

Washington Law Review

Volume 88 | Number 1

3-1-2013

The Landmark That Wasn't: A First Amendment Play in Five Acts

Lee Levine

Stephen Wermiel

Follow this and additional works at: <https://digitalcommons.law.uw.edu/wlr>

 Part of the [First Amendment Commons](#)

Recommended Citation

Lee Levine & Stephen Wermiel, Case Study and Commentaries, *The Landmark That Wasn't: A First Amendment Play in Five Acts*, 88 Wash. L. Rev. 1 (2013).

Available at: <https://digitalcommons.law.uw.edu/wlr/vol88/iss1/2>

This Case Study and Commentaries is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact cnyberg@uw.edu.

THE LANDMARK THAT WASN'T: A FIRST AMENDMENT PLAY IN FIVE ACTS

Lee Levine* & Stephen Wermiel**

Abstract: What follows is an original case study of our First Amendment law of free expression and how it is created by the Supreme Court. Drawing heavily on heretofore unpublished internal papers from the chambers of Justice William Brennan and other Justices, this Article reveals how the 1964 landmark decision in *New York Times Co. v. Sullivan* was once in serious jeopardy of being overruled. In the course of this discussion, and in their examination of the evolution of the Court's decision in *Dun & Bradstreet v. Greenmoss Builders* (1985), the authors describe and analyze: (1) how and to what extent the holdings in *Sullivan* and *Gertz v. Robert Welch, Inc.* (1974) came to be reconsidered; (2) how the nature of the expression at issue in *Greenmoss Builders* factored into the examination of this defamation case and changed the way the First Amendment limits the common law of defamation; (3) how the members of the Burger Court considered the question of the media versus non-media status of a defendant in a defamation case; (4) how the Justices grappled with the question of the legitimacy under the First Amendment of presumed and punitive damages awards in defamation actions; (5) how the issue of the difference between private speech and public speech came to take on constitutional significance; (6) whether the Court should reconsider the balance it struck in *Sullivan* between the public's interest in being fully informed about public officials and public affairs and the competing interest of those who have been defamed in vindicating their reputation; and (7) how all of this ultimately influenced and determined the outcome in *Greenmoss Builders*.

In the swirl of this discussion and examination of the historical record, the reader gets a rare glimpse of the inner workings of the Court and its clerks along with a better appreciation of how consensus is built and lost, replete with occasional barbs. Moreover, this Article reveals just how laborious the shaping of First Amendment doctrine can be, given the issues (some never fully discussed in published opinions) raised by the Justices in their consideration of the *Greenmoss Builders* case. In these respects and others, this Article informs the reader of some of the central (albeit internal) moments in the history of defamation law following *Sullivan* and thereby sheds new light on how the law in this area might be shaped in the future.

* Partner, Levine, Sullivan, Koch & Schulz, Washington, D.C.; Adjunct Professor, Georgetown University Law Center.

** Fellow in Law and Government, American University Washington College of Law. The authors wish to thank Abby Duggan, Marisa Harrilchak and Matthew Schafer for their invaluable research assistance; Jeff Flannery at the Manuscript Division of the Library of Congress, John Jacob, archivist of the Lewis Powell Papers at Washington and Lee Law School, and Amy Taylor at the American University Washington College of Law Pence Law Library; Adam Liptak for his thoughtful comments on a preliminary draft, and Ron Collins, to whom the authors are especially indebted for his wise counsel and guidance.

PROLOGUE.....	3
I. ACT I—THE DRAMA BEGINS	7
A. The Protagonists.....	11
B. The Argument	14
C. The Initial Conference	18
D. The Second Conference	21
E. Brennan Takes Charge	23
F. Counting to Five.....	27
G. Powell’s Problems.....	29
H. Powell’s Dissent – Take One	32
I. The Undecided	34
J. The Fight for White.....	36
K. Strange Company	37
L. Two Questions	39
II. ACT II—THE END OF PUNITIVE DAMAGES AND THE MEDIA/NONMEDIA DISTINCTION?.....	42
A. Powell Prepares for Reargument.....	42
B. The Reargument and Conference.....	46
C. The Battle Resumes	52
D. Powell’s Folly	56
E. Waiting for White	59
III. ACT III—THE ASSAULT ON <i>SULLIVAN</i> AND THE “PUBLIC/PRIVATE” DISTINCTION.....	64
A. White’s Bombshell.....	64
B. Powell’s Appeasement.....	67
C. White’s Reaction.....	69
D. Settling for a Plurality	71
E. Enter Justice Rehnquist.....	73
IV. ACT IV—DEFENDING <i>SULLIVAN</i> AND REGRETTING <i>GERTZ</i>	76
A. The Contours of Compromise.....	76
B. Brennan Strikes Back.....	79
C. Enter Justice Stevens.....	83
D. White Responds and Powell Reacts	85
E. The Chief Justice.....	86
V. ACT V—LITTLE ADO ABOUT SOMETHING?.....	90
A. Brennan Regroups.....	90
B. Powell Reworks	91
C. Brennan’s Final Retreat	93
D. The Chief Reappears	97
E. And in the End	99
EPILOGUE	101

*[D]ebate on public issues should be uninhibited, robust, and wide-open.*¹
—Justice William J. Brennan (1964)

PROLOGUE

At this time next year, legal scholars, journalists, media lawyers, and at least some portion of the generally informed citizenry will commemorate the fiftieth anniversary of the Supreme Court's decision in *New York Times Co. v. Sullivan*.² When it was decided in March 1964, the renowned free speech philosopher Alexander Meiklejohn famously declared Justice William J. Brennan's opinion for the Court to be "an occasion for dancing in the streets."³ In his seminal treatment of the case published in 1991, shortly before Justice Brennan resigned from the Court on which he had then served for nearly thirty-four years, journalist Anthony Lewis hailed *Sullivan* as effecting "a sea change . . . in the law of the First Amendment," one that has since then caused the Supreme Court to give "the amendment's bold words their full meaning."⁴ More recently, the Court emphatically reaffirmed its allegiance to the theory of free expression that Justice Brennan set out in *Sullivan*, holding in *Bartnicki v. Vopper*⁵ that "our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open'"⁶ makes it "clear" that even "a stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern."⁷

Over the years, however, *Sullivan* has had its share of detractors as well, including not only those who believe they have been harmed by the publication of defamatory falsehoods, but also an assortment of academics, pundits and judges.⁸ Most recently, Justice Antonin Scalia

1. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

2. *Id.*

3. Harry Kalven, Jr., *The New York Times Case: A Note on "the Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 221 n.125 (quoting Meiklejohn).

4. ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* 234 (1991).

5. 532 U.S. 514 (2001).

6. *Id.* at 534 (quoting *Sullivan*).

7. *Id.* at 535.

8. *See, e.g.,* *Faxon v. Mich. Republican State Cent. Comm.*, 624 N.W.2d 509, 523 (Mich. Ct. App. 2001) ("[The outcome mandated by *Sullivan*] is not a result of which, to say the least, we are enamored. We recognize the value of open, free-wheeling, and 'robust' political debate [H]owever, we question the value of arguably false, defamatory, and negative political advertising whose purpose is not to defeat an opponent but to demean and destroy that opponent."); *Doe v.*

singled out *Sullivan* as the best example he could conjure of constitutional law run amok, an illegitimate declaration by Brennan and the other “living constitutionalists” sitting on the Warren Court that, “[y]es it used to be that . . . George Washington could sue somebody that libeled him, but we don’t think that’s a good idea anymore.”⁹

Sullivan, of course, was not the Court’s last word on the role of the First Amendment in limiting the rights of Presidents and everyone else to “sue somebody that libeled” them. In the first decade after it was decided, the Court consistently expanded *Sullivan*’s reach, but this process took a decisive turn in 1974 with Justice Lewis Powell’s opinion for the Court in *Gertz v. Robert Welch, Inc.*¹⁰ There, Powell sketched out a complicated scheme of First Amendment-based limitations on the common law of defamation pursuant to which (1) public officials and

Daily News, L.P., 632 N.Y.S.2d 750, 756 (N.Y. Sup. Ct. 1995) (“The sliding scale approach formulated by the Court [in *Sullivan*] has resulted in the appearance that the First Amendment does not apply equally to either speakers or speech of public concern. The text of the First Amendment draws no such distinctions, and neither should the Court.”); see also Anthony Lewis, New York Times v. Sullivan Reconsidered: Time to Return to “The Central Meaning of the First Amendment,” 83 COLUM. L. REV. 603, 620 (1983) (“If there can be no test of truth in political debate, then there can be no libel actions as a result of anything said in such debate.”); Abner J. Mikva, *In My Opinion, Those Are Not Facts*, 11 GA. ST. U. L. REV. 291, 297 (1995) (noting that “at some point [the expansion of *Sullivan*] might be protecting too much inaccurate and harmful reporting”); Rodney A. Smolla, *A Defense of the Annenberg Libel Reform Proposal*, 7 COMM. LAW. 3, 3 (1989) (arguing that *Sullivan* had spawned a body of law that “is costly, cumbersome, and fails to vindicate either free speech values or the protection of reputation”); Memorandum from Bruce Fein, General Counsel, Fed. Commc’ns Comm’n (undated) (John Roberts Files, on file with the Ronald Reagan Presidential Library, Box 25) (describing *Sullivan* as “profoundly flawed” and supported by “errant reasoning”) (on file with the Washington Law Review).

9. Justice Antonin Scalia, Remarks at the 2011 Washington Ideas Forum (Oct. 6, 2011), available at <http://www.theatlantic.com/national/archive/2011/10/scalia-our-political-system-is-designed-for-gridlock/246257/>.

10. 418 U.S. 323 (1974). The Court’s holding in *Sullivan* itself was limited to defamation actions instituted by public officials; to recover damages in a civil defamation action, such plaintiffs were obliged to prove, by clear and convincing evidence, that the defendant published a defamatory falsehood about them with “actual malice.” As Professor Harry Kalven presciently noted, however, *Sullivan* had a “generous sweep” that would invite courts “to follow a dialectic progression from [discussion about] public official[s] to government policy to public policy to matters in the public domain.” Kalven, *supra* note 3, at 209, 221; see also Harry Kalven, Jr., *The Reasonable Man and the First Amendment: Hill, Butts, and Walker*, 1967 SUP. CT. REV. 267. Specifically, three years after *Sullivan*, in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), the Court held that defamation actions instituted by “public figures”—i.e., a then ill-defined class of noteworthy persons who did not hold public office—were also governed by the *Sullivan* actual malice standard. *Id.* at 163–65 (Warren, C.J., concurring). And, four years after *Butts*, in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), a plurality of the Court, in an opinion by Justice Brennan, determined the “actual malice” requirement articulated in *Sullivan* should extend “to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous.” *Id.* at 44 (Brennan, J., plurality opinion) (emphasis added).

public figures could not sue successfully unless the defendant had published a defamatory falsehood about them with “actual malice”—i.e., knowledge of its falsity or reckless disregard for the truth; (2) other defamation plaintiffs could not prevail unless the defendant could be shown to have published the falsehood with some degree of fault (to be set as a matter of state law); and (3) no defamation plaintiff could recover presumed or punitive damages without proving “actual malice.”¹¹

Unlike *Sullivan*, in which the Court was unanimous in its result and no Justice contended that the First Amendment demanded *less* than Brennan’s opinion required,¹² the Court in *Gertz* was badly divided. Only four other Justices joined Powell’s opinion, which was attacked in separate opinions by Brennan and by Justice Byron White—the former contending that the “actual malice” standard should apply in all cases (regardless of the status of the plaintiff) in which the publication at issue addressed a matter of public concern; the latter asserting that the First Amendment-based rights articulated in *Sullivan* should not extend beyond cases brought by public officials and public figures at all.¹³

11. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 334 (1974) (“The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964)); *id.* at 336–37 (“The Court extended the constitutional privilege announced in [*Sullivan*] to protect defamatory criticism of nonpublic persons who ‘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.’”) (quoting *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 164 (1967)); *id.* at 347 (“We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.”); *id.* at 349 (“[W]e hold that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.”); see also Joel D. Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349 (1975); Lee Levine & Stephen Wermiel, *The Making of Modern Libel Law: A Glimpse Behind the Scenes*, 29 COMM. LAW. 1 (2012).

12. Although the Court was unanimous in its result in *Sullivan*, Justices Black, Goldberg, and Douglas each concurred, arguing that the Court should have gone further and held all defamation actions brought by public officials violative of the First Amendment. See, e.g., *Sullivan*, 376 U.S. at 297 (Black, J., with Douglas, J., joining, concurring) (“I regret that the Court has stopped short of [finding an absolute privilege to criticize public officials as] indispensable to preserve our free press from destruction.”); *id.* at 298 (Goldberg, J., with Douglas, J., joining, concurring) (“The impressive array of history and precedent marshaled by the Court . . . confirms my belief that the Constitution affords greater protection than that provided by the Court’s standard to citizen and press in exercising the right of public criticism.”).

13. Justice Powell’s opinion was joined by Justices Marshall, Stewart, and Blackmun. Justice White’s dissenting opinion was premised on his strongly stated view that “[r]ecovery under

All of the foregoing is common knowledge; it is the stuff of law school curricula and literally thousands of legal briefs filed in litigated cases. What is not generally known is that a decade after *Gertz*, and twenty years after *Sullivan*, the Court grappled with another defamation case that raised fundamental questions about the ongoing efficacy of *Sullivan* itself, about the reach of the First Amendment, and about the contours of the so-called “constitutional” law of defamation. Indeed, as the voluminous unpublished papers compiled on the case by Justices Brennan, Powell, and White reveal, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*¹⁴ promised to be the Court’s most important decision in the field since *Gertz*. That it ultimately was not is itself significant, especially when considered against the backdrop of the considerable internal debate and exchange of substantive views about the very viability of *Sullivan* that it engendered. And, at least for Brennan, Powell, and White—Justices who espoused very different conceptions of the role of the First Amendment in defamation matters—*Greenmoss Builders* presented an opportunity both to debate the merits of *Sullivan* and to address (at least within the Court) what the Justices had, for better and worse, accomplished in *Gertz*.

When it was decided in 1985, *Greenmoss Builders* yielded no majority opinion and therefore made no new law, at least as a technical matter. Like *Gertz*, however, it featured separate opinions by Justices

common-law standards for defamatory falsehoods about a private individual, who enjoys no ‘general fame or notoriety in the community,’ who is not ‘pervasive(ly) involve(d) in the affairs of society,’ and who does not ‘thrust himself into the vortex of (a given) public issue . . . in an attempt to influence its outcome,’ is simply not forbidden by the First Amendment.” *Gertz*, 418 U.S. at 399 (White, J., dissenting) (alterations in original) (internal footnote omitted). Conversely, Justice Brennan’s dissent advocated the rule that had been adopted by the plurality for which he wrote in *Rosenbloom*. See *id.* at 361 (Brennan, J., dissenting) (“I adhere to my view expressed in *Rosenbloom v. Metromedia, Inc.* . . . that we strike the proper accommodation between avoidance of media self-censorship and protection of individual reputations only when we require States to apply the . . . knowing-or-reckless-falsity standard in civil libel actions concerning media reports of the involvement of private individuals in events of public or general interest.”). Justice Douglas continued to espouse his—and Justice Black’s—belief that “[s]tates are without power ‘to use a civil libel law or any other law to impose damages for merely discussing public affairs.’” *Id.* at 357 (Black, J., concurring) (quoting *Sullivan*, 376 U.S. at 295). Chief Justice Burger also dissented, asserting that, with respect to plaintiffs that were neither public officials nor public figures, he “would prefer to allow this area of law to continue to evolve as it has up to now . . . rather than embark on a new doctrinal theory which has no jurisprudential ancestry.” *Id.* at 355 (Burger, C.J., dissenting). See also *id.* at 354 (Blackmun, J., concurring) (“If my vote were not needed to create a majority, I would adhere to my prior view [in support of Justice Brennan’s plurality opinion in *Rosenbloom*].”); Levine & Wermiel, *supra* note 11, at 41 (noting that “[f]rom the outset, Powell [was] determined to remake substantially the constitutional balance that Brennan had struck in *Sullivan* and in the decade of decisions that followed it.”).

14. 472 U.S. 749 (1985).

Powell, Brennan, and White, in which each Justice offered his own perspective.¹⁵ Those views are by now well known. What has not previously been understood is the drama (personal and professional) that preceded those opinions and what it reveals both about how the Court formulates constitutional doctrine and the body of First Amendment law it created in *Sullivan* and *Gertz*.

Greenmoss Builders consumed the Court's attention for two full years, from the beginning of the October 1983 Term, when it first considered the petition for certiorari filed in the case, through the last day of the October 1984 Term, when the decision was finally announced. As a result, the Justices left behind one of the most detailed records of the Supreme Court's internal deliberations on a single case in recent memory, certainly in a case involving the competing interests of free expression and protecting individual reputation. The record tells a tale that at times resembles the maneuverings of battlefield commanders, in this case seeking strategic advantage in a constitutional war of ideas while simultaneously defending against the salvos of their ideological adversaries. At bottom, however, this is a story of an internal struggle for the very survival of *Gertz* and *Sullivan*, in which the three central characters—Justices Brennan, Powell, and White—advocated profoundly different visions of the role of a free press in a democracy and of the proper responsibility of government to place limits on that freedom. We present it here as a constitutional play in five Acts.

I. ACT I—THE DRAMA BEGINS

Greenmoss Builders was not an obvious candidate for the articulation of fundamental First Amendment principles. It did not, like *Sullivan*, spring from a raging public controversy over civil rights or even from a publication addressing any public issue at all. Rather, it arose from a credit report issued to its paid subscribers by Dun & Bradstreet, which falsely informed them that the plaintiff company had filed for bankruptcy. The Vermont Supreme Court had ruled for the plaintiff, concluding that the constitutional limitations on the reach of the common law of defamation set out in *Gertz* did not apply in an action brought against a nonmedia defendant such as Dun & Bradstreet and that, as a result, the plaintiff should not only prevail, but recover both presumed and punitive damages without a showing of either fault or

15. See *id.* at 751 (Powell, J., plurality opinion); *id.* at 765 (White, J., concurring in judgment); *id.* at 774 (Brennan, J., dissenting).

actual injury.¹⁶

Initially, Brennan assumed that *Greenmoss Builders* would be a simple case. As framed by the Vermont Supreme Court and the petition for certiorari, the case squarely raised only one issue: whether the First Amendment protections identified in *Gertz* applied to nonmedia defendants.¹⁷ The only Justice who had ever indicated that the First Amendment applied more robustly to media (as opposed to nonmedia) speakers was Potter Stewart,¹⁸ who retired from the Court before

16. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 461 A.2d 414, 416 (Vt. 1983), *aff'd*, 472 U.S. 749 (1985). *Greenmoss Builders, Inc.* was a construction company about which *Dun & Bradstreet* had gathered and thereafter distributed information to a limited number of paid subscribers. *Id.* at 415–16. *Dun & Bradstreet's* reports were “based on information solicited from the business itself, the business’ banking and credit sources, from trade suppliers, and from public records.” *Id.* at 416. Based on a part-time employee’s misreading of such public records, which *Dun & Bradstreet* did not further review (in contravention of its own policies), the report at issue falsely stated that *Greenmoss Builders* had filed for bankruptcy. *Id.* *Dun & Bradstreet* later corrected the error but refused to disclose to *Greenmoss Builders* which five subscribers had received the initial, erroneous report. *Id.* Unsatisfied with both the correction and with *Dun & Bradstreet's* refusal to provide its subscriber list, *Greenmoss Builders* instituted a defamation action in the state courts of Vermont. *Id.* at 417.

In the Vermont courts, *Greenmoss Builders* argued that the false report had “damaged [its] business reputation, [and had caused a] loss of company profits, and . . . of money expended to correct the error.” *Id.* at 415. A jury returned a verdict in favor of *Greenmoss Builders*, awarding it \$50,000 in compensatory damages and \$300,000 in punitive damages, but the trial judge granted *Dun & Bradstreet's* motion for a new trial, concluding that the jury instructions inaccurately reflected portions of the Supreme Court’s holding in *Gertz*. *Id.* (citing *Gertz*, 418 U.S. 323). On interlocutory appeal, the Vermont Supreme Court addressed what it described as the “critical issue” of “whether the First and Fourteenth Amendments . . . require that the qualified protections afforded the media in ‘private’ defamation actions, as set forth in *Gertz*, be extended to actions involving nonmedia defendants.” *Id.* at 417. Asserting that “[t]here is a clear distinction between a publication which disseminates news for public consumption and one [like *Dun & Bradstreet*] which provides specialized information to a selective, finite audience,” the court concluded that “[t]here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-censorship by the press” in the latter circumstance that warrants constitutional protection. *Id.* at 417–18 (citations omitted). Accordingly, the Vermont Supreme Court held that the First Amendment-based standards articulated in *Gertz* were inapplicable and affirmed the jury’s awards of both compensatory and punitive damages on that basis under the otherwise controlling common law. *See id.* at 419–20.

17. Petition for a Writ of Certiorari from the Supreme Court of the State of Vermont, *Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc.*, 461 A.2d 414, 416 (Vt. 1983) (No. 83-18), 1983 U.S. S. Ct. Briefs LEXIS 1118.

18. Those views were first articulated in a highly publicized speech at Yale Law School, in which Stewart argued that the First Amendment’s press clause was designed to extend separate and more substantial protections to the media than to other speakers. *See Potter Stewart, Or of the Press*, 26 HASTINGS L.J. 631 (1975); *see also* David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 533 (1983) (“Freedom of the press—not freedom of speech—was the primary concern of the generation that wrote the Declaration of Independence, the Constitution, and the Bill of

Greenmoss Builders and was replaced by Justice Sandra Day O'Connor. That debate had already played itself out in academia and in a number of non-defamation cases (most notably the Court's 1978 decision in *First National Bank of Boston v. Bellotti*¹⁹), with Justices at both ends of the

Rights. Freedom of speech was a late addition to the pantheon of rights; freedom of the press occupied a central position from the very beginning."); Timothy B. Dyk, *Newsgathering, Press Access, and the First Amendment*, 44 STAN. L. REV. 927, 933 (1992) ("Whether or not we believe that press freedom ranked at the very pinnacle of constitutional values, it surely was of great importance, and the First Amendment was designed to protect the freedom of the press by putting, in Jefferson's words, a 'legal check . . . into the hands of the judiciary.'") (quoting Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), in 14 THE PAPERS OF THOMAS JEFFERSON 1788-1789 659 (1958)); Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 UCLA L. REV. 1497, 1505 (2007) (noting that the First Amendment's language suggests that the press deserves special First Amendment protections); Melville B. Nimmer, *Introduction—Is Freedom of the Press a Redundancy: What Does it Add to Freedom of Speech?*, 26 HASTINGS L.J. 639, 658 (1975) ("[F]reedom of the press as a right recognizably distinct from that of freedom of speech is an idea whose time is past due.".) *But see* David Lange, *The Speech and Press Clauses*, 23 UCLA L. REV. 77, 118 (1975) ("I submit that the goal of first amendment theory should be to equate and reconcile the interests of speech and press, rather than to separate them.").

19. 435 U.S. 765, 782 (1978) ("[T]he press does not have a monopoly on either the First Amendment or the ability to enlighten."); *id.* at 802 (Burger, C.J., concurring) ("Because the First Amendment was meant to guarantee freedom to express and communicate ideas, I can see no difference between the right of those who seek to disseminate ideas by way of a newspaper and those who give lectures or speeches and seek to enlarge the audience by publication and wide dissemination."); *see also* *Houchins v. KQED, Inc.*, 438 U.S. 1, 16 (1978) (holding that "[t]he media have no special right of access to [prisons] different from or greater than that accorded the public generally"); *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 609 (1978) ("The First Amendment generally grants the press no right to information about a trial superior to that of the general public."); *Saxbe v. Washington Post Co.*, 417 U.S. 843, 850 (1974) ("Newsmen have no constitutional right of access to prisons or their inmates beyond that afforded to the general public.") (quoting *Pell v. Procunier*, 417 U.S. 817, 834 (1974)); *id.* at 857 (Powell, J., dissenting) ("The guarantees of the First Amendment broadly secure the rights of every citizen; they do not create special privileges for particular groups or individuals."); *Pell v. Procunier*, 417 U.S. 817, 833 (1974) ("It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally.") (quoting *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972)); *Citizen Pub. Co. v. United States*, 394 U.S. 131, 140 (1969) ("Freedom to publish means freedom for all and not for some."); *Estes v. Texas*, 381 U.S. 532, 589 (1965) ("[A] reporter's constitutional rights are no greater than those of any other member of the public."); *Associated Press v. NLRB*, 301 U.S. 103, 132-33 (1937) ("The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others."); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 735 (1931) ("Story defined freedom of the press guaranteed by the First Amendment to mean that 'every man shall be at liberty to publish what is true, with good motives and for justifiable ends.'") (quoting JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1880 (5th ed. 1891)); *see also* Lee Levine, Note, *The Editorial Function and the Gertz Public Figure Standard*, 87 YALE L.J. 1723, 1723-24 n.6 (1978) (noting that the history of the press clause and the evolving nature of the press as an institution, among other things, militates against conclusion that the First Amendment protects institutional press more than any other citizen); Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. PA. L. REV. 459, 465 (2012) (concluding that "any calls for specially protecting the press-as-industry

Court's ideological spectrum (including Brennan) rejecting the idea that the First Amendment protects media speech most robustly.

In an unpublished narrative "Term History" that Brennan had his law clerks prepare annually for his own reference, the account of *Greenmoss Builders* for the Court's October 1984 Term asserts that Brennan expected it to be an "easy" case but that, for a number of reasons, it turned out to be more "complicated."²⁰ For one thing, Dun & Bradstreet itself proved to be arguably less popular with the Justices than the gallery of media defendants that had come before them in previous defamation cases (less popular even than pornographer Larry Flynt and the John Birch Society, not to mention *Time Magazine* and the *New York Times*).²¹ The way Brennan explained it, "[m]any of the Justices had had personal experience in private practice with Dun & Bradstreet and were not especially enamored of what they thought of as a large, often irresponsible, company that could easily ruin small businesses."²² In addition, a number of Justices expressed concern that a reversal would place in doubt the constitutionality of the Fair Credit Reporting Act, which regulated the dissemination of credit-related information by entities such as Dun & Bradstreet.²³

Most importantly, as Brennan noted, the deliberations in *Greenmoss Builders* revealed deep "hostility" within the Court "to the *New York*

have to look to sources other than text, original meaning, tradition, and precedent for support"). Justice Brennan, specifically, consistently recognized no distinction between media and nonmedia for the purposes of First Amendment protection. See *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 43 (1971) (Brennan, J., plurality opinion) ("Whether the person involved is a famous large-scale magazine distributor or a 'private' businessman running a corner newsstand has no relevance in ascertaining whether the public has an interest in the issue."); *New York Times Co. v. Sullivan*, 376 U.S. 254, 264 (1964) (Brennan, J.) ("We hold that the rule of law applied by the Alabama courts is constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action brought by a public official against critics of his official conduct.").

20. Justice Brennan, 1983 Term Histories LXXXII (on file with the Brennan Papers, Library of Congress Manuscript Division) (on file with the Washington Law Review).

21. See *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 47 (1988) (involving *Hustler* magazine published by Larry Flynt); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 325 (1974) (involving a magazine published by the John Birch Society); *Time, Inc. v. Pape*, 401 U.S. 279, 282 (1971) (involving an article in *Time* magazine); *Sullivan*, 376 U.S. at 257 (involving an advertisement published in the *New York Times*).

22. Justice Brennan, 1983 Term Histories, *supra* note 20, at LXXXII.

23. Fair Credit Reporting Act, 15 U.S.C. §§ 1681–1681t (1982). Originally passed by Congress in 1970, the Fair Credit Reporting Act was intended to give consumers better access to credit information about themselves and created a cause of action against credit agencies for failing to follow reasonable procedures to report accurate information. The Justices may have worried that a ruling in favor of Dun & Bradstreet would undermine enforcement of the federal law by affording additional, First Amendment-based protection to credit reporting agencies.

Times v. Sullivan line of cases generally and to *Gertz* in particular.”²⁴ As a result, the case was “fiercely fought out”²⁵ in a manner largely unseen by the public, but nevertheless of substantial significance to an informed appreciation of the Court’s defamation jurisprudence.

A. *The Protagonists*

The protagonists in the drama revealed themselves early on. When the petition for certiorari in *Greenmoss Builders* was first discussed in Conference in early October 1983, only Justices Brennan, White and Powell expressed serious interest in it.²⁶ Thereafter, both White and Powell had it relisted several times,²⁷ suggesting that each was mulling over what to do with the case.

In Powell’s chambers, the case received significant attention from the outset. Although he asked to have the case relisted, Powell noted to himself in late September that the Court should “still deny”²⁸ the petition because, since the jury had been instructed that the standards articulated by the Supreme Court in *Gertz* applied to the credit reporting agency, and had found for the plaintiff in any event, the case did not “squarely” present the constitutional issue of *Gertz*’s application to nonmedia defendants set forth in the petition for certiorari.²⁹ Still, in the

24. Justice Brennan, 1983 Term Histories, *supra* note 20, at LXXXII.

25. *Id.*

26. *Id.* at LXXXII–LXXXIII.

27. *Id.* at LXXXIII. Under longstanding Supreme Court procedures, four votes are required for a petition to be granted and scheduled for argument and decision. When the *Dun & Bradstreet* petition came to the Court in the summer of 1983, six of the nine Justices participated in a “cert. pool” in which each petition was read and summarized by one law clerk, assigned on a rotating basis, and the resulting memorandum was shared among all six chambers. At the time, only Justices Brennan, Marshall, and Stevens did not participate in the cert. pool and Brennan screened the petitions himself, except when his law clerks reviewed cases in the summer (which is when the *Dun & Bradstreet* case came to the Court). When the petition and brief in opposition are filed, a case is scheduled for review at the Court’s conference. Any Justice can ask that a case be discussed, and any Justice can ask that the case be held over (relisted) for a subsequent conference. These procedures are still followed today, although now all Justices except Samuel Alito participate in the cert. pool. For a discussion of the current workings of the cert. pool and its history, see Adam Liptak, *A Second Justice Opts Out of a Longtime Custom: The ‘Cert. Pool,’* N.Y. TIMES, Sept. 26, 2008, at A21.

28. Justice Powell, Docket Sheet (*Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*) (Sept. 26, 1983) (with handwritten notes from Justice Powell) (on file with the Powell Archives, Washington and Lee Law Library), *available at* <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>.

29. More specifically, *Greenmoss Builders* argued that “the applicability of *Gertz* to nonmedia defendants [was] not squarely before the Court because the Vermont Supreme Court found that the jury instructions satisfied the *Gertz* standard.” See Preliminary Memorandum from Justice Powell to the Cert. Pool 5 (Sept. 26, 1983) (with handwritten notes from Justice Powell) (on file with the

preliminary memorandum prepared for the cert. pool (serving six of the nine Justices), a law clerk advised the Justices that, in essence, the Vermont Supreme Court had gotten it right—i.e., “[o]n its face, *Gertz* does not apply to a non-media defendant, and this Court has never so extended it.”³⁰ In the margins of his copy of that memorandum, Powell sketched out by hand what appeared to be his conflicting views about the issue. He noted that *Gertz* was “concerned [with the] tension [between the] ‘need for a vigorous and uninhibited press and the legitimate [interest] in redressing wrongful injury,’”³¹ adding both that the Court “must consider [the] state interest in protecting/compensating private persons subject to defamation” and the “uncontrolled discretion of juries to award damages where no actual loss unnecessarily inhibits [First Amendment] freedoms.”³² Thus, he wrote that, although the “doctrine of presumed damages [is] bad,” the Court should “only interfere [with state] law on damages where that law implicates [First Amendment] concerns.”³³ Ultimately, Powell concluded, the question before him was “does [the] commercial speech at issue here warrant intruding in state law?”³⁴

By the time the *Greenmoss Builders* case arrived at the Court, Byron White had come to harbor serious reservations about the Court’s development, following *Sullivan*, of a constitutional law of defamation.³⁵

Powell Archives, Washington and Lee Law Library), available at <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>. Thus, “[u]nless the Court wishe[d] to overturn that conclusion, the holding that *Gertz* does not apply is really only dicta.” *Id.*

30. *Id.* at 6.

31. *Id.* at 8.

32. *Id.*

33. *Id.*

34. *Id.*

35. See DENNIS J. HUTCHINSON, THE MAN WHO ONCE WAS WHIZZER WHITE: A PORTRAIT OF JUSTICE BYRON R. WHITE 421–23 (1998) (noting that, by the time *Greenmoss Builders* came before the Court, Justice White “regretted joining *New York Times v. Sullivan*”); see also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 398–99 (1974) (White, J., dissenting) (“I continue to subscribe to the *New York Times* decision and those decisions extending its protection to defamatory falsehoods about public persons. My quarrel with the Court stems from its willingness ‘to sacrifice good sense to a syllogism’—to find in the *New York Times* doctrine an infinite elasticity.”) (footnote omitted); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 60 (1971) (White, J., concurring) (noting that he was in the minority in his view that *Sullivan* should not be expanded beyond its current borders); *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 301 (1971) (White, J., concurring) (“Inevitably, [*Sullivan*], by imposing on libel and slander plaintiffs the burden of showing knowing or reckless falsehood in specified situations will result in extending constitutional protection to lies and falsehoods which, though neither knowing nor reckless, do severe damage to personal reputation.”); *Greenbelt Co-op. Pub. Ass’n v. Bresler*, 398 U.S. 6, 22 (1970) (White, J., concurring) (cautioning against extending *Sullivan*).

Those reservations become apparent in an October 13, 1983 dissent that White circulated from what then appeared to be a denial of certiorari in the *Greenmoss* case. In that never-issued dissent, White argued that the issue “whether the First Amendment actual malice standard applies in a defamation action brought by a private plaintiff against a non-media defendant” was both “important and unsettled” and therefore “deserves our attention.”³⁶ White correctly acknowledged that the Court had “several times, without discussion, applied *New York Times* in cases involving public figure plaintiffs and nonmedia defendants,”³⁷ specifically citing *Garrison v. Louisiana*³⁸ and *Henry v. Collins*,³⁹ and noted that “*New York Times* was decided along with *Abernathy v. Sullivan*,⁴⁰ which involved four individual petitioners to whom the same standards were applied as to the newspaper.”⁴¹ However, he also observed that, in *Hutchinson v. Proxmire*,⁴² the Court asserted that it had “‘never decided’ whether *New York Times* extends to nonmedia defendants, thus indicating that the question remains open.”⁴³

In addition, White contended that *Greenmoss Builders* raised what he described as the “related question” of *Gertz*’s applicability “in a case involving a private plaintiff and a nonmedia defendant.”⁴⁴ In White’s view, these issues are “especially appropriate for consideration by this Court because of [their] implications for First Amendment jurisprudence as a whole.”⁴⁵ And, White, citing Chief Justice Burger’s concurring opinion in *Bellotti*,⁴⁶ wrote, “this issue intersects with another difficult issue: the extent to which the institutional press perhaps enjoys unique privileges [under the First Amendment].”⁴⁷

36. Justice White, Draft Dissent from Denial of Petition for Certiorari One 1 (Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.) (Oct. 13, 1983) (on file with the White Papers, Library of Congress Manuscript Division) (on file with Washington Law Review).

37. *Id.* at 3.

38. 379 U.S. 64 (1964).

39. 380 U.S. 356 (1965).

40. 376 U.S. 254 (1964).

41. Justice White, Draft Dissent from Denial of Petition for Certiorari One, *supra* note 36, at 3. *Abernathy v. Sullivan*, a separate defamation action that Sullivan had instituted against civil rights leader, Rev. Ralph David Abernathy and three other individual, nonmedia defendants, was consolidated in the Supreme Court with the *New York Times* case.

42. 443 U.S. 111 (1979).

43. Justice White, Draft Dissent from Denial of Petition for Certiorari One, *supra* note 36, at 3 (quoting *Hutchinson*, 443 U.S. at 133 n.16).

44. *Id.* at 4.

45. *Id.* at 5.

46. *Id.* (citing *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 798 (1978)).

47. *Id.*

Brennan, as noted, believed that *Greenmoss Builders* was an “easy” case and should be disposed of on the simple ground that the constitutional rules set out in *Sullivan* and *Gertz* protected all defamation defendants, not just those affiliated with the media.⁴⁸ Accordingly, he arrived at each of the Court’s conferences in the fall of 1983 prepared to vote to grant the petition and, thereafter, to reverse the decision of the Vermont Supreme Court.⁴⁹

By the end of October, Chief Justice Warren Burger had joined White and Brennan in voting to grant the petition.⁵⁰ When the Chief Justice circulated a memorandum indicating that White’s draft opinion had led him “to give a reluctant ‘grant,’”⁵¹ Powell wrote in the margin of his copy that he was “still inclined to deny.”⁵² Nevertheless, Powell had the case relisted again and, on November 4, 1983, voted to grant as well.⁵³ His handwritten notes indicate that Justice Thurgood Marshall was also prepared to grant “if I do.”⁵⁴ Powell wrote to himself that he had “again looked at this,”⁵⁵ and although “we may have to rely on arguably dicta to reach [the] *Gertz* issue,”⁵⁶ the Court “probably . . . could,” especially “in view of [the] importance of [the] underlying [question] whether *Gertz* applies to non-media [defendants].”⁵⁷ In the end, five Justices voted to grant the petition.⁵⁸

B. *The Argument*

Prior to the argument, which was scheduled for March 21, 1984, Powell received a bench memorandum from his law clerk, which he

48. Justice Brennan, 1983 Term Histories, *supra* note 20, at LXXXII.

49. *Id.* at LXXXII–LXXXIII.

50. *Id.* at LXXXIII.

51. Memorandum from Chief Justice Burger to the Conference (Oct. 21, 1983) (with handwritten notes from Justice Powell) (on file with the Powell Archives, Washington and Lee Law Library), available at <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>.

52. *Id.*

53. Justice Powell, Docket Sheet (*Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*) (Nov. 4, 1983) (with handwritten notes from Justice Powell) (on file with the Powell Archives, Washington and Lee Law Library), available at <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>.

54. Justice Powell, Docket Sheet (*Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*) (Oct. 28, 1983) (with handwritten notes from Justice Powell) (on file with the Powell Archives, Washington and Lee Law Library), available at <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>.

55. *Id.*

56. *Id.*

57. *Id.*

58. Justice Powell, Docket Sheet, *supra* note 53 (The five Justices that voted to grant certiorari were Chief Justice Burger along with Justices Brennan, White, Marshall, and Powell.).

described as “excellent.”⁵⁹ The clerk recommended, as Powell described it in his own handwritten notes, that the Court “extend *Gertz*’s requirement of a malice showing to allow recovery of ‘presumed’ or ‘punitive’ damages in a libel suit by a private plaintiff vs a private (non-media) defendant,” but that “no malice [be] required to recover actual damages.”⁶⁰ According to the clerk, this result followed from what Powell had himself written in *Bellotti*—i.e., that the “press does not have a monopoly on either the First Amendment or the capacity to enlighten.”⁶¹ In his notes, however, Powell observed that, while “this is true . . . it doesn’t necessarily follow that, absent malice, only ‘actual’ damages may be recovered vs a non-media defendant.”⁶²

Powell’s extensive handwritten notes of the argument itself appear intended to document the views of his colleagues. He noted that O’Connor had asked whether, “if D&B’s position is accepted (that is all speakers have First Amendment rights) it would extend to Securities Acts, including § 10(b)?”⁶³ When counsel for Greenmoss Builders

59. Bench Memorandum from Cammie R. Robinson for Justice Powell 1 (Mar. 17, 1984) (with handwritten notes from Justice Powell) (on file with the Powell Archives, Washington and Lee Law Library), available at <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>.

60. *Id.* The Court in *Gertz* had held that, although state law may not impose strict liability on defendants who libeled a private figure, beyond that states were free to award damages for “actual injury” sustained by such plaintiffs. 418 U.S. at 347–48. By the same token, the Court held that the common law could not provide for the recovery of presumed or punitive damages absent a showing of actual malice. *Id.* at 349. Accordingly, the clerk’s suggestion would have extended these aspects of the holding in *Gertz*, to the extent it was properly construed otherwise, to cases involving nonmedia defendants.

61. Bench Memorandum from Cammie R. Robinson for Justice Powell, *supra* note 59, at 7 (quoting *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 782 (1978)).

62. *Id.* at 1.

63. The transcript of the oral argument roughly confirms Powell’s notes. Transcript of Oral Argument at 10–11, *Dun & Bradstreet Inc. v. Greenmoss Builders Inc.*, 472 U.S. 749 (1985) (No. 83-18), available at http://www.oyez.org/cases/1980-1989/1983/1983_83_18. Although transcripts in the 1980s did not identify the Justices by name, the OYEZ website recording of the argument makes it clear that the questioner was Justice O’Connor. According to the transcript, the following exchange took place between a Justice and Gordon Garrett representing Dun & Bradstreet:

QUESTION: There are federal laws in the securities fields, such as Section 10(b)(5), that govern statements that are made in connection with the sale of securities. Do you think there’s a First Amendment right for people who are publishing information about securities that has to be considered every time we have a 10(b)(5) action?

MR. GARRETT: Your Honor, I think that would require a different analysis than we have in the defamation area. As I understand the question, we would be talking about individuals publishing matters who are subject to the control of the SEC, as being licensed, perhaps.

I think that in restraining those types of publications there is a much different focus. In those cases, I believe the Court is focusing on the recipient of the report rather than the individual identified in the report in defamation cases. And I think —

QUESTION: Well, but you’re asking us to recognize a First Amendment right here in

asserted that the case involved commercial speech, the argument turned to a discussion of the Court's decision in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.⁶⁴ In *Greenmoss Builders*, a holding that the credit report at issue constituted commercial speech would have yielded the conclusion, under the *Central Hudson* test, that it was not protected by the First Amendment at all because it was false. As Powell noted, White "said if respondent is right about commercial speech, petitioner has conceded falsity—flunking the first test of *Central*

connection with the Dun & Bradstreet type of publication, and I'm just wondering if that wouldn't lead us to having to recognize First Amendment rights in a 10(b)(5) situation or an ordinary fraud situation, anything?

MR. GARRETT: I do not believe so, Your Honor, because what we are talking here about is the sole issue of speech in context of defamation, not speech in the context of giving advisor's advice to the SEC. And as I indicated, I believe a totally different analysis would apply there.

What we are asking the Court to recognize is that the First Amendment protects all speakers against these types of awards, and we do not believe that the state interest varies in securing gratuitous awards of money damages for plaintiffs depending on the speaker or the message.

64. 447 U.S. 557 (1980). Overruling several decades of precedent holding otherwise, *see Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) ("We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising."), the Court in 1976 asserted for the first time that so-called "commercial speech"—*i.e.*, typically described as speech that "does no more than propose a commercial transaction"—is entitled to at least some degree of First Amendment protection. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (internal quotation marks omitted). In *Virginia Board*, the commercial speech in question was described as: "I will sell you the X prescription drug at the Y price." *Id.* at 761. Thus, the category of commercial speech subject to comparatively modest First Amendment protection has typically been confined to analogous advertising and solicitation. *See, e.g., Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 534 (2001) (cigarette advertising outdoors and at point-of-sale); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 492 (1996) (alcohol advertisements); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 629 (1985) (legal services advertisements); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507 (1981) (commercial billboards).

In *Central Hudson*, the Court distilled the so-called *Central Hudson* test from its previous, albeit less than definitive, commercial speech jurisprudence. 447 U.S. at 560–61, 564. Specifically, the test, which assesses those circumstances in which government regulation of commercial speech violates the First Amendment, is comprised of four factors: (1) the speech must not propose or advocate the sale of an illegal product or be false or otherwise misleading; (2) the state interest in regulating the speech must be substantial; (3) the regulation must "directly advance" the state's interest; and (4) the regulation cannot be "more extensive than is necessary to serve that interest." *Id.; see, e.g., id.* at 563 ("[T]here can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity."). Ultimately, however, the Court rejected the plaintiff's argument, presumably because the credit report at issue did not itself purport to propose a commercial transaction. *See Greenmoss Builders*, 472 U.S. at 762 n.8 ("We also do not hold, as the dissent suggests we do, that the report is subject to reduced constitutional protection because it constitutes economic or commercial speech. We discuss such speech, along with advertising, only to show how many of the same concerns that argue in favor of reduced constitutional protection in those areas apply here as well.") (internal citations omitted); *id.* at 790 (Brennan, J., dissenting) (noting that speech at issue proposed no commercial transaction).

Hudson.⁶⁵ When the respondent's lawyer agreed and "said this should end the case,"⁶⁶ Powell noted that White "seemed to agree—if this was commercial speech."⁶⁷ Powell also recorded that, at this point, Justice John Paul Stevens asked about "commercial speech' in a newspaper? E.g., that a company had gone bankruptcy [sic]?"⁶⁸

65. The transcript contains the following exchange between an unnamed Justice, presumably White, and Thomas Heilmann, counsel for Greenmoss Builders:

QUESTION: Well, yes, but if you're right about your commercial speech ground you never get to all this other argument.

MR. HEILMANN: That's correct, Your Honor.

QUESTION: Because I guess you rely on the first requirement for constitutional protection that the Court suggested in *Central Hudson*.

MR. HEILMANN: We do, and it's never been —

QUESTION: You say that there's no constitutional objection to the suppression of commercial messages that do not accurately inform the public.

MR. HEILMANN: That's right.

QUESTION: And if it's—you say that if it's conceded this report was false, they have conceded themselves out of First Amendment protection.

MR. HEILMANN: Yes, because —

QUESTION: Because this is commercial speech.

MR. HEILMANN: Not only because it's commercial speech.

Transcript of Oral Argument at 35, *Dun & Bradstreet Inc. v. Greenmoss Builders Inc.*, 472 U.S. 749 (1985) (No. 83-18), available at http://www.oyez.org/cases/1980-1989/1983/1983_83_18.

66. *Id.* at 35:

QUESTION: Well, if we agree with that isn't that the end of the case?

QUESTION: Yes.

MR. HEILMANN: I think that is the end of the case.

67. *Id.*

68. *Id.* at 42–44, contains the following exchange:

QUESTION: May I ask one question. I think you're getting to your end. Take your opponent's hypothetical of a newspaper of general circulation that has a column on the back: Recent legal developments, subhead bankruptcies, and they mistakenly say your company went into bankruptcy, the same facts.

What happens with that?

MR. HEILMANN: Well, the issue again is self-censorship. Is the newspaper going to say that they won't publish this fact—and we're not talking about your analysis of Greenmoss' business. We're talking about this fact, Greenmoss is bankrupt.

If the newspaper is going to say they won't publish the fact because of presumed damages, and if they won't publish that for that reason, for the reason of presumed and punitive damages, then the news will just be pabulum, and that's the fear that the Court has, obviously.

QUESTION: Let me be sure I understand your answer. You're saying a different rule would apply to that case than to this case?

MR. HEILMANN: Yes. I'm getting into the answer that I think is involved here. The issue is chilling of speech. I don't think a company like Dun & Bradstreet is going to be chilled, because, for one thing, the news media very rarely simply publishes a fact. They publish the fact in connection with a thesis.

From Brennan's perspective, the argument provided few clues about the internal fireworks to come. Although, according to Brennan, Justice William Rehnquist appeared "to push strongly for an affirmance," the other Justices "seemed resigned, with varying degrees of enthusiasm, to a reversal," which would overturn the verdict against Dun & Bradstreet.⁶⁹ Following the argument, and even after both White and Powell "seemed to grow intrigued with the idea that the case could be affirmed on commercial speech grounds," the "betting" in Brennan's chambers before the Conference was that Powell (the author of *Gertz*) would vote to reverse and White (the "vigorous" dissenter in that case) would vote to affirm.⁷⁰ What transpired thereafter, Brennan would note later, "demonstrated the folly of such predictions."⁷¹

C. *The Initial Conference*

According to Brennan's Term History, and confirmed by his handwritten notes at Conference on March 23, 1984, the discussion of *Greenmoss Builders* that day was "surprisingly spirited and tentative."⁷² As was his custom "in difficult cases in which he wishes to maintain his assignment power" regardless of whether he ultimately joined the majority,⁷³ Burger voted to dismiss the writ as improvidently granted,

QUESTION: But in Justice Stevens' question I thought he did give you a hypothetical where the newspaper published a fact somewhat separately from its editorial and news coverage. And I think his question was what should be the rule in that case as to the newspaper.

MR. HEILMANN: Well, I'm not really addressing what should happen in the situation with the newspaper. I don't think you can take the result —

69. Justice Brennan, 1983 Term Histories, *supra* note 20, at LXXXIII.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* In response to the Chief Justice's assignment practices, Justice Douglas once threatened to publish a dissent complaining that the Chief Justice's effort to retain the assignment power in one case was "an action no Chief Justice in my time would ever have taken. For the tradition is a longstanding one that the senior justice in the majority makes the assignment. . . . When, however, the minority seeks to control the assignment, there is a destructive force at work in the Court. When a Chief Justice tries to bend the Court to his will by manipulating assignments, the integrity of the institution is imperiled." LAWRENCE S. WRIGHTSMAN, *THE PSYCHOLOGY OF THE SUPREME COURT* 146 (2006) (quoting Justice Douglas' unpublished dissent in *Roe v. Wade*, 410 U.S. 113 (1973)); *see also* PETER H. IRONS, *A PEOPLE'S HISTORY OF THE SUPREME COURT: THE MEN AND WOMEN WHOSE CASES AND DECISIONS HAVE SHAPED OUR CONSTITUTION* 440–41 (2006) (describing how Chief Justice Burger once assigned four cases despite finding himself in the minority); BERNARD SCHWARTZ, *DECISION: HOW THE SUPREME COURT DECIDES CASES* 45 (1997) ("Chief Justice Burger was severely criticized because he did not always follow the spirit of the established assignment practice."); BERNARD SCHWARTZ, *THE UNPUBLISHED OPINIONS OF THE BURGER COURT* 8 (1988) ("It is said that Chief Justice Burger did not follow the established practice in his

while at the same time expressing his opposition both to invocation of the commercial speech doctrine and to a media/nonmedia distinction in the allocation of First Amendment rights.⁷⁴ Indeed, taking the issue as framed by the Vermont Supreme Court, Burger, according to Brennan's account, again expressed his disagreement with the views of Justice Potter Stewart (retired at this point) that the First Amendment reflected an "institutionalized dichotomy" that gave the "press special [First Amendment protection]"⁷⁵

After Burger had spoken, Brennan set out his view that the judgment should be reversed, on the ground that the *Gertz* standard necessarily applied. According to Powell's notes of the Conference, Brennan specifically urged the Court to "address [the] commercial speech issue and reject it."⁷⁶ Brennan reportedly said that "D&B is like [the] Wall Street Journal reporting a bankruptcy."⁷⁷

White then surprised at least Brennan by joining his vote to reverse, calling the case a "clear reversal."⁷⁸ White, in Brennan's account, explained that, although he was "no fan of *Gertz*,"⁷⁹ he rejected both the notion that the speech at issue was "commercial"⁸⁰ (according to Powell, White said the speech at issue was "like all financial reporting"⁸¹) and any media/nonmedia distinction in applying the law of defamation. Marshall and Justice Harry Blackmun expressed essentially the same views,⁸² although the former added that he would not be averse to dismissing the writ as improvidently granted.⁸³ After Powell passed, Rehnquist voted to affirm.⁸⁴ He reportedly told his colleagues that, although he considered all of the alternative arguments for deciding the

assignment of opinions. It is alleged that he voted with the majority in order to control the assignment of opinions, even though his true sentiments were the other way.").

74. Justice Brennan, 1983 Term Histories, *supra* note 20, at LXXXIII.

75. Justice Brennan, Conference Notes 2 (Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.) (Mar. 23, 1984) (on file with the Brennan Papers, Library of Congress Manuscript Division) (on file with the Washington Law Review).

76. Justice Powell, Conference Notes (Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.) (Mar. 23, 1984) (on file with the Powell Papers, Washington and Lee Law Library), *available at* <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>.

77. *Id.*

78. Justice Brennan, 1983 Term Histories, *supra* note 20, at LXXXVII.

79. *Id.* at LXXXIII.

80. *Id.*

81. Justice Powell, Conference Notes, *supra* note 76.

82. Justice Brennan, 1983 Term Histories, *supra* note 20, at LXXXIV.

83. *Id.*

84. *Id.*

case “singularly unattractive,”⁸⁵ he considered *Gertz* to be “a last minute compromise,” which he said he would not join again (although he had provided the fifth vote for Powell’s opinion in that case) and did not wish to extend any further.⁸⁶

Stevens, who (as Brennan noted in his Term History) was “author of the Seventh Circuit opinion that had been reversed in *Gertz*,”⁸⁷ said he considered *Greenmoss Builders* to be an extremely “difficult”⁸⁸ case and expressed some sympathy for Burger’s proposal simply to dismiss the petition. If the Court were to decide the case, Stevens said, he was inclined to reverse, although he was particularly concerned that a decision to do so would call into question the constitutionality of the Fair Credit Reporting Act. On the one hand, Stevens suggested, the kind of speech regulated by that statute might be considered “commercial”;⁸⁹ on the other, the Vermont Supreme Court had been wrong to hold that *Gertz* is “inapplicable”⁹⁰ to all nonmedia defendants.

For her part, O’Connor, the Court’s most junior Justice, also expressed some interest in dismissing the writ but offered an alternative theory to affirm. According to O’Connor, *Gertz* ought not to be held to apply to “purely private speech.”⁹¹ In her view, only speech concerning public affairs ought to be protected by the First Amendment in the defamation context. In other words, she reportedly told the Conference,

85. *Id.*

86. *Id.*

87. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 330 (1974). In the Seventh Circuit, *Gertz* argued that *Sullivan* was inapplicable because he was not a public figure. *Gertz v. Robert Welch, Inc.*, 471 F.2d 801, 805 (7th Cir. 1972), *rev’d*, 418 U.S. 323 (1974). In his opinion for a panel of that Court, then-Judge Stevens did not address whether the plaintiff was a public figure, assuming instead that he was not. Instead, Stevens focused on a different question, i.e., “[w]hether the article, taken as a whole, and more narrowly in its references to plaintiff, is of any *significant* public interest.” *Id.* Relying on Brennan’s opinion in *Rosenbloom*, Stevens concluded that the underlying civil action in which *Gertz* had represented the plaintiff was of “significant public interest” and therefore analogous to the subjects addressed by the publications and broadcasts at issue in *Sullivan* and its progeny. *Id.* (citing *Rosenbloom v. Metromedia*, 403 U.S. 29, 47–52 (1971)). In his opinion in *Gertz*, Stevens considered distinguishing the case before him from *Sullivan*, because “[i]t is one thing to omit the word ‘alleged’ from an otherwise accurate comment on a newsworthy subject [but] it is quite another to include a gratuitous and collateral remark about a participant in a public controversy [as was done here].” *Id.* (footnote omitted). Nevertheless, he ultimately concluded that, under *Sullivan*, “even a false statement of fact made in support of a false thesis is protected unless made with knowledge of its falsity or with reckless disregard of its truth or falsity.” *Id.* at 806. Finding in favor of the defendant, Stevens held that the publisher neither knew that the information was false nor “acted recklessly within the Supreme Court’s definition of that term.” *Id.* at 806–07.

88. Justice Brennan, 1983 Term Histories, *supra* note 20, at LXXXIV.

89. Justice Brennan, Conference Notes, *supra* note 75, at 1.

90. *Id.*

91. Justice Brennan, 1983 Term Histories, *supra* note 20, at LXXXIV.

“*Gertz* standard applies to some non-media defendants” only if the purposes of *Gertz* are engaged.⁹²

When Powell finally spoke, he told his colleagues—apparently for the first time and with surprising candor—that he regretted what he described as the “unnecessarily broad language” that he had employed in *Gertz*.⁹³ He said that he had come to conclude that his “sins” in *Gertz* had returned to “haunt” him.⁹⁴ Having reconsidered the issue, Powell had now concluded, according to Brennan’s account, that “*Gertz* must be read in” and limited to the “context of media defendants.”⁹⁵

D. *The Second Conference*

Because four Justices (Burger, Powell, Stevens, and O’Connor) had not cast final votes, the case was scheduled for a second Conference on March 30, 1984.⁹⁶ On March 26, Stevens notified the Conference that he too would vote to reverse, having satisfied himself that a narrowly crafted opinion would not threaten the Fair Credit Reporting Act.⁹⁷ Two days later, however, O’Connor circulated a memorandum in which she announced her vote to affirm on the ground she had advanced at the first Conference, that the speech at issue in *Greenmoss Builders* “related to

92. Justice Powell, Conference Notes, *supra* note 76

93. Justice Brennan, 1983 Term Histories, *supra* note 20, at LXXXIV.

94. *Id.*

95. Later that day, Powell dictated, but did not send, a private letter to Stevens and O’Connor. See Letter from Justice Powell to Justices Stevens and O’Connor (Mar. 23, 1984) (on file with the Powell Papers, Washington and Lee Law Library), available at <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>. In it, he urged his colleagues to join in dismissing the writ. He went on, however, to pick up on a suggestion that Stevens had made at Conference, that “we may be able to identify some subclass between the typical media defendant and the common law libel suit between private individuals,” a view “similar” to that expressed by O’Connor. *Id.* According to Powell, *Sullivan* “was based on the special role of the media in a democracy,” which “justified a constitutional decision in that case,” as well as “in each of our subsequent cases.” *Id.* Powell suggested that *Dun & Bradstreet* “has some of the characteristics of the financial page of newspapers, but it is essentially different—as I believe both of you noted. It can be argued quite reasonably that *Dun & Bradstreet* owes a higher duty than the press. It is in the business—not of serving the need in a democracy for a forum in which issues and ideas may be debated—but of making money by selling sensitive credit information.” *Id.* Thus, Powell ended his letter (which he ultimately decided not to send), by suggesting that “we could say that because of its business, and at least its implicit guarantee of a high degree of accuracy, that as a minimum, the *New York Times* [actual malice] standard applies.” *Id.* Powell wrote that he “could agree cheerfully to this, but am not yet persuaded we should deprive the states altogether of their traditional right to apply their own libel laws in litigation between private parties” and concluded by suggesting that, if “any purpose could be served by the three of us discussing this, I would be happy to join you at any time.” *Id.* at 2. There is no record that any such discussion ever took place.

96. Justice Brennan, 1983 Term Histories, *supra* note 20, at LXXXIV.

97. *Id.*

commercial credit and the marketplace of money, not the marketplace of ideas.”⁹⁸ In her view, “[s]uch information is marketed more as a commodity than as speech and deserves only the most modest First Amendment protection.”⁹⁹

Within hours of his receipt of O’Connor’s memo, Powell—who had apparently received an early copy of it—informed the Conference that he agreed with it and would also vote to affirm.¹⁰⁰ Although (as Brennan described him in the Term History) Powell was no “friend of punitive damages,” he remained troubled by “what he saw as Dun & Bradstreet’s enormous unchecked power to harm small businesses.”¹⁰¹ Hence, Brennan believed Powell had been struggling to find a way to “avoid his own opinion in *Gertz*” which he otherwise “had no desire to overrule.”¹⁰²

Thus, in his own memorandum to the Conference following O’Connor’s, Powell included large portions of a private letter that he had drafted but not sent to Stevens and O’Connor the previous week.¹⁰³ In it, he described the *Greenmoss Builders* case as “a ‘sport’ in the law of libel.”¹⁰⁴ He noted that D&B is a “business” that “has some of the characteristics of the financial page of newspapers, but is essentially different” because “its business is narrowly specialized.”¹⁰⁵ At this juncture, however, Powell appeared to change his mind about the consequences of this distinction. Specifically, although Powell said in his unsent letter that he would “agree cheerfully” to a decision that granted D&B the protections of the actual malice standard, he now told the Conference that, “in view of the nature of D&B’s business and its capability to destroy the credit of other businesses (particularly small businesses), it would not be irrational to hold D&B to strict liability.”¹⁰⁶ Accordingly, Powell asserted, it would be “unfortunate” if the Court were to “choose this case as a vehicle for constitutionalizing the entire

98. *Id.*

99. *Id.*

100. *Id.* at LXXXV.

101. *Id.*

102. *Id.*

103. Memorandum from Justice Powell for the Conference (Mar. 28, 1984) (on file with the Powell Papers, Washington and Lee Law Library), available at <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>; see also Letter from Justice Powell to Justices Stevens and O’Connor, *supra* note 95.

104. Letter from Justice Powell to Justices Stevens and O’Connor, *supra* note 95.

105. *Id.*

106. *Id.*

law of libel” and agreed with O’Connor’s proposal that the Court treat “D&B as belonging to a special category of disseminators of information” who traffic in a “type of commercial speech.”¹⁰⁷

E. Brennan Takes Charge

At the March 30 Conference, therefore, five Justices (Brennan, White, Marshall, Stevens, and Blackmun) voted to reverse, while three (Powell, Rehnquist, and O’Connor) voted to affirm. Burger indicated that, although he “might vote to affirm,” he was not yet “at rest.”¹⁰⁸ Accordingly, the Chief Justice had no choice but to relinquish to Brennan, the senior Associate Justice in the majority, the authority to assign the case. Although he gave some thought to assigning the majority opinion to White in order to keep him on board, Brennan assumed that White’s vote was “safe”¹⁰⁹ since he had not altered his position following receipt of the O’Connor and Powell memoranda. Thus, according to his Term History, Brennan “considered it safe”¹¹⁰ to keep the opinion for himself and thereby take advantage of his first opportunity since his plurality opinion in *Rosenbloom* in 1971¹¹¹ to write the Court’s controlling opinion in a defamation case. Needless to say, it would also be his first opportunity to lead the Court in a re-examination of *Gertz* and its implications.

Brennan’s colleagues appeared to sense the potential significance of this assignment as well. After it was made, Powell and Rehnquist received a private letter from Burger in which the Chief Justice confided that he did not believe it “feasible to assign a dissent until we see how far Bill [Brennan] goes. He will, I assume, want to push out some ‘new frontiers’ on *Sullivan*.”¹¹² The following week, Powell wrote Burger to agree, and suggested that he share his views with O’Connor as well.¹¹³

Brennan circulated his draft majority opinion on May 29. In it, he squarely held that *Gertz*’s prohibition of “awards of presumed or punitive damages for false and defamatory statements absent a showing

107. *Id.*

108. Justice Brennan, 1983 Term Histories, *supra* note 20, at LXXXVI.

109. *Id.*

110. *Id.*

111. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 29 (1971).

112. Justice Brennan, 1983 Term Histories, *supra* note 20, at LXXXVI.

113. Letter from Justice Powell to Chief Justice Burger (Apr. 6, 1984) (on file with the Powell Papers, Washington and Lee Law Library), available at <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>.

of knowing falsity or reckless disregard for the truth” extends to nonmedia defendants.¹¹⁴ He characterized the Court’s decision in *Rosenbloom*, “[d]espite the variety of views on liability”¹¹⁵ expressed in that case, as reflecting a “clear consensus for the conclusion that, at the very least, the First Amendment limits the availability of punitive damages awards in defamation actions brought by private parties.”¹¹⁶ And, hoping that his words would speak for the Court, Brennan endeavored to re-explain the relevant holding in *Gertz*. Specifically, he wrote that, although the Court in *Gertz* “had no occasion to consider”¹¹⁷ whether “presumed and punitive damages in defamation actions are invariably incompatible with the First Amendment,”¹¹⁸ it did hold that “such damages could not be awarded” absent a showing of actual malice.¹¹⁹ Building on the multiple reasons that Powell had articulated in *Gertz* for this limitation, Brennan concluded that “when the threat of unpredictable and disproportionate damages induces potential speakers to refrain from speaking, both the speaker and society as a whole are the losers.”¹²⁰ His opinion proceeded to reject the notion that there is any relevant distinction to be made between media and nonmedia speakers in this regard, noting (apparently in anticipation of a dissent from Powell) that “the fact that petitioner’s information is ‘specialized’ or that its subscribers pay ‘substantial fees’ hardly distinguishes these reports from articles in many publications to which respondent would presumably attach the label ‘media’.”¹²¹

Brennan then turned to the heart of the matter, explaining why and how the First Amendment simultaneously protects the press and nonmedia speakers. “Recognizing the critical historical role played by the press in gathering and disseminating information for the benefit of the public, we have often emphasized the need for careful judicial scrutiny of government actions that impede the exercise of that function or that single out the press for different treatment.”¹²² By the same token,

114. Justice Brennan, Draft Opinion One I (*Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*) (May 29, 1984) (on file with the Brennan Papers, Library of Congress Manuscript Division) (on file with the Washington Law Review).

115. *Id.* at 6.

116. *Id.*

117. *Id.* at 8.

118. *Id.*

119. *Id.*

120. *Id.* at 10.

121. *Id.* at 12.

122. *Id.* at 13.

Brennan asserted, by “guaranteeing equal liberty of expression, the First Amendment furthers a central object of our constitutional scheme, to assure every member of society an equal right to dignity, respect, and the opportunity to participate in self-government.”¹²³ As a result:

[T]he constitutional protections afforded speech depend on the nature, context, and function of the expressive activity at issue, not on the status or identity of the speaker. Accordingly, the rights of the institutional press, however defined, are no greater and no less than those enjoyed by other individuals or organizations engaged in the same activities.¹²⁴

Finally, Brennan’s opinion rejected the contention that the “character or content” of the speech at issue—that is, its putative status as “commercial speech”—deprived it of the First Amendment’s protections.¹²⁵ Here, Brennan reminded his readers that “apart from identifying those limited types of unprotected expression” famously catalogued in *Chaplinsky v. New Hampshire*,¹²⁶ the Court had been quite clear that “judges, like other government officials, are not free to decide on the basis of their content which sorts of protected expression are in their judgment less ‘valuable’ than others.”¹²⁷ In addition, he rejected the

123. *Id.* at 14.

124. *Id.*

125. *Id.* at 15.

126. 315 U.S. 568 (1942). Since 1942, the Court had operated from the premise that the First Amendment does not protect certain, specifically defined categories of speech. *See generally id.* at 571–72 (“[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances. There 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” such as fighting words, obscenity, defamation and incitement, which “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.”); Laurent Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424, 1430 (1962) (“[I]f there are categories . . . of speech which are unprotected without regard to balancing, is it not proper to infer that there are categories which are protected without regard to balancing?”). The Court’s identification of various categories of unprotected speech in *Chaplinsky* spawned its subsequent embrace of a categorical approach to defining the limits of First Amendment protections. *See, e.g.*, *New York v. Ferber*, 458 U.S. 747 (1982) (child pornography as unprotected category); *Miller v. California*, 413 U.S. 15 (1973) (obscenity); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (incitement to imminent lawless action); *Watts v. United States*, 394 U.S. 705 (1969) (true threats); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (defamation); *Roth v. United States*, 354 U.S. 476 (1957) (Brennan, J.) (obscenity).

127. Justice Brennan, Draft Opinion One, *supra* note 114, at 15. Most recently, the Court has decided a series of cases endorsing Brennan’s views in this regard and rejected invitations that it recognize additional categories of unprotected speech. *See United States v. Alvarez*, ___ U.S. ___, 132 S. Ct. 2537 (June 28, 2012) (Kennedy, J., announcing judgment) (false speech about military honors); *id.* at 2544 (discussing *United States v. Stevens*, 559 U.S. ___, ___, 130 S. Ct. 1577, 1585 (2010) (content-based restrictions are permissible “only when confined to the few historic and

“commercial speech” argument on the ground that “the mere fact that petitioner’s speech concerns commerce or business in itself provides no basis for altering the constitutional analysis.”¹²⁸ The so-called “commercial speech” doctrine, in contrast to the publication at issue in *Greenmoss Builders*, encompasses only expression that, by its terms, purports to “propose” a “commercial transaction” by relating “facts uniquely within the speaker’s knowledge.”¹²⁹

The opinion was classic Brennan. He used the occasion of having what he thought was a solid five-vote majority to underscore the major values undergirding First Amendment protection in defamation cases and to bolster the foundations of *Sullivan* that had, perhaps, eroded some in *Gertz* and its progeny.¹³⁰ Two years shy of his 80th birthday and less often in command of majorities than earlier in his tenure, Brennan seemed mindful that he would not be on the Court forever and that opportunities to advance important constitutional values should not be missed.¹³¹

traditional categories [of expression] long familiar to the bar”); *Brown v. Entm’t Merchants Ass’n*, ___ U.S. ___, 131 S. Ct. 2729, 2734 (2011) (speech depicting violence directed to children) (“[N]ew categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated.”); *Stevens*, 130 S. Ct. at 1586 (speech depicting violence to animals) (“Our decisions . . . cannot be taken as establishing a free-wheeling authority to declare new categories of speech outside the scope of the First Amendment. Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law.”); see also Lee Levine, *Judge and Jury in the Law of Defamation: Putting the Horse Behind the Cart*, 35 AM. U. L. REV. 3, 7 (1985) (“[T]he efficacy of the constitutional standard depends on judges defining the limits of that category of expression entitled to first amendment protection rather than on juries evaluating the demeanor and credibility of witnesses and drawing inferences from the evidence.”).

128. Justice Brennan, Draft Opinion One, *supra* note 114, at 19.

129. *Id.*

130. See, e.g., *Wolston v. Reader’s Digest Ass’n, Inc.*, 443 U.S. 157, 172 (1979) (Brennan, J., dissenting); *Herbert v. Lando*, 441 U.S. 153, 181 (1979) (Brennan, J., dissenting) (arguing that the First Amendment bestows an “editorial privilege” on media defendants unless overcome by a public-figure plaintiff making prima facie showing that statement at issue was defamatory); *Time, Inc. v. Firestone*, 424 U.S. 448, 481 (1976) (Brennan, J., dissenting) (“In my view . . . the actual-malice standard of *New York Times* must be met in order to justify the imposition of liability in these circumstances.”).

131. Following a mild stroke, Brennan retired from the Court on July 20, 1990. See Linda Greenhouse, *Vacancy on the Court; Brennan, Key Liberal, Quits Supreme Court; Battle For Seat Likely*, N.Y. TIMES, July 21, 1990, at A1. Just a year earlier, Brennan had marshaled a majority in *Texas v. Johnson*, 491 U.S. 397 (1989), where the Court overturned the conviction of a man for burning an American flag. *Id.* at 420. Indeed, just over a month before his retirement, Brennan wrote the Court’s opinion declaring unconstitutional a federal law passed in response to *Johnson*, noting, “[p]unishing desecration of the flag dilutes the very freedom that makes this emblem so revered, and worth revering.” *United States v. Eichman*, 496 U.S. 310, 319 (1990); see also *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 552 (1990) (Brennan, J.) (finding FCC minority ownership policies constitutional under equal protection clause), *overruled by Adarand Constructors, Inc. v.*

F. *Counting to Five*¹³²

Marshall promptly joined Brennan's opinion, as did Stevens who, at least according to his clerks, had "become solidly convinced" to do so by Brennan's "excellent opinion."¹³³ He did, however, privately ask Brennan to modify the sentence, quoted above, in which Brennan wrote that "judges, like other government officials, are not free to decide on the basis of their *content* which sorts of protected expression are in their judgment less 'valuable' than others."¹³⁴ Stevens wrote to Brennan that he feared the sentence could be viewed as inconsistent with the view he had championed in cases such as *Young v. American Mini-Theatres*¹³⁵ and *FCC v. Pacifica Foundation*,¹³⁶ which envisioned judges doing just that in many circumstances. Although Brennan had crossed swords with Stevens on the latter's reasoning in this regard in the past,¹³⁷ he thought it best not to confront him again and offered to change the word "content" to "message."¹³⁸ This accommodation satisfied Stevens, who promptly joined the Brennan opinion on June 4, 1984.¹³⁹

White, however, was another matter. The initial reaction to the Brennan draft in his Chambers appeared to be positive. In a

Pena, 515 U.S. 200 (1995); *Grady v. Corbin*, 495 U.S. 508 (1990) (Brennan, J.) (double jeopardy), *overruled by* *United States v. Dixon*, 509 U.S. 688 (1993). *But see* *Osborne v. Ohio*, 495 U.S. 103 (1990) (Brennan, J., dissenting) ("When speech is eloquent and the ideas expressed lofty, it is easy to find restrictions on them invalid. But were the First Amendment limited to such discourse, our freedom would be sterile indeed. Mr. Osborne's pictures may be distasteful, but the Constitution guarantees both his right to possess them privately and his right to avoid punishment under an overbroad law."); *Ward v. Rock Against Racism*, 491 U.S. 781, 803 (1989) (Marshall, J., dissenting, joined by Brennan, J.) (dissenting from ruling that the City of New York could control private amplification equipment at concert).

132. The term "counting to five" is a reference to Brennan's legendary emphasis on strategizing to figure out how to secure five-vote majorities on the Court. He would tell his law clerks each Term that getting five votes was the most important principle of constitutional law. For a fuller discussion, see SETH STERN & STEPHEN WERMIEL, *JUSTICE BRENNAN: LIBERAL CHAMPION* 196 (2010).

133. Justice Brennan, 1983 Term Histories, *supra* note 20, at LXXXVI.

134. *Id.* (emphasis added).

135. 427 U.S. 50 (1976).

136. 438 U.S. 726 (1978).

137. *Compare Young*, 427 U.S. at 70 (Stevens, J.) ("[A] line may be drawn on the basis of content without violating the government's paramount obligation of neutrality in its regulation of protected communication."), *with Pacifica Found.*, 438 U.S. at 777 (Brennan, J., dissenting) ("[T]he Court's decision may be seen for what, in the broader perspective, it really is: another of the dominant culture's inevitable efforts to force those groups who do not share its mores to conform to its way of thinking, acting, and speaking.").

138. Justice Brennan, 1983 Term Histories, *supra* note 20, at LXXXVI.

139. *Id.*

memorandum to his Justice, White's law clerk pronounced Brennan's opinion "very strong."¹⁴⁰ Still, the clerk acknowledged, Brennan had painted with "a broad brush" and pointed out to White "a few places where he might be felt to have overdone it."¹⁴¹ Specifically, the law clerk noted that Brennan "offers some general ruminations about the illegitimacy of punitive damages," which raised the question for White of "how much of a rehash of *Gertz* you are willing to join" especially since Brennan's "treatment of punitive damages is pretty inconsistent with what you wrote in *Gertz*."¹⁴² Finally, the clerk noted that Brennan had not included in his draft "any statement to the effect that the Court is not deciding what rule applies when a *public* figure sues a nonmedia defendant."¹⁴³ In the clerk's view, however, the "vast majority" of courts have held that *Sullivan*'s "actual malice" standard applies in such circumstances and "it seems a correct and unavoidable result"—accordingly, he wrote to White, "I think that any disclaimer would be insincere, misleading, and incorrect, and the present silence is appropriate."¹⁴⁴

After returning from the Fifth Circuit Judicial Conference in early June (which he had attended with Brennan), however, White circulated a memorandum to the Conference that Brennan's chambers described "as something of a bombshell."¹⁴⁵ Having learned that Powell was planning to write a dissent, and that O'Connor had said she would wait for it before announcing her own intentions, White did the same—he said that he would await Powell's draft before casting his own vote. Brennan's

140. Memorandum from Michael Herz for Justice White 1 (*Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*) (undated) (on file with the White Papers, Library of Congress Manuscript Division) (on file with the Washington Law Review).

141. *Id.*

142. *Id.* In his own draft, Brennan had stated that punitive damages "pose[] a danger of constitutional dimension" when the conduct deterred by the threat of them is "expression protected by the First Amendment." Justice Brennan, Draft Opinion One, *supra* note 114, at 10. The law clerk offered White "two ways of bringing this situation within *Gertz*." Memorandum from Michael Herz for Justice White, *supra* note 140, at 1. On the one hand, White could join Brennan on the ground that "it is impossible to draw a line between media and nonmedia defendants; this is essentially an administrative concern." *Id.* On the other, White could premise his vote to reverse on the argument that, "even if one could draw such a line, it would be inappropriate because nonmedia defendants enjoy the same protection as media defendants, there being no legitimate distinction between them." *Id.* Brennan, according to White's clerk, had made both arguments and the clerk believed "he is correct to rely on both prongs. Even if you disagree with *Gertz*," he wrote to White, "if the rule in that case is going to be applied, there is no good reason for not applying it across the board." *Id.* at 2.

143. Memorandum from Michael Herz for Justice White, *supra* note 140, at 2.

144. *Id.* at 3.

145. Justice Brennan, 1983 Term Histories, *supra* note 20, at LXXXVI.

chambers learned that White's own clerks "as usual, had no idea what was bothering" their Justice, which further perplexed Brennan, especially because White "had pushed to get the case granted in the first place" and had called it a "clear reversal" at Conference.¹⁴⁶

Indeed, Brennan was moved to pick up the phone and call White, who explained to Brennan that he "hated" *Gertz* and had been "startled" to learn that Powell was planning to write a dissent.¹⁴⁷ As Brennan described the conversation, White said he "could not imagine what Powell would write but would be sympathetic to any reasonable way to get around" *Gertz*.¹⁴⁸ After the call, Brennan described himself as "fairly confident" that White would "ultimately go along" with his opinion.¹⁴⁹

G. *Powell's Problems*

Unbeknownst to Brennan, there was a wild card in the process that would prompt White to withhold his vote. Specifically, Brennan was unaware of the degree to which Powell now harbored doubts about his own decision in *Gertz*. Indeed, in late May, another of Powell's law clerks provided Powell with a memorandum offering alternative "general approaches" the Justice might take in crafting an opinion of his own.¹⁵⁰ Powell had apparently told the clerk that, while he did not object to construing the First Amendment to preclude states from awarding punitive damages absent a showing of actual malice "in the present situation," he would find it "unacceptable" to "constitutionaliz[e] the entire law of libel."¹⁵¹ Although Brennan's opinion did not purport to do the latter, the clerk's "suspicion" was that it would have that "effect."¹⁵² Accordingly, the clerk recommended that, "if it is possible to write a coherent dissent articulating a contrary view, you should not join" Brennan.¹⁵³ In the end, the clerk recommended that Powell:

[B]ack away slightly from *Gertz's* statement that there was *no* state interest in presumed and punitive damages. That is, you

146. *Id.* at LXXXVII.

147. *Id.*

148. *Id.*

149. *Id.*

150. Memorandum from Joseph Neuhaus for Justice Powell 1 (Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.) (May 30, 1984) (with handwritten notes from Justice Powell) (on file with the Powell Papers, Washington and Lee Law Library), *available at* <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>.

151. *Id.* at 2.

152. *Id.*

153. *Id.*

could say that *Gertz* was speaking in the context at issue there. It meant that there was no *net* state interest in these forms of damages, after the First Amendment values were considered. Of course, there is some interest in allowing presumed damages, and perhaps some in allowing punitive damages as well.¹⁵⁴

In his handwritten notes in the margins of the clerk's memo, Powell wrote "yes" no fewer than three times.¹⁵⁵

On June 1, 1984, Powell dictated a memorandum in which he considered his options. After reminding himself that, in *Sullivan*, the Court "draws no distinction between 'damages' of various kinds," and noting "as a matter of interest" that *Sullivan*, "in several places, indicates that truth or falsity is really irrelevant to any constitutional consideration, a position *Gertz* rejected,"¹⁵⁶ Powell acknowledged that Brennan's proposed holding in *Greenmoss Builders* was "limited to presumed and punitive damages" and did not purport to address either the standard of liability or the availability of compensatory damages in such cases.¹⁵⁷ Nevertheless, he shared his law clerk's concern that "much"¹⁵⁸ of the Brennan opinion "can be read—and perhaps will be—as limiting even actual damages to proof of malice when that issue is

154. *Id.* at 5 (emphasis in original).

155. *Id.* at 2, 5. In a second memorandum to Powell expanding on his original views the following day, the clerk seemed to reconsider, at least somewhat, his conclusion that his Justice ought to dissent. After explaining that the Brennan opinion would not, as a practical matter, alter the common law significantly, he wrote: "In sum, WJB's result would not be a bad thing for the world, but it does tend to trample unnecessarily on principles of federalism. For me this would probably be enough to reach a different result, but it is a close call." Memorandum from Joseph Neuhaus for Justice Powell 4 (May 31, 1984) (with handwritten notes from Justice Powell) (on file with the Powell Papers, Washington and Lee Law Library), available at <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>. And, because he recognized the difficulties inherent in attempting to draw lines based on the identity of the speaker or the content of the speech (including expanding the commercial speech category to encompass more than advertisements), the clerk told Powell that "I now favor essentially listing the factors that make us conclude that this is not an area of speech that implicates constitutional values to the degree they were implicated in *Gertz*"—i.e., "that this is not an issue of public or general importance, that this is not speech that appears in a newspaper, and that this is speech of an economic or commercial nature that is unlikely to be chilled very much by application of state rules." *Id.* at 5. The clerk ended his memorandum by telling Powell that, although he favored a dissent by the Justice along these lines, he was not "certain that the Court should create a variety of levels of First Amendment protection for speech" depending on such factors. *Id.* at 7. To this, Powell wrote in the margin of the clerk's memorandum, "this is troublesome." *Id.*

156. Personal memorandum of Justice Powell 2 (June 1, 1984) (on file with the Powell Papers, Washington and Lee Law Library), available at <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>.

157. *Id.*

158. *Id.*

before the Court.”¹⁵⁹ Accordingly, Powell set out his options. There were two suggested by the law clerk: (1) concurring in the result and writing separately to emphasize that, although “there is a difference between private speech and public speech,”¹⁶⁰ the government “interest in both presumed and punitive damages is so minimal that states cannot impose them at all except under constitutional standards,”¹⁶¹ or (2) dissenting in an opinion that “back[s] away slightly from *Gertz*’s statement that there is no state interest in presumed and punitive damages.”¹⁶² Powell himself added a third—“make a distinction between presumed and punitive damages”¹⁶³—an option that he wrote “would appeal to me because I think a malice standard may well be justified before punitive damages are awarded even in a suit by a private person against a private person.”¹⁶⁴ In assessing the alternatives, Powell returned to the language of his “holding” in *Gertz*—i.e., “the states may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity of [sic] reckless disregard for the truth.”¹⁶⁵ This, he recognized, “may not be easy to reconcile in terms of drawing a distinction between presumed and punitive damages,” which,

159. *Id.*

160. *Id.* at 3

161. *Id.*

162. *Id.* (citation omitted).

163. *Id.*

164. *Id.*

165. *Id.* at 5. The Court in *Sullivan* had held that a public official could only recover damages resulting from defamation if the official could prove that the defamatory statement was made with “knowledge that it was false or with reckless disregard of whether it was false or not.” *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964); *see also* *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964) (“[S]ince . . . erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the breathing space that they need . . . to survive. . . , only those false statements made with *the high degree of awareness of their probable falsity* demanded by *New York Times* may be the subject of either civil or criminal sanctions.”) (emphasis added) (internal quotations omitted). As the Court has explained, the actual malice standard articulated in *Sullivan* is “quite different” from “malice” as traditionally defined at common law, which is “frequently expressed in terms of either personal ill will toward the plaintiff or reckless or wanton disregard of the plaintiff’s rights.” *Cantrell v. Forest City Pub Co.*, 419 U.S. 245, 252 (1974); *see also* *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 511 (1991); *Harte-Hanks Commc’ns, Inc. v. Connaughton*, 491 U.S. 657, 666 n.7 (1989) (“The phrase ‘actual malice’ is unfortunately confusing in that it has nothing to do with bad motive or ill will.”). Moreover, a mere “[f]ailure to investigate does not in itself establish bad faith.” *St. Amant v. Thompson*, 390 U.S. 727, 733 (1968). Instead, “[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.” *Id.* at 731. Such evidence may include those instances “where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call.” *Id.* at 732.

he concluded, warranted further discussion with his law clerk.¹⁶⁶

Later that same day, presumably following those further discussions, Powell wrote the Conference that he would “try my hand at a dissent.”¹⁶⁷

H. *Powell’s Dissent—Take One*

Powell circulated the first draft of that dissent on June 15. In it, he relied both on the identity of the speaker and on the content of the speech at issue to distinguish *Greenmoss Builders* from *Sullivan* and *Gertz*, which were otherwise endorsed in all respects. The opinion’s opening paragraph framed the discussion of *Sullivan* as limiting “the reach of state laws of libel and slander in suits against media defendants,”¹⁶⁸ ignoring entirely the *Abernathy* nonmedia defendants in that case,¹⁶⁹ and asserted that “[a]ll of the Court’s decisions since then that have considered the constitutional role in defamation law also have involved suits against a media defendant arising out of an article or broadcast on an issue of public concern and importance,”¹⁷⁰ despite the presence of cases like *Garrison v. Louisiana*,¹⁷¹ *Henry v. Collins*,¹⁷² and *St. Amant v. Thompson*¹⁷³ among the Court’s defamation decisions.¹⁷⁴ It included a footnote warning that, while Brennan’s “opinion discusses only the questions of presumed and punitive damages, its effect is broader,” and its “logic . . . apparently would require that the rule announced in *Gertz* . . . barring liability without fault in cases involving media discussion of public issues, be applied in all defamation

166. Personal memorandum of Justice Powell, *supra* note 156, at 5.

167. Memorandum from Justice Powell for the Conference (June 1, 1984) (on file with the Brennan Papers, Library of Congress Manuscript Division) (on file with the Washington Law Review). As noted in her June 5th memorandum, O’Connor indicated that she would “wait to see” what Powell drafted, Memorandum from Justice O’Connor for the Conference, Brennan Papers (June 5, 1984) (on file with the Brennan Papers, Library of Congress Manuscript Division), and White also wrote to say he too would “await Lewis’s dissent,” Memorandum from Justice White for the Conference, Brennan Papers (June 5, 1984) (on file with the Brennan Papers, Library of Congress Manuscript Division) (on file with Washington Law Review).

168. Justice Powell, Draft Dissent One 1 (*Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*) (June 15, 1984) (on file with the Powell Papers, Washington and Lee Law Library), available at <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>.

169. See *supra* notes 40–41 and accompanying text.

170. Justice Powell, Draft Dissent One, *supra* note 168, at 1.

171. 379 U.S. 64 (1964).

172. 380 U.S. 356 (1965).

173. 390 U.S. 727 (1968).

174. See *supra* text accompanying notes 37–39.

actions.”¹⁷⁵ *Gertz* did not support such a result, Powell wrote, both because in that case there “was a libel suit against a media defendant” and because the “article in question discussed a question of undoubted public importance.”¹⁷⁶ *Greenmoss Builders*, in contrast, involved “a purely private defamation action against a commercial credit reporting agency.”¹⁷⁷ In the end, Powell asserted that the Court’s result “unnecessarily repudiates the common law and trivializes the First Amendment. There is nothing in *Gertz* that requires it.”¹⁷⁸ At this point, the opinion contained another footnote that addressed Powell’s previously expressed concerns about the express “holding” in *Gertz*:

There is language in *Gertz* that can be read broadly to the effect that presumed and punitive damages have no place in the law of defamation. It is necessary, however, to view this language in the context of the only issue before the Court. The suit was by a private person against a media defendant. It was the presence of the media defendant that primarily caused the Court in *Gertz* to limit recovery to “actual injury.”¹⁷⁹

As to the damages question, Powell added:

Presumed and punitive damages were deemed—for the reasons first articulated in *New York Times*—to threaten the historic role of the media in a representative democracy. No such threat is present when one private party is libeled by another private party—at least where the libel is circulated in the course of, and is solely concerned with, both parties’ businesses. In weighing the interests that may be at issue, it is well also to repeat that there is a significant public interest “in compensating private individuals for wrongful injury to reputation.”¹⁸⁰

This reframing of the decision in *Gertz* might have effectively cleared up for Powell the concerns he harbored about the scope of the First Amendment interest in defamation cases and about the importance of allowing the states substantial leeway in crafting their own laws. It is, however, an exceedingly narrow statement of the purposes of both *Sullivan* and *Gertz* that ignores the difficulty of line-drawing among types of speakers, subjects of speech and types of damages that Powell

175. Justice Powell, Draft Dissent One, *supra* note 168, at 2.

176. *Id.* at 5.

177. *Id.*

178. *Id.* (footnote omitted).

179. *Id.* at 10–11.

180. *Id.* at 11 (quoting *Gertz v. Robert Welch Inc.*, 418 U.S. 323, 348–49 (1974)).

himself acknowledged in his exchange with his law clerk.¹⁸¹

I. The Undecided

Powell's draft was apparently enough for Blackmun to cement his own views—he joined Brennan's opinion that same day.¹⁸² O'Connor and Rehnquist, however, joined Powell.¹⁸³ With a tally of four for Brennan and three for Powell, that left Burger and White. Although Brennan's chambers had been led to believe that Burger's own clerk had "pushed him hard"¹⁸⁴ to join the Brennan-crafted majority opinion, Burger reportedly could not "bring himself"¹⁸⁵ to do so and, on June 19, 1984, told the Conference that "as of now," he would vote only to dismiss the writ.¹⁸⁶

At this juncture, therefore, Brennan knew he needed White but that further efforts to persuade him might backfire. So, although Brennan was known as the master of discerning and accommodating the concerns of other Justices to forge majority opinions,¹⁸⁷ he held back and awaited further word from White. Powell, however, was more proactive. Following what appears to have been some one-on-one discussion with White, Powell wrote to him privately on June 18, to address White's apparent suggestion that the case be reargued because Powell's opinion "would decide an issue not decided below or argued here"¹⁸⁸—i.e., whether all of the First Amendment-based protections set out in *Gertz* applied in suits against nonmedia defendants. Powell disagreed, telling White that the "question of whether the entire law of defamation should be constitutionalized clearly is before us and needs to be decided."¹⁸⁹ That said, he invited White to make "suggestions"¹⁹⁰ for revisions to his opinion, which Powell said he would "welcome the opportunity to

181. See *supra* text accompanying note 155.

182. Justice Brennan, 1983 Term Histories, *supra* note 20, at LXXXVII.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. For a discussion of Brennan's reputation as a consensus builder on the Court, see STERN & WERMIEL, *supra* note 132, at 223.

188. Letter from Justice Powell to Justice White (June 18, 1984) (on file with the Powell Papers, Washington and Lee Law Library), available at <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>.

189. *Id.*

190. *Id.*

consider.”¹⁹¹

On June 20, Powell wrote a second private letter, this one to Burger, with copies to Rehnquist and O'Connor. In it, he told the Chief Justice that his vote “to DIG[] came as a surprise.”¹⁹² He then proceeded to “review[] the ‘bidding,’”¹⁹³ for Burger’s benefit, emphasizing that the Chief Justice had not only previously indicated an inclination to join him, O'Connor, and Rehnquist, but also that he had subsequently written to them to express concern about “how far Bill Brennan” would go in his own opinion.¹⁹⁴ In this regard, Powell pushed hard to define the contours of the debate, adding that “I note at this point that Bill could not have gone any farther than he has in his opinion for the Court.”¹⁹⁵ Powell concluded with the following:

In view of this rather clear record, I wrote a full dissenting opinion on the assumption that there were four of us who could not go with Bill Brennan. His opinion overrules two centuries of the common law and the present defamation laws of most of the states. As a vote to DIG at this time would have no significance, I hope that in due time—when you have an opportunity to take another look—you will “stay with us.”¹⁹⁶

Upon receiving her copy, O'Connor wrote a handwritten note to Powell, thanking him “for writing to the Chief to refresh recollections of the history of this important case.”¹⁹⁷

Powell’s letter got Burger’s attention. Later that same day, he wrote to Powell, with copies to Rehnquist and O'Connor, indicating that “[i]f you think it will help ‘institutionally,’ I will go along with you. I would want to see what, if anything, Byron [White] does.”¹⁹⁸

191. *Id.*

192. Letter from Justice Powell to Chief Justice Burger (June 20, 1984) (on file with the Powell Papers, Washington and Lee Law Library), *available at* <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>. The term DIG means “dismissed as improvidently granted.”

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. Handwritten note from Justice O'Connor to Justice Powell (June 20, 1984) (on file with the Powell Papers, Washington and Lee Law Library), *available at* <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>.

198. Letter from Chief Justice Burger to Justice Powell (June 20, 1984) (on file with the Powell Papers, Washington and Lee Law Library), *available at* <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>.

J. *The Fight for White*

Thus, it became apparent to both Powell and Brennan that White's vote would almost certainly determine the outcome of the case. For his part, Powell took renewed aim at Brennan's opinion in an effort to win White's vote and garner his own majority. He launched what Brennan's Term History described as a "battle of footnotes" in which the authors of *Sullivan* and *Gertz* appeared to fight for the legacy of their signature cases, each invoking "increasingly strong language through several drafts on both sides."¹⁹⁹

As the Term wound down, the waiting continued. White apparently had to leave town again, this time for his daughter's wedding. Nevertheless, both Brennan and Powell continued to court his vote, informally sending typewritten versions of additional footnotes for his consideration. Still, White remained silent. At lunch one day, shortly before he left Washington, White reportedly asked his clerks whether they thought Powell was offering to overrule *Gertz*, at least in part. His clerks told him they did not read the Powell opinion to do so.²⁰⁰ Accordingly, when he returned to the Court on June 25, 1984, White visited Powell and put the question to him directly. Powell reportedly told him that, although he had no intention of overruling *Gertz*, he did hope to cut back on the implications of some of the broad dicta in his

199. Justice Brennan, 1983 Term Histories, *supra* note 20, at LXXXVII. Some of these footnotes merit comment. In one, Powell addressed the Tenth Circuit's then relatively recent decision in *Pring v. Penthouse International, Ltd.*, 695 F.2d 438 (10th Cir. 1982), reversing a jury verdict against the publisher of *Penthouse* magazine, which had included punitive damages in the amount of \$25 million. The footnote pointed out that the district judge had reduced the jury's award to \$12.5 million and that the Court of Appeals had eliminated it entirely as a consequence of its "holding that an obviously fictional account of the pageant could not be libelous under the narrow theory argued by plaintiff." Justice Powell, Draft Rider B for Draft Dissent One (*Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*) (June 14, 1984) (on file with the Powell Papers, Washington and Lee Law Library), available at <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>. This account was apparently included to demonstrate that punitive damages may or may not be appropriate given the circumstances of a given case. In another, Powell attempted to suggest that punitive and presumed damages might be treated differently, despite his acknowledgement that "[m]y opinion for the Court in *Gertz*, as the Court today notes, did not distinguish between" them. Justice Powell, Draft Rider C for Draft Dissent One (*Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*) (June 14, 1984) (on file with the Powell Papers, Washington and Lee Law Library), available at <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>. Nevertheless, Powell wrote that, "[u]pon the more mature reflection required by the Court's constitutionalization of the entire law of libel, I find both historic and logical reasons" for distinguishing between them—i.e., because the "purpose of presumed damages is essentially compensatory, . . . they are appropriate when it is clear from the nature of the libel that injury occurred and that measuring the damages precisely is impossible," while the purpose of punitive damages is "wholly different" and effectively permits "a private litigant to punish a defendant . . . without due process of any kind." *Id.*

200. Justice Brennan, 1983 Term Histories, *supra* note 20, at LXXXVIII.

opinion.²⁰¹ White was not satisfied. Indeed, he subsequently confided in Brennan that, if Powell had only made some changes in his dissenting opinion, he might have joined it, thereby creating a majority to affirm the Vermont Supreme Court.²⁰²

After his fateful meeting with Powell, White broke his silence, in a memorandum he addressed to Brennan and circulated to the Conference later that same day. He said that he was “up in the air”²⁰³ about the case on a number of fronts:

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

Justice White concurring in the judgment.

I am unprepared to join either Justice Brennan’s or Justice Powell’s opinion and believe that the case should be reargued. That view not having prevailed, I join the Court’s judgment of reversal, which I think is more consistent with existing precedent than an affirmance would be.²⁰⁴

K. *Strange Company*

The irony in all of this was palpable. Brennan, the author of *Sullivan and Rosenbloom*, who had been effectively marginalized by Powell as he crafted the Court’s majority and opinion in *Gertz*,²⁰⁵ had been placed in the position of defending Powell’s handiwork and reaffirming it. White, who had joined Brennan in both *Sullivan* and *Rosenbloom*, and who had railed against Powell’s opinion in *Gertz*,²⁰⁶ was sufficiently moved by

201. *Id.*

202. *Id.*

203. Memorandum from Justice White for Justice Brennan and the Conference (June 25, 1984) (on file with the Powell Papers, Washington and Lee Law Library), available at <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>.

204. *Id.*

205. See Levine & Wermiel, *supra* note 11 at 4 (“From the standpoint of Justice Brennan, the story of *Gertz* is one about his colleagues’ reactions to Brennan and the positions he espoused rather than about Brennan’s own role.”).

206. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 370 (1974) (White, J., dissenting) (“[I]n

Powell's reasoning (and offended by Brennan's defense of *Gertz*) to withhold his vote from Brennan. And Powell, who had withstood White's withering attack in *Gertz* and had dismantled the plurality Brennan had cobbled together in *Rosenbloom*, had apparently managed to curry at least some favor with White by disclaiming at least some aspects of his own reasoning in *Gertz*.

White's memorandum provoked Brennan to telephone his colleague again, this time to inquire whether White's cryptic reference to Brennan's opinion being "more consistent with existing precedent" might lead him to join the Brennan opinion if additional changes were made.²⁰⁷ It was then that White told Brennan that, if anything, Powell was more likely to secure his vote if changes were made in Powell's opinion.²⁰⁸ Still, White continued to advocate reargument, perhaps in the hope that he could thereby garner sufficient support to overrule at least significant portions of *Gertz*.

It might have been expected that Burger, who had by this time twice voted to dismiss the case, would be opposed to reargument. Nonetheless, perhaps because White had provided him with a fifth vote for reargument in *Garcia v. San Antonio Metropolitan Transit Authority*²⁰⁹ at about the same time, the other Justices were not surprised when Burger wrote to White (and the Conference) on June 25 that "I had voted to DIG but I will give you a 'consolation vote' to join your vote to reargue."²¹⁰ Brennan had written to Burger earlier that day and, after noting that the Chief had "voted to deny cert in this case and . . . twice voted to DIG," assumed that "Byron's suggestion that the case be argued again will not have much appeal for you."²¹¹ Accordingly, Brennan asked, "Is there anything I can do in the way of changing my opinion

a few printed pages, [the Court in *Gertz*] has federalized major aspects of libel law by declaring unconstitutional in important respects the prevailing defamation law in all or most of the 50 States.").

207. Justice Brennan, 1983 Term Histories, *supra* note 20, at LXXXIX.

208. *Id.* at LXXXVIII.

209. 469 U.S. 528 (1985). In *Garcia*, the Court, by 5-4 vote, ultimately overruled *National League of Cities v. Usury*, 426 U.S. 833 (1976), and held that it was impossible to define what actions of state and local government constitute traditional functions that would make them immune from federal regulation. The majority opinion was written by Blackmun and joined by Brennan, White, Marshall, and Stevens, with Burger, Rehnquist, Powell, and O'Connor dissenting.

210. Memorandum from Chief Justice Burger for Justice White and the Conference (June 25, 1984) (on file with the Powell Papers, Washington and Lee Law Library), available at <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>.

211. Letter from Justice Brennan to Chief Justice Burger (June 25, 1984) (with handwritten notes from Chief Justice Burger) (on file with the White Papers, Library of Congress Manuscript Division) (on file with Washington Law Review).

that might enable you to join it so that we can avoid burdening the Court with another argument in this case?”²¹² In a handwritten note to Brennan scrawled across the bottom of the latter’s letter, Burger replied, “Dear Bill, I want to relieve your worries about the December calendar—hence I will vote to reargue.”²¹³ Even before Burger had announced his intentions, Stevens privately predicted as much to his clerks: “He didn’t think the case should be argued, but he’ll probably think that since it was argued, it should be argued twice!”²¹⁴

L. *Two Questions*

The final scenes of what would be the first Act of the *Greenmoss Builders* drama took place in the last days of the 1983–84 Term. Just before the Conference voted 5-4 to rehear the case, Powell made one last attempt to secure White’s vote, repeating his contention that Brennan’s opinion would overrule “centuries”²¹⁵ of common law. Upon hearing this, Rehnquist was moved to say, “Why, Lewis, I thought *you* did that in *Gertz*.”²¹⁶

Brennan and Powell then put down their swords long enough to collaborate on the questions that the parties would be asked to reargue the following term. On June 26, 1984, Powell’s law clerk proposed four separate questions, each reflecting a different permutation of the media/nonmedia distinction and the nature of the speech, which was variously referred to as “speech of an economic nature” and “reports on the financial condition of private parties.”²¹⁷ By the following day, however, Powell had reduced the questions to two, which he proposed to

212. *Id.*

213. *Id.*

214. Justice Brennan, 1983 Term Histories, *supra* note 20, at LXXXIX.

215. *Id.*

216. *Id.*

217. Memorandum from Joseph Neuhaus for Justice Powell (June 26, 1984) (on file with the Powell Papers, Washington and Lee Law Library), *available at* <http://law.wlu.edu/powellarchives/page.asp?pageid=1355> (“1. Whether, in a defamation action, the constitutional rule of *New York Times* and *Gertz* with respect to presumed and punitive damages should apply where the suit is against a nonmedia defendant and the speech is dissimilar from that at issue in those cases. 2. Whether, in a defamation action, the constitutional rule of *New York Times* and *Gertz* with respect to presumed and punitive damages should apply to nonmedia defendants sued for reports on the financial condition of private parties. 3. Whether, in a defamation action, the constitutional rule of *New York Times* and *Gertz* with respect to presumed and punitive damages should apply where the suit is against a nonmedia defendant and the alleged defamation is a report on the financial condition of a private party. 4. Whether, in a defamation action, the constitutional rule of *New York Times* and *Gertz* with respect to presumed and punitive damages should apply in suits against nonmedia defendants involving speech of an economic nature.”).

Brennan in a private letter:

1. Whether, in a defamation action, the constitutional rule of *New York Times* and *Gertz* with respect to presumed and punitive damages should apply where the suit is against a non-media defendant?
2. Whether, in a defamation action, the constitutional rule of *New York Times* and *Gertz* with respect to presumed and punitive damages should apply where the speech is of a commercial or economic nature?²¹⁸

In his letter, Powell told Brennan that he believed these questions were both appropriate because, while the “reasoning of your opinion applies to all defamation actions against media and nonmedia defendants and without regard to the type of speech,” Powell’s “would leave open the question whether the constitutional rule applies with equal force regardless of the nature of speech,” and “[t]here may be a different balance where the speech relates solely to an economic matter (as in this case) or to an accusation that a lady is sleeping with the wrong gentleman.”²¹⁹

Brennan apparently agreed, because later that same day, Powell adapted his letter to Brennan as a memorandum to the entire Conference, which included both the questions he had proposed to Brennan as well as the rationale for posing them.²²⁰ O’Connor, White, and Burger all concurred in what was now the Powell-Brennan formulation.²²¹

And there it stood on the Term’s final day, when the Justices returned from lunch to announce that both *Greenmoss Builders* and *Garcia* would be reargued the following fall. At the time, Brennan did not suspect that the case would ultimately “number among the great disappointments”²²²

218. Letter from Justice Powell to Justice Brennan (June 27, 1984) (on file with the Powell Papers, Washington and Lee Law Library), available at <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>.

219. *Id.*

220. Memorandum from Justice Powell for the Conference (June 27, 1984) (on file with the Powell Papers, Washington and Lee Law Library), available at <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>.

221. Letter from Chief Justice Burger to Justice Powell and the Conference (July 2, 1984) (on file with the Brennan Papers, Library of Congress Manuscript Division) (on file with the Washington Law Review); Letter from Justice White to Justice Powell and the Conference, (June 28, 1984) (on file with the Brennan Papers, Library of Congress Manuscript Division) (on file with Washington Law Review); Letter from Justice O’Connor to Justice Powell and the Conference (June 27, 1984) (on file with the Brennan Papers, Library of Congress Manuscript Division) (on file with Washington Law Review).

222. Justice Brennan, 1984 Term Histories 91 (on file with the Brennan Papers, Library of Congress Manuscript Division) (on file with the Washington Law Review).

of the October 1984 Term or that it would “presage difficulties for Justice Brennan’s doctrines of First Amendment limitations on state defamation law”²²³ for years to come.

Perhaps Brennan was overconfident, relying too much on his long, warm relationship with White and his frequent alliances forged with Powell.²²⁴ Or perhaps Brennan simply believed in the invincibility of what he had created in *Sullivan*. But by the summer of 1984, it had become clear in media law circles that the existing state of defamation law was far from at rest, even if the extent of that unease was not enough to shake Brennan’s faith.²²⁵

223. *Id.*

224. Brennan and White sat next to each other at oral argument for a number of years and developed a warm relationship. See STERN & WERMIEL, *supra* note 132 at 453. Brennan counted Powell as an important swing vote or fifth vote for much of their tenure together. For an example of this, see *Plyler v. Doe*, 457 U.S. 202 (1982), and for a discussion of it, see STERN & WERMIEL, *supra* note 132, at 475.

225. In 1982, General William Westmoreland, the commander of United States forces during the Vietnam war, brought a highly publicized defamation action seeking \$120 million in damages against CBS for its portrayal of the General in a CBS documentary, “The Uncounted Enemy: A Vietnam Deception.” *Westmoreland v. CBS, Inc.*, 601 F. Supp. 66 (S.D.N.Y. 1984). At about the same time, former Israeli Defense Minister and future Prime Minister Ariel Sharon brought an equally well known defamation suit against Time, Inc., in which he sought \$500 million in damages arising from an article entitled “The Verdict Is Guilty: An Israeli Commission Apportions the Blame for the Beirut Massacre.” *Sharon v. Time, Inc.*, 599 F. Supp. 538 (S.D.N.Y. 1984). These and other significant defamation suits of the era, see, e.g., *Tavoulaareas v. Piro*, 817 F.2d 762, 771 (D.C. Cir. 1987) (describing jury verdict awarding President of Mobil Oil Co. and his son of \$250,000 in compensatory damages and \$1.8 million in punitive damages after the *Washington Post* published an article suggesting that the father had used his influence to launch his son’s career), caused many in the media industry to believe that *Sullivan* had proven to provide ineffective protection to the press. See Michael Massing, *The Libel Chill: How Cold Is It Out There?*, COLUM. JOURNALISM REV., May–June 1985, at 31, 43 (surveying media professionals’ views on increasing number of libel actions and concluding that then-current state of “libel is threatening to take [investigative journalism] in an unhealthy direction, creating a type of immunity for powerful figures, especially those with entrenched interests in the local community”). In response, in 1988 a group of libel experts proposed a model statute for libel reform. See ANNENBERG WASHINGTON PROGRAM, PROPOSAL FOR THE REFORM OF LIBEL LAW: THE REPORT OF THE LIBEL REFORM PROJECT OF THE ANNENBERG WASHINGTON PROGRAM (1988). As Professor Rodney A. Smolla, the primary proponent of the Proposal, wrote, “The Annenberg recommendations apparently struck a number of responsive chords—not always harmonious—generating a cacophony of public discourse ranging from euphoric praise to excoriating criticism.” Rodney Smolla & Michael Gaertner, *The Annenberg Libel Reform Proposal: The Case for Enactment*, 31 WM. & MARY L. REV. 25, 26 (1989) (listing sources); see also C. Thomas Dienes, *Libel Reform: An Appraisal*, 23 U. MICH. J.L. REFORM 1, 18 (1989) (noting that the Proposal is “preferable to proposals that simply force a predetermined structure on the variety of plaintiffs and defendants . . . [or] abandon the *New York Times* balance in favor of a questionable legislative experiment that restructures libel law”); Paul Gaffney, *First Amendment Analysis of the Annenberg Libel Reform Proposal*, 1990 U. CHI. LEGAL F. 601, 623 (1990) (concluding that the Proposal “ignores the beneficial aspects of libel damages, and rests on potentially faulty assumptions about what libel defendants and plaintiffs may want”).

II. ACT II—THE END OF PUNITIVE DAMAGES AND THE MEDIA/NONMEDIA DISTINCTION?

A. *Powell Prepares for Reargument*

Over the summer that followed, Powell reassigned the case to one of his new law clerks. He explained to his new clerk that he thought it “unlikely that Justice Brennan will change his opinion substantially, and possibly major changes in our opinion will not be necessary.”²²⁶ Even so, Powell said he had learned “from experience . . . that additional time for reflection and research often does enable one to improve an opinion. As we may have a chance to win BRW, this is worth a try.”²²⁷

The new law clerk was not shy about running with Powell’s invitation. He produced a detailed memorandum in which he suggested that Powell revise his previous position extensively, picking up on the distinction between punitive and presumed damages he had explored in a footnote in his draft dissent.²²⁸ The law clerk proposed that Powell “distinguish between presumed and punitive damages in a way that would make the opinion both broader and narrower than Justice Brennan’s.”²²⁹ With respect to punitive damages, the law clerk suggested that Powell could “lay out your objections to them and suggest either voiding them entirely on substantive due process grounds or hemming them in procedurally.”²³⁰ Presumed damages, in contrast, would “be allowed only when actual damages would fail fully to compensate the victim.”²³¹ Powell underlined this passage in his copy of the memorandum and wrote an emphatic “Yes” in the margin.²³² In early

226. Memorandum from Justice Powell for Daniel Ortiz at 2 (June 30, 1984) (on file with the Powell Papers, Washington and Lee Law Library), available at <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>.

227. *Id.*

228. Memorandum from Daniel Ortiz for Justice Powell (undated) (on file with the Powell Papers, Washington and Lee Law Library), available at <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>. See Justice Powell, Draft Dissent One, *supra* note 168, at 11.

229. Memorandum from Daniel Ortiz for Justice Powell, *supra* note 228, at 10.

230. *Id.*

231. *Id.* at 11.

232. *Id.* In *Gertz*, the Court held that private plaintiffs could not recover punitive or presumed damages absent a showing of actual malice. 418 U.S. at 349–50. In doing so, Justice Powell’s opinion for the Court explained that, by requiring no showing of fault before a defamation plaintiff could recover presumed damages, the common law had effectively permitted juries to “award damages where there is no loss,” a result which “unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms.” *Id.* at 349. Similarly, with respect to punitive damages, the Court concluded in *Gertz* that

September, Powell further set forth his own views on the issue in a note to his law clerk, which largely accorded with the clerk's proposal:

I have gradually become persuaded that at least in personal injury cases—or perhaps in any cases where compensatory damages are provable—punitive damages are an archaic carryover from a different age. The difference is that the proof of compensatory damages has become a specialized professional skill. There is less need for punitive damages.²³³

Powell then reflected on his own practice as a lawyer:

In the early years of my law practice I tried a number of suits, including common law and FELA damage suits, brought against the Southern Railroad. My law firm was state litigation counsel. Proof even of compensatory damages was rather primitive. Punitive damages were rarely even requested. Today, techniques of proof, developed by the American Trial Lawyers Association, enable injured plaintiffs to recover fully for present and estimated future damages, including speculative damages for pain and suffering.²³⁴

He then proceeded to base his inability to join Brennan's opinion from the previous term on "two considerations"—(1) "particularly in

"juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused[, which] . . . unnecessarily exacerbates the danger of media self-censorship." *Id.* at 350. For many of the same reasons, the approach advocated by Powell's clerk would have gone even further than *Gertz* and extended the protections afforded by the First Amendment against the award of presumed and punitive damages in defamation actions beyond those provided by the actual malice standard to include, in the case of punitive damages, their outright prohibition in defamation cases, and, in the case of presumed damages, their limitation to cases in which the plaintiff would not otherwise be fully compensated for its loss by an award of provable damages.

233. Memorandum from Justice Powell for Daniel Ortiz 1 (Sept. 13, 1984) (on file with the Powell Papers, Washington and Lee Law Library), *available at* <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>.

234. *Id.* at 1, 2. The Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51–60, was passed in 1908 to create a cause of action under federal law for railroad workers to sue their employers for negligence in connection with workplace illness or injury. Powell's representation in FELA cases dated back decades. *See, e.g.*, *Fore v. S. Ry. Co.*, 178 F.2d 349 (4th Cir. 1949) (ruling that plaintiff failed to show negligence on part of railroad); *S. Ry. Co. v. Mays*, 63 S.E.2d 720 (Va. 1951) (ruling that plaintiff's negligence caused his death and railroad was not responsible). In both these cases, Powell served as co-counsel defending the railroad. Powell also defended the railroad against personal injury lawsuits seeking damages that were not FELA cases. *See, e.g.*, *Nichols v. S. Ry. Co.*, 45 S.E.2d 913 (Va. 1948) (ruling that the negligence of the farmer caused his own death when he was struck by train while walking his cows across tracks); *S. Ry. Co. v. Barker*, 4 S.E.2d 395 (Va. 1939) (holding that the railway was responsible for sparks that ignited plaintiff's truck and hay). For a history of the Association of Trial Lawyers of America, including efforts to educate lawyers about trying damage cases, see RICHARD S. JACOBSON & JEFFREY R. WHITE, *DAVID V. GOLIATH: ATLA AND THE FIGHT FOR EVERYDAY JUSTICE* (2004), *available at* <http://www.poundinstitute.org/davidvgoliath.aspx>.

defamation cases, it is difficult to prove compensatory damages, and injured persons would be without a remedy,”²³⁵ and (2) “I am reluctant to have this Court constitutionalize the common law of a large number of states only in defamation cases.”²³⁶ Accordingly, Powell saw the challenge before him as whether “I could write a principled opinion holding that punitive damages—by definition a penalty—lawfully may be imposed only by the *state* in cases where compensatory damages can be proved.”²³⁷ This, Powell recognized, “would be an unprecedented change, but the system as a whole would be fairer.”²³⁸

Four days later, Powell wrote to the law clerk again, this time after having “reread the opinions last Term, and also in *Gertz*.”²³⁹ As reargument fast approached, he described himself “not at rest,”²⁴⁰ and identified three “intriguing”²⁴¹ paths he might take. He could, he wrote, (1) stand on last term’s dissent; (2) retain its substance but “add a separate Part that argues more fully the difference between allowing punitive damages in defamation cases and in cases (particularly damage suits) in which fully compensatory damages are provable and recoverable;”²⁴² or (3) “join the Court’s judgment but argue that punitive damages in all types of cases—absent proof of malice (as defined)—violate the Constitution.”²⁴³ Under the last option, “*New York Times* would be extended as *WJB* proposes to all defamation actions.”²⁴⁴ On one copy of this memorandum in his files, however, Powell had crossed through this third alternative and written “confused dictation” in the

235. Memorandum from Justice Powell for Daniel Ortiz, *supra* note 233, at 2.

236. *Id.*

237. *Id.* (emphasis in original).

238. *Id.* Powell’s consideration of these issues preceded, albeit by only a few years, the Court’s subsequent and detailed body of precedent subjecting awards of punitive damages generally to constitutional scrutiny under the Fourteenth Amendment. *See, e.g.*, *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996) (imposing such limitations); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991) (deciding for first time whether punitive damage award violated due process); *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 277 (1989) (noting, as of 1989, the issue as to “whether due process acts as a check on undue jury discretion to award punitive damages in the absence of any express statutory limit . . . must await another day”) (internal citations and quotation marks omitted).

239. Memorandum from Justice Powell for Daniel Ortiz 1 (Sept. 17, 1984) (on file with the Powell Papers, Washington and Lee Law Library), *available at* <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>.

240. *Id.* at 5.

241. *Id.*

242. *Id.* at 3.

243. *Id.* at 4.

244. *Id.*

margin.²⁴⁵

Some days later, Powell's law clerk provided to him the answers to several questions the Justice had posed about an approach that would "(i) deny punitive damages in all libel actions, (ii) allow presumed damages in all non-media action without proof of actual malice, and (iii) allow presumed damages against media defendants only on a showing of actual malice."²⁴⁶ The clerk noted that, "[i]nsofar as your rule would deny punitive damages to public persons even when actual malice is shown," it would "alter the *New York Times v. Sullivan* rule."²⁴⁷ That led Powell, on the eve of the Conference, to again memorialize his own thoughts, candidly admitting in a memorandum to himself that "I am not sure I have yet thought through all of the implications of trying to develop a new theory of damage liability."²⁴⁸ Remarkably, Powell also confessed (albeit only to himself and presumably to his law clerk) this about his opinion in *Gertz*:

Although I was proud of the opinion at the time, I now view it as far too long and unnecessarily broad in its sweep. I hope I have learned a good deal about opinion writing since the 1973 Term. But, I think the basic holding of *Gertz* is clear and [was] sound at that time.²⁴⁹

Having now revisited the issues raised in *Gertz*, Powell decided that, "[s]ubject to further thought and discussions," he should "consider" permitting presumed damages without a showing of malice in "private defamation cases such as this,"²⁵⁰ but still hold that "punitive damages are not recoverable in any defamation case without regard to whether or not malice is proved. Recovery against a media defendant would be limited to presumed damages, and allow these only when malice as defined at common law is proved."²⁵¹ And, Powell noted, his rule "against the imposition of punitive damages in defamation cases would be broad enough to apply to any cases in which compensatory damages

245. Memorandum from Justice Powell for Daniel Ortiz, *supra* note 239, at 1.

246. Memorandum from Daniel Ortiz for Justice Powell 1 (Oct. 4, 1984) (on file with the Powell Papers, Washington and Lee Law Library), available at <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>.

247. *Id.*

248. Personal memorandum of Justice Powell 1 (Oct. 4, 1984) (on file with the Powell Papers, Washington and Lee Law Library), available at <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>.

249. *Id.*

250. *Id.* at 4.

251. *Id.* at 5.

may be recovered.”²⁵²

B. The Reargument and Conference

In his Term History, Brennan described the reargument itself as revealing “little new.”²⁵³ The subsequent Conference, however, was—as

252. *Id.*

253. Justice Brennan, 1984 Term Histories, *supra* note 222, at 92. At the outset of the reargument, the Dun & Bradstreet lawyer, Gordon Lee Garrett, was peppered with questions about whether the defendant was a media company or not and whether that made a difference in the case. The transcript, Transcript of Oral Argument at 2–5, 472 U.S. 749 (1985) (No. 83-18), available at http://www.oyez.org/cases/1980-1989/1983/1983_83_18, contains the following exchange between unnamed Justices and Garrett:

QUESTION: I wonder if you would tell me your definition of the difference between media and non-media. I can understand it clearly if a private individual writes a letter and makes the statement. That person as an individual is probably non-media. But what is your definition of non-media generally?

MR. GARRETT: Your Honor, I think that is the rub in this case when it comes to deciding constitutional limitations on presumed and punitive damages. Obviously, the media could be defined as one who uses a medium to communicate information, and Dun and Bradstreet, much like a newspaper, does that. We hire reporters to obtain information which our subscribers will want.

QUESTION: Now, we have in Washington I don't know how many, but I suppose it must be a great number of letters, like The Kiplinger Letter, that goes out every week or periodically, sometimes on a broad range of subjects, sometimes on a limited subject like labor law.

Is that media or non-media?

MR. GARRETT: It seems to me, Your Honor, while The Kiplinger Letter, like Dun and Bradstreet, may not be considered the traditional media, it is certainly media in that it is an organization that communicates information to its readers which have a reason to know that.

QUESTION: Is that issue before us, counsel? You didn't bring that issue up here.

MR. GARRETT: The media/non-media issue? That is the very basis that the Vermont Supreme Court ruled against Dun and Bradstreet in this case.

QUESTION: I know, but they held that you were non-media.

MR. GARRETT: They held—they said—

QUESTION: Did you challenge that in your petition for certiorari?

MR. GARRETT: Oh, absolutely, Your Honor. Well, we did not—we have never taken the position, Your Honor, that we were the traditional media.

QUESTION: Are you taking the position that you are media?

MR. GARRETT: We certainly take the position that we are media for the application of the Gertz rules on presumed and punitive damages.

QUESTION: Well, of course, your first question presented in certiorari is, do the First and Fourteenth Amendments to the Constitution permit private plaintiffs to recover presumed compensatory damages or generally for libel against a non-media defendant?

MR. GARRETT: That is correct, Your Honor. As I said, we have never taken the position that Dun and Bradstreet was part of the traditional media like the New York Times or CBS, but we certainly are media in the sense that we communicate information to our subscribers.

QUESTION: Yes, but the way you present the case to us is that— let's assume that this is a

Brennan later put it—“another story.”²⁵⁴ This was especially so because, at the time, the other Justices—including Brennan—apparently had no idea what was taking place inside Powell’s chambers.

At the Conference, Burger began the discussion by once again declining to take a firm position. According to Powell’s notes, Burger asserted that the media had not traditionally “been given special protection”²⁵⁵ and that “D&B, & Kiplinger, & others who give advice are different from media,” although they “inflict more damage.”²⁵⁶ By the same token, Burger said he would “not extend *Gertz*,”²⁵⁷ which, he added, he “didn’t agree [with] then, & don’t agree [with] now,”²⁵⁸ because the “[r]ationale of media cases does not apply to private defendant[s].”²⁵⁹ Thus, although the case had now been argued twice on its merits, Burger reiterated that he would prefer to dismiss the writ

non-media defendant, and then does *Gertz* apply to non-media defendants. That is the question you put to us.

MR. GARRETT: That is correct—

QUESTION: So we have to get into whether Dun and Bradstreet is or isn’t a media defendant?

MR. GARRETT: Your Honor, I think it is—

QUESTION: You say we don’t, really, in this question.

MR. GARRETT: Well, I think it is quite correct that the constitutional prohibitions against presumed and punitive damages don’t depend on the nature of the speaker or the subject matter of his speech.

QUESTION: Right. I thought you thought in order to win your case you would have to convince us that *Gertz* applies to non-media defendants generally, and I think that is your whole argument, too, in your brief.

MR. GARRETT: I think certainly that that would win the case for us, Your Honor.

QUESTION: How do we reach that question if we don’t know what a non-media defendant is?

MR. GARRETT: Well, I think that is the very problem in the case, Your Honor, that it would force the Court to go back to basically the Rosenbloom ad hoc test to make determinations on who is and who is not the media, and I think the most important thing is that the rationale for the *Gertz* opinion simply does not depend on those kinds of distinctions.

254. Justice Brennan, 1984 Term Histories, *supra* note 222, at 92.

255. Justice Powell, Conference Notes (*Dun & Bradstreet v. Greenmoss Builders, Inc.*) (Oct. 5, 1984) (on file with the Powell Papers, Washington and Lee Law Library), available at <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>.

256. *Id.* Kiplinger, to which Burger referred, and which was also referenced in the second argument, see the transcript for the Dun & Bradstreet reargument, *supra* note 253, is a company that publishes numerous newsletters and magazines that analyze the economy and offer economic and investing advice, perhaps the most famous being *The Kiplinger Letter*.

257. Justice Powell, Conference Notes, *supra* note 255.

258. *Id.*; see *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 355 (1974) (Burger, C.J., dissenting) (expressing concern that right to counsel would be hindered if every lawyer was “fair game for irresponsible reporters and editors”).

259. Justice Powell, Conference Notes, *supra* note 255.

entirely, but “will not reverse.”²⁶⁰

That left the field open for the combatants from the previous term to launch their initial salvos, proceeding as always in order of seniority. Brennan began by reiterating the views expressed in his previous, albeit ill-fated opinion. According to a Memorandum to the Conference he prepared, and likely read as was his custom by this time in his tenure on the Court, Brennan was unusually blunt. After noting that “[n]othing presented on reargument has changed my mind,”²⁶¹ he limited his “remarks to three items that I believe to be of particular significance.”²⁶² First, he wrote:

[T]his Court has never accepted the distinction between media and non-media defendants. Are we now prepared to announce that we have changed our minds and that the billion dollar media industry in this country is deserving of greater first amendment protection than the individual citizen or the “lonely pamphleteer”? I hope not.²⁶³

Second, Brennan asserted, even if the Court were to attempt to make such a distinction, “there is no principled way to draw a line between Dun & Bradstreet and innumerable other corporations and organizations, including the *Wall Street Journal* and the *New York Times*, that publish for financial gain and rely upon the accuracy of those publications to attract subscribers.”²⁶⁴ Third, Brennan argued that “the distinction between public and non-public speech”²⁶⁵ that Powell had proposed the previous term “does not sufficiently protect the values behind the first amendment,”²⁶⁶ which is “concerned not only with furthering self-government but also with guaranteeing the dignity of the individual.”²⁶⁷

260. *Id.*

261. Memorandum from Justice Brennan for the Conference 1 (undated) (on file with the Brennan Papers, Library of Congress Manuscript Division) (on file with the Washington Law Review).

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.* In this passage, Brennan alluded to two of the leading theories typically advanced to explain why the First Amendment properly protects the freedom of expression. Compare ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 25 (1948) (“[The voters] must know what they are voting about. And this, in turn, requires that so far as time allows, all facts and interests relevant to the problem shall be fully and fairly presented . . .”), and *Connick v. Myers*, 461 U.S. 138, 156 (1983) (“[S]peech about ‘the manner in which government is operated or should be operated’ is an essential part of the communications necessary for self-governance the protection of which was a central purpose of the First Amendment.”) (quoting Mills

In Brennan's view, "[e]conomic, social, and religious information plays a critical role in that process."²⁶⁸

For his part, White offered a new twist on the position he had announced in June. Not unexpectedly, he began by saying he was prepared to overrule *Gertz*. According to Powell's notes, White said that, "*Gertz* is dead wrong," but had been "accepted . . . as a precedent."²⁶⁹ If "we still accept *Gertz*," he added, "it is not easy to avoid it here."²⁷⁰ Accordingly, he said, he would vote to affirm if the Court were prepared to overrule *Gertz* but, if not, he would vote to reverse, but would join only in the judgment, "probably" in a separate opinion.²⁷¹ And, although the comment apparently and somewhat remarkably escaped Brennan's attention at the time (since it is not noted in his Term History or taken into account in his subsequent strategy), Powell's notes indicate that White also told his colleagues that, "[*New York Times*] also was [a] mistake."²⁷²

After Marshall and Blackmun reaffirmed their support for Brennan, Powell, as Brennan described it in his Term History, "stirred the soup."²⁷³ After voicing continued support for a media/nonmedia distinction, he floated his proposal that presumed and punitive damages be treated differently. As Brennan later put it, this proposal not only came "out of the blue," but it had also not been considered by the court below, by the litigants in their briefing, or by any member of the Court

v. Alabama, 384 U.S. 214, 218 (1966)), with THOMAS IRWIN EMERSON, THE SYSTEM OF FREE EXPRESSION 6 (1970) ("The proper end of man is the realization of his character and potentialities as a human being. For the achievement of this self-realization the mind must be free. Hence suppression of belief [or] opinion . . . is an affront to the dignity of man, a negation of man's essential nature."). Notably, the second rationale is not mentioned in *Sullivan*. See generally *New York Times Co. v. Sullivan*, 376 U.S. 274 (1964). See also Kalven, Jr., *supra* note 3, at 209 (noting that, in *Sullivan* "the Court is carried along by a momentum of insight about the democratic necessities for free speech" (citation omitted)). For a general overview of the First Amendment's theoretical underpinnings and supporting sources, see LEE LEVINE, ROBERT C. LIND, SETH D. BERLIN & C. THOMAS DIENES, NEWSGATHERING AND THE LAW § 1.02 (4th ed. 2011).

268. Memorandum from Justice Brennan for the Conference, *supra* note 261, at 1. Powell's notes suggest that Brennan delivered essentially these views at the Conference. According to Powell, Brennan saw "no distinction between media and non-media [defendants]" and "certainly no real difference between D&B and conventional media." Justice Powell, Conference Notes, *supra* note 255, at 1. Powell also recorded Brennan as saying that, "every member of society [is] entitled to 'robust speech,'" to which Powell added the parenthetical "even falsehoods about one's bankruptcy." *Id.*

269. Justice Powell, Conference Notes, *supra* note 255, at 1.

270. *Id.*

271. *Id.*

272. *Id.*

273. Justice Brennan, 1984 Term Histories, *supra* note 222, at 92.

the previous term.²⁷⁴

Powell described his own vote at Conference as one “to affirm in part and reverse in part.”²⁷⁵ While he emphasized that he was “not entirely at rest,” he asserted that he “will not agree a non-media defendant is entitled to the same protection as media.”²⁷⁶ He then set forth what he described as his “tentative [thinking].”²⁷⁷ He again asserted (albeit incorrectly) that “all prior cases applying the First Amendment in defamation cases have involved media defendants,” and that “*Gertz* involved a *private* plaintiff and the same First Amendment concerns identified in *New York Times* for media defendants existed.”²⁷⁸ According to Powell, “at risk [in *Gertz*] was freedom of the *press* to express views on *public issues*.”²⁷⁹ In Powell’s view, “none of these concerns is present when one private person is libeled by another private person.”²⁸⁰ If the Court were to adopt Brennan’s view, Powell said, “we are talking about changing the common law—centuries old.”²⁸¹ Thus, Powell asserted, “*Gertz* must be read in the context of a *media* defendant” and, “if it can be read otherwise, it is dicta.”²⁸²

At this point, Powell proceeded to explain that his dissent the previous term “adhered to [the] common law”²⁸³ by concluding that “only falsity and publication need be shown to be entitled to presumed and punitive damages.”²⁸⁴ Now, he said, he was advocating a “possible modification of the common law,”²⁸⁵ one which reflected what he perceived as “a major difference between *presumed* and *punitive* damages,” that would reflect the fact that “the purpose of one [is] to *compensate*” while “the purpose of the other [is] to *punish*.”²⁸⁶ After pointing to the criticism of punitive damages contained in Brennan’s opinion from the previous term,²⁸⁷ Powell said he “would consider”

274. *Id.*

275. Justice Powell, Conference Notes, *supra* note 255.

276. *Id.*

277. *Id.*

278. *Id.* For an earlier discussion of this issue, see *supra* notes 36–41 and accompanying text (emphasis in original).

279. Justice Powell, Conference Notes, *supra* note 255 (emphasis in original).

280. *Id.*

281. *Id.*

282. *Id.* (emphasis in original).

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.* (emphasis in original).

287. *Id.*; see *supra* note 142 and accompanying text for a discussion of the controversy over the

erecting a regime that would “allow *presumed* damages against non-media defendants without proof of malice” because, in cases such as *Greenmoss Builders*, “proof of actual damages is often impossible”²⁸⁸ and “many *private* persons libeled can’t *afford* to prove malice.”²⁸⁹ But, he said, his construct would “allow *punitive* [damages] only on proof of malice as defined” in *Sullivan*.²⁹⁰

From Brennan’s perspective, Powell’s strategy was, to say the least, unclear. Although his negative views of punitive damages were by this time well known, his proposal did not appear to be designed to command a majority. It would appear especially unlikely to appeal to White, who particularly abhorred Powell’s extensive renovations of the common law in the name of the First Amendment in *Gertz* itself. Brennan speculated that Powell might have thought the approach would solidify the votes of Rehnquist and O’Connor, both of whom had similarly expressed disdain for punitive damages more generally, as well as Brennan and his allies, who disapproved of them in defamation cases against the media.²⁹¹ It is also conceivable that Powell thought his proposal would be attractive to White, who had generally suggested in his *Gertz* dissent that the First Amendment’s focus should be on limiting damage awards, not on further tinkering with common law liability rules.²⁹²

Regardless of its motivation, the Powell proposal was, as Brennan put it, “dead on arrival”²⁹³ at the Conference. No member of the Court embraced it. Rehnquist appeared satisfied to leave the common law where it was in all respects. According to Powell’s notes, Rehnquist said that he had “joined *Gertz* because he thought it was [the] least objectionable view at the time.”²⁹⁴ Addressing Powell’s latest proposal, Rehnquist said that, “if punitive damages are ok in other types of litigation, they are ok in libel cases.”²⁹⁵ Powell’s notes of Rehnquist’s

use of punitive damages in Brennan’s earlier opinion.

288. Justice Powell, Conference Notes, *supra* note 255 (emphasis in original).

289. *Id.* (emphasis in original).

290. *Id.* (emphasis in original).

291. Justice Brennan, 1984 Term Histories, *supra* note 222, at 92–93.

292. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 391 (1974) (White, J., dissenting) (“[I]t would appear that [the Court’s] new requirements with respect to general and punitive damages would be ample protection. Why it also feels compelled to escalate the threshold standard of liability I cannot fathom . . .”).

293. Justice Brennan, 1984 Term Histories, *supra* note 222, at 93.

294. Justice Powell, Conference Notes, *supra* note 255.

295. *Id.*

comments also include two parenthetical comments. In one, Powell indicated that, “Bill [Rehnquist] said to me privately (at a break) that as of now he would not abolish punitive damages here unless we [overrule] *Gertz*.”²⁹⁶ In another, which may or may not have reflected what Rehnquist actually said at Conference, Powell noted that, “Bill agrees with BRW that *New York Times* was a mistake.”²⁹⁷

Stevens, at least according to Powell’s notes, said he “agree[d] with some” of what Powell had said “about punitive damages.”²⁹⁸ In addition, Stevens expressed some sympathy for “clarify[ing] presumed damages to hold that a plaintiff can’t rely on the presumption alone” but must introduce “some evidence” of harm.²⁹⁹ Still, Stevens asserted, the damages issue was “before us” and he believed that, at the end of the day, “D&B should get as much protection” as a media defendant.³⁰⁰

For her part, O’Connor continued to focus on distinctions drawn based on the identity of the speaker and the content of the speech. Although Powell noted that she too was “not at rest,”³⁰¹ O’Connor emphasized that “we have distinguished different types of speech—commercial, fire in crowded theater, obscenity”³⁰² in past cases and that, in her view, “D&B is more akin to private speech than to media.”³⁰³

C. *The Battle Resumes*

From Brennan’s perspective, the result of the Conference appeared to be that, since Powell had not indicated a willingness to overrule *Gertz*, Brennan had retained White’s vote and the majority.³⁰⁴ Accordingly, on October 30, 1984, Brennan re-circulated his putative majority opinion from the previous term, with only minor modifications.³⁰⁵ Within forty-

296. *Id.*

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.*; *see, e.g.*, *Cent. Hudson Gas & Elec. Corp. v. Pub. Svc. Comm’n*, 447 U.S. 557, 562–63 (1980) (“The Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.”); *Roth v. United States*, 354 U.S. 476, 484 (1957) (“[I]mplicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.”); *Schenck v. United States*, 249 U.S. 47, 52 (1919) (“The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.”); *see also supra* note 126 and accompanying text.

303. Justice Powell, Conference Notes, *supra* note 255.

304. Justice Brennan, 1984 Term Histories, *supra* note 222, at 93.

305. *Id.*

eight hours, Stevens, Blackmun and Marshall joined it.³⁰⁶ O'Connor, not surprisingly, promptly responded that she would "await further writing" before "deciding what action to take"³⁰⁷ and Powell wrote Brennan that, "[a]s you would expect, my position remains basically in dissent. I may make some changes, however, in the draft I circulated last Term."³⁰⁸ He added that it "may take me a while to get this done."³⁰⁹

Indeed, Powell and his clerk spent almost two months working on his new opinion. On November 12, after all four of Powell's clerks³¹⁰ had reviewed the first draft, they sent him a carefully worded memorandum detailing what they described as "a tension" in his reasoning, "which may appear an inconsistency."³¹¹ As they explained it, "[a]lthough you criticize Justice Brennan for abrogating the common law, your own position now also abrogates it. We realized this might be a problem, but I am unsure how to minimize it."³¹² The memorandum then set out several alternatives, two of which Powell endorsed in the margin: (1) "criticize Justice Brennan not for abrogating the common law, but for abrogating it unnecessarily,"³¹³ and (2) criticize "him for being unfaithful to the aim of the common law"³¹⁴—i.e., "although you are abrogating the common law, you are at least remaining true to its most important aim in damages—compensation—while Justice Brennan is not."³¹⁵ With this, Powell enthusiastically agreed, writing "Yes!"³¹⁶ in the margin and adding the following by hand: "and the common law in England has been changed with respect to punitive damages."³¹⁷ In

306. *Id.*

307. Letter from Justice O'Connor to Justice Brennan (Oct. 30, 1984) (on file with the Brennan Papers, Library of Congress Manuscript Division) (on file with the Washington Law Review).

308. Letter from Justice Powell to Justice Brennan (Oct. 30, 1984) (on file with the Brennan Papers, Library of Congress Manuscript Division) (on file with the Washington Law Review).

309. *Id.*

310. Powell's law clerks that Term were Arthur Bentley III, Annmarie Levins, Daniel Ortiz, and Lynda Simpson.

311. Memorandum from Daniel Ortiz for Justice Powell 1 (Nov. 12, 1984) (with handwritten notes from Justice Powell) (on file with the Powell Papers, Washington and Lee Law Library), available at <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>.

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.* at 2.

316. *Id.* (with handwritten notes from Justice Powell).

317. *Id.* Less than ten years earlier, the United Kingdom's Faulks Committee on Defamation had issued a report discussing the state of defamation law and making recommendations regarding its reform. See *Reports of Committees: Report of the Committee on Defamation*, 39 MOD. L. REV. 187 (1976). The Committee came to the conclusion that there was "no logical justification for the

subsequent drafts, therefore, Powell and his clerks both emphasized the English experience with punitive damages and scrubbed the first section of the opinion (i.e., his dissent from the previous Term) to remove unnecessary (and potentially awkward) pledges of fidelity to the common law.³¹⁸

Powell's own thinking is further revealed, at least in part, in a memorandum he wrote to one of his law clerks on October 22, 1984, which contained his comments on the clerk's first draft of Powell's new opinion. As they had discussed, the draft retained most of his opinion from the previous term, but also included a new section that separately addressed Powell's proposal for the disparate treatment of presumed and punitive damages. The draft followed *Gertz* in permitting awards of punitive damages in any defamation case in which actual malice had been proven. This, however, was not what Powell now wanted to do:

Subject to further thought and discussion with you, I am inclined to say that punitive damages are not appropriate even where actual malice can be shown. If I reach this conclusion, I would hold that in a non-media case (such as this case), presumed damages may be recovered with no showing of malice required; but where the libel defendant is a member of the media, I would require proof of actual malice as a predicate for recovering presumed damages.³¹⁹

retention of exemplary damages, and therefore recommends their abolition." *Id.* at 193. Nevertheless, in recent years, the United Kingdom generally, and England specifically, has become the destination of choice for so-called "libel tourists," persons allegedly defamed by publications circulated around the world who choose the courts of England as the most hospitable forum for litigation. *See, e.g.,* Heather Maly, *Publish at Your Own Risk or Don't Publish at All: Forum Shopping Trends in Libel Litigation Leave the First Amendment Unguaranteed*, 14 J.L. & POL'Y 883, 905 (2006) ("The United Kingdom has notoriously plaintiff-friendly laws for defamation that attract 'libel tourists' who try to take advantage of the pro-plaintiff laws."); Rachel Ehrenfeld, *Britain's Half-Hearted Bid to Reform Libel Law*, N.Y. TIMES, July 24, 2012, <http://www.nytimes.com/2012/07/25/opinion/britains-half-hearted-bid-to-reform-libel-law.html> ("[English libel law] chills free speech through the award of disproportionate damages, a lack of viable defenses and the application of the law to cases with only the slightest links to Britain, even when neither party lives there, a practice that has led to what is known as 'libel tourism.'"). In response, Parliament is currently considering a libel reform act that would, among other things, strip British courts of jurisdiction in such cases unless "of all the places in which the statement complained of has been published, England and Wales is clearly the most appropriate place in which to bring an action in respect of the statement." Defamation Bill, 2012–13, H.C. Bill [51] cl. 9 (Gr. Brit.), *available at* http://www.publications.parliament.uk/pa/bills/cbill/2012-2013/0051/cbill_2012-20130051_en_2.htm#pb1-11g1.

318. *See, e.g.,* Justice Powell, Draft Concurrence and Dissent One (*Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*) (Nov. 23, 1984) (on file with the Powell Papers, Washington and Lee Law Library), *available at* <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>.

319. Memorandum from Justice Powell for Daniel Ortiz 3 (Oct. 22, 1984) (on file with the

And then in a crucial passage, Powell added:

Of course, the foregoing views would be a significant departure from *New York Times* and *Gertz*. This departure might have considerable attraction for the members of the Court who have joined WJB. It would be rejected heatedly by Justices who joined me last Term. If we went this route, WJB might take this part of my opinion away from me. I believe he would be deterred, however, by recognizing that he would be retreating from his views as to punitive damages in *Smith v. Wade* and the Court's opinion in *Silkwood*. In any event, this would be an interesting situation.³²⁰

His October 22 memorandum to his clerk reveals Powell's desire to pull back from *Gertz* in another respect as well. Addressing language in the clerk's draft that, drawing from *Gertz*, asserted that "presumed damages share some of the problems of punitive damages,"³²¹ Powell counseled that it was "best not to emphasize—as the draft does—language from that case. My thinking in this area has undergone a good deal of refinement in the first private libel case I have considered carefully."³²²

Powell finally circulated his own opinion on November 23, denominating it, as he had indicated he would at Conference, one "concurring in part and dissenting in part."³²³ When he circulated it to Burger, Rehnquist and O'Connor, he added a cover letter. In it, Powell told them that the opinion "adhere[d] to my view of last Term that the entire law of libel should not be constitutionalized" because that "would be an unprecedented extension of *New York Times* and *Gertz*."³²⁴ At the same time, Powell advised his colleagues that:

Powell Papers, Washington and Lee Library), available at <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>.

320. *Id.* In *Smith v. Wade*, 461 U.S. 30 (1983), Justice Brennan authored an opinion for a 5-4 majority, finding that punitive damages could be awarded against a prison guard in an action under 42 U.S.C. § 1983 when a jury finds reckless or callous conduct. In *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), the Court held by a 5-4 majority, which included Brennan that the award of punitive damages to the family of Karen Silkwood, who was exposed to plutonium at a nuclear plant but died in a car accident, was not preempted and therefore not prohibited under federal law. Powell's point was that, in both of these cases, Brennan voted on the side that favored an award of punitive damages.

321. Memorandum from Justice Powell for Daniel Ortiz, *supra* note 319, at 4.

322. *Id.*

323. Justice Powell, Draft Concurrence and Dissent One, *supra* note 318.

324. Cover Letter from Justice Powell to Chief Justice Burger with copies sent to Justices Rehnquist and O'Connor (Nov. 23, 1984) (on file with the Powell Papers, Washington and Lee Law Library), available at <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>.

After considerable thought, I have concluded that punitive damages should be abolished except where authorized by a statute that prescribes appropriate standards. The imposition of punishment is a function of the state, not of lay juries without standards or statutory limitations. I do not see how permitting a jury to impose private fines can be reconciled with the Fifth and Fourteenth Amendments. Also, the purpose of tort recovery is to compensate—not to confer a windfall.³²⁵

He concluded by noting that his “opinion is divided into parts so that you may, if you wish, join it in part. You would be welcome.”³²⁶

D. Powell’s Folly

Powell’s new approach fell largely on deaf ears. White, Rehnquist, and O’Connor did not respond to it, at least in communications shared with the rest of the Conference. Something, however, did appear to be afoot, albeit unbeknownst to Brennan. The first hint came on November 29, when Burger wrote to his colleagues that, because he was “hav[ing] some problems with the case,” he would “await Byron’s views which, I gather, he may write out.”³²⁷ Brennan had not previously been informed that White had taken up his pen. That same day, again unbeknownst to Brennan, Rehnquist wrote to Powell with copies to Burger and O’Connor, similarly to advise him that “I agree more with your separate opinion in this case than I do with Bill Brennan’s proposed opinion, but I have enough reservations about yours so I think that I will wait and see what Byron writes. I am not yet ready to prohibit punitive damages in defamation cases.”³²⁸

On December 14, Brennan circulated a second draft of his own opinion, in which he responded, albeit briefly and only in footnotes, to Powell’s new proposal. With respect to Powell’s proposed treatment of presumed damages, Brennan confined himself largely to criticizing once again the distinction between media and nonmedia defendants on which it was premised, citing a host of cases in which state courts had not

325. *Id.*

326. *Id.*

327. Letter from Chief Justice Burger to the Conference (Nov. 29, 1984) (on file with the Brennan Papers, Library of Congress Manuscript Division) (on file with the Washington Law Review).

328. Letter from Justice Rehnquist to Justice Powell with copies to Chief Justice Burger and Justice O’Connor (Nov. 29, 1984) (on file with the Powell Papers, Washington and Lee Law Library), available at <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>.

distinguished between them in adjudicating defamation cases.³²⁹ With respect to Powell's call to abolish punitive damages, Brennan pointed out that Powell had articulated the same rationale in *Gertz* itself for limiting, but not abolishing, both punitive *and* presumed damages.³³⁰ In addition, Brennan took aim at Powell's contention that presumed damages should be awarded "in the realm of commercial expression" absent a showing of malice, despite the fact, as Brennan saw it, in such cases "proving that actual damages occurred is relatively easy."³³¹

In Powell's chambers, Brennan's minimal treatment of his opinion was viewed as "surprising[]." ³³² In response to Brennan's use of Powell's own language in *Gertz* to undermine his newly minted distinction between presumed and punitive damages, Powell himself drafted a rejoinder, also as a footnote:

My opinion for the Court in *Gertz*, as the Court today notes, did not distinguish between presumed and punitive damages in libel suits against media defendants. Upon the more mature reflection, required in this case in which the Court constitutionalizes the entire law of libel, I find both historic and logical reasons for the distinction I now make.³³³

Building on that logic, Powell added:

The purpose of presumed damages essentially is compensatory. As I have noted in the text above, they are appropriate where it is clear from the nature of the libel that injury occurred and where proving a dollar amount for the injury often is impossible. This compensatory rationale for allowing presumed damages is wholly different from allowing a private litigant to punish a defendant by awarding punitive damages without due process of any kind.³³⁴

In addition, Powell's chambers reviewed all of the state cases Brennan had cited, and undertook additional research concerning the

329. Justice Brennan, Draft Opinion Two 22–23 n.10 (*Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*) (Dec. 14, 1984) (on file with the Brennan Papers, Library of Congress Manuscript Division) (on file with the Washington Law Review).

330. *Id.* at 15 n.9; *see also* *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348–50 (1974).

331. Justice Brennan, Draft Opinion Two, *supra* note 329, at 21 n.9.

332. Memorandum from Daniel Ortiz for Justice Powell 1 (Dec. 17, 1984) (on file with the Powell Papers, Washington and Lee Law Library), *available at* <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>.

333. Personal memorandum of Justice Powell (Dec. 17, 1984) (on file with the Powell Papers, Washington and Lee Law Library), *available at* <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>.

334. *Id.*

comparative fates of media and nonmedia defendants at common law. In the course of doing so, Powell's law clerk was obliged to make an embarrassing admission to the Justice. Specifically, on December 18, 1984, the clerk wrote to Powell that, "in going through all the state cases I was pushed into rereading *New York Times* and [a] few of this Court's other pre-*Gertz* cases. I noticed that several of them, including *New York Times* itself, apply the actual malice standard to nonmedia defendants."³³⁵

In writing at least, Powell took the clerk's discovery in stride. In handwritten notes in its margins, he pronounced the memo "perceptive," indicated his agreement with its recommended fix, and expressed "surprise" both by the "string of new cases" Brennan had cited and by the fact that "apparently WJB and I both missed" the Court's own prior cases applying the actual malice standard to nonmedia defendants.³³⁶ Over the following days, therefore, Powell and his clerk worked to revise the opinion, inserting multiple references to "public expression"³³⁷ and "media expression"³³⁸ in those places where its predecessor had referred to "suits against a media defendant,"³³⁹ and to recraft its characterization of *Greenmoss Builders* as a case involving "private expression"³⁴⁰ rather than a "nonmedia defendant."³⁴¹ Isolated references

335. Memorandum from Daniel Ortiz for Justice Powell 2 (Dec. 18, 1984) (with handwritten notes from Justice Powell) (on file with the Powell Papers, Washington and Lee Law Library), available at <http://law.wlu.edu/powellarchives/page.asp?pageid=1355> (citing *St. Amant v. Thompson*, 390 U.S. 727 (1968); *Henry v. Collins*, 380 U.S. 356 (1965); *Garrison v. Louisiana*, 379 U.S. 64 (1964)); see *supra* notes 36–43, 169–74, 278 and accompanying text. The law clerk added that, by pointing this out, he was not suggesting "that you should abandon your distinction between media and nonmedia defendants. Rather, I recommend that you modify it. From your dissent, it appears that you are not interested so much in distinguishing between media and nonmedia defendants as between libels involving media and nonmedia expression." Memorandum from Daniel Ortiz, *supra*, at 2 (emphasis added). After pointing out that all of the Court's prior cases involving nonmedia defendants nevertheless involved speech by them disseminated through the media, the clerk suggested that Powell "consider recharacterizing the distinction as one between private and public expression. This recharacterization would better accord with this Court's prior cases and would also harmonize nearly all of the state cases Justice Brennan cites." *Id.* at 3. The clerk concluded by apologizing to Powell for "suggesting such a change to you now," explaining that, in earlier drafts, he "did not question last year's research in the earlier part of the opinion." *Id.* at 4.

336. Memorandum from Daniel Ortiz, *supra* note 335, at 1.

337. See Justice Powell, Draft Concurrence and Dissent Two *passim* (*Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*) (Dec. 21, 1984) (on file with the Brennan Papers, Library of Congress Manuscript Division) (on file with the Washington Law Review).

338. See *id.*

339. See Justice Powell, Draft Concurrence and Dissent One, *supra* note 318, at 1.

340. See Justice Powell, Draft Concurrence and Dissent Two, *supra* note 337, *passim*.

341. See Justice Powell, Draft Concurrence and Dissent One, *supra* note 318, *passim*.

to the “press clause” of the First Amendment were also jettisoned.³⁴² And, Powell responded to Brennan’s string cite of state cases by pointing out that, “though not invariably clear, these cases involved *public* expression pertaining to ‘public questions.’”³⁴³ This, Powell now discovered, “is a critical distinction” because “[t]he case before us today involves a privately communicated libel by one private party against another on a subject of little First Amendment concern.”³⁴⁴

Powell circulated his revised draft to the Conference on December 21. With it, the major premise for the petition for certiorari and the central issue over which the Justices had skirmished the entire preceding term, not to mention the central issue the Court had asked the parties to address at reargument—i.e., whether the constitutional rules announced in *Sullivan* and *Gertz* applied in defamation actions instituted against nonmedia defendants—ceased to be an issue at all, at least for Powell’s purposes.³⁴⁵

E. *Waiting for White*

On December 26, White wrote to Brennan that it would be “some time before I am ready in this case,”³⁴⁶ which led to virtual silence from all quarters over the next month, at least from the perspective of Brennan’s chambers. In fact, on December 29, Powell had written a

342. Compare Justice Powell, Draft Concurrence and Dissent Two, *supra* note 337, with Justice Powell, Draft Concurrence and Dissent One, *supra* note 318, *passim*.

343. Personal memorandum of Justice Powell to Daniel Ortiz 2 (Dec. 20, 1984) (on file with the Powell Papers, Washington and Lee Law Library), *available at* <http://law.wlu.edu/powellarchives/page.asp?pageid=1355> (emphasis in original) (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964)).

344. *Id.*

345. See Justice Powell, Draft Concurrence and Dissent Two, *supra* note 337. On December 20, the day before Powell circulated his revised draft, Brennan had received a copy of a letter from Burger addressed to Powell, which may well have been forwarded to Brennan’s chambers in error. Letter from Chief Justice Burger to Justice Powell (Dec. 20, 1984) (on file with the Brennan Papers, Library of Congress Manuscript Division) (on file with the Washington Law Review). In it, Burger, who was apparently unaware that Powell was about to jettison it entirely, told his colleague that he was not comfortable with the media/nonmedia distinction contained in Powell’s initial draft. D&B, he wrote, “is not like the *New York Times*, but it is a second cousin, at least, of the *Wall Street Journal*.” *Id.* And, Burger added, he, like Rehnquist, was “not ready to drop punitive damages.” *Id.* Burger circulated another letter seven days later, which said largely the same thing—“I cannot accept either the media-nonmedia dichotomy or the abolition of punitive damages in libel cases, especially the latter. So, very likely I will agree with no one except myself.” Letter from Chief Justice Burger to Justice Powell (Dec. 27, 1984) (on file with the Brennan Papers, Library of Congress Manuscript Division) (on file with the Washington Law Review).

346. Letter from Justice White to Justice Brennan (Dec. 26, 1984) (on file with the Brennan Papers, Library of Congress Manuscript Division) (on file with the Washington Law Review).

“personal” letter to Burger, in which he once again attempted to secure his vote.³⁴⁷ Picking up on Burger’s discomfort with a “media/non-media” distinction,³⁴⁸ Powell pointed out that, in the “second draft of my opinion,” he had “clarified what concerns you. Initially, I had drawn the distinction simply between media and nonmedia defendants. After a good deal of further research, I concluded that the relevant distinction turns on the *nature* of the speech rather than who the parties are.”³⁴⁹ As a result, Powell wrote, “[i]f the speech relates to public issues or public persons, my opinion now agrees that the *New York Times* standard is applicable (subject to my view of punitive damages).”³⁵⁰ And, with respect to punitive damages, Powell wrote that, although he “share[d]” Burger’s “view as to the irresponsibility of what sometimes is reported in the press”³⁵¹—citing specifically a then “recent disclosure to the Soviet Union of the purpose of our top secret military satellite”³⁵²—he had “thought for several years . . . that punitive damages are not compatible with due process. My view is not limited to the media.”³⁵³ Powell closed his letter by advising Burger that:

I am not urging that you join my dissent—though you would be welcome. I do suggest that, in whatever you write, it may be prudent to leave yourself free to consider the punitive damages issue in nonlibel cases. In the typical product liability, personal injury and civil rights cases, *compensatory* damages normally are provable. Adding windfall punitive damages on top of these is unprincipled; and is without any of the due process protections guaranteed by the Constitution.³⁵⁴

347. Letter from Justice Powell to Chief Justice Burger (Dec. 29, 1984) (on file with the Powell Papers, Washington and Lee Law Library), available at <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>.

348. *Id.* at 1; see also Letter from Chief Justice Burger to Justice Powell (Dec. 20, 1984) (on file with the Brennan Papers, Library of Congress Manuscript Division) (on file with the Washington Law Review).

349. Letter from Justice Powell to Chief Justice Burger, *supra* note 347, at 1.

350. *Id.*

351. *Id.*

352. *Id.* This reference is especially ironic because the leak to which Powell apparently was referring was by a government employee to a military specialty journal. In 1984, Samuel Loring Morison, a Navy intelligence analyst, was accused of leaking to *Jane’s Defence Weekly* three intelligence satellite photographs of a Soviet nuclear submarine under construction. Morison was convicted of espionage and sentenced to two years in prison. President Clinton pardoned him in 2001. See *United States v. Morison*, 844 F.2d 1057 (4th Cir. 1988) (upholding conviction for transmittal of photographs in violation of the Espionage Act, 18 U.S.C. § 793(d)–(e) (1950)).

353. Letter from Justice Powell to Chief Justice Burger, *supra* note 347, at 2.

354. *Id.*

Shortly thereafter, Powell was diagnosed with prostate cancer and his treatment and recovery would keep him away from the Court for several months.³⁵⁵ Indeed, although he continued to remain involved in cases, including *Greenmoss Builders*, in which he had participated in the argument, dozens of others that were argued in January and February 1985 after he took ill were either resolved by 4-4 votes, decided without him, or held over for argument to the following term.³⁵⁶

On January 22, 1985, O'Connor delivered a "personal and confidential"³⁵⁷ letter to Powell's chambers, knowing that he was ill and instructing his law clerk that it not be shown to him until he was "truly ready to go back to work."³⁵⁸ Still, when the law clerk saw that it concerned *Greenmoss Builders*, he asked O'Connor for permission to forward it on to the Justice, since Powell had already asked him "to send . . . some materials on this case" and that he was "thinking about it."³⁵⁹ On hearing this, O'Connor's clerk "thought I could send it along so long as I was sure to say that you should not feel any pressure to respond or indeed even to think about it until you are back in Washington and feeling fine."³⁶⁰

O'Connor began her three-page letter by expressing concern that, although the "case has been making its uncertain way through this Court for two terms now," she was "not sure the Court will succeed in resolving it in any way which I regard as satisfactory."³⁶¹ Still, she wrote to Powell, "during your illness something has occurred which offers the possibility that four, and perhaps five, of us can partially agree on one significant feature."³⁶² Specifically, O'Connor said that White had showed her a draft of an opinion that he was contemplating and that, in it, White declined to join the Brennan majority.³⁶³ Accordingly,

355. Powell had prostate surgery on January 4, 1985, and remained away from the Court at least until mid-March. For much of that time, he was at a hospital in Rochester, Minnesota. See *Powell Back in Hospital; May Go Home Today*, WASH. POST, Mar. 16, 1985, at A8.

356. Michael S. Serrill, *An Illness Ties Up the Justices: The Second Oldest Court Shows the First Signs of Age*, TIME, Apr. 8, 1985, at 59 (noting that Powell missed fifty-six oral arguments in all).

357. Letter from Justice O'Connor to Justice Powell 1 (Jan. 22, 1985) (on file with the Powell Papers, Washington and Lee Law Library), available at <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>.

358. See *id.*; Memorandum from Daniel Ortiz for Justice Powell (Jan. 24, 1985) (with handwritten notes from Justice Powell) (on file with the Powell Papers, Washington and Lee Law Library), available at <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>.

359. Memorandum from Daniel Ortiz for Justice Powell, *supra* note 358.

360. *Id.*

361. Letter from Justice O'Connor to Justice Powell, *supra* note 357, at 1.

362. *Id.*

363. *Id.*

O'Connor wrote, this development was "reason enough to make it worthwhile to pursue every avenue of agreement among those in dissent, who might thereby become a majority."³⁶⁴

In her letter, O'Connor then proceeded to sketch out the contours of a "possible agreement" amongst Powell, "Byron, the Chief, Bill Rehnquist, and me that the *Gertz* standards apply at most to expression related to matters of public importance."³⁶⁵ In O'Connor's view, "[i]f we were to all agree that the nature of the speech, rather than the nature of the speaker, determines whether *Gertz* applies, I believe we could then also agree this case should be affirmed, at least in part."³⁶⁶ O'Connor told Powell that she "appreciate[d]" that, "in order to solidify our votes on this point, certain language in *Gertz* will have to be explained."³⁶⁷ Nevertheless, she asserted, Powell's then-current draft, "by distinguishing between 'public expression' and 'private expression[,]'" already approaches the position that *Gertz* only applies to expression concerning matters of public importance."³⁶⁸ Thus, in O'Connor's view, "[i]t is certainly plausible to contend that the reasons for imposing constitutional limits on state libel laws as in *New York Times v. Sullivan* and in *Gertz* are not substantially implicated where the libelous expression does not concern a matter of public importance."³⁶⁹ In this regard, she noted, in an observation that Brennan had predicted when it was decided, that *Time, Inc. v. Firestone*³⁷⁰ "also is consistent with this view in its reliance on a content-based categorization of speech to determine whether the plaintiff was a public figure."³⁷¹ In the end,

364. *Id.*

365. *Id.*

366. *Id.*

367. *Id.*

368. *Id.*

369. *Id.* at 2.

370. 424 U.S. 448 (1976).

371. Letter from Justice O'Connor to Justice Powell, *supra* note 357, at 2. Echoing Marshall's dissent in *Rosenbloom v. Metromedia*, 403 U.S. 29, 78 (1971) (Marshall, J., dissenting, joined by Stewart, J.), Powell, writing for the majority in *Gertz*, had criticized the *Rosenbloom* plurality's application of the actual malice standard to allegedly defamatory falsehoods that addressed matters of "public concern," regardless of the status of the plaintiff. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974). Powell asserted that such a rule was both unworkable and unwise because it would "forc[e] state and federal judges to decide on an ad hoc basis which publications address issues of 'general or public interest' and which do not." *Id.* at 346. In *Time, Inc. v. Firestone*, however, the Court appeared to reintroduce essentially the same concept by defining limited purpose public figures to include only those persons who had voluntarily injected themselves into a "public controversy." *Firestone*, 424 U.S. at 454; *see id.* ("Dissolution of a marriage through judicial proceedings is not the sort of 'public controversy' referred to in *Gertz*, even though the marital difficulties of extremely wealthy individuals may be of interest to some portion of the reading

O'Connor proposed that:

[W]ith some fairly minor changes to parts I–III of your circulating draft, it would effectively hold that *Gertz* applies only to speech involving public issues and, therefore, does not require a showing of the *New York Times* type of actual malice in this case. I strongly suspect you could get the additional four votes for that approach, even if not all the same votes were available for the punitive damages aspect. I would certainly be able to join at least parts I–III, and I believe the others would as well.³⁷²

Powell apparently read the letter immediately upon its receipt, noting in the margin of his clerk's cover memorandum that O'Connor's "suggestion has merit" and that he would "pursue it with sympathetic interest."³⁷³

Three days later, on January 25, 1985, White sent Brennan a note shortly before noon. It read, in its entirety:

Dear Bill,

It will not surprise you, I am sure, to learn that I am voting to affirm in this case. I shall circulate shortly indicating my position. Neither am I joining Lewis [Powell] at this point. Having said this, I am fleeing the city for a week or two.³⁷⁴

And there things stood at high noon on January 25, 1985. By then, the *Greenmoss Builders* case had been on the Court's calendar for nearly two years, had spawned two sets of briefs and arguments on the merits, and had consumed literally hundreds of pages of opinions that had yet to be issued. Still, at that moment, the case was no closer to decision than it was when Byron White first drafted a dissent from what he believed was the Court's wrong-headed inclination to deny review in the first place. At this juncture, it appeared that it was effectively up to White to determine the outcome.

public"); *id.* at 477 (Brennan, J., dissenting) (arguing that a public trial amounted to a public controversy); *id.* at 488 (Marshall, J., dissenting) ("*Gertz* obviously did not intend to sanction any such inquiry [into whether an event is a public controversy] by its use of the term 'public controversy.' Yet that is precisely how I understand the Court's opinion to interpret *Gertz*.").

372. Letter from Justice O'Connor to Justice Powell, *supra* note 357, at 2.

373. Memorandum from Daniel Ortiz for Justice Powell, *supra* note 358.

374. Letter from Justice White to Justice Brennan (Jan. 25, 1985) (on file with the Brennan Papers, Library of Congress Manuscript Division) (on file with the Washington Law Review).

III. ACT III—THE ASSAULT ON *SULLIVAN* AND THE “PUBLIC/PRIVATE” DISTINCTION

A. *White’s Bombshell*

As it turned out, Brennan did not have long to wait to learn White’s “position,” how it differed from Powell’s, at least for the moment, and why White had felt obliged to give Brennan some (albeit minimal) advance warning both that he was voting to affirm and that he was about to “flee” the city. White’s dissent was circulated during the lunch hour that very day. It was, as Brennan’s Term History would later describe it, a full “frontal assault” on *Sullivan* itself.³⁷⁵ It did not differ materially from the opinion that White ultimately filed in the case and included essentially the same proclamation, made by a Justice who had joined, without reservation, Brennan’s landmark opinion twenty years earlier:

I have . . . become convinced that the Court struck an improvident balance in the *New York Times* case between the public’s interest in being fully informed about public officials and public affairs and the competing interest of those who have been defamed in vindicating their reputation.³⁷⁶

In White’s newly formulated view, *Sullivan* “countenances two evils: first, the stream of information about public officials and public affairs is polluted and often remains polluted by false information; and second, the reputation and professional life of the defeated plaintiff may be destroyed by falsehoods that might have been avoided with a reasonable effort to investigate the facts.”³⁷⁷ To White, “these seem grossly perverse results.”³⁷⁸ On reflection, White had come to conclude that, in *Sullivan*, “instead of escalating the plaintiff’s burden of proof to an almost impossible level, we could have achieved our stated goal by limiting the recoverable damages to a level that would not unduly threaten the press. . . . Had that course been taken and the common-law standard of liability been retained,” White wrote, “the defamed public official, upon proving falsity, could at least have had a judgment to that effect” such that his “reputation would then be vindicated.”³⁷⁹

375. Justice Brennan, 1984 Term Histories, *supra* note 222, at 96.

376. *Id.* (quoting Justice White).

377. Justice White, Draft Dissent One 5 (*Dun & Bradstreet v. Greenmoss Builders, Inc.*) (Jan. 25, 1985) (on file with Brennan Papers, Library of Congress Manuscript Division) (on file with the Washington Law Review).

378. *Id.*

379. *Id.* at 7.

Perhaps most cutting, in one draft, White characterized the celebrated analytical underpinnings of Brennan's opinion in *Sullivan*—his equation of a “private” defamation action by a public official with the law of seditious libel—as an analogy that “substitutes hyperbole for an analysis of the interests actually at stake.”³⁸⁰ In the end, White contended, “other commercial enterprises in this country must pay for the damages they cause as a cost of doing business, and it is difficult to argue that the United States did not have a free and vigorous press before the rule in *New York Times* was announced.”³⁸¹ As a result, White simply was not prepared to “assume that the press, as successful and powerful as it is, will be intimidated into withholding news that by decent journalistic standards it believes to be true.”³⁸²

That afternoon, Brennan was, as he himself described his reaction to White's opinion, “crestfallen.”³⁸³ He had expected an attack on *Gertz* but, as Brennan wrote in his Term History, “the gratuitous attack on

380. *E.g.*, Justice White, Draft Dissent Four 8 (*Dun & Bradstreet v. Greenmoss Builders, Inc.*) (Mar. 29, 1985) (on file with the Brennan Papers, Library of Congress Manuscript Division) (on file with the Washington Law Review). In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), Brennan analyzed the tortured history of the Sedition Act of 1798 and, through that analysis, purported both to identify “the central meaning of the First Amendment,” *i.e.*, the unconstitutionality of the law of seditious libel, and to explain why the analogous award of civil damages to a public official for published criticism of his official conduct at issue in *Sullivan* effectively amounted to the same thing. *Id.* at 273. “The judgment awarded in this case—without the need for any proof of actual pecuniary loss—was one thousand times greater than the maximum fine provided by the Alabama criminal statute, and one hundred times greater than that provided by the Sedition Act.” *Id.* at 277. At the time, Alexander Micklejohn proclaimed, and Professor Harry Kalven agreed, that this aspect of Brennan's opinion for the Court in *Sullivan* was “an occasion for dancing in the streets.” *See* Kalven, *supra* note 3, at 221 n.125; *see also* LEWIS, *supra* note 4, at 625 (describing Brennan's reasoning in this regard in *Sullivan* as “thrilling” and exuding a sense of “grandness”).

381. Justice White, Draft Dissent Four, *supra* note 380, at 8.

382. *Id.* at 11. Curiously, in a handwritten note to his secretary, which is scrawled across the top of a file copy of the January 25 first draft of his dissent, White sketched out what appeared to be a draft of a private letter to Powell. It read, “I could join your circulating dissent if you eliminated the distinction between public and private distributors and confined *Gertz* to cases involving publication about matters of public concern.” Justice White, Draft Dissent One 1 (*Dun & Bradstreet v. Greenmoss Builders, Inc.*) (Jan. 25, 1985) (with handwritten notes of Justice White) (on file with the White Papers, Library of Congress Manuscript Division), *available at* <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>. There is no record that White ever had this letter typed or sent to Powell, at least in this form, although White made essentially the same point in a February 19 letter to O'Connor, a copy of which he also sent to Powell. Letter from Justice White to Justices O'Connor and Powell (Feb. 19, 1985) (on file with the White Papers, Library of Congress Manuscript Division) (on file with the Washington Law Review). And, of course, in the end, White did not join Powell's plurality opinion even though it had been so narrowed, largely at the behest of Rehnquist and O'Connor. Powell's efforts to narrow his opinion are examined at length in text accompanying *infra* notes 402–23.

383. Justice Brennan, 1984 Term Histories, *supra* note 222, at 96.

Times itself could not reasonably have been anticipated in a case presenting no question of criticism of government officials.”³⁸⁴ Brennan not only feared that other Justices—most notably Rehnquist, O’Connor, and Burger, might now join White, he found “deeply troubling” what his Term History later characterized as “the notion of a fissure in the very foundation of the doctrine of constitutional limits on state defamation law,” which he considered one of his “most important contributions to the advancement of constitutional law.”³⁸⁵ From Brennan’s perspective, “[n]o Justice in twenty years had objected in an opinion to the fundamental premises of *Times* itself.”³⁸⁶ And, although he did not mention it in his Term History, Brennan must have remembered that, just the previous term, the full Court had reaffirmed *Sullivan* in emphatic terms in *Bose Corp. v. Consumers Union of United States, Inc.*³⁸⁷ (a decision, however, in which White dissented³⁸⁸).

Accordingly, Brennan wrote to the Conference to say that White’s opinion “requires a considered response,” which he said he would “undertake to make as soon as I can.”³⁸⁹ While he waited for word from

384. *Id.*

385. *Id.*

386. *Id.*

387. 466 U.S. 485 (1984). *Bose Corp.*, a manufacturer of audio speakers and systems, sued Consumers Union, publisher of *Consumer Reports* magazine, for a product review that was less than favorable. The Supreme Court, in an opinion by Justice Stevens joined fully by four other Justices, held that, when applying the actual malice standard, a judge must determine by independent review that there is clear and convincing evidence of actual malice. The Court found such evidence lacking in the case before it. In his strong defense of the actual malice standard, Justice Stevens wrote:

The requirement of independent appellate review reiterated in *New York Times Co. v. Sullivan* is a rule of federal constitutional law. It emerged from the exigency of deciding concrete cases; it is law in its purest form under our common-law heritage. It reflects a deeply held conviction that judges—and particularly Members of this Court—must exercise such review in order to preserve the precious liberties established and ordained by the Constitution. The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of “actual malice.”

Id. at 510–11. For a full discussion of *Bose*, see Levine, *supra* note 127 (suggesting that *Bose* was a direct response by the Court to the libel lawsuits prosecuted by Generals Westmoreland and Sharon).

388. *Bose*, 466 U.S. at 515 (White, J., dissenting).

389. Memorandum from Justice Brennan for the Conference (Jan. 25, 1985) (on file with the Brennan Papers, Library of Congress Manuscript Division) (on file with the Washington Law Review).

other chambers, Brennan and his clerks considered his options.³⁹⁰ Indeed, they spent most of the morning of January 28, 1985, doing just that. Although the consensus in Brennan's chambers was that a direct response to White's "jeremiad against *Times*"³⁹¹ was imperative, they recognized that the vehicle that White had chosen to launch it—a case involving credit reporting, not speech criticizing public officials for the performance of their official duties—made the task a difficult one. Ultimately, Brennan agreed with his clerks' proposal that they try their hand at an opinion that began with a defense of *Sullivan*, proceeding as it must from "Meiklejohnian premises and stress[ing] the chilling effect on speech crucial to public affairs and self-government,"³⁹² and moving from there to the issue of affording constitutional protection to credit reporting, a subject concededly "far" from the "political speech that first gave rise to constitutional limits on state defamation law."³⁹³

B. *Powell's Appeasement*

While Brennan and his clerks worked on their response to White's broadside, Powell and his chambers pondered how best to respond to O'Connor's overture, especially in the wake of the extreme position White had now staked out. Although still not fully recovered from his illness and recuperating at home, Powell instructed his clerk to take a pass at making the changes that O'Connor had suggested.³⁹⁴ In a memorandum to the Justice on February 11, however, the clerk confessed his fear that "the changes," which he understood were designed to placate White and make Powell's opinion "more to his liking," would "practically overrule *Gertz* in two respects."³⁹⁵ First, the clerk wrote:

[B]y distinguishing *Gertz* on the ground that it concerned "public expression upon matters of public importance or concern," the draft essentially adopts the *Rosenbloom* test, which this Court expressly rejected in *Gertz* . . . for two reasons:

390. Brennan's clerks that term were Charles Curtis, James Feldman, Michael Rips, and Donald Verrilli.

391. Justice Brennan, 1984 Term Histories, *supra* note 222, at 97.

392. *Id.* For a discussion of Meiklejohn's view and its role in *New York Times Co. v. Sullivan*, see *supra* note 3 and accompanying text.

393. Justice Brennan, 1984 Term Histories, *supra* note 222, at 97.

394. Memorandum from Daniel Ortiz for Justice Powell 1 (Feb. 11, 1985) (on file with the Powell Papers, Washington and Lee Law Library), available at <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>.

395. *Id.*

(i) it inadequately protected both the state interest in compensating individuals for injury to their reputations and the First Amendment interest in protecting the press when it has taken every reasonable precaution to ensure against falsehood and (ii) it was almost impossible to apply in a principled fashion.³⁹⁶

Second, he added, “there is a real danger that lower courts (or even this Court) might interpret the public importance or concern standard to be roughly coextensive with the *Gertz* public figure test,”³⁹⁷ which, based on the clerk’s conversations with his counterpart in O’Connor’s chambers, “appears to be what she had in mind.”³⁹⁸ This, Powell’s clerk asserted, “would effectively overrule the larger part of *Gertz*,” for “if the line between public and private figures nearly matches the line between matters of public and private importance or concern, defendants in suits brought by private figures would be accorded no First Amendment protection at all” and the “careful accommodation of interests you worked out in *Gertz* would come to nought.”³⁹⁹ In short, the clerk wrote, “the more narrowly the new standard is interpreted” (which would appear necessary to garner at least White’s vote), “the more *Gertz* is overruled.”⁴⁰⁰

Over the next several days, however, Powell and his clerks worked to revise his draft opinion to reflect O’Connor’s suggestion as best they could. Indeed, to a significant extent, Powell’s and O’Connor’s clerks collaborated on preparing it.⁴⁰¹ As a result, Powell’s revised opinion backed away from his most recent reliance on a distinction between “public” and “private” expression, determined according to whether or not it was directed to a mass audience, in favor of an approach that relied equally on the size of the audience and, as O’Connor had suggested, the nature of the speech. In this draft, as the clerk put it, “‘private expression on matters of private concern’ is subject to reduced constitutional protection.”⁴⁰²

396. *Id.* For a discussion of the interplay among the Justices with respect to *Rosenbloom* and *Gertz*, see *supra* text accompanying notes 205–06.

397. Memorandum from Daniel Ortiz for Justice Powell, *supra* note 394, at 2; see also Justice Brennan, 1984 Term Histories, *supra* note 222, at 96.

398. *Id.*

399. *Id.*

400. *Id.* at 3.

401. Memorandum from Daniel Ortiz for Justice Powell 1 (Feb. 14, 1985) (on file with Powell Papers, Washington and Lee Law Library), available at <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>.

402. *Id.* at 2.

In addition, Powell apparently concluded (whether based on further discussions with O'Connor or other Justices is unclear) that his proposal to eliminate punitive damages would not garner additional votes. Accordingly, he instructed his clerk to work on "splitting the opinion into two,"⁴⁰³ with the idea that the final section—in which the distinction in his treatment of presumed and punitive damages was set out—would "be omitted"⁴⁰⁴ if Rehnquist, O'Connor, and Burger would "accept"⁴⁰⁵ the remainder of his analysis. Under that scenario, Powell wrote in notes to himself, "the bottom line" would be "to *affirm* and simply say nothing about punitive damages."⁴⁰⁶ If he could cobble together a majority that would deny constitutional protection to "private expression on matter[s] of private concern," Powell thought, he "could forego a separate op[inion]" expressing his antipathy to punitive damages.⁴⁰⁷ Still, Powell noted, he would "like a separate op[inion] if we can make it reasonable to do this," an opinion that "probably would say that [although] the distinction bet[ween] '*presumed* and *punitive*' was not presented in this case,"⁴⁰⁸ the issue "is imp[ortant] and merits consideration."⁴⁰⁹

C. *White's Reaction*

On February 19, White wrote to O'Connor, with a copy to Powell but to no other Justice, to inform them that O'Connor's efforts to create a majority around Powell's opinion had failed, at least for the moment. In short, Powell's resistance to abandoning his distinction between "public" and "private" speech proved too much for White:

Although Lewis has made substantial changes, I still have difficulty with this draft, which at several places states that the publication here was a private publication about a non-public

403. *See id.* at 1.

404. Handwritten note from Justice Powell to Daniel Ortiz 1 (undated) (on file with the Powell Papers, Washington and Lee Law Library), *available at* <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>.

405. *Id.*

406. *Id.*

407. *Id.*

408. *Id.* (emphasis in original).

409. *Id.* The "logistics" of "splitting the opinion into two" proved to be "so complicated" as a technological matter that doing so delayed circulation of Powell's revised draft for several days. Memorandum from Daniel Ortiz for Justice Powell, *supra* note 401, at 1. According to his clerk, to accomplish it, he had "to work with a person in the computer room who is only there Mondays through Fridays from 9 to 5." *Id.* In addition, before he circulated it to the Conference, on February 16, Powell privately provided his draft to O'Connor, who took the liberty of passing it along to White. Letter from Justice White to Justices O'Connor and Powell, *supra* note 382.

matter. It is emphasized that the circulation here went only to subscribers. I take it, then, that if the publication had been a public one, *Gertz* rules would apply even if the subject matter was non-public. Although Lewis states that the distinction is not between media and non-media defendants, there obviously are different rules for those who publish publicly and those who circulate privately; and, obviously enough, a media defendant would always be publishing publicly and entitled to the protections of *Gertz*, whether the subject matter was public or private.⁴¹⁰

This result was unacceptable to White, who told O'Connor and Powell that he therefore could not "join the draft in this form."⁴¹¹ In White's view, "[t]o give more protection to those who publish publicly and hence do the most damage makes little sense to me."⁴¹² Still, White explained that he remained prepared to provide a fifth vote for Powell's opinion if this distinction were abandoned:

Lewis could do what he wants to do by simply applying *Gertz* to matters of public importance, regardless of who the publisher is. As I have indicated in what I have already circulated, I believe I could join such an approach, at least for the purpose of producing a court opinion.⁴¹³

Powell was plainly tempted by White's proposal. In handwritten notes to himself that appear to have been penned shortly after he received it, Powell worked his way through the issues. He began from the premise that his "present draft is limited to the case where *both* publication and subject are private" and reasoned that, under that approach, "a media defendant (e.g. Wall St[reet] Journal) always will publish publicly" such that, "under *Gertz*, it would be liable only if malice is shown."⁴¹⁴ After

410. Letter from Justice White to Justices O'Connor and Powell, *supra* note 382.

411. *Id.*

412. *Id.*

413. *Id.* At the bottom of Powell's copy of the letter, White, noting Powell's re-engagement with his colleagues even though he was not physically back at the Court yet, wrote by hand, "Lewis: It's great to have you back in the swing. Take care of yourself." *Id.* (with handwritten note from Justice White).

414. Personal handwritten notes of Justice Powell (undated) (on file with the Powell Papers, Washington and Lee Law Library), *available at* <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>. Here, Powell seems to have forgotten both that the actual malice standard would not apply unless the plaintiff was also a public figure and that the issue of the liability standard was not before the Court in any event. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974) ("Those who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures and those who hold governmental office may recover for injury to

pronouncing this result “ok,” he recounted White’s objection to providing “more protection (the malice defense) to a defendant who publishes its libel than to the defendant as in this case who did *not* publish it publicly.”⁴¹⁵ This objection, according to Powell’s notes, “makes sense” since, otherwise, the “[*Wall Street Journal*], having given wider publicity to the libel, would fare better than D&B that had only published it privately.”⁴¹⁶ He then turned to White’s proposed fix— “B.R.W. thinks I could simply apply *Gertz* to matters of ‘public importance’ whether published privately or publicly (i.e., whether media or non-media)”⁴¹⁷—which would permit the Court to “affirm here because” there is “no matter of public importance” involved. Such an opinion, Powell noted in conclusion, “B.R.W. would join.”⁴¹⁸ Off in the margin of this last passage, however, Powell posed the one-word question, “*Rosenbloom?*”⁴¹⁹

D. *Settling for a Plurality*

Later that same day, O’Connor wrote privately to Powell and appeared to assume that he would not abandon the public/private distinction in exchange for White’s vote. “By now,” she wrote, “you have seen Byron’s response to your recirculation. I have also talked to Bill Rehnquist and the Chief Justice and I feel reasonably confident that you will have four votes for your proposed new circulation. Byron would at least be a fifth vote to affirm the judgment which would effectively place the plurality opinion in your hands.”⁴²⁰ She concluded by suggesting that “[p]erhaps this is the best we can do but I am certainly with you on your recirculation.”⁴²¹

Powell finally circulated his new draft on February 22. As expected,

reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth.”); *see also supra* note 29 and accompanying text (explaining that, due to the jury instruction below, which required the jury to find liability under *Gertz*, there was no need for the Court to pass on the applicable standard for liability).

415. Personal handwritten notes of Justice Powell, *supra* note 414.

416. *Id.*

417. *Id.*

418. *Id.*

419. *Id.* *See supra* note 371 and accompanying text.

420. Letter from Justice O’Connor to Justice Powell (Feb. 19, 1985) (on file with the Powell Papers, Washington and Lee Law Library), *available at* <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>.

421. *Id.*

he gave up entirely on his efforts to preclude punitive damages awards and to limit awards of presumed damages, arguing instead that both forms of recovery should be available where, as in *Greenmoss Builders*, the speech at issue constituted “private expression involving purely a matter of private concern.”⁴²² He did not circulate a separate opinion addressing the presumed/punitive damages issue. In addition, express reference to a media/nonmedia distinction had also disappeared although, at least in Brennan’s view, it lingered in the analysis nonetheless.⁴²³

More significantly, Powell’s new draft retained its dual focus on “purely private expression on a matter of private concern.”⁴²⁴ It characterized *Sullivan* as a case “involving public expression on matters of public concern”⁴²⁵ and contrasted it with the facts in *Greenmoss Builders*, which Powell said involved “private expression between a construction company and a commercial credit reporting agency on an issue of purely private concern.”⁴²⁶ And, in a footnote responding to Brennan’s survey of state law cases declining to make a media/nonmedia distinction, Powell pointed out that “though not invariably clear, these cases do not involve private expression on essentially private matters. This, not a defendant’s media or non-media status, is the critical distinction.”⁴²⁷ And, in the opinion’s concluding section, Powell asserted that while, “[i]n this case there is no need to define precisely what constitutes private expression on matters of private concern,” in his view, “the libelous speech at issue here implicates the First Amendment at most tangentially,” primarily because it was “private expression”

422. Justice Brennan, 1984 Term Histories, *supra* note 222, at 97.

423. *Id.* Brennan, unaware of the extensive interaction between the other Justices or its substance, erroneously concluded that the abandonment of the media/nonmedia distinction was the change responsible for garnering O’Connor’s vote, which was announced shortly thereafter. *Id.* In that regard, Brennan’s Term History suggests that O’Connor was otherwise hostile to the media/nonmedia distinction and that she joined Powell only because it had been “disguised sufficiently to satisfy” her. *Id.* In fact, O’Connor had consistently supported a media/nonmedia distinction in *Greenmoss Builders*, see, e.g., Letter from Justice O’Connor to Chief Justice Burger and the Conference (Mar. 28, 1984) (on file with the Powell Papers, Washington and Lee Law Library), available at <http://law.wlu.edu/powellarchives/page.asp?pageid=1355> (highlighting nonmedia status of Dun & Bradstreet), and would cling to it two years later in her opinion for the Court in *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 779 n.4 (1986) (“[W]e [do not] consider what standards would apply if the plaintiff sues a nonmedia defendant.”).

424. Justice Powell, Draft Dissent Three 3 (*Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*) (Feb. 22, 1985) (on file with the Brennan Papers, Library of Congress Manuscript Division) (on file with the Washington Law Review).

425. *Id.* at 2.

426. *Id.*

427. *Id.* at 4 n.7.

distributed “to only five subscribers, who were not allowed under the subscription agreement to disseminate it any further.”⁴²⁸

E. Enter Justice Rehnquist

In circulating his new draft in this form, it appears clear that Powell consciously chose to forsake White’s vote rather than rely solely on the “public importance” distinction he himself had rejected in *Gertz*. He might even have harbored at least some doubts that, at the end of the day, the mercurial Chief Justice would join what now appeared to be a plurality. He likely did not, however, anticipate that his circulation would place in jeopardy the support he had consistently received from Rehnquist. Nevertheless, on March 1, Rehnquist wrote privately to Powell to advise him that he did not “fully agree with either your circulation or Byron’s as they now stand.”⁴²⁹ Rehnquist, it turned out, had the same objection as White to Powell’s “emphasis on the fact that in this case we have a ‘matter of private expression on a matter of private concern.’”⁴³⁰ Apparently unaware that White had voiced precisely the same concern to both Powell and O’Connor barely two weeks earlier, Rehnquist told Powell:

I would like to see the emphasis on the “private” nature of the expression either removed or very much subdued, because it seems to me that the way it is now the doctrine has a very ironic twist. A “private expression” that may be circulated to only three or four people is subject to no constitutional protection, but a similar expression on a matter of “private concern” that is circulated to 1,000 people may be able to claim constitutional protection. This runs contrary to one of the principal tenets of libel law, as I understand it, a tenet based on the idea that the greater the circulation of the falsehood, the greater the damage to the plaintiff.⁴³¹

Accordingly, Rehnquist asked, “[w]ouldn’t it be enough in this case to say that the matter was one of ‘private’ concern—e.g., not a matter of ‘public concern’ and dispense with the fact that it was not widely circulated.”⁴³² In Rehnquist’s view, “[i]f one who falsely defames can

428. *Id.* at 8.

429. Letter from Justice Rehnquist to Justices Powell, White, and O’Connor 1 (Mar. 1, 1985) (on file with the Powell Papers, Washington and Lee Law Library), available at <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>.

430. *Id.*

431. *Id.*

432. *Id.*

gain some sort of constitutional immunity by widely circulating the defamation, I think the doctrine has very little to commend it.”⁴³³ That said, Rehnquist recognized that he was suggesting a distinction not much different than the one “between matters of ‘public concern’ and other matters, which Bill Brennan attempted to draw”⁴³⁴ in *Rosenbloom*, a distinction the Court “rejected” in *Gertz* “when offered as a substitute for the distinction between public figures and private figures.”⁴³⁵ At the end of the day, however, Rehnquist had concluded that such a distinction was unavoidable:

[U]nless one is to go all the way with Bill Brennan and constitutionalize everything—which I certainly don’t want to do—or draw the line between media and non-media defendants—which I likewise do not want to do—some useful distinction that can be developed in subsequent cases has to be made here. I think the one you have hit upon—“matters of private concern” versus other matters—is worth a try, but I don’t think it should be freighted with the additional requirement that the circulation or expression be “private.”⁴³⁶

Rehnquist ended his letter by advising Powell that, “[i]f you find it is not palatable to modify your opinion in this regard, I will think anew.”⁴³⁷ Although it was not clear to Rehnquist whether White would affirm the judgment below, he advised Powell that, “if he would, I might well join him. But since Sandra has already joined you, I would like to join you if possible.”⁴³⁸

Powell was plainly taken aback by Rehnquist’s letter. In the margins of it, he made notes to himself to ask his law clerk “why this is not so” and “what’s our answer” to Rehnquist’s arguments against the public/private expression distinction.⁴³⁹ At the end of the letter, Powell sketched out, in his own hand, the consequences of the approach that had now been separately advocated to him by both White and Rehnquist:

Under Bill [Rehnquist]’s view, even if [a] libel is published by [the *New York Times*] it would have no [constitutional] protection *unless* the plaintiff is a public figure or public official. The test would be the “*subject*” of [the] libel. If [the *New York*

433. *Id.*

434. *Id.*

435. *Id.* at 2.

436. *Id.*

437. *Id.*

438. *Id.*

439. *Id.* at 1 (with handwritten notes from Justice Powell).

Times] had falsely published that [Respondent] was bankrupt, it would have no constitutional protection. State libel laws would apply.⁴⁴⁰

Later that day, Powell heard from his law clerk, who characterized Rehnquist's letter as a request that "you drop the 'public expression' prong of your test and, in effect, adopt JUSTICE WHITE'S position," even though, in his letter, the clerk noted Rehnquist "admits that this is tantamount to accepting the *Rosenbloom* test."⁴⁴¹ The clerk reminded Powell of their "previous discussions" about "the consequences of taking this position,"⁴⁴² in which they had concluded that, in doing so, the Court "would not only have to adopt a test rejected in *Gertz*, but also risk in practical terms overruling much of what *Gertz* accomplished."⁴⁴³ The clerk (and undoubtedly Powell as well) was plainly frustrated. As he wrote to Powell:

At this point, I really don't know what to suggest. You have made reasonable accommodations to the views of others without much success. Further concessions, while possibly gaining a Court or plurality, entail some risks and in practical terms would require major changes in the opinion.⁴⁴⁴

He added that he had talked to O'Connor's clerk who, he said, had "asked me to tell you that she was 'surprised and shocked' by JUSTICE REHNQUIST'S letter and will stay with you whether or not you follow its suggestions."⁴⁴⁵

As winter turned to spring in 1985, therefore, the Court appeared no closer to a resolution than it had been in October 1983, when it first considered taking the case. Far from having clarity or consensus developing with the passage of time, the Court was more splintered than ever, with the fate of *Gertz* very much still up in the air and that of *Sullivan* not far behind.

440. *Id.* at 2 (with handwritten notes from Justice Powell).

441. Memorandum from Daniel Ortiz for Justice Powell 1 (Mar. 1, 1985) (on file with the Powell Papers, Washington and Lee Law Library), available at <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>. This characterization is not entirely accurate. In *Rosenbloom*, the question was whether the "knowing-or-reckless-falsity [constitutional] standard applies in a state civil libel action brought not by a 'public official' or a 'public figure' but by a private individual." *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 31 (1971) (plurality). Here, in contrast, the question was whether the First Amendment would apply at all.

442. Memorandum from Daniel Ortiz for Justice Powell, *supra* note 441, at 1.

443. *Id.* See *supra* notes 397–400 and accompanying text.

444. Memorandum from Daniel Ortiz for Justice Powell, *supra* note 441, at 3.

445. *Id.*

IV. ACT IV—DEFENDING *SULLIVAN* AND REGRETTING *GERTZ*

On March 4, 1985, still recuperating and “handicapped here in the apartment without books and face-to-face discussion with Justices as well as” his clerks, Powell dictated a “MEMO TO MYSELF,” in which he once again attempted to sort out his options.⁴⁴⁶ In it, he made a telling, albeit private, concession:

As I view it now, my opinion in *Gertz* is an example of overwriting a Court opinion. I said much that was unnecessary to a decision of that case. A large part of *Gertz* is *dicta*.⁴⁴⁷

Thus, Powell found himself “left in something of a dilemma particularly in view of what I wrote (perhaps unnecessarily) in *Gertz*.”⁴⁴⁸

A. *The Contours of Compromise*

As Powell continued to assess his options, his clerk talked to Rehnquist’s and confirmed that Rehnquist was asking Powell “to drop entirely the private expression prong of your ‘private expression on a matter of private concern’ test,” which Powell’s law clerk reminded him makes Rehnquist’s “position practically identical” to White’s.⁴⁴⁹ On March 7, therefore, Powell sketched out by hand the contours of a “possible compromise.”⁴⁵⁰ He could, he wrote, “de-emphasize” his previous reliance on the concept of “private expression,” retain his “emphasis on ‘private concern’ but leave open when *expression* may be viewed as *public*.”⁴⁵¹ Thus, in *Greenmoss Builders*, “where there was no *public* interest in the [*New York Times*] sense, I’d reach [the] same result if D&B had circulated to 1000 customers.”⁴⁵² Such a narrow holding, Powell thought, would leave open the question of constitutional protection in a case in which “the D&B report to 1000 had said the *only bank* in town was bankrupt,” which would presumably be a matter of

446. Personal Memorandum of Justice Powell 1 (Mar. 4, 1985) (on file with the Powell Papers, Washington and Lee Law Library), available at <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>.

447. *Id.* at 1–2.

448. *Id.* at 5.

449. Memorandum from Daniel Ortiz for Justice Powell 1 (Mar. 5, 1985) (on file with the Powell Papers, Washington and Lee Law Library), available at <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>.

450. Personal notes of Justice Powell (Mar. 7, 1985) (on file with the Powell Papers, Washington and Lee Law Library), available at <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>.

451. *Id.*

452. *Id.*

“local public concern.”⁴⁵³ Powell asked himself whether this would be “the type of public concern with the *NYT/Gertz* sense of ‘robust debate’ on public issues?”⁴⁵⁴ In his notes, Powell avoided answering his own question, positing only that a “Johns Manville or Continental Bank situation *would be* of national economic concern” and in those circumstances the “expression would be public.”⁴⁵⁵ In the end, Powell suggested, he could simply “leave open when the expression is public.”⁴⁵⁶

Ultimately, this is what Powell chose to do. He circulated a fourth draft of his opinion to O’Connor and Rehnquist privately. In it, he removed virtually all express references to the concept of “public expression” and focused instead solely on the distinction between “matters of public concern,” on the one hand, and “expression on a matter of purely private concern,” on the other.⁴⁵⁷ It professed “no need to define precisely what constitutes expression on matters of private concern” because “it is clear that the libelous speech at issue here implicates the First Amendment at most only tangentially.”⁴⁵⁸ It provided no further guidance beyond the assertion that “[p]etitioner’s credit reporting is a matter of private concern, for it is speech solely in

453. *Id.*

454. *Id.*

455. *Id.* At the time, Johns-Manville, one of the nation’s largest asbestos manufacturers, was litigating numerous product liability cases brought by customers and by employees in its manufacturing plants. See Barnaby Feder, *Asbestos Injury Suits Mount, With Severe Business Impact*, N.Y. TIMES, July 3, 1981, at A1 (noting that “[m]ore than 400 new suits [were] filed each month against . . . Johns-Mansville”). According to the *Times*, “since millions of Americans ha[d] already been significantly exposed [to asbestos], some accountants and businessmen [wondered] whether Johns-Manville and other industrial defendants, and the insurance companies backing them, ha[d] the means to compensate all of the potential victims.” *Id.* at D4. Continental Illinois National Bank and Trust Company was, at the time, the subject of multiple press reports arising from its own financial difficulties and resulting concerns that the bank might fail. See Peter T. Kilborn, *The High-Stakes Scramble to Rescue Continental Bank*, N.Y. TIMES, May 21, 1984, at A1; Sharon Stangenes, *Continental Bank No More: Closing The Book On Chicago’s Oldest Financial Institution*, CHI. TRIB., Aug. 31, 1994, at 1. See generally *Snyder v. Phelps*, __U.S.__, 131 S. Ct. 1207, 1216 (2011) (“Speech deals with matters of public concern when it can ‘be fairly considered as relating to any matter of political, social, or other concern to the community,’ or when it ‘is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.’”) (internal citations omitted); *In re Apex Long Term Acute Care—Katy, L.P.*, 465 B.R. 452, 458 (Bankr. S.D. Tex. 2011) (bankruptcy is a matter of “distinct[] public concern”); *In re Shulman Transp. Enters., Inc.*, 744 F.2d 293, 294 (2d Cir. 1984) (same).

456. Personal notes of Justice Powell, *supra* note 450.

457. Justice Powell, Draft Dissent Four 3 (*Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*) (Mar. 13, 1985) (on file with the Brennan Papers, Library of Congress Manuscript Division) (on file with the Washington Law Review).

458. *Id.* at 7.

the individual economic interest of the speaker and its specific business audience”⁴⁵⁹ and a footnote suggesting that “commercial reporting disseminated in the general public interest would involve different considerations.”⁴⁶⁰ All that was left of the “public expression” concept was a sentence in another footnote, in which Powell noted that the “particular information contained in the disputed credit report, for example, was made available to only five business subscribers, who, under the terms of the subscription agreement, could not disseminate it any further.”⁴⁶¹ The significance of this observation was not further explained.

On March 12, before it had been circulated to the Conference, Rehnquist reaffirmed his support for Powell’s new approach in a letter thanking him “for your response to my suggestions” and pronouncing himself “happy to join your fourth draft.”⁴⁶² It appears that this letter was inadvertently copied to all the other Justices, since Brennan’s chambers received it that day as well and Rehnquist sent a more formal “join”⁴⁶³ letter to Powell, with a copy to the Conference, the following week. Indeed, on March 13, Powell wrote a “personal” letter to Burger, with copies only to O’Connor and Rehnquist, in which he related “some good news in this case at long last.”⁴⁶⁴ He informed Burger that “Sandra, Bill Rehnquist, and I have been cooperating, and the three of us have agreed on the draft (my 4th draft) that I am circulating today.”⁴⁶⁵ Powell described for Burger his “understanding that this draft is in accord with your views also” and took the opportunity to remind him that his “vote will at least give us a plurality to affirm the decision, and prevent the constitutionalizing of all libel law that Bill Brennan’s opinion would accomplish.”⁴⁶⁶ Oddly, there is no indication either that Powell reached

459. *Id.*

460. *Id.* at 9 n.11.

461. *Id.* at 7–8 n.8.

462. Letter from Justice Rehnquist to Justice Powell and the Conference (Mar. 12, 1985) (on file with the Powell Papers, Washington and Lee Law Library), *available at* <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>.

463. A “join” letter is the way a Justice expresses intent to sign on to another’s draft opinion that has been circulated among them. The letter literally says, “Please join me” in the opinion. The custom has long persisted despite the odd syntax, which seems to suggest that the opinion author is joining the letter-writer, rather than the letter-writer joining the opinion author.

464. Letter from Justice Powell to Chief Justice Burger and Justices Rehnquist and O’Connor (Mar. 13, 1985) (on file with the Powell Papers, Washington and Lee Law Library), *available at* <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>.

465. *Id.*

466. *Id.*

out to White now that he had effectively made the changes White had previously requested or that, having reviewed Powell's draft, White seriously reconsidered whether he could or would join it.

B. Brennan Strikes Back

For Brennan and his clerks, who had been collectively unaware of the jockeying over Powell's now-abandoned "public expression" concept, Rehnquist's decision to join Powell was significant for a very different reason. By joining Powell, Rehnquist had effectively deprived White of any additional votes for his repudiation of *Sullivan*, with the possible exception of Burger's. And, even as Powell continued to court Burger's vote, Brennan thought he had at least some reason to believe that the unpredictable Burger would join him, which would create a majority through which to rebut both Powell and White.

On March 20, Brennan finally circulated his own revised opinion, including his rejoinder to White and now to Powell's latest position. Still styled as an opinion for the Court, Brennan set out the question presented as he at that juncture continued to understand it—i.e., "whether *Gertz* should be restricted to cases that do not involve 'nonmedia' defendants or speech about economic and commercial matters."⁴⁶⁷ To this, Powell wrote in the margin of his own copy, "not the Q."⁴⁶⁸ Brennan further purported to "reject any distinction between 'media' and 'nonmedia' defendants."⁴⁶⁹ In the body of the opinion, Brennan shifted the analysis on this score slightly, ascribing the proposed media/nonmedia distinction to "Respondent" (rather than to Powell) and noting that Powell now "seeks the same result solely on the basis of the content of the speech."⁴⁷⁰ Brennan wrote that "both approaches" were not only "unworkable and irreconcilable with our precedents," but "[m]ore fundamentally" they "contravene basic First Amendment values."⁴⁷¹ Indeed, Brennan wrote, "[o]nly legal alchemy could transform these independently insufficient rationales into a legitimate justification for denying the type of speech at issue in this case any protection from the chill of unrestrained presumed and punitive

467. Justice Brennan, Draft Opinion Four 1 (*Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*) (Mar. 20, 1985) (on file with the Powell Papers, Washington and Lee Law Library), available at <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>.

468. *Id.* (with handwritten notes of Justice Powell).

469. *Id.* at 3.

470. *Id.* at 20–21.

471. *Id.* at 21.

damage awards.”⁴⁷²

Brennan mounted a full-throated defense of *Sullivan*, which emphasized the difficulty of litigating the issue of truth in a courtroom as well as a self-governing society’s fear of designating any branch of government—including the judiciary—as an arbiter of political truth:

Even if the erroneous assertion were not the inevitable companion of the truthful one in robust discourse, the difficulty of litigating the question of “truth” would, we suggested in *New York Times v. Sullivan*, still stand as a daunting deterrent. Our cases in the two decades since that decision bear out this perception about the judicial risks of a judicial test of truth. Often the spoken or written word will capture a judgment, inference or interpretation the “truth” of which is not readily susceptible to adjudication. [*Bose*]. “Truth” will often be a matter of degree or context. [*Greenbelt*]. Particularly when we debate the unwisdom of a policy or political point of view, our perspective on “truth” will be colored by the shared assumptions of the day; often what seems truth is but fashion. . . . The amorphous essence of political “truth” creates the risk of erroneous imposition of liability, and thereby chills debate, even when a jury seeks to discharge its duty in good faith. When the speaker is unpopular and the jury hostile, a rule of law permitting the imposition of liability for mere inaccuracy gives the jury *carte blanche* to oppress.⁴⁷³

Indeed, Brennan took pains to elaborate the basis for his concern about making the government the final arbiter of truth:

The aversion to a judicial test of political truth also reflects a related judgment about the propriety of vesting an organ of government with such powers to say what the truth is. . . . When we entrust to courts, to the government, the unfettered power to resolve ambiguous questions about the truth of political expression we cede a measure of our individual liberty and right of self-government and hazard a regime of imposed orthodoxy. . . . Sharp criticism and free trade in political ideas does not guarantee the discovery of political truth, but our Constitution embodies the judgment that it is far better to risk error than suffer tyranny.⁴⁷⁴

Although his draft did not mention or otherwise discuss either case

472. *Id.*

473. *Id.* at 7–8 (internal citations omitted).

474. *Id.* at 8–9.

specifically, it seems obvious that Brennan had in mind the trials in *Westmoreland v. CBS, Inc.*⁴⁷⁵ and *Sharon v. Time, Inc.*⁴⁷⁶ These cases, which had then only recently concluded in New York, had spawned much discussion and criticism of the role of *Sullivan* in those extraordinarily expensive examples of litigation viewed by many as designed to yield a definitive “verdict” on the truth of issues such as the propriety of U.S. involvement in Vietnam and the Israeli incursion into Lebanon.⁴⁷⁷ It is indeed difficult to read Brennan’s opinion and not conclude that he was, at the same time, attempting both to rebut White’s attack on *Sullivan* and to explain how it had since been misperceived by litigants and misconstrued by courts:

Nor would a shift in emphasis from proof of defendant’s state of mind to proof of the truth of the challenged speech reduce the chilling effect of litigation costs. Allegations of libel will often raise difficult historical or policy questions that can only be answered through complex, and consequently expensive, litigation. The would-be critic will be deterred not only by the cost of his or her own attorney fees but also by the prospect of liability for the other side’s fees if the jury verdict is unfavorable. And this approach adds incremental deterrence because it encourages public officials to sue to vindicate their reputations and thereby increases the number of libel suits a would-be critic will be faced with defending. Thus the suggested alternative would result in more suits and more victories for plaintiffs and would not significantly reduce the deterrent potential of damages that could be awarded in these suits.⁴⁷⁸

In crafting his new opinion, Brennan considered whether to abandon the support for *Gertz* that had characterized his earlier drafts (and effectively driven away White) and to advocate instead the position he had previously championed in *Rosenbloom*. After all, now that White was in dissent, Brennan no longer needed to defend *Gertz* to secure White’s vote (perverse as that logic might have been, it was actually quite right—White had earlier indicated his willingness to join Brennan’s majority only if the Court were not prepared to overrule *Gertz*⁴⁷⁹). In addition, Burger, whose vote Brennan now needed to

475. 601 F. Supp. 66 (S.D.N.Y. 1984); *see also supra* note 225.

476. 599 F. Supp. 538 (S.D.N.Y. 1984); *see also supra* note 225.

477. These cases are discussed in detail in note 225.

478. Justice Brennan, Draft Opinion Four, *supra* note 467, at 11–12 (internal citations omitted).

479. White’s earlier position is discussed at notes 203–204, 269–272 and accompanying text.

cobble together a majority, had joined his plurality in *Rosenbloom*.⁴⁸⁰

Ultimately, however, Brennan determined that he was not likely to secure Burger's vote, no matter what position he took on *Gertz*. As a result, he concluded that his "best course" would be to accept *Gertz* and attempt to explain its rationale and rules in a way that would further the law's development in more constructive directions.⁴⁸¹ In Brennan's view, because "future debate would be about the scope of *Gertz*," no matter what his opinion in *Greenmoss Builders* said, "the most leverage could be brought to bear by staying with *Gertz* at this time, even if he thought the *Rosenbloom* approach correct."⁴⁸² In addition, as his Term History explains, Brennan feared that "Powell and White between them had so destabilized defamation law by abandoning *Gertz* and moving right" that he should not "exacerbate the uncertainty by abandoning *Gertz* and moving left."⁴⁸³ And, of course, Brennan was fairly certain that, if he too attacked *Gertz*, he would lose the votes of Marshall (who had not joined him in *Rosenbloom* and was an early supporter of Powell in *Gertz*) and Stevens.⁴⁸⁴

For his part, it appears that Powell did not know quite what to make of this last addition to Brennan's opinion. When he read Brennan's explication of *Gertz*'s reasoning (from which Brennan subtly disassociated himself, but not the Court, by employing phrasing such as "[t]his approach was thought"⁴⁸⁵), Powell wrote words like "true" in the margins of his copy.⁴⁸⁶ But, when he got to the heart of Brennan's recounting of the reasoning in *Gertz*—i.e., that its holding applied to *all* speech by *all* speakers—Powell took to scribbling words like "no" and "not so" in the margins.⁴⁸⁷ In a separate handwritten note to himself addressing Brennan's "new draft,"⁴⁸⁸ Powell again took issue with

480. See Levine & Wermiel, *supra* note 11 (reporting that Burger joined Brennan's opinion in *Rosenbloom* largely because he did not approve of the activities of the plaintiff, a so-called "smut peddler").

481. Justice Brennan, 1984 Term Histories, *supra* note 222, at 99.

482. *Id.*

483. *Id.*

484. *Id.*; see *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 79 (1971) (Marshall, J., dissenting) ("Courts, including this one, are not anointed with any extraordinary prescience. . . . [Nonetheless, under the plurality's opinion,] courts will be required to somehow pass on the legitimacy of interest in a particular event or subject; what information is relevant to self-government.").

485. Justice Brennan, Draft Opinion Four, *supra* note 467, at 13.

486. *Id.* (with handwritten notes of Justice Powell).

487. *Id.* at 14, 16.

488. Handwritten note of Justice Powell responding to Justice Brennan's Draft Opinion Four of Mar. 20, 1985 (undated) (on file with the Powell Papers, Washington and Lee Law Library), available at <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>.

Brennan's characterization of *Gertz's* holding—i.e., that it “precluded presumed or punitive damages in ‘any libel action’”—reassuring himself (after wondering “Did I say this?”) that *Gertz* had left the standard of liability to the States and that its holding with respect to presumed and punitive damages “applied to suit by *private* individuals versus a *media* defendant and where [the] *subject* was of *public interest*.”⁴⁸⁹

C. Enter Justice Stevens

Brennan's own concerns about forming a majority were driven home within one day of the circulation of his March 20 draft when he received what he later described as a “dispiriting” private letter from Stevens.⁴⁹⁰ To Brennan's dismay, Stevens had written to express “serious misgivings” about Brennan's opening section—his pointed defense of *Sullivan* against White's attack.⁴⁹¹ Stevens wrote that he found Brennan's argument “less persuasive” than *Sullivan* itself and urged him to limit himself to “nothing more than a few appropriate quotations” from *Sullivan* coupled with “a brief reference to its solid acceptance in the jurisprudence of the Court.”⁴⁹² More significantly, Stevens rejected

489. *Id.* Powell was right insofar as he disagreed with Brennan's characterization of the holding in *Gertz*. See *Gertz v. Welch, Inc.*, 418 U.S. 323, 349 (1974). Powell's apparent frustration with Brennan's draft continued on March 21, when his clerk provided Powell with a written analysis of it. The clerk characterized Brennan's work as his “strongest draft yet” and told Powell that “[a]part from making a very strong and spirited defense of *New York Times v. Sullivan*, it makes two points which you should keep in mind”—specifically, that the “case concerns only damages rules and not liability standards” and that Brennan's opinion “tries to hold you to much of your language in *Gertz*.” Memorandum from Daniel Ortiz for Justice Powell 1–2 (Mar. 21, 1985) (on file with the Powell Papers, Washington and Lee Law Library), available at <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>. Beyond identifying the issues and offering some alternative responses (for example, on the issue of whether to leave open whether Powell's analysis would apply to the liability standard as well, “I would be happy taking either position, but I am not sure how much sense it would make to say that the First Amendment either does or might abrogate one kind of standard but not the other,” *id.* at 1), the clerk focused on the strategic implications of their response to Brennan's draft:

Because the only two votes still up in the air are THE CHIEF JUSTICE'S and JUSTICE WHITE'S, I would suggest that you make no changes at this point unless you feel that there is a danger that they might be persuaded by some of JUSTICE BRENNAN'S criticisms. It would be better, I feel, to wait to see what changes they may suggest before trying to answer JUSTICE BRENNAN. Also, it would be easier to respond to JUSTICE BRENNAN when we transform the opinion into a plurality or (we can hope) majority opinion. For now, I suggest you just sit tight.

Id. at 2.

490. Justice Brennan, 1984 Term Histories, *supra* note 222, at 100.

491. Letter from Justice Stevens to Justice Brennan 1 (Mar. 21, 1985) (on file with the Brennan Papers, Library of Congress Manuscript Division) (on file with the Washington Law Review).

492. *Id.*

Brennan's contention that *Sullivan* was the "'well-spring' for the Court's First Amendment libel jurisprudence," conceding it "was indeed a great opinion and [that] it did mark the Court's first step into the field," but gently asserting that it was "a natural development of principles that have always underlain our First Amendment jurisprudence" and that it was "presaged by a solid common law development and scholarly opinion."⁴⁹³ And the central problem of defending *Sullivan* in the context of *Greenmoss Builders* did not escape Stevens's notice:

[T]he extensive and passionate discussion of the importance of public debate . . . strikes me as somewhat counterproductive in the context of the particular facts of this case. As I read these parts of the opinion I kept asking myself whether the arguments shed much light on the question whether commercial credit reports are entitled to special protection.⁴⁹⁴

In the end, Stevens counseled, "[u]nless someone joins Byron,"⁴⁹⁵ Brennan could and, in Stevens's view should, "safely assume that eight members of the Court (perhaps I should say seven) accept the basic holding in *New York Times*."⁴⁹⁶ It was then not entirely certain to which of his colleagues Stevens was referring in the quoted parenthetical—the mystery, however, would be cleared up soon enough.

As disappointed as he was by Stevens's response, Brennan knew that he had no choice but to accommodate him. After all, as he later

493. *Id.* Indeed, in *Sullivan*, Brennan drew not only from the Court's previous First Amendment precedent applying a categorical approach to define those narrow categories of expression left unprotected, including perhaps most significantly his own opinion in *Roth v. United States* employing the concept of definitional balancing to bring much allegedly "obscene" speech within the protections of the First Amendment, *see* *N.Y. Times, Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (citing *Roth v. United States*, 354 U.S. 476 (1957)), but also from ongoing development of the common law, most notably his derivation of the actual malice standard from an analogous concept adopted by the Kansas Supreme Court in *Coleman v. MacLennan*, 98 P. 281 (Kan. 1908), *see Sullivan*, 376 U.S. at 272–76. For his part, Stevens did much the same in his own opinion for the Court just the previous year in *Bose Corp. v. Consumer Union of U.S., Inc.* 466 U.S. 485, 504 (1984) (explaining necessity of independent appellate review of defamation judgments, in significant part, based on both common law principles and role of courts in determining whether the expression at issue in a given case falls within a defined category of speech unprotected by the First Amendment). *See also* *Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001) (Stevens, J.) ("It was the overriding importance of that commitment [to debate] that supported our holding [in *Sullivan*] that neither factual error nor defamatory content, nor a combination of the two, sufficed to remove the First Amendment shield from criticism of official conduct."); *supra* notes 126 and 302 and accompanying text.

494. Letter from Justice Stevens to Justice Brennan, *supra* note 491, at 1–2.

495. *Id.* at 2.

496. *Id.*

explained it, “[g]iven White’s broadside,”⁴⁹⁷ a defense of *Sullivan* that Stevens declined to join would suggest that support for the case “was crumbling on the Court.”⁴⁹⁸ In his response to Stevens that same day, Brennan “confess[ed]” that his draft “reflects concern that Byron’s propositions might attract support” and conceded it was “[p]erhaps . . . an overreaction.”⁴⁹⁹ He told Stevens that his “suggestion that eight (or at least seven) of the Court accept the basic holding of *New York Times* is very comforting” and ended his private letter by assuring Stevens that he would “be trying to adjust the circulation along the lines that you suggest.”⁵⁰⁰

D. *White Responds and Powell Reacts*

Although Marshall and Blackmun were advised of Brennan’s plans through their law clerks, Brennan held back another draft for a time, concerned “that hasty withdrawal of the defense of *Times* would further encourage White.”⁵⁰¹ Thus, on March 29, White fired back at the original draft in what Brennan described as “harsh tones,”⁵⁰² specifically aiming his shots at the initial draft’s defense of *Sullivan*. Among other things, White took issue with what he characterized as Brennan’s suggestion “that courts, as organs of the government, cannot be trusted to discern what the truth is” in a defamation action.⁵⁰³ To this, White asserted that “[i]t is perverse indeed to say that these bodies are incompetent to inquire into the truth of a statement of fact in a defamation case” when “[w]e entrust to juries and the courts the responsibility of decisions affecting the life and liberty of persons.”⁵⁰⁴

In addition, White noted the changes that Powell had made to his own opinion, applauding the fact that Powell “does not rest his application of a different rule here on a distinction drawn between media and non-media defendants” and noting his agreement with Brennan that the “First Amendment gives no more protection to the press in defamation suits

497. Justice Brennan, 1984 Term Histories, *supra* note 222, at 101.

498. *Id.*

499. Letter from Justice Brennan to Justice Stevens (Mar. 21, 1985) (on file with the Brennan Papers, Library of Congress Manuscript Division) (on file with the Washington Law Review).

500. *Id.*

501. Justice Brennan, 1984 Term Histories, *supra* note 222, at 101.

502. *Id.*

503. Justice White, Draft Dissent Four 5 n.2 (*Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*) (Mar. 29, 1985) (on file with the Brennan Papers, Library of Congress Manuscript Division) (on file with the Washington Law Review).

504. *Id.*

than it does to others exercising their freedom of speech.”⁵⁰⁵ On this score, however, White concluded his analysis with a bow toward Powell:

If *Gertz* is to be distinguished from this case, it should be on the ground that it applies only where the allegedly false publication deals with a matter of general or public importance. If the false publication does not deal with such a matter, the common-law rules would apply whether the defendant is a member of the media or other public disseminator or a non-media individual publishing privately.⁵⁰⁶

As Powell’s clerk noted to his Justice upon reading White’s opinion, “Justice White has eliminated his attacks on your opinion from this draft. He adds nothing that requires a response from us.”⁵⁰⁷

Accordingly, after giving O’Connor and Rehnquist a sneak preview on March 28 of the changes he proposed to make in response to Brennan, and securing at least O’Connor’s agreement to them, Powell circulated a new draft of his own on April 1. “There is a good deal more that could be said in reply,” he wrote to O’Connor and Rehnquist, “but I am inclined to think that our view of this case is adequately stated Bill Brennan’s opinion, although 50% longer, still would constitutionalize the entire law of libel.”⁵⁰⁸ Predictably, Powell took on Brennan’s description of the sweep of *Gertz*, accusing him of “mischaracteriz[ing] that case and mistak[ing] its holding.”⁵⁰⁹ As Powell now saw it, “[l]ike every other case in which this Court has found constitutional limits on state laws of defamation, *Gertz* involved expression directly relevant to the effective operation of our system of democratic self-government.”⁵¹⁰

E. The Chief Justice

Although Powell remained hopeful that his fifth draft would attract Burger’s vote and thereby give Powell at least a plurality, O’Connor was not so sure. On March 29, before Powell had even circulated his draft,

505. *Id.* at 9.

506. *Id.* at 10.

507. *Id.* at 1 (with handwritten notes from Daniel Ortiz).

508. Letter from Justice Powell to Justices Rehnquist and O’Connor (Mar. 28, 1985) (on file with the Powell Papers, Washington and Lee Law Library), available at <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>.

509. Justice Powell, Draft Dissent Six 5 (*Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*) (Apr. 1, 1985) (on file with the Brennan Papers, Library of Congress Manuscript Division) (on file with the Washington Law Review).

510. *Id.*

O'Connor wrote to him and to Rehnquist that she was "somewhat concerned that the Chief ha[d] not yet joined" Powell's opinion and confided that she "spoke to him about a week ago expressing my earnest hope that he would be joining."⁵¹¹

After receiving Powell's latest draft, however, Burger sent a pair of curious notes to Powell and to White, on April 9 and 10 respectively, the latter of which was copied to the Conference. To Powell, Burger wrote that he had "long struggled with this case" and reminded Powell that "[y]ou know what I think of the excess of *New York Times* and my reservations on your *Gertz*."⁵¹² In the end, he told Powell, "I think my views are best served by joining both you and Byron. This is a 'tight rope' to walk and I hope I can do it *sans* explanation."⁵¹³ The next day, Burger sent a similar note to White, in which he advised him that "I have joined Lewis, but I will also join your concurring opinion."⁵¹⁴

In Brennan's chambers, Burger's proclamation was treated with derision. It did not seem to phase the Chief Justice, Brennan's Term History asserted, that White's opinion proceeded from the premise that *Gertz* (and *Sullivan*) had been wrongly decided, while Powell's opinion endorsed both of them, and particularly *Gertz*.⁵¹⁵ A Brennan clerk (and perhaps others) alerted Burger's chambers to the "problem," and the clerk thought that Burger's administrative assistant "immediately assumed a stiffly defensive posture."⁵¹⁶

In Powell's chambers, the Burger position produced a more sympathetic response. Powell's clerk wrote to him that, in the wake of Burger's letter, he had "reread JUSTICE WHITE'S opinion in this case and believe[d] that there [was] no technical inconsistency between it and yours."⁵¹⁷ He described White's opinion as reflecting two "*alternat[ive]*

511. Letter from Justice O'Connor to Justices Powell and Rehnquist (Mar. 29, 1985) (on file with the Powell Papers, Washington and Lee Law Library), *available at* <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>.

512. Letter from Chief Justice Burger to Justice Powell (Apr. 9, 1985) (on file with the Powell Papers, Washington and Lee Law Library), *available at* <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>.

513. *Id.*

514. Letter from Chief Justice Burger to Justice White and the Conference (Apr. 10, 1985) (on file with the Brennan Papers, Library of Congress Manuscript Division) (on file with the Washington Law Review).

515. Justice Brennan, 1984 Term Histories, *supra* note 222, at 101.

516. *Id.* at 102.

517. Memorandum from Daniel Ortiz for Justice Powell I (Apr. 9, 1985) (on file with the Powell Papers, Washington and Lee Law Library), *available at* <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>.

holdings (i) that *New York Times* and *Gertz* are no longer good law and (ii) that, even if they are, they do not apply here for the reason you state in your opinion.”⁵¹⁸ Moreover, the clerk wrote, if Powell were to point out to Burger “the implicit contradiction of joining both”⁵¹⁹ his and White’s opinion, “you stand the risk of losing him to JUSTICE WHITE completely.”⁵²⁰ In any event, Burger did clarify his position the following day, and thereby revealed himself unambiguously as the Justice cryptically referenced in Stevens’ parenthetical,⁵²¹ advising his colleagues that he would “add something along the following line”:

I join those parts of Justice Powell’s opinion essential to the disposition of the case; I agree generally with Justice White’s opinion with respect to *Gertz v. Robert Welch, Inc.* and *New York Times Co. v. Sullivan*.⁵²²

Burger’s clarification, however, “concerned” Powell, who wrote confidentially to the Chief Justice the next day and told him that “[u]nless this language is refined, I cannot include you in what we have hoped would be a plurality opinion.”⁵²³ More specifically, he informed Burger that “since it is not clear which parts of my opinion you believe are ‘essential to the disposition of the case’ and which parts are not, other courts looking for guidance will have doubts as to where a majority of the Court stands.”⁵²⁴ Remarkably, Powell attempted to convince Burger that his opinion simply did not speak to the issue of whether *Sullivan* and *Gertz* are and should remain good law:

It was necessary for me to cite *Gertz* and *New York Times* to distinguish them. As Byron [White]’s opinion implicitly recognizes, *Gertz* and *New York Times* at present are “the law.” I simply did not consider—and the disposition of this case does not require us to consider—whether these two cases should be

518. *Id.* (emphasis in original).

519. *Id.*

520. *Id.* at 1–2.

521. See Letter from Justice Stevens to Justice Brennan, *supra* note 491, at 2 (“Unless someone joins Byron, it would seem to me that you could safely assume that eight members of the Court (perhaps I should say seven) accept the basic holding in *New York Times* and are merely concerned with the scope of that holding.”).

522. Memorandum from Chief Justice Burger for the Conference (Apr. 11, 1985) (on file with the Powell Papers, Washington and Lee Law Library), available at <http://law.wlu.edu/powellarchives/page.asp?pageid=1355> (internal citations omitted).

523. Letter from Justice Powell to Chief Justice Burger 1 (Apr. 12, 1985) (on file with the Powell Papers, Washington and Lee Law Library), available at <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>.

524. *Id.*

reversed.⁵²⁵

Accordingly, Powell encouraged Burger to recraft his statement to read: “I join Justice Powell’s opinion disposing of this case; I agree generally, however, with Justice White’s opinion with respect to *Gertz* and *New York Times*.”⁵²⁶ This, Powell wrote, “would give us a solid plurality for the reasons why the entire law of libel should not be constitutionalized, and—with Byron’s opinion—there would be clear guidance to all lower courts.”⁵²⁷ Finally, Powell wrote, “I have talked to Bill Rehnquist about this, and he also hopes that you can make this sort of clarification of your views. You would still fully preserve your views as to *Gertz* and *New York Times*.”⁵²⁸

As Powell recognized, with Burger’s vote, there were now five justices committed to affirming the Vermont Supreme Court. On April 22, therefore, Powell again wrote to Burger to remind him that he needed to “confirm your assignment of this case to me” so that he could “convert my dissent into a plurality opinion for the four of us.”⁵²⁹ Accordingly, on April 22, Burger formally reassigned the majority opinion to Powell, “with all the ‘pluses’ and ‘minuses’ that go with it!”⁵³⁰

Thus, what had started as an interesting but not especially difficult defamation case was now the focus of major drama within the Supreme Court. And at least inside the Court support was clearly eroding for *Sullivan*, the landmark that had universally been considered the solid and immutable foundation of modern First Amendment jurisprudence. Although Brennan tried to convince himself otherwise, it must have shaken his faith in his own legacy as the Justice who had both discovered and articulated the “central meaning” of the First Amendment. As the drama entered its final Act, at least from Brennan’s perspective, there was no “occasion for dancing in the streets.”⁵³¹

525. *Id.*

526. *Id.* at 2.

527. *Id.*

528. *Id.*

529. Letter from Justice Powell to Chief Justice Burger (Apr. 22, 1985) (on file with the Powell Papers, Washington and Lee Law Library), available at <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>.

530. Letter from Chief Justice Burger to Justice Powell and the Conference (Apr. 22, 1985) (on file with the Powell Papers, Washington and Lee Law Library), available at <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>.

531. See Kalven, *supra* note 3, at 221 n.125 (quoting Meiklejohn as having said of the *New York Times Co. v. Sullivan* case, “It is . . . an occasion for dancing in the streets”); see also *supra* note 380.

V. ACT V—LITTLE ADO ABOUT SOMETHING?

A. *Brennan Regroups*

Burger's reassignment of the opinion to Powell, coupled with his perceived need to accommodate Stevens, led Brennan to change course yet again. Now that he was in dissent, Brennan decided that the best strategy was to "make the case seem as idiosyncratic and trivial as possible" and to stress that the Court was not speaking with a single voice even then.⁵³² And, he decided, he would position the dissent less as an angry attack on the Court's abandonment of core First Amendment principles, and more as a clarification and reminder that the Court had done precisely the opposite—i.e., though he and Powell might disagree on how to deal with this "trivial" case, there was no question that the Court remained solidly committed to the fundamental constitutional doctrine laid out in *Sullivan*.⁵³³ Accordingly, Brennan's new draft began as follows:

This case involves a difficult question of the proper application of *Gertz v. Robert Welch, Inc.* to credit reporting—a type of speech at some remove from that which first gave rise to explicit First Amendment restrictions on state defamation law—and has produced a diversity of considered opinions, none of which speaks for the Court. JUSTICE POWELL'S plurality opinion affirming the judgment below would not apply the *Gertz* limitations on presumed and punitive damages to this case; rather, the three Justices joining that opinion would hold that the First Amendment requirement of actual malice . . . should have no application in this defamation action because the speech involved a subject of purely private concern and was circulated to an extremely limited audience. Establishing this exception, the opinion reaffirms *Gertz* for cases involving matters of public concern and reaffirms *New York Times Co. v. Sullivan* for cases in which the challenged speech allegedly libels a public official or a public figure.⁵³⁴

Brennan then added a few lines to reaffirm the core principles of *Sullivan*:

532. Justice Brennan, 1984 Term Histories, *supra* note 222, at 102.

533. *Id.*

534. Justice Brennan, Draft Dissent One 1 (*Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*) (May 23, 1985) (on file with the Brennan Papers, Library of Congress Manuscript Division) (on file with the Washington Law Review) (internal citations omitted).

The four who join this opinion would reverse the judgment of the Vermont Supreme Court. We believe that, although protection of the type of expression at issue is admittedly not the “central meaning of the First Amendment,” *Gertz* makes clear that the First Amendment nonetheless requires restraints on presumed and punitive damage awards for this expression. The lack of consensus in approach to these idiosyncratic facts should not, however, obscure the solid allegiance the principles of *New York Times v. Sullivan* continue to command in the jurisprudence of this Court. See also *Bose Corp. v. Consumer's Union of the United States, Inc.*⁵³⁵

Brennan had successfully employed an analogous strategy in defining Powell's handiwork in the past—most notably in *Regents of the University of California v. Bakke*⁵³⁶—and he would make use of it again in future defamation cases—most notably *Milkovich v. Lorain Journal*.⁵³⁷ Still, Brennan remained unsure that Stevens would go along, even though the notion of the Court's ongoing support for *Sullivan* was his. Finally, Brennan decided to press his luck with Stevens by recasting his detailed defense of *Sullivan* as a long footnote. As his Term History put it, Brennan thought it was “worth a try.”⁵³⁸

B. *Powell Reworks*

In the meantime, Powell set about recrafting his own opinion, now ostensibly for a plurality, in an effort to secure Burger's unequivocal support. In that cause, he instructed his law clerk to revise the opinion to remove any overt endorsement of the ongoing validity of his own reasoning in *Gertz*.⁵³⁹ In hand editing on his clerk's draft, Powell

535. *Id.* at 2 (internal citations omitted).

536. 438 U.S. 265 (1978). In *Bakke*, with the Court split 4-1-4 over whether race could be used in affirmative action in medical school admissions, Brennan used the occasion to explain where Powell's solo opinion agreed with Brennan's, implicitly creating a majority. The technique highlighted points of agreement and blunted the impact of points of disagreement among the Justices. The practical effect was to keep the door open for the use of race in affirmative action in admissions for higher education.

537. 497 U.S. 1 (1990); see also Levine & Wermiel, *supra* note 11, at 44 (noting that, in *Milkovich*, Brennan set out “to write a dissent that could help shape the nature and reach of the Chief Justice's opinion”) (quoting Justice Brennan, 1989 Term Histories 83).

538. Justice Brennan, 1984 Term Histories, *supra* note 222, at 102.

539. Daniel Ortiz, Typewritten Draft Opinion for Justice Powell Announcing the Judgment of the Court 1 (*Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*) (May 4, 1985) (with handwritten notes from Justice Powell) (on file with the Powell Papers, Washington and Lee Law Library), available at <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>.

explained his decision to omit such language—"I hope [Burger] joins 100% after he sees this but he is not easy to persuade."⁵⁴⁰ On May 9, 1985, Powell delivered advance copies of his new "plurality" opinion to O'Connor and Rehnquist, explaining that he had "not changed the substance of what you have approved."⁵⁴¹ He added that he had written "the Chief a personal letter and talked to him sometime ago in an effort to persuade him that he could join our opinion without qualification, and still agree with Byron that *New York Times* and *Gertz* should be overruled. I do not know what he will do."⁵⁴² Later that same day, O'Connor pronounced the Powell plurality opinion to be "splendid" and predicted that "it will be helpful in a number of First Amendment cases in the future."⁵⁴³ The new opinion was circulated to the Conference on May 10.

When he received Powell's draft of what was now the Court's plurality opinion, White circulated it to his clerk, along with a handwritten note inquiring "what do I do to my concurrence?"⁵⁴⁴ On May 14, the clerk responded with a memorandum to his Justice that recommended "only minor modifications in response to Justice Powell's latest draft."⁵⁴⁵ Moreover, the clerk noted that, on what he termed White's "alternative rationale"—i.e., "that *Gertz* applies only to matters of public concern"—there now appeared to be "little or no distance between your opinion and Justice Powell's."⁵⁴⁶ Thus, the clerk asked whether White now wished to concur in Powell's opinion, rather than simply in the judgment. After all, the clerk reminded White, Powell had "deleted the discussion which you might have the most objection to," namely the suggestion that "a *Wall Street Journal* article" on the same subject "might be treated differently" than a credit report, because it was

540. *Id.*

541. Letter from Justice Powell to Justices Rehnquist and O'Connor (May 9, 1985) (on file with the Powell Papers, Washington and Lee Law Library), available at <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>.

542. *Id.*

543. Letter from Justice O'Connor to Justices Powell and Rehnquist (May 9, 1985) (on file with the Powell Papers, Washington and Lee Law Library), available at <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>.

544. Justice Powell, Draft Opinion One 1 (*Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*) (May 10, 1985) (with handwritten note from Justice White) (on file with the White Papers, Library of Congress Manuscript Division) (on file with the Washington Law Review).

545. Memorandum from Dean Gloster for Justice White 1 (May 14, 1985) (on file with the White Papers, Library of Congress Manuscript Division) (on file with the Washington Law Review).

546. *Id.*

circulated to a larger audience.⁵⁴⁷

White, however, never made any further overtures to Powell about joining his opinion and perhaps thereby having it speak for a majority of the Court. Although White himself has left no record of why he decided not to do so, at the time, his clerk recognized that White might have additional reasons for wanting to concur only in the judgment, beyond the obvious proposition that “a separate opinion, without a join, has more impact.”⁵⁴⁸ More importantly, the clerk wrote, “if your principal beef is with *Gertz* itself, you may not wish to join an opinion that applies what purports to be a *Gertz* categorical balancing of interests, but with a different weight on the free speech interest where a matter not of public concern is involved.”⁵⁴⁹ Moreover, the clerk noted, Powell’s latest draft, though “persuasive and well-reasoned on its face,” is “a little hard to take in light of the history of *Gertz*, which rejected *Rosenbloom*’s public interest/not public interest distinction.”⁵⁵⁰ In the clerk’s view, “[a] more forthright opinion would explain that it cut back on *Gertz* rather than applied it.”⁵⁵¹ Finally, the clerk recognized that “the two central points made in [White’s] opinion—that the balance in *New York Times* may have been improvidently struck and that there is no media/nonmedia distinction among the levels of protection accorded libel defendants—are not addressed by Justice Powell.”⁵⁵²

C. *Brennan’s Final Retreat*

On May 20, Brennan circulated his revised draft, now a dissent, to his putative allies, Marshall, Blackmun, and Stevens. He hoped to gain their approval before circulating it to others, especially to White. As Brennan reflected on it in his Term History, this tactic “proved sage”⁵⁵³ because, although Marshall and Blackmun expressed their approval, Stevens sent Brennan another private letter, this time focusing on his “concern[s]” about the newly added footnote.⁵⁵⁴ It ended with the somewhat ominous assertion that, “[e]ven though I am not sure I disagree with anything you have said, I am presently inclined to join all of your dissent except

547. *Id.* at 1–2.

548. *Id.* at 2.

549. *Id.*

550. *Id.*

551. *Id.* at 3.

552. *Id.*

553. Justice Brennan, 1984 Term Histories, *supra* note 222, at 103.

554. *Id.*

footnote 2.”⁵⁵⁵

This, in Brennan’s view, was the death knell for his direct rejoinder to White. Brennan was not only “disappointed” that Stevens’ objections had deprived him of that opportunity, he was also concerned that Stevens’ reluctance to join reflected Stevens’ own “desire to preserve substantial leeway for tinkering with the actual malice standard” in the future.⁵⁵⁶ Nevertheless, on May 22, he privately advised Marshall and Blackmun of Stevens’ position “that we circulate initially with footnote 2 deleted. His thought is that we don’t yet know what Byron may circulate when he converts his present dissent into a concurrence.”⁵⁵⁷ Brennan added that, “[i]f Byron repeats his attacks on the *Times/Sullivan* principles, we could then reconsider a response. If there is not to be one, I think John would wish to consider some revision of footnote 2. I have sent the draft to the printer with footnote 2 deleted.”⁵⁵⁸ Despite Brennan’s attempt to leave the door open in his letter to Marshall and Blackmun, and the arrival of a supportive note from Blackmun that same day,⁵⁵⁹ no version of footnote 2 would ever be reinserted. Instead, the dissent’s first footnote gently observed that White’s dissent “ventures some modest proposals for restructuring the First Amendment protections currently afforded defendants in defamation actions,” but asserted that White “agrees with *New York Times v. Sullivan*” that “the breathing space needed to ensure the robust debate of public issues essential to our democratic society is impermissibly threatened by unrestrained damage awards for defamatory remarks.”⁵⁶⁰

Brennan’s efforts to soften his attacks on Powell’s plurality opinion, and to emphasize instead the broad areas on which they agreed, was apparently lost on Powell himself. When he read Brennan’s draft of May

555. *Id.*

556. *Id.* In some respects, Brennan’s reservations proved prescient. Compare *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964) (Brennan, J.) (defining “actual malice” as requiring a “high degree of awareness” that the defamatory statement at issue was “probabl[y] fals[e]”), with *Harte-Hanks Commc’ns, Inc. v. Connaughton*, 491 U.S. 657, 667 (1989) (Stevens, J.) (asserting that defendant’s motives and ill will toward plaintiff may properly be considered in assessing “actual malice”); and *id.* at 692 (Stevens, J.) (suggesting that “purposeful avoidance of the truth” can constitute “actual malice”).

557. Letter from Justice Brennan to Justices Marshall and Blackmun (May 22, 1985) (on file with the Brennan Papers, Library of Congress Manuscript Division) (on file with the Washington Law Review).

558. *Id.*

559. Letter from Justice Blackmun to Justices Brennan, Marshall, and Stevens (May 22, 1985) (on file with the Brennan Papers, Library of Congress Manuscript Division) (on file with the Washington Law Review).

560. Justice Brennan, Draft Dissent One, *supra* note 534, at 2 n.1.

23, he told his law clerk, he did so “[w]ith an increasing rise in my blood pressure.”⁵⁶¹ On the Brennan draft itself, he sketched out by hand his proposed “answer” to Brennan’s opinion: “Effect of this opinion is to extend *NYT* to entire law of libel, a result contrary to the common law, to the history of our country, and with a total disregard of the interest of the individual in his reputation.”⁵⁶² To Brennan’s footnote assertion that “[o]ne searches *Gertz* in vain for a single word to support the proposition that limits on presumed and punitive damages obtained only when speech involved matters of public concern,”⁵⁶³ Powell protested in the margin that this question was “not at issue in *Gertz*.”⁵⁶⁴ And, in a memorandum to his law clerk, Powell fumed that Brennan’s dissent “repeatedly attributes to our opinion views we did not express.”⁵⁶⁵ In yet another memorandum, he sought his clerk’s views on the advisability of adding the following sentiment to his opinion:

If the dissent were the law, a woman of impeccable character who was branded a whore would have no effective recourse unless she could prove ‘malice’ by clear and convincing evidence—not in the ordinary meaning of that term but under the more demanding standard of *New York Times*. The dissent would, in effect, constitutionalize the entire common law of libel.⁵⁶⁶

In suggesting this, it apparently had slipped Powell’s mind that, when it came to both the standard of liability and the ability of a private figure plaintiff to recover actual damages for injury to reputation, Brennan’s dissent deferred entirely to Powell’s own formulations in *Gertz* which, among other things, did not obligate the “woman of impeccable character” to prove “malice” at all.⁵⁶⁷

561. Memorandum from Justice Powell for Daniel Ortiz 1 (May 27, 1985) (on file with the Powell Papers, Washington and Lee Law Library), available at <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>.

562. Justice Brennan Draft Dissent One, *supra* note 534, at 1 (with handwritten notes from Justice Powell) (on file with the Powell Papers, Washington and Lee Law Library), available at <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>.

563. *Id.* at 11 n.11.

564. *Id.*

565. Memorandum from Justice Powell for Daniel Ortiz, *supra* note 561, at 1.

566. Memorandum from Justice Powell for Daniel Ortiz (May 28, 1985) (on file with the Powell Papers, Washington and Lee Law Library), available at <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>.

567. See *Gertz v. Welch, Inc.*, 418 U.S. 323, 344 (1974) (“Private individuals are . . . more vulnerable to injury, and the state interest in protecting them is correspondingly greater.”); *id.* at 347 (“We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory

Powell's clerk, in contrast to his Justice, apparently recognized what Brennan was attempting to accomplish. He wrote to Powell that, "[o]n the whole," he was "surprised by the approach JUSTICE BRENNAN has taken. For the most part, his draft emphasizes the common ground between the justices' different positions and it attacks your opinion fairly mildly."⁵⁶⁸ And, he reminded his Justice, some of Brennan's criticisms of Powell's efforts to recast his opinion in *Gertz* were not entirely off the mark. He was particularly troubled by Brennan's reference to Powell's assertion in *Gertz* that:

[A] publisher or broadcaster of a defamatory error which a court deems unrelated to an issue of public or general interest may be held liable in damages even if it took every reasonable precaution to ensure the accuracy of its assertions. And liability may far exceed compensation for any actual injury to the plaintiff, for the jury may be permitted to presume damages without proof of loss and even to award punitive damages.⁵⁶⁹

"Unfortunately," the clerk told Powell, "these two sentences *do* suggest that the *Gertz* standards apply even if the libel involves no matter of public concern."⁵⁷⁰ Although the clerk offered a means of distinguishing *Gertz*, one that he described as "not very persuasive,"⁵⁷¹ Powell responded by hand that he would "not answer WJB expressly" beyond possibly "repeat[ing] that what was said in *Gertz* must be read in light of the issue presented."⁵⁷²

For his part, Brennan held out some hope that, having accommodated Stevens, White might soften his own attack on *Sullivan*. Alas, this was not to be. On June 11, White circulated a new draft of his own opinion "concurring in the judgment," which retained his attacks on *Sullivan*. In fact, in a move that was "somewhat irksome" to Brennan's chambers,

falsehood injurious to a private individual.").

568. Memorandum from Daniel Ortiz for Justice Powell 1 (May 25, 1985) (with handwritten notes from Justice Powell) (on file with the Powell Papers, Washington and Lee Law Library), available at <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>.

569. *Id.* at 2.

570. *Id.*

571. *Id.*

572. *Id.* In addition, Powell specifically agreed with his clerk's recommendation that they not emphasize that *Gertz* had in fact addressed the liability standard:

[F]or now it may be a good idea to mention liability standards as little as possible. Strict liability is JUSTICE WHITE'S big bugaboo, and, to the extent you suggest that *Gertz*'s liability rules are not affected at all by *Dun & Bradstreet*, you may lose any chance of adding his name to your opinion.

Id.

White “even retained his explicit rejoinders” to Brennan’s now deleted arguments in support of *Sullivan*, introducing them with the phrase “it could be argued,” rather than “Justice Brennan argues.”⁵⁷³

The process by which White included this language in his draft is revealing. Initially, his law clerk took a crack at revising his then extant dissenting opinion in the wake of Brennan’s and Powell’s circulations. In addition to changing it from a dissent to an opinion “concurring in the judgment,” White’s clerk deleted in significant part the sharp language from the previous draft that had attacked Brennan’s now-abandoned defense of *Sullivan*.⁵⁷⁴ Indeed, in a memorandum to White dated May 29, 1985, the clerk noted that “Justice Brennan has pulled the language in defense of *New York Times v. Sullivan* that had caused you to respond,” which, the clerk indicated, warranted the deletion of much of the previous draft’s rejoinder.⁵⁷⁵ White, however, overruled the clerk, using the editing term “STET”⁵⁷⁶ to signify his decision to retain most of the strong language from the previous draft and substituting, in his own hand, phrases such as “it might be suggested” and “it could be suggested” for the prior draft’s references to what “Justice Brennan suggests.”⁵⁷⁷

D. *The Chief Reappears*

On May 23, the same day that Brennan circulated the latest incarnation of his dissent, Burger too circulated a new opinion, again “concurring in the judgment.”⁵⁷⁸ Rather than adopt Powell’s more

573. Justice Brennan, 1984 Term Histories, *supra* note 222, at 104. In addition, the significance of Powell’s comparative silence with respect to the *Gertz* liability standard was not lost on White. He added a sentence explaining that, “[a]lthough JUSTICE POWELL speaks only of the inapplicability of the *Gertz* rule with respect to presumed and punitive damages, it must be that the *Gertz* requirement of some kind of fault on the part of the defendant is also inapplicable in cases such as this.” Justice White, Draft Concurrence Five 10 (*Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*) (June 11, 1985) (on file with the Brennan Papers, Library of Congress Manuscript Division) (on file with the Washington Law Review).

574. Justice White, Draft Concurrence Five, *supra* note 573, at 10.

575. Memorandum from Dean Gloster for Justice White (May 29, 1985) (on file with the White Papers, Library of Congress Manuscript Division) (on file with the Washington Law Review).

576. “Stet” is a longstanding proofreader’s term derived from Latin, meaning “let it stand.” It is used most often to undo an editing change.

577. Justice White, Draft Dissent Four 5, 8 (*Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*) (Mar. 29, 1985) (with handwritten notes from Justice White) (on file with the White Papers, Library of Congress Manuscript Division) (on file with the Washington Law Review).

578. Chief Justice Burger, Draft Concurrence One 1 (*Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*) (May 23, 1985) (on file with the Powell Papers, Washington and Lee Law Library), available at <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>.

modest suggestions,⁵⁷⁹ however, Burger attempted to explain himself at greater length. He reiterated his dissatisfaction with *Gertz* but explained that it “is now the law of the land, and until it is overruled, it must, under the principle of *stare decisis*, be applied by this Court.”⁵⁸⁰ Accordingly, Burger pronounced his agreement with Powell “to the extent that it holds that *Gertz* is inapplicable in this case.”⁵⁸¹ Nevertheless, Burger emphasized, he agreed with White that “*Gertz* should be overruled” as well as with his general “observations concerning *New York Times v. Sullivan*.”⁵⁸² He then took the opportunity to endeavor to rewrite the actual malice standard itself, declaring that “since *New York Times* equates ‘reckless disregard of the truth’ with malice, this should permit a jury instruction that malice may be found if the defendant is shown to have published defamatory material which, in the exercise of reasonable care, would have been revealed as untrue.”⁵⁸³ He added that:

If this is not what *New York Times v. Sullivan* means, I agree with JUSTICE WHITE that it should be reexamined. The great rights guaranteed by the First Amendment carry with them certain responsibilities.

Consideration of these issues inevitably recalls the aphorism of journalism attributed to the late Roy Howard that, “too much checking on the facts has ruined many a good news story.”⁵⁸⁴

Powell and his clerk remained perplexed by Burger’s approach and strategy. “I honestly can’t see why he doesn’t join us,” the clerk wrote by hand on Powell’s copy of Burger’s opinion, to which the Justice added, “I agree.”⁵⁸⁵ Still, Powell’s attentions remained focused on Brennan and, on May 27, he wrote to Brennan, somewhat curtly, that he

579. See *supra* note 542 and accompanying text.

580. Chief Justice Burger, Draft Concurrence One, *supra* note 578, at 1.

581. *Id.* at 2

582. *Id.*

583. *Id.* The Court had specifically repudiated this view in *Connaughton*. See *Harte-Hanks Commc’ns, Inc. v. Connaughton*, 491 U.S. 657, 666 (1989) (“Today, there is no question that public figure libel cases are controlled by the *New York Times* standard and not by the professional standards rule, which never commanded a majority of this Court.”).

584. *Id.* On June 17, 1985, Burger revised the beginning of this passage from “If this is not what *New York Times v. Sullivan* means” to “But since the Court has not applied the literal language of *New York Times* in this way.” Chief Justice Burger, Draft Concurrence Two 2 (*Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*) (June 17, 1985) (on file with the Powell Papers, Washington and Lee Law Library), available at <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>. The impetus for Burger’s acknowledgement that his preferred reading of *Sullivan* is not the law remains unclear.

585. Chief Justice Burger, Draft Concurrence One, *supra* note 578, at 1 (with handwritten notes from Daniel Ortiz and Justice Powell).

would “probably make some response to your 23-page dissenting opinion, and it may take me a while to do this.”⁵⁸⁶

E. And in the End

On June 19, 1985, after clearing it with O'Connor and Rehnquist, Powell circulated his own revised opinion. In it, he added three footnotes rebutting specific points in the Brennan dissent. Most notably, in footnote four, he took on the troublesome contradiction Brennan had noted between the plurality opinion and *Gertz*, implementing the strategy he had developed with his clerk and explaining that “[g]iven the context of *Gertz*,” the holding in that case rightly applied only “in cases involving *public speech*.”⁵⁸⁷ And, in footnote seven, he added his hypothetical treatment of the “woman of impeccable character.”⁵⁸⁸

The following day, White wrote to Powell and the Conference to advise them that, having reviewed the latest drafts, he would only be adding the following “two sentences” to his own opinion:

A legislative solution to the damages problem would also be appropriate. Moreover, since libel plaintiffs are very likely more interested in clearing their names than in damages, I doubt that limiting recoveries would deter or be unfair to them.⁵⁸⁹

With these changes, White asserted, “I see no reason why the case

586. Letter from Justice Powell to Justice Brennan (May 27, 1985) (on file with the Powell Papers, Washington and Lee Law Library), *available at* <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>.

587. Justice Powell, Draft Opinion Four 7 n.4 (*Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*) (June 19, 1985) (on file with the Brennan Papers, Library of Congress Manuscript Division) (on file with the Washington Law Review) (emphasis in original).

588. *Id.* at 11 n.7. Powell did not, however, add an additional footnote drafted by his clerk because he had “some doubt as to [its] advisability,” considered it “marginal,” and was “not sure whether this would trouble WHR and SOC.” Memorandum from Daniel Ortiz for Justice Powell 1, 5 (June 13, 1985) (with handwritten notes from Justice Powell) (on file with the Powell Papers, Washington and Lee Law Library), *available at* <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>. Specifically, the clerk had proposed taking on, albeit subtly, White’s conclusions with respect to the liability standard, *see supra* note 573 and accompanying text:

Because negligence was shown at trial, we do not consider the extent to which *Gertz*’s fault requirement applies to libels involving no matter of public concern. Like damages rules, liability standards are subject to First Amendment scrutiny. *See Gertz v. Robert Welch, Inc., New York Times Co v. Sullivan*. They do, however, involve somewhat different concerns and we indicate no opinion today on how these competing interests balance under *Gertz*.

Memorandum from Daniel Ortiz for Justice Powell, *supra* note 588, at 5 (internal citations omitted).

589. Letter from Justice White to Justice Powell and the Conference (June 20, 1985) (on file with White Papers, Library of Congress Manuscript Division) (on file with the Washington Law Review).

cannot be scheduled to come down next week.”⁵⁹⁰

The decision was finally announced on June 26, 1985. In so doing, Powell told the gallery in the courtroom that, unlike the Court’s prior defamation cases:

[T]he suit today—by a private party—involves only a matter of private interest to the parties. In a word, this is a typical common law libel suit. A majority of the Court declines to constitutionalize the entire law of libel.

Accordingly the judgment of the Vermont Supreme Court is affirmed. There is, however, no Court opinion.⁵⁹¹

From Justice Brennan’s perspective, this last sentence read aloud by Justice Powell was undoubtedly the most significant. In the end, there was “no Court opinion” that restricted *Sullivan* and *Gertz* to suits brought against media defendants, there was “no Court opinion” placing speech about matters not deemed to be of “public concern” entirely outside the reach of the First Amendment and, most importantly, there was “no Court opinion” questioning, much less overruling, the constitutional balance struck in *Sullivan* itself. After two years of ideological combat on all of these fronts, Brennan could rightfully declare this at least a small victory.

Indeed, in the three decades since the Court decided *Greenmoss Builders*, the constitutional balance struck by Brennan in *Sullivan* has survived largely intact. Despite White’s hostility to both its analytical underpinnings and the definitional balance it struck, *Sullivan* has since been reaffirmed on multiple occasions, and often in stirring terms.⁵⁹² Moreover, despite the disagreements and machinations that characterized its deliberations in *Greenmoss Builders*, the Court now appears largely content with the shape of the constitutional law of defamation it crafted in *Sullivan* and *Gertz*. Not only has it not heeded

590. *Id.*

591. Justice Powell, typewritten statement of bench announcement 2 (June 24, 1985) (with handwritten note, author unknown, stating, “As handed down 6/26”) (on file with the Powell Papers, Washington and Lee Law Library), available at <http://law.wlu.edu/powellarchives/page.asp?pageid=1355>.

592. See, e.g., *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988) (“Freedoms of expression require ‘breathing space.’ This breathing space is provided by a constitutional rule that allows public figures to recover for libel or defamation only when they can prove *both* that the statement was false and that the statement was made with the requisite level of culpability.”) (internal citations omitted) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964)); *Bartnicki v. Vopper*, 532 U.S. 514, 534 (2001) (reaffirming “our ‘profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open’”) (quoting *Sullivan*, 376 U.S. at 270); see also Levine & Wermiel, *supra* note 11, at 45 (describing Brennan’s enduring influence).

White's and Burger's call to revisit those decisions, it has not deemed it necessary to consider a defamation case on its merits in more than two decades. As the fiftieth anniversary of the Court's decision in *Sullivan* approaches, therefore, the import of *Greenmoss Builders* appears to be that, in the end, it preserved—albeit without fanfare—a fundamental tenet of First Amendment jurisprudence at a point in history when it very much remained vulnerable.

EPILOGUE

On December 19, 1985, almost six months after the decision in *Greenmoss Builders* was announced, Burger wrote to the Conference to explain that he was revising the last sentence of his own opinion to “accommodate a request of the estate of Roy Howard.”⁵⁹³ Burger's opinion now concluded with the otherwise unattributed “aphorism of journalism that ‘too much checking on the facts has ruined many a good news story.’”⁵⁹⁴ Apparently, Mr. Howard had never said any such thing. To the contrary, Howard *was* the author of the much quoted “Editor's Creed,”⁵⁹⁵ taken from a letter he had written to a disgruntled reader of one of his newspapers in which he explained that journalism's mission is to “insure to readers the fullest possible access to the truth and the greatest possible divergency of viewpoint.”⁵⁹⁶ It is not known whether the irony of the Chief Justice's publication of such a defamatory falsehood, which, as he put it, “in the exercise of reasonable care, would have been revealed as untrue,”⁵⁹⁷ was ever called to his attention.

593. Memorandum from Chief Justice Burger to the Conference (Dec. 19, 1985) (on file with the Brennan Papers, Library of Congress Manuscript Division) (on file with the Washington Law Review).

594. *Id.*

595. The description “Editor's Creed” is used in the biographical sketch of Roy W. Howard that accompanies the archives of his personal papers at the University of Indiana at Bloomington School of Journalism. For the biographical sketch, see *About Roy W. Howard*, IND. U. SCHOOL JOURNALISM, <http://journalism.indiana.edu/resources/royhoward/about-roy-w-howard/> (last visited Feb. 26, 2013).

596. The Roy W. Howard Archive includes a copy of the letter, later referred to as the “Editor's Creed,” published on what is labeled simply as the Editorial Page of the *New York World-Telegram & Sun* on October 27, 1950, under the headline, “Freedom of Opinion: A Letter from a Reader and the Editor's Reply.”

597. Chief Justice Burger, Draft Concurrence One, *supra* note 578, at 2.