of opinions and reputation. Based on the well established principle that "[t]he federal Constitution sets a floor [for individual rights], and states are free to raise that floor as long as they don't crash through the federal ceiling,"<sup>185</sup> several state courts have accepted *Milkovich*'s invitation to protect opinions based on state grounds. These courts rely on *Michigan v. Long*<sup>186</sup> for the proposition that if a case is decided on adequate and independent state constitutional grounds, then the Supreme Court cannot review it.<sup>187</sup>

Some commentators argue that using state constitutional analysis is an "illegitimate" tactic.<sup>188</sup> In fact, Judge Simons stated in his concurring opinion in *Immuno* that state constitutional analysis violates the tenets of judicial restraint and was constitutionally unsound because it denies the Supreme Court its ultimate legal authority.<sup>189</sup> However, the Court in *Milkovich* seemingly supports state constitutional analysis in defamation cases.<sup>190</sup> In a footnote, the Court discussed the Lorain Journal Company's argument that it was precluded from reviewing the case under *Long*.<sup>191</sup> The Court rejected this argument because the Ohio courts' decisions were based on an absolute privilege in *Gertz*; therefore, the decisions was "'at least interwoven with federal law,' and was not clear on its face as to the court's intent to rely on independent state grounds."<sup>192</sup> Nonetheless, the Court said that "the Ohio Supreme Court remains free, of course, to address all of the foregoing issues on remand."<sup>193</sup> This statement indicates, at the very least, that the Ohio Supreme Court could have decided the case on independent state grounds, but failed to do so.

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185. Berdon, *supra* note 2, at 665 (quoting Professor Laurence H. Tribe); *see also* *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980) (the Supreme Court of California was free to interpret its constitution to provide additional protections of individual liberties so long as it did not go below the minimum standards of constitutional law); *Immuno*, 567 N.E.2d at 1277 (citations omitted).

186. 463 U.S. 1032 (1983).

187. *Id.* at 1038 (citing *Abie State Bank v. Bryan*, 28 U.S. 765, 773 (1931)).

188. *See* Earl M. Maltz, *The Dark Side of State Court Activism*, 63 TEX. L. REV. 995 (1985) (questioning the value of independent state constitutional review based on policy); Hans A. Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 OR. L. REV. 125 (1970) (reviewing constitutional premises for judicial review of Oregon's regulatory policies).

189. *Immuno*, 567 N.E.2d at 1283-86 (Simons, J., concurring).

190. 497 U.S. at 10 n.5.

191. *Id.*

192. *Id.* (citing *Long*, 463 U.S. at 1040-41).

193. *Id.*

## CONCLUSION

The limitations imposed by *Milkovich* marks the Court's attempt to balance free speech and protection of reputation. By rejecting a wholesale privilege for opinions, the Court implicitly recognized that the opinion privilege potentially usurped states' interest in protecting reputation. Therefore, it set the federal floor of falsity analysis at factual verifiability. While this standard does not affect the applicability of the many pre-*Milkovich* opinion tests, it undoubtedly prevents courts from granting summary judgment based solely on the subjectiveness of the assertion. This does not mean that subjective assertions are not protected under the First Amendment. Instead, when a speaker offers his viewpoint or evaluation, he will not receive immunity for that "opinion" if it is factually verifiable and his conclusion was unreasonable, which depends on the varying levels of constitutional fault for defamation.

It is important, however, to see *Milkovich* as more than a rejection of the constitutional privilege for opinions. The decision represents the Court's careful judgment that states have an interest in balancing "the need to redress injuries to reputation with guarantees of free expression in a distinct way, thereby accounting for the unique history, needs, and experiences of their residents."<sup>194</sup> As such, states are free to limit protection based on pre-existing First Amendment case law. But, they also are free to raise the level of protection for opinions based on their constitutions and common law. This allows states autonomy to protect the interest of their private citizens, but also leaves uninhibited the federal interest in free speech concerning public matters.

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194. *West v. Thomson Newspaper*, 872 P.2d 999, 1007 (Utah 1994).