

# Defamation and the Government Employee: Redefining Who Constitutes a Public Official

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## INTRODUCTION

With its decision in *New York Times Co. v. Sullivan*, the United States Supreme Court created critical free speech protections by imposing upon public officials a requirement to demonstrate actual

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malice in order to recover for defamatory comments related to their official conduct.<sup>1</sup> However, in doing so, the Court declined to indicate which government employees constituted public officials to whom these restrictions would apply.<sup>2</sup> In subsequent cases, most notably *Rosenblatt v. Baer* (1966)<sup>3</sup> and *Hutchinson v. Proxmire* (1979),<sup>4</sup> the Supreme Court defined public officials in a manner suggesting exclusion of lower-level government employees.<sup>5</sup> As a consequence, the speech-protective actual malice standard does not apply to a citizen's comments about the actions of lower-level government employees in their official capacity.

This Article argues for reconsideration of this approach, asserting that speech about the action and inaction of lower-level government employees in their official capacity should be protected under the First Amendment. Defining public officials in a manner that excludes lower-level government employees is inconsistent with the Court's rationale in *New York Times Co. v. Sullivan*. Furthermore, even assuming that exclusion of lower-level government employees was ever proper, such exclusion is no longer tenable for four reasons. One, a dramatic transformation in understanding of the actual operation of the administrative state, which occurred after *Rosenblatt* and *Hutchinson*, has evinced the important role that lower-level government employees play in policy-making, governance, and public perception thereof. Two, social and technological changes have substantially effaced the justifications for states being able to protect lower-level government employees from scrutiny. Three, jurisprudential changes in how courts apply part of the defamation framework have undermined a critical conceptual basis for distinguishing lower-level government employees from their higher-level counterparts. Four, the failure to protect speech about the official conduct of lower-level government employees creates

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1. See 376 U.S. 254, 279–80 (1964); see also, e.g., *Walker v. Associated Press*, 417 P.2d 486, 489 (Colo. 1966) (“In the *New York Times Company* case the Supreme Court of the United States rather severely limited the right of public officials to recover for libelous newspaper articles by holding that the constitutional safeguards regarding freedom of speech and press require that a public official in a libel action against a critic of his official conduct must show actual malice on the part of such critic before the public official can make any recovery . . . .” (emphasis omitted)).

2. *Sullivan*, 376 U.S. at 283 n.23; see also Andrew L. Turscak, Jr., Note, *School Principals and New York Times: Ohio's Narrow Reading of Who Is a Public Official or Public Figure*, 48 CLEV. ST. L. REV. 169, 172 (2000) (“Although *New York Times* established the rule that a public official must prove actual malice in order to recover for a defamatory falsehood, the Court did not define who is a ‘public official,’ or even issue rough parameters for determination.”).

3. 383 U.S. 75 (1966).

4. 443 U.S. 111 (1979).

5. See *infra* Part III.A (describing the inconsistencies with the rationale of *New York Times Co. v. Sullivan*).

significant and troubling dissonance in the Supreme Court's First Amendment jurisprudence.

To understand these issues, it is helpful to begin with the *New York Times Co. v. Sullivan* case, which was "about as easy to resolve as a landmark decision could be."<sup>6</sup> Responding to a civil rights movement fundraising advertisement that criticized the Montgomery Police Department in the pages of the *New York Times*,<sup>7</sup> Montgomery County Commissioner L.B. Sullivan<sup>8</sup> and the Alabama political establishment<sup>9</sup> seized upon minor factual errors therein<sup>10</sup> as part of a brazenly

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6. John C.P. Goldberg, *Judging Reputation: Realism and Common Law in Justice White's Defamation Jurisprudence*, 74 U. COLO. L. REV. 1471, 1478 (2003).

7. On March 29, 1960, the *New York Times* published a page-length editorial advertisement entitled *Heed Their Rising Voices*, which had been created by civil rights leaders A. Philip Randolph and Bayard Rustin. KENNETH C. CREECH, *ELECTRONIC MEDIA LAW AND REGULATION* 331 (5th ed. 2007); LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 304 (2000). The advertisement, which listed eighty prominent endorsers, was an appeal to raise money to assist Dr. Martin Luther King, Jr. with legal fees incurred in the civil rights struggle. *Heed Their Rising Voices*, N.Y. TIMES, Mar. 29, 1960, at 25; POWE, *supra*, at 304–05. The advertisement included minor factual errors regarding the conduct of Montgomery police officers. SUSAN DUDLEY GOLD, *NEW YORK TIMES CO. V. SULLIVAN: FREEDOM OF THE PRESS OR LIBEL?* 19 (2007).

8. L.B. Sullivan was one of three elected County Commissioners for Montgomery County, Alabama. ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* 256 (1991). In his position as Commissioner of Public Affairs, he supervised the Montgomery Police Department. *Id.*

9. The Alabama political establishment was extremely displeased with the press coverage of civil rights-related matters within the State. See GOLD, *supra* note 7, at 22–24 (describing the actions taken by various Montgomery officials in response to the advertisement). Alabama's Attorney General saw an opportunity and advised state public officials to file multi-million dollar lawsuits against the New York Times Company. LUCAS A. POWE, JR., *THE FOURTH ESTATE AND THE CONSTITUTION: FREEDOM OF THE PRESS IN AMERICA* 82 (1991).

10. Sullivan objected to assertions in the third and sixth paragraphs of the advertisement. LEWIS, *supra* note 8, at 12. In Montgomery, Alabama, after students sang "My Country, 'Tis of Thee" on the State Capitol steps, their leaders were expelled from school, and truck-loads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was pad-locked in an attempt to starve them into submission . . . . Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times—for "speeding," "loitering" and similar "offenses." And now they have charged him with "perjury" . . . under which they could imprison him for ten years. Obviously, their real purpose is to remove him physically as the leader to whom the students and millions of others—look for guidance and support, and thereby to intimidate all leaders who may rise in the South. Their strategy is to behead this affirmative movement, and thus to demoralize [African] Americans and weaken their will to struggle. The defense of Martin Luther King, spiritual leader of the student sit-in movement, clearly, therefore, is an integral part of

aggressive use of defamation litigation as a tool in support of white supremacy.<sup>11</sup> Having fashioned a defamation suit into a weapon, the Alabama political establishment struck at their political adversaries in the press<sup>12</sup> and the civil rights movement.<sup>13</sup> Sullivan's suit and the substantial monetary judgments awarded by a Montgomery County jury exposed in a dramatic fashion the potential dangers posed to democratic self-governance by defamation suits brought by government officials.<sup>14</sup>

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the total struggle for freedom in the South.

*Heed Their Rising Voices*, *supra* note 7, at 25. The errors in the advertisement included the following:

[T]he campus dining hall had not been padlocked on any occasion, the police had a significant presence near the campus but did not "ring" the campus and had not been called to the campus in response to the demonstration at the capitol steps, the students had sung a different song, and the police had arrested Dr. King four not seven times.

Jeffrey Omar Usman, *Finding the Lost Involuntary Public Figure*, 2014 UTAH L. REV. 951, 957–58 (2014) (footnotes omitted).

11. See Brief for Petitioners at 29, *Abernathy v. Sullivan*, 376 U.S. 254 (1963) (No. 40), 1963 WL 105893, at \*29 (explaining that the actions were brought to silence critics of Alabama's enforced segregation policy).

12. GOLD, *supra* note 7, at 22–24; KERMIT L. HALL & JOHN J. PATRICK, *THE PURSUIT OF JUSTICE: SUPREME COURT DECISIONS THAT SHAPED AMERICA* 143 (2006); LEWIS, *supra* note 8, at 12; JIM NEWTON, *JUSTICE FOR ALL: EARL WARREN AND THE NATION HE MADE* 429 (2006).

13. Garrett Epps, *The Other Sullivan Case*, 1 N.Y.U. J. L. & LIBERTY 783, 784–86 (2005). Without contradiction, the ministers testified they had not authorized use of their names as endorsers or even seen the advertisement prior to its application; nevertheless, the jury still imposed substantial verdicts against them. LEWIS, *supra* note 8, at 12. The ministers had only discovered their names were listed on the advertisement upon Sullivan's filing of suit against them. KERMIT L. HALL & MELVIN I. UROFSKY, *NEW YORK TIMES V. SULLIVAN: CIVIL RIGHTS, LIBEL LAW, AND THE FREE PRESS* 15–18 (2011). Sullivan and the Alabama judiciary proved to be particularly vindictive towards the four ministers in enforcing the judgment including seizing and levying their property without following standard procedures in awaiting resolution of the case on appeal. Epps, *supra*, at 785; HALL & UROFSKY, *supra*, at 88; ALFRED H. KNIGHT, *THE LIFE OF THE LAW: THE PEOPLE AND CASES THAT HAVE SHAPED OUR SOCIETY, FROM KING ALFRED TO RODNEY KING* 228 (1996).

14. See Alex Kozinski, *The Bulwark Brennan Built*, COLUM. JOURNALISM REV., Nov./Dec. 1991, at 85 ("If successful, the lawsuits would effectively ring down the curtain on conditions of blacks in the South, for every story and every advertisement commenting on those conditions would expose the media sources to liability. Worse, if L.B. Sullivan—a small-town official from the heart of Dixie—could intimidate *The New York Times*, the media in this country would become as effective as a toothless guard dog."); see also NORMAN L. ROSENBERG, *PROTECTING THE BEST MEN: AN INTERPRETIVE HISTORY OF THE LAW OF LIBEL* 236 (1986) (indicating that the libel suits "seemed about to inhibit political discussion even more seriously than had the infamous Sedition Act of 1798"). Sullivan's success in litigation before a Montgomery County jury shone a path for southern officials to bring the northern press to heel. In the eighteen months that immediately followed the verdict, southern political officials filed defamation actions seeking more than three hundred million dollars in damages related to news coverage of the civil rights movement. KNIGHT, *supra* note 13, at 229. The targets of the lawsuits were those reporters who were covering civil rights issues in the South. JAMES L. AUCOIN, *THE EVOLUTION OF AMERICAN INVESTIGATIVE JOURNALISM* 68 (2005). While *New York Times Co. v. Sullivan* was pending

While in retrospect the unconstitutionality of Alabama's strict liability approach to defamation suits involving public officials is clear,<sup>15</sup> that conclusion was far from obvious based upon then existent precedent.<sup>16</sup> Drawing upon precedent, the Alabama Supreme Court noted that Sullivan's suit involved libelous portions of the advertisement and that "[t]he First Amendment of the U.S. Constitution does not protect libelous publications."<sup>17</sup> At the time, this was a perfectly orthodox conclusion. The United States Supreme Court in a number of previous decisions had classified libelous speech as low-value speech that stood outside the ambit of the protections afforded by the First Amendment.<sup>18</sup> No lesser authority than William Blackstone in his influential *Commentaries*<sup>19</sup> had blessed the view that libel was not

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before the Supreme Court, the New York Times Company "pulled its reporters out of Alabama, achieving precisely what the state had hoped—an end to national attention to its racial policies, at least in the pages of the Times." NEWTON, *supra* note 12, at 429. That the defamation lawsuits were curtailing reporting by the press on the civil rights movement in the South was far from a hidden consequence of the litigation. KNIGHT, *supra* note 13, at 228–29. A headline in the *Montgomery Advertiser* rejoiced "State Finds Formidable Club to Swing at Out-of-State Press." *Id.* The *Alabama Journal* observed that as a result of the verdict its northern press counterparts might "re-survey . . . their habit of permitting anything detrimental to the south and its people to appear in their columns." DOUGLAS M. FRALEIGH & JOSEPH S. TUMAN, *FREEDOM OF EXPRESSION IN THE MARKETPLACE OF IDEAS* 172 (2011) (citing LEWIS, *supra* note 8, at 34).

15. Goldberg, *supra* note 6, at 1478.

16. KNIGHT, *supra* note 13, at 229–30. Confident of his chances of prevailing before the Supreme Court, Sullivan's lawyer M. Roland Nachman, Jr. observed that "[t]he only way the Court could decide against me was to change one hundred years or more of libel law." POWE, *supra* note 7, at 307.

17. *N.Y. Times Co. v. Sullivan*, 144 So. 2d 25, 40 (Ala. 1962).

18. *See, e.g., Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942). Therein, the Supreme Court indicated that

[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

*Id.* at 571–72 (footnote omitted).

19. "Blackstone's *Commentaries* served as a conduit through which English jurisprudential developments influenced the Framers and thus affected the development of the Constitution. . . . Blackstone's *Commentaries* had such a profound influence on the Framers' generation that it 'was often used by practitioners as a shortcut to the law.'" Michael D. Pepson & John N. Sharifi, *Two Wrongs Don't Make a Right: Federal Death Eligibility Determinations and Judicial Trifurcations*, 43 AKRON L. REV. 1, 28–29 (2010) (quoting Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 RUTGERS L.J. 77, 79 (1995)).

protected as free speech: “[W]here blasphemous, immoral, treasonable, schismatical, seditious, or scandalous libels are punished by the English law . . . the liberty of the press, properly understood, is by no means infringed or violated.”<sup>20</sup>

The advertisement being libelous proved not to be controlling; quite to the contrary, the Court glided past the crux of Sullivan’s argument, finding that “libel can claim no talismanic immunity from constitutional limitations.”<sup>21</sup> Distinguishing precedents, which had seemingly suggested a contrary conclusion, the Supreme Court noted these cases had not involved application of libel suits “to impose sanctions upon expression critical of the official conduct of public officials.”<sup>22</sup> Rejecting Sullivan’s contention that libelous speech stands outside the bounds of First Amendment protection, the Court instead concluded that defamation actions must be “measured by standards that satisfy the First Amendment.”<sup>23</sup>

In assessing Alabama’s defamation tort law under those standards, neither the availability of truth as a defense nor the presence of false information in the advertisement proved sufficient to render the verdict sustainable.<sup>24</sup> The Supreme Court expressed concern that requiring government critics to guarantee the truth of all their statements under the looming threat of a libel judgment would dampen the vigor and limit the variety of public debate.<sup>25</sup> In order to protect public discourse about the conduct of public officials, the Court determined that the existence of an error, even an error resulting from negligence, should not be a sufficient basis to recover tort damages.<sup>26</sup> The Court recognized 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.’”<sup>27</sup>

To maintain the necessary breathing space, the Supreme Court ruled that a public official cannot recover damages for a defamatory falsehood relating to his or her official conduct without proof that the statement

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20. 4 WILLIAM BLACKSTONE, COMMENTARIES 151 (Univ. Chi. Press 1979) (1765–1769) (emphasis omitted).

21. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964).

22. *Id.* at 268.

23. *Id.* at 269.

24. *Id.* at 267–69.

25. *Id.* at 270–71, 279.

26. *Id.* at 268–69.

27. *Id.* at 271–72 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

was made with “actual malice.”<sup>28</sup> Clarifying what was necessary to meet the actual malice standard, the Court indicated that claimants need to show the statement was made “with knowledge that it was false or with reckless disregard of whether it was false or not.”<sup>29</sup> As for the foundational questions of who qualifies as a “public official” and what constitutes speech “relating to his [or her] official conduct,” the Supreme Court determined no further exploration was warranted in the *New York Times Co. v. Sullivan* case given the facts thereof:

We have no occasion here to determine how far down into the lower ranks of government employees the “public official” designation would extend for purposes of this rule, or otherwise to specify categories of persons who would or would not be included. Nor need we here determine the boundaries of the “official conduct” concept. It is enough for the present case that respondent’s position as an elected city commissioner clearly made him a public official, and that the allegations in the advertisement concerned what was allegedly his official conduct as Commissioner in charge of the Police Department.<sup>30</sup>

But, “there’s the rub,”<sup>31</sup> for though *New York Times Co. v. Sullivan*

28. *Id.* at 279–80.

29. *Id.*

30. *Id.* at 283 n.23 (citation omitted).

31. “To die, to sleep; To sleep: perchance to dream: ay, there’s the rub.” WILLIAM SHAKESPEARE, *HAMLET* act 3, sc. 1.

These latter words, then, are the point where the self-induced deconstruction of Hamlet’s death wish is complete and where he is forced to “pause” and redirect his thought. If this is so, then one may legitimately ask what significance is attached to the expression “there’s the rub,” which marks the reversal. English speakers of today are likely to respond to the expression as a whole, since it is familiar, almost proverbial, perhaps a mere verbal gesture recognizing some difficulty, or perhaps an intensified variant of “that is the question” at the beginning of the soliloquy. This is how the in dictionaries of current English usage the pertinent sense of the noun *rub* (apart from the more usual meaning “the act of rubbing”) is explained, mostly with reference to the idiomatic *there’s the rub* itself; for example:

*There’s / here’s the rub*] used when saying that a particular problem is the reason why a situation is so difficult.

The rub [sing.] (*dated or rhet.*) a problem or difficult: . . . there’s / there lies the rub.

But then the familiarity of the phrase may well be due to its occurrence in the most famous monologue of the most famous play of the most famous [British] dramatist. Shakespeare may, indeed, have coined it—the *OED*, at any rate, has no earlier attestations of the phrase. If so, he would have made use of a meaning of *rub* common in his own time but obsolete today. In early modern English, *rub* was a bowling term, denoting “an obstacle or impediment by which a bowl is hindered in, or diverted from, its proper course.” It also had a more general meaning, no doubt transferred from the bowling context, signifying any kind of “impediment or difficult” of either a physical

proved to be an “easy case,” it sowed “the problem of how to decide subsequent cases, in which all signs are not pointing toward one resolution.”<sup>32</sup> Though the issue was avoidable in *New York Times Co. v. Sullivan*, a challenging and recurring question that has plagued courts since is which government employees qualify as public officials for the purpose of applying the actual malice test.<sup>33</sup>

Having declined to explore the parameters of this issue in *New York Times Co. v. Sullivan*, the Supreme Court two years later in *Rosenblatt v. Baer*<sup>34</sup> offered some guidance.<sup>35</sup> The Court indicated the public official designation applies “at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.”<sup>36</sup> The Court added that “[t]he employee’s position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy.”<sup>37</sup> Addressing the suggestion that this test might convert the “night watchman accused of

or mental nature . . . . In the Shakespeare canon itself, *rub* in those senses occurs about ten times, though it is not always easy to determine whether, and to what extent, the bowling association is present or whether a more general meaning predominates—in other words, whether *rub* is a fresh or faded metaphor. It will be noticed, however, that in Shakespeare a *rub* is usually something that obstructs a path, in which case the bowling association seems natural—as in *Henry V* (“We doubt not now / But every rub is smoothed our way”) or in *King John* (“the breath of what I mean to speak / Shall blow each dust, each straw, each little rub”). Or else it may obstruct, in a more abstract sense, the course of fortune . . . . Surely Shakespeare is aware of both meanings—the concrete one applied to bowling *and* the transferred one, since he plays with them in the garden scene of *Richard II*; when the lady-in-waiting, attempting to cheer up the melancholy queen, suggests: “Madam, we’ll play at bowls,” the answer is: “Twill make me think the world is full of rubs / and that my fortune runs against the bias.”

Werner Habicht, *Translating Hamlet’s Thoughts Process*, in SHAKESPEARE WITHOUT BOUNDARIES: ESSAYS IN HONOR OF DIETER MEHL 267, 268–69 (Christa Jansohn et al. eds., 2011) (footnotes and citations omitted). The expression is used here in both the classical and modern sense. In the classical sense, the Supreme Court’s definition of a public official has proven to obstruct and impede the fulfillment of the rationale of the *New York Times Co. v. Sullivan* decision. In the modern sense, the determination of who constitutes a public official has been a recurring and difficult question for courts.

32. Goldberg, *supra* note 6, at 1478.

33. 3 RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 23:3.75, at 23–57 (2015).

34. 383 U.S. 75 (1966).

35. See *The Supreme Court, 1965 Term*, 80 HARV. L. REV. 123, 197 (1966–1967) (characterizing the *Rosenblatt Court*’s description of a public official as “a modest contribution to the development of the definition”).

36. *Rosenblatt*, 383 U.S. at 85.

37. *Id.* at 86 n.13.



stealing state secrets” into a public official, the Court rejected this contention.<sup>38</sup> In doing so, the Court observed the actual malice standard would not be applied “merely because a statement defamatory of some person in government employ catches the public’s interest; that conclusion would virtually disregard society’s interest in protecting reputation.”<sup>39</sup> In other words, a “low[er]-level government employee does not become a public official simply because a news story about him attracts public attention; he must be a public official by virtue of his position or potential influence over governmental policy.”<sup>40</sup>

Summarizing the Supreme Court’s jurisprudence as of 1979 on the question of who qualifies as a public official, Chief Justice Warren Burger observed in *Hutchinson v. Proxmire* that while the Supreme Court “has not provided precise boundaries for the category of ‘public official’; it cannot be thought to include all public employees.”<sup>41</sup> With this limit declared, the Supreme Court has left the heavy lifting of defining who qualifies as a public official to the lower courts.<sup>42</sup> In the nearly five decades since *Rosenblatt*, scholarly attention has been more focused on defamation issues connected with public figures than public officials,<sup>43</sup> and the Supreme Court has largely left this aspect of the doctrine untended.<sup>44</sup>

In this void, irreconcilable conflicts have arisen among the lower courts.<sup>45</sup> “These varied interpretations, ‘blur[ring] the taxonomy to the point where it loses all shape and meaning,’ run the gamut from extremely broad to relatively narrow; many bear no resemblance to one another, and some bear little resemblance to the *Rosenblatt* test itself.”<sup>46</sup> These divergent understandings can be organized around two strong

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38. *Id.*

39. *Id.*

40. LYRISSA BARNETT LIDSKY & R. GEORGE WRIGHT, FREEDOM OF THE PRESS: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 76 (2004).

41. *Hutchinson v. Proxmire*, 443 U.S. 111, 119 n.8 (1979).

42. See Brian Markovitz, Note, *Public School Teachers As Plaintiffs in Defamation Suits: Do They Deserve Actual Malice?*, 88 GEO. L.J. 1953, 1962 (2000) (explaining that the *Rosenblatt* court refused to draw precise lines as to what type of government employees constitute public officials).

43. Richard E. Johnson, *No More Teachers’ Dirty Looks—Now They Sue: An Analysis of Plaintiff Status Determinations in Defamation Actions by Public Educators*, 17 FLA. ST. U. L. REV. 761, 762 (1990).

44. See *id.* at 764 (“The 1966 *Rosenblatt* decision was the last time the Court offered any meaningful clarification of who could be classified as a public official.”).

45. David Finkelson, Note, *The Status/Conduct Continuum: Injecting Rhyme and Reason into Contemporary Public Official Defamation Doctrine*, 84 VA. L. REV. 871, 884–85 (1998).

46. *Id.* (citation omitted).

poles: a narrow and an expansive definition of the term public official. This division often manifests through the prism of whether the court emphasizes *Rosenblatt*'s above-the-line description of a public official or the description set forth in footnote thirteen<sup>47</sup>—what defamation scholar David Elder has termed the “two-part alternative test for ‘public official.’”<sup>48</sup> The above-the-line language declares the public official designation applies “at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.”<sup>49</sup> The below-the-line language in footnote thirteen provides, in part, that “[t]he employee’s position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy.”<sup>50</sup> The narrow view suggests the public official designation should be limited to *Rosenblatt*'s “at the very least” category of high-level policy-making officials.<sup>51</sup> The broad conception embraces within the scope of public officialdom positions that are of importance to the public in general.<sup>52</sup> Both approaches

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47. Finkelson, *supra* note 45, at 885; Kate M. Adams, Comment, *(Re)defining Public Officials and Public Figures: A Washington State Primer*, 23 SEATTLE U. L. REV. 1155, 1166–68 (2000).

48. David Elder, *Defamation, Public Officialdom and the Rosenblatt v. Baer Criteria—A Proposal for Revivification: Two Decades After New York Times Co. v. Sullivan*, 33 BUFF. L. REV. 579, 679 (1984).

49. *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966).

50. *Id.* at 86 n.13.

51. See, e.g., *Kassel v. Gannett Co.*, 875 F.2d 935, 939 (1st Cir. 1989) (conceiving of public officials as “[p]olicymakers, upper-level administrators, and supervisors”); *Smith v. Russell*, 456 So. 2d 462, 464 (Fla. 1984) (viewing of a public official as a “highly visible representative of government authority who has power over citizens and broad discretion in the exercise of that power”); *Ellerbee v. Mills*, 422 S.E.2d 539, 540 (Ga. 1992) (excluding public school principals from the category of public officials because they do not govern and are not at a sufficiently high level of policymaking); *E. Canton Educ. Ass’n v. McIntosh*, 709 N.E.2d 468, 475 (Ohio 1999) (declining to apply the actual malice standard to a principal because he did not assume a role of special prominence in society or governance); *Richmond Newspapers, Inc. v. Lipscomb*, 362 S.E.2d 32, 37 (Va. 1987) (concluding that the actual malice standard was inapplicable to a government employee who was not a policymaker).

52. See, e.g., *Kahn v. Bower*, 284 Cal. Rptr. 244, 251 (Cal. Ct. App. 1991) (indicating that even in the absence of policymaking authority that the exercise of power and public visibility can render a government employee a public official); *Ryan v. Dionne*, 248 A.2d 583, 585 (Conn. Super. Ct. 1968) (concluding that a government employee qualified as a public official because of performing important governmental functions in the public interest); *Hodges v. Okla. Journal Publ’g Co.*, 617 P.2d 191, 194 (Okla. 1980) (finding a government contractor to be a public official because of the appearance of substantial responsibility for government affairs); *Press, Inc. v. Verran*, 569 S.W.2d 435, 441 (Tenn. 1978) (stating that the designation as a public official “does not necessarily apply only to high public position. Any position of employment that carries with it duties and responsibilities affecting the lives, liberty, money or property of a citizen or that

concede that not all government employees qualify as public officials.

This Article embraces neither the narrow nor broad conceptualization of a public official but instead suggests revisiting the *Rosenblatt* formulation and the one clear limitation set forth by *Hutchinson* that whatever the scope of public officialdom may be “it cannot be thought to include all public employees.”<sup>53</sup> Though not all speech about government employees should be deemed to be related to their official capacity, all government employees should be considered public officials, and speech related to their official conduct should be safeguarded by the actual malice standard. To explain and support this contention, this Article in Part II delineates the Supreme Court’s constitutional framework for categorizing plaintiffs in defamation cases. In Parts III and IV of the Article, the three principal arguments for not applying the actual malice standard to lower-level government employees and why those arguments are ultimately unavailing are explored. More precisely, Part III of the Article addresses the contention that speech about lower-level government employees is unimportant to democratic self-governance. In responding to this argument, Part III seeks to demonstrate that speech about the actions of lower-level government employees who are acting in their official capacity is political speech that is critical to democratic self-governance. The Article in Part IV sets forth the opposing argument that the actual malice standard should not be applied to lower-level government employees because of their lack of access to media for purposes of self-help and because they have not voluntarily submitted to such scrutiny. These rationales for not protecting speech relating to the official conduct of lower-level government employees arise from the Supreme Court’s 1974 decision in *Gertz v. Robert Welch, Inc.*<sup>54</sup> Part IV delves into the manner in which four decades of societal and technological change since *Gertz* have significantly diminished the persuasiveness of the lack of access to media rationale. Part IV also examines how the jurisprudential transformation in the concept of voluntariness in the years after *Gertz* has rendered the voluntariness rationale unavailing as

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may enhance or disrupt his enjoyment of life, his peace and tranquility, or that of his family, is a public office within the meaning of the constitutional privilege”); *HBO v. Harrison*, 983 S.W.2d 31, 36–39 (Tex. App. 1998) (applying the public official designation to an individual who exercised governmental power); *Palmer v. Bennington Sch. Dist.*, 615 A.2d 498, 502–03 (Vt. 1992) (determining that a principal is a public official because of the responsibility and control over governmental functions).

53. *Rosenblatt*, 383 U.S. at 86 n.13; *Hutchinson v. Proxmire*, 443 U.S. 111, 119 n.8 (1979).

54. 418 U.S. 323 (1974).

a basis for not applying the actual malice standard to lower-level government employees. The Article in Part V explores the First Amendment jurisprudential dissonance created by failure to afford greater protection to speech about the official conduct of lower-level government employees. Ultimately, the Article seeks to explain, in contradistinction with *Rosenblatt* and *Hutchison*, why all government employees should be deemed public officials, and why speech related to their actions within their official capacity should be protected by the actual malice standard.

## II. THE SUPREME COURT'S FRAMEWORK FOR CATEGORIZING PLAINTIFFS IN DEFAMATION SUITS

The Supreme Court has structured a constitutional framework for defamation litigation designed to address the inherent tension between states' interest in redressing reputational injuries arising from defamation and the constitutional safeguards necessary for fostering a vigorous and robust discussion of governmental conduct.<sup>55</sup> While theoretically the balance could be struck through case-by-case determinations, the Court recognized the impracticability and substantive undesirability of such an approach.<sup>56</sup> Instead, the Supreme Court balanced the competing interests by creating categorical groupings, assigning different types of defamation plaintiffs to different categories, and establishing rules for each of those categories.

Plaintiffs in defamation cases are classified into one of five categories: (1) public officials, (2) all-purpose public figures, (3) limited-purpose public figures, (4) involuntary public figures, and (5) private individuals.<sup>57</sup> For the heightened protections of the actual malice test to apply to a public official, the allegedly defamatory speech must be related to his or her official conduct.<sup>58</sup> As for the second

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55. *Id.* at 342.

56. *Id.* at 343.

57. *Usman*, *supra* note 10, at 972; *see Wilson v. Daily Gazette Co.*, 588 S.E.2d 197, 214 & n.7 (W. Va. 2003) (noting that plaintiffs can be categorized as public officials, private individuals, and three types of public figures: all-purpose public figures, limited-purpose public figures, and involuntary public figures); JAMES G. SAMMATARO, *FILM AND MULTIMEDIA AND THE LAW* § 5:20 (West 2015) (stating individuals can be classified as private individuals, public officials, all-purpose public figures, limited-purpose public figures, and involuntary limited-purpose public figures).

58. *See SMOLLA*, *supra* note 33, § 23:3.75, at 23–57 (noting that one of the important factors in determining public official status is the extent to which the allegedly defamatory article seeks to hold the plaintiff “accountable” for their public official duties). In *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964), the Supreme Court expressly concluded that the heightened actual malice

category, all-purpose public figures are persons who “occupy positions of such persuasive power and influence that they are deemed public figures for all purposes.”<sup>59</sup> This category, which applies to a relatively small number of persons,<sup>60</sup> is comprised of individuals with significant fame and notoriety, i.e., “household names.”<sup>61</sup> If the plaintiff in a defamation suit is an all-purpose public figure, the constitutional protection of the actual malice standard applies to the plaintiff<sup>62</sup> for “all purposes and in all contexts.”<sup>63</sup>

The third category, limited-purpose public figures, includes people who have “thrust themselves to the forefront of particular public controversies” or “the vortex of [a] public issue” “in order to influence the resolution of the issues involved” and in doing so “have assumed roles of especial prominence in the affairs of society.”<sup>64</sup> Such persons are public figures in connection with matters upon which they have

standard reached beyond official conduct to fitness for office, including considerations of private character, when considering candidates for public office. The Court stated:

The *New York Times* rule is not rendered inapplicable merely because an official’s private reputation, as well as his public reputation, is harmed. The public-official rule protects the paramount public interest in a free flow of information to the people concerning public officials, their servants. To this end, anything which might touch on an official’s fitness for office is relevant. Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official’s private character.

*Id.* Utilizing even starker language, the Supreme Court observed in *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971), that

[g]iven the realities of our political life, it is by no means easy to see what statements about a candidate might be altogether without relevance to his fitness for the office he seeks. The clash of reputations is the staple of election campaigns, and damage to reputation is, of course, the essence of libel.

*Id.* at 275.

59. *Gertz*, 418 U.S. at 345.

60. *Waldbaum v. Fairchild Publ’ns, Inc.*, 627 F.2d 1287, 1296 (D.C. Cir. 1980) (“Few people, of course, attain the general notoriety that would make them public figures for all purposes.”); Patrick H. Hunt, *Tortious Tweets: A Practical Guide to Applying Traditional Defamation Law to Twibel Claims*, 73 LA. L. REV. 559, 573 (2013) (“[F]ew people are truly ‘all-purpose’ public figures.”); see also Dennise Mulvihill, Comment, *Irving v. Penguin: Historians on Trial and the Determination of Truth Under English Libel Law*, 11 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 217, 247 (20002001) (noting that if the case had been brought under U.S. libel law, the plaintiff would be determined a public figure and therefore be required to prove actual malice).

61. 1A ALEXANDER LINDEY & MICHAEL LANDAU, *LINDEY ON ENTERTAINMENT, PUBLISHING AND THE ARTS* § 4:8, at 4-22 (3d ed. 2010); see Susan M. Gilles, *From Baseball Parks to the Public Arena: Assumption of the Risk in Tort Law and Constitutional Libel Law*, 75 TEMP. L. REV. 231, 251 n.118 (2002) (explaining the focus of an all-purpose public figure is whether or not the person has achieved “national prominence”).

62. 1 RODNEY A. SMOLLA, *LAW OF DEFAMATION* § 3:23, at 3-36 (2d ed. 2010).

63. *Gertz*, 418 U.S. at 351.

64. *Id.* at 345, 352.

assumed such a role, “but in all other aspects of their lives they remain private figures.”<sup>65</sup> Accordingly, they are public figures and subject to application of the actual malice standard “for a limited range of issues.”<sup>66</sup> The fourth category, the involuntary public figure category, applies in limited circumstances to persons who are “drawn into a particular public controversy” and “become a public figure through no purposeful action of [their] own.”<sup>67</sup> For the actual malice standard to be applied to the plaintiff in either category three, the limited-public figure category, or category four, the involuntary public figure category, the speech must address a matter of public concern.<sup>68</sup> Finally, persons who are not public officials, all-purpose public figures, limited-purpose public figures, or involuntary public figures are categorized as private individuals. Significantly for purposes of the discussion herein, plaintiffs who are lower-level government employees in defamation actions are assigned to the private individual category, even if the speech is addressed to their actions as a government employee.<sup>69</sup> The Supreme Court has ruled that states are prohibited from setting strict liability standards in defamation suits but otherwise enabled states to set their own standards, providing significantly less protection for speakers on speech regarding private individuals even where the speech addresses a matter of public concern.<sup>70</sup>

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65. RODNEY A. SMOLLA, RIGHTS AND LIABILITIES IN MEDIA CONTENT: INTERNET, BROADCAST, AND PRINT § 6:38, at 6-316 (2d ed. 2010).

66. *Gertz*, 418 U.S. at 351.

67. *Id.* at 345, 351.

68. *See* SMOLLA, *supra* note 62, § 3:23, at 3-36 (noting that if the allegedly defamatory comment is not a matter of public concern, the plaintiff may essentially “revert” to private figure status).

69. *See generally* *Rosenblatt v. Baer*, 383 U.S. 75, 86 n.13 (1966) (excluding application of the actual malice standard to a night watchman accused of stealing state secrets); *Hutchinson v. Proxmire*, 443 U.S. 111, 119 n.8 (1979) (indicating that not all government employees will qualify as public officials).

70. *Gertz*, 418 U.S. at 346-48 & n.10. Commentators addressing the Supreme Court’s decision in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), have argued that if the defamatory statements regarding a private person are not addressed to a matter of public concern, then strict liability could apply:

The United States Supreme Court, in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, held that when a private person who is neither a public official nor a public figure sues for defamation arising from publication of matters that are *not* of public concern, she need not prove actual damages as required in the private person, public concern cases. Thus the common law rule of presumed damages can be applied by the states to cases in this category if the states are so minded.

Several decisions have said or assumed that the *Dun & Bradstreet* case means that *all* of the common law rules remain intact, not merely the damages rule. That would mean that in the private person case where the issue is not of public concern, the

### III. COMMENTING ON LOWER-LEVEL GOVERNMENT EMPLOYEES AND PROTECTING POLITICAL SPEECH

One of the principal arguments<sup>71</sup> advanced for assigning lower-level government employees to the private individual category, even where the speech addresses their actions as a government employee, is that speech about the actions of such employees is immaterial to democratic self-governance: “the public interest in the activities of most civil servants is slight.”<sup>72</sup> Alternatively, some scholars have rejected such a total exclusion approach, conceding that some lower-level government employees may constitute public officials, and have instead presented a nuanced approach to distinguish those who are public officials from those who are not.<sup>73</sup> The total exclusion understanding meshes well with a narrow definition for the term public official while the nuanced approach more closely ties in with a broader definition of a public official.<sup>74</sup> Both approaches are problematic, however, for at least three reasons. One, the exclusion of speech regarding lower-level government employees from the ambit of the actual malice constitutional safeguard is inconsistent with the rationale of *New York Times Co. v. Sullivan*. Two, even well-considered nuanced approaches for distinguishing those lower-level government employees who are public officials from those who are not ultimately prove untenable. Three, and most importantly, speech about lower-level government employees is political speech that is critical to democratic self-governance.

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states would also be free to presume falsehood as well as damages, and possibly even to presume that the defendant was at fault; courts could go back to the old common law of prima facie strict liability in this class of cases. If the rules develop along these lines, courts in private person cases will be required to determine what counts as an issue of public concern.

3 DAN B. DOBBS ET AL., *THE LAW OF TORTS* § 557 (2d ed. 2011 & Supp. 2014) (citations omitted).

71. The First Circuit Court of Appeals has conceived of delineation between public officials and lower-level government employees who should instead be treated as private individuals as standing upon a three-legged stool. *Mandel v. Bos. Phx., Inc.*, 456 F.3d 198, 204 (1st Cir. 2006). The three legs of the stool (importance of the position, access to media, and voluntary submission to scrutiny) are also the three arguments advanced for not imposing the actual malice standard upon lower-level government employees.

72. *The Supreme Court, 1965 Term*, *supra* note 35, at 197.

73. See generally Marc A. Franklin, *Constitutional Libel Law: The Role of Content*, 34 *UCLA L. REV.* 1657, 1677–79 (1987) (setting forth his approach for determining whether a governmental employee is a public official for purposes of defamation suits).

74. See *supra* Part I (discussing the narrow and broad definitions employed by courts to define the term public official).

A. *Inconsistency with the Rationale of New York Times Co. v. Sullivan*

The categorical exclusion of speech relating to the official conduct of lower-level government employees from the protections afforded under the actual malice test is inconsistent with the Supreme Court's rationale in *New York Times Co. v. Sullivan*. A politically oriented theory of the First Amendment undergirds the constitutional protections set forth in *New York Times Co. v. Sullivan*.<sup>75</sup> The Supreme Court recognized therein that:

“[I]t is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions, and this opportunity is to be afforded for “vigorous advocacy” no less than “abstract discussion.”

The First Amendment, said Judge Learned Hand, “presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.” Mr. Justice Brandeis, in his concurring opinion in *Whitney v. California*, gave the principle its classic formulation:

Those who won our independence believed that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew . . . that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law . . . .

Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.<sup>76</sup>

This understanding fits smoothly with the Supreme Court's consistent recognition that within the pantheon of free speech, the most protected variety is political speech.<sup>77</sup> Safeguarding political speech is the core

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75. Frederick Schauer, *Public Figures*, 25 WM. & MARY L. REV. 905, 918 (1984).

76. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269–70 (1964) (citations omitted).

77. CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 232–42 (1993) (articulating a hierarchical understanding of First Amendment protections with political speech at the highest level); Valerie M. Fogleman & James Etienne Viator, *The Critical Technologies Approach: Controlling Scientific Communication for the National Security*, 4 BYU J. PUB. L. 293, 355 (1990) (“Many modern commentators recognize that Supreme Court jurisprudence has regarded



purpose, the primary *raison d'être*, of the First Amendment.<sup>78</sup> Such speech stands at the “highest rung of the hierarchy [sic] of First Amendment values’ and is entitled to special protection.”<sup>79</sup> Simply stated, “[t]he maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.”<sup>80</sup>

By protecting speech related to the official conduct of public officials, the Supreme Court viewed its adoption of the actual malice standard in *New York Times Co. v. Sullivan* as honoring the core self-governance purpose of the First Amendment.<sup>81</sup> Such protections are deduced from principles of self-government, which require the electorate to be able to gain sufficient knowledge to fulfill its responsibilities in a representative republic.<sup>82</sup> These safeguards are also critically tied to being able to voice grievances about government and seek redress through nonviolent means.<sup>83</sup> Because the citizenry plays a critical role in democratic self-governance and because of what is needed to be able to play this role, “speech concerning public affairs . . . is the essence of self-government.”<sup>84</sup> In the absence of the information and debate derived from and fostered by such speech, “citizens cannot play their assigned roles in choosing and instructing their

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political speech as the most protected category of discourse.”)

78. See *Boos v. Barry*, 485 U.S. 312, 318 (1988) (noting that public picketing is considered classically political speech, and as such, possible restrictions are scrutinized carefully).

79. *Connick v. Myers*, 461 U.S. 138, 145 (1983) (citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982)).

80. *Stromberg v. California*, 283 U.S. 359, 369 (1931).

81. See generally, e.g., Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. 978, 1024 (2011) (noting the “core self-governance goals of the First Amendment”); Lyriisa Barnett Lidsky, *Nobody’s Fools: The Rational Audience as First Amendment Ideal*, 2010 U. ILL. L. REV. 799, 839 (“It is generally agreed that a core purpose of the First Amendment is to foster the ideal of democratic self-governance.”).

82. See ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 26–27 (1948) (“The principle of the freedom of speech springs from the necessities of the program of self-government. . . . It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage.”); Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255 (characterizing freedom of speech as a right focused on self-governance by allowing the electorate to become informed).

83. See *Whitney v. California*, 274 U.S. 357, 376–78 (1927) (Brandeis, J., concurring), *overruled in part by Brandenburg v. Ohio*, 395 U.S. 444 (1969) (setting forth a view of freedom of speech as relieving opposition pressure and allowing for reform).

84. *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964).

representatives and in participating in the formation of public policy.”<sup>85</sup> Whatever disagreements Supreme Court Justices have had over the last century with regard to the exact applications of the First Amendment, there has been a long-standing consensus among Justices across the ideological continuum that the constitutional guarantee protecting freedom of speech safeguards discussions of governmental action and inaction.<sup>86</sup>

The critical question that emerges next, when considering who qualifies as a public official, is whether speech about lower-level government officials falls within the ambit of speech related to self-governance. When subjected to measured analysis, the argument that there is not a public interest in commenting on lower-level government officials proves to be inconsistent with the core constitutional purposes of *New York Times Co. v. Sullivan*. Simply stated, “the first amendment theory expounded in *New York Times* was much broader than the limited privilege which it produced” in *Rosenblatt*.<sup>87</sup> The *Rosenblatt* definition has generated confusion among the lower courts precisely because the protections afforded by *New York Times Co. v. Sullivan* “seem[] to go well beyond the limited class of government employees” conceived of as public officials in *Rosenblatt*.<sup>88</sup> The inconsistency between the restrictive definition of public officials in *Rosenblatt* and the more expansive speech protecting purposes of *New York Times Co. v. Sullivan*, not only created confusion but spawned active resistance among many lower courts to the narrow *Rosenblatt* conception of a public official.<sup>89</sup>

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85. Lidsky, *supra* note 81, at 810.

86. *Mills v. Alabama*, 384 U.S. 214, 218–19 (1966) (“Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes.”); Margaret Tarkington, *A First Amendment Theory for Protecting Attorney Speech*, 45 U.C. DAVIS L. REV. 27, 60 (2011) (“[T]he Court carefully protects political speech, considering it at the ‘core’ of the First Amendment.”).

87. Joel D. Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1376 (1975).

88. Comment, *Defamation of the Public Official*, 61 Nw. U. L. Rev. 614, 616 (1966).

89. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 867 (2d ed. 1988) (stating approvingly that lower courts have tended to disregard the highly restrictive understanding of public official suggested by the Court in *Rosenblatt* and *Hutchinson*). See generally Eaton, *supra* note 87, at 1376 (marking that the lower courts either failed to comprehend the *Rosenblatt* formulation or disregarded it).

*B. Nuanced Approaches Fail to Adequately Cover the Spectrum of Self-Governance*

Responding to such concerns, venerable mass media scholar Marc Franklin offered a thoughtful, nuanced approach to drawing a line between categorical exclusion that no lower-level government employee could constitute a public official and the position taken in this Article that all lower-level government employees are public officials.<sup>90</sup> Professor Franklin began his analysis by inquiring

[b]ut how far into government does the [self-governance] rationale go? Surely speech about less obvious parts of government or about lower level employees is not always unimportant. On the other hand, although citizens should be encouraged to discuss every aspect of their government, statements about the efficiency of the highway department's snow removal or of the teaching prowess of an elementary school teacher seem to fall far from the paradigm, especially in a self-governing society that relies heavily on a representative structure.

A first cut for purposes of defining “self-governance” for libel purposes—after including discussion of electoral matters—might well track a distinction between charges of a conscious abuse of power or of criminality on the one hand and most charges of negligence or ineptness on the other. Some ineptness, however, may have important implications for functions most citizens consider central to the role of government—matters of public health and safety. If, following a major air disaster, a speaker blames the carelessness of a small group of government air traffic controllers, that statement would seem entitled to the higher tier of protection because of its close connection to the government's role in public safety. The first cut, then, may be that speech related to self-governance involves charges of abuse of power, of criminality, or of carelessness or oversight that affects public health or safety.

This dual line of focusing on abuse by government personnel and on the government's role in public health and safety is likely to capture the mass of what most people think of as involving the essence of self-governance.<sup>91</sup>

Professor Franklin's reasoned analysis is a vast improvement over a categorical rejection of the premise that speech regarding a lower-level government employee cannot constitute speech related to self-

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90. See Franklin, *supra* note 73, at 1677–79 (setting forth his approach for determining whether a governmental employee is a public official for purposes of defamation suits).

91. *Id.* at 1677–78.

governance. However, his approach fails to fully capture the expansive scope of matters of governance that may be of concern to citizens or the importance of lower-level government officials to the functioning of local, state, and federal governments in the United States.

One of Professor Franklin's examples, exclusion of discussion of "the teaching prowess of an elementary school teacher," provides a helpful illustration of the manner in which even his more expansive understanding of who qualifies as public official is still too narrow.<sup>92</sup> While protecting public school teachers from defamatory comments by not defining them as public officials certainly has appeal,<sup>93</sup> the contrary view has the better of the argument. The United States Supreme Court observed in *Brown v. Board of Education* that "education is perhaps the most important function of state and local governments."<sup>94</sup> Elementary and secondary education provides the "foundation of good citizenship . . . [and awakens] the child to cultural values, in preparing [her] for later professional training, and in helping [her] to adjust normally to [her] environment."<sup>95</sup> Voters consistently agree, identifying education as an important political issue.<sup>96</sup> Education is an

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92. *Id.* at 1678. See generally, e.g., *Franklin v. Lodge 1108, Benevolent & Protective Order of Elks*, 159 Cal. Rptr. 131, 136–37 (Cal. Ct. App. 1979) (concluding that teachers are not public officials); *Richmond Newspapers, Inc. v. Lipscomb*, 362 S.E.2d 32, 35–37 (Va. 1987) (finding that a teacher is a private person and not a public official).

93. See, e.g., Eugene C. Bjorklund, *Are Teachers Public Officials for Defamation Purposes?* 2 WEST'S EDUC. L.Q. 527, 534–35 (1993) (advancing the position that teachers are confronted by overwhelming challenges in terms of criticism of them in the performance of their jobs such that the actual malice standard should not be applied); Markovitz, *supra* note 42, at 1964–81 (explaining why public school teachers should not be categorized as public officials); Kristian D. Whitten, *The Economics of Actual Malice: A Proposal for Legislative Change to the Rule of New York Times v. Sullivan*, 32 CUMB. L. REV. 519, 568 (2002) (expressing concern that with "applying the public official/public figure label to . . . public school teachers, the 'actual malice' rule prevents many people in public service, who may not have ready access to the media to defend themselves, from having any meaningful remedy when they are defamed in the media").

94. 347 U.S. 483, 493 (1954).

95. *Id.*

96. See, e.g., DAVID T. CONLEY, WHO GOVERNS OUR SCHOOLS?: CHANGING ROLES AND RESPONSIBILITIES 8 (2003) (observing that education policy has emerged as a central political issue in many states); CHRISTOPHER A. SIMON, TO RUN A SCHOOL: ADMINISTRATIVE ORGANIZATION AND LEARNING 52 (2001) (addressing the political role of education); THE GALLUP POLL: PUBLIC OPINION 2004, at 431 (Alec Gallup & Frank Newport eds., 2006) (reflecting findings demonstrating the importance of education as an issue to voters); Tim Conlan & Paul Posner, *A Solution for All Seasons: The Politics of Tax Reduction in the Bush Administration*, in BUILDING COALITIONS, MAKING POLICY: THE POLITICS OF THE CLINTON, BUSH & OBAMA PRESIDENCIES 182, 185 (Martin A. Levin et al. eds., 2012) (noting that education was in polling identified by voters as among the most important issues); Luis Ricardo Fraga & Ann Frost, *Democratic Institutions, Public Engagement, and Latinos in American Public Schools*, in PUBLIC ENGAGEMENT FOR PUBLIC EDUCATION: JOINING FORCES TO REVITALIZE

important political issue not only to parents of school-aged children,<sup>97</sup> but also for businesses<sup>98</sup> and the military,<sup>99</sup> among many others.<sup>100</sup> The value assigned by the electorate to the government's role in education is reflected through its enshrinement in all fifty state constitutions.<sup>101</sup>

In the debate over education, teacher quality (or the teaching prowess of the teacher as Professor Franklin describes it) has moved center-stage: "Teacher quality is not just an important issue in addressing the many challenges facing the nation's schools: It is *the* issue."<sup>102</sup> The

DEMOCRACY AND EQUALIZE SCHOOLS 117, 123–24 (Marion Orr & John Rogers eds., 2011) (noting the importance placed on education by voters).

97. See, e.g., BENJAMIN LEVIN, *REFORMING EDUCATION: FROM ORIGINS TO OUTCOMES* 121 (2001) (addressing the active political involvement of parents with school-aged children in education issues); Mark R. Warren, *Community Organizing for Education Reform*, in *PUBLIC ENGAGEMENT FOR PUBLIC EDUCATION: JOINING FORCES TO REVITALIZE DEMOCRACY AND EQUALIZE SCHOOLS* 139, 141 (Marion Orr & John Rogers eds., 2011) ("Studies consistently show that parents of all racial and class backgrounds care deeply about their children's education . . .").

98. See, e.g., ARCHIE B. CARROLL ET AL., *CORPORATE RESPONSIBILITY: THE AMERICAN EXPERIENCE* 328 (Kenneth E. Goodpaster et al. eds., 2012) (addressing the importance of the quality of education system for employers); THOMAS E. CRONIN & ROBERT D. LOEVY, *COLORADO POLITICS AND POLICY: GOVERNING A PURPLE STATE* 334 (2012) (discussing the involvement of business in the politics of education policy in Colorado); U.S. CHAMBER OF COMMERCE, *EDUCATION REFORM PLAYBOOK: A BUSINESS LEADER'S GUIDE* 2–35 (2012), [http://www.uschamberfoundation.org/sites/default/files/publication/edu/Education\\_Reform\\_Playbook.pdf](http://www.uschamberfoundation.org/sites/default/files/publication/edu/Education_Reform_Playbook.pdf) (setting forth the education reform position of the U.S. Chamber of Commerce and recommended approaches for obtaining education reform for members thereof); C. Kent McGuire, *Meeting the Challenges of Urban Communities: Funding School Districts*, in *POLICY, LEADERSHIP, AND STUDENT ACHIEVEMENT: IMPLICATIONS FOR URBAN COMMUNITIES* 3, 14 (C. Kent McGuire & Vivian W. Ikpa eds., 2008) (reflecting upon the involvement of business in political struggles over education policy).

99. See, e.g., PAUL L. KIMMELMAN, *THE SCHOOL LEADERSHIP TRIANGLE: FROM COMPLIANCE TO INNOVATION* 21 (2010) (noting the importance of a quality education system for the effective functioning of the military); ROBERT E. WISE, *RAISING THE GRADE: HOW HIGH SCHOOL REFORM CAN SAVE OUR YOUTH AND OUR NATION* 12–13 (2008) (discussing the connection between the quality of education and a qualified military).

100. See LEVIN, *supra* note 97, at 121 (discussing the active political involvement of teachers in education politics); PAUL E. PETERSON ET AL., *TEACHERS VERSUS THE PUBLIC: WHAT AMERICANS THINK ABOUT THEIR SCHOOLS AND HOW TO FIX THEM* 35 (2014) (addressing how public school issues impact homeowners without children); James G. Cibulka, *The NEA and School Choice*, in *CONFLICTING MISSIONS?: TEACHERS UNIONS AND EDUCATIONAL REFORM* 150, 151 (Tom Loveless ed., 2000) (noting the importance of education reform to labor unions beyond the teachers union).

101. See generally Jeffrey Omar Usman, *Good Enough for Government Work: The Interpretation of Positive Constitutional Rights in State Constitutions*, 73 ALB. L. REV. 1459, 1461, 1465–69 & n.43 (2010) (addressing education clauses in state constitutions).

102. Sam Minner, *Our Own Worst Enemy*, EDUC. WEEK (May 30, 2011), <http://www.edweek.org/ew/articles/2001/05/30/38minner.h20.html>. See LESLIE S. KAPLAN & WILLIAM A. OWINGS, *TEACHER QUALITY, TEACHING QUALITY, AND SCHOOL IMPROVEMENT* 1–2 (2002) (addressing the place of teacher quality in the debate over education reform).

National Commission on Excellence in Education report *A Nation at Risk: The Imperative for Educational Reform* raised troubling concerns about the state of education in the United States and found serious deficiencies in teaching to be a root cause.<sup>103</sup> A series of subsequent studies have shown that the quality of teachers and their teaching prowess are among the most important factors in shaping students' learning.<sup>104</sup> In a study assessing the impact of quality variances among teachers, Professor Eric Hanushek found that over the course of a year, students in classrooms with top teachers will exceed what is generally deemed as one year worth of educational development, advancing by a grade level and a half.<sup>105</sup> Alternatively, students in classrooms with the worst teachers will advance by only half a grade level over the course of a year.<sup>106</sup> Thus, according to Professor Hanushek's study, the development gap between good and bad teachers per year is one full year of educational development.<sup>107</sup> California Superior Court Judge Rolf M. Treu found in a June 2014 decision that

a grossly ineffective teacher costs students \$1.4 million in lifetime earnings per classroom [per year and that] . . . students in [Los Angeles Unified School District] who are taught by a teacher in the bottom 5% of competence lose 9.54 months of learning in a single year compared to students with average teachers.<sup>108</sup>

Professor Hanushek's analysis on improving American education suggests that by ending the "dance of the lemons"<sup>109</sup> and "de-selecting,"

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103. See Michael L. Yell, *A Nation at Risk*, in 2 ENCYCLOPEDIA OF EDUCATIONAL REFORM AND DISSENT 649, 649–51 (Thomas C. Hunt et al. eds., 2010) (summarizing the findings and recommendations of the 1983 National Commission on Excellence in Education's *A Nation at Risk* report).

104. Richard M. Ingersoll, *Power, Accountability, and the Teacher Quality Problem*, in ASSESSING TEACHER QUALITY: UNDERSTANDING TEACHER EFFECTS ON INSTRUCTION AND ACHIEVEMENT 97, 97 (Sean Kelly ed., 2011).

105. Eric Hanushek, *The Difference is Great Teachers*, in WAITING FOR "SUPERMAN": HOW WE CAN SAVE AMERICA'S FAILING PUBLIC SCHOOLS 81, 84 (Karl Weber ed., 2010).

106. *Id.*

107. *Id.*

108. *Vergara v. California*, No. BC484642, 2014 WL 2598719, at \*8 (Cal. Super. Ct. June 10, 2014) (tentative decision).

109. One commentator notes:

The "lemons" are dysfunctional teachers, and this dance pairs them with new principals in different schools. Some of the transfers are voluntary, attempts by teachers to escape impending remediation or possible dismissal. In many cases, principals trade lemons with colleagues, hoping to get slightly more competent or less angry teachers in exchange for their difficult ones. . . . The dance of the lemons merely sends one principal's problem to another administrator.

ELAINE K. MCEWAN, HOW TO DEAL WITH TEACHERS WHO ARE ANGRY, TROUBLED,

that is firing instead of transferring the worst eight percent of teachers and replacing them with teachers who are on par with the quality of today's average teacher, the United States would catch Finland for the top spot in the world education rankings.<sup>110</sup> Even when factoring in the increased costs needed to attract and retain higher-quality teachers, scholars have found an incredibly significant economic benefit is produced from replacing bad teachers with average teachers.<sup>111</sup>

Researchers Raj Chetty, John N. Friedman, and Jonah E. Rockoff found “that children exposed to even a single highly effective teacher during primary school are significantly more likely to go to college, attend better colleges, earn higher incomes, have higher savings rates, live in higher income neighborhoods, and (among females) are less likely to become teenage mothers.”<sup>112</sup> In other words, “[t]he current evidence suggests that great teachers not only raise student learning in areas captured on standardized tests but also develop students’ human capital in broader and deeper dimensions that have a lifelong payoff.”<sup>113</sup>

Even assuming for purposes of argument that the consistent findings of studies and common sense are wrong and that teacher quality does not impact educational outcomes, parents would still have other justifiable reasons for being concerned with teacher quality. Teachers help to shape students’ attitudes towards government and citizenship as well as social perceptions and values;<sup>114</sup> teachers even influence students’ sense of self-efficacy.<sup>115</sup> Parents consistently indicate that they are particularly concerned about the manner in which teachers impact their children’s happiness, safety, socialization, and values.<sup>116</sup>

EXHAUSTED, OR JUST PLAIN CONFUSED 120 (2005).

110. Eric A. Hanushek, *The Economic Value of Higher Teacher Quality*, 30 *ECON. EDUC. REV.* 466, 474–75 (2011).

111. BARBARA BRUNS & JAVIER LUQUE, *GREAT TEACHERS: HOW TO RAISE STUDENT LEARNING IN LATIN AMERICA AND THE CARIBBEAN* 231–32 (2015).

112. *Id.* at 69. See generally Raj Chetty et al., *Measuring the Impacts of Teachers II: Teacher Value-Added and Student Outcomes in Adulthood*, 104 *AM. ECON. REV.* 2633 (2014) (addressing the long-term impact of higher-quality teachers).

113. BRUNS & LUQUE, *supra* note 111, at 70–71.

114. *Ambach v. Norwick*, 441 U.S. 68, 79 (1979). See generally ROBERTA BERNS, *CHILD, FAMILY, SCHOOL, COMMUNITY: SOCIALIZATION AND SUPPORT* 241 (2015) (addressing the socializing impact of education); MICHELE FOSTER, *BLACK TEACHERS ON TEACHING* 102 (1998) (“Teachers work with young minds, and if they are molding these young minds for the future, then they can’t avoid teaching values.”).

115. JOY ELISE HARRIS, *THE IMPACT OF GENDER SOCIALIZATION ON WOMEN’S LEARNED TECHNOLOGICAL HELPLESSNESS AND ITS ANDRAGOGICAL IMPLICATIONS* 51 (2008).

116. See R.P. CHAMBERLIN ET AL., *FAILING TEACHERS?* 184–85 (2005) (noting that a parent’s view of what makes a good teacher often addresses qualities other than academic

As observed by the United States Supreme Court, “[i]n shaping the students’ experience to achieve educational goals, teachers by necessity have wide discretion over the way the course material is communicated to students . . . . No amount of standardization of teaching materials or lesson plans can eliminate the personal qualities a teacher brings to bear in achieving these goals.”<sup>117</sup> Quite reasonably, the Oklahoma Supreme Court<sup>118</sup> and Illinois Court of Appeals<sup>119</sup> found that “public school teachers . . . and the conduct of such teachers . . . and their policies, are of as much concern to the community as are other ‘public officials.’” In an article that offers a strong defense of the application of the actual malice standard to public school teachers, Richard Johnson explains that most parents have a greater interest in the actions of a public school teacher than a variety of high-level government officials:

Most parents take an acute interest in the “qualifications and performance” of any stranger who has . . . power over their children for six or seven hours per day. This interest is likely to exist even for people who are mostly indifferent to or ignorant of the “qualifications and performance” of senators, governors, and the secretary of agriculture—all of whom are unquestionably public officials.<sup>120</sup>

Contrary to Professor Franklin’s understanding, speech criticizing the prowess of a public school teacher is not a distant outpost of political speech, but instead it is a critical part of democratic self-governance in terms of seeking redress and contributing to the conversation on broader political issues. While the termination of public school teachers for poor performance is relatively rare, parental complaints tend to be part of what leads to a public school teacher being terminated.<sup>121</sup> Even if a

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performance like the happiness and safety of their children); JOAN DEAN, *MANAGING THE PRIMARY SCHOOL* 100 (2002) (addressing parental expectations of what makes for a good school); CHRISTOPHER GABRIELI & WARREN GOLDSTEIN, *TIME TO LEARN: HOW A NEW SCHOOL SCHEDULE IS MAKING SMARTER KIDS, HAPPIER PARENTS, AND SAFER NEIGHBORHOODS* 261 (2008) (indicating that parents place considerable emphasis on the safety of their children at educational institutions); GENE E. HALL ET AL., *INTRODUCTION TO TEACHING: MAKING A DIFFERENCE IN STUDENT LEARNING* 209 (2013) (“[P]robably nothing concerns parents more than the moral values, or ethics, the teachers of their children demonstrate. Parental concern over the moral values of individual teachers as well as those expressed by schools has given rise to an increased interest in homeschooling and school vouchers.”); ROSEMARY C. SALOMONE, *VISIONS OF SCHOOLING: CONSCIENCE, COMMUNITY, AND COMMON EDUCATION* 62 (2008) (noting that the “debate over education and parental values has now become a major political issue”).

117. *Ambach*, 441 U.S. at 78.

118. *Johnston v. Corinthian Television Corp.*, 583 P.2d 1101, 1103 (Okla. 1978).

119. *Basarich v. Rodeghero*, 321 N.E.2d 739, 742 (Ill. App. Ct. 1974).

120. Johnson, *supra* note 43, at 791.

121. KENNETH D. PETERSON, *TEACHER EVALUATION: A COMPREHENSIVE GUIDE TO NEW*



teacher is not terminated, complaints and criticisms of teachers from parents are significant contributing factors in poor-performing teachers voluntarily leaving the profession of their own accord or under the suggestive guidance of administrators.<sup>122</sup> Teachers also may self-correct behavior in response to critiques from parents,<sup>123</sup> and principals may exercise closer supervision in response thereto.<sup>124</sup> Parental complaints can lead to additional teacher training to address identified problems and shortcomings<sup>125</sup> and circumscribing of teachers' leeway in terms of curricular selections in their classrooms.<sup>126</sup> Criticism of a public school teacher's teaching prowess can also contribute to the marketplace of ideas with regard to public perception on an impressive variety of broader political issues including, among others, teacher compensation,<sup>127</sup> vouchers,<sup>128</sup> education standardization (as examples No Child Left Behind and the Common Core),<sup>129</sup> home schooling,<sup>130</sup>

DIRECTIONS AND PRACTICES 306 (2d ed. 2000); Diana Pullin, *Judging Teachers: The Law of Teacher Dismissal*, in *TEACHER ASSESSMENT AND THE QUEST FOR TEACHER QUALITY* 309 (Mary Kennedy ed., 2010).

122. RICHARD P. MCADAMS, *EXPLORING THE MYTHS AND THE REALITIES OF TODAY'S SCHOOLS: A CANDID REVIEW OF THE CHALLENGES EDUCATORS FACE* 33–34 (2010).

123. CAROL GESTWICKI, *HOME, SCHOOL, AND COMMUNITY RELATIONS* 421 (9th ed. 2014); FELICIA MARIA VAUGHN COLEMAN, *QUALITY IN EDUCATION: PERSPECTIVES REGARDING BALDRIGE-BASED PRACTICES AND INSTRUCTIONAL LEADERSHIP IN MIDDLE SCHOOLS* 100 (2008).

124. WILLIAM B. RIBAS, *TEACHER EVALUATION THAT WORKS!!: THE EDUCATIONAL, LEGAL, PUBLIC RELATIONS (POLITICAL) & SOCIAL-EMOTIONAL (E.L.P.S.) STANDARDS & PROCESSES OF EFFECTIVE SUPERVISION & EVALUATION* 179 (2005).

125. Bill Utterback, *Parent Complaint Leads to Special Needs Training in PA District*, TEACHHUB, <http://www.teachhub.com/parent-complaint-leads-special-needs-training-pa-district> (last visited Oct. 7, 2015).

126. PAMELA HUNT STEINLE, IN *COLD FEAR: THE CATCHER IN THE RYE CENSORSHIP CONTROVERSIES AND POSTWAR AMERICAN CHARACTER* 96 (2000); Charlotte Garden, *Teaching for America: Unions and Academic Freedom*, 43 U. TOL. L. REV. 563, 573–79 (2012). See generally Eric A. DeGroff, *Parental Rights and Public School Curricula: Revisiting Mozart After 20 Years*, 38 J.L. & EDUC. 83 (2009) (reflecting on the evolving relationship between parents' right to direct the education of their children and the state's role in inculcating common values in public schools).

127. WINSTON APPLE, *EDUTOPIA: A MANIFESTO FOR THE REFORM OF PUBLIC EDUCATION* 94 (2003); JAMES HARVEY, *THE SUPERINTENDENT'S FIELDBOOK: A GUIDE FOR LEADERS OF LEARNING* 279 (2013); JANET MCKENZIE, *CHANGING EDUCATION: A SOCIOLOGY OF EDUCATION SINCE 1944*, at 131 (2014); Allan E. Parker, *Public Education: Is It Education Under State Constitutions*, in *MAKING GOVERNMENT WORK: A CONSERVATIVE AGENDA FOR THE STATES* 51 (Tex Lezar ed., 1994).

128. MARLOW EDIGER, *PHILOSOPHY AND CURRICULUM* 102–03 (2003); ARNOLD S. KLING, *UNCHECKED AND UNBALANCED: HOW THE DISCREPANCY BETWEEN KNOWLEDGE AND POWER CAUSED THE FINANCIAL CRISIS AND THREATENS DEMOCRACY* 96 (2010).

129. KELLY GALLAGHER, *READICIDE: HOW SCHOOLS ARE KILLING READING AND WHAT YOU CAN DO ABOUT IT* 12 (2009); W. James Popham, *All About Accountability / "Teaching to*

America's declining math and science predominance,<sup>131</sup> sexual morality of and the prevention of sexually transmitted diseases among young people,<sup>132</sup> racial discrimination,<sup>133</sup> etc. Simply stated, through the political process, important changes have already occurred "in schooling . . . because of ongoing efforts by parents."<sup>134</sup>

Nor is this self-governance role limited to education; Professor Franklin's second exemplar for clear exclusion from public officialdom, the efficiency of the highway department's snow removal efforts, while not attracting the attention education does, also proves ultimately to not warrant categorical exclusion.<sup>135</sup> Though seemingly innocuous in nature, snow removal has proven to be a political issue of discussion, debate, and vote determination to a much greater extent than one might initially expect. Local politics is often focused on issues like snow removal<sup>136</sup> with the electorate concerned about efficient performance of

*the Test*": *An Expression to Eliminate*, 62 EDUC. LEADERSHIP 82, 82–83 (2004).

130. LINDA DOBSON, *THE FIRST YEAR OF HOMESCHOOLING YOUR CHILD: YOUR COMPLETE GUIDE TO GETTING OFF TO THE RIGHT START* 203 (2009); RACHEL GATHERCOLE, *THE WELL-ADJUSTED CHILD: THE SOCIAL BENEFITS OF HOMESCHOOLING* 77 (2007); HALL ET AL., *supra* note 116, at 209.

131. WILLIAM J. BENNETT, *THE DE-VALUING OF AMERICA: THE FIGHT FOR OUR CULTURE AND OUR CHILDREN* 43 (1994); CHARLES T. STEWART, *THE DECLINE OF LEARNING IN AMERICA* 163 (2008). See generally VINCE M. BERTRAM, *ONE NATION UNDER TAUGHT: SOLVING AMERICA'S SCIENCE, TECHNOLOGY, ENGINEERING & MATH CRISIS* (2014) (describing the challenge American students face in competing globally in science, technology, engineering, and math fields, and suggesting reforms to remedy the problem).

132. SIMON BLAKE, *SEX AND RELATIONSHIPS EDUCATION: A STEP-BY-STEP GUIDE FOR TEACHERS* 48 (2013); Susan C. Schena, *Legal Organization Addresses Sex Ed 'Controversy' At Acalanes H.S.*, LAMORINDA PATCH (Dec. 8, 2014), <http://patch.com/california/lamorinda/legal-organization-addresses-sex-ed-controversy-acalanes-hs-0>; Todd Starnes, *Graphic Sex Ed Class Under Fire*, FOX NEWS (June 22, 2010), <http://www.foxnews.com/us/2010/06/22/graphic-sex-ed-class/>.

133. See, e.g., Dennis Carlson et al., *Risky Business: Teaching about the Confederate Flag Controversy in a South Carolina High School*, in *BEYOND SILENCED VOICES: CLASS, RACE, AND GENDER IN UNITED STATES SCHOOLS* (Lois Weis & Michelle Fine eds., rev. ed. 2005) (addressing the importance of teaching well when addressing issues related to race, racial identity, and racial discrimination); see SHARON RUSH, *HUCK FINN'S "HIDDEN" LESSONS: TEACHING AND LEARNING ACROSS THE COLOR LINE* 140–41 (2006) (reflecting upon how quality teachers making well-reasoned pedagogical educational decisions related to subjects touching upon race impacts students and the broader society); see also Taylor Gordon, *MS Teacher Directs Racist Comment to Black Middle Schoolers: I'll 'Send Your Colored Selves To the Office'*, ATLANTA BLACKSTAR (Nov. 4, 2014), <http://atlantablackstar.com/2014/11/04/insensitive-teacher-black-middle-schoolers-ill-send-colored-selves-office/> (addressing the impact of teachers' racism in education).

134. LEVIN, *supra* note 97, at 121.

135. Franklin, *supra* note 73, at 1677–78.

136. KAREN KIRST-ASHMAN & GRAFTON HULL, JR., *GENERALIST PRACTICE WITH ORGANIZATIONS AND COMMUNITIES* 293 (4th ed. 2008).

this type of governmental services.<sup>137</sup> Mayors have experienced political difficulties and even election defeats as a result of poor snow removal.<sup>138</sup> Snow removal has at times even become intertwined with federal politics in terms of disaster relief declaration status.<sup>139</sup> Snow removal appears as a political issue with surprising regularity globally; even Hezbollah, which has been classified as a terrorist organization,<sup>140</sup> opted to adjust its approach to snow removal in the Bekaa Valley as part of expanding its electoral appeal in Lebanese elections.<sup>141</sup>

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137. DAVID L. MARTIN, *RUNNING CITY HALL: MUNICIPAL ADMINISTRATION IN AMERICA* 178 (1990); JOE WILLIAMS, *CHEATING OUR KIDS: HOW POLITICS AND GREED RUIN EDUCATION* 161 (2005).

138. See, e.g., BETH BOOSALIS DAVIS, *MAYOR HELEN BOOSALIS: MY MOTHER'S LIFE IN POLITICS* 229 (2008) (reflecting upon snow removal politics in mayoral politics in Lincoln, Nebraska); see PAUL M. GREEN, *Michael A. Bilandic: The Last of the Machine of the Regulars, in THE MAYORS: THE CHICAGO POLITICAL TRADITION* 164–67 (4th ed. 2013) (addressing the downfall of Chicago Mayor Bilandic as result of the failure of the City to properly remove snow during February of 1979); NORMAN KRUMHOLZ, *MAKING EQUITY PLANNING WORK: LEADERSHIP IN THE PUBLIC SECTOR* 38–39 (2011) (reflecting upon snow removal politics in Cleveland, Ohio); ANTHONY M. TOWNSEND, *SMART CITIES: BIG DATA, CIVIC HACKERS, AND THE QUEST FOR A NEW UTOPIA* 208 (2013) (addressing Chicago snow removal politics in 2000s); Richard Weir et al., *Patience Wears Thin As Snow Piles Grow Deeper*, BOS. HERALD (Feb. 10, 2015), [http://www.bostonherald.com/news\\_opinion/local\\_coverage/2015/02/patience\\_wears\\_thin\\_as\\_snow\\_piles\\_grow\\_deeper](http://www.bostonherald.com/news_opinion/local_coverage/2015/02/patience_wears_thin_as_snow_piles_grow_deeper) (discussing residents frustrations with the action of government in addressing snow removal); see also GLENN SPARKS, *MEDIA EFFECTS RESEARCH: A BASIC OVERVIEW* 214 (2012).

One of my favorite parts of the local newspaper in the wintertime is the coverage of the aftermath of a big snowstorm. Consider how the media might frame such news coverage. In the wake of a huge snowfall, the news could concentrate on winter recreation and that fun that children in the area have playing with snowballs and sledding down steep hills. On the other hand, the media could focus on how slowly snow removal is progressing and attempt to track down local government officials to comment on the problem. Depending on which way the story of the snowstorm is framed, consumers may have different thoughts as a result of reading the news. Traditionally, this effect might be described in the standard agenda-setting terminology: ‘The media don’t tell us what to think, they tell us what to think about.’ But a closer inspection of what goes on here suggests that there is more to it. By framing the story in terms of poor snow removal instead of recreational activities, the media are doing more than just telling us what to think about. In a very real way, they are telling us what to think by focusing attention on one particular angle of the story instead of another one.

*Id.*

139. Lee Leonard, *Rhodes’ Second Eight Years, 1975-1983*, in *OHIO POLITICS* 123 (Alexander P. Lamis ed., 1994).

140. Parvez Ahmed, *Terror in the Name of Islam—Unholy War, Not Jihad*, 39 CASE W. RES. J. INT’L L. 759, 773 (2007).

141. Keely M. Fahoum, *Deprivation, Occupation, and Social Change: Hamas and Hezbollah’s Evolution from Bombs to Ballot Boxes*, in *TERRORISM AND HOMELAND SECURITY: PERSPECTIVES, THOUGHTS, AND OPINIONS* 213 (Dale L. June ed., 2010).

In his book *Politics and Pasta*, colorful six-term former Providence, Rhode Island mayor Vincent Buddy Cianci, Jr.,<sup>142</sup> one of America's longest-serving, big-city mayors,<sup>143</sup> observes that “[t]hey don’t teach the fine art of snow removal at [Harvard University’s] Kennedy School of Government.”<sup>144</sup> Nevertheless, noting that the manner in which snow removal is handled is an important political issue for local politicians, Mayor Cianci offers his own primer.<sup>145</sup> Therein, Cianci reflects upon the importance of having every employee, from the frontline worker through the city government department heads and the mayor, well organized with a clear plan that is properly and quickly implemented.<sup>146</sup> Cianci is not the only local politician to realize the importance of snow removal to his or her constituents.<sup>147</sup> Despite Mayor Cianci’s surmising to the contrary, snow removal as a matter of public policy and politics has not entirely escaped the attention of the academy. As an example, Professor Donald S. Kettl, currently a Professor at the University of Maryland School of Public Policy and formerly Dean thereof,<sup>148</sup> in his text *Politics of the Administrative Process*, presents public administration students with a case study and questions directed towards addressing the political and policy

142. Mayor Cianci was elected by the residents of Providence, Rhode Island to six terms as mayor from 1975 to 1984 and then again from 1991 through 2001. MICHAEL Z. HACKMAN & CRAIG E. JOHNSON, *LEADERSHIP: A COMMUNICATION PERSPECTIVE* (6th ed. 2013). Cianci helped to revitalize the city during his terms in office. Thomas J. Vicino, *Urban Governance, in CITIES OF NORTH AMERICA: CONTEMPORARY CHALLENGES IN U.S. AND CANADIAN CITIES* 189 (2013). He stepped down from his position as mayor in 1984 after he pled guilty to the assault of a man who was having a relationship with his estranged wife and was sentenced to five years of probation. ROBERT W. SPEEL, *CHANGING PATTERNS OF VOTING IN THE NORTHERN UNITED STATES: ELECTORAL REALIGNMENT, 1952–1996*, at 95 n.1 (2010). His second stint as mayor also ended in a conviction, specifically for violating the Racketeer Influenced and Corrupt Organizations Act (“RICO”). FRANCIS J. LEAZES & MARK T. MOTTE, *PROVIDENCE, THE RENAISSANCE CITY* 49 (2004); MIKE STANTON, *THE PRINCE OF PROVIDENCE: THE RISE AND FALL OF BUDDY CIANCI, AMERICA’S MOST NOTORIOUS MAYOR* 369–82 (2004).

143. Vicino, *supra* note 142, at 189.

144. VINCENT “BUDDY” CIANCI, JR. & DAVID FISHER, *POLITICS AND PASTA: HOW I PROSECUTED MOBSTERS, REBUILT A DYING CITY, DINED WITH SINATRA, SPENT FIVE YEARS IN A FEDERALLY FUNDED GATED COMMUNITY, AND LIVED TO TELL THE TALE* 96 (2011).

145. *See id.* at 96–103 (discussing Cianci’s advice on snow removal).

146. *Id.*

147. *See, e.g.*, DAVIS, *supra* note 138, at 229 (reflecting upon snow removal politics in mayoral politics in Lincoln, Nebraska); JESSICA TROUNSTINE, *POLITICAL MONOPOLIES IN AMERICAN CITIES: THE RISE AND FALL OF BOSSES AND REFORMERS* 157 (2009) (discussing elected officials’ appreciation of the politics of snow removal).

148. DONALD KETTL, <https://www.publicpolicy.umd.edu/faculty/donald-kettl> (last visited Sept. 7, 2015).

complications presented by snow removal.<sup>149</sup>

Snow removal political fallout can result from, among other complications, poor budgeting<sup>150</sup> or implementation,<sup>151</sup> snow removal priorities that are discordant from those of the electorate, including playing racial<sup>152</sup> and class politics,<sup>153</sup> aiding political patrons and punishing political opponents,<sup>154</sup> and being overly or not sufficiently solicitous of environmental impact<sup>155</sup> or alternative transportation (for

149. DONALD F. KETTL, *POLITICS OF THE ADMINISTRATIVE PROCESS* 19–20 (6th ed. 2014).

150. GEORGE M. GUESS & PAUL G. FARNHAM, *CASES IN PUBLIC POLICY ANALYSIS* 159–60 (2011); Bryan T. Morytko, *Snow Removal, Fees Cause Budget Woes*, HARTFORD COURANT, Mar. 14, 1996, at B4; *Cleveland's Botched Snow Removal: Editorial Board Roundtable*, CLEVELAND.COM (Feb. 12, 2015), [http://www.cleveland.com/opinion/index.ssf/2015/02/clevelands\\_botched\\_snow\\_removal.html](http://www.cleveland.com/opinion/index.ssf/2015/02/clevelands_botched_snow_removal.html); see also Christopher Keating, *Luke Bronin: Plow Hartford's Streets Better*, HARTFORD COURANT (Feb. 10, 2015, 2:13 PM), <http://www.courant.com/politics/capitol-watch/hc-luke-bronin-plow-hartfords-streets-better-20150210-story.html>. In campaigning for mayor of Hartford, mayoral candidate, Luke Bronin, has argued:

It is stunning to me that the Mayor only budgeted for three storms, and that admission explains why Hartford's plowing and snow removal has been worse than any other city or town around us. Sure, we've gotten a lot of snow this year, but we've gotten a lot of snow each of the last few years. To budget for only three storms is irresponsible. Under-budgeting is a gimmick that the people of Hartford and Hartford's businesses have to pay for in a different way—in the form of impassible sidewalks, one-lane streets, traffic jams, and dangerous road conditions.

*Id.*

151. ANTHONY M. TOWNSEND, *SMART CITIES: BIG DATA, CIVIC HACKERS, AND THE QUEST FOR A NEW UTOPIA* (2013); Green, *supra* note 138, at 164–66; Sewell Chan, *Remembering a Snowstorm That Paralyzed the City*, N.Y. TIMES (Feb. 10, 2009), [http://cityroom.blogs.nytimes.com/2009/02/10/remembering-a-snowstorm-that-paralyzed-the-city/?\\_r=0](http://cityroom.blogs.nytimes.com/2009/02/10/remembering-a-snowstorm-that-paralyzed-the-city/?_r=0); *Cleveland's Botched Snow Removal*, *supra* note 150.

152. Green, *supra* note 138, at 164–66; Edward Thompson III, *Race and the 1983 Chicago Election*, CRISIS, Oct. 1983, at 14–15.

153. DAVID F. REMINGTON, ASHBEL P. FITCH: CHAMPION OF OLD NEW YORK 187 (2011); Chan, *supra* note 150; James Nye, *De Blasio Has Left New York City on Its A\*\*! Al Roker Leads Criticism of New Mayor's 'Class War' Snow Failures*, DAILY MAIL (Jan. 22, 2014), <http://www.dailymail.co.uk/news/article-2543959/Hes-trying-New-Yorks-Mayor-Blasio-accused-waging-class-war-Upper-East-Side-snow-plows-fail-clear-roads-city-grinds-halt-officials-admit-unprepared-storm.html>; see Fran Spielman, *Streets and Sanitation Chief Pleads for Patience on Side-Street Snow Removal*, CHI. SUN-TIMES (Feb. 2, 2015), <http://chicago.suntimes.com/chicago-politics/7/71/338890/streets-sanitation-commissioner-pleads-patience-side-street-snow-removal> (highlighting a mayoral candidate campaigning against Rahm Emanuel based upon alleged inequities between rich and poor neighborhoods in terms of snow removal).

154. TOWNSEND, *supra* note 151; Spielman, *supra* note 153.

155. Beth Quimby, *Snow removal: Maine Towns Want More Power over Those Piles*, PORTLAND PRESS HERALD (Feb. 9, 2011), [http://www.pressherald.com/2011/02/09/towns-seek-pile-powers\\_2011-02-09/](http://www.pressherald.com/2011/02/09/towns-seek-pile-powers_2011-02-09/); Michael Walsh, *Snow Where to Go: Boston-Area Town Dumps Excess White Stuff in Harbor*, YAHOO NEWS (Feb. 10, 2015), <http://news.yahoo.com/boston-might-dump-excess-snow-from-record-setting-winter-in-harbor-171544664.html>.

example, bike lanes).<sup>156</sup> Snow removal politics can also arise in a number of other forms. For example, private Residential Community Associations (“RCAs”) have successfully, but not without political controversy, lobbied in some jurisdictions for the ability to conduct their own snow removal in return for property tax refunds.<sup>157</sup> This produces a recurring divide between the speed with which snow is removed from RCAs and the speed of removal from residential areas served by public snow removal.<sup>158</sup> Alternatively, some local governments, having acquired the necessary equipment, are able to defer costs or raise revenues by selling their city’s snow removal services to neighbors.<sup>159</sup> In other locales snow removal has been at the center of public funds being lost through graft and corruption.<sup>160</sup>

Professor Franklin is likely correct that voters would be better served by directing their attention to issues of public health rather than snow removal; however, drawing distinctions that prioritize protection for speech about preferred political issues over less preferred political issues is antithetical to the First Amendment. Reflecting on the core purposes of the First Amendment, the Supreme Court observed that “[p]remised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects.”<sup>161</sup> Even outside of

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156. Steven Vance, *City Explains Gap in Snow Removal From Protected Bike Lanes This Week*, STREETS BLOG CHI. (Dec. 12, 2013), <http://chi.streetsblog.org/2013/12/12/city-explains-gap-in-snow-removal-from-protected-bike-lanes-this-week/>.

157. MARGARET KOHN, BRAVE NEW NEIGHBORHOODS: THE PRIVATIZATION OF PUBLIC SPACE 90–91 (2004); Daniel A. Bell, *Civil Society vs. Civic Nature*, in FREEDOM OF ASSOCIATION 245 (Amy Gutmann ed., 1998). New Jersey by statute requires local governments to reimburse RCAs for providing their own snow removal. Daniel A. Bell, *Residential Community Associations: Community or Disunity?*, in THE ESSENTIAL COMMUNITARIAN READER 167, 175 (Amitai Etzioni ed., 1998).

158. ROBERT JAY DILGER, NEIGHBORHOOD POLITICS: RESIDENTIAL COMMUNITY ASSOCIATIONS IN AMERICAN GOVERNANCE 31 (1992).

159. BETH WALTER HONADLE ET AL., FISCAL HEALTH FOR LOCAL GOVERNMENTS 234 (2003).

160. See PAUL GRONDAHL, MAYOR ERASTUS CORNING: ALBANY ICON, ALBANY ENIGMA 504 (2007) (recounting how the city’s poor snow removal was tied to political corruption); HENRY H. KLEIN, BANKRUPTING A GREAT CITY: THE STORY OF NEW YORK 42–43 (1915) (addressing snow removal corruption in New York City); THOMAS J. O’GORMAN & LISA MONTANARELLI, STRANGE BUT TRUE CHICAGO: TALES OF THE WINDY CITY 184 (2005) (discussing the 1979 conviction of Salvatore Mucerino, owner of a Chicago snow removal firm, for snow removal fraud); FRANK S. ROBINSON, MACHINE POLITICS: A STUDY OF ALBANY’S O’CONNELLS 150 (1977) (discussing snow removal corruption in Albany, New York); Kevin Flynn, “*Plow Now Anyhow, Buried City Hired Tainted Contractors*,” NEWSDAY, Feb. 28, 1994, at 7 (discussing the Giuliani administration’s snow removal contracts made with corrupt contractors in New York City).

161. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 340 (2010).

the category of political speech, the Court in addressing commercial speech has noted while “[s]ome of the ideas and information [presented in the commercial marketplace] are vital, some [are] of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented.”<sup>162</sup> The efficacy of snow removal may not be an extremely important issue, but nevertheless, as was recently observed by urban policy reporter Emily Badger, “snow is political”<sup>163</sup> and thus discussion of the efficacy of snow removal efforts is political speech.

The ultimate problem with Professor Franklin’s approach, and other similar attempts at providing a nuanced understanding of what governmental officials address matters of such significance as to warrant public attention is that the voters ultimately get to decide what issues are important to them. For good or ill, voters have decided that the teaching prowess of elementary school teachers and the efficacy of governmental efforts at snow removal are important. A foundational premise of representative democracy is that a single voter can identify an issue as a matter of concern and try to effectuate change.<sup>164</sup> The voters, or even a single voter, are free to decide if any governmental action or inaction is of importance or at least to advocate that it should be of importance to the community.<sup>165</sup>

### *C. Lower-Level Government Employees and Democratic Governance*

The above discussion points towards commentary upon an elementary school teacher’s teaching prowess constituting speech related to democratic self-governance. Mayor Cianci’s discussion of snow removal invites the same conclusion with regard to frontline snow removal workers. To understand why discussion of the action and inaction of lower-level government employees in their official capacity is critical to democratic self-governance, it is helpful to appreciate the dramatic transformation in the understanding of the functioning of the

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162. *Edenfield v. Fane*, 507 U.S. 761, 767 (1993).

163. Emily Badger, *The End of Political Snow Plowing*, WASH. POST (Jan. 6, 2015), <http://www.washingtonpost.com/blogs/wonkblog/wp/2015/01/06/the-end-of-political-snow-plowing>.

164. See, e.g., LEE C. BOLLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* 7–11 (1986) (setting forth an understanding of free speech as protective of the right of the extreme or individual believer to advocate a position that ultimately is not better for achieving truth in a marketplace of ideas, but instead better for providing tolerance for the dissenting voice); STEVEN H. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* 86–109 (1990) (addressing the importance of individualism and dissent within the protections of free speech).

165. BOLLINGER, *supra* note 164, at 7–11; SHIFFRIN, *supra* note 164, at 86–109.

administrative state that has occurred over that last three decades. In essence, the working conceptual understanding of the administrative state that would have been predominant when *Rosenblatt* and *Hutchison* were decided has been fundamentally transformed by further research and analysis.<sup>166</sup>

Max Weber provided the then-leading model for understanding the modern administrative bureaucratic state.<sup>167</sup> Weber's administrative state converted law into impersonal formal actions taken through a controllable hierarchical structure composed of an unbroken chain running from the lawmaker through an accountable bureaucracy that rendered a rationally calculable, correct application of formal law made at a higher level rather than decision making at a lower one.<sup>168</sup> Weber's administration of law subdued human affairs to the application of law with certain and determinable correct applications thereof.<sup>169</sup> Weber rejected "government by bureaucrats" and the concept of political decision makers in bureaucracy.<sup>170</sup> Thus, Weber

emphasized control from top to bottom in the form of monocratic hierarchy, that is, a system of control in which policy is set at the top and carried out through a series of offices, with each manager and worker reporting to one superior and held to account by that person. The bureaucratic system is based on a set of rules and regulations flowing from public law; the system of control is rational and legal.

166. See *infra* III.C (developing the argument that speech about lower-level government employees is political speech critical to democratic self-governance).

167. See, e.g., CRITICAL STUDIES IN ORGANIZATION AND BUREAUCRACY 1 (Frank Fischer & Carmen Sirianni eds., rev. ed. 1994) (observing that Weber's theory of bureaucracy was likely the most widely known and was highly influential in shaping the future understanding of bureaucracy); A. MICHAEL DOUGHERTY, PSYCHOLOGICAL CONSULTATION AND COLLABORATION IN SCHOOL AND COMMUNITY SETTINGS 157 (6th ed. 2013) (indicating that Weber's model of bureaucracy is considered the classical model of bureaucracy); BARUN KUMAR SHAU, UNWRITTEN FLAWS OF INDIAN BUREAUCRACY 77 (2004) (noting the influence of Weber's bureaucratic model); Carl K.Y. Shaw, *Hegel's Theory of Modern Bureaucracy*, 86 AM. POL. SCI. REV. 381, 381 (1992) ("Weber's ideal type of bureaucracy . . . has had a pervasive influence in the development of the sociological tradition.")

168. Christoph Reichard, *The Study of Public Management in Germany: Poorly Institutionalized and Fragmented*, in THE STUDY OF PUBLIC MANAGEMENT IN EUROPE AND THE US: A COMPARATIVE ANALYSIS OF NATIONAL DISTINCTIVENESS 50–51 (Walter Kickert ed., 2008).

169. Ogunrotifa Ayodeji Bayo, *Democratic Deficit: The Dark Side of Weberian Bureaucracy in Nigeria*, 3 INT'L J. SOC. SCI. & EDUC. 541, 545 (2013).

170. BERTRAND BADIE & PIERRE BIRNBAUM, THE SOCIOLOGY OF STATE 24 (Arthur Goldhammer trans., 1983); see also Wolfgang J. Mommsen, *German Artists, Writers and Intellectuals and the Meaning of War, 1914–1918*, in STATE, SOCIETY AND MOBILIZATION IN EUROPE DURING THE FIRST WORLD WAR 31–32 (John Horne ed., 2002) (noting Weber's view that decision making by bureaucrats leads to irresponsible governance).



The role of the bureaucrat is strictly subordinate to the political superior.<sup>171</sup>

The classic Weberian understanding of the administrative state presupposes the individual discretion of lower-level government employees is immaterial to the implementation of law, playing no part.<sup>172</sup>

Critics offered descriptive and normative challenges, claiming a disconnect between Weber's description and the real world operation of modern bureaucracies and also the undesirability of the inflexible Weberian top-down hierarchical bureaucracy.<sup>173</sup> Scholars found that Weber's model did not necessarily mesh with real world experience.<sup>174</sup> Instead of simply implementing top-down commands, lower-level government employees "pursue interests and express feelings from the bottom up that can constrain, facilitate, or transform formal organizational systems into complex congeries marked by informal cultures and shadow structures."<sup>175</sup> Professor Norton Long observed "[n]ot only does political power flow in from the sides of [a bureaucratic] organization . . . ; it also flows up the organization to the center from the constituent parts."<sup>176</sup> Even information dominance, which had long been viewed as the domain of the higher rather than the lower-level government employee, was turned on its head through realization that lower-level bureaucrats "often possess information not independently available to their political superiors."<sup>177</sup> The lower-level bureaucrat has a simultaneity of information, possessing both information internal to the bureaucracy and information from the client who is external to the government entity.<sup>178</sup> An information asymmetry

171. James P. Pfiffner, *Traditional Public Administration versus The New Public Management: Accountability versus Efficiency*, in INSTITUTIONENBILDUNG IN REGIERUNG UND VERWALTUNG: FESTSCHRIFT FÜR KLAUS KONIG 443, 443–44 (A. Benz et al. eds., 2004), [http://pfiffner.gmu.edu/files/pdfs/Book\\_Chapters/NewPublicMgt.doc.pdf](http://pfiffner.gmu.edu/files/pdfs/Book_Chapters/NewPublicMgt.doc.pdf).

172. Arre Zuurmond, *Bureaucratic Bias and Access to Public Services*, in THE STATE OF ACCESS: SUCCESS AND FAILURES OF DEMOCRACIES TO CREATE EQUAL OPPORTUNITIES 164 (Jorrit De Jong & Gowher Rivzi eds., 2009).

173. See generally Pfiffner, *supra* note 171 (demonstrating that Weber's classical model has been challenged by the "new public management" model of bureaucracy).

174. JOS C.N. RAADSCHELDERS, GOVERNMENT: A PUBLIC ADMINISTRATION PERSPECTIVE 325 (2003) (noting "the reality of their functioning differed from the idealtypical (Weber)").

175. Shannon Portillo & Danielle S. Rudes, *Construction of Justice at the Street Level*, 10 ANN. REV. L. & SOC. SCI. 321, 322 (2014).

176. Norton E. Long, *Power and Administration*, 9 PUB. ADMIN. REV. 257, 258 (1949).

177. CHARLES GOODSSELL, THE CASE FOR BUREAUCRACY: A PUBLIC ADMINISTRATION POLEMIC 128 (4th ed. 2004).

178. RICHARD W. SCHWESTER, HANDBOOK OF CRITICAL INCIDENT ANALYSIS 221 (2014).

emerges therefrom that “gives [bureaucrats] the ability to outmaneuver their principals and pursue their own objectives.”<sup>179</sup>

The most important breaking point in the movement away from Weber’s previously dominant understanding arrived with Professor Michael Lipsky’s seminal 1980 book *Street-Level Bureaucracy: Dilemmas of the Individual in Public Services*,<sup>180</sup> which was published nearly fifteen years after the Supreme Court’s decision in *Rosenblatt*.<sup>181</sup> Simply stated, Professor Lipsky’s work, and those who joined in exploring the impact of lower-level government employees, “change[d] a field” and “altered . . . thinking about American bureaucracy.”<sup>182</sup>

Professor Lipsky not only added greatly to the descriptive challenge to Weber’s model but also struck at it normatively.<sup>183</sup> His work proved to be groundbreaking and influential in the study of bureaucratic implementation, shifting the focus from top-down policy makers to bottom-up implementers, who proved in the real world to be policy makers in their own right.<sup>184</sup> This change in focus has been crucial to developing the modern understanding of the administrative state.<sup>185</sup> It has also sparked a number of realizations that are central to appreciating the role of lower-level government employees in democratic self-governance.

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179. GOODSSELL, *supra* note 177, at 125.

180. MICHAEL LIPSKY, *STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES* (1980).

181. MICHAEL HILL & PETER HUPE, *IMPLEMENTING PUBLIC POLICY: AN INTRODUCTION TO THE STUDY OF OPERATIONAL GOVERNANCE* 53 (3d ed. 2014); Steven Maynard-Moody & Shannon Portillo, *Street Level Bureaucratic Theory*, in *THE OXFORD HANDBOOK OF AMERICAN BUREAUCRACY* 252 (Robert F. Durant ed., 2010); EVERT VEDUNG, *PUBLIC POLICY AND PROGRAM EVALUATION* 235 (1997).

182. Maynard-Moody & Portillo, *supra* note 181, at 252.

183. *See, e.g.*, GREG MCELLIGOTT, *BEYOND SERVICE: STATE WORKERS, PUBLIC POLICY, AND THE PROSPECTS FOR DEMOCRATIC ADMINISTRATION* 20 (2001) (stating that Lipsky’s theory has the effect of “‘standing the study of policy implementation on its head,’ extend[ing] the critique of Max Weber far enough to assert a direct causal link between the actions of lower-level public servants and the policy output of the state”); HILL & HUPE, *supra* note 181, at 53–56 (noting that Lipsky’s theory offers a challenge both descriptively and normatively to the top-down hierarchical model of the administrative state); Catherine Trundle, *Compassion and Interaction in Charity Practices*, in *DIFFERENTIATING DEVELOPMENT: BEYOND AN ANTHROPOLOGY OF CRITIQUE* 218 (Soumya Venkatesan & Thomas Yarrow eds., 2012) (casting Lipsky in opposition to the top-down model of Weber).

184. HILL & HUPE, *supra* note 181, at 50–52; LARS TUMMERS, *POLICY ALIENATION AND THE POWER OF PROFESSIONALS: CONFRONTING NEW POLICIES* 42 (2013); VEDUNG, *supra* note 181, at 235; Maynard-Moody & Portillo, *supra* note 181, at 252.

185. HILL & HUPE, *supra* note 181, at 50–52; VEDUNG, *supra* note 181, at 235; Maynard-Moody & Portillo, *supra* note 181, at 252.

When citizens interact with government it is overwhelmingly through lower-level government employees rather than higher-level policy-making officials.<sup>186</sup> Lower-level government officials present the face of the government, personifying the authority of the government and its manner of operation.<sup>187</sup> As was well observed by Professor Charles Goodsell: “[T]he principal function of public administration, the implementation of law and policy, puts bureaucracy in the position of representing the sovereign majesty of the state to citizens in concrete, everyday terms. To them, the state *is* bureaucracy.”<sup>188</sup> The implementation of law through the modern administrative state occurs at the end of a long line from lawmaker to lower-level government employee that traverses along the route of various relationships and interactions.<sup>189</sup> The implementation ultimately emerges through the interaction of a citizen with a lower-level government employee.<sup>190</sup> It is actions of the lower-level government employee at the end of that chain that “actually constitute the services ‘delivered’ by government.”<sup>191</sup>

Lower-level government employees exercise decision-making and policy-making judgments that are neither anticipated by nor welcomed under a strict Weberian administrative structure.<sup>192</sup> Through their interactions with the public, lower-level government employees “actually make policy choices rather than simply implement the decisions of elected officials.”<sup>193</sup> As observed by Professor Lipsky, “[p]olicy implementation in the end comes down to the people who actually implement it.”<sup>194</sup> Referring to these lower-level government employees as “street-level bureaucrats,” Professor Lipsky explains that

[t]he ways in which street-level bureaucrats deliver benefits and sanctions structure and delimit people’s lives and opportunities.

186. TUMMERS, *supra* note 184, at 42.

187. ZACHARY W. OBERFIELD, *BECOMING BUREAUCRATS: SOCIALIZATION AT THE FRONT LINES OF GOVERNMENT SERVICE* 16–17 (2014).

188. GOODSSELL, *supra* note 177, at 125.

189. SARAH L. HARTZELL, *MANAGING WELFARE STIGMA FROM THE OTHER SIDE OF THE DESK: A LOOK AT RURAL TANF CASEWORKERS* 30 (2007); Marcia K. Meyers & Nara Dillon, *Institutional Paradoxes: Why Welfare Workers Cannot Reform Welfare*, in *PUBLIC MANAGEMENT REFORM AND INNOVATION: RESEARCH, THEORY, AND APPLICATION* 232 (H. George Frederickson & Jocelyn Johnston eds., 1999).

190. HARTZELL, *supra* note 189, at 30; Meyers & Dillon, *supra* note 189, at 232.

191. LIPSKY, *supra* note 180, at 3.

192. BADIE & BIRNBAUM, *supra* note 170, at 24; Mommsen, *supra* note 170, at 31–32.

193. ROBERT B. DENHARDT ET AL., *MANAGING HUMAN BEHAVIOR IN PUBLIC AND NONPROFIT ORGANIZATIONS* 152 (3d ed. 2013).

194. MARTHA R. BURT, *STRATEGIES FOR IMPROVING HOMELESS PEOPLE’S ACCESS TO MAINSTREAM BENEFITS AND SERVICES* 7 (2010).

These ways orient and provide the social (and political) contexts in which people act. Thus every extension of service benefits is accompanied by an extension of state influence and control. As providers of public benefits and keepers of public order, street-level bureaucrats are the focus of political controversy. They are constantly torn by the demands of service recipients to improve effectiveness and responsiveness and by the demands of citizen groups to improve the efficacy and efficiency of government services. . . .

Street-level bureaucrats dominate political controversies over public services for two general reasons. First, debates about the proper scope and focus of governmental services are essentially debates over the scope and function of these public employees. Second, street-level bureaucrats have considerable impacts on peoples' lives. The impact may be of several kinds. They socialize citizens to expectations of government services and a place in the political community. They determine the eligibility of citizens for government benefits and sanctions. They oversee the treatment (the service) citizens receive in these programs.<sup>195</sup>

Nor is this impact limited to lower-level government employees who interact with the public. In a 2010 report to the President and Congress, the United States Merit Systems Protection Board concluded that first-level supervisors form a critical nexus between higher-level management and frontline employees.<sup>196</sup> The Board determined that how these supervisors perform their duties is vital to ensuring that congressional and executive policy determinations are actually implemented.<sup>197</sup> Accordingly, "modern public officials have much more individual decision-making discretion than predicted by Weber."<sup>198</sup> Civil servants "should not be seen as cogs in the machine,"

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195. LIPSKY, *supra* 180, at 4; *see also* JOEL F. HANDLER, LAW AND THE SEARCH FOR COMMUNITY 4-5 (1990).

Despite the masses of legislation, rules, regulations, and administrative orders, most large, complex administrative systems are shot through with discretion, from the top policy-makers down to the line staff—the inspectors, social workers, intake officers, police, teachers, health personnel, even the clerks. How they interpret the rules, how they listen to the explanations, how they help the citizen or remain indifferent all affect the substance and quality of the encounter, an encounter made increasingly important because of our widespread dependence on the modern state.

*Id.*

196. U.S. MERIT SYS. PROT. BD., A CALL TO ACTION: IMPROVING FIRST-LEVEL SUPERVISION OF FEDERAL EMPLOYEES, at i (Annie Marrelli ed., 2010).

197. *Id.*

198. CHRISTOPH DEMMKE & TIMO MOILANEN, EFFECTIVENESS OF PUBLIC-SERVICE ETHICS AND GOOD GOVERNANCE IN CENTRAL ADMINISTRATION OF THE EU-27: EVALUATING REFORM OUTCOMES IN THE CONTEXT OF THE FINANCIAL CRISIS 7 (2012).

but instead, to understand the administrative state, one has to grasp the “individual, value-laden, emotional, pluralistic, and . . . unpredictable” nature of governance that arises from implementers as decision makers.<sup>199</sup> The consequences of this are enormous because “[t]hrough administrative discretion, bureaucrats [even lower-level government employees] participate in the governing process of our society.”<sup>200</sup>

Many of the policy decisions of these lower-level government employees arise through informal rules and practices.<sup>201</sup> That the policy decisions of these government employees are often informal makes them no less critical, however, in terms of the implementation of law.<sup>202</sup> These informal decisions are in essence policy decisions that carry, whether with the knowledge or not of higher-ups,<sup>203</sup> the force of the state and the law thereof.<sup>204</sup> Whereas the nature of personal interactions between citizens and government bureaucrats are immaterial under Weberian theory in terms of actual implementation, the impact upon citizens in the real world is significant.<sup>205</sup> The nature of the interaction between the civil servant and the citizen at the point of implementation can have both positive effects in terms of improving policy implementation through flexible application at the street level,<sup>206</sup> or negative, for example, with the denial of benefits to which a citizen is otherwise entitled.<sup>207</sup> With either approach, “the actions of front-line workers have substantial and sometimes unexpected consequences for the *actual* direction and outcome of . . . programs [resulting in] . . . street-level bureaucrats . . . not implementing the policies that the ‘state’ intended to be delivered.”<sup>208</sup> Through the mediating of citizen’s needs

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199. *Id.*

200. JOHN A. ROHR, *ETHICS FOR BUREAUCRATS: AN ESSAY ON LAW AND VALUES* 48 (2d ed. 1989).

201. Evelyn Z. Brodtkin, *Accountability in Street-Level Organizations*, 31 INT’L J. PUB. ADMIN. 317, 318, 329–30 (2008).

202. U.S. DEP’T OF HOUS. & URBAN DEV., OFFICE OF POLICY DEV. & RESEARCH, *STRATEGIES FOR IMPROVING HOMELESS PEOPLE’S ACCESS TO MAINSTREAM BENEFITS AND SERVICES* 7–8 (2010).

203. Brodtkin, *supra* note 201, at 318, 329–30.

204. TODD DONOVAN ET AL., *STATE AND LOCAL POLITICS* 289 (2014).

205. DAVID A. WILLIAMSON, *JOB SATISFACTION IN SOCIAL SERVICES* 12–13 (1996).

206. *See* Trundle, *supra* note 183, at 218 (observing that lower-level bureaucrats can “transform policies of ‘indifference’ through practice and develop their own systems and sets of rules against such top-down pressures towards disinterest” (citation omitted)).

207. Arre Zuurmond, *Bureaucratic Bias and Access to Public Services*, in *THE STATE OF ACCESS: SUCCESS AND FAILURE OF DEMOCRACIES TO CREATE EQUAL OPPORTUNITIES* 164 (Jorrit De Jong & Gowher Rizvi eds., 2008).

208. NORMA M. RICCUCCI, *HOW MANAGEMENT MATTERS: STREET-LEVEL BUREAUCRATS*

within a prism of the implementer's own biases and views, administrative rules and available resources, and interaction with higher-ranking officials, the street-level bureaucrat provides bottom-up leadership in the administrative state.<sup>209</sup> Thus, as opposed to the smooth hierarchical flow of the Weberian model, a more contemporary understanding of the administrative state instead posits that

[b]ureaucracies are checked but not chained. They are responsive to external political control but not politically supine. They react not merely to static instructions but to changed circumstances. They not only implement policy but shape and advocate it . . . . [T]hey draw from . . . [the] lifeblood of power to advance ideas they think are right.<sup>210</sup>

While frustrating and undesirable from a Weberian point of view, from a Hegelian perspective, none of this should be particularly surprising. For Georg Wilhelm Friedrich Hegel,<sup>211</sup> a bureaucracy “mediates between the universal (laws or council decisions) and the particular (application to specific cases).”<sup>212</sup> Bureaucracy provides an “integrating force as it links the civil society and the state . . . . In Hegelian analysis bureaucracy takes its meaning from the opposition between the particular interest of the civil society and the general interest of the state.”<sup>213</sup> In its performance of this role, unlike Weber, who maintained a strict separation between politics for the lawmakers

AND WELFARE REFORM 5, 75 (2005).

209. R.A.W. Rhodes, *Public Administration*, in THE OXFORD HANDBOOK OF POLITICAL LEADERSHIP 101, 107–08 (R. A.W. Rhodes & Paul T. Hart eds., 2014).

210. GOODSSELL, *supra* note 177, at 128.

211. Hegel's dialectic can be described as follows:

Hegel's dialectic consists of a three-step process: thesis-anti-thesis-synthesis. The process starts with a current situation of common wisdom, called the thesis. The situation usually has a strong disadvantage, such as an unexplainable phenomenon in a theory, or needs of people not being met. This at one moment leads to people adopting the opposite belief, approach, or situation. This reaction is called antithesis. It solves the previous disadvantage, but brings new disadvantages as well. We are now in the stage of a dilemma: Both thesis and antithesis present dominant disadvantages. So far, this is nothing new, as yin and yang provided the same insight. But where with yin and yang the pendulum keeps swinging between opposites, Hegel offers a way out. He introduces the idea of synthesis, where over time the two opposites will fuse, or reconcile, creating the best of both worlds. And then, . . . the synthesis becomes the new thesis, what is believed to be true, to be eventually challenged by an antithesis once again.

FRANK BUYTENDIJK, DEALING WITH DILEMMAS: WHERE BUSINESS ANALYTICS FALL SHORT 11 (2010).

212. A.F. McGovern, *The Young Marx on the State*, in 1 KARL MARX'S ECONOMICS: CRITICAL ASSESSMENTS 177, 177 (1987).

213. S. P. NAIDU, PUBLIC ADMINISTRATION: CONCEPTS AND THEORIES 90 (5th ed. 2004).

and bureaucratic administration, Hegel did not descriptively or normatively separate the two.<sup>214</sup> Hegel instead focused his attention on seeking effective governance upon the emergence, hiring, and retention of highly qualified civil servants and appropriate control over these bureaucrats,<sup>215</sup> rather than excluding them from decision making.<sup>216</sup> The division between Hegel and Weber is, at least in part, attributable to Hegel's legitimization of state power through an abstract notion of a universal common good while Weber grounded legitimacy in formal legality.<sup>217</sup> In achieving this universal common good, Hegel took Immanuel Kant's notion of the individual politician with his or her "pure practical reason," and instead distributed that discernment through the political community with properly educated and trained civil servants of the society mediating the application of the law to the individual case, giving the sense of the society.<sup>218</sup> "For Hegel, bureaucratic administration, carried out by a cadre of independent and disinterested civil servants, is the essence of the rational state."<sup>219</sup> Unlike Weber's administrative state machine, "Hegel's theory of the state reminded civil servants to give their best for the sake of the state as the true representative of both reason and a quasi-religious commitment to the unselfish fulfillments of duty."<sup>220</sup> Hegel's theory for grounding such a role in civil servants "was based on the idea that the state was

214. Fritz Sager & Christian Rosser, *Weber, Wilson, and Hegel: Theories of Modern Bureaucracy*, 69 PUB. ADMIN. REV. 1136, 1143 (2009).

215. See, e.g., Prabhat Kumar Datta, *Karl Marx*, in ADMINISTRATIVE THINKERS 279 (D. Ravindra Prasad et al. eds., 1991) (addressing checks on the bureaucracy); see JERRY Z. MULLER, THE MIND AND THE MARKET: CAPITALISM IN WESTERN THOUGHT 164 (2003) (explaining Hegel's views regarding the education and training of bureaucrats).

216. See Wolfgang Seibel, *Beyond Bureaucracy-Public Administration as Political Integrator and Non-Weberian Thought in Germany*, 70 PUB. ADMIN. REV. 719, 721 (2010) (noting that Hegel embraced a role for bureaucrats beyond mere conduits for higher-level authorities).

217. *Id.*

218. G. A. Kelly, *Hegel's America*, 2 PHIL. & PUB. AFF. 3, 33 (1972).

Hegel's 'universal class', bureaucracy, is the only group whose roles in the state and civil society are said to coincide. Yet bureaucracy itself arises out of the separation of the two spheres. . . . The state is said to mediate the contradictions of civil society. The civil servant, educated in 'thought and ethical conduct' as well as the in the mechanics of administration, forgoes his own subjective interest and finds satisfaction in the dutiful discharge of his public functions. The bureaucracy is prevented by the combined pressures of the sovereign and the . . . [civil society] from 'acquiring the isolated position of an aristocracy and using its education and skill as means to an arbitrary tyranny.'

MICHAEL EVANS, KARL MARX 111 (1975).

219. EDWARD ROYCE, CLASSICAL SOCIAL THEORY AND MODERN SOCIETY: MARX, DURKHEIM, WEBER 210 (2015).

220. Seibel, *supra* note 216, at 721.

embedded in civil society and, indeed, was the prime representative of the ethical substance of the people as citizens.”<sup>221</sup>

One does not need to embrace Hegel’s justification for the discretion of civil servants to appreciate the critical role that bureaucrats, even lower-level government employees, play in the implementation of law and the conduct of government. As noted by Professors Goodsell and Lipsky, to members of the electorate, such employees are the personification of the government, its laws, and its services.<sup>222</sup> Thus, “the citizen’s impression of government may be significantly influenced by interaction with civil servants at the very lowest level of their organizations.”<sup>223</sup> Even if one were to only accredit the position that the public perceives lower-level government officials as the embodiment of the government, that would alone be sufficient cause to warrant assigning a role to discussion of the acts of such employees in their official capacity as part of democratic self-governance. The fact that lower-level government employees exercise real power removes any reasonable doubt as to whether the ability to discuss the action and inaction of such employees in their official capacity is integral to democratic self-governance.

“The core of the First Amendment . . . is the freedom to say whatever one thinks about the government . . . [and] its conduct . . .”<sup>224</sup> Devoid of speech about lower-level government employees, this is a voice without words. The failure to safeguard speech about lower-level government employees threatens to “hobble effective criticism of government.”<sup>225</sup> Accordingly, as part of political speech and democratic self-governance, discussion of the conduct of lower-level government employees in their official capacity belongs upon the highest rung of protection under the First Amendment.

#### IV. THE *GERTZ* COURT’S RATIONALES ARE NO LONGER AVAILING WHEN

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221. *Id.*

222. See LIPSKY, *supra* note 191, at 4 (noting that street-level bureaucrats who implement policies are the focus of what constitutes government for citizens); see also GOODSSELL, *supra* note 177, at 125 (“The principal function of public administration, the implementation of law and policy, puts bureaucracy in the position of representing the sovereign majesty of the state to citizens in concrete, everyday terms. To them, the state *is* bureaucracy.”).

223. B. GUY PETERS, *COMPARING PUBLIC BUREAUCRACIES: PROBLEMS OF THEORY AND METHOD* 112 (1988).

224. Ronald A. Cass, *Weighing Constitutional Anchors: New York Times Co. v. Sullivan and the Misdirection of First Amendment Doctrine*, 12 *FIRST AMEND. L. REV.* 399, 400 (2014).

225. WILLIAM K. JONES, *INSULT TO INJURY: LIBEL, SLANDER, AND INVASIONS OF PRIVACY* 43 (2003).



## APPLIED TO A GOVERNMENT EMPLOYEE

That speech about lower-level government officials is political speech, seemingly warranting such protection, does not, however, end the inquiry into whether the actual malice standard should be applied to lower-level government officials. The two remaining arguments in favor of not requiring lower-level government employees to surmount the actual malice test both arise from the United States Supreme Court's 1974 decision in *Gertz v. Welch*.<sup>226</sup> The *Gertz* Court concluded that the actual malice test should not be applied to private individuals even if the speech was upon a matter of public concern because of their (1) lack of access to media for purposes of self-help, and (2) lack of voluntariness in exposing themselves to public scrutiny.<sup>227</sup> Applying the *Gertz* Court's reasoning to lower-level government employees, there is a strong argument to be made that lower-level government employees are more akin to private individuals than high-level government officials or public figures in these two critical respects. This argument is not without appeal.<sup>228</sup> However, four decades of technological change in access to media, an erosion of the privacy of ordinary persons, and jurisprudential changes in how courts understand voluntariness in the context of defamation have all combined to undermine the force of these rationales. Ultimately, the two *Gertz* factors no longer provide sufficient support to justify failing to protect speech about the action and inaction of lower-level government employees in their official capacity, especially given the heightened protection that should be afforded to such speech given its role in democratic self-governance.

To fully understand the contrary position, it is helpful to start with the United States Supreme Court's 1971 decision in *Rosenbloom v. Metromedia, Inc.*,<sup>229</sup> which has proven to date to be the high-water mark for protecting speakers against defamation suits.<sup>230</sup> In *Rosenbloom*, the Supreme Court, or at least a plurality thereof, extended application of the actual malice test to otherwise private individuals so

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226. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

227. *Id.* at 344.

228. *See Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 52 (1971) (finding that even if a news broadcast defames a private citizen, it is not libel unless the plaintiff can demonstrate malicious intent).

229. 403 U.S. 29 (1971), *abrogated by Gertz*, 418 U.S. at 333–39.

230. *See, e.g.*, Michael A. Albert & Robert L. Bocchino Jr., *Trade Libel: Theory and Practice Under the Common Law, The Lanham Act, and the First Amendment*, 89 TRADEMARK REP. 826, 832 (1999) (“The high water mark of First Amendment protection came in *Rosenbloom v. Metromedia, Inc.*”).

long as the content of the speech related to a matter of public concern.<sup>231</sup> Writing for the plurality, Justice Brennan reasoned that “[i]f a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not ‘voluntarily’ choose to become involved.”<sup>232</sup> Brennan asserted that “[t]he public’s primary interest is in the event; the public focus is on the conduct of the participant and the content, effect, and significance of the conduct, not the participant’s prior anonymity or notoriety.”<sup>233</sup> Adopting this approach, at least in the view of the plurality, honored “the commitment to robust debate on public issues, which is embodied in the First Amendment, by extending constitutional protection to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous.”<sup>234</sup>

Just three years later, the Supreme Court in *Gertz* concluded that the *Rosenbloom* plurality had gone too far.<sup>235</sup> The *Gertz* Court viewed the *Rosenbloom* plurality’s balancing of the competing interests of persons injured by defamation and protection of speech as having been overly protective of the media and insufficiently so of private individuals.<sup>236</sup> *Gertz* offered a correction to the perceived excesses of *Rosenbloom*.<sup>237</sup> The *Gertz* Court redirected the focus in determining the applicable standard back to the status of the plaintiff.<sup>238</sup> For private individuals, those persons who are neither public officials nor all-purpose public figures (“household names”), the Supreme Court narrowed the circumstances wherein the actual malice standard applies.<sup>239</sup> In doing so, the Court created greater protection for the defamation suit plaintiff and less protection for the defamation suit defendant, the speaker.<sup>240</sup>

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231. See *Rosenbloom*, 403 U.S. at 43–48 (discussing protection of speech on matters of public concern under the First Amendment).

232. *Id.* at 43.

233. *Id.*

234. *Id.* at 43–44.

235. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345–46 (1974) (discussing how *Rosenbloom*’s plurality test impedes the States’ ability to enforce a legal remedy for private individuals injured by defamatory remarks).

236. *Id.*

237. *Id.*

238. See Joseph H. King, Jr., *Deus ex Machina and the Unfulfilled Promise of New York Times v. Sullivan: Applying the Times for All Seasons*, 95 KY. L.J. 649, 663–65 (2006–2007) (addressing the shift in focus from the content of the speech to the identity of the subject of the speech).

239. *Id.* at 664–65.

240. *Id.* at 664.

The actual malice standard only applies to an otherwise private person if the speech is both about a matter of public concern and the plaintiff has voluntarily thrust herself into a public controversy or, in some rare circumstances, where the plaintiff has been drawn into a public controversy.<sup>241</sup> Otherwise, the constitutional safeguard of the actual malice standard is inapplicable to private individuals.<sup>242</sup>

The *Gertz* Court's rationale for distinguishing between private individuals and public figures, and in doing so rejecting the *Rosenbloom* plurality's approach, stands upon two pillars: (1) lack of access to media for self-help and (2) voluntary assumption of the risk.<sup>243</sup> The first rationale for the distinction between private individuals and public figures is that public figures have greater access to media as a means of self-help for addressing defamatory statements.<sup>244</sup> The *Gertz* Court reasoned that

[t]he first remedy of any victim of defamation is self-help—using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation. Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than [sic] private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.<sup>245</sup>

The second rationale for distinguishing private individuals from public figures is that the latter have voluntarily thrust themselves into matters of public controversy, thereby assuming the risk of adverse comment.<sup>246</sup> This second rationale “is heavily grounded in cultural and moral equity” attached to a sense that those who seek to influence matters of public concern should accept that “if you can’t stand the heat of the fire, stay out of the kitchen.”<sup>247</sup>

Contextualizing lower-level public employees within the broader scope of *Gertz*'s analysis, which distinguishes public figures from private persons, venerable defamation scholar Professor David Elder

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241. *Id.* at 664–65.

242. *Id.*

243. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344–45 (1974) (discussing the differences between private individuals and public figures in regard to defamation).

244. *Id.* at 344.

245. *Id.*

246. SMOLLA, *supra* note 65, § 6:40, at 6-336.

247. *Id.* at 6-354.

has argued that imposition of the actual malice standard to lower-level public employees is antithetical to the general reasoning behind the *Gertz* framework.<sup>248</sup> He notes that “[l]ow-ranking or ‘garden variety’ public employees do not in any realistic sense assume the risk of enhanced press scrutiny and they generally have little access to the media for rebuttal on a ‘regular and continuing’ or other basis.”<sup>249</sup> Simply stated, most lower-level government employees “have no more access to the press than private individuals, and none have assumed the risk of media exploitation by taking low-level positions.”<sup>250</sup> As noted above, this argument is not without appeal or force. However, four decades of technology and social changes in access to media, the general erosion of the privacy of ordinary persons, and jurisprudential changes in how courts understand voluntariness in context of defamation have undermined the force of these rationales.

#### A. Dramatically Increased Access to Media

The rapid pace of societal and technological change in the four decades since the United States Supreme Court decided *Gertz* in 1974 has been dizzying.<sup>251</sup> Thomas Friedman, reflecting on technological changes since the publication of his book *The World is Flat*, observed that “Facebook didn’t exist for most people, ‘Twitter’ was still a sound, the ‘cloud’ was something in the sky, ‘3G’ was a parking space, ‘applications’ were what you sent to college, and ‘Skype’ was a typo.”<sup>252</sup> Friedman wrote *The World is Flat* in 2005;<sup>253</sup> *Gertz* was decided in 1974. The technological revolution that would reshape the world was still in its infancy in 1974. Computers were for large corporations and the government, not ordinary people.<sup>254</sup> A majority of

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248. DAVID ELDER, DEFAMATION: A LAWYER’S GUIDE § 5:1, Westlaw (database updated July 2015).

249. *Id.*; see also Whitten, *supra* note 93, at 568 (noting that lower-level government employees “may not have ready access to the media to defend themselves”).

250. Finkelson, *supra* note 45, at 888.

251. See BRUCE A. SHUMAN, ISSUES FOR LIBRARIES AND INFORMATION SCIENCE IN THE INTERNET AGE, at x (2001) (“The rise of the Internet is one of the most astonishing developments of this or any other century, compared by some writers in importance to the capture of fire and to Gutenberg’s printing press . . .”).

252. THOMAS L. FRIEDMAN & MICHAEL MANDELBAUM, THAT USED TO BE US: HOW AMERICA FELL BEHIND IN THE WORLD IT INVENTED AND HOW WE CAN COME BACK 59 (2011).

253. THOMAS L. FRIEDMAN, THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY (2005).

254. See, e.g. JUNE JAMRICH PARSONS & DAN OJA, NEW PERSPECTIVES ON COMPUTER CONCEPTS 6 (2014) (observing that computers originally were enormous and expensive devices used by large corporations and the government but not ordinary people); see also JANNA

households in the United States did not have a computer for more than a quarter of century after *Gertz* was decided.<sup>255</sup> In 1974, the Internet was the exclusive preserve of the military and scientists; it was unknown to the general public.<sup>256</sup> Widespread usage of the Internet by non-techies was still two decades away,<sup>257</sup> as were the first blogs, which were essentially online diaries.<sup>258</sup> Widespread blogging did not appear for another twenty-five years after *Gertz* was decided.<sup>259</sup>

The Supreme Court of the mid-1970s saw a world in which there were only a few media options limited to local newspapers, commercial radio stations, the big-three television networks, and national newsmagazines.<sup>260</sup> Because of both the limited number of available media platforms and the narrowness of control thereof, popular participation in the media was nonexistent.<sup>261</sup> Simply stated, these were

QUITNEY ANDERSON, *IMAGINING THE INTERNET: PERSONALITIES, PREDICTIONS, PERSPECTIVES* 39–42 (2005) (noting that computers were extremely expensive, most were so large they could fill an entire room, and many organizations “shared” time on a single computer).

255. See LYNN G. GREF, *THE RISE AND FALL OF AMERICAN TECHNOLOGY* 110 (2010) (discussing the history of the Personal Computer (“PC”)); see also Kenneth R. Wilson et al., *Social Stratification and the Digital Divide*, in *HANDBOOK OF PUBLIC INFORMATION SYSTEMS* 173, 175 (G. David Garson ed., 2005) (addressing the impact and history of the Internet).

256. See MARY LOU ROBERTS & DEBRA ZAHAY, *INTERNET MARKETING: INTEGRATING ONLINE & OFFLINE STRATEGIES* 3–4 (3d ed. 2013) (discussing the history of the Internet).

257. MARK F. DOBECK & EUEL ELLIOTT, *MONEY* 188 (2007); ANASTASIA GOODSTEIN, *TOTALLY WIRED: WHAT TEENS AND TWEENS ARE REALLY DOING ONLINE* 56 (2007); see also Pamela Samuelson & Hal R. Varian, *The “New Economy” and Information Technology Policy*, in *AMERICAN ECONOMIC POLICY IN THE 1990S*, at 361, 365–66 (Jeffrey A. Frankel & Peter R. Orszag eds., 2002) (noting that the first Internet interface for non-techies was not developed until 1991).

258. ROB BROWN, *PUBLIC RELATIONS AND THE SOCIAL WEB: HOW TO USE SOCIAL MEDIA AND WEB 2.0 IN COMMUNICATIONS* 26 (2009). Brown notes,

The first bloggers were . . . online diarists, who would keep a running account of their lives. These blogs began well before the term was coined and the authors referred to themselves usually as diarists or online journalists. Perhaps the first of these and therefore the original blogger was Justin Hall, who began blogging in 1994.

*Id.*

259. See *id.* (explaining how public participation in blogging began to significantly increase in 1999 with the arrival of Blogger, which Google purchased four years later).

260. DAVID CROTEAU & WILLIAM HOYNES, *THE BUSINESS OF MEDIA: CORPORATE MEDIA AND THE PUBLIC INTEREST* 111 (2d ed. 2006); see, e.g., RICHARD CAMPBELL ET AL., *MEDIA & CULTURE: AN INTRODUCTION TO MASS COMMUNICATION* G-8 (8th ed. 2012) (describing the mid-1950s through the late-1970s as the network era for the dominance of the big three television networks: ABC, CBS, and NBC); Kevin Drum, *A Blogger Says: Save The MSM!*, MOTHER JONES, <http://www.motherjones.com/politics/2007/03/blogger-says-save-msm/> (last visited Oct. 8, 2015) (stating that in the early- to mid-1970s “most people still had pretty limited access to news . . . one or two newspapers, three TV networks, and a few national newsmagazines”).

261. See Nico Carpentier et al., *Waves of Media Democratization: A Brief History of Contemporary Participatory Practices in the Media Sphere*, 19 *CONVERGENCE* 287, 291 (2013)

“modes of communication that ordinary citizens generally could not tap into,” in seeking to exercise self-help in responding to defamatory comments.<sup>262</sup>

The cumulative effect of the advances in technology and social media have provided access for ordinary people to communicate broadly through media in a manner that would have been unthinkable to the members of the Supreme Court in 1974. There has been a

wave of media democratization . . . with the popularization of the Internet, especially Web 2.0 . . . . In contrast to [earlier] participation through the Internet . . . [more recent] participation in the Internet focuses on the opportunities provided to non-media professionals to (co-)produce media content themselves and to (co-)organize the structures that allow for this media production.<sup>263</sup>

The core of Web 2.0, which dates its birth to around 2000, is technological services including “blogs, wikis, podcasts, Really Simple Syndication (RSS) feeds etc., which facilitate a more socially connected Web where everyone is able to add to and edit the information space.”<sup>264</sup> With computer coding knowledge no longer necessary to produce and distribute content, the nontechnophile person can utilize sophisticated communication technology relatively easily through user-friendly interfaces.<sup>265</sup>

Among rich and poor, young and old, and persons of diverse racial and ethnic backgrounds, this technological revolution has taken hold.<sup>266</sup> Social media is increasingly becoming a “key source [of] news and information,”<sup>267</sup> and an important forum for discourse on public issues.<sup>268</sup> For Americans under the age of fifty, the Internet serves as their main source for news, and even when Americans of all age groups are considered, the Internet remains well ahead of newspaper and radio

(discussing the history of media post-World War II).

262. David Lat & Zach Shemtob, *Public Figurehood in the Digital Age*, 9 J. ON TELECOMM. & HIGH TECH. L. 403, 410 (2011).

263. Carpentier et al., *supra* note 261, at 292.

264. PAUL ANDERSON, *WEB 2.0 AND BEYOND: PRINCIPLES AND TECHNOLOGIES* 1 (2012).

265. See Sharon Meraz, *The Many Faced “You” of Social Media*, in *JOURNALISM AND CITIZENSHIP: NEW AGENDAS IN COMMUNICATION* 123 (Zizi Papacharissi ed., 2009) (summarizing the shifts in blogging and internet practices).

266. See generally Maeve Duggan et al., *Social Media Update 2014*, PEW RES. CTR. (Jan. 9, 2015), <http://www.pewinternet.org/2015/01/09/social-media-update-2014/> (demonstrating technology’s powerful effect across economic, racial, and generational lines).

267. Alan B. Albarran, *Preface to THE SOCIAL MEDIA INDUSTRIES*, at xviii, xix (Alan B. Albarran ed., 2013).

268. Lyrissa Lidsky, *Public Forum 2.0*, 91 B.U. L. REV. 1975, 2003–04 (2011).

and second only to television as their source of news.<sup>269</sup> Seeking to survive the onslaught of social media, traditional media is adapting to integrate reader participation.<sup>270</sup> For example, newspapers and magazines open up their articles for comment from members of the public<sup>271</sup> and create forums for citizen journalism.<sup>272</sup>

While it remains difficult to grasp the full scope of the societal change that has been driven by technology, it can be safely stated that “the ability for self-help has spread to the masses.”<sup>273</sup> Unlike their counterparts in 1974, “ordinary people can now publish their thoughts on Twitter . . . attack those in power on Blogger . . . and report on events excluded from other mainstream media by sending their own news stories and photos to citizen journalism sites like Demotix.”<sup>274</sup> Via the Internet, ordinary people have “the opportunity to share their experiences (good and bad), air their views and opinions, and vent their frustrations.”<sup>275</sup> Ordinary citizens “can now leverage their Web-based social networks for creating knowledge and meaning outside elite cueing, which is transforming how information is created, interpreted, and diffused in the Internet age.”<sup>276</sup>

Persons who would have been excluded from mass communication in 1974 can now access vast potential audiences<sup>277</sup> at an extremely low

269. *Number of Americans Who Read Print Newspapers Continues Decline*, PEW RES. CTR. (Oct. 11, 2012), <http://www.pewresearch.org/daily-number/number-of-americans-who-read-print-newspapers-continues-decline/>.

270. See Dina A. Ibrahim, *Broadcasting and Cable Networks*, in 1 ENCYCLOPEDIA OF SOCIAL NETWORKS 88, 90–91 (George A. Barnett ed., 2011) (addressing the challenge posed to traditional media by social media and how traditional media is responding).

271. See Paul Grabowicz, Tutorial: The Transition to Digital Journalism, BERKELEY: ADVANCED MEDIA INST. (2014), <http://multimedia.journalism.berkeley.edu/tutorials/digital-transform> (last visited Sept. 7, 2015) (“One of the most basic ways that a news organization can engage people is to provide a way for them to comment on and discuss news stories on the website and postings to staff weblogs.”).

272. See, e.g., *Citizen Journalism*, MEDIASHIFT, <http://mediashift.org/social-media/citizen-journalism> (last visited Sept. 7, 2015) (providing a forum for citizen journalism).

273. Jeff Kosseff, *Private or Public? Eliminating the Gertz Defamation Test*, 2011 U. ILL. J.L. TECH. & POL’Y 249, 266.

274. KEN BROWNE, AN INTRODUCTION TO SOCIOLOGY 324 (4th ed. 2011).

275. TERRY NICKLIN, CAMBRIDGE MARKETING HANDBOOK: STAKEHOLDER 58 (2013).

276. MERAZ, *supra* note 265, at 123.

277. See BROWNE, *supra* note 274, at 324 (addressing the communication possibilities offered for ordinary persons through technology and sociological impacts thereof); Michelle Sherman, *The Anatomy of a Trial with Social Media and the Internet*, 14 J. INTERNET L. 8, 8 (2011) (“Social media is connection. It is communication, a rather unlimited form of it with people speaking to a large audience.”); Aaron Perzanowski, Comment, *Relative Access to Corrective Speech: A New Test for Requiring Actual Malice*, 94 CALIF. L. REV. 833, 835 (2006) (“The average citizen—previously confined to the one-to-one methods of distributing information—

cost<sup>278</sup> through leveraging technology. Media studies scholars Professors Andrea Press and Bruce Williams have observed that “new media . . . challenges elites . . . by providing communication channels for ordinary citizens to directly produce and access information about political, social, and economic life.”<sup>279</sup> Technological changes greatly empower the ordinary person through increasing democratization of the means of media production and the manner by which consumers obtain information.<sup>280</sup> New-media bloggers are now even holding traditional institutional news media accountable for errors.<sup>281</sup>

The new reality of ordinary people being able to reach large audiences at low costs using technology has not gone entirely unnoticed by the courts. The Delaware Supreme Court concluded that ordinary

enjoys a potential global audience on the internet.”).

278. See Geoffrey W.G. Leane, *Deliberative Democracy and the Internet: New Possibilities for Legitimising Law Through Public Discourse?*, 23 CAN. J.L. & JURIS. 373, 379–80 (2010) (addressing the low costs of mass communication through the Internet); Stephen C. Jacques, Comment, *Reno v. ACLU: Insulating the Internet, the First Amendment, and the Marketplace of Ideas*, 46 AM. U. L. REV. 1945, 1989 (1997) (“The Internet . . . breaks down . . . barriers, offering an egalitarian form of communication where the cost is little or nothing and an opinion is instantaneously distributed worldwide.”). In the *Gertz* era, media distribution required enormous capital expenditure and investment; as an illustration, printing and distributing newspapers required significant operational expenditures including printing presses, delivery trucks and delivery persons, reporters, editors, assistants, etc. See SHANNON E. MARTIN & KATHLEEN A. HANSEN, *NEWSPAPERS OF RECORD IN A DIGITAL AGE: FROM HOT TYPE TO HOT LINK* 44 (1998) (addressing the costs of newspaper publication).

279. ANDREA L. PRESS & BRUCE A. WILLIAMS, *THE NEW MEDIA ENVIRONMENT: AN INTRODUCTION* 20 (2010); see also Dan Gillmor, *Bloggers Breaking Ground in Communication*, 11 EJOURNAL USA: EMERGING MEDIA 24, 24 (2006) (“Software technology that allows writers to easily post their own essays on the World Wide Web has challenged the traditional role of media organizations as gatekeepers to a mass audience. At a steadily increasing pace over the last several years, ordinary citizens have made themselves into reporters and commentators on the social scene. They have made a remarkably rapid ascent onto their own platform in the realm of social and political debate.”). Hugh Hewitt, a conservative political commentator, has argued that “[t]he power of elites to determine what [is] news via a tightly controlled dissemination system [has been] shattered. The ability and authority to distribute text are now truly democratized.” HUGH HEWITT, *BLOG: UNDERSTANDING THE INFORMATION REFORMATION THAT’S CHANGING YOUR WORLD* 70–71 (2005); cf. David Gauntlett, *Creativity and Digital Innovation*, in *DIGITAL WORLD: CONNECTIVITY, CREATIVITY AND RIGHTS* 77, 80 (Gillian Youngs ed., 2013) (addressing the shift in perception of media as wholly separate and above the masses with the empowerment of the ordinary person to reach mass audiences through technology).

280. DAVID TAYLOR & DAVID MILES, *FUSION: THE NEW WAY OF MARKETING* 11 (2011); cf. CARNE ROSS, *THE LEADERLESS REVOLUTION: HOW ORDINARY PEOPLE WILL TAKE POWER AND CHANGE POLITICS IN THE TWENTY-FIRST CENTURY*, at xvii (2011) (“[I]n an increasingly interconnected system, such as the world emerging in the twenty-first century, the action of one individual or a small group can affect the whole system very rapidly.”).

281. S. Robert Lichter, *The Media*, in *UNDERSTANDING AMERICA: THE ANATOMY OF AN EXCEPTIONAL NATION* 181, 215 (Peter H. Schuck & James Q. Wilson eds., 2008).



persons now have access to

a very powerful form of extrajudicial relief. The Internet provides a means of communication where a person wronged by statements of an anonymous poster can respond instantly, can respond to the allegedly defamatory statements on the same site or blog, and thus, can, almost contemporaneously, respond to the same audience that initially read the allegedly defamatory statements. The [person] can thereby easily correct any misstatements or falsehoods, respond to character attacks, and generally set the record straight. This unique feature of internet communications allows a potential plaintiff ready access to mitigate the harm, if any, he has suffered to his reputation as a result of an anonymous defendant's allegedly defamatory statements made on an internet blog or in a chat room.<sup>282</sup>

Similarly, the Supreme Court of Georgia adopted a broad interpretation of an online speech statutory protection provision in accordance with a public policy of encouraging “defamation victims to seek self-help, their first remedy, by ‘using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation.’”<sup>283</sup> In adopting this statutory interpretation, the Georgia Supreme Court indicated that it was “strik[ing] a balance in favor of uninhibited, robust, and wide-open debate in an age of communications when anyone, anywhere in the world, with access to the Internet can address a worldwide audience of readers in cyberspace.”<sup>284</sup>

Congress has also deemed self-help to constitute an appropriate remedy in the Internet era. In the Communications Decency Act of 1996 (“CDA”) Congress expressly noted its finding that “[t]he Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.”<sup>285</sup> Congress also declared that “[t]he Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.”<sup>286</sup> Through the CDA, Congress sought “to promote the continued development of the Internet and other interactive computer services and other interactive media [and] to preserve the

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282. *Doe v. Cahill*, 884 A.2d 451, 464 (Del. 2005).

283. *Mathis v. Cannon*, 573 S.E.2d 376, 385 (Ga. 2002) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974)).

284. *Id.* at 386 (citations omitted).

285. 47 U.S.C. § 230(a)(3) (2012).

286. *Id.* § 230(a)(4).

vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.”<sup>287</sup> In pursuit of these ends, Congress provided under the CDA that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”<sup>288</sup> The practical result of this limitation is to leave available the remedy of online self-help, which is a remedy Congress considered to be adequate.<sup>289</sup>

Extralegal private market solutions are also available through online reputation management tools. For example, companies like Reputation.com, also known as Reputation Defender, serve their clients by helping individuals and companies to manage their online appearance.<sup>290</sup> Reputation Defender and its counterparts can monitor online commentary, boost positive comments in search engine ranking returns while lowering negative comments, and scrub negative comments by having them removed.<sup>291</sup> Utilizing online reputation management tools offers certain advantages in comparison with defamation suits including eliminating the defamatory statements and not drawing additional attention to the defamatory material.<sup>292</sup>

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287. *Id.* § 230(b)(1), (2).

288. *Id.* § 230(c)(1).

289. See Ellyn M. Angelotti, *Twibel Law: What Defamation and its Remedies Look Like in the Age of Twitter*, 13 J. HIGH TECH. L. 430, 485 (2013) (“One purpose of the CDA is to promote self-help on the internet . . . .”); Allison E. Horton, Note, *Beyond Control?: The Rise and Fall of Defamation Regulation on the Internet*, 43 VAL. U. L. REV. 1265, 1305–06 (2009) (“[T]he CDA’s purpose is to promote self-help on the Internet and prevent the potential chilling effect that regulation may have on Internet speech.”).

290. *Combat Negative Search Results with Reputation Defender*, REPUTATION.COM, <http://www.reputation.com/reputationdefender> (last visited Sept. 7, 2015).

291. See Lyriisa Barnett Lidsky, *Anonymity in Cyberspace: What Can We Learn from John Doe?*, 50 B.C. L. REV. 1373, 1390 (2009) (explaining how reputation defender can address defamatory online speech). See generally Angelotti, *supra* note 289, at 495 (describing some of the means by which such companies accomplish their objectives on behalf of their clients).

292. See Lidsky, *supra* note 291, at 1390. Professor Jacqueline Lipton has also noted that [t]hese services provide a number of advantages over legal solutions to online abuses, including the fact that several of them now have many years of experience with reputation management and have established solid working relationships with websites that host harmful communications. The use of private commercial services does not raise the specter of a First Amendment challenge. . . . [M]any laws directed at curtailing online speech may raise First Amendment concerns and may be open to constitutional challenge. Reputation management services also avoid many of the practical problems associated with litigation including jurisdictional challenges and difficulties identifying a defendant in the first place. A commercial service does not need to identify or locate a potential defendant in order to engage in astroturfing or search engine optimization. Resort to a reputation management service also avoids

While the Supreme Court has not addressed the impact of technological tools on First Amendment jurisprudence in the context of defamation specifically, the availability of self-help technology to accomplish ends that might otherwise be arrived at only through legally imposed restrictions on speech has been of significant impact in the Court's analysis of other free speech issues. For example, the Court explained that "the mere possibility that user-based Internet screening software would 'soon be widely available' was relevant to our rejection of an overbroad restriction of indecent cyberspeech."<sup>293</sup> In seeking to invalidate restrictions imposed under the CDA, the challengers focused on the availability of self-help technological remedies in asserting a reduced need for governmentally imposed speech restrictions.<sup>294</sup> As Professor Ann Bartow observed, that was precisely where the Justices turned in analyzing the constitutionality of the decency restrictions imposed by Congress, noting

[a] remedy was available for parents who did not want their children exposed to pornography or "indecency" on the Internet. They could purchase filtering software (a.k.a. "censorware") and subscribe to related content filtering services to keep undesired words and images away from their computers. In this way they could accomplish with their private purchasing power what the government would not do for them in terms of providing tools to regulate the information that was accessible to their children.<sup>295</sup>

Writing in a time period when Internet usage was at a stage of comparative infancy, approximately two decades ago, the United States Supreme Court observed that "[t]hrough the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer."<sup>296</sup> The empowerment of ordinary citizens has

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drawing public attention to the damaging content. Harmful content can simply be unobtrusively de-prioritized in search engine results.

Jacqueline D. Lipton, *Combating Cyber-Victimization*, 26 BERKELEY TECH. L.J. 1103, 1147 (2011) (citations omitted).

293. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 814 (2000) (quoting *Reno v. ACLU*, 521 U.S. 844, 876-77 (1997)).

294. See generally Tom W. Bell, *Pornography, Privacy, and Digital Self Help*, 19 J. MARSHALL J. COMPUTER & INFO. L. 133, 138-42 (2000) (describing how self-help remedies have made certain governmental restrictions upon speech that may be indecent or harmful to minors unnecessary and unconstitutional).

295. Ann Bartow, *Internet Defamation as Profit Center: The Monetization of Online Harassment*, 32 HARV. J.L. & GENDER 383, 422 (2009) (citations omitted).

296. *Reno*, 521 U.S. at 870.

grown exponentially in the last two decades, fundamentally undermining the *Gertz* Court's notion that private persons do not have meaningful access to channels of communication for redressing attacks on their reputations. In 2015, a lower-level government employee has access to means of communication for purposes of self-help that far exceed what would have been available to high-level public officials in 1974.

*B. Private Individuals Are Less Private Than They Were in 1974*

Underlying the Court's defamation jurisprudence is a view that states have a greater interest in protecting private persons who are not normally in the public domain from scrutiny than persons who are regularly in the public sphere. Private persons are not as isolated from the public sphere as they would have been in 1974. In his plurality opinion in *Rosenbloom*, and subsequently in his dissenting opinion in *Gertz*, Justice Brennan observed that "[v]oluntarily or not, we are all 'public' men to some degree."<sup>297</sup> In the 1970s, Justice Brennan did not find agreement from a sufficient number of his colleagues to form a majority around this conclusion. David Lat, founder of the website *Above the Law*, and Professor Zach Shemtob have argued that "Justice Brennan's words ring even more true in the digital age."<sup>298</sup>

Private individuals are undisputedly less private in 2015 than they were in 1974. And for that, as Cassius proclaims to Brutus in William Shakespeare's *Julius Caesar*, "[t]he fault, dear Brutus, is not in our stars. But in ourselves."<sup>299</sup> Judge Alex Kozinski has consistently argued privacy is being killed by the ordinary person and his or her love affair with technology:<sup>300</sup>

It started with the supermarket loyalty programs. They seemed innocuous enough—you just scribble down your name, number and address in exchange for a plastic card and a discount on Oreos. . . .

Letting stores track our purchases may not appear to be permitting an intensely personal revelation but, as the saying goes, you are what you eat, and we inevitably reveal more than we thought. Have diapers

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297. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 48 (1971), *abrogated by Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Gertz*, 418 U.S. at 364.

298. Lat & Shemtob, *supra* note 262, at 413.

299. WILLIAM SHAKESPEARE, *JULIUS CAESAR* act 1, sc. 2.

300. See, e.g., Alex Kozinski & Eric S. Nguyen, *Has Technology Killed the Fourth Amendment?*, 2011–2012 CATO SUP. CT. REV. 15, 15–30 (exploring how technology and people's love affair therewith have eroded privacy); Alex Kozinski & Stephanie Grace, *Pulling Plug on Privacy: How Technology Helped Make the 4th Amendment Obsolete*, FREE REPUBLIC (June 22, 2011), <http://www.freerepublic.com/focus/f-chat/2738236/posts> (same).

in your cart? You probably have a baby. Tofu? Probably a vegetarian. A case of Muscatel a week? An alcoholic (with poor taste, at that). The cards also track the “where” and “when” of our shopping expeditions. Making a late-night run to a convenience store near your ex-girlfriend’s house? Buying posters and markers the day before a political rally? If you swiped your card, all that information is now public. . . .

. . . .

These cards were just the beginning. Fast Track passes quickly followed—with their lure of a shorter commute for a little privacy. Then came eBay and Amazon, which save us from retyping our billing and shipping information, if only we create an account. Before long, convenience became paramount, and electronic tracking became the norm. Nowadays, Google not only collects data on what websites we visit but uses its satellites to take pictures of our homes.<sup>301</sup>

The digitization of government records has also moved much of what was formerly buried in dusty government records offices to something that it is easily accessible online.<sup>302</sup> For instance, a nosy neighbor can discover almost instantaneously how much someone paid for his or her home on Zillow.<sup>303</sup> With only a little more work, that same nosy neighbor can find arrest records, professional licenses, property liens, trademarks, patents, driver’s license information, and bankruptcy history, among other things.<sup>304</sup>

Social media collapses the private sphere even further. In 2008, the editors of *Webster’s New World Dictionary* chose “overshare,” which they defined as “to divulge excessive personal information,” as their word of the year.<sup>305</sup> Simply stated, people tend to overshare on social media.<sup>306</sup> Professor Bruce Boyden has observed that “[t]oo many

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301. Kozinski & Grace, *supra* note 300.

302. HERMAN T. TAVANI, *ETHICS AND TECHNOLOGY: ETHICAL ISSUES IN AN AGE OF INFORMATION AND COMMUNICATION TECHNOLOGY* 138 (2004).

303. David Carlson, *How Zillow Fueled My Real Estate Obsession*, *YOUNG ADULT MONEY* (Oct. 15, 2012), <http://www.youngadultmoney.com/2012/10/15/how-zillow-fueled-my-real-estate-obsession> (“Much to the shock of some people that the price they paid for their home is on public record, Zillow aggregates this public record data and makes it easy to see what a home was sold for in the past.”).

304. *How to Find Free Public Records Online*, ABOUT.COM, <http://websearch.about.com/od/governmentpubliclegal> (last visited Sept. 7, 2015).

305. *Word of the Year 2008: Overshare*, WEBSTER’S NEW WORLD DICTIONARY (Dec. 1, 2008, 6:31 AM), <https://wordoftheyear.wordpress.com/2008/12/01/2008-word-of-the-year-over-share>.

306. See Jennifer Rowsell, *My Life on Facebook: Assessing the Art of Online Social Networking*, in *ASSESSING NEW LITERACIES: PERSPECTIVES FROM THE CLASSROOM* 95, 97–98 (Anne Burke & Roberta F. Hammett eds., 2009) (observing the tendency people have to

people, confronted with the ability to share information with others via social networks, readily avail themselves of that opportunity, causing personal information to be shared from Facebook or Twitter accounts with little care as to its relevance or privacy.”<sup>307</sup> Through social media, people increasingly document almost every aspect of their lives.<sup>308</sup> Neuroscientists have helped to explain this oversharing phenomenon, suggesting that disclosure itself, especially personal self-disclosure, functions as an intrinsic reward, stimulating regions of the brain associated with pleasure.<sup>309</sup> Communications and media studies scholars have also offered insight into oversharing, having found that computer-mediated communication eliminates social and biological cues that would normally signal restraint and instead make the Internet not “feel public to its users,” thereby fostering less-restricted communication.<sup>310</sup> The problem is at such epidemic levels that a cottage industry of writers has emerged to caution against oversharing<sup>311</sup> and offer advice on where to draw the line.<sup>312</sup>

Nevertheless, oversharing has arguably become the new normal with the non-oversharer as the outlier.<sup>313</sup> Facebook CEO Mark Zuckerberg argues that openly sharing is the new social norm.<sup>314</sup> It is difficult to

overshare online).

307. Bruce E. Boyden, *Oversharing: Facebook Discovery and the Unbearable Sameness of Internet Law*, 65 ARK. L. REV. 39, 39 (2012).

308. *Id.* at 40.

309. See Diana I. Tamir & Jason P. Mitchell, *Disclosing Information about the Self is Intrinsically Rewarding*, 109 PRO. NAT’L ACAD. SCI. U.S. AM. 8038, 8038 (2012) (explaining neuroscience research and findings with regard to the oversharing online).

310. Malin Sveningsson Elm et al., *Question 3: How Do Various Notions of Privacy Influence Decisions in Qualitative Internet Research?*, in INTERNET INQUIRY: CONVERSATIONS ABOUT METHOD 69, 77 (Annette N. Markham & Nancy K. Baym eds., 2009) (emphasis omitted).

311. See, e.g., Andy O’Donnell, *The Dangers of Facebook Oversharing*, ABOUT.COM <http://netsecurity.about.com/od/securityadvisorie1/a/The-Dangers-Of-Facebook-Oversharing.htm> (last visited Sept. 7, 2015) (cautioning against oversharing); Robert Siciliano, *Oversharing on Social Media Common Amongst 50+*, MCAFEE BLOG CENT. (Oct. 23, 2013), <https://blogs.mcafee.com/consumer/50plus-tech-savvy-but-still-at-risk> (same).

312. See, e.g., Amy Guth, *Social Media and Oversharing: How to Check Yourself Before You Wreck Yourself*, CHI. TRIB. (Jan. 31, 2013), [http://articles.chicagotribune.com/2013-01-31/features/ct-tribu-social-media-oversharing-20130131\\_1\\_social-media-tweet-or-post-online-boundaries](http://articles.chicagotribune.com/2013-01-31/features/ct-tribu-social-media-oversharing-20130131_1_social-media-tweet-or-post-online-boundaries) (addressing how to draw lines to avoid oversharing); Mary Dell Harrington & Lisa Endlich Heffernan, *Oversharing: Why Do We Do It and How Do We Stop?*, HUFFINGTON POST (Dec. 4, 2013, 1:07 PM), [http://www.huffingtonpost.com/grown-and-flown/oversharing-why-do-we-do-it-and-how-do-we-stop\\_b\\_4378997.html](http://www.huffingtonpost.com/grown-and-flown/oversharing-why-do-we-do-it-and-how-do-we-stop_b_4378997.html) (same).

313. See Natalie J. Ferrall, Comment, *Concerted Activity and Social Media: Why Facebook is Nothing Like the Proverbial Water Cooler*, 40 PEPP. L. REV. 1001, 1026–27 (2013) (addressing increased social expectations of oversharing online).

314. Bobbie Johnson, *Privacy No Longer a Social Norm, Says Facebook Founder*, GUARDIAN

argue with the conclusion that there has been a radical redefinition of social norms at least insofar as people “are freely giving up some of their privacy to strangers, as they willingly friend strangers and post information and images they would never have shared so publicly before.”<sup>315</sup> In selecting “overshare” as their word of the year, *Webster’s* editors were quite conscious of this duality:

It’s also a word that is rather slip-slippery, chameleon-like. Some people use it disparagingly; they don’t like oversharing. Others think oversharing is good and that one must give full disclosure of one’s inner life. Sometimes there is a generational shift in the way people look at this practice and therefore view the word.<sup>316</sup>

Even if an individual is cautious about sharing information online, a friend, a parent, an acquaintance, a neighbor, or any other person with whom one interacts with may be far less hesitant about sharing or oversharing what formerly would have been private information about another person.<sup>317</sup> And in this new era of social media, “friend” is a far more expansive concept and less-known commodity, a problem only magnified by the unfathomable expansion online of the concept of a “friend of a friend.”<sup>318</sup>

Even among the most active and adept users of technology, there is little understanding of what is being made publicly available through users’ online activities.<sup>319</sup> Such lack of knowledge, or at least full appreciation thereof, can result in even classically private information such as what one is reading becoming exposed through Internet connectivity programs via Facebook’s social reader.<sup>320</sup>

(Jan. 10, 2010, 10:58 PM), <http://www.theguardian.com/technology/2010/jan/11/facebook-privacy>.

315. Laurie Thomas Lee, *Privacy and Social Media*, in *THE SOCIAL MEDIA INDUSTRIES* 146, 150 (Alan B. Albarran ed., 2013).

316. *Word of the Year 2008: Overshare*, *supra* note 305.

317. FREDERICK S. LANE, *AMERICA PRIVACY: THE 400-YEAR HISTORY OF OUR MOST CONTESTED RIGHT* 255–61 (2009).

318. *See generally* DOUGLAS JACOBSON & JOSEPH IDZIOREK, *COMPUTER SECURITY LITERACY: STAYING SAFE IN A DIGITAL WORLD* 214–17 (2012) (discussing the concept of “friend” in the digital world as it relates to varying levels of access to private information).

319. *See* JOHN PALFREY & URS GASSER, *BORN DIGITAL: UNDERSTANDING THE FIRST GENERATION OF DIGITAL NATIVES* 66–68 (2008) (noting people’s lack of full appreciation of just how tracked and observed they are through social media and online tools).

320. Margot Kaminski, *Reading Over Your Shoulder: Social Readers and Privacy Law*, *WAKE FOREST L. REV. ONLINE* (2012), <http://wakeforestlawreview.com/2012/03/reading-over-your-shoulder-social-readers-and-privacy-law/>. “Websites are adopting techniques to glean information about visitors to their sites, in real time, and then deliver different versions of the Web to different people.” Jennifer Valentino-DeVries et al., *Websites Vary Prices, Deals Based on Users’ Information*, *WALL ST. J.* (Dec. 24, 2012), <http://www.wsj.com/articles/SB1000142412>

Aggregation of massive amounts of data about formerly private individuals and data mining tools for exploring that information pose an even greater threat to privacy.<sup>321</sup> “[W]ith the advent of more powerful data mining techniques, the aggregation of seemingly innocuous personal data across a range of social media makes it fairly straightforward to put together a disturbingly detailed profile of the data’s originator.”<sup>322</sup> The access to information through aggregation and data mining is fundamentally undermining what was formerly the private sphere.<sup>323</sup> Given these technological realities, Sun Microsystems CEO Scott McNealy indelicately declared: “You have zero privacy. Get over it.”<sup>324</sup> At the very least, technology and people’s use of that technology has resulted in private individuals in 2015 being significantly less private than they were in 1974.

### C. Reduction in the Demands of Voluntariness

In addition to the lack of access to media and resulting inability to

7887323777204578189391813881534. Websites’ prices and text displays vary to respond to the customer’s IP address, search history, and means of accessing the site. *Id.*

321. LORI ANDREWS, I KNOW WHO YOU ARE AND I SAW WHAT YOU DID: SOCIAL NETWORKS AND THE DEATH OF PRIVACY 118–19 (2012); Craig Blakeley & Jeff Matsuura, *Welcome to the World of Information Aggregation*, LEGAL SOLUTIONS BLOG (Feb. 13, 2012), <http://blog.legalsolutions.thomsonreuters.com/law-and-techology/welcome-to-the-world-of-information-aggregation/>; Andre Oboler et al., *The Danger of Big Data: Social Media As Computational Social Science*, FIRST MONDAY (July 2, 2012), <http://firstmonday.org/ojs/index.php/fm/article/view/3993/3269>.

322. Lynne Y. Williams, *Who is the ‘Virtual’ You and Do You Know Who is Watching You?*, in SOCIAL MEDIA FOR ACADEMICS: A PRACTICAL GUIDE 175, 177–78 (Diane Rasmussen Neal ed., 2012).

323. See Saby Ghoshray, *The Emerging Reality of Social Media: Erosion of Individual Privacy Through Cyber-Vetting and Law’s Inability to Catch Up*, 12 J. MARSHALL REV. INTELL. PROP. L. 551, 556–65 (2013) (discussing a diminished fundamental right when an employer searches through an applicant’s cyber life). Reflecting upon the new realities for privacy presented by technology and social media, a New York state court observed:

[W]hen Plaintiff created her Facebook and MySpace accounts, she consented to the fact that her personal information would be shared with others, notwithstanding her privacy settings. Indeed, that is the very nature and purpose of these social networking sites else they would cease to exist. Since Plaintiff knew that her information may become publicly available, she cannot now claim that she had a reasonable expectation of privacy. As recently set forth by commentators regarding privacy and social networking sites, given the millions of users, “[i]n this environment, privacy is no longer grounded in reasonable expectations, but rather in some theoretical protocol better known as wishful thinking.”

Romano v. Steelcase Inc., 907 N.Y.S.2d 650, 657 (N.Y. Sup. Ct. 2010) (citation omitted).

324. Deborah Radcliff, *A Cry for Privacy: As E-Commerce Grows, Businesses Must Avoid Intruding on the Lives of Customers—Or Risk Losing Them*, COMPUTERWORLD, May 17, 1999, at 46.



exercise self-help rationale, the *Gertz* Court also explained the distinguishing of private individuals from public figures upon the basis that public figures have voluntarily submitted to scrutiny.<sup>325</sup> The *Gertz* Court envisioned public figures as persons “thrust[ing] themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved” and in doing so “assum[ing] roles of especial prominence in the affairs of society.”<sup>326</sup> Such a person “voluntarily injects himself . . . into a particular public controversy.”<sup>327</sup>

However, “[w]hat is and is not voluntary is by no means self-evident.”<sup>328</sup> And what is declared by courts to be voluntary looks increasingly less limited to persons thrusting themselves into matters of public controversies in order to influence the resolution thereof. Professor Rodney Smolla’s explanation of the application of public figure status to athletes is revealing and insightful on this point:

Professional athletes voluntarily enter the “arena,” quite literally the “sports arena,” and issues germane to their performance or fitness, including issues relating to mental and physical health, but also to their character and position in society as role models, justify treating professional athletes as public figures and also justifies a reasonably broad understanding of the range of issues concerning the professional athlete’s life that falls within the perimeter of that public figure status.<sup>329</sup>

Professional athletes have entered an arena that attracts public attention, but professional athletes have not “thrust” themselves to “the forefront of particular public controversies in order to influence the resolution of the issues involved.”<sup>330</sup> Instead, the finding of voluntariness for athletes derives from entering a profession that “command[s] the attention of sports fans.”<sup>331</sup> With this transition in understanding of what constitutes voluntariness, even the court’s voice shifts from active to passive. For example, in determining whether a

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325. See W. Wat Hopkins, *The Involuntary Public Figure: Not So Dead After All*, 21 CARDOZO ARTS & ENT. L.J. 1, 19 (2003) (“[V]oluntariness seemed to be the key element in determining whether a libel plaintiff is a public figure.”). Questions have been raised, however, about the soundness of the voluntariness rationale. See, e.g., David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487, 527–30 (1991) (challenging underlying presumptions about the voluntariness rationale).

326. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974).

327. *Id.* at 351.

328. *Schiavone Constr. Co. v. Time, Inc.*, 619 F. Supp. 684, 703 (D.N.J. 1985).

329. SMOLLA, *supra* note 65, § 6:40, at 6-361.

330. *Gertz*, 418 U.S. at 345.

331. *Chuy v. Phila. Eagles Football Club*, 595 F.2d 1265, 1280 (3d Cir. 1979).

plaintiff, a professional football player, was a public figure, the Third Circuit Court of Appeals concluded, “Chuy *had been thrust* into public prominence.”<sup>332</sup>

The concept of voluntariness even extends to individuals who scrupulously endeavor to maintain their anonymity and privacy, and to avoid the public sphere. While noting that the Mafioso figure in the case before it “yearns for [the] shadow,” the Fifth Circuit Court of Appeals, nevertheless, found him to be a public figure because, by being a Mafioso, he “voluntarily engaged in a course that was bound to invite attention and comment.”<sup>333</sup> The Third Circuit Court of Appeals embraced the same understanding, concluding that “[w]hen an individual undertakes a course of conduct that invites attention, even though such attention is neither sought nor desired, he may be deemed a public figure.”<sup>334</sup> In other words and remarkably, “[v]oluntariness, for purposes of public figure status, could be involuntary.”<sup>335</sup> The underlying analysis of this less-demanding form of voluntariness emphasizes “run[ning] the risks’ and ‘rais[ing] the chances’ of becoming a news item.”<sup>336</sup> When implementing such an approach, as noted by the Third Circuit Court of Appeals, “courts have classified some people as limited purpose public figures because of their status, position or associations.”<sup>337</sup> Redefining voluntariness in such a manner makes the voluntariness rationale for distinguishing public from private persons readily susceptible to the criticism that “[t]he premise that public figures have voluntarily accepted the risk of defamation, or that it goes with the territory, is nothing more than a handy fiction.”<sup>338</sup>

Changes in technology and media make utilizing this form of analysis, which lowers the bar for voluntariness, especially problematic. Professor Gerald Ashdown has observed,

[i]n our highly mobile, visible, and interactive society, the risk of attracting the attention of the press is as apparent as it is unpredictable. Becoming involved in any number of events, whether voluntarily or involuntarily, e.g., from an accident, natural disaster to a winning

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332. *Id.* (emphasis added).

333. *Rosanova v. Playboy Enters.*, 580 F.2d 859, 861 (5th Cir. 1978) (quoting *Rosanova v. Playboy Enters.*, 411 F. Supp. 440, 445 (S.D. Ga. 1976)).

334. *McDowell v. Paiewonsky*, 769 F.2d 942, 949 (3d Cir. 1985).

335. *Hopkins*, *supra* note 325, at 24 n.157.

336. *King*, *supra* note 238, at 692 (alterations in original) (quoting *Clyburn v. News World Commc'ns, Inc.*, 903 F.2d 29, 33 (D.C. Cir. 1990)).

337. *Marcone v. Penthouse Int'l Magazine for Men*, 754 F.2d 1072, 1083 (3d Cir. 1985).

338. *King*, *supra* note 238, at 698.

lottery ticket (i.e., good luck or bad), makes us vulnerable to media exposure.<sup>339</sup>

Accordingly, voluntariness is no longer confined to individuals who thrust themselves into the vortex of a public controversy to try to influence the resolution of the matter in controversy.<sup>340</sup> Instead,

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339. Gerald G. Ashdown, *Journalism Police*, 89 MARQ. L. REV. 739, 757 (2006).

340. The U.S. Courts of Appeals have repeatedly found voluntariness to be satisfied even in circumstances in which the subject of the speech did not attempt to intervene or address any matter of public controversy. *See, e.g.*, *McDowell v. Paiewonsky*, 769 F.2d 942, 949 (3d Cir. 1985) (finding that an architect who worked on public building projects was a public figure though he did not “intend to attract attention by his actions”); *Marcone*, 754 F.2d at 1083 (labeling a plaintiff who purchased marijuana as part of a drug smuggling ring a limited public figure); *Chuy v. Phila. Eagles Football Club*, 595 F.2d 1265, 1280 (3d Cir. 1979) (determining that a starting player for an NFL football team was thrust into public prominence and was a public figure); *Rosanova v. Playboy Enters.*, 580 F.2d 859, 861 (5th Cir. 1978) (noting that Rosanova voluntarily engaged in organized crime, which was “bound to invite attention and comment”); *see also, e.g.*, *Lohrenz v. Donnelly*, 350 F.3d 1272, 1274 (D.C. Cir. 2003) (“Because Lohrenz’s evidence shows that she chose the F-14 combat jet while well aware of the public controversy over women in combat roles, her challenge to the ruling that she was a voluntary limited-purpose public figure once the Navy assigned her to the F-14 combat aircraft rings hollow: she chose combat training in the F-14 and when, as a result of that choice, she became one of the first two women combat pilots, a central role in the public controversy came with the territory. Having assumed the risk when she chose combat jets that she would in fact receive a combat assignment, Lt. Lohrenz attained a position of special prominence in the controversy when she ‘suited up’ as an F-14 combat pilot.”); *Clyburn*, 903 F.2d at 33 (“Clyburn’s acts *before* any controversy arose put him at its center. His consulting firm had numerous contracts with the District government, he had many social contacts with administration officials, and Medina, at least as one may judge from attendance at her funeral, also enjoyed such ties. Clyburn also spent the night of Medina’s collapse in her company. One may hobnob with high officials without becoming a public figure, but one who does so runs the risk that personal tragedies that for less well-connected people would pass unnoticed may place him at the heart of a public controversy. Clyburn engaged in conduct that he knew markedly raised the chances that he would become embroiled in a public controversy. This conduct, together with his false statements at the controversy’s outset, disable him from claiming the protections of a purely ‘private’ person.”); *Dombey v. Phx. Newspapers, Inc.*, 724 P.2d 562, 570–71 (Ariz. 1986) (“Dombey sought, received, accepted and struggled to keep appointments as the designated insurance agent of record for a large county and administrator of deferred compensation programs for its employees. While he was not employed by and received no direct benefits from the public body, he did receive significant and valuable benefits because of his position. He did more than compile and transmit research results or publish arcana in obscure learned journals; he made recommendations resulting in substantial expenditures from the public fisc for health and life insurance programs and of private funds obtained by payroll deductions from public employees for the deferred compensation program. By assuming the position that he held, Dombey invited public scrutiny and should have expected that the manner in which he performed his duties would be a legitimate matter of public concern, exposing him to public and media attention. This is not to say that every provider of goods and services to the government becomes a public figure. We believe that no bright line can be drawn. A person who sells legal pads to the judicial department may legitimately expect to retain almost complete anonymity. Those responsible for providing rockets for the space program may not legitimately enjoy the same expectations. Dombey is at neither pole, but we believe that by assuming the positions of agent of record and administrator for the

voluntariness can be satisfied by a less demanding showing that plaintiffs willingly engaged in activity that foreseeably put them at risk of public attention.

Lower-level government officials have entered precisely such an arena. The primary charge of the press in the United States is to serve as a government watchdog so as to provide “transparency of government actions, thus contributing to government accountability and discouraging corruption.”<sup>341</sup> The press stands in the stead of the public as its eyes and ears so as to be able to inform the public about the actions of the government.<sup>342</sup> In doing so, Professor C. Edwin Baker has observed that the press serves as a deterrent upon governmental misconduct.<sup>343</sup> With regard to lower-level government employees, the media plays an important role in exposing bureaucratic incompetence, dereliction, ineptitude, and scandal.<sup>344</sup> Professor Mordecai Lee has found that reporters often utilize their reporting as a conduit for complaining about bureaucracy.<sup>345</sup> Consequently, Professor Goodsell notes that bureaucrats must be wary of the press, which is a watchdog of the bureaucracy.<sup>346</sup> Given that two of the primary roles of the press in the United States are “serving the public as a watchdog over the government and as a critic of the government’s actions”<sup>347</sup> and that those actions are taken through the administrative bureaucratic state,

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deferred compensation plans, he surrendered any legitimate expectation of anonymity with regard to the manner in which he performed in his positions, his relationship with executives of the governmental agencies and the other matters with which the articles were concerned. . . . Whatever requirement there might be to ‘thrust’ oneself into a public controversy was satisfied by his voluntary participation in activity calculated to lead to public scrutiny.” (citations omitted)).

341. Emily Berman, *Democratizing the Media*, 35 FLA. ST. U. L. REV. 817, 824 (2008).

342. See James Carey, “A Republic If You Can Keep It”: *Liberty and Public Life in the Age of Glasnost* (1991), reprinted in JAMES CAREY: A CRITICAL READER 207, 218 (Eve Stryker Munson & Catherine A. Warren eds., 1997) (noting that the press serves the public as the eyes, ears, guardians, and protectors of the public’s right to know).

343. See C. EDWIN BAKER, MEDIA, MARKETS, AND DEMOCRACY 133 (2001) (noting that the most important function of the press is its exposure of government corruption or incompetence, serving as the watchdog for the public).

344. DAVID L. PALETZ ET AL., 21ST CENTURY AMERICAN GOVERNMENT AND POLITICS § 16.4, at 775 (2012).

345. MORDECAI LEE, GOVERNMENT PUBLIC RELATIONS: A READER 92 (Mordecai Lee ed., 2007). See generally MORDECAI LEE, MEDIA AND BUREAUCRACY IN THE UNITED STATES, in ENCYCLOPEDIA OF PUBLIC ADMINISTRATION AND PUBLIC POLICY (Evan M. Berman ed., 2d ed. 2008) (addressing the media’s reporting upon bureaucracy).

346. See GOODSSELL, *supra* note 177, at 61 (detailing the number of “watchdogs” that serve as external reviewers of bureaucracies, such as auditors, legislative committees, budget offices, investigative bodies, program evaluation units, and, appropriately, the press).

347. Jennifer Elrod, *Protecting Journalists from Compelled Disclosure: A Proposal for A Federal Statute*, 7 N.Y.U. J. LEGIS. & PUB. POL’Y 115, 123 (2004).

media attention of government employees is hardly unforeseeable. Additionally, the public's role in democratic self-governance suggests that an expectation by a governmental employee of not being subject to public attention in the performance of one's official conduct is misplaced. Simply stated, the government employee has entered an arena that attracts and should attract public attention.

#### V. FIRST AMENDMENT DISSONANCE

Nevertheless, the Supreme Court has failed to protect speech about the action and inaction of lower-level government employees in their official capacity. This failure creates a discordant break in First Amendment jurisprudence in at least three critical respects. One, the Supreme Court's failure to safeguard speech about lower-level government employees devalues self-governance related speech in comparison to nonpolitical speech such as speech about literature and science. Two, the Supreme Court's failure to apply the actual malice standard is inconsistent with its rejection of balancing of the costs and benefits of protected speech—political speech about lower-level government employees constituting protected speech that should not be subjected to such balancing. Three, failing to provide greater protection for speakers addressing the conduct of lower-level government employees from defamation suits is inconsistent with the Supreme Court's handling of suits in other areas of tort law, such as intentional infliction of emotional distress claims.

As for the first fissure, Professor Frederick Schauer in his insightful article *Public Figures* questions the reasonableness of parity in treatment of public figures and public officials through application of the actual malice standard to both.<sup>348</sup> In his concurring opinion in *Curtis Publishing Co. v. Butts*, Chief Justice Warren articulated the Supreme Court's reason for extending the actual malice constitutional safeguard to include speech related to public figures where the speech is upon a matter of public concern:

To me, differentiation between “public figures” and “public officials” and adoption of separate standards of proof for each have no basis in law, logic, or First Amendment policy. Increasingly in this country, the distinctions between governmental and private sectors are blurred. Since the depression of the 1930's and World War II there has been a rapid fusion of economic and political power, a merging of science, industry, and government, and a high degree of interaction between

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348. See generally Schauer, *supra* note 75.

the intellectual, governmental, and business worlds. Depression, war, international tensions, national and international markets, and the surging growth of science and technology have precipitated national and international problems that demand national and international solutions. 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. This blending of positions and power has also occurred in the case of individuals so that many who do not hold public office at the moment are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.<sup>349</sup>

Chief Justice Warren's portrait of the public figure, which provided the foundation for the *Gertz* Court's embrace and structuring of the public-figure category,<sup>350</sup> is plainly the image of "a nominally private person [who] exercises as much, if not more, influence on the determination of public policy issues as do many public officials."<sup>351</sup> In that sense, the public figure doctrine "is heavily grounded in the public policy of facilitating free social discourse—those who voluntarily seek to influence events and issues may appropriately be forced to accept as part of the bargain a greater risk of defamation."<sup>352</sup> However, Professor Schauer has astutely observed that the Court's archetype of the public figure as a political actor engaged in influencing and directing political affairs "is only a part, and perhaps only comparatively small part, of the domain of public figures. The universe of public figures includes many people whose involvement in or influence on public policy matters is either attenuated or nonexistent."<sup>353</sup>

While conceding that parity between non-policy-making public

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349. *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 163–64 (1967) (Warren, C.J., concurring).

350. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (quoting from Chief Justice Warren's description of a public figure in explaining the difference in treatment of private individuals and public figures with regard to defamation suits); *see also* Schauer, *supra* note 75, at 914 (questioning the reasonableness of equal treatment of public figures and public officials through application of the actual malice standard to both).

351. Schauer, *supra* note 75, at 916.

352. SMOLLA, *supra* note 62, § 2:35.50, at 2-64.35.

353. Schauer, *supra* note 348, at 917.

figures (as examples, fiction authors and painters) and politicians may be justified based upon other aspects of the First Amendment, Professor Schauer observes that “[s]uch an argument . . . can be found neither in *New York Times* nor in an extension of *New York Times* premised on the inevitable or predominant involvement of some public figures in the same types of decisions made by public officials.”<sup>354</sup> The parity problem is even worse when considered in relation to lower-level government officials. Despite being integral components of the modern administrative state, and comments regarding their official conduct being critical to democratic self-governance, lower-level government employees are not actually in parity with non-policy-making public figures in defamation suits. Instead, a lower-level government official has less constitutional constraint in seeking damages through a defamation suit than a fiction writer or painter. While not disputing that non-political speech is, and should be, protected under the First Amendment,<sup>355</sup> political speech is, at least in theory, to have the greatest degree of First Amendment protection.<sup>356</sup> Failure to afford

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354. *Id.* at 919.

355. The Supreme Court has recognized that “guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government.” *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967). Protected speech could also, for example, be related to economic, religious, or cultural matters. *See NAACP v. Alabama*, 357 U.S. 449, 460 (1958) (“It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the ‘liberty’ assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. Of course, it is immaterial whether the beliefs sought to be advanced by associations pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.” (citations omitted)). First Amendment protections embrace a “right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences.” *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969). In fact, in recent years the nonpolitical entertainment-related speech issues that have been before the Supreme Court have been so pronounced in terms of their “sheer volume, [that] . . . media entertainment speech seems to be subtly changing the cultural backdrop of the First Amendment, relegating political speech to a subordinate level within the general cultural awareness,” though the actual importance of political speech is undiminished. Patrick M. Garry, *The First Amendment and Non-Political Speech: Exploring a Constitutional Model That Focuses on the Existence of Alternative Channels of Communication*, 72 MO. L. REV. 477, 478 (2007).

356. The Supreme Court and scholars have repeatedly noted the special protection afforded for political speech. *Boos v. Barry*, 485 U.S. 312, 318 (1988); *Connick v. Myers*, 461 U.S. 138, 145 (1983); *see also* Aaron Johnson, *Interning Dissent: The Law of Large Political Events*, 9 DUKE J. CONST. L. & PUB. POL’Y 87, 87–88 (2013) (asserting that it is “fair to say that once a federal court determines that a restriction is content-based, the restriction will fall”); Amy J. Sepinwall, *Citizens United and the Ineluctable Question of Corporate Citizenship*, 44 CONN. L. REV. 575, 607 (2012) (declaring that political speech receives the greatest protection in First Amendment jurisprudence because it “was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people”).

protection for speech about lower-level government employees acting in their official capacity is inconsistent with that understanding.

As for the second fissure, balancing of the value of protected speech, in *Stevens v. United States*, the Court considered the government's argument "that a claim of categorical exclusion should be considered under a simple balancing test: 'Whether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs.'"<sup>357</sup> In an eight to one decision, the Court rejected this contention in unambiguous terms:

As a free-floating test for First Amendment coverage, that sentence is startling and dangerous. The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it.<sup>358</sup>

This approach to First Amendment interpretation has led to the protection of speech that threatens potentially far greater harm than defamation.<sup>359</sup> A dissonance in First Amendment jurisprudence exists if courts are generally disabled from weighing the relative cost-benefit of protected speech but are free to do so when a citizen is commenting on the government, which in theory should enjoy the highest protection, if a lower-level government employee is involved.

As for the third fissure, the failure to protect speech relating to the conduct of lower-level government employees in their official capacity is also inconsistent with the Court's approach to addressing the intersection of the First Amendment with other areas of tort law, such as the tort of intentional infliction of emotional distress. In his dissenting opinion in *Snyder v. Phelps*,<sup>360</sup> Justice Alito found the distinction between the status of the plaintiff in an intentional infliction of emotional distress case—a public figure versus a private individual—to

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357. *United States v. Stevens*, 559 U.S. 460, 470 (2010).

358. *Id.*

359. *See generally id.* (permitting crush videos of animals); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002) (permitting images and videos of virtual young children); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (protecting the burning of crosses); *Brandenburg v. Ohio*, 395 U.S. 43 (1977) (protecting racial invective-laden white supremacist rallies); *Nat'l Socialist Party of Am. v. Vill. of Skokie*, 432 U.S. 43 (1977) (protecting American Nazi marches through the town with the highest percentage of Holocaust survivors).

360. 131 S. Ct. 1207 (2011).



be of critical importance in considering the First Amendment protection to be afforded.<sup>361</sup> In *Hustler Magazine, Inc. v. Falwell*, the Supreme Court had protected the speaker (Hustler Magazine) against a tort suit for its intentional infliction of emotional distress upon Reverend Jerry Falwell through a parody it published suggesting Falwell's first sexual experience had been with his mother in an outhouse.<sup>362</sup> Justice Alito noted that Falwell was a public figure and Matthew Snyder, the subject of the Westboro Baptist Church's invective in *Snyder v. Phelps*, was not.<sup>363</sup> Justice Alito observed that the Court in *Hustler Magazine, Inc. v. Falwell* did "not suggest that its holding would also apply in a case involving a private figure" and yet that is precisely what the Court did in *Snyder v. Phelps*.<sup>364</sup>

In another eight to one decision, the United States Supreme Court upheld the right of the members of the Westboro Baptist Church to picket, displaying their horrifyingly offensive and painful signs,<sup>365</sup> at the funeral of United States Marine Lance Corporal Matthew Snyder without being subject to a tort suit for intentional infliction of emotional distress.<sup>366</sup> The members of the Westboro Baptist Church were protected in doing so by the First Amendment because their speech was upon a matter of public concern and addressed not only to the Snyder family but also the broader public.<sup>367</sup> The speech of the members of the Westboro Baptist Church was addressed to a matter of public concern given that the church members were advancing their view that tolerance of homosexuality is leading to the destruction of the United States.<sup>368</sup> Reiterating the same core principles that animated *New York Times Co. v. Sullivan*, the Supreme Court noted in *Snyder v. Phelps* that

[s]peech on matters of public concern is at the heart of the First Amendment's protection. The First Amendment reflects a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. That is because speech

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361. *Id.* at 1222 (Alito, J., dissenting).

362. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 47–57 (1988).

363. *Snyder*, 131 S. Ct. at 1222 (Alito, J., dissenting).

364. *Id.* at 1228.

365. See generally EDWIN J. DELATTRE, CHARACTER AND COPS: ETHICS IN POLICING 520 (2011) (discussing the Westboro Baptist Church and the signs it uses in picketing events); PAUL FROESE & CHRISTOPHER BADER, AMERICA'S FOUR GODS: WHAT WE SAY ABOUT GOD—AND WHAT THAT SAYS ABOUT US 78–80 (2010) (addressing the Westboro Baptist Church's understanding of God and how its infamous signs connect with the Church's religious views).

366. *Snyder*, 131 S. Ct. at 1219 (majority opinion).

367. *Id.* at 1216–17.

368. *Id.*

concerning public affairs is more than self-expression; it is the essence of self-government. Accordingly, speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.<sup>369</sup>

Because speech that causes no offense or injury needs no protection, for the majority “the point of all speech protection . . . is to shield [precisely] those choices of content that in someone’s eyes are misguided, or even hurtful.”<sup>370</sup>

The Supreme Court’s disabling of the use of the tort of intentional infliction of emotional distress where the speech is upon a matter of public concern and directed towards the public creates a division between intentional infliction of emotional distress jurisprudence and defamation jurisprudence. It does so through the majority gliding past the concerns voiced by Justice Alito regarding the differentiation between private individuals and public figures. Whatever portents the Court’s decision in *Snyder v. Phelps* has with regard to the private individual category in defamation, and there are potentially sensible grounds for distinguishing, it creates a stark division with the Court’s approach to lower-level government employees. The Court currently fails to protect speakers whose speech addresses the conduct of lower-level government employees taken in their official capacity if it causes injury to the reputation of government employees but does protect speakers who cause severe emotional distress to purely private individuals so long as the speech is on a matter of public concern. Protection of the latter may certainly be a price of freedom of speech, but again, the Court’s approach results in providing less protection for speech addressing the action or inaction of the government, which should be the most jealously protected form of speech.

#### CONCLUSION

“It is axiomatic that the freedom of speech is vitally important to our democratic society and that being able to criticize the government is at the core of this freedom.”<sup>371</sup> The Supreme Court recognized in *New York Times Co. v. Sullivan* that “erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression

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369. *Id.* at 1215.

370. *Id.* at 1219 (quoting *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Bos.*, 515 U.S. 557, 574 (1995)).

371. Ilya Shapiro and Sophie Cole, *Government Can’t Silence Speech Criticizing Its Actions, Even If That Speech Is ‘Commercial,’* CATO INST. (Dec. 28, 2012), <http://www.cato.org/blog/government-cant-silence-speech-criticizing-its-actions-even-speech-commercial>.

are to have the ‘breathing space’ that they ‘need . . . to survive.’”<sup>372</sup> To maintain the necessary breathing room for protecting public debate, the Supreme Court ruled a public official cannot recover damages for a defamatory falsehood relating to his or her official conduct without proof that the statement was made with “actual malice.”<sup>373</sup> Clarifying what was necessary to meet the actual malice standard, the Court indicated that claimants needed to show the statement was made “with knowledge that it was false or with reckless disregard of whether it was false or not.”<sup>374</sup>

To a great extent, lower-level government employees are the government, both in terms of implementation of law through formation of street-level policy and public perception. There is, however, no magical quality that makes erroneous statements less likely to occur because the speaker is addressing the action or inaction of lower-level government employees in their official capacity rather than higher-level employees. And yet speech addressing the conduct of lower-level government employees in their official capacity receives no greater constitutional protection than speech about a private individual.

There are reasons, and not illegitimate ones, for declining to impose a substantial barrier upon lower-level government employees in recovering in defamation claims, but, like sand slipping through an hourglass, none of these reasons can ultimately hold against the force of gravity imposed by the First Amendment. In a modern administrative state, speech related to the actions of lower-level government employees in their official capacity is an essential component of political speech and critical to democratic self-governance. The government functions through its appendages and the public has the right, or should have the right under the First Amendment, to address the actions of those appendages. While lower-level government officials certainly have less access to media than some of their higher-level counterparts, though likely not all, they can exercise self-help by accessing media in ways and to an extent that far exceeds what would have been available to most high-level public officials when *Gertz* was decided in 1974. First Amendment pressures have also resulted in a jurisprudential transformation of what is considered voluntarily inviting scrutiny. This expansion of voluntariness is broad enough to include

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372. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271–72 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

373. *Id.* at 279–80.

374. *Id.* at 280.

persons as varied as artists, authors, football players, scientists, and surfers; it should also include lower-level government officials.

The development of intricate constitutional doctrines can sometimes obscure the answer to constitutional questions rather than clarifying. Courts have struggled with the question of who qualifies as a public official, dividing over narrow and broad conceptions. The analysis in these cases has, however, obscured the more important point. The First Amendment protects above anything else the right of a citizen to criticize his or her government and to seek redress and change through peaceful means. Lower-level government employees are critical to the implementation of government and are perceived by citizens as the embodiment of government. If a citizen wishes to criticize the action or inaction of these governmental actors either to seek correction from a supervisor or voice concern in the marketplace of ideas, the Constitution protects such speech and recognizes the inevitability of misstatement and error. In the absence of actual malice, the First Amendment safeguards a citizen critiquing the actions of a government official whether high or low.