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MILKOVICH MEETS MODERN FEDERALISM IN LIBEL LAW: THE LOST OPINION PRIVILEGE GIVES BIRTH TO ENHANCED STATE CONSTITUTIONAL PROTECTION

Nancy K. Bowman*

Like a will-o'-the-wisp, the absolute privilege for opinion was created out of nothing and has vanished from federal constitutional law with a stroke of the judicial pen. In *Milkovich v. Lorain Journal Co.*,¹ the Supreme Court of the United States decided that this lower court-created privilege never existed and was not needed to protect media defendants from defamation claims.²

The media immediately recoiled in alarm. Did this mean more libel trials, more constraints on freedom of the press, a chill wind blasting through newsrooms across the nation? The media said yes. Some legal experts agreed, yet others believed, as the Supreme Court did, that the First Amendment and state common law already provided opinion with all the protection it needed.³ However, the Court left open the possibility of enhanced state constitutional protection for opinion.⁴ A post-*Milkovich* case confirmed the viability of this method of state constitutional protection when the Court denied certiorari in June of 1991 to *Immuno AG. v. Moor-Jankowski*.⁵ This case allowed the use of a separate state constitutional

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1. 110 S. Ct. 2695 (1990).

2. *Id.* at 2705.

3. See, e.g., Mark Eissman, *A Matter of Opinion*, NEWSINC., Feb. 1991, at 30 (reporting the media's reaction to *Milkovich* and suggesting that the decision's effect could be limited); Robert S. Warren & Rex S. Heinke, *Not As Bad As It Looks*, NAT'L L.J., July 30, 1990, at 13 (arguing that the *Milkovich* decision does not diminish First Amendment protection of speech). *But see* Lewis R. Clayton, *High Court: No Federal Privilege for "Opinion" Found Defamatory*, NAT'L L.J., Aug. 27, 1990, at 27 (assessing the lack of protection for opinion); Gail D. Cox, *Lawyer Wins \$1.6 Million Libel Award*, NAT'L L.J., Nov. 5, 1990, at 13 (reporting the reaction of the legal community to the use of the *Milkovich* doctrine in *O'Connor v. McGraw-Hill*); David A. Schulz, *Aftermath of the Milkovich Case: Pure Opinion Still Protected*, EDITOR & PUBLISHER, Feb. 2, 1991, at 20 (stating that pure opinion remains protected).

4. *Milkovich*, 110 S. Ct. at 2702 n.5.

5. 567 N.E.2d 1270 (N.Y.), cert. denied, 111 S. Ct. 2261 (1991). Although remanded after *Milkovich*, the New York Court of Appeals approved the use of the state constitution to give

ground to protect opinion to a greater extent than might be possible using the First Amendment and state common law, as *Milkovich* recommended. Because there was no federal question presented, *Immuno*, a state supreme court opinion, avoided United States Supreme Court review.⁶

The absolute privilege for opinion was based on the lower courts' generally accepted interpretation of Justice Powell's 1974 dictum in *Gertz v. Robert Welch, Inc.*,⁷ in which he stated, "Under the First Amendment there is no such thing as a false idea."⁸ This dictum was unrelated to the *Gertz* holding regarding private figures and their burden of proof for damages in defamation cases. However, these words were used subsequently by many state and federal courts to create a First Amendment-based absolute privilege for opinion, which protected almost any statements labeled opinion from defamation claims.⁹ This protection was systematized in 1984 by the widely accepted four-factor opinion analysis set forth in *Ollman v. Evans*,¹⁰ a United States Court of Appeals case for the District of Columbia Circuit. Two of the four factors involved context: *where* the article was placed within the publication and *what kind* of article it was.¹¹ One question raised by *Milkovich* was whether the context analysis was dead, or whether it was still acceptable as the basis for analysis under other state and federal opinion protections. Rumors of its death were apparently premature.¹²

What *Milkovich* clearly held was that a label indicating that challenged statements are opinion is not enough to protect the state-

greater protection to opinion. The method thus remains viable as a way to protect opinion, reduce self-censorship, and decrease libel trials as a result of the *Milkovich* decision.

6. See *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983). "Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground." *Id.* at 1040. "It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions." *Id.* at 1041 (quoting *Minnesota v. National Tea Co.*, 309 U.S. 551, 557 (1940)).

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

8. *Id.* at 339.

9. See, e.g., *Ollman v. Evans*, 750 F.2d 970, 975 n.6 (D.C. Cir. 1984) ("[A] majority of federal circuit courts, including this one, have accepted the [dictum] as controlling law."), *cert. denied*, 462 U.S. 1127 (1985).

10. *Id.* at 979-84.

11. See *infra* notes 51-60 and accompanying text (discussing the four-part *Ollman* test).

12. Rodney W. Ott, Note, *Fact and Opinion in Defamation: Recognizing the Formative Power of Context*, 58 *FORDHAM L. REV.* 761, 784-87 (1990) (encouraging the use of context analysis in fact/opinion libel cases "[b]ecause context shapes the meaning of individual words and sentences, it also influences their degree of precision or ambiguity").

ments as opinion. The Supreme Court said that an article calling the plaintiff a "liar" while testifying under oath at a judicial proceeding implied defamatory facts.¹³ The Court held that the core issue in the case was "whether or not a reasonable factfinder could conclude that the statements imply an assertion" of fact that could be objectively proved true or false.¹⁴

Milkovich stripped away the protective shield of the absolute opinion privilege and exposed published statements to a libel action if provable defamatory facts could be implied from the "opinion."¹⁵ As a result, more cases now could go to trial because the Supreme Court now said what was once protected opinion may imply defamatory facts.¹⁶ The lower courts today, however, have shown a shrewd adaptability in the face of the lost privilege. They have either taken the Supreme Court's cue and used the shopping list of state and federal media libel defenses enumerated in *Milkovich*,¹⁷ or they have sidestepped federal review by basing their decisions on independent state grounds, utilizing state constitutional protections of speech and the press that go beyond federal constitutional protections.¹⁸

Unelko Corp. v. Rooney,¹⁹ a Ninth Circuit case decided two months after *Milkovich*, took the simpler route; the court used a federal constitutional defense from the *Milkovich* list to affirm for the defendants.²⁰ The defense was based on the First Amendment requirement that the plaintiff have the burden of proving the falsity of the challenged factual statements when there is a media defendant. The *Immuno* court also used this defense where some statements in question were admitted to be factual.²¹ Since the

13. *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695, 2707 (1990).

14. *Id.* at 2705-08.

15. *Id.* at 2706; see Nat Stern, *Defamation, Epistemology, and the Erosion (But Not Destruction) of the Opinion Privilege*, 57 TENN. L. REV. 595, 623 (1990) (concluding that the Court's reasoning in *Milkovich* "gives impetus to an increase rather than diminution in successful suits by objects of criticism").

16. *Milkovich*, 110 S. Ct. at 2705-06.

17. See, e.g., *Unelko Corp. v. Rooney*, 912 F.2d 1049 (9th Cir. 1990) (using the defense in which the plaintiff must bear the burden of proving falsity when there is a media defendant and an issue of public concern to affirm for the defendant), *cert. denied*, 111 S. Ct. 1586 (1991); see also *Milkovich*, 110 S. Ct. at 2706-07 (enumerating the defenses discussed in the case).

18. See *Immuno AG. v. Moor-Jankowski*, 567 N.E.2d 1270 (N.Y.), *cert. denied*, 111 S. Ct. 2261 (1991).

19. 912 F.2d 1049 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 1586 (1991).

20. See *infra* notes 108-12 and accompanying text (discussing the *Milkovich* case).

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

Milkovich decision, the plaintiff's burden to prove falsity has been the most frequently used defense for libelous factual statements.²²

Many post-*Milkovich* courts have used context analyses relating to First Amendment protections, indicating that *Milkovich* has not been interpreted as discarding context as a factor in distinguishing between fact and opinion.²³ The main problem with the *Milkovich* decision is that it does not explain *how* to distinguish between fact and opinion, leaving courts with the same subjective choices on this matter of law as they had before the decision.²⁴ That lack of subjectivity is perhaps why the lower courts had so enthusiastically embraced the absolute opinion privilege.²⁵ It was the closest thing to a bright-line rule for opinion analysis. Instead, the media now face the possibility of more self-censorship. They must be more careful when they publish opinion, wondering always if a court will say the opinion implied facts.²⁶

The purpose of this Article is to examine *Milkovich v. Lorain Journal Co.*, analyze its possible effects on the media, and examine how state and federal courts have adapted to the new fact/opinion analysis required by *Milkovich*. The Article then will suggest the use of state constitutional defenses to give a higher protection to opinion than that granted by the Federal Constitution after *Milkovich* and to provide a way to avoid further United States Supreme Court review of the case. The use of these defenses is one way to reduce self-censorship and to avoid more libel trials.

I. THE FACT/OPINION DISTINCTION PRE-MILKOVICH²⁷

The essence of the fact/opinion distinction in defamation claims

22. See, e.g., *Unelko Corp. v. Rooney*, 912 F.2d 1049 (9th Cir. 1990), cert. denied, 111 S. Ct. 1586 (1991); *Flip Side, Inc. v. Chicago Tribune Co.*, 564 N.E.2d 1244 (Ill. App. Ct. 1990).

23. See *infra* notes 220-32 and accompanying text (outlining the use of context analysis in South Dakota, California, and Illinois); see also Stern, *supra* note 15, at 614-15.

24. See Jerry J. Phillips, *Opinion and Defamation: The Camel in the Tent*, 57 TENN. L. REV. 647, 675 (1990) (concluding that the opinion rule is "unmanageable in scope and unpredictable in application").

25. See, e.g., *Ollman v. Evans*, 750 F.2d 970, 974 n.6 (D.C. Cir. 1984) (listing federal circuit cases which used the absolute privilege for opinion as controlling law), cert. denied, 462 U.S. 1127 (1985).

26. *The Supreme Court, 1989 Term: Leading Cases*, 104 HARV. L. REV. 219, 224 (1990) [hereinafter *Leading Cases*]; T.R. Hager, Note, *Recent Development: Milkovich v. Lorain Journal Co.: Lost Breathing Space — Supreme Court Stifles Freedom of Expression by Eliminating First Amendment Opinion Privilege*, 65 TULANE L. REV. 944, 951-52 (1991).

27. See generally George C. Christie, *Defamatory Opinions and the Restatement (Second) of Torts*, 75 MICH. L. REV. 1621 (1977) (criticizing the Restatement's "inflexible approach");

is that an opinion based on true statements cannot be proved objectively to be true or false.²⁸ Rather, it is the subjective creation of the writer's thought processes after analyzing factual statements on which the opinion is based. For example, consider the statement "I love Cajun food because it's so spicy." In that statement, it is not possible to objectively judge whether or not the speaker "loves" Cajun food; thus, the statement is an opinion.

A factual statement, however, can be proved true or false by examining objective evidence on which the statement is based.²⁹ It is important to note that what appears to be an opinion actually can be a factual statement.³⁰ For example, prefacing the factual statement "Jones is a liar" with the words "in my opinion" will not remove the need for evidence proving that Jones is indeed a liar.

A. *The Law of Defamation*

Defamation includes the two torts of libel and slander. Libel involves written or other published materials such as cartoons and photographs.³¹ Slander involves reputation-damaging words spoken about one person to a third party.³² These laws were historically the

Timothy Gleason, *The Fact-Opinion Distinction in Libel*, 10 COMM. & ENT. L.J. 763 (1988) (advocating contextual categories of protected forums for opinion); Sheldon W. Halpern, *Of Libel, Language, and Law: New York Time [sic] v. Sullivan at Twenty-Five*, 68 N.C. L. REV. 273 (1990) (analyzing defamation law since *Sullivan* and suggesting a unitary system of practice, damages, and fault); Gordon Schneider, *A Model for Relating Defamatory "Opinions" to First Amendment Protected "Ideas,"* 43 ARK. L. REV. 57 (1990) (developing a model of analysis for the fact/opinion distinction); Eileen Finan, Note, *The Fact-Opinion Determination in Defamation*, 88 COLUM. L. REV. 809 (1988) (advocating principles of strict construction for defamation cases on matters of public concern); Seth A. Kaplan, Note, *Fact and Opinion After Gertz v. Robert Welch, Inc.: The Evolution of a Privilege*, 34 RUTGERS L. REV. 81 (1981) (regarding the American Law Institute's position as untenable and looking for Supreme Court guidance); Loren W. Moll, Note, *Defamation — Actionable Statement of Fact Versus Privileged Opinion: Ollman v. Evans*, 34 KAN. L. REV. 367 (1985) (suggesting the resuscitation of the fair comment doctrine); Michael Sanders, Comment, *The Fact/Opinion Distinction: An Analysis of the Subjectivity of Language and Law*, 70 MARQ. L. REV. 673 (1987) (refuting the absence of a bright-line rule); Robert N. Webner, Note, *The Fact-Opinion Distinction in First Amendment Libel Law: The Need for a Bright-Line Rule*, 72 GEO. L.J. 1817 (1984) (arguing that the courts should develop a bright-line test).

28. See RESTATEMENT (SECOND) OF TORTS § 566 cmt. a (1977).

29. *Milkovich*, 110 S. Ct. at 2707.

30. *Cianci v. New York Publishing Co.*, 639 F.2d 54 (2d Cir. 1980). "It would be destructive of the law of libel if a writer could escape liability for accusations of crime simply by using, explicitly or implicitly, the words 'I think.'" *Id.* at 64.

31. See BLACK'S LAW DICTIONARY 915-16 (6th ed. 1990).

32. See PROSSER & KEETON ON TORTS §§ 111, 112 (W. Page Keeton ed., 1984) (defining defamation, libel, and slander); RESTATEMENT (SECOND) OF TORTS § 559 (1977) (defining defamatory communication).

province of the states and included both statutory and common law as they evolved in court opinions.³³ Liability for libel usually requires four elements: (1) a false and defamatory statement about another; (2) an unprivileged publication of the statement to a third party; (3) some level of defendant fault; and (4) the presence of harm to the plaintiff caused by the publisher's statement.³⁴

In 1964, the United States Supreme Court, in *New York Times Co. v. Sullivan*,³⁵ first entered the libel arena by providing a First Amendment-based defense for libelous statements made by the media about public officials, giving rise to the *New York Times* "actual malice" defense or privilege.³⁶ Since that time, the Court has further infringed on state libel law by providing other constitutional defenses for the media.³⁷

State common law itself has amended its rules, which had originally required only that the plaintiff allege an "unprivileged publication of false and defamatory matter to state a cause of action for defamation."³⁸ This had to be changed because under state libel laws, opinions as well as factual assertions could be defamatory. The *Restatement (Second) of Torts* states that opinion in the past could be defamatory if:

the expression was sufficiently derogatory of another as to cause harm to his reputation. . . . The expression of opinion was also actionable in a suit for defamation, despite the normal requirement that the communication be false as well as defamatory. . . . This position was maintained even though the truth or falsity of an opinion — as distinguished from a statement of fact — is not a matter that can be objectively determined and truth is a complete defense to a suit for defamation.³⁹

The remedy for this anomaly in libel law was the "fair comment" privilege. It allowed the writer to express opinions on issues of public interest based on factual statements if there was no intent to harm the subject.⁴⁰

33. See *Milkovich*, 110 S. Ct. at 2702-03.

34. RESTATEMENT (SECOND) OF TORTS § 558 (1977).

35. 376 U.S. 254 (1964).

36. *Id.* at 279-80.

37. See *Milkovich*, 110 S. Ct. at 2706-07 (summarizing federal protections for media defendants).

38. *Id.* at 2702.

39. RESTATEMENT (SECOND) OF TORTS § 566 cmt. a (1977).

40. *Milkovich*, 110 S. Ct. at 2702-03; see also Charles H. Carman, Hutchinson v. Proxmire and the Neglected Fair Comment Defense: An Alternative to Actual Malice, 30 DEPAUL L. REV. 1 (1980) (advocating the expansion of the use of the fair comment doctrine); Herbert W. Titus, *Statement of Fact Versus Statement of Opinion — A Spurious Dispute in Fair Comment*, 15

B. *Enter Gertz v. Robert Welch, Inc.*

In 1974, the Supreme Court decided *Gertz v. Robert Welch, Inc.*⁴¹ There, the Court held that a media defendant publishing defamatory falsehoods about a private person regarding a public issue could not use the *New York Times Co. v. Sullivan*⁴² actual malice defense. That defense, requiring proof of reckless disregard for the truth or knowledge of falsity of the challenged statements,⁴³ could be used only when the plaintiff was a public official or public figure. The *Gertz* Court instead required a lower standard of proof of fault when a private plaintiff is involved, but held that no liability *without* fault could be imposed.⁴⁴ An award of punitive damages, however, required the actual malice standard of proof in these circumstances, while an award of compensatory damages required only the state law standard, which is usually some level of negligence.⁴⁵

It is clear from Justice Powell's opinion in *Gertz* that the fact/opinion distinction was not an issue in the holding. Subsequently, however, lower courts at both the federal and state levels found something in the opinion that struck a responsive chord. It was Justice Powell's "no false idea" dictum:

We begin with the common ground. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.⁴⁶

However, Justice Powell did not expand on the untouchability of opinion. Rather, he discussed in depth the lack of value in false statements of fact and the opposing need for avoiding media self-censorship caused by fear that the innocent printing of a false state-

VAND. L. REV. 1203 (1962) (proposing new standards and methods of analysis for the defense of fair comment).

41. 418 U.S. 323 (1974); see, e.g., James J. Brosnahan, *From Times v. Sullivan to Gertz v. Welch: Ten Years of Balancing Libel Law and The First Amendment*, 26 HASTINGS L.J. 777 (1975) (assessing the Supreme Court's view of libel and finding a retreat from First Amendment protection).

42. 376 U.S. 254 (1964) (holding that a public official may be awarded damages for a defamatory falsehood relating to his official conduct only if the official proves actual malice).

43. *Id.* at 279-80; see also W. WAT HOPKINS, ACTUAL MALICE: TWENTY-FIVE YEARS AFTER TIMES V. SULLIVAN (1989) (reviewing the actual malice standard).

44. *Gertz*, 418 U.S. at 347-48.

45. *Id.* at 346-50.

46. *Id.* at 339-40 (footnotes omitted).

ment will not be protected.⁴⁷

Despite the irrelevance of the opinion analysis in *Gertz*, both state and federal lower courts espoused the "no false idea" dictum with a vengeance.⁴⁸ It took on a life of its own, in the form of the now-defunct absolute constitutional privilege for opinion. The *Gertz* dictum has been cited in case after case, reaching its zenith of popularity in *Ollman v. Evans*.⁴⁹ *Ollman*, a 1984 United States Court of Appeals case for the District of Columbia Circuit, systematized the absolute opinion privilege analysis.

C. *Ollman v. Evans: The Opinion Privilege Analysis*⁵⁰

Judge Starr's opinion for the court in *Ollman v. Evans*⁵¹ created a four-factor analysis by which the court would determine whether statements were absolutely protected opinion or unprotected factual assertions.⁵² In this case, the plaintiff, Bertel Ollman, a professor of political science at New York University, claimed that a newspaper column by the defendants, syndicated columnists Rowland Evans and Robert Novak, defamed his professional reputation, causing him to lose the opportunity to head the Department of Government and Politics at the University of Maryland.⁵³ The United States District Court for the District of Columbia granted the defendants' motion for summary judgment, concluding that the column was protected opinion via the *Gertz* dictum.⁵⁴ The District of Columbia Court of Appeals affirmed.⁵⁵

Judge Starr began his analysis with a less than convincing rationale for the use of the *Gertz* dictum to validate the court's use of the absolute opinion privilege:

In *Gertz*, the Supreme Court in *dicta* seemed to provide absolute immunity from defamation actions for all opinions and to discern the basis for this immunity in the First Amendment. . . . By this statement, *Gertz* elevated to

47. *Id.* at 340-41.

48. *See, e.g.*, *Ollman v. Evans*, 750 F.2d 970, 974-75 (D.C. Cir. 1984), *cert. denied*, 462 U.S. 1127 (1985).

49. *Id.*

50. *See, e.g.*, Edward G. Heidig, *Ollman v. Evans: Skinning the Membrane of Fact Versus Opinion*, 23 TORT & INS. L.J. 232 (1987).

51. 750 F.2d 970.

52. *Id.* at 979-84.

53. *Id.* at 971-73.

54. *Ollman v. Evans*, 479 F. Supp. 292 (D.D.C. 1979), *aff'd*, 750 F.2d 970 (D.C. Cir. 1984) (*en banc*), *cert. denied*, 462 U.S. 1127 (1985).

55. 750 F.2d 970 (D.C. Cir. 1984).

constitutional principle the distinction between fact and opinion, which at common law had formed the basis of the doctrine of fair comment.⁵⁶

In a related footnote, the court admitted that the statement in *Gertz* was clearly dictum but then grabbed its bootstraps. "Despite its status as *dicta*, a majority of federal circuit courts, including this one, have accepted the statement as controlling law."⁵⁷ The footnote then listed cases from various circuits in accord with the D.C. Circuit.⁵⁸

With this discussion as the preamble to the *Ollman* analysis, Judge Starr listed the four factors used to analyze the "totality of the circumstances in which statements are made to decide whether they merit the absolute First Amendment protection enjoyed by opinion."⁵⁹ The four factors were:

1. Common usage or meaning of the specific language of the statement — Is there a commonly understood meaning, or is the statement indefinite and ambiguous?;⁶⁰

2. Verifiability — Can the statement be objectively characterized as true or false? If not, would the reasonable reader understand it to be opinion?;⁶¹

3. Full context — The entire article or column should be considered. The surrounding language will influence the average reader's inferences regarding specific statements;⁶²

4. Broader context or setting — Is it on the editorial page, for example? Some types of writing, by custom or convention, signal readers that what is being read is opinion.⁶³

The third and fourth factors rely on context analysis. The *Ollman* court relied on these two factors as determinative, despite its conclusion that analysis of some of the statements using the first two factors, or fair comment, would make the statements actionable as factual.⁶⁴

The statement by Evans and Novak that the court found most troubling was the one in which the defendants quoted an anonymous

56. *Id.* at 974-75 (citations omitted).

57. *Id.* at 974 n.6.

58. *Id.*

59. *Id.* at 979.

60. *Id.* at 979-81.

61. *Id.* at 981-82.

62. *Id.* at 982-83.

63. *Id.* at 983-84.

64. *Id.* at 989-90.

political science professor who said that *Ollman* had “no status” within his profession and was a pure and simple political activist.⁶⁵ Judge Starr conceded that at least one pre-*Gertz* case has held that the common law privilege of fair comment does not extend protection to remarks which disparage one’s status among one’s peers.⁶⁶ However, he stated that the appearance of the column on the Op-Ed page (the broader context setting) would nevertheless influence the average reader to conclude that the remark was an opinion.⁶⁷ Indeed, Judge Starr held that the charge of “no status” was “rhetorical hyperbole” within the meaning of the Supreme Court’s decision in *Greenbelt Publishing Ass’n v. Bresler*,⁶⁸ where the Court employed the context analysis to find that “blackmail” was used as hyperbole.⁶⁹

In supporting the *Ollman* court’s preferential attitude toward the two context factors, Judge Starr made the following statement:

But most fundamentally, we are reminded that in the accommodation of the conflicting concerns reflected in the First Amendment and the law of defamation, the deep-seated constitutional values embodied in the Bill of Rights requires that we not engage, without bearing clearly in mind the context before us, in a Talmudic parsing of a single sentence or two, as if we were occupied with a philosophical enterprise or linguistic analysis.⁷⁰

Is *Ollman* really a two-factor test relying solely on a contextual analysis? It appears so. More importantly, did the *Milkovich* court really ignore context? The Court did not ignore it in *Bresler*, in which a charge of blackmail by irate citizens at a city council meeting was accurately reported in a local newspaper.⁷¹ The Supreme Court placed the blackmail charge in the “rhetorical hyperbole” and “vigorous epithet” category of protected opinion based on the context in which statements were made during a heated debate.⁷² Likewise, in *Milkovich* the Court used the words “tenor and context” in its analysis of the *Gertz* dictum and used the word “tenor” when referring to the challenged *Diadiun* column.⁷³

65. *Id.* at 989.

66. *Id.* (citing *Cepeda v. Cowles Magazines & Broadcasting, Inc.*, 328 F.2d 869 (9th Cir.), *cert. denied*, 379 U.S. 844 (1964)).

67. *Id.* at 990.

68. 398 U.S. 6 (1970).

69. *Ollman*, 750 F.2d at 989-91.

70. *Id.* at 991.

71. *Bresler*, 398 U.S. 6.

72. *Id.* at 14.

73. See *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695, 2705, 2707 (1990).

It appears that the United States Supreme Court would disapprove of *Ollman* for its espousal of the absolute opinion privilege, and not for its context analysis.⁷⁴ It would, therefore, be possible to transfer the *Ollman* test to other First Amendment analyses in future cases. It would also seem reasonable to include context in any fact/opinion analysis because it is based on the reader's reality. Readers generally do not read a sentence without looking at the article as a whole. And it is obvious that articles and columns that appear on an editorial page, for example, are more likely to be read with caution as not necessarily stating only facts which the reader should digest without question.⁷⁵

The same may apply to cautionary language attached to an article or column. However, the words "I think" and "In my opinion" are not sufficiently cautionary, as the Supreme Court in *Milkovich* clearly stated, because it would be easy to follow them with factual observations about an individual.⁷⁶ The problem then arises: Isn't the Op-Ed page or a letter-to-the-editor logo cautionary language too? But this is what the *Milkovich* Court meant when it said an opinion label is not enough to protect opinion.⁷⁷ If so, the article's *internal* context may be more valuable to the media defendant's argument than the article's *location*, which runs headlong into the "no label" analysis.⁷⁸

The problem with the fact/opinion analysis generally is that it has a circular quality,⁷⁹ which may be what led the Supreme Court in *Milkovich* to be more restrictive in its analysis parameters.⁸⁰ Furthermore, this may be why the lower courts were so enamored of the

74. *Id.* at 2709 (Brennan, J., dissenting).

75. See *Ollman v. Evans*, 750 F.2d 970, 986-87 (D.C. Cir. 1984), *cert. denied*, 462 U.S. 1127 (1985).

76. *Milkovich*, 110 S. Ct. at 2705-06.

77. *Id.*

78. *But see* *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1054 (9th Cir. 1990) (holding that the humorous or hyperbolic nature of Andy Rooney's broadcast segment did not preclude finding that the challenged statement was factual), *cert. denied*, 111 S. Ct. 1586 (1991).

79. A circular argument could go as follows: "Theft" is a crime provable as true or false, so to call someone a thief is to state a fact, not an opinion. But if it were said during an angry outburst to someone who "stole" the victim's wife, it would be termed loose or figurative language, or rhetorical hyperbole, and therefore be protected by the First Amendment. Then again, who is to say that the heated statement was not said quite seriously, as with *Milkovich's* "liar" charges?

80. "The dispositive question in the present case then becomes whether or not a reasonable fact finder could conclude that the statements in the *Diadiun* column imply an assertion that petitioner *Milkovich* perjured himself in a judicial proceeding. We think the answer must be answered in the affirmative." *Milkovich*, 110 S. Ct. at 2707.

Gertz absolute opinion privilege. It saved them from tedious and often subjective analyses of opinion. A bright-line rule would be convenient.⁸¹ The question remains: Would such a rule be fair to both the media and the plaintiff — or just the easy way out? *Milkovich*, in effect, says there is no easy way out; keep struggling.

II. *MILKOVICH v. LORAIN JOURNAL CO.*: THE NEW FACT/OPINION ANALYSIS

In *Milkovich v. Lorain Journal Co.*,⁸² the Supreme Court of the United States in a 7-2 decision held that there is no need for a separate and absolute privilege for opinion based on the First Amendment.⁸³ Chief Justice Rehnquist, in his majority opinion, stated that safeguards already established in state common law and in federal constitutional law would be sufficient to protect opinion. The Court further held that a reasonable factfinder could conclude that statements that implied that the plaintiff has committed the crime of perjury were sufficiently factual to be capable of being proved true or false, permitting possible recovery for defamation.⁸⁴ The Court reversed the lower court's finding for the defendants and remanded the case to the Ohio court.⁸⁵

Plaintiff *Milkovich*'s libel claim was based on newspaper columnist J. Theodore Diadiun's 1974 sports page column about Maple Heights (Ohio) High School teacher and wrestling coach, Michael *Milkovich*, and H. Don Scott, superintendent of Maple Heights Public Schools.⁸⁶ Scott sued for libel in a separate case.⁸⁷ While *Milkovich* was the wrestling coach at Maple Heights, his team was involved in an altercation at a home wrestling match with Mentor High School, a rival local team.⁸⁸

81. See Webner, *supra* note 27 (espousing that all opinion should be absolutely protected if it is labeled as such for the reader's benefit). *But see* Schneider, *supra* note 27 (suggesting three tiers of protection for opinion: (1) absolute First Amendment protection for opinion related to core values such as the self-government process; (2) a conditional privilege for public issues of lesser importance such as opinion about a space probe to gain information about extraterrestrial life; and (3) no First Amendment protection for cultural opinion comments such as book reviews, which would use state fair comment and traditional defamation analysis).

82. 110 S. Ct. 2695 (1990).

83. *Id.* at 2707.

84. *Id.*; see also Nicole A. LaBarbera, Note, *The Art of Insinuation: Defamation by Implication*, 58 *FORDHAM L. REV.* 677, 703 (1990) (encouraging the use of defamation by implication).

85. *Milkovich*, 110 S. Ct. at 2708.

86. *Id.* at 2697-2700.

87. *Scott v. News-Herald*, 496 N.E.2d 699 (Ohio 1986).

88. *Milkovich*, 110 S. Ct. at 2698.

Milkovich and Scott testified at an investigatory hearing before the Ohio High School Athletic Association. The team was placed on probation, and Milkovich was censured for his behavior at the match.⁸⁹ Subsequently, several parents and wrestlers from Maple Heights sought a restraining order in county court against the Athletic Association's ruling.⁹⁰ Milkovich and Scott testified under oath at this judicial proceeding.⁹¹

The day after the court's decision overturning the ruling on due process grounds, defendant Lorain Journal Company's newspaper, the *News-Herald* in Lake County, Ohio, published a column written by Diadiun. The column, which sided with the opponent high school's team, expressed Diadiun's outrage at the county court's overruling of Maple Heights' probation and tournament ineligibility.⁹² The headline on the sports page column read, "Maple beat the law with the 'big lie.'" Beneath this appeared the columnist's photograph and the words "TD Says." The jump headline said, "Diadiun says Maple told a lie."⁹³ The column text stated that the lesson students learned from this was:

If you get in a jam, lie your way out. . . . The teachers responsible were mainly Maple wrestling coach, Mike Milkovich, and former superintendent of schools, H. Donald Scott. . . . Anyone who attended the meet . . . knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth.⁹⁴

Columnist Diadiun said in his column that he attended both the wrestling meet and the Athletic Association hearing, but he did not say that he attended the court proceeding.⁹⁵

Milkovich sued in county court for libel based on the headline text and nine passages in the column, including those quoted above.⁹⁶ The plaintiff claimed the statements accused him of committing the crime of perjury at the court proceeding, an indictable offense in Ohio, and damaged his reputation as a respected coach and teacher.⁹⁷

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 2699.

97. *Id.* at 2699-80.

In the first round of the litigation, the trial court granted summary judgment for the defendants, finding that the challenged statements were protected opinion.⁹⁸ The Ohio Court of Appeals affirmed.⁹⁹ In 1984, the Supreme Court of Ohio reversed in favor of the plaintiff and remanded, holding that the column's statements were unprotected factual assertions.¹⁰⁰ In 1986, while the case was on remand, the Ohio Supreme Court reversed its position in Superintendent Scott's separate libel suit against the same defendants.¹⁰¹ The *Scott* court held that Diadium's column was protected opinion using the 1984 *Ollman v. Evans* four-factor opinion analysis.¹⁰² The Ohio Supreme Court held that although the article's statements appeared to be factual under the first two factors, common usage and verifiability, the column's internal context and broader setting on the sports page indicated that the statements would most likely be treated as opinion by the sports section readers.¹⁰³

In 1989, the Ohio Court of Appeals considered *Milkovich* a second time on an appeal by the plaintiff and held that it was bound by the *Scott* state supreme court decision in favor of the defendants.¹⁰⁴ The Ohio Supreme Court dismissed *Milkovich*'s subsequent appeal.¹⁰⁵ The Supreme Court of the United States granted certiorari,¹⁰⁶ then in 1990 reversed for *Milkovich* and remanded the case for "further proceedings not inconsistent with this opinion."¹⁰⁷

III. THE *MILKOVICH* OPINION ANALYSIS

Although Michael *Milkovich* ultimately settled with the defendants,¹⁰⁸ the most important effect of his judicial odyssey remains the United States Supreme Court's rejection of the absolute opinion privilege and the changes that rejection brings to the fact/opinion

98. See *Milkovich v. News-Herald*, 473 N.E.2d 1191, 1193 (Ohio 1984) (per curiam), cert. denied, 474 U.S. 953 (1985).

99. See *id.*

100. *Id.* at 1199.

101. *Scott v. News-Herald*, 496 N.E.2d 699 (Ohio 1986).

102. *Id.* at 706-09.

103. *Id.* at 706-07.

104. *Milkovich v. News-Herald*, 545 N.E.2d 1320, 1324 (Ohio Ct. App. 1989).

105. See *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695, 2701 (1990).

106. *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 863 (1990).

107. *Milkovich v. Lorain Journal Co.*, 110 S. Ct. at 2708.

108. The *Milkovich v. Lorain Journal Co.* case was settled when the plaintiff was paid "a tad over \$100,000" after sixteen years in the state and federal court systems. Mark Fitzgerald, *Milkovich "Libelous Opinion" Case Settled*, EDITOR & PUBLISHER, Apr. 20, 1991, at 10 (quoting Lake County, Ohio *News-Herald* publisher Joseph A. Cocozzo).

analysis. A label as an opinion column and placement on the sports page, for example, are no longer enough to shield all statements as opinion if a court finds that factual statements are implied.¹⁰⁹

What the Court did for media defendants generally was to provide in one opinion a complete shopping list of traditional libel defenses to show why there is no need for a separate First Amendment privilege for opinion.¹¹⁰ These protections range from the state common law fair comment privilege for opinion to various federal constitutional protections beginning with the *New York Times Co. v. Sullivan* actual malice privilege.¹¹¹ *Milkovich's* flaw is its lack of instructional detail on how to distinguish between opinion and factual assertions after selecting the appropriate defenses.¹¹²

A. *The State Common Law Defense*

The *Milkovich* Court observed that opinion under original state common law could not be proved to be false, but was capable of being defamatory.¹¹³ The Court added that this lack of protection for opinion was later remedied so that state defamation laws could not stifle public debate.¹¹⁴ That remedy was the "fair comment" privilege, a common law affirmative defense to a defamation action.¹¹⁵ The Court stated:

[C]omment was generally privileged when it concerned a matter of public concern, was upon true or privileged facts, represented the actual opinion of the speaker, and was not made solely for the purpose of causing harm. "According to the majority rule, the privilege of fair comment applied only to an expression of opinion and not to a false statement of fact, whether it was expressly stated or implied from an expression of opinion." Thus under the common law, the privilege of "fair comment" was the device employed to strike the appropriate balance between the need for vigorous public discourse and the need to redress injury wrought by invidious or irresponsible speech.¹¹⁶

109. *Milkovich*, 110 S. Ct. at 2706.

110. See *supra* notes 17-18 and accompanying text.

111. 376 U.S. 254 (1964).

112. See *Leading Cases, supra* note 26, at 224.

113. *Milkovich*, 110 S. Ct. at 2706.

114. *Id.*

115. *Id.* at 2701-03.

116. *Id.* at 2703 (quoting RESTATEMENT (SECOND) OF TORTS § 566 cmt. a (1977)) (citations omitted).

B. State Constitutional Protections

The Supreme Court in *Milkovich* did not specifically name state constitutional law as a further protective measure for opinion, but it did allude to the possibility in a footnote.¹¹⁷ The footnote stated in part that in *Scott*, the Ohio Supreme Court relied on both the Federal Constitution and the Ohio Constitution in its recognition of an absolute opinion privilege. "*Scott* relied heavily on federal decisions interpreting the scope of First Amendment protection accorded defamation defendants Thus, the *Scott* decision was at least 'interwoven with the federal law,' [and] was not clear on its face as to the court's intent to rely on independent state grounds" ¹¹⁸

The caveat here for media defendants is that if they do not establish clearly their "adequate" and "independent" state constitutional grounds for protecting opinion,¹¹⁹ they will lose the protection by default if federal case law is also used as precedent.¹²⁰

Thus, after *Milkovich*, there is no federal absolute opinion privilege, but enhanced speech and press protections may be available under state constitutions.¹²¹ One interesting result when using dual constitutional analyses is that when adequate and independent state grounds are used by a state court deciding state law, the Supreme Court will not review the case under *Michigan v. Long*.¹²² This

117. *Id.* at 2702 n.5.

118. *Id.*

119. See, e.g., Eric B. Schnurer, *The Inadequate and Dependent "Adequate and Independent State Grounds,"* 18 HASTINGS CONST. L.Q. 371, 388-89 (1991) (advocating the use of adequate and independent state grounds to protect opinion, but worrying that they will not be honored because the state and federal court systems "are ideologically out of line and the United States Supreme Court is activist"). But see *Immuno AG. v. Moor-Jankowski*, 567 N.E.2d 1270 (N.Y.) (challenging the New York court's use of its state constitution to enhance protection of opinion in libel cases over that given by the First Amendment), *cert. denied*, 111 S. Ct. 2261 (1991).

120. See, e.g., *Michigan v. Long*, 463 U.S. 1032 (1983).

[W]hen . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the fact of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

Id. at 1040-41.

121. The Court in *Milkovich* remarked:

[R]espondents concede that the *Scott* court relied on both the United States Constitution as well as the Ohio Constitution in its recognition of an opinion privilege Under *Long*, then, federal review is not barred in this case. We note that the Ohio Supreme Court remains free, of course, to address all of the foregoing issues on remand.

Milkovich, 110 S. Ct. at 2702 n.5 (emphasis added).

122. *Long*, 463 U.S. at 1041-42.

means that a state court can totally sidestep federal review of its decision.

Some judges and legal commentators have called this an "illegitimate" tactic.¹²³ Justice O'Connor in *Long* left open a number of loopholes through which federal review could be used; therefore, mixing state and federal grounds may not be the wisest method to use when testing *Milkovich's* limits.¹²⁴ The Supreme Court, however, has denied certiorari to a case that challenges the use of a state constitution to give added protection to opinion beyond the federal limits set forth in *Milkovich*.¹²⁵ It would appear that state constitutional protection, when used carefully, is a way both to give more protection to opinion than the First Amendment does and to avoid Supreme Court review — an impressive shield not typically used in libel cases before *Milkovich*, when First Amendment law

The principle that we will not review judgments of state courts that rest on adequate and independent state grounds is based, in part, on "the limitations of our own jurisdiction." The jurisdictional concern is that we not "render an *advisory opinion*, and if the *same* judgment would be rendered by the state court after we corrected its view of federal laws, our review could amount to nothing more than an advisory opinion."

Id. (quoting *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945) (Simons, J., concurring) (emphasis added)).

123. See, e.g., *Immuno AG. v. Moor-Jankowski*, 567 N.E.2d 1270 (N.Y.) (deciding that the court should have used only federal grounds because the use of independent state grounds blocks federal review of a federal question and violates rules of judicial restraint that a court should decide no more than necessary to resolve a dispute or it is overstepping its proper bounds), *cert. denied*, 111 S. Ct. 2261 (1991); Scott H. Bice, *Anderson and the Adequate State Ground*, 45 S. CAL. L. REV. 750 (1972) (predicting new importance of state courts due to the Supreme Court's retrenchment); Hans A. Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 OR. L. REV. 125 (1970) (reviewing constitutional premises for judicial review of Oregon's regulatory policies); Earl M. Maltz, *The Dark Side of State Court Activism*, 63 TEX. L. REV. 995 (1985) (questioning the value of independent state constitutional review based on policy and tradition of the state and other "noninterpretive" analysis and deciding that the more acceptable "interpretive" analysis is based on *language* in the state constitution that specifically recognizes rights not enumerated in the Federal Constitution). *But see* Judith Kaye, *Dual Constitutionalism in Practice and Principle*, 61 ST. JOHN'S L. REV. 399 (1987) (exploring the significance of state constitutional law; Kaye is an Associate Judge for the New York Court of Appeals and wrote the opinion in *Immuno AG. v. Moor-Jankowski*, which used a state constitutional analysis to protect opinion); Vito J. Titone, *State Constitutional Interpretation: The Search for an Anchor in a Rough Sea*, 61 ST. JOHN'S L. REV. 431 (1987) (analyzing state constitutional theory; Titone is also a judge on the New York Court of Appeals and heard the *Immuno* case); F. Brittan Clayton III, Comment, *Ohio v. Johnson: The Continuing Demise of the Adequate and Independent State Ground Rule*, 57 COLO. L. REV. 395 (1986) (tracing the Supreme Court's hostility to the adequate and independent state ground rule).

124. See *Long*, 463 U.S. at 1041 n.6 ("There may be certain circumstances in which clarification [of state law decisions] is necessary or desirable, and we will not be foreclosed from taking the appropriate action.").

125. *Immuno AG. v. Moor-Jankowski*, 567 N.E.2d 1270 (N.Y.), *cert. denied*, 111 S. Ct. 2261 (1991).

had been favored since *New York Times Co. v. Sullivan* was decided in 1964.¹²⁶

C. Federal Constitutional Protections for the Press

The *Milkovich* Court listed several First Amendment protections available to media defendants and suggested their use in the aftermath of the lost opinion privilege.¹²⁷ First, the Court held that statements on matters of public concern are constitutionally protected from liability under state defamation law, unless they contain "provably false factual connotation[s]"¹²⁸ Second, it reasoned that certain statements, such as "rhetorical hyperbole," cannot reasonably be interpreted as containing factual connotations.¹²⁹ Third, the Court stated that public figures or officials who allege certain statements of "opinion" regarding them reasonably imply false and defamatory facts must prove the defendant made the statement with knowledge of their falsity or with reckless disregard for their truth.¹³⁰ Fourth, where the statement involves a private figure on a matter of public concern, the plaintiff must prove the false connotations were made with some level of fault.¹³¹ Finally, the *Milkovich* Court asserted that media defendants are protected by heightened appellate scrutiny of lower court factual determinations, which it stated assured that defamation determinations would not "'constitute a forbidden intrusion of the field of free expression.'" ¹³²

1. The Actual Malice Standard of Proof

*New York Times Co. v. Sullivan*¹³³ was the watershed case that first established First Amendment limits on the application of state defamation law by using its new "actual malice" privilege or defense.¹³⁴ The *New York Times* Court recognized the need for federal law "that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he

126. 376 U.S. 254 (1964).

127. See *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695, 2706-07 (1990) (summarizing federal protections discussed in detail earlier in the opinion).

128. *Id.* at 2706.

129. *Id.*

130. *Id.* at 2706-07.

131. *Id.* at 2707.

132. *Id.* (quoting *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984)).

133. 376 U.S. 254 (1964).

134. *Id.* at 256.

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."¹³⁵

The *New York Times* Court reasoned that this defense, or "rule" as the Court called it,¹³⁶ was needed to protect critics of public officials,¹³⁷ even though some of their statements may be false, in order to ensure robust and uninhibited public debate on governmental and other matters of public concern.¹³⁸ This standard protects statements which negligently assert or imply false facts if they do not reach the "reckless disregard" or "knowledge of falsity" levels of fault.¹³⁹

The *Milkovich* Court next cited *Curtis Publishing Co. v. Butts*,¹⁴⁰ a 1967 Supreme Court case in which the actual malice rule was extended to public figures as well as public officials. To be a public figure, the *Butts* Court said that one need only be "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."¹⁴¹

Media defendants should remember, however, that in *Gertz v. Robert Welch, Inc.*,¹⁴² the Supreme Court refused to extend the actual malice standard to media defendants when a *private* person who was involved in matters of public interest claimed actual or economic damages flowing from false and defamatory statements.¹⁴³ The Court maintained that public officials and public figures have *voluntarily* exposed themselves to more public scrutiny and criticism, but that private persons have not similarly volunteered themselves.¹⁴⁴ Applying this rationale, the Court determined that attor-

135. *Id.* at 279-80.

136. *Id.* at 279.

137. See *infra* notes 140-41 and accompanying text (discussing how the actual malice privilege was later expanded to cases involving public figures as plaintiffs as well as to public officials).

138. *New York Times Co. v. Sullivan*, 376 U.S. at 270.

139. *Id.* at 288 (stating that the case must be considered "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials").

140. 388 U.S. 130 (1967).

141. *Id.* at 164; see also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 352 (1974) (holding that absent clear evidence of general fame or notoriety in the community, or pervasive involvement in community affairs, an individual should not be deemed a public official for all aspects of his life).

142. 418 U.S. 323 (1974).

143. *Id.* at 347-51.

144. *Id.* at 344-45.

ney Gertz was not a public figure, but that he was merely representing the family of a murder victim in a noncontroversial civil case related to a controversial murder trial.¹⁴⁵ The *Gertz* Court did retain the actual malice standard as a defense for punitive damages, however, in order to protect the media from huge awards for the private plaintiff.¹⁴⁶ The Supreme Court reasoned that without the defense, the fear of large and unpredictable awards might unnecessarily exacerbate media self-censorship.¹⁴⁷

In *Gertz*, the Supreme Court did require some showing of fault by a media defendant, thus eliminating automatic or strict liability in cases involving a private plaintiff and a public issue.¹⁴⁸ The Court wrote that this was a satisfactory balancing of interests; the private person would be protected in his or her reputation, yet the media would be shielded from a presumption of liability without proof of fault.¹⁴⁹

Thus, the actual malice standard does double duty. It protects speech about public persons by creating such a high standard of proof that the plaintiff usually cannot meet the burden.¹⁵⁰ It also is used in certain cases, like *Gertz*, to make huge damage awards unlikely.¹⁵¹ The problem with actual malice, as with the fact/opinion distinction, is that the analysis methods vary from court to court — and so do the results.¹⁵² As *Milkovich* itself went up and down the judicial ladder, initial court analyses deemed the plaintiff a public figure, but later court analyses declared him a private person.¹⁵³ Actual malice also needs a bright-line rule or at least better instructional guidelines from the Supreme Court.¹⁵⁴

145. *Id.* at 351-52.

146. *Id.* at 350.

147. *Id.*

148. *Id.* at 346-48.

149. *Id.* at 348.

150. *But see* *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989) (upholding a jury's finding of actual malice in a newspaper's reporting of allegations against a political candidate, where evidence showed the newspaper failed to listen to tape recordings of a conversation that the candidate made available to the newspaper and also failed to contact a major witness who should have been able to confirm or deny allegations).

151. *Gertz*, 418 U.S. at 350.

152. For a critical study of the actual malice rule, see HOPKINS, *supra* note 43.

153. Superintendent Scott, in his separate libel case, was held to be a *public* figure, while in *Milkovich* the plaintiff was held to be a *private* figure. See *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695, 2701 n.5 (1990) ("[R]espondents claim that the determination by the Ohio Supreme Court in *Milkovich v. News-Herald* . . . that petitioner is not a public official or figure was overruled in *Scott* . . . is meritless.").

154. See HOPKINS, *supra* note 43, at 76 (suggesting alternative methods of resolving libel

2. Proof of Falsity — The Plaintiff's Burden

The Supreme Court clarified the multi-faceted *Gertz* case in *Philadelphia Newspapers, Inc. v. Hepps*,¹⁵⁵ where it held "that the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern."¹⁵⁶ More importantly, it also held that the plaintiff must bear the burden of proving falsity, as well as fault, in order to recover damages.¹⁵⁷ This allows some false speech to escape a judgment through lack of proof. It also relieves the media defendant of the burden of proving the truth of its published statements.

3. Rhetorical Hyperbole and Vigorous Epithets

The Supreme Court in *Milkovich* also reminded media defendants of the "rhetorical hyperbole" defense, which limits the *type* of speech that could be libelous.¹⁵⁸ It cited *Greenbelt Cooperative Publishing Ass'n v. Bresler*¹⁵⁹ as supporting the use of this defense.¹⁶⁰ *Bresler* involved the reporting of heated discussions at Greenbelt, Maryland city council meetings over a developer's tactics in gaining zoning variances for use of land he owned in the city.¹⁶¹ Two news articles were published in the *Greenbelt News Review* which stated that at the meetings some people had said developer Bresler's negotiating position was "blackmail."¹⁶²

Bresler sued for libel, claiming that the use of the word blackmail implied that he had committed the crime of blackmail.¹⁶³ The Supreme Court rejected his claim, holding that "as a matter of constitutional law, the word 'blackmail' in these circumstances was not slander when spoken, and not libel when reported."¹⁶⁴ The Court stated that the reports were "accurate and full" and that "even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who con-

claims that could avoid libel trials altogether).

155. 475 U.S. 767 (1986).

156. *Id.* at 777.

157. *Id.* at 776.

158. *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695, 2706 (1990).

159. 398 U.S. 6 (1970).

160. *Milkovich*, 110 S. Ct. at 2704-05.

161. *Bresler*, 398 U.S. at 7-8.

162. *Id.*

163. *Id.* at 8.

164. *Id.* at 13.

sidered the developer's negotiating position extremely unreasonable."¹⁶⁵ It should be noted that in *Bresler*, the Court found that the statements in question did not appear to be statements of fact, but rather words used in a state of high emotion, and were not intended to be taken literally.¹⁶⁶ The Supreme Court's analysis here is strongly contextual. Without the use of context, "blackmail" could have been read as meaning a criminal charge, as "liar" was interpreted in *Milkovich*. It is interesting to note that the word "perjury" was never used in Diadiun's column, but was merely implied.¹⁶⁷

The *Milkovich* Court noted two other Supreme Court decisions that further refined the "rhetorical hyperbole" defense. In *Hustler Magazine, Inc. v. Falwell*,¹⁶⁸ the Court held that the First Amendment precluded recovery under a state emotional distress action for sexual innuendo in an ad parody which "could not reasonably have been interpreted as stating actual facts about the public figure involved."¹⁶⁹ In *Letter Carriers v. Austin*,¹⁷⁰ the Supreme Court treated the word "traitor," as used in a labor dispute to characterize strikebreakers, similarly to its treatment of "blackmail" in *Bresler*.¹⁷¹ The Court said it was not defamatory under federal labor law, but rather was used "in a loose, figurative sense" and was "merely rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members."¹⁷²

4. Independent Examination of the "Whole Record"

Finally, the Supreme Court in *Milkovich* pointed to a further procedural protection for media defendants in cases raising First

165. *Id.* at 14. The Court noted that the articles accurately and fully described Bresler's proposal, and that although the article stated some people at the meetings called the proposal blackmail, it also reported that other people indicated Bresler's position was not unreasonable. *Id.*

166. *Id.* at 13-14.

167. See *supra* text accompanying notes 92-95 (detailing the allegations in Diadiun column); see also Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 603, 627-46 (1990).

168. 485 U.S. 46 (1988).

169. *Id.* at 57. The parody involved a sexual play on words of a liquor ad that featured celebrities talking about the "first time" they tasted the liqueur. *Hustler Magazine* parodied the advertisement, featuring the Reverend Jerry Falwell as the "celebrity," and intimated his "first time" was during a drunken incestuous rendezvous with his mother in an outhouse. *Id.* at 48.

170. 418 U.S. 264 (1974).

171. *Id.* at 285-86.

172. *Id.*

Amendment issues. It cited its previous decision in *Bose Corp. v. Consumers Union*,¹⁷³ where the Court held that appellate courts must “‘make an independent examination of the whole record’ in order to make sure that ‘the judgment does not constitute a forbidden intrusion on the field of free expression.’”¹⁷⁴ This enhanced review of the record, beyond that used in other types of appeals, protects the media from having a judgment decided only on the trial court’s interpretation of the facts.¹⁷⁵

D. *The Absolute Opinion Privilege Is Rejected*

The Supreme Court in *Milkovich v. Lorain Journal Co.*¹⁷⁶ then addressed the viability of the *Gertz*-based absolute privilege for opinion. It rejected the concept completely: “[W]e do not think this passage from *Gertz* was intended to create a wholesale defamation exemption for anything that might be labeled ‘opinion.’”¹⁷⁷

Chief Justice Rehnquist stated in his majority opinion in *Milkovich* that the “marketplace of ideas” origin of this passage points strongly to the view that opinions were the sort of thing that could be corrected by discussion.¹⁷⁸ He added that such an interpretation would not only be contrary to the “tenor and context of the passage, but it would also ignore the fact that expressions of ‘opinion’ may often imply an assertion of objective fact.”¹⁷⁹ The *Milkovich* Court did not see the marketplace of ideas today as an

173. 466 U.S. 485 (1984).

174. *Id.* at 499 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-86 (1964)).

175. *Id.* at 498-501. Appellate courts normally give deference to the trial court’s decision and accept its findings of fact unless they are “clearly erroneous,” especially if the case has been lengthy and complicated. This is based on acknowledgment of the trial court’s more intimate knowledge of the details and nuances of the trial proceedings. *Id.*

176. 110 S. Ct. 2695 (1990).

177. *Id.* at 2705.

178. *Id.*; see, e.g., William J. Brennan, Jr., *The Supreme Court and the Meiklejohnian Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965) (responding to Meiklejohn’s view of Supreme Court First Amendment decisions); Harry Kalven, Jr., *The New York Times Case: A Note on “The Central Meaning of the First Amendment.”* SUP. CT. REV. 191 (1964) (analyzing *New York Times v. Sullivan* and historical constitutional interpretation); Alexander Meiklejohn, *The First Amendment Is An Absolute*, SUP. CT. REV. 245 (1961) (discussing the factionalization of the Court on First Amendment issues); Post, *supra* note 167 (defining the domain of public discourse in light of *Hustler v. Falwell*); Frederick F. Schauer, *Language, Truth, and the First Amendment: An Essay in Memory of Harry Canter*, 64 VA. L. REV. 263 (1978) (examining the First Amendment doctrine in connection with political speech, defamation, and commercial speech); Shneider, *supra* note 27, at 65-70 (establishing a model of analysis for opinion).

179. *Milkovich*, 110 S. Ct. at 2705.

intellectual free-for-all without limits.¹⁸⁰

The Supreme Court cited Judge Friendly in *Cianci v. New Times Publishing Co.* as support for this proposition.¹⁸¹ Judge Friendly observed that the *Gertz* dictum "has become the opening salvo in all arguments for protection from defamation actions on the ground of opinion, even though the case did not remotely concern the question."¹⁸² The *Milkovich* Court then stated that the *Gertz* dictum was "merely a reiteration of Justice Holmes's classic 'marketplace of ideas' concept" espoused in his dissent in *Abrams v. United States*. "[T]he ultimate good desired is better reached by free trade in ideas . . . the best test of truth is the power of the thought to get itself accepted in the competition of the market."¹⁸³

The Supreme Court in *Milkovich* did not agree that Justice Holmes's statement meant that opinions containing defamatory facts or implications could be corrected by discussion.¹⁸⁴ The Court said this would

ignore the fact that expressions of "opinion" may often imply an assertion of objective fact. . . . Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; and the statement, "In my opinion Jones is a liar," can cause as much damage to reputation as the statement, "Jones is a liar."¹⁸⁵

The key here is that *any* statement that *implies* false and defamatory facts, no matter what its label, is not protected. Again quoting Judge Friendly in *Cianci*, the Supreme Court held that "it would be destructive of the law of libel if a writer would escape liability for accusations of [defamatory conduct] simply by using, explicitly or implicitly, the words "I think"'" to introduce a statement.¹⁸⁶ The *Milkovich* Court added: "[W]e think the "breathing space"'

180. *Id.*

181. *Id.* at 2706 (quoting *Cianci v. New Times Publishing Co.*, 639 F.2d 54, 64 (2d Cir. 1980)).

182. *Cianci v. New Times Publishing Co.*, 639 F.2d 54, 61-62 (2d Cir. 1980) (observing that *Gertz* involved allegations that the defendant had a criminal record).

183. *Abrams v. United States*, 250 U.S. 616, 630 (1919). However, Justice Holmes said, "Of course I am speaking only of expressions of opinion and exhortations, which were all that were uttered here." *Id.* at 631. This, in itself, acknowledges that he, too, knew there were some limits to the right to speak freely.

184. *Milkovich*, 110 S. Ct. at 2705.

185. *Id.* at 2705-06.

186. *Id.* at 2706 (quoting *Cianci v. New Times Publishing Co.*, 639 F.2d 54, 64 (2d Cir. 1980)).

which “‘freedoms of expression require in order to survive,’” . . . is adequately secured by existing constitutional doctrine without the creation of an artificial dichotomy between “‘opinion’” and fact.”¹⁸⁷

In summary, the Court held that the *Bresler-Letter Carriers-Falwell* line of cases provides protection for “statements that cannot ‘reasonably [be] interpreted as stating actual facts’ about an individual.”¹⁸⁸ Thus, public debate can include “‘imaginative expression’” and “‘rhetorical hyperbole.’”¹⁸⁹ The Court next reasoned that the *New York Times-Butts-Gertz* culpability requirements further ensure uninhibited public debate by requiring proof of actual malice for speech about public persons and for punitive damage awards for private persons involved in public issues. Finally, the Court observed that the enhanced appellate review allowed by *Bose Corp. v. Consumers Union*¹⁹⁰ provides an extra safeguard for free expression.¹⁹¹

The “dispositive question,” the Court said in *Milkovich*, “becomes whether or not a reasonable factfinder could conclude that the statements in the Diadion column imply an assertion that plaintiff Milkovich perjured himself in a judicial proceeding. We think the question must be answered in the affirmative.”¹⁹² Nine statements and two headlines said that Milkovich lied under oath at the judicial proceeding. The Supreme Court did not find this to be “loose, figurative or hyperbolic language which would negate the impression that the writer was seriously maintaining petitioner committed the crime of perjury,” nor did it find that “the *general tenor* of the article negated this impression.”¹⁹³

The “general tenor” statement clearly indicates that the Supreme Court was using a contextual basis for part of its analysis, although it did not articulate this specifically.¹⁹⁴ But in *Milkovich* the general tenor was “liar, liar, liar” throughout and did not use satire or the emotional outburst of an angered citizenry as in the *Bresler-Letter*

187. *Id.* (citing *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 772 (1986)).

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

189. *Id.*

190. 466 U.S. 485 (1984).

191. *Milkovich*, 110 S. Ct. at 2707.

192. *Id.*

193. *Id.* (emphasis added).

194. See *supra* text accompanying notes 71-78 (outlining the contextual basis analysis).

Carriers-Falwell line of cases.¹⁹⁵

It would seem that the *Milkovich* Court could have found columnist Diadiun's "liar" statements equally loose and figurative but for its connection with testimony Coach Milkovich made under oath at a judicial proceeding. When statements are made under oath and the court comes to a decision based on that testimony, it is clearly unwise for a media defendant to count on court sympathy when the testimony is disparaged. In addition, records of the two proceedings could be checked, but Diadiun did not compare them in his column. Instead, he implied that they would prove that Milkovich committed perjury.¹⁹⁶

Implying defamatory facts that can readily be proved true or false will not be protected as rhetorical hyperbole no matter how emotional the statements may be and no matter where they are located. Ironically, Diadiun may only have had to state his supporting evidence from the testimony along with his conclusory opinion in order to save himself, and the media, from the loss of a privilege.

E. Justice Brennan's Dissent

Justice Brennan, dissenting from the holding in *Milkovich*,¹⁹⁷ agreed with the Court's basic holding that the First Amendment protects opinion sufficiently, even without an absolute opinion privilege.¹⁹⁸ He also stated that the Court's analysis of the Diadiun statements used

the same indicia that lower courts have been relying on for the past decade or so to distinguish between statements of fact and statements of opinion: the type of language used, the meaning of the statement in context, whether the statement is verifiable, and the broader social circumstances in which the statement was made.¹⁹⁹

These indicia mirror the *Ollman* four-factor analysis.²⁰⁰

Where Brennan parted company with the majority was with the application of these rules. Specifically, he found the statements in Diadiun's column to be opinion, not fact. He called Diadiun's statement that Milkovich must have lied in court "conjecture" and said

195. See *supra* notes 158-72 and accompanying text (comparing the language at issue in *Milkovich* with the language at issue in *Bresler*, *Letter Carriers*, and *Falwell*).

196. See *Milkovich*, 110 S. Ct. at 2698 n.2 (setting forth the Diadiun article in its entirety).

197. *Id.* at 2708-15 (Brennan, J., dissenting).

198. *Id.* at 2708-09.

199. *Id.* at 2709.

200. See *supra* notes 59-75 and accompanying text (discussing the *Ollman* test in detail).

that Diadiun was "simply guessing."²⁰¹ Justice Brennan stated that Diadiun clearly indicated the point where factual analysis ended and open attempts to "surmise" began by his change in word choice towards the latter part of the article.²⁰² Justice Brennan reasoned that using words such as "seemed," "probably," and "apparently" negated any impression Diadiun had first-hand knowledge of the subject matter.²⁰³

This total divergence in results using the same tests points to the problem that the Court still has not addressed: There are First Amendment protections for opinion, but where is the test that can sort out opinion from fact? If Justice Brennan used the same test and came up with a different result than did Chief Justice Rehnquist and the majority, then what good is such a test?

This is why previous lower courts had gladly adopted the absolute opinion privilege. This label/context test made it clearer what was opinion and what was not. Here, in *Milkovich*, the Supreme Court said it rejected contextual labels, but it still used an internal context analysis.²⁰⁴

Milkovich does little to clarify the law of libel in regard to the fact/opinion distinction. The Supreme Court selected an atypically clear-cut case to analyze this murky area of libel law but gave no clear instructions on how to apply the opinion protections it enumerated. The media defendant is left with less protection and the likelihood of more litigation now because the lower courts had been more likely to call a statement opinion while the absolute opinion privilege still existed.²⁰⁵ There remains no clear test to determine whether statements published will be considered to be fact or opinion. This may lead to further self-censorship or to atypical libel law analyses, such as use of state constitutional grounds for protection of opinion, to give opinion increased protection beyond the First Amendment and to avoid federal review.

The media stand on shakier ground than before *Milkovich* and must await more specific instructions from the Supreme Court before their fears are allayed. However, until this occurs, it is informative to see how post-*Milkovich* courts have tackled the prob-

201. *Milkovich*, 110 S. Ct. at 2710-11 (Brennan, J., dissenting).

202. *Id.*

203. *Id.*

204. See *supra* notes 192-95 and accompanying text.

205. See *supra* note 27.

lem and how media defendants have fared.

IV. LOWER COURT DECISIONS AFTER *MILKOVICH V. LORAIN JOURNAL CO.*

Despite the loss of the absolute opinion privilege, media defendants have generally won their cases. Because the Supreme Court has not yet heard a case that would further clarify the fact/opinion method of analysis, the lower courts are carefully tiptoeing around the issue.

Lower federal and state court decisions after *Milkovich v. Lorain Journal Co.* have used fact/opinion analyses that have ranged from the sublimely simple to the constitutionally quixotic. Some have used the First Amendment defenses listed in *Milkovich*, often basing them on a context analysis.²⁰⁶ The New York Court of Appeals used federal constitutional grounds to protect factual assertions and, based on a context analysis, found separate state constitutional grounds to protect opinion.²⁰⁷

A. Federal Constitutional Protections after *Milkovich*

One of the first courts to tackle the new fact/opinion analysis after *Milkovich* was the Ninth Circuit Court of Appeals in *Unelko Corp. v. Rooney*.²⁰⁸ The manufacturer of a car-care product sued television personality Andy Rooney and CBS for libel based on a statement that Rooney made on the television program *60 Minutes*.²⁰⁹ Rooney had been sent a sample of the product by plaintiff Unelko Corporation, tried it, and said in a broadcast that “[i]t didn’t work.”²¹⁰ Rooney claimed the statement was opinion; Unelko claimed it was a false and defamatory statement.²¹¹

Originally, Rooney received a summary judgment in his favor from the United States District Court for the District of Arizona, which held that the statement was constitutionally protected opinion.²¹² The appellate court subsequently had to develop a new analy-

206. *E.g.*, *Unelko Corp. v. Rooney*, 912 F.2d 1049 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 1586 (1991).

207. *Immuno AG. v. Moor-Jankowski*, 567 N.E.2d 1270 (N.Y.), *cert. denied*, 111 S. Ct. 2261 (1991).

208. 912 F.2d 1049 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 1586 (1991).

209. *60 Minutes* (CBS television broadcast, Apr. 17, 1988, and May 8, 1988).

210. *See Unelko Corp.*, 912 F.2d at 1051.

211. *Id.* at 1052-53.

212. *Id.* at 1050.

sis because *Milkovich* had been decided before the appeal reached the Ninth Circuit.²¹³

The court held that *Milkovich* overruled all previous Ninth Circuit fact/opinion decisions analyzed under the opinion privilege standard.²¹⁴ It then used the *Milkovich* Court's analysis, ignoring labels, and decided that "[i]t didn't work" was an objectively verifiable statement, not an opinion as the lower court had held.²¹⁵

The *Unelko Corp.* analysis rejected context as being irrelevant to the specific challenged statement. It ignored the satirical and hyperbolic "tenor" of the broadcast segment as being influential. The Ninth Circuit reasoned that "[a]lthough part of a humorous report, the statement 'It didn't work' was presented as fact and understood as such by several viewers who wrote to CBS."²¹⁶ The Ninth Circuit concluded that "[f]or these reasons, a fact finder could conclude that Rooney's statement that Rain-X 'didn't work' implied an assertion of objective fact."²¹⁷

Despite finding that Rooney's statement did not constitute opinion, the court held that Rooney was not liable for defamation. It held that the *Milkovich*-approved *Hepps* standard of proof²¹⁸ required that the plaintiff prove the falsity of the statement if there is a media defendant involved in an issue of public concern. The court held that *Unelko* did not meet its burden of proof and affirmed the district court's summary judgment for Rooney and CBS.²¹⁹

State courts have also continued to use the *Ollman* four-factor analysis. In *Janklow v. Viking Press*,²²⁰ the South Dakota Supreme Court, shortly after *Milkovich*, used a four-factor, *Ollman*-type opinion analysis to reject a libel claim brought by the governor of South Dakota against the publishers of a book that made references

213. *Milkovich* was decided June 21, 1990; *Unelko Corp.* was decided August 24, 1990.

214. *Unelko Corp.*, 914 F.2d at 1053; cf. *Phantom Touring, Inc. v. Affiliated Publications*, 953 F.2d 724, 727 (1st Cir.) (holding that *Milkovich*, although eschewing fact-opinion terminology, did not change the standard of review in defamation cases), cert. denied, 112 S. Ct. 2942 (1992); *Moldea v. New York Times Co.*, 793 F. Supp. 335, 337 (D.D.C. 1992) (stating that *Milkovich* did not change prior First Amendment law but only rejected a separate constitutional privilege for statements of "opinion").

215. *Unelko Corp.*, 914 F.2d at 1053-55.

216. *Id.* at 1054 (citations omitted).

217. *Id.* at 1055.

218. See *supra* text accompanying notes 155-57 (outlining the *Hepps* burden of proof requirements).

219. *Unelko Corp.*, 914 F.2d at 1055-58.

220. 459 N.W.2d 415 (S.D. 1990).

to specific instances of alleged sexual misconduct involving him.²²¹ The court held that under the four-factor analysis, the references were protected opinion and were not made with actual malice, particularly since they were directly related to political events and campaigns.²²² Thus, the defendant's book was not defamatory and was protected under the First Amendment. This approach follows *Milkovich*.

In a 1990 California case, *Moyer v. Amador Valley Joint Union High School*,²²³ an *Ollman* context analysis was also used to protect the defendants' statements as opinion. The suit involved a high school student newspaper that published an article labeling the plaintiff as a babbler and the worst teacher at the school, among other things.²²⁴ In applying the four-factor test to label the statements as opinion, a California appellate court stated that this "totality of the circumstances" test was used "before *Milkovich*" and that the principles of analysis had not substantially changed after the Supreme Court's decision.²²⁵ This is in line with Justice Brennan's view on the continuing validity of the four-factor test in his dissent in *Milkovich*.²²⁶

Similarly, an Illinois appellate court, in *Flip Side, Inc. v. Chicago Tribune Co.*,²²⁷ used a context analysis to conclude that a Dick Tracy cartoon strip did not contain libelous materials.²²⁸ The court held that the comic strip, which featured escapades involving a record company, organized crime, payola, and murders, could not reasonably be understood as describing actual facts about the plaintiff record company.²²⁹ The court stated that the "entire episode," not just one artistic square, must be considered in a libel action.²³⁰ It reasoned that in this context, the statements were "all fanciful adventure," "all classic Dick Tracy" — *Bresler-Letter Carriers-Falwell* imaginative speech per *Milkovich*.²³¹

221. *Id.* at 417-18.

222. *Id.* at 422-24.

223. 275 Cal. Rptr. 494 (Cal. Ct. App. 1990).

224. *Id.* at 495.

225. *Id.* at 496-97.

226. *See Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695, 2709 (1990) (Brennan, J., dissenting).

227. 564 N.E.2d 1244 (Ill. App. Ct. 1990).

228. *Id.* at 1253-54.

229. *Id.* at 1246-50.

230. *Id.* at 1251.

231. *Id.* at 1252-54.

Although the names and nature of the real businesses and those in the comic strip were basically the same, the court said:

The breathing space that is required for first amendment freedoms . . . will not allow a defamation action to be maintained merely because there is a similarity of names and business between the plaintiff and the subject in the publication . . . unless the subject in the publication is reasonably understood as describing actual facts about the plaintiff.²³²

The contextual approach is clearly the most popular method of analyzing fact versus opinion no matter what speech protection is used as the basis for the defense.

B. *The Emergence of State Constitutional Protections after Milkovich*

At the other end of the spectrum was the much-touted 1991 New York Court of Appeals holding in *Immuno AG. v. Moor-Jankowski*.²³³ Some commentators have looked to this case as the media's best hope for victory after *Milkovich*.²³⁴ The Supreme Court let stand the New York court's use of state constitutional protection of opinion as an alternative to use of common law or First Amendment protections enumerated in *Milkovich*.²³⁵

The libel action in *Immuno* arose out of a letter to the editor published in a science journal in December of 1983.²³⁶ The letter's author, an animal rights activist, criticized the research methods employed by Immuno AG., a biologic products manufacturer.²³⁷ Specifically, the author alleged that Immuno used noncaptive chimpanzees, an endangered species, for product experimentation and research.²³⁸ The letter was published almost a year after its receipt and more than ten months after the journal had submitted the letter to Immuno for comment and reply.²³⁹ The published letter was prefaced by an editor's note explaining Immuno's disapproval and its

232. *Id.* at 1253.

233. 567 N.E.2d 1270 (N.Y.), *cert. denied*, 111 S. Ct. 2261 (1991).

234. *See, e.g.*, Spencer, *New York Court Looks to State Law on Libel*, NAT'L. L.J., Jan. 28, 1991, at 16 (noting the chilling effect libel litigation has on free speech); *Top N.Y. Court Protects letters*, EDITOR & PUBLISHER, Feb. 16, 1991, at 27 (stating that *Immuno* greatly expanded protection for media defendants in libel suits).

235. *Immuno*, 111 S. Ct. 2261 (1991).

236. *Immuno*, 567 N.E.2d at 1272.

237. *Id.*

238. *Id.*

239. *Id.*

referral of the matter to its New York lawyers.²⁴⁰ Immuno subsequently sued the editor for libel.²⁴¹

The New York Court of Appeals, like the *Unelko Corp.* court, was faced with creating a fact/opinion analysis because the lower court's analysis had been based on the absolute opinion privilege.²⁴² New York's highest court developed a dual analysis based on separate federal and state constitutional grounds. The federal ground used was the *Hepps* proof-of-falsity approach for *factual* statements.²⁴³ The court held that Immuno did not meet the burden of proof regarding certain stated and implied factual assertions.²⁴⁴

Addressing the letter under state constitutional grounds, the Court of Appeals used an *Ollman*-type of contextual analysis and concluded that the body of the letter conveyed opinions, not facts, to the average reader.²⁴⁵ The court reasoned that the state constitution afforded enhanced protection to the press and speech beyond that given by the Federal Constitution.²⁴⁶ It said that this was borne out by case precedents and the tradition of special reverence for freedom of expression espoused by residents of the state.²⁴⁷ The court added that the Federal Constitution fixes only "minimum standards applicable throughout the Nation," and that state courts may supplement those standards to meet local needs and expectations.²⁴⁸

The Court of Appeals derived its context analysis from its decision in *Steinhilber v. Alphonse*,²⁴⁹ which held that the test for determining if a statement is opinion or fact is whether the reasonable reader believes the statements contained defamatory facts about the plaintiff based on the whole communication, its tone, and its apparent purpose.²⁵⁰ Applying this test, the Court of Appeals concluded

240. *Id.*

241. *Id.* at 1273.

242. The New York Court of Appeals had previously dismissed the libel suit on absolute opinion privilege grounds. *Immuno AG. v. Moor-Jankowski*, 549 N.E.2d 129 (N.Y. 1989). The Supreme Court vacated and remanded the case for further consideration in light of *Milkovich*. 110 S. Ct. 3266 (1990).

243. *Immuno*, 567 N.E.2d at 1275; see *supra* text accompanying notes 155-57 (discussing the *Hepps* standard).

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

245. *Id.* at 1277-82. The Court of Appeals adopted "an analysis that begins by looking at the content of the whole communication, its tone and apparent purpose." *Id.* at 1281.

246. *Id.* at 1278.

247. *Id.* at 1277-79.

248. *Id.* at 1277.

249. 501 N.E.2d 550 (N.Y. 1986).

250. *Id.* at 553.

that the average reader of the *Journal of Medical Primatology* would look upon some of the statements in the letter as an expression of opinion rather than a statement of fact, even though the language was serious and restrained.²⁵¹

The court cited *Unelko Corp.* as antithetical. "Our state law analysis of the remainder of the letter . . . would not involve the fine parsing of its length and breadth that might now be required under Federal law for speech that is not loose, figurative or hyperbolic."²⁵² The state court sidestepped the *Milkovich* analysis for opinion and used a more comprehensive state protection for speech.

The rationale for this carefully constructed state defense is supported by the Supreme Court in *Michigan v. Long*.²⁵³ In *Long*, the Court held that it would not review state law cases if they were decided on adequate and independent grounds.²⁵⁴ As long as the state ground was not related to federal constitutional grounds and did not depend on federal grounds as precedent, the Court held that it would not review the decision.²⁵⁵

The problem with this type of analysis is that the avoidance of federal review has been termed "illegitimate" by some legal commentators and judges, including Judge Simons in his concurring opinion in *Immuno*.²⁵⁶ Judge Simons concluded that the state grounds analysis violated the tenets of judicial restraint and was constitutionally unsound because it denied the Supreme Court, charged with ultimate authority in the area, a measure of control over the law it had created.²⁵⁷ In addition, Justice O'Connor's opinion in *Long* actually tightened the reins on separate state grounds analysis, rather than loosening them.²⁵⁸

But for now, the *Immuno* state law method can insulate its opinion analysis from federal review and provide a safe harbor for media defendants. *Immuno* appears to have separated its state grounds successfully, proving state constitutional protection to be more than

251. *Immuno*, 567 N.E.2d at 1281.

252. *Id.* (citations omitted).

253. 463 U.S. 1032 (1983).

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

255. *Id.*

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

257. *Id.* at 1287.

258. *Long*, 463 U.S. at 1038-41 (1983) (holding that if the state law ground rests primarily on federal law, or is interwoven with federal law, or is unclear on the face of the opinion, the Supreme Court will assume that the ground was federal by default).

just the possibility mentioned in *Milkovich*.²⁵⁹

The post-*Milkovich* cases generally have favored media defendants despite the loss of the absolute opinion privilege. Courts have continued to rely on the *Ollman* type of context analysis on which to base either federal or state constitutional and common law protections. So far, the cases caught in the middle, those which decided in favor of media defendants using the opinion privilege prior to *Milkovich* and which had to use a different analysis to reach the same results after *Milkovich*, have still held for the defendants.

The main problem now and in the future is that it is more likely that what was once protected opinion will now be deemed to be factual. The inability of plaintiffs to prove actual malice under *New York Times Co. v. Sullivan*²⁶⁰ may remain stable as a protection when a statement does not pass muster as opinion via rhetorical hyperbole²⁶¹ or fair comment analysis.²⁶² Thus far, there appears to be no serious change in media libel case results, but there may be more cases going to trial because challenged statements are held to be factual. This fear of increased litigation costs alone is enough to promote a higher level of press self-censorship — or a retreat to enhanced state constitutional protection and its review-avoiding advantage.

And the ever-present problem remains — the fact/opinion distinction is still vague and subjective. *Milkovich* has not changed the murkiness in this already troubled area of libel law.

CONCLUSION

The Supreme Court in *Milkovich v. Lorain Journal Co.* changed how libel claims are defended by rejecting the sixteen-year-old *Gertz* absolute privilege for opinion based on the First Amendment. It held that there are sufficient protections for opinion in federal constitutional law and in state common law, and possibly in state constitutional law. It rejected an opinion "label" as insufficient to protect challenged statements and held that assertions must be judged on whether a reasonable factfinder could conclude that the

259. *Milkovich*, 110 S. Ct. 2695, 2702 (1990); see *supra* text accompanying notes 117-26 (discussing the state constitutional grounds analysis in *Milkovich*).

260. 376 U.S. 254 (1964).

261. See *supra* notes 158-72 and accompanying text (discussing "rhetorical hyperbole" under *Milkovich*).

262. See *supra* note 40 and accompanying text (discussing "fair comment").

statements *implied factual assertions* which could be objectively verified.

The *Milkovich* Court listed existing First Amendment protections for media defendants: the actual malice fault standard; the rhetorical hyperbole or imaginative or loose language standard; placement of the burden of proof of falsity on the plaintiff; and enhanced appellate review of the whole record. *Milkovich* also revived the pre-*Gertz* state common law privilege of fair comment for opinion, and it hinted at the possibility of enhanced press and speech protection under state constitutional law.

The latter has been called an illegitimate method of avoiding federal judicial review by some commentators, but it has been tacitly approved by the Supreme Court's denial of certiorari in 1991 to plaintiff Immuno in *Immuno AG. v. Moor-Jankowski*. Supreme Court review would have tested whether the state court's use of state constitutional protection was adequate and independent enough to pass muster under *Michigan v. Long*. The Supreme Court apparently believed the test had been met and judicial review was thus precluded under *Long*.

Although *Milkovich's* summarizing of existing protections was helpful, the Supreme Court failed to explain how to distinguish between fact and opinion, leaving the courts in the same subjective position they were in pre-*Milkovich*. Because the absolute opinion privilege was the closest thing to a bright-line rule for protecting opinion, its demise has left members of the media wondering even more how they can be sure what they publish is protected. This will likely increase media self-censorship because more statements intended as opinion will be held to be factual and will result in more libel trials — unless the enhanced state constitutional protection approach catches on now that it appears viable.

The *Ollman* four-factor opinion analysis has survived *Milkovich* so far, but it is now used to support the other opinion protections rather than the absolute opinion privilege. This does not, however, reduce the dangers of media self-censorship because the tests are subjective.

Milkovich itself is not helpful to the media because it involved a clear-cut scenario where statements made under oath in official proceedings were readily verifiable via recorded testimony. Most libel cases are less clear-cut.

It appears that *Milkovich v. Lorain Journal Co.* has stripped

away a layer of protection for the media and set the scene for the possibility of more libel trials or for increased self-censorship in newsrooms nationwide — or both.

For those unwilling to test the waters by publishing robust opinion and counting on fair comment and existing First Amendment protections to bail out their ship of state(ments), why not try state constitutional protection? Its benefits are several. Added protection can be given to opinion beyond that of federal and common law; Supreme Court review can be avoided if the defense is worded carefully, as in *Immuno*, and it avoids self-censorship and increased libel suits because the state that taketh away, via libel law, giveth back with a bonus via state constitutional protections. What does a media defendant have to lose?

There is an irony here. Yes, *Milkovich* removed to a slight degree the federal constitutional protection for opinion. But, like an unwary gardener, the Supreme Court pulled one weed, the absolute opinion privilege, and up sprang a hardier one — modern federalism in libel law.