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The Corporate Defamation Plaintiff in the Era of SLAPPs: Revisiting New York Times v. Sullivan

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THE CORPORATE DEFAMATION PLAINTIFF IN THE ERA OF SLAPPS: REVISITING *NEW YORK TIMES V. SULLIVAN*

Corporations have increasingly used defamation suits as an offensive weapon. Many of these suits may be defined as SLAPP suits—Strategic Litigation Against Public Participation. These suits, often meritless, are designed to harass and silence a corporations' critics. Following a survey of the history of defamation law and the protection of free speech, this Note argues that corporations should be treated as per se public figures in defamation suits. This derives from the uniquely public nature of a corporation and an assumption of the risk of defamatory falsehoods that arises from the act of incorporation. Treating corporations in this manner would place a heavier burden on corporations by requiring a showing of actual malice in their defamation claims. This Note concludes that such a requirement would provide a better balance between corporations' defamation concerns and their opponents' free speech rights.

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> [T]he dignity of a person is acknowledged to all human beings; and as a consequence there is proclaimed, as a fundamental right, the right of free movement in search for truth and in the attainment of moral good and of justice, and also the right to a dignified life . . . .[1]

INTRODUCTION

Defamation involves a conflict. While the freedom to speak is an essential principle of personal liberty, defamation law seeks to remedy the reputational injuries resulting from speech. The lines demarcating the interest of speech and the interest of reputation unavoidably intersect. For this reason, establishing the constitutional limits on the tort of defamation has proved a challenging and dynamic endeavor.

As part of this effort, the status of the defamation plaintiff has been a critical inquiry since the United States Supreme Court's 1964 decision in *New York Times v. Sullivan*.[2] The Court established that public officials and public figures must meet a higher standard of proof—actual malice—in order to prevail as defamation plaintiffs. While the Court has carved out several tests for determining when a plaintiff is a public figure, the Court has yet to speak definitively on the status of corporations.

Since *New York Times*, corporations have been making greater use of the

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[1] POPE JOHN XXIII (Angelo Giuseppe Roncalli), PACEM IN TERRIS 49 (1963).

[2] 376 U.S. 254 (1964).

defamation tort. Intimidation lawsuits have become a major weapon in the corporate arsenal. Using defamation suits against civic-minded citizens, groups, and publishers, corporations have drastically squelched citizen and news media involvement. In this way, the defamation suit has become a tool to ward off public criticism and oversight.

At the same time, corporate criticism and oversight has become more crucial. The corporate entity has gained influence over the political process and achieved greater economic power than before. Traditional state functions have been delegated to the private sector. Corporations have continued to receive public benefits such as tax breaks and subsidies. All of these factors weigh in favor of making corporations more publicly accountable. A greater need for accountability demands that citizens be afforded the same First Amendment protections when speaking about corporations as afforded by *New York Times* when speaking about public officials. Corporate plaintiffs should be treated as per se public figures; that is, in order to prevail in defamation suits, corporations must prove that defamatory statements were made with actual malice.

Part I of this Note describes current use of defamation law by corporations. Part II outlines the development of First Amendment protection of speech directed at public officials, public figures, and corporations. Part III argues that corporations should be treated as per se public figures in defamation suits. Part IV concludes that a per se public figure rule would alleviate several current problems in defamation law.

I. USE OF DEFAMATION LAW BY CORPORATIONS

Corporations have begun to use defamation suits as an offensive tactic. Many defamation suits may be defined as Strategic Litigation Against Public Participation, or SLAPPs.[3] SLAPPs are "meritless suits"[4] intended not to win but "to intimidate and harass political critics into silence . . . ."[5] SLAPPs are aimed at "punish[ing] people for exercising their right, guaranteed by the First Amendment to the Constitution, to participate in public discourse."[6] For example, a New York

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[3] *See* George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 PACE ENVTL. L. REV. 3, 4 (1989); *see also* Bill Johnson's Rests., Inc. v. NLRB, 461 U.S. 731, 740-41 (1983) ("A lawsuit no doubt may be used as a powerful instrument of coercion or retaliation . . . . [and] the chilling effect upon willingness to engage in protected activity is multiplied where the complaint seeks damages . . . .").

[4] John C. Barker, *Common-Law and Statutory Solutions to the Problem of SLAPPs*, 26 LOY. L.A. L. REV. 395, 399 (1993).

[5] Edmond Costantini & Mary Paul Nash, *SLAPP/SLAPPback: The Misuse of Libel Law for Political Purposes and a Countersuit Response*, 7 J.L. & POL. 417, 423 (1991).

[6] RALPH NADER & WESLEY J. SMITH, NO CONTEST 163 (1996). Professor Pring states, "Yes it is true. Today, you, your neighbors, your community leaders can be sued for

resident was sued for defamation because she circulated fliers that called a local developer "greedy."[7] These suits are aimed not at rectifying truly defamatory statements made by defendants, but rather, at intimidating them from voicing their public concerns.[8] Moreover, corporations use SLAPPs to discourage involvement not only by the named defendants, but also by their neighbors and the remaining community.[9]

SLAPP suits share several common characteristics. Plaintiffs are usually large corporations, typically private developers or businesses seeking to enter the community.[10] Some investigators estimate that thousands of such suits are filed each year.[11] Plaintiffs utilize a multitude of causes of action, but defamation is the most common.[12] Plaintiffs' goals are to delay and distract political adversaries, and thereby tie up their resources by forcing them to pay significant expenses.[13] Additionally, plaintiffs seek to de-politicize issues, and thereby force defendants out of the legislative process, where public opinion can win the day, and into the win-lose process of court.[14] Going to court also switches public attention from the corporation to the defendant.[15] Simply put, SLAPPs are "another tool in a strategy to win a political and/or economic battle."[16]

The effectiveness of SLAPPs for corporations derives from the disparity of resources between the plaintiff and defendant. Corporate plaintiffs may have huge treasuries with which to mount protracted litigation. As one defense lawyer stated, "[f]ew average citizens have the wherewithall [sic] to defend themselves against the armoire of monies expended by . . . corporations—who not only may have the

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millions of dollars, just for telling government what you think, want, or believe in." *Id.* (citing George Pring, interview with the authors (Oct. 28, 1994)).

[7] *See* Sharlene A. McEvoy, *"The Big Chill": Business Use of the Tort of Defamation to Discourage the Exercise of First Amendment Rights*, 17 HASTINGS CONST. L.Q. 503, 504 (1990) (citing Boccella, *Expensive Free Speech*, NEWSDAY, Mar. 18, 1988, at 3). In fact, SLAPPs have been brought for:

> [w]riting a letter to the president of the United States opposing a political appointment; testifying against a real estate developer at a zoning hearing; filing administrative agency appeals; complaining to a school board about unfit teachers; peacefully demonstrating against government action; collecting signatures on a petition; and, campaigning for or against a state ballot.

NADER & SMITH, *supra* note 6, at 164-65.

[8] *See* McEvoy, *supra* note 7, at 504.

[9] *See* Costantini & Nash, *supra* note 5, at 466-70.

[10] *See* Barker, *supra* note 4, at 400.

[11] *See* Pring, *supra* note 3, at 4.

[12] *See* Barker, *supra* note 4, at 402.

[13] *See id.* at 403.

[14] *See id.* at 405.

[15] *See id.* at 406.

[16] Penelope Canan, *The SLAPP from a Sociological Perspective*, 7 PACE ENVTL. L. REV. 23, 30 (1989).

means to mount suits, but can claim further tax advantages for the legal expenses involved."[17] Defendants, on the other hand, are usually "middle-of-the-road Americans," often involved in public affairs for the first time.[18] For defendants

> the price of civil involvement can be very high, not only in terms of attorney's fees and general litigation expenses, but also through the disruption of families, physical illness and emotional upheaval. Such protracted vexation can have the effect of discouraging even the hardiest of souls from exercising their first amendment rights.[19]

SLAPPs present difficult questions because each party in the dispute invokes important interests. Nevertheless, defendants suffer particular harm because they may be forced to defend against truly meritless claims. One scholar describes these suits as pitting

> two sets of fundamental constitutional rights against each other: (1) defendants' rights of free speech and petition and (2) plaintiffs' rights of access to the judicial system and rights to non-falsely maligned reputations. . . . Defendants must be protected from entirely frivolous intimidation suits designed to chill legitimate participation in public affairs.[20]

Those defendants who do proceed to court win eighty to ninety percent of all suits argued on the merits.[21] Nevertheless, many defendants capitulate to the plaintiff's demands, either through settlement or by withdrawing political opposition.[22]

The existing standards do not sufficiently protect defendants.[23] It is because so

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[17] McEvoy, *supra* note 7, at 506 (quoting Notice of Motion to Amend Answer, Terra Homes, Inc. v. Blake, Index No. 1563/88, at 3).

[18] NADER & SMITH, *supra* note 6, at 165. Media defendants are also a common target of SLAPPs. As one journalist noted:

> [B]usiness reporting is on the rise. Frequently, that reporting has rejected the older, more deferential style and brought a new aggressiveness to the business desk. . . . Moreover, media businesses involved in public relations and advertising are at risk for defamation actions as well, particularly when waging aggressive campaigns that compare one company to another.

Matthew D. Bunker, *The Corporate Plaintiff as Public Figure*, 72 JOURNALISM & MASS. COMM. Q. 597 (1995).

[19] McEvoy, *supra* note 7, at 505.

[20] Barker, *supra* note 4, at 397-98.

[21] *See* Pring, *supra* note 3, at 23.

[22] *See id.*

[23] *See* Barker, *supra* note 4, at 406-07. Since "winning is not a SLAPP plaintiff's prime motivation, existing safeguards are inadequate. They focus on preventing plaintiffs from

many meritless suits proceed past the pleading stage that SLAPPs remain an effective deterrent to speech.[24] Indeed, "[t]he most effective way to combat the SLAPP industry is for laws to be enacted that prevent SLAPPs from getting off the ground."[25] Requiring a standard of actual malice means that fewer SLAPPs will be filed, many will be dismissed before they become a viable threat, and many can be dismissed earlier in the litigation before they have taken their toll on defendants.

II. DEFAMATION AND FIRST AMENDMENT PRIVILEGES

A. *Defamation*

Defamation consists of the "twin torts" of libel and slander.[26] At common law, the defamation action guarded against damage to a person's reputation in regards to their business, trade, profession, or office.[27] Prosser defines defamation as that which

> tends to hold the plaintiff up to hatred, contempt or ridicule, or to cause him to be shunned or avoided. . . . [and is] that which tends to injure "reputation" in the popular sense; to diminish the esteem, respect, goodwill or confidence in which the plaintiff is held, or to excite adverse, derogatory or unpleasant feelings or opinions against him. It

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winning meritless suits. SLAPP plaintiffs, however, expect to lose their suits, and often concede the litigation costs, such as the defendants' attorney's fees, as costs of doing business." *Id.*

[24] *See* NADER & SMITH, *supra* note 6, at 165 (Of those SLAPP suits that are not dismissed outright, the "overwhelming majority settle, on terms quite favorable to the SLAPPer. Typically, the defendants agree to stop their public activism. Some defendants offer an apology for their activism.").

[25] *Id.* at 180.

[26] WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 111, at 737 (4th ed. 1971). The distinction between the two torts is mostly a relic of the past. *See* Patricia Nassif Fetzer, *The Corporate Defamation Plaintiff as First Amendment "Public Figure:" Nailing the Jellyfish,* 68 IOWA L. REV. 35, 35-36 n.2 (1982). Libel and slander are both actions for injury to reputation due to false publications. *See* PROSSER, *supra,* § 111, at 737; 3 RESTATEMENT (SECOND) OF TORTS § 558 (1976) [hereinafter RESTATEMENT]. Historically, slander involved oral communications, whereas libel involved written words. *See* PROSSER § 112, at 751. Today, libel encompasses all communications embodied in a permanent tangible form. *See id.* at 752. Therefore, defamation law treats as libel television and radio broadcasts, even if not read from a script. *See* RESTATMENT § 568A.

[27] *See* PROSSER, *supra* note 26, § 112, at 754; *see also* Harmon v. Delany, 2 Strange 898 (1731) ("The law has always been very tender of the reputation of tradesman, and therefore words spoken of them in the way of their trade will bear an action that will not be actionable in the case of another person.").

> necessarily . . . involves the idea of disgrace . . . .[28]

Beginning with this broad definition, defamation law developed a long list of privileges, beginning with the privilege of truth, and perhaps culminating with the *New York Times v. Sullivan* constitutional privilege.

B. *The Development of the* New York Times v. Sullivan *Privilege*

At common law, courts considered defamatory statements constitutionally unprotected speech.[29] All defamation actions were within the exclusive province of the states.[30] Nevertheless, the common law recognized several areas of speech that were privileged. For example, statements of truth, judicial proceedings, and executive communications could not be subjects of a defamation suit.[31] Most importantly, courts recognized "the qualified privilege of 'fair comment' on matters of public interest . . . ."[32] Matters of public interest involved communications to those expected to take official action for the protection of some interest on behalf of the public.[33] However, this privilege

> was not limited to officers and candidates, but extended to other matters of public concern, such as work to be paid for out of public funds, the admission or disbarment of attorneys, and the management of institutions, such as schools, charities, and churches, in which the public has a legitimate interest. Likewise any private enterprise, to the extent that it begins to affect the general interests of the community . . . was held to be a proper subject for such privileged comment.[34]

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[28] PROSSER, *supra* note 26, § 111, at 739.

[29] The Court considered defamatory statements to be lacking in any constitutional value. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (stating that libelous statements are one of a "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem").

[30] *See* Fetzer, *supra* note 26, at 38.

[31] *See id.*

[32] Fetzer, *supra* note 26, at 38; *see also* 1 A. HANSON, LIBEL AND RELATED TORTS 140-41 (1969 & Supp. 1976); PROSSER, *supra* note 26, at 822. The fair comment privilege extended to discussions of public officials and public events. *See, e.g.*, Broking v. Phoenix Newspapers, Inc., 76 Ariz. 334, 340 (1953); AAFCO Heating & Air Conditioning Co. v. Northwest Publ'ns, Inc., 162 Ind. App. 671, 674 (1974). However, some courts limited this privilege only to opinion statements. *See* Mashburn v. Collin, 355 So. 2d 879, 885 (La. 1977).

[33] *See* PROSSER, *supra* note 26, § 115, at 831. "Thus, for example, complaints made by members of the public to school boards about the character, competence or conduct of their teachers are subject to a qualified privilege." *Id.* at 792.

[34] PROSSER, *supra* note 26, § 115, at 831-32; *see also* Bishop v. Wometco Enters., 235

Building on this common law privilege, the Court in *New York Times v. Sullivan* sought to balance the interests of free speech with the interest of protection of reputation.[35]

The case arose from an advertisement published in *The New York Times* in support of the southern civil rights movement. The advertisement inaccurately described, inter alia, reports of police misconduct toward demonstrators. An Alabama official responsible for supervising the Montgomery Police Department filed a suit alleging defamation. The Alabama Supreme Court affirmed the trial court award of $500,000.[36] In a revolutionary opinion, the United States Supreme Court held that defamatory publications may be entitled to constitutional protection.[37] The Court held that "libel can claim no talismanic immunity from constitutional limitations."[38] Protection of speech, the Court stated, was based on a "profound national commitment" to achieving public debate that is "uninhibited, robust, and wide open."[39] The Court reasoned that "erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'"[40] Critically underlining the opinion was the notion that in order to protect all speech, some false speech must be protected.[41] Accordingly, the Court held that plaintiffs who are public officials must meet a higher standard:

> The constitutional guarantees require . . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.[42]

Thus, public officials hoping to prevail in a defamation suit must prove not only that

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So. 2d 759 (Fla. App. 1970) (discussing public concern of granting preferential tax treatment).

[35] *See* Fetzer, *supra* note 26, at 38 ("If there is one truism in the history of constitutional defamation privilege, it is that 'whatever is added to the field of libel is taken from the field of free debate.'") (citing Sweeney v. Patterson, 128 F.2d 457, 458 (D.C. Cir. 1942)), *quoted in* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 272 (1964).

[36] *See id.*

[37] *See N.Y. Times*, 376 U.S. at 268.

[38] *Id.* at 269.

[39] *Id.* at 270-72.

[40] *Id.* at 271-72 (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).

[41] *See id.* at 278-79.

[42] *Id.* at 279-80. The Court's description of the standard as "actual malice" may have been unfortunate. While malice tends to imply an evil or sadistic quality, the Court required only the state of mind of recklessness. *See id.* This distinction may have confused many in its application.

a statement was false, but that it was published with knowledge of its falsity or with reckless disregard to its falsity.[43]

The *New York Times* progeny further developed the actual malice standard. The Court held in *Rosenblatt v. Baer*[44] that the term "officials" included not only elected officials, but also public employees whose work would engender public interest apart from the defamation.[45] The Court further elaborated that the defendant must be subjectively aware of the possible falsity of the publication or its "possible defamatory interpretation."[46] As to private plaintiffs, the Court held that states must require a minimum level of fault for a plaintiff to prevail, but that they were otherwise free to determine the standard of proof required for a defamation action.[47]

Three years later in the consolidated cases of *Curtis Publishing Co. v. Butts*[48] and *Associated Press v. Walker*,[49] the Court expanded the reach of *New York Times* to include public figures. Butts was the athletic director for the University of Georgia. He was accused, in *The Saturday Evening Post*, of fixing a football game.[50] The Court held that the constitutional standard had been met; Butts was a public figure by virtue of his position.[51] The Court outlined the public figure standard based on two distinctions between private individuals and public figures.[52] First, public figures are less vulnerable to injury because they occupy positions of power and can more easily rebut defamatory speech.[53] Second, public figures are less deserving of recovery because they voluntarily expose themselves to the risks of defamation.[54] The extension of the standard to public figures also reflected the Court's understanding that private sources of power implicated the need for less

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[43] *See id.*

[44] 383 U.S. 75 (1966).

[45] *Id.*

[46] PROSSER, *supra* note 26, § 112 Supp., at 109; *see also* Bose Corp. v. Consumers Union of the U.S., Inc., 466 U.S. 485 (1984).

[47] *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974). Some states have taken significant steps to provide more protection to publishers. For example, New York applies a "gross irresponsibility" test to protect statements involving matters of "public concern." Gaeta v. N.Y. News, Inc., 465 N.E.2d 802, 803 (N.Y. 1984) (holding that false information about the wife of a public mental patient was a matter of public concern); *see also* Dairy Stores, Inc., v. Sentinel Publ'g Co., 516 A.2d 220 (N.J. 1986) (extending a privilege to all matters of public concern and protecting false statements that are not made with actual malice); Sisler v. Gannett Co., 516 A.2d 1083 (N.J. 1986) (requiring that private plaintiffs meet the actual malice standard if the plaintiff voluntarily engages in conduct that a reasonable person would know would involve the public interest).

[48] 388 U.S. 130, 155 (1967).

[49] 388 U.S. 130, 155 (1967).

[50] *See id.* at 135-36.

[51] *See id.* at 161-62.

[52] *See Gertz*, 418 U.S. at 344-45.

[53] *See id.*

[54] *See id.*

restricted speech beyond just public officials.[55]

In later cases, the Court outlined a definition of public figure. In *Rosenblum v. Metromedia, Inc.*,[56] an adult magazine distributor sued a radio station for broadcasts concerning his criminal charges.[57] The Court extended the public figure privilege "to all discussion and communication involving matters of public or general concern," regardless of the fame or position of the plaintiff.[58] The Court backed away from this public interest emphasis, however, and began to focus specifically on the status of the plaintiff.

In *Gertz v. Robert Welch, Inc.*,[59] an attorney sued the publisher of the John Birch Society magazine, *The American Opinion*, for statements accusing him of being communist.[60] The defendants argued that Gertz was a public figure plaintiff because he had recently been involved in a politically charged criminal and civil trial, a matter clearly within the public interest.[61] The Court, however, chose to distance itself from the *Rosenblum* public interest test. In doing so, the Court held that *Rosenblum* could not be read to overrule the legitimate state interest in the "compensation of *individuals*" for injurious defamation that impinges on "the essential dignity and worth of every *human being*."[62] *Gertz* set forth two major

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[55] In a concurring opinion, Chief Justice Warren voiced this concern directly:

> Increasingly in this country, the distinctions between governmental and private sectors are blurred . . . . [T]here has been a rapid fusion of economic and political power, a merging of science, industry, and government, and a high degree of interaction between the intellectual, governmental and business worlds . . . . While these trends and events have occasioned a consolidation of governmental power, power has also become much more organized in what we have commonly considered to be the private sector. In many situations, policy determinations which traditionally were channeled through formal political institutions are now originated and implemented through a complex array of boards, committees, commissions, *corporations*, and associations, some only loosely connected with the Government . . . .
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> . . . .
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> [That public figures are not politically accountable] only underscores the legitimate and substantial nature of the interest, since it means that public opinion may be the only instrument by which society can attempt to influence their conduct.

Curtis, 388 U.S. at 163-64 (Warren C.J., concurring) (emphasis added).

[56] 403 U.S. 29 (1971).

[57] *See id.*

[58] *Id.* at 44.

[59] 418 U.S. 323 (1974).

[60] *See id.* at 325-26.

[61] *See id.*

[62] *Id.* at 341 (Stewart, J., concurring) (emphasis added) (citing Rosenblatt v. Baer, 383 U.S. 75, 92 (1966)). The common law view of reputation is still evident in the language employed in *Gertz*. Underlying the Court's opinion is the notion of a reputational interest based on preventing the personal and emotional harm resulting from a loss of esteem in

factors to be used in defining public figures. First, public figures must enjoy greater access to channels of communication, making them less vulnerable to injury.[63] Second, public figures must voluntarily assume the risk of greater public scrutiny—including risks from defamation—and, therefore, are less deserving of recovery.[64] Importantly, the Court added, the subject matter for which the plaintiff has availed himself of public attention must be the same subject matter of the defamatory statements.[65] Under these factors, the Court concluded that Gertz was not a public figure.[66] While Gertz had voluntarily assumed the risk for public scrutiny of his trial work, he had not opened himself to scrutiny for his political affiliations.[67]

C. *The Corporate Defamation Plaintiff*

The theory of corporate defamation is problematic. First, it is difficult to determine if the proper parties have been defamed in order to show that the corporation has been defamed. Second, it is difficult to define corporate reputation. Third, it is difficult to determine when a corporation properly fits the definition of a public figure.

The initial problem in a corporate defamation theory lies in determining who must be defamed in order for the corporation to be defamed.[68] Generally, there is

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one's community.

[63] *See* Gertz, 418 U.S. at 344.

[64] *See id.* at 345. The Court noted that it is "exceedingly rare" to be a public figure without voluntary assent. *Id.* One scholar suggests that this volitional requirement is the more compelling criterion of the public figure test. *See* Fetzer, *supra* note 26, at 45, 48-49 & n.79. In other words, the Court's primary emphasis is on the plaintiff's voluntary injection into the subject of the publication rather than the importance of the subject itself. *See id. Compare* Time, Inc. v. Firestone, 424 U.S. 448 (1976) (concluding that the plaintiff undergoing a personal divorce proceeding was not a public figure), *and* Wolston v. Reader's Digest Ass'n, Inc., 439 U.S. 1066 (1979) (concluding that the plaintiff involved in a grand jury proceeding was not a public figure), *with* Steaks Unlimited, Inc. v. Deaner, 623 F.2d 264 (3d Cir. 1980) (concluding that a corporate meat distributor was a public figure), *and* Bose Corp. v. Consumers Union of U.S., Inc., 508 F. Supp. 1249 (D. Mass. 1981) (concluding that a stereo speaker manufacturer was a public figure). *Gertz* also considered that plaintiffs may have limited public figure status if they thrust themselves into "public controversies." *Gertz*, 418 U.S. at 345. Subsequent cases struggled with defining this status. *See* Waldbaum v. Fairchild Publ'ns, Inc., 627 F.2d 1287, 1296 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 898 (1980) ("A public controversy is not simply a matter of interest to the public; it must be a real dispute, the outcome of which affects the general public or some segment of it in an appreciable way.").

[65] *See Gertz*, 418 U.S. at 345.

[66] *See id.* at 354.

[67] *See id.*

[68] This question can arise for individual plaintiffs as well. For individual plaintiffs, if the publication does not, on its face, refer to the plaintiff, the plaintiff has the burden of proving,

no cause of action for a publication that defames a large group or a class of persons.[69] This is based on the rationale that such a general statement could not injure the reputations of each individual that comprises the group.[70] However, if the statement refers to a definite number of people and the statement could reasonably apply to an individual within that group, the plaintiff may state a cause of action.[71] A corporation is composed of many people, many of whom could be affected by speech damaging to the entity.[72] However, statements directed at its officers, stockholders, or employees do not defame a corporation.[73] Corporate defamation consists of statements that directly relate only to the trade or business.[74] The *Restatement* suggests:

> One who falsely, and without a privilege to do so, publishes of a corporation for profit matter which tends to prejudice it in the conduct of its trade or business or to deter third persons from dealing with it, is liable to the corporation . . . . One who falsely, and without a privilege to do so, publishes of a corporation not for profit which depends upon the financial support of the public, matter which tends to prejudice it in public estimation and thereby to interfere with the conduct of its activities is liable to the corporation . . . .[75]

In a typical example of corporate defamation, a defendant places a sign on a public highway that falsely states that the plaintiff corporation released poisons, which endanger humans and kill livestock.[76]

Second, it is difficult to define corporate defamation since corporations do not

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by way of "colloquim," that the defamatory statement refers to him. *See* PROSSER, *supra* note 26, § 113, at 773.

[69] *See* Loeb v. Globe Newspaper Co., 489 F. Supp. 481, 483-84 (1980).

[70] *See id.*

[71] *See* Fawcett Publ'ns, Inc. v. Morris, 377 P.2d 42 (Okla. 1962) (upholding verdict for the plaintiff where he was a member of a sixty-to-seventy player football team accused of using drugs). Group defamation of racial, ethnic, and religious minorities has led to the enactment of criminal statutes in a number of states. *See* James A. Scott, Note, *Criminal Sanctions for Group Libel: Feasibility and Constitutionality*, 1 DUKE B.J. 218 (1951).

[72] *See* Fred T. Magaziner, Note, *Corporate Defamation and Product Disparagement: Narrowing the Analogy to Personal Defamation*, 75 COLUM. L. REV. 963, 966 (1975).

[73] *See* PROSSER, *supra* note 26, § 111, at 779-80; *see, e.g.*, Life Printing & Publ'g Co. v. Field, 64 N.E. 2d. 383 (Ill. App. Ct. 1946); People's U.S. Bank v. Goodwin, 149 S.W. 1148 (Mo. Ct. App. 1912); Hapgoods v. Crawford, 110 N.Y.S. 122 (1908).

[74] *See* Brayton v. Cleveland Special Police Co., 57 N.E. 1085 (Ohio 1900).

[75] RESTATEMENT (FIRST) OF TORTS §561 (1938).

[76] *See* Martin v. Reynolds Metals Co., 224 F. Supp. 978 (D. Or. 1963), *appeal dismissed*, 336 F.2d 876 (9th Cir. 1964).

have a reputation in any personal sense.[77] A corporation is an "artificial being . . . existing only in contemplation of law."[78] One federal court underscored "the obvious fact that a libel action brought on behalf of a corporation does not involve 'the essential dignity and worth of every human being' . . . and, thus, is not 'at the root of any decent system of ordered liberty.'"[79]

Nevertheless, corporations enjoy certain rights as "persons" under several provisions of the Constitution.[80] Furthermore, the corporation does have "prestige and standing in the business in which it engaged . . . ."[81] Moreover, a corporation's financial viability may be affected by its reputation for honesty,[82] credit,[83] or other business characteristics.[84] Nevertheless, "[n]o guiding principles have emerged that may be uniformly applied to a corporation seeking judicial vindication for injury to its reputation."[85]

Third, the Supreme Court has yet to establish the status of corporate defamation plaintiffs.[86] Since corporations "are not so much real entities as they are simply

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[77] *See* PROSSER, *supra* note 26, § 106, at 745 ("[A corporation] cannot be defamed by words, such as those imputing unchastity, which would affect the purely personal repute of an individual."); *see, e.g.*, Saucer v. Giroux, 202 P. 887 (Cal. App. 2d 1921); Renfro Drug Co. v. Lawson, 160 S.W.2d 246 (Tex. Comm'n App. 1942).

[78] Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 636 (1819).

[79] Martin Marietta Corp. v. Evening Star Newspaper Co., 417 F. Supp. 947, 955 (D.D.C. 1976) (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974)).

[80] *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 771 (1978) (declaring that corporations have a First Amendment right to free speech). Other rights of corporations "include the Fourth Amendment right against unreasonable searches and seizures, the Fifth Amendment right to due process, and the Fourteenth Amendment right to equal protection of the laws." Bunker, *supra* note 18, at 604-05 n.18; *see also* HARRY G. HENN, HANDBOOK OF THE LAW OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES § 80, 111-12 (2d ed. 1970). "A Corporation, however, does not enjoy the Fifth Amendment right against self-incrimination and generally has no right of privacy." Bunker, *supra*; *see also* HENN, *supra*.

[81] PROSSER, *supra* note 26, § 111, at 745.

[82] *Id.*; *see, e.g.*, Pullman Standard Car Mfg. Co. v. Local Union No. 2928, 152 F.2d 493 (7th Cir. 1945); Den Norske Ameriekalinje Actiesselskabet v. Sun Printing & Publ'g Ass'n, 122 N.E. 463 (N.Y. 1919).

[83] PROSSER, *supra* note 26, § 106, at 762; *see, e.g.*, Brayton v. Crowell-Collier Publ'g Co., 205 F.2d 644 (2d Cir. 1953); Aetna Life Ins. Co. v. Mutual Benefit Health & Accident Ass'n, 82 F.2d 115 (8th Cir. 1936); Maytag Co. v. Meadows Mfg. Co., 45 F.2d 299 (7th Cir. 1930); Wayne Works v. Hicks Body Co., 115 Ind. App. 10 (1944).

[84] PROSSER, *supra* note 26, § 111, at 749; *see, e.g.*, DiGiorgio Fruit Corp. v. AFL-CIO, 30 Cal. Rptr. 350 (1963); Axton Fisher Tobacco Co. v. Evening Post Co., 183 S.W. 269 (Ky. 1916); St. James Military Acad. v. Gaiser, 28 S.W. 85 (Mo. 1894); R.H. Bouligny, Inc. v. United Steelworkers of Am., 154 S.E.2d 344 (N.C. 1967).

[85] Fetzer, *supra* note 26, at 36. Courts have taken inconsistent positions when comparing natural persons with corporate defendants. *See infra* notes 87-139 and accompanying text.

[86] The Court has heard, however, a defamation case involving a corporate plaintiff. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985). Nevertheless, the

means of structuring financial transactions," corporations are neither clearly private individuals nor public figures.[87] In search of definition, the lower courts have taken a wide variety of approaches. While scholars have attempted to classify the approaches into several categories,[88] a survey of cases reveals a widely unsettled body of law.

Though most courts coalesced to the Supreme Court's retreat from *Rosenblum*, one court chose to adopt a public interest test to determine corporate plaintiff status. In *Martin Marietta Corp. v. Evening Star Newspaper Co.*,[89] a federal district court declared that media critics should be afforded greater protection from corporate plaintiffs than from individual plaintiffs.[90] *Martin Marietta* involved a corporate defense contractor that sued the publisher of *The Washington Star*.[91] The *Star* alleged improper entertainment of Defense Department personnel at a stag party.[92] The court held that corporate defamation suits must meet the actual malice standard whenever the subject of defamation involves the public interest.[93] In so ruling, the court recognized important distinctions between corporate and individual plaintiffs, including a corporation's lack of a private life.[94] Because the article involved entertainment of public officials for the purpose of influencing expenditure of public funds, the court ruled that the alleged entertainment was a "legitimate public controversy."[95] The court held that Martin Marietta was a public figure for the limited issues discussed in the article.[96] Perhaps in response to the problems inherent in defining "public interest," only one other court has followed this reasoning. In *U.S. Energy Services v. Colen*,[97] a Florida state court held that an air

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Court did not decide the public figure status of the corporation. The Court held that a construction company could receive damages based on the dissemination of an erroneous credit report. The plurality decision stated that confidential credit reports were not a matter of public concern—and thus the defendant was ineligible for the actual malice privilege of *Sullivan* and *Gertz*. *See id.* at 763. Additionally, the Court has suggested that the status of the defendant as a media entity might influence the standard a plaintiff must meet. *See, e.g., id.*; Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986).

[87] Bunker, *supra* note 18, at 598.

[88] *See id.* at 599; Fetzer, *supra* note 26, at 35-86; Douglas E. Lee, *Public Interest, Public Figures, and the Corporate Defamation Plaintiff:* Jadwin v. Minneapolis Star & Tribune, 81 NW. U. L. REV. 318-48 (1987).

[89] 417 F. Supp. 947 (D.D.C. 1976).

[90] *See id.* at 955-56.

[91] *See id.* at 949-50.

[92] *See id.*

[93] *See id.* at 956-57.

[94] *See id.* at 956. Drawing on the rationale of *Time, Inc. v. Firestone*, the court emphasized that "[n]o event in the life of a corporation involves such sacred personal events as marriage and divorce." *Id.*

[95] *Id.* at 957.

[96] *See id.*

[97] 17 Media L. Rep. (BNA) 1481 (Fla. Cir. Ct. 1990).

conditioning business was required to meet the actual malice standard because it was associated with a matter of public concern.[98]

While *Martin Marietta* received immediate attention for its "boldness,"[99] many courts openly rebuffed its rationale.[100] Nevertheless, subsequent cases began to further scrutinize corporate defamation plaintiffs. In *Steaks Unlimited, Inc., v. Deaner*,[101] the Third Circuit Court of Appeals appeared to take the *Martin Marietta* approach seriously, citing the case without adverse comment.[102] *Steaks* involved a corporate meat distributor that conducted a four-day beef sale at area department stores that included a large advertising budget.[103] A local television station aired reports charging the distributor with misrepresentation.[104] Like *Martin Marietta*, the *Steaks* court emphasized that broad policy concerns are involved with corporate defamation plaintiffs:

> In recent years, there has been an increase in consumer interest and awareness. Consumer reporting enables citizens to make better informed purchasing decisions .... Application of the public figure rule to sellers such as Steaks, which through advertising solicit the public's attention and seek to influence consumer choice, therefore serves the values underlying the First Amendment by insulating consumer reporters and advocates from liability unless they have abused their positions by knowingly or recklessly publishing false information.[105]

Because of its own behavior, therefore, the corporation had "injected itself into a matter of public interest."[106] Accordingly, the court held that the plaintiff was a public figure for purposes of the "controversy" that resulted from its large-scale advertising campaign.[107]

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[98] *See id.*

[99] *See* Fetzer, *supra* note 26, at 74.

[100] *See, e.g.*, Trans World Accounts, Inc., v. Associated Press, 425 F. Supp. 814 (N.D. Cal. 1977); Vegod Corp. v. ABC, 603 P.2d 14 (Cal. 1979), *cert. denied*, 449 U.S. 886 (1980).

[101] 623 F.2d 264 (3d Cir. 1980).

[102] *See id.* at 274 n.47.

[103] *See id.* at 266-68.

[104] *See id.*

[105] *Id.* at 280.

[106] *Id.* at 274.

[107] *See id.* The lower court, as well, emphasized that Steaks Unlimited had voluntarily involved itself in a large-scale steak sale, which was a matter of public interest, by its widespread advertising and its management of the sale. By inviting the public's attention to the sale, plaintiff thrust itself into the vortex of any public comment regarding its management of an unusual, large-scale sale involving the public's health.

Following *Steaks*, the majority of decisions have interpreted *Gertz* strictly.[108] These courts have held that there must be a nexus between the subject of self-promotion and the subject of the defamation suit. Therefore, advertising itself does not automatically make a corporation a public figure.[109] In *Blue Ridge Bank v. Veribanc, Inc.*,[110] the Fourth Circuit held that a bank was not a public figure because its promotional activities were not linked to a specific subject of defamation, though the bank had engaged in extensive advertising.[111] Correspondingly, the court in *National Life Insurance Company v. Phillips Publishing, Inc.*[112] held that a corporation was a public figure because the subject of its advertising (good financial health) was the same as the subject of the defamation suit (allegations that the corporation was a poor investment).[113] In contrast, some courts have applied *Gertz* more flexibly, determining that voluntary publicity may result in public figure status.[114] For example, in *Sunshine Sportswear & Electronics, Inc. v. WSOC Television, Inc.*,[115] the court found an electronics store to be a public figure because of its extensive advertising.[116]

Steaks Unlimited, Inc. v. Deaner, 468 F. Supp. 779, 784 (W.D. Pa. 1979).

[108] *See* Bunker, *supra* note 18, at 600 ("Of twenty reported cases identified in the period under study [1988-1993] . . . thirteen cases adopted a stricter approach to the *Gertz* criteria . . . ."); *see, e.g.*, Snead v. Redland Aggregates Ltd., 988 F.2d 1325 (5th Cir. 1993); Contemporary Mission, Inc. v. N.Y. Times Co., 842 F.2d 612 (2nd Cir. 1988), *cert. denied*, 488 U.S. 856 (1988); Schiavone Constr. Co. v. Time, Inc., 847 F.2d 1069 (3d Cir. 1988); Long v. Cooper, 848 F.2d 1202 (11th Cir. 1988); Kroll Assocs. v. City and County of Honolulu, 833 F. Supp. 802 (D. Haw. 1993); Saro Corp. v. Waterman Broad. Corp., 595 So. 2d 87 (Fla. Dist. Ct. App. 1992), *rev. denied*, 604 So. 2d 489 (Fla. 1992); Southern Air Transport, Inc. v. Post-Newsweek, 568 So. 2d 927 (Fla. Dist. Ct. App. 1990); Osborne v. Ottaway Newspapers, Inc., 18 Media L. Rep. (BNA) 2395 (Ky. Ct. App. 1991); New Franklin Enters. v. Sabo, 480 N.W.2d 326 (Mich. Ct. App. 1992); Mich. Microtech v. Federated Publ'ns, 466 N.W.2d 717 (Mich. Ct. App. 1991), *appeal denied*, 438 Mich. 872 (1991); Foothill Fin. v. Bonneville Int'l Corp., 19 Media L. Rep. 1575 (Utah Dist. Ct. 1991). Several scholars have alluded to the general notion of strict and elastic applications of *Gertz*. *See, e.g.*, BRUCE W. SANFORD, LIBEL AND PRIVACY: THE PREVENTION AND DEFENSE OF LITIGATION, § 7.6, 354 (Supp. 1993); Bunker, *supra* note 18, at 600.

[109] *See* Bunker, *supra* note 18, at 601.

[110] 866 F.2d 681 (4th Cir. 1989).

[111] *See id.* at 683.

> Our resolution of this issue does not turn on the extent of defendant's advertising effort and accepts as a fact that Blue Ridge Bank enjoys a relatively high public profile in Floyd County. It is the absence of a correlation between plaintiff's promotional efforts and defendant's publication that is determinative.

Id. at 688 n.10.

[112] 793 F. Supp. 627 (D. Md. 1992).

[113] *See id.*

[114] *See* Bunker, *supra* note 18, at 600.

[115] 738 F. Supp. 1499 (D.S.C. 1989).

[116] *See id.* "Through their extensive advertising, the plaintiffs engaged the public's

Other courts have determined that a corporation is a not a public figure where commercial speech is involved.[117] These courts have held that if the defamatory statements stem from commercial speech, then the corporation is not subject to the actual malice standard. For example, the Third Circuit in *U.S. Healthcare v. Blue Cross of Greater Philadelphia*[118] held that a health insurance company defamed by a competitor's advertisement was not subject to the public figure standard.[119]

Other courts have taken unique approaches to defining the corporate public figure. One court refused to make a distinction between natural persons and corporate plaintiffs altogether. In *Trans World Accounts, Inc. v. Associated Press*,[120] the federal district court refused to distinguish between corporations and individuals for determining public figure status.[121] In *Trans World*, the corporate plaintiff claimed defamation by a published series of Federal Trade Commission reports that alleged wrongful debt collection practices.[122] The court concluded that the plaintiff was a public figure for the limited scope of the issues in the reports.[123] Unlike *Martin Marietta*, the court did not analyze whether the issues in the report were of public interest.[124] More importantly, the court held that this analysis applied to corporate plaintiffs in the same way it would be applied to human plaintiffs, noting that "the distinction between corporations and individuals is one without a difference."[125]

In contrast, one scholar has advocated a "particularized approach" that takes into account the attributes of the corporate plaintiff on a case-by-case basis in order to determine public figure status.[126] An approval of this approach was suggested in

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attention and therefore, assumed the accompanying risk. Just as the plaintiffs had the means to conduct their advertising campaigns, they could have used the same means to refute any criticism they received from the defendants." *Id.* at 1507.

[117] *See* Bunker, *supra* note 18, at 602.

[118] 898 F.2d 914 (3d Cir. 1990).

[119] *See id.* at 933. The court suggested three factors with which to distinguish commercial speech from noncommercial speech. First, "is the speech an advertisement;" second, "does the speech refer to a specific product or service;" third, "does the speaker have an economic motivation for the speech." *Id.* Speech that is deemed commercial is granted less protection under the First Amendment. *See id.* at 932.

[120] 425 F. Supp. 814 (N.D. Cal. 1977).

[121] *See id.* at 819.

[122] *See id.* at 817.

[123] *See id.* at 821.

[124] *See id.* at 819.

[125] *Id.*

[126] *See* Fetzer, *supra* note 26, at 83-84 ("[T]he corporate factor should be a significant and active criterion . . . . The question whether a corporation is a public figure should be determined on a case-by-case basis within the current framework of constitutional privilege.").

Bruno & Stillman, Inc. v. Globe Newspaper Co.[127] In *Bruno*, a large corporate boat manufacturer sued the publisher of the *Boston Globe*.[128] Several *Globe* articles alleged that the corporation had manufactured defective boats.[129] The First Circuit ruled that corporations could not be considered public figures as a class.[130] The court noted that some corporations did not enjoy special advantaged access to the media, and that the selling of a product could not amount to a public controversy.[131] On the other hand, the court noted that some corporations do fit this description.[132] Accordingly, the court reasoned that while commercial conduct could give rise to public figure status in some cases, in this case, the plaintiff was only a "successful manufacturer-merchant" and did not achieve the level of a public figure.[133]

While praising the "particularized approach" of *Bruno*, the court in *Bose Corp. v. Consumers Union of U.S., Inc.*,[134] "went on to model its analysis and result more nearly after the *Steaks* approach to product marketing."[135] In *Bose*, a corporate stereo equipment manufacturer brought a product disparagement suit against the publisher of *Consumer Reports*.[136] The court reasoned that a consumer's interest in obtaining product information significantly outweighed a manufacturer's interest

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[127] 633 F.2d 583 (1st Cir. 1980).

[128] *See id.* at 584.

[129] *See id.* at 585.

[130] *See id.* at 589. The district court, however, supported a per se rule conferring public figure status on corporations. The court argued that corporations were more like *Gertz* public figures than private individuals. Furthermore, corporations had more access to means of communications and had voluntarily subjected themselves to public scrutiny by placing products in the market. The court, therefore, ruled that corporations should be treated as public figures whenever the subject of defamation involved product quality. *See id.* at 585; Fetzer, *supra* note 26, at 78 (describing the First Circuit opinion in *Bruno*).

[131] *See Bruno*, 633 F.2d at 591.

[132] *See id.*

[133] *Id.* at 592. Nevertheless, the court remanded the case in order to establish a fuller record of the plaintiff's activities. The court instructed the lower court to determine "whether the prominence, power, or involvement of the company in respect to the controversy—or its public efforts to influence the results of such controversy—were such as to merit public figure treatment." *Id.*

[134] 508 F. Supp. 1249 (D. Mass. 1981), *rev'd*, 692 F.2d 189 (1st Cir. 1982), *aff'd*, 466 U.S. 485 (1984).

[135] Fetzer, *supra* note 26, at 79.

[136] *See Bose*, 508 F. Supp. at 1250-51. The court held that the *New York Times* standard applied to product disparagement suits as well as defamation suits. *See id.* at 1271. Product disparagement differs only slightly from defamation: both result from the publication of false statements. However, defamation requires injury of an entity's reputation that lowers its esteem, while product disparagement requires injury to a product's reputation that lowers its commercial value. *See generally* Magaziner, *supra* note 72, at 963 (discussing the similarity between corporate defamation and product disparagement). The plaintiff also sued for unfair competition and violation of § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a) (1976). *See Bose*, 508 F. Supp. at 1250.

in its commercial reputation.[137] Moreover, stated the court, a corporation's interest in reputation is not as important as an individual's interest in reputation.[138] Applying the "particularized test" of *Bruno*, the court held that Bose was a "limited-purpose public figure."[139] The court explained that the extensive advertising of Bose boasted of the speaker's uniqueness.[140] The quality of the speaker's sound, therefore, was a matter of public controversy. Bose voluntarily assumed the risk of defamatory speech by choosing to market its product heavily.[141] Therefore, for purposes of the quality of the speaker's sound, Bose was a public figure.[142]

Since *New York Times v. Sullivan*, courts have examined a wide variety of factors in deciding whether corporations are public figures. Courts have looked at a corporation's consent to public attention, its access to channels of communications, its use of advertisement, and the connection between commercial speech and the subject of the defamatory speech. Not surprisingly, these courts have come to a wide variety of conclusions. Courts have found some corporations to be public figures, some not to be public figures, and yet others to be limited-purpose public figures. However, the court in *Martin Marietta* suggested, in dicta, another possibility: *a per se public figure status for corporate plaintiffs*.[143] In other words, corporations, like public officials, should be subject to the actual malice standard as a matter of law. While mostly ignored by scholars and courts, this approach would best protect the constitutional values invoked by *New York Times v. Sullivan*.

III. CORPORATIONS SHOULD BE TREATED AS PER SE PUBLIC FIGURES

A. *First Amendment Interests Are Best Served With General Rules*

Courts have applied a wide variety of factors in determining the status of the corporate defamation plaintiff. Focusing on the similarities of corporations to individual public figures, these tests vary equally in their results. In response, commentators have proposed a series of particularized tests, attempting to take into account the qualities of individual corporate litigants. A general rule, however, more appropriately governs the interests at stake in corporate defamation cases.

Particularized tests require courts to engage in extensive fact-finding. For

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[137] *See Bose*, 508 F. Supp. at 1271.

[138] *See id.* at 1270.

[139] Fetzer, *supra* note 26, at 79.

[140] *See id.* Bose spent over $600,000 on promotional advertising between 1969 and 1979 to promote the new speakers. *See Bose*, 508 F. Supp. at 1273 n.38.

[141] *See Bose*, 508 F. Supp. at 1249.

[142] *See id.*

[143] *See* Martin Marietta Corp. v. Evening Star Newspaper Co., 417 F. Supp. 947, 956 (D.D.C. 1976) ("It would be possible to hold . . . that the malice standard applies to *any* libel action brought by a corporate plaintiff.") (emphasis added).

example, the Fetzer particularized test "involves a detailed, fact-sensitive analysis . . . . [that] calls on the courts to carefully scrutinize corporate plaintiffs—their characteristics, operations and influence—and determine how such factual elements affect the First Amendment and reputational interests at stake."[144] The public figure presumption proposed by Professor Bunker[145] would also require a detailed analysis of each corporate litigant—litigating the issue of whether the corporation should be considered a public figure.

These approaches create several problems. First, particularized tests create unpredictable rules. Requiring the weighing of many factors and values means that courts will decide these issues in many different ways. Unpredictability means that litigants will not be able to act in reliance on well-supported expectations. This leads, inevitably, to a greater amount of litigation and to less uniform standards across jurisdictions.[146] Consequently, citizen activists will not be able to rely effectively on precedent since each corporate plaintiff faces potentially different burdens of proof.

Adding to this unpredictability is the difficulty and complexity of the issues involved. Seeking to define slippery concepts, public figure analysis has yielded widely varying results. For example, in *Time, Inc. v. Firestone*,[147] the Court split considerably over whether the wife of a famous businessperson was a public figure.[148] In *Dun & Bradstreet v. Greenmoss Builders*,[149] the Court split on the question of whether credit reporting is a matter of public concern.[150] In comparison, public official defamation cases, utilizing a per se approach to plaintiff status, have yielded a more consistent and predictable body of law.[151]

Second, a particularized approach allows more defamation cases to proceed past the pleading stage. The primary goal of corporations in SLAPP litigation is to exhaust citizens by bringing them to court.[152] Corporations can more easily fulfill this goal if courts are required to first examine the public figure status of each

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[144] Fetzer, *supra* note 26, at 86.

[145] *See* Bunker, *supra* note 18.

[146] Courts also have a general interest in efficiency. *See* FED. R. EVID. 102 ("These rules shall be construed to secure . . . elimination of unjustifiable expenses and delay."). For example, courts seek rules that eliminate unnecessary collateral issues. *See, e.g.*, Mo.-Kan.-Tex. R.R. v. McFerrin 291 S.W.2d 931, 940 (Tex. 1956) (reasoning that the inconvenience to the court of exploring a collateral matter outweighs its probative value).

[147] 424 U.S. 448 (1976).

[148] *See id.*

[149] 472 U.S. 749 (1985).

[150] *See id.*

[151] *See generally* CLIFTON O. LAWHORNE, DEFAMATION AND PUBLIC OFFICIALS: THE EVOLVING LAW OF LIBEL (1971) (discussing the historical evolution of civil libel suits instituted by public officials).

[152] *See supra* notes 18-21 and accompanying text.

corporation that files a defamation suit.[153] Alternatively, a per se public figure rule means that less corporate plaintiffs can validly sue for defamation since only the most serious corporate criticism may proceed to trial. Under a general rule, citizen activists can speak confidently knowing that their criticism cannot be challenged unless it is made with "knowledge that it [is] false or with reckless disregard of whether it [is] false or not."[154]

Finally, particularized tests run counter to the principles of First Amendment jurisprudence. The Supreme Court has stated its desire for a "broad rule of general applicability" even if it "necessarily requires treating alike cases that involve differences as well as similarities."[155] While particularized rules may be appealing in the precision with which they fit individual cases, First Amendment rules also function to demonstrate fundamental constitutional principles. As one constitutional scholar describes this conflict, "[t]he principal defect of all law is at the same time its most essential and most valuable characteristic—its generality."[156] While conceding this disadvantage, a general rule governing corporate defamation best serves the First Amendment interests at stake. Courts can more easily create rules that describe constitutional principles. Citizen activists can act under an appropriate level of free speech protection, understanding the predictable limits within which they must act. Moreover, corporate plaintiffs are properly disallowed from using the defamation tort to harass and threaten those who disagree with their policies.

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[153] If a case is not dismissed on summary judgment, a defendant's costs increase enormously. *See* David A. Hollander, *The Economics of Libel Litigation*, *in* THE COSTS OF LIBEL: ECONOMIC AND POLICY IMPLICATIONS 278 n.27 (Everette E. Dennis & Eli M. Noam eds., 1988). While a defendant can respond to a complaint for under $5,000, a relatively uncomplicated case may cost over $250,000 to defend through trial. *See id.*

[154] N.Y. Times v. Sullivan, 376 U.S. 254, 279-80 (1964).

[155] Cox Broad. Corp. v. Cohn, 420 U.S. 469, 499-500 (1975) (Powell, J., concurring).

[156] CHARLES HOWARD MCILWAIN, CONSTITUTIONALISM, ANCIENT AND MODERN 33 (1940). The inherent generality of constitutional governance is perhaps its most familiar and long-standing quality of criticism. *See id.* The earliest of political thinkers were familiar with this problem:

> The law cannot comprehend exactly what is noblest or more just, or at once ordain what is best, for all. The differences of men and actions, and the endless irregular movements of human things, do not admit of any universal and simple rule. No art can lay down any rule which will last forever . . . . A perfectly simple principle can never be applied to a state of things which is the reverse of simple.

Id. (quoting PLATO'S POLITICUS).

B. *Corporations Have Diminished First Amendment Interests*

1. Minimal Reputational Harm

Corporate plaintiffs should be treated as per se public figures because they suffer minimal harm to their reputations. Defamation law is based primarily on the interest of protecting reputations. Corporations, by their nature, do not have as high an interest in their reputation as do private individuals.

Defamation law is designed to protect reputation "in the popular sense," that which diminishes "the esteem, respect, goodwill or confidence in which the plaintiff is held."[157] The traditional definition of reputation, however, concerns the personal and emotional consequences of false speech.[158] In *Gertz*, the Court stated explicitly that defamation law exists to protect "the essential dignity and worth of *every human being*."[159]

Corporations are incapable of suffering the reputational injury that defamation law seeks to redress. The corporation is a "artificial being . . . existing only in contemplation of law."[160] A corporation does not have social relationships and cannot suffer the same emotions that a natural person may suffer.[161] They do not have a private life.[162] Nor do they have a purely personal reputation.[163] Moreover,

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[157] PROSSER, *supra* note 26, § 111, at 739.

[158] *See id.* Damage to the reputation is defined as that which excites "adverse, derogatory or unpleasant feelings or opinions against [the plaintiff]. It necessarily . . . involves the idea of disgrace." *Id.*

[159] Gertz v. Welch, Inc., 418 U.S. 323, 341 (1974) (emphasis added).

[160] Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 536 (1819) (opinion of Marshall, J.). "Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence." *Id.*

While partnerships are generally viewed as extensions of individual ownership, corporations may be regarded as distinct entities from their owners. *See* HENN, *supra* note 80, at § 79, 108. A corporation is "an artificial person composed of natural persons; and, regardless of choice of legal theory, from the point of view of legal relationships, has group interests more or less distinguishable from the individual interests of its individual members." *Id.* This distinction is apparent in the unique attributes afforded to corporations: limited liability, perpetual life, separation of management and control, and liquidity of ownership interests. *See id.* at §§ 68-77, 79.

[161] *See* Fetzer, *supra* note 26, at 52. "The business corporation has no personality, no dignity that can be assailed, no feelings that can be touched. Since it cannot suffer physical pain, worry or distress, it cannot lie awake nights brooding about a dafamatory article." ROBERT H. PHELPS & E. DOUGLAS HAMILTON, LIBEL: RIGHTS, RISKS, RESPONSIBILITIES 80 (rev. ed. 1978).

[162] *See, e.g.*, Golden Palace, Inc. v. NBC, 386 F. Supp. 107, 109 (D.D.C. 1974); DiGiorgio Fruit Corp. v. AFL-CIO, 215 Cal. App. 2d 560, 570-72 (1963).

[163] *See, e.g., id.*

the reputation of a corporation is not directly attributable to any natural person. The separation of management control and shareholder ownership "place[s] the shareholder at a greater emotional and legal distance from an allegedly defamatory publication concerning the corporation."[164] In essence, corporations do not have a "character to be affected" by defamation.[165]

While they cannot be personally harmed, corporations may have a property interest in their reputations, an intangible asset akin to good will.[166] At common law, a corporation can recover for insults to its reputation for "financial soundness, efficiency, credit, management, or other matters affecting business reputation."[167] Corporations may stand to lose substantial amounts of wealth if their corporate name is tarnished.[168] The concept of reputation as a property interest, however, is problematic in the defamation law context. First, the Supreme Court has been unwilling to recognize a heightened constitutional interest based on that party's economic position.[169] Second, because defamation law is based on personal

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[164] Fetzer, *supra* note 26, at 54. This understanding is reflected in the law's distinction between defamation of a corporation and defamation of a shareholder or officer. *See id.*; *see also supra* note 76 and accompanying text.

[165] Reporters' Ass'n of Am. v. Sun Printing & Publ'g Ass'n, 79 N.E. 710, 711 (1906).

[166] *See* I.A. DEWING, THE FINANCIAL POLICY OF CORPORATIONS 285 (1953) (defining goodwill as a property right).

[167] Fetzer, *supra* note 26, at 53; *see also* Diplomat Elec., Inc., v. Westinghouse Elec. Supply Co., 378 F.2d 377, 382-83 (5th Cir. 1967); Maytag Co. v. Meadows Mfg. Co., 45 F.2d 299, 302 (7th Cir. 1930).

[168] The economic effect of public opinion is a major consideration for the corporation: It is not just management psyches that are affected by negative corporate images. Firms are also affected in more conventional ways by hostile public opinion generated by adverse publicity. They justify the large sums that most of them spend on public relations principally by the rationale that a favorable public image is good for sales.

RUSSELL B. STEVENSON, JR., CORPORATIONS AND INFORMATION 141 (1980).

[169] *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 659 (1969) (Harlan, J., dissenting) (refusing to consider "wealth" a suspect classification for equal protection analysis).

The Court has considered economic status, however, in its analysis of criminal procedural rights. *See, e.g.*, Ake v. Oklahoma, 470 U.S. 68, 78 (1985) (deciding that the state must provide psychiatric evaluations to indigent defendants whose sanity is in question); Bearden v. Georgia, 461 U.S. 660, 665 (1983) (holding that the state may not revoke an indigent defendant's probation for failing to pay a fine). Differing treatment based on wealth, however, has been justified under a "noncomparative right" analysis: all defendants are entitled to a minimal level of procedural protection regardless of their economic status. *See Kenneth W. Simons, Equality as a Comparative Right*, 65 B.U. L. REV. 387, 470-71 (1985). The Court has not been willing to consider economic status once basic procedural protections are no longer at issue. *See id.* at 470-72; *see, e.g.*, Ross v. Moffitt, 417 U.S. 600 (1974) (rejecting an indigent defendant's claim of a right to court-appointed counsel for the purpose of discretionary appeals).

In light of this jurisprudence, it would be inappropriate to consider a defamation

reputational interests, it allows for a "substantial verdict for the plaintiff without any proof of actual harm to reputation."[170] A corporate plaintiff thus puts "defamation law in the business of compensating individuals for harms which, from the perspective of reputation as property, may well be nonexistent."[171] Third, unfair trade practices, product disparagement suits, and market controls diminish the chances of corporate loss to reputation.[172] Finally, corporations have unique access to the channels of communication in order to launch countervailing speech in response to defamatory falsehoods.[173]

Because the reputation of a corporation is not the same type of reputation as that of a natural person, defamation law is not well-served by treating personal and

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plaintiff's economic interest in determining the standard of review. First, defamation puts protection of reputation at issue, not the protection of fundamental procedural rights. Second, the Court has created heightened protections to remedy unfairness to poor litigants, not to expand benefits for the wealthy. Finally, a defamation plaintiff's financial considerations are properly left to the question of damages, not to the scope of underlying liability.

[170] LAURENCE H. EDREDGE, THE LAW OF DEFAMATION § 95, at 537 (1978); *see, e.g.*, Melton v. Bow, 247 S.E. 2d 100, 101 (Ga. 1978), *cert. denied*, 439 U.S. 985 (1978) (stating that the plaintiff "had no burden to prove that his reputation had been damaged .... The law infers injury to his reputation").

[171] Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 677, 697 ("[T]he concept of reputation as property is deeply inconsistent with important doctrines of common law defamation.").

[172] A recent example involves the ever-important debate over which corporation uses the best pizza ingredients. *See* Pizza Hut, Inc., v. Papa John's Int'l, Inc., 80 F. Supp. 2d 600 (N.D. Tex. 2000), *rev'd and vacated*, No. 60-10071, 2000 WL 1346149 (5th Cir. Sept. 19, 2000).

[173] "The corporation's natural immunity from certain types of reputational injury has been enhanced by" a recognition of "a corporate right to 'speak out' on a range of issues." Fetzer, *supra* note 26, at 54; *see, e.g.*, Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n, 447 U.S. 530 (1980) (holding that restrictions on corporate speech must result from a compelling state interest); First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978) (striking down a Massachusetts statute that restricted the participation of corporations in elections); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (protecting a corporation's right to speak through paid advertisement, reasoning that a speech interest based on a "purely economic" motive is not diminished); Bigelow v. Virginia, 421 U.S. 809 (1975) (recognizing a corporation's constitutional right to commercial speech).

Gertz also defined the public figure as one who possesses "significantly greater access to the channels of effective communication." Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 (1974). Under this analysis, corporations are properly considered public figures. Corporations enjoy greater access to the media due to their economic power. Their "right to speak out" provides that a corporation's communications are protected on a broad range of issues.

corporate reputations as equivalent. As corporations cannot suffer personal reputation injury, "corporations as a class are less deserving of reputational protection than individuals."[174]

2. Incorporation Is a Voluntary Assumption of Risk

The second prong of the *Gertz* public figure test asks whether plaintiffs have voluntarily placed themselves in the public eye, therefore assuming the risk of defamatory falsehoods.[175] The Court reasoned that purposeful activity that makes a plaintiff the object of debate should decrease the ability of the plaintiff to recover.[176] In order to become a corporation, the association must voluntarily incorporate through the state. By taking the purposeful action of operating under a state granted charter, the corporation knowingly assumes the risk of being an object of public debate. Because all corporations fulfill the second prong of *Gertz*, corporations are properly considered per se public figures.

The corporation, as opposed to other forms of organization, holds a status that is voluntarily assumed. Partnerships and sole proprietorships are formed by the mere association of people.[177] Corporations, on the other hand, must be formed according to strict legal requirements set forth by the state of incorporation.[178] Rather than a matter of purely private contracts, compliance with statutory requirements is what gives rise to the legal existence of a corporation.[179]

Incorporation, therefore, is an act that is chosen freely by those who would prefer to assume the corporate form. Simply put, those groups that would prefer to operate as private contractors may do so as partners, but those who wish to take advantage of the additional state benefits of the corporate form may chose incorporation. As one scholar notes:

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[174] Fetzer, *supra* note 26, at 84.

[175] *See* Gertz, 418 U.S. at 345.

[176] *See id.*

[177] Partnerships are created solely by the voluntary actions of the parties rather than by operation of the law. *See, e.g.*, Bartelt v. Smith, 129 N.W. 782, 783 (Wis. 1911) (holding that written articles are not necessary to form a partnership). The arrangement can exist without a formal agreement that describes the relationship. *See* Comm'r v. Tower, 327 U.S. 280, 287 (1946). A partnership is "an association of two or more persons to carry on as co-owners a business for profit . . . ." REVISED UNIF. PARTNERSHIP ACT § 101(6) (1997).

[178] "One or more persons, or a domestic or foreign corporation, may act as incorporator or incorporators of a corporation by signing and delivering in duplicate to the Secretary of State articles of incorporation for such corporation." MODEL BUSINESS CORP. ACT § 53 (1980); *see also* DEL. CODE ANN. tit. 8, §§ 103, 241 (1974). Corporations are subject to "formal statutory requirements concerning filing articles of incorporation, publication of notice, and filing of annual public reports." Fetzer, *supra* note 26, at 61.

[179] *See, e.g.*, State v. Webb, 12 So. 377, 380 (Ala. 1893); Martin v. Deetz, 36 P. 368, 370 (Cal. 1894).

> Regardless of the size of the corporate operation, individuals usually incorporate because of some perceived benefit stemming from the corporate form. Even the smaller entrepreneur—one who might otherwise conduct his business as a sole proprietor or partner—frequently incorporates to obtain the limited liability afforded corporate stockholders or to take advantage of the income tax provisions applicable to corporations. . . . [S]uch "special privileges and franchises" are tantamount to an assumption of the additional risk of government intrusion.[180]

Incorporation is more than a voluntary assumption of corporate status, however; it is also a voluntary assumption of corporate responsibilities. Corporations voluntarily agree to comply with general corporate laws governing business structure, management responsibilities, and shareholder rights.[181] Moreover, corporations are subject to special regulations of their business through control of securities transactions, corporate taxation, antitrust and trade regulations, consumer protection, employment law,[182] and, more recently, foreign and international law.[183] The Supreme Court has stated that a corporation, by its "special nature and voluntary existence, may open itself to intrusions that would not be permissible in a purely private context."[184] Additionally, the Court has stated that corporations may owe different obligations to the public "by virtue of their creation by the state and because of the nature and purpose of their activities."[185] Some scholars have argued that by seeking legislative authority to perform its business as a corporation,

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[180] *See* Fetzer, *supra* note 26, at 62-63.

[181] *See* HENN, *supra* note 80, at § 14.

[182] *See generally* Edwin M. Epstein, *Societal, Managerial, and Legal Perspectives on Corporate Social Responsibility—Product and Process*, 30 HASTINGS L.J. 1287, 1296 (1979).

[183] For example, American oil companies have come under attack for violating the standard of care set forth by the Kyoto Protocol to the U.N. Framework Convention on Climate Change. *See* Janusz Symonides, *The Human Right to a Clean, Balanced, and Protected Environment*, 20 INT'L J. OF LEGAL INFO. 24, 25 (1992).

[184] G.M. Leasing Corp. v. United States, 429 U.S. 338, 353 (1977); *see also* United States v. Morton Salt Co., 338 U.S. 632, 651 (1950) (upholding disadvantageous penalty and reporting provisions of the Federal Trade Commission Act that applied solely to corporations).

[185] United States v. White, 322 U.S. 694, 697-98 (1944); *cf.* HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW, 1836-1937 3 (1991) ("Classical political economy purported to develop rules for evaluating a legal regime's justice or fairness without regard to how its wealth happened to be distributed. As a political and legal doctrine, classicism identified the best regime as the one that maximized total wealth.").

corporations agree to act in the public interest.[186]

Critics of the "state creation" theory argue in favor of a "nexus of contracts" model of corporations.[187] Under this reasoning, corporations exist independent of states, produced voluntarily by individual consent.[188] Articles of incorporation are "mere procedural" requirements much like the filing of marriage certificates.[189] The business arrangement of corporations, so it goes, is no more state created than the personal relationship of marriage.

These critics, nevertheless, confuse the existence of a physical association with the existence of a legal entity. While business people may freely combine their resources as a matter of association, it is not until the state has consented that the association becomes a corporation—a legal entity. Unlike marriages, corporations cannot exist independent of the state. Unlike corporations, couples may enjoy at least some types of marriage without state consent and are constitutionally protected from state-imposed divorce. To the degree that a legal marriage depends on state consent, a "legally married" status is also a creation of the state. Arguments against the wisdom of the state created marital status, however valid, nevertheless fail to negate the existence of the state-created corporate status.

In order to exist as a corporation, an association must incorporate. Incorporation is the voluntary agreement to follow the additional regulations and legal requirements under which the association must operate. Further, incorporation involves an assumption of greater public accountability and responsibility. By taking this purposeful activity, the corporation voluntarily places itself in the public eye, and assumes the risk of possible defamatory falsehoods. The corporation, therefore, is most appropriately a public figure under *Gertz*. Because all corporations meet this test, by virtue of their status, the corporation is properly considered a per se public figure.

3. Corporations Fulfill a Public Role

Underlying *New York Times* is the rationale that speech directed at public actors deserves greater protection. This reasoning is rooted in two propositions. First, that government functions best when it broadly allows for dissenting opinions, knowing that some communications may be false. Second, those in the public arena, entrusted with power, require greater accountability. These propositions form the

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[186] *See* Nader & Green, *The Case for Federal Charters*, THE NATION, Feb. 5, 1973, at 173-75.

[187] FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 12 (1991).

[188] *See id.*

[189] *See* Robert Hessen, *A New Concept of Corporations: Contractual and Private Property Model*, 30 HASTINGS L.J. 1327, 1337-38 (1979).

basis for the public official privilege and the *Gertz* public figure test. A complete analysis of the corporate defamation plaintiff, therefore, should consider to what extent corporations are public. The corporation's inherent public character and power dictate that corporations be subject to a higher level of scrutiny as defamation plaintiffs.

An examination of the history and purpose of the corporate charter illustrates its public role. Indeed, the "corporation is more 'public' in terms of its origin and obligations than any other significant business forms."[190] Originally, the corporation existed as an extension of the government,[191] deriving its authority directly from the state.[192] Early corporations were given charters for a definite number of years, and their charters were frequently revoked.[193] Moreover, corporations were limited in scope to public purposes. As one scholar describes:

> America's earliest business corporations, established at the end of the eighteenth and beginning of the nineteenth century, were founded for public service objectives, such as improving overland transportation through the establishment of turnpikes, stagecoach companies, and bridges; encouraging inland water transportation through the building of canals; the safeguarding of public safety through the creation of water companies and insurance corporations; providing a reliable source of credit and currency by forming urban money banks and rural land banks; and, finally, establishing, manufacturing corporations to both stimulate the domestic economy and free it of dependence on British and other foreign industry. Public service and profit seeking were compatible in early American corporations.[194]

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[190] Fetzer, *supra* note 26, at 60.

[191] A corporation is "an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence." Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 636-38 (1819).

[192] *See* Richard Grossman, *Revoking the Corporation*, 11 J. ENVTL. L. & LITIG., 141, 145 (1996) ("It was a *quo warranto* hearing—where the people demanded to know, literally, *by what authority* has this subordinate entity taken . . . an action? And if this entity was adjudged to have acted beyond its authority, it was declared *ultra vires*; it was beyond the authority.").

[193] *See* ROBERT BENSON, CHALLENGING CORPORATE RULE, 41-42 (1999); *see also* Liggett Co. v. Lee, 288 U.S. 517, 541 (1933) (Brandeis, J., dissenting).

[194] Epstein, *supra* note 182, at 1308-09. Observing this philosophy, Alexis de Tocqueville noted that "Americans of all ages, all conditions and dispositions constantly form associations" for the good of society. II ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 114 (Random House ed. 1954).

During the nineteenth century, states began enacting general charter laws, precipitating a loosening of government control on corporate power.[195] These economic advantages encouraged large aggregations of capital to operate in the corporate form.[196] State and federal governments attempted to restrain corporate action instead through direct legislation and administrative regulation.[197] Nevertheless, the corporation has enjoyed considerable growth in power and influence.[198]

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[195] *See* BENSON, *supra* note 193, at 42-43. Observing this "race to the bottom," Justice Brandeis remarked:

> The removal of the leading industrial States of the limitations upon the size and powers of business corporations appears to have been due, not to their conviction that maintenance of the restrictions was undesirable in itself, but to the conviction that it was futile to insist upon them; because local restriction would be circumvented by foreign incorporation. Indeed, local restriction seemed worse than futile. Lesser states, eager for the revenue derived from the traffic in charters, had removed safeguards from their own incorporation laws. Companies were early formed to provide charters for corporations in states where the cost was lowest and the laws least restrictive. The states joined in advertising their wares. The race was one not of diligence but of laxity.

Liggett, 288 U.S. at 557 (1933) (Brandeis, J., dissenting).

Some have argued that this movement was a "race to the top," since deregulation led to higher profits. *See* Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251, 254-56 (1977). Nevertheless, "profit data do not show a causal link between the removal of controls and higher profits. More importantly, the data ignore the increase in usurpation of ungranted powers, corporate lawlessness, anti-social and undemocratic behavior as states let go of the reins." BENSON, *supra* note 193, at 43.

[196] Corporate law became "the source of nearly all great enterprises." Hale v. Henkel, 201 U.S. 43, 76 (1906); *see* McKinley v. Wheeler 130 U.S. 630, 633 (1889) ("[N]early all great enterprises, for the prosecution of which large expenditures are required, are conducted by corporations. They occupy in such cases almost all branches of industry, and prosecute them by means of united capital of their members with increased success.").

[197] *See* BENSON, *supra* note 193, at 44. Scholars have disputed whether governments have been successful in bounding corporate behavior. By "financing two-party-only elections, and by direct lobbying, the business community has for years generally dominated legislators and captured administrative agencies." *Id.* Moreover, ineffective controls may minimally alter corporate behavior while simultaneously serving corporate political goals. For example, Richard Olney, President Grover Cleveland's Attorney General, argued to railroad executives that regulation of their industry would "be of great use" to their companies because it could "satisfy the popular clamor for government supervision of railroads, at the same time that the supervision is almost entirely nominal." *Id.* (quoting KENNETH CULP DAVIS, ADMINISTRATIVE LAW TEXT 6 (3d ed. 1972)).

[198] In 1987, corporations reporting earnings of $500,000 or more "constitute[d] only about 5% of the total number of business enterprises, but account[ed] for roughly 87% of earnings from all business." MICHAEL P. DOOLEY, FUNDAMENTALS OF CORPORATION LAW 22 (1995). Presently, one-half of the 100 largest economies in the world are corporations,

With the growth of corporations "has come a greater resemblance to public sectors of power"[199] and an increasing difficulty in distinguishing between public and private forms of power.[200] Likened to a "mini-state,"[201] scholars have commented on the nature of corporate power:

> Prominent analysts like A. A. Berle, Walton Hamilton, Robert Dahl, John Kenneth Galbraith, Earl Latham, Richard Ells, and Arthur S. Miller have correctly perceived the largest corporations to be more like private governments. "The corporate organizations of business," wrote Columbia Professor Wolfgang Friedman, "have long ceased to be private phenomena. That they have a direct and decisive impact on the social, economic, and political life of the nation is no longer a matter of argument."[202]

Even the United States Chamber of Commerce has stated that "business can no longer regard its activities as being in the 'private sector' while government operates in the 'public sector.'"[203]

The actual malice standard works to provide a check on sources of power. The

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and 500 corporations control 70% of global trade. *See* BENSON, *supra* note 193, at 46 ("[Corporations] have the power to run or ruin foreign economies, topple foreign governments, uproot cultural traditions overnight, threaten whole races of indigenous peoples, and destroy the global biosphere upon which the survival of future generations depends."). *See generally* DAVID C. KORTEN, WHEN CORPORATIONS RULE THE WORLD (1995).

[199] Fetzer, *supra* note 26, at 63; *see supra* note 55.

[200] *See supra* note 55; *see, e.g.*, Cox Enter., Inc., v. Carrol/City County Hosp. Auth., 247 Ga. 39 (1981) (holding that a "public body corporate" is a governmental entity). The business community has sometimes encouraged the association of private sources of power as performing a public role. In 1953, Charles Wilson, president of General Motors and President Eisenhower's nominee to be Secretary of Defense famously asserted that "what was good for our country was good for General Motors, and vice versa." Martin H. Redish and Howard M. Wasserman, *What's Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 GEO. WASH. L. REV. 235, 235 (1998) (quoting *Excerpts from Two Wilson Hearings Before Senate Committee on Defense Appointments*, N.Y. TIMES, Jan. 24, 1953, at A8). "On at least one level, however, Wilson was recognizing an indisputable fact of modern political life: whatever the government does will inescapably have an immeasurable impact on the health and welfare of the private corporate world and vice versa." *Id.*

[201] Fetzer, *supra* note 26, at 63; *see, e.g.*, RALPH H. NADER, TAMING THE GIANT CORPORATION 17 (1976); LEE E. PRESTON & JAMES E. POST, PRIVATE MANAGEMENT AND PUBLIC POLICY: THE PRINCIPLE OF PUBLIC RESPONSIBILITY 151 (1975).

[202] *See* NADER & SMITH, *supra* note 6, at 17.

[203] CHAMBER OF COMMERCE OF THE U.S., THE CORPORATION IN TRANSITION—REDEFINING ITS SOCIAL CHARTER 1-2 (1973).

rationale for a heightened standard for public officials is based on the idea that government power must be carefully scrutinized to prevent corruption and abuse.[204] The reputation of persons associated with public service, thus, is considered minimal in recognition of the importance of speech on matters of public interest.[205] Correspondingly, "the laws for libeling public officials have been narrowed consistently as the people's right to know about their government and to discuss their governors has been broadened." [206]

In a free market economy, it is equally important to check the corruption and abuses of private forms of power. As the Supreme Court has noted:

> So long as we preserve a predominately free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.[207]

Maximizing this flow of information demands greater protection for potentially defamatory speech involving corporations. This concern is especially important in the context of SLAPPs, since the object of the suit is to quelch the dissemination of information important to public decision-making. Speech critical of corporations gives citizens key information on goods and services and helps define consumer preferences. Moreover, consumer safety may depend on an informed public. Finally, controlling corporate action though the product market depends on an educated populace. Citizens must be free to engage in critical speech if the "aggressive coverage of corporations is to be encouraged."[208]

In response to a heightened standard for corporate litigants, corporate theorists raise several objections. First, critics contend that not all corporations are large and powerful.[209] The corporation, they argue, exists in differing sizes and for varying

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[204] *See* Vincent Blasi, *The Checking Value in First Amendment Theory*, A.B.A. RES. J. 521-649 (1977).

[205] *See* Fetzer, *supra* note 26, at 63. Professor Tribe points out that "[o]ne teaching of *New York Times v. Sullivan* is that reputational interests are attenuated for persons who become affiliated with government exactly because government itself, unlike individuals, has no legitimate reputational interest: government cannot be defamed." LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 643 (1978).

[206] LAWHORNE, *supra* note 151, at 265.

[207] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976); *see also* Dun & Bradstreet v. Greenmoss Builders, Inc., 472 U.S. 749, 787 (1985) ("Speech about commercial matters, even if not directly implicating 'the central meaning of the First Amendment' . . . is an important part of our public discourse.") (Brennan, J., dissenting) (citation omitted).

[208] Bunker, *supra* note 18, at 602.

[209] *See* DOOLEY, *supra* note 198, at 22 ("The emphasis on economic power should not

purposes and may not necessarily exert large social power.[210] Corporations are, nevertheless, generally the form of association of greatest economic power. More importantly, the heightened requirement for corporate plaintiffs does not require that all, or even most, corporations be socially powerful. A per se public figure status is appropriate because it functions well as a general rule. That a per se standard may work less well for smaller corporations may be disagreeable in certain instances, but is nevertheless justified because of its value in most cases. The Court undoubtedly understood this in *New York Times*. The per se standard applied to all public officials, acknowledging that not all public officials are socially powerful. The standard applies equally to college football coaches as it might to the President of the United States. In addition, it is notable that the plaintiff in *New York Times* was a small-town sheriff, a public official who may have been less powerful than most modern corporations. That some corporations are not socially powerful, therefore, should not preclude a per se rule for corporate plaintiffs.

Second, critics might assert that the corporation should be held to the same level of accountability as the individual since ultimately it is composed of individuals. Corporate wealth, they argue, is purely private, simply an extension of individual property defined by contract. This argument, however, fails to consider that corporate wealth, at least partially, is the product of government activity. Businesses are able to amass large amounts of wealth because they utilize the corporate form, a legal status endowed by the state. Moreover, this improved capacity creates an economic comparative advantage for corporations since they compete with individuals who do not benefit from a corporate status. The Supreme Court has noted the "corrosive and distorting effects of immense aggregations of wealth that are accumulated *with the help of the corporate form* . . . ."[211] The corporate legal status is a grant of power, requiring a commensurate level of accountability.

A per se public figure status for the corporate defamation plaintiff fulfills the

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obscure the fact that corporations come in many sizes, whether measured by number of shareholders and employees, extent of assets or amount of earnings and income."). As of 1987, 50.4% of corporations held less than $100,000 in assets. *See id.*

[210] *See* Epstein, *supra* note 182, at 1288-90. Corporations may exist as non-profit associations, public bodies, professional groupings, neighborhood businesses, or as multinational companies. *See id.* Epstein argues:

> Although all of these entities are engaged in the production and distribution of socially useful goods and services, each performs a very different social task, has different constituencies, affects widely divergent sectors of the public, has different human and capital resources, and poses substantially different issues of corporate power and accountability. "Corporateness" per se therefore indicates very little about an institution's social role and responsibilities.

Id. at 1289.

[211] Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 660 (1990) (emphasis added).

underlying goals of *New York Times*. A per se rule provides the breathing room necessary for critical opinions on issues of public power. Such a rule recognizes that the historic rationale of the corporation is to encourage activity fulfilling a public purpose. Further, a per se rule acknowledges the heightened economic and social power of modern corporations. Finally, such a rule understands that corporations have come to resemble public sources of power and that corporations should face a commensurate level of accountability.

CONCLUSION

Defamation law balances two important interests, an endeavor made no less onerous in the context of the corporate defamation plaintiff. First, defamation law seeks to protect reputation, which for the corporation, is a valuable property interest. Second, defamation law recognizes the interest of free speech, acknowledging the heightened concern for communications involving public officials and public figures.

The corporate plaintiff brings a unique set of concerns to the task of balancing these interests. First, the corporate interest in reputation is low. Defamation law seeks to protect personal and emotional damage to reputation, a concern that is uniquely human. Defamation law is not well-suited to protect the corporate reputation, as this concern is solely a property interest. Second, through the act of incorporating, the corporation voluntarily assumes the risk of defamatory falsehoods. By seeking a privileged legal status through the state, the corporation takes a position in the public eye, subjecting itself to a greater level of public scrutiny. Third, the corporation fulfills a public role. The modern corporation is a large economic, political, and social force. The expansion of corporate authority has blurred the distinction between public and private sources of power. In order to provide effective accountability, speech involving the corporation carries a heightened speech interest. The law must allow breathing space for a free expression of ideas, an accomplishment requiring that some defamatory falsehoods be tolerated.

A per se public figure status for the corporate plaintiff properly balances the interests of reputation and speech. Corporations may protect their reputations in cases where they can show actual malice (knowledge or reckless disregard of the falsity of the defamatory statements). At the same time, citizen activists are able to participate under a lowered threat of SLAPP suits. Creating a higher standard for corporate plaintiffs, a per se status means that fewer SLAPPs will succeed at trial. A lowered likelihood of success means that more SLAPPs will be dismissed at the pleading stage, undermining the threat of protracted legal expenses. Furthermore, a per se standard allows more opportunity to levy sanctions against corporations for filing frivolous suits. Most importantly, a per se rule creates a predictable level of

protection for citizen activists, thus providing the necessary breathing space for healthy public debate.

Finally, a per se public figure status accords with our essential notions of human dignity. As a constituted people, we have affirmed the belief that the right to speak is fundamental. Bound by the covenant that our government "shall make no law . . . abridging the freedom of speech,"[212] we must diligently protect this right, even in the face of competing concerns. An unencumbered liberty to search for truth animated the first principles of our people; its continued promise breathes life into our constitutional order.

D. MARK JACKSON

[212] U.S. CONST. amend. I.