Court of Appeals of New York.
IMMUNO AG., Appellant,
v.
J. MOOR-JANKOWSKI, Respondent.
Jan. 15, 1991.
Certiorari Denied June 3, 1991. See 111 S.Ct. 2261.

Libel action was brought against, inter alia, editor of scientific journal, which published letter to editor criticizing biologic products manufacturer's plan to establish African facility for hepatitis research using wild chimpanzees. The Supreme Court, New York County, Shainswit, J., denied editor's motion for summary judgment, and editor appealed. The Supreme Court, Appellate Division, 145 A.D.2d 114, 537 N.Y.S.2d 129, reversed. Manufacturer appealed by permission granted. The Court of Appeals, 74 N.Y.2d 548, 549 N.Y.S.2d 938, 549 N.E.2d 129, affirmed. On petition for writ of certiorari, the United States Supreme Court, 110 S.Ct. 3266, vacated and remanded for further consideration. On remand, the Court of Appeals, Kaye, J., held that: (1) manufacturer failed to show falsity of factual assertions in letter to editor; (2) remand of action from United States Supreme Court to Court of Appeals "for further consideration in light of" another Supreme Court opinion addressing federal law applicable to libel actions did not preclude Court of Appeals from resolving case on separate and independent state constitutional ground, as well as under federal law; (3) under State Constitution, analysis of statements which are subject of libel action to determine whether statements are actionable fact or protected opinion should begin by looking at content of whole communication, its tone and apparent purpose in order to determine whether reasonable person would view statement as expressing or implying any facts; and (4) under state constitutional analysis, presumptions and predictions in letter as to what "appeared to be" or "might well be" or "could well happen" or "should be" were protected from libel action.

Affirmed.

Simons, Titone and Hancock, JJ., filed separate opinions concurring in result.

West Headnotes

[1] Libel and Slander 237 ⚷6(1)

237 Libel and Slander
237I Words and Acts Actionable, and Liability Therefor
237k6 Actionable Words in General
237k6(1) k. In General. Most Cited Cases
In determining whether speech is actionable or is protected opinion in libel action, key inquiry is whether challenged expression, however labeled by defendant, would reasonably appear to state or imply assertions of objective fact; literal words of challenged statements do not entitle media defendant to "opinion" immunity or libel plaintiff to go forward with its action, and courts must also consider impression created by words used as well as general tenor of expression from point of view of reasonable person. U.S.C.A. Const.Amend. 1.

[2] Libel and Slander 237 ⚷101(1)

237 Libel and Slander
237IV Actions
237IV(C) Evidence
237k101 Presumptions and Burden of Proof
237k101(1) k. In General. Most Cited Cases
Libel plaintiff has burden of showing falsity of factual assertions.

[3] Libel and Slander 237 ⚷9(7)

237 Libel and Slander
237I Words and Acts Actionable, and Liability Therefor
237k9 Words Tending to Injure in Profession or Business

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

237k9(7) k. Merchants, Tradesmen, and Manufacturers. Most Cited Cases
Biologic product manufacturer failed to show falsity of factual assertions in letter to editor of scientific journal critizing manufacturer's plan to establish African facility for hepatitis research using wild chimpanzees, core premise of letter asserted that there was no scientific method to determine carrier status, and that manufacturer would release possible carrier chimpanzees who might endanger wild population.

[4] Libel and Slander 237 9(7)

237 Libel and Slander
237I Words and Acts Actionable, and Liability Therefor
237k9 Words Tending to Injure in Profession or Business
237k9(7) k. Merchants, Tradesmen, and Manufacturers. Most Cited Cases
Even if assertion in letter to editor of scientific journal critizing biologic products manufacturer's plan for hepatitis research using wild chimpanzees, that no scientific test existed to determine carrier status, had been shown to be false, that assertion would not itself libel manufacturer, as it did not state actual facts about manufacturer.

[5] Federal Courts 170B 513

170B Federal Courts
170BVII Supreme Court
170BVII(E) Review of Decisions of State Courts
170Bk513 k. Determination and Disposition of Cause. Most Cited Cases
Remand of libel action from United States Supreme Court to Court of Appeals "for further consideration in light of" another Supreme Court opinion addressing federal law applicable to libel actions did not preclude Court of Appeals from resolving case on separate and independent state constitutional ground, as well as under federal law. U.S.C.A. Const.Amend. 1; McKinney's Const. Art. 1, § 8.

[6] Constitutional Law 92 2165

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(X) Defamation
92k2160 In General
92k2165 k. Opinion. Most Cited Cases
(Formerly 92k90.1(5))
Under State Constitution, analysis of statements which are subject of libel action to determine whether statements are actionable fact or protected opinion should begin by looking at content of whole communication, its tone and apparent purpose in order to determine whether reasonable person would view statement as expressing or implying any facts. McKinney's Const. Art. 1, § 8.

[7] Constitutional Law 92 2161

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(X) Defamation
92k2160 In General
92k2161 k. In General. Most Cited Cases
(Formerly 92k90.1(5))
Under state constitutional analysis, media defendant has no license to misportray facts; false statements are actionable in libel when they would be perceived as factual by reasonable person. McKinney's Const. Art. 1, § 8.

[8] Constitutional Law 92 1623

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(D) False Statements in General
92k1621 Opinion
92k1623 k. Particular Issues and Applications. Most Cited Cases
(Formerly 92k90.1(5))
Letter to editor of scientific journal criticizing biologic products manufacturer's plan for hepatitis re-

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

search using wild chimpanzees, which stated that "release of chimpanzee 'veterans' of hepatitis * * * research would be hazardous to wild populations, as there is no way to determine that an animal is definitely not a carrier * * *," both expressed and implied statements of fact that, if shown to be false, would be actionable under state constitutional analysis; core premise of letter asserted that there was no scientific method to determine carrier status, and that manufacturer would release possible carrier chimpanzees who might endanger wild population. McKinney's Const. Art. 1, § 8.

[9] Constitutional Law 92 ⚷2168

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(X) Defamation
92k2167 Particular Issues and Applications
92k2168 k. In General. Most Cited Cases
(Formerly 92k90.1(5))

Libel and Slander 237 ⚷9(7)

237 Libel and Slander
237I Words and Acts Actionable, and Liability Therefor
237k9 Words Tending to Injure in Profession or Business
237k9(7) k. Merchants, Tradesmen, and Manufacturers. Most Cited Cases
(Formerly 92k90.1(5))
Under state constitutional analysis, presumptions and predictions in letter to editor criticizing biologic products manufacturer's plan for hepatitis research using wild chimpanzees as to what "appeared to be" or "might well be" or "could well happen" or "should be" were protected from libel action, as they would not have been viewed by average reader of journal as conveying actual facts about manufacturer. McKinney's Const. Art. 1, § 8.

*****907 *236 **1271** Raymond S. Fersko, Anders R. Sterner, Mitchell Lapidus and Jonathan W. Lubell, New York City, for appellant.

***237** Philip A. Byler and Louis Lauer, New York City, for respondent.

Floyd Abrams, Taryn V. Shelton, Robert J. Pape, Kathryn J. Rodgers, Thomas DeJulio, Michael G. MacDonald, James E. McCarthy, III, S. Andrew Schaffer, Ada Meloy, New York City, Shelley Sanders Kehl, Brooklyn, Herbert D. Schwartzman, Jamaica, Thomas S. Evans, Syracuse, and Martin H. Bockstein, New York City, for Adelphi University et al., amici curiae.

***238** Laura M. Mattera, New York City, for Sierra Club et al., amici curiae.

Henry R. Kaufman, New York City, for World Wildlife Fund et al., amici curiae.

Arthur N. Eisenberg and Kenneth P. Norwick, New York City, for New York Civil Liberties Union, amicus curiae.

***239** Edward A. Miller, New York City, for Association of American Publishers, Inc., amicus curiae.

OPINION OF THE COURT

KAYE, Judge.

One year ago, applying what appeared to be settled law, we affirmed the dismissal of plaintiff's libel action against the editor of a scientific journal, essentially for his publication of a signed letter to the editor on a subject of public controversy. We concluded that there was no triable issue of fact as to the falsity of the threshold factual assertions of the letter, that-beyond those threshold factual assertions-the letter writer's statements of opinion were entitled to the absolute protection of the State and Federal constitutional free speech guarantees, and that charges of defendant's deliberate incitement to have a defamatory letter published lacked factual foundation (*Immuno AG. v. Moor-Jankowski,* 74 N.Y.2d 548, 549 N.Y.S.2d 938, 549 N.E.2d 129).

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

*****908 **1272** On plaintiff's petition, the United States Supreme Court granted certiorari, vacated our judgment, and remanded the case for further consideration in light of ***240***Milkovich v. Lorain Journal Co.,* 497 U.S. 1, 110 S.Ct. 2695, 111 L.Ed.2d 1, decided June 21, 1990. 497 U.S. 1021, 110 S.Ct. 3266, 111 L.Ed.2d 776. For the reasons stated below, we adhere to our determination that defendant's summary judgment motion was properly granted and the complaint dismissed, premising our decision on independent State constitutional grounds as well as the Federal review directed by the Supreme Court.

I.

This libel action arises out of a letter to the editor published in the Journal of Medical Primatology in December 1983. The letter was written by Dr. Shirley McGreal as Chairwoman of the International Primate Protection League (IPPL), an organization known for its vigorous advocacy on behalf of primates, particularly those used for biomedical research. Defendant Dr. J. Moor-Jankowski, a professor of medical research at New York University School of Medicine and director of the Laboratory for Experimental Medicine and Surgery in Primates of the New York University Medical Center, is cofounder and editor of the Journal.

The subject of McGreal's letter (reprinted at 145 A.D.2d 114 at 118-120, 537 N.Y.S.2d 129) was a plan by plaintiff, Immuno AG.-a multinational corporation based in Austria that manufactures biologic products derived from blood plasma-to establish a facility in Sierra Leone, West Africa, for hepatitis research using chimpanzees. Voicing the concerns of IPPL, McGreal's letter was critical of Immuno's proposal on a number of grounds: (1) that the motivation for the plan was presumably to avoid international policies or legal restrictions on the importation of chimpanzees, an endangered species; (2) that it could decimate the wild chimpanzee population, as capture of chimpanzees generally involved killing their mothers, and it was questionable whether experimental animals could be returned to the wild, as plaintiff proposed; and (3) that returning the animals to the wild could well spread hepatitis to the rest of the chimpanzee population. McGreal stated that the current population of captive chimpanzees should be adequate to supply any legitimate requirements.

The letter was prefaced by an Editorial Note written by defendant that set out its background. Identifying McGreal as Chairwoman of IPPL, the Note stated that the Journal had received the initial version of the letter in January 1983 and ***241** had submitted it to plaintiff for comment or reply. FN1 Plaintiff had acknowledged receipt of defendant's letter in February, offering no comment but that it was referring the matter to its New York lawyers. Thereafter, plaintiff's lawyers wrote that the statements were inaccurate, unfair and reckless, and requested the documents upon which the accusations were based, threatening legal action if the letter were printed before plaintiff had a meaningful opportunity to reply. The Editorial Note went on to state that the editors had advised plaintiff's attorneys that they should obtain the documentation directly from McGreal, and extended the period for plaintiff's reply by two months. The letter was published nearly a year after its receipt. In the meantime, articles had appeared in the Austrian press apparently confirming much of what McGreal had written, and defendant received no further word from plaintiff or its lawyers.

FN1. The letter defendant actually sent to plaintiff enclosed the McGreal letter, noting that “if the allegations in her letter can be proved to us to be incorrect we will return the letter to Dr. McGreal declining its publication.” It further noted “past results of interventions” by McGreal regarding animal exportation and experimentation programs in India, Bangladesh and elsewhere, and that “[i]t is the policy of the Journal to allow all the concerned parties to take a position in a controversial mat-

ter."

In addition to the letter that is the focus of contention, plaintiff complains that it was defamed by comments made by defendant quoted in an article entitled "Loophole May Allow Trade in African Chimps" that appeared in the New Scientist magazine *****909 **1273** shortly before McGreal's letter was published. Defendant is quoted as saying that the supply of captive chimpanzees was sufficient for research, describing plaintiff's attempts to circumvent controls on endangered species as "scientific imperialism," and warning that they will "backfire on people like me involved in the bona fide use of chimpanzees and other primate animals" for research.

In December 1984, plaintiff commenced this lawsuit against Moor-Jankowski and seven other defendants, including McGreal and the publishers and distributors of the New Scientist and the Journal of Medical Primatology, and it has since been vigorously litigated. By now, all the defendants except Moor-Jankowski have settled with plaintiff for what the motion court described as "substantial sums," and the complaint has been dismissed as to them. After extensive discovery-his own deposition conducted over 14 days-defendant moved for summary judgment. Supreme Court granted the motion to the ***242** extent of dismissing a claim for prima facie tort. It denied the motion as to the defamation claims, ruling that the statements at issue were statements of fact and, regardless of whether plaintiff was a public figure, there were triable issues of fact concerning whether defendant acted with actual malice in making or publishing the statements.

On defendant's appeal, the Appellate Division unanimously reversed Supreme Court's judgment (insofar as appealed from), granted defendant's motion, and dismissed the complaint (145 A.D.2d 114, 537 N.Y.S.2d 129). The court held that all of the comments attributed to defendant in the New Scientist article were expressions of opinion that could not, as a matter of law, support an action for defamation. As to the McGreal letter, the Appellate Division held that for the most part it too was a constitutionally protected expression of opinion. To the extent there were (in the court's view) statements of a factual nature, the Appellate Division examined each statement meticulously, and concluded from the voluminous record that plaintiff had failed to adduce evidence of falsity. We now affirm, adopting without further elaboration our prior conclusion as to the lack of factual foundation for the deliberate incitement charges, and concentrating our analysis on the substance of the challenged statements.

II.

Our analysis first focuses on *Milkovich,* in compliance with the Supreme Court's direction on remand.

As the Supreme Court wrote, *Milkovich* leaves in place all previously existing Federal constitutional protections, including the " ' "breathing space" ' " which " ' "freedoms of expression require in order to survive" ' " (497 U.S., at ----, 110 S.Ct., at 2706, quoting *Philadelphia Newspapers v. Hepps,* 475 U.S. 767, 772, 106 S.Ct. 1558, 1561, 89 L.Ed.2d 783), and specifically including immunity for statements of opinion relating to matters of public concern that do not contain a provably false factual connotation (497 U.S., at ----, 110 S.Ct., at 2706; *Philadelphia Newspapers v. Hepps, supra). Milkovich,* however, puts an end to the perception-as it turns out, misperception-traceable to dictum in *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 339-340, 94 S.Ct. 2997, 3007, 41 L.Ed.2d 789 that, in addition to all other Federal constitutional protections, there is a "wholesale defamation exemption for anything that might be labeled 'opinion.' " (497 U.S., at ----, 110 S.Ct., at 2705, *supra.*)

Thus, statements of opinion relating to matters of public ***243** concern are today no less subject to constitutional protection, but speech earns no greater protection simply because it is labeled "opinion."

[1] The key inquiry is whether challenged expres-

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

sion, however labeled by defendant, would reasonably appear to state or imply assertions of objective fact. In making this inquiry, courts cannot stop at literalism. The literal words of challenged statements do not entitle a media defendant to "opinion" immunity or a libel plaintiff to go forward with its action. In determining whether speech is actionable, courts must additionally consider the impression created by the words used as well as the *****910 **1274** general tenor of the expression, from the point of view of the reasonable person.

As often happens, a court's application of stated rules to the facts before it illuminates the rules. In this case the exercise is especially instructive.

The Supreme Court in *Milkovich* reversed the Ohio court's judgment-in substance reached in the companion case *Scott v. News-Herald,* 25 Ohio St.3d 243, 496 N.E.2d 699-dismissing plaintiff's defamation complaint. The State court, applying the widely used four-part *Ollman* formula (*Ollman v. Evans,* 750 F.2d 970 [D.C.Cir.], *cert. denied* 471 U.S. 1127, 105 S.Ct. 2662, 86 L.Ed.2d 278 [*see especially,* Rehnquist, J., dissenting]) for separating immune opinion from actionable fact, had looked first to the article's specific words as commonly understood, and second to whether the statements were verifiable, and it concluded that on both scores plaintiff would have stated a valid cause of action. The plain import of the challenged statements was that plaintiff had committed perjury, a verifiable fact.

But the Ohio court went on to dismiss the complaint because of the remaining two *Ollman* factors (the full context of the article in which the challenged statements appear, and the broader social context or setting surrounding the communication). FN2 The court was persuaded from the language of the article and its context that the reasonable reader would ***244** recognize it as no more than the writer's opinion on a subject of public concern, and therefore constitutionally protected. "Examining the article in its larger context * * * the large caption 'TD Says' * * * would indicate to even the most gullible reader that the article was, in fact, opinion" (*Scott v. News-Herald,* 25 Ohio St.3d, at 252, 496 N.E.2d, at 707, *supra*) and, because the article appeared on the sports page-a "traditional haven for cajoling, invective, and hyperbole"-the challenged statements by the sports columnist likely would not have been read as charging the crime of perjury in judicial hearings (25 Ohio St.3d, at 253-254, 496 N.E.2d, at 708).

FN2. In Milkovich's action (Scott pursued a separate action on the same article), the Ohio Supreme Court-only shortly before *Ollman* was handed down-had actually reversed the summary judgment awarded to defendants, concluding that the statements in issue were factual assertions and not constitutionally protected opinion (*Milkovich v. News-Herald,* 15 Ohio St.3d 292, 473 N.E.2d 1191, *cert. denied* 474 U.S. 953, 106 S.Ct. 322, 88 L.Ed.2d 305). Only after *Ollman* did the Ohio Supreme Court dismiss the complaints-Scott's as well as Milkovich's-as protected opinion. From the case chronology it is obvious that the Ohio court considered the latter two *Ollman* factors determinative.

The United States Supreme Court, looking at basically the same first two *Ollman* factors, determined that a reasonable fact finder could conclude that the challenged statements in *Milkovich* implied an assertion that petitioner had perjured himself in a judicial proceeding, and the connotation that petitioner had committed a felony was sufficiently factual to be susceptible of being proved true or false. Those were the same conclusions that had been reached by the Ohio court.

The critical difference lay in the Supreme Court's treatment of the second two *Ollman* factors-the immediate and broader context of the article-reduced essentially to one: type of speech. Moreover, the Court made clear that by protected type of speech it had in mind the rhetorical hyperbole, vigorous epithets, and lusty and imaginative expression found in

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

Hustler Mag. v. Falwell, 485 U.S. 46, 108 S.Ct. 876, 99 L.Ed.2d 41 [ad parody]; *Letter Carriers v. Austin,* 418 U.S. 264, 94 S.Ct. 2770, 41 L.Ed.2d 745 [labor dispute], and *Greenbelt Publ. Assn. v. Bresler,* 398 U.S. 6, 90 S.Ct. 1537, 26 L.Ed.2d 6 [heated real estate negotiation]-all instances where the Court had determined that the imprecise language and unusual setting would signal the reasonable observer that no actual facts were being conveyed about an individual.

In *Milkovich,* the Supreme Court resolved "type of speech" considerations in two sentences: "This is not the sort of loose, figurative or hyperbolic language which would negate the impression that the writer was seriously maintaining petitioner committed the crime of perjury. Nor does ***911 **1275 the general tenor of the article negate this impression." (*Milkovich v. Lorain Journal Co.,* 497 U.S., at ----, 110 S.Ct., at 2707, *supra.*) In this analysis, the Supreme Court said nothing of either the conjectural language of the disputed article, or the format of the piece-a signed editorial column appearing on the sports page. Both those considerations occupied the Ohio court and ***245** the dissent at length (*see, Milkovich v. Lorain Journal Co., supra,* at ---- - ----, 110 S.Ct., at 2710-2713 [Brennan, J., dissenting]), ultimately persuading those Judges that no reasonable reader would have regarded the challenged assertions, *in their context,* as factual. The Supreme Court's failure to mention either point becomes particularly telling when its writing is laid against the State court opinion and Justice Brennan's dissent.

Thus, if not alone from the Supreme Court's statement of the governing rules, then from its application of those rules to the facts of *Milkovich,* it appears that the following balance has been struck between First Amendment protection for media defendants and protection for individual reputation: except for special situations of loose, figurative, hyperbolic language, statements that contain or imply assertions of provably false fact will likely be actionable.

We next apply *Milkovich* to the facts before us.

In general, as previously observed, it is hard to conceive that any published statement could be without some factual grounding. In particular, we recognized that the McGreal letter was provoked by a certain state of affairs, that it set out limited points of factual reference, and that to the extent that letter contained defamatory factual statements about plaintiff, they would be actionable if false (74 N.Y.2d, at 559, 549 N.Y.S.2d 938, 549 N.E.2d 129, *supra*).

Unlike the Supreme Court's characterization of the analysis done in *Scott v. News-Herald,* we did not, and do not, hold that the assertions of verifiable fact in the McGreal letter were overridden or "trumped" by their immediate or broader context and therefore automatically and categorically protected as opinion. We did not, and do not, hold that all letters to the editor are absolutely immune from defamation actions, or that there is a wholesale exemption for anything that might be labeled "opinion."

[2][3] But a libel plaintiff has the burden of showing the falsity of factual assertions (*see, Philadelphia Newspapers v. Hepps,* 475 U.S. 767, 776, 106 S.Ct. 1558, 1563, 89 L.Ed.2d 783, *supra; Steinhilber v. Alphonse,* 68 N.Y.2d 283, 508 N.Y.S.2d 901, 501 N.E.2d 550; *Silsdorf v. Levine,* 59 N.Y.2d 8, 462 N.Y.S.2d 822, 449 N.E.2d 716, *cert. denied* 464 U.S. 831, 104 S.Ct. 109, 78 L.Ed.2d 111), and we concluded that plaintiff did not meet that burden. Given the thorough Appellate Division review of the factual assertions in issue, there hardly seemed a need for repetition of the charges and the relevant evidence. We noted simply that the factual review undertaken by the Appellate Division established that plaintiff had raised no triable issue as to the falsity of any of the threshold factual assertions of the McGreal ***246** letter (*Immuno AG. v. Moor-Jankowski,* 74 N.Y.2d 548, 559, 549 N.Y.S.2d 938, 549 N.E.2d 129, *supra*).

We continue to believe that the Appellate Division

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

review, to the extent it identified assertions of fact and concluded that such assertions had not been shown to be false, established that no triable issue of fact existed. While there still appears no need for us to restate those extensive findings, application of *Milkovich* to what plaintiff characterizes as the "core libel," or "core premise," or "core factual statement" of the IPPL letter illustrates the enduring soundness of that analysis.

According to plaintiff, the core premise of the letter is as follows: "Release of chimpanzee 'veterans' of hepatitis non-A, non-B research would be hazardous to wild populations, as there is no way to determine that an animal is definitely not a carrier of the disease."

Applying *Milkovich,* we discern two assertions of fact, one express and one implied..***912 **1276 First, the statement asserts that there is no scientific method for determining if a chimpanzee exposed to the non-A, non-B virus is not a carrier of the disease. Second, the statement implies that plaintiff will release possible carrier-chimpanzees who may endanger the wild population. Both assertions-the existence of a scientific test to determine carrier status, and plaintiff's plans-are verifiable. Finally, the "type of speech," unlike *Falwell, Letter Carriers* or *Greenbelt,* is restrained, the statements are seriously maintained, and they have an apparent basis in fact.

Though this core premise could be actionable, plaintiff's complaint was nonetheless properly dismissed because, on the record presented, it was apparent that plaintiff did not satisfy its burden of proving those statements false (*see,* 145 A.D.2d, at 139-141, 537 N.Y.S.2d 129; *Philadelphia Newspapers v. Hepps,* 475 U.S., at 767, 106 S.Ct., at 1558, *supra; Milkovich v. Lorain Journal Co.,* 497 U.S., at ----, 110 S.Ct., at 2704, *supra*).

As for the express assertion of the absence of a test, plaintiff has pointed us to no proof establishing a scientific test in the relevant period that could conclusively determine the carrier state in chimpanzees or, more specifically, could definitely rule out that a veteran chimpanzee was not a carrier of the virus. When considered against the extensive record, plaintiff's effort to establish that there was a failproof test, by weaving together isolated fragments of the testimony of various experts (including defendant), simply does not satisfy its legal burden.

[4] ***247** To the contrary, what is apparent from the record is that in the relevant period there was an ongoing process of discovery and debate centering on the very existence of a carrier state of the virus, all of which was made even more inconclusive by ambiguity as to precisely when relevant technology was acquired. When asked if it was possible that certain tests for detecting the carrier state would yield negative results even though the chimpanzee carried the virus, plaintiff's Dr. Johann Eibl replied "[t]here is no proof on that." Finally, even if the express assertion of the "core premise" had been shown to be false, that assertion would not itself libel plaintiff, because it does not " 'stat[e] actual facts' about [that] individual." (*Milkovich v. Lorain Journal Co.,* 497 U.S., at ----, 110 S.Ct., at 2706, *supra; see also, King Prods. v. Douglas,* 742 F.Supp. 778, 784 [S.D.N.Y.].)

Similarly, as the Appellate Division concluded, there was no proof of falsity of the implied assertion of fact-that plaintiff in the relevant period planned to release chimpanzees with no means of definitely determining that they were not carriers of the disease, thus endangering the wild populations. It is clear from the record that plaintiff, in 1983, was considering the option of rehabilitating chimpanzees used at the projected Sierra Leone facility, for return to a natural state (*see,* 145 A.D.2d, at 136, 537 N.Y.S.2d 129). With no proof of the falsity of the express assertion that there was a conclusive test of carrier status available in 1983, it follows that there was also no proof of the falsity of the implied assertion that plaintiff planned to return its veteran test animals with no means of definitely determining that they were not hepatitis carriers.

As an additional matter, the Appellate Division

considered infectiousness as well as carrier status (the "core premise" refers only to carriers [*see,* 145 A.D.2d, at 139, 537 N.Y.S.2d 129]). Although there was testimony that infectiousness might be tested by inoculating a healthy chimpanzee with the blood of a potentially infected animal to see whether the healthy animal developed hepatitis symptoms, plaintiff produced no proof that it would in fact be implementing that procedure at its facility. That procedure was described by Dr. Alfred Prince, a leading expert, as "expensive," "laborious" and "wasteful," in that it involved the deliberate infection of healthy chimpanzees to test the infectiousness of animals that had been exposed to the virus. As the Appellate Division noted, "McGreal can hardly be faulted for not assuming that Immuno would necessarily ***248** perform the inoculation procedure on every one of the many chimps it intended to return to the *****913 **1277** wild." (145 A.D.2d, at 140, 537 N.Y.S.2d 129.)

In sum, our "further consideration in light of *Milkovich*" 497 U.S. ----, 110 S.Ct. 2695, *supra*, using the core premise as illustrative, confirms our conclusion that, on this factual record, summary judgment was properly granted to defendant.[FN3]

FN3. In this section of the opinion, we follow plaintiff's format, analyzing the "core premise" under *Milkovich.* Plaintiff additionally continues to press all of its prior defamation claims, and makes clear that its case is not limited to the core premise. While we believe that we have complied with the Supreme Court mandate by reviewing the express and implied factual assertions of the McGreal letter and New Scientist article as they were identified by the Appellate Division, it is impossible to state with complete certainty that some of the statements previously considered protected opinion, because of the language and format of the speech, would not now be viewed as implied assertions of fact. This may be an area of uncertainty left open by *Milkovich (see, The Supreme Court, 1989 Term-Leading Cases,* 104 Harv.L.Rev. 219, 226-227 [1990]).

III.

We next proceed to a State law analysis, and also conclude on this separate and independent ground that the complaint was correctly dismissed.

A.

[5] It has long been recognized that matters of free expression in books, movies and the arts generally, are particularly suited to resolution as a matter of State common law and State constitutional law, the Supreme Court under the Federal Constitution fixing only the minimum standards applicable throughout the Nation, and the State courts supplementing those standards to meet local needs and expectations (*see, e.g., People ex rel. Arcara v. Cloud Books,* 68 N.Y.2d 553, 557-558, 510 N.Y.S.2d 844, 503 N.E.2d 492). Indeed, striking an appropriate balance "between the need for vigorous public discourse and the need to redress injury to citizens wrought by invidious or irresponsible speech" (*Milkovich v. Lorain Journal Co.,* 497 U.S., at ----, 110 S.Ct., at 2703, *supra*), is consistent with the traditional role of State courts in applying privileges, including the opinion privilege, which have their roots in the common law (*see, Immuno AG. v. Moor-Jankowski,* 74 N.Y.2d, at 555, 549 N.Y.S.2d 938, 549 N.E.2d 129, *supra; Cole Fisher Rogow, Inc. v. Carl Ally, Inc.,* 25 N.Y.2d 943, 305 N.Y.S.2d 154, 252 N.E.2d 633; *Julian v. American Business Consultants,* 2 N.Y.2d 1, 155 N.Y.S.2d 1, 137 N.E.2d 1; *Hoeppner v. Dunkirk Print. Co.,* 254 N.Y. 95, 99, 172 N.E. 139).

***249** This State, a cultural center for the Nation, has long provided a hospitable climate for the free exchange of ideas (*Matter of Beach v. Shanley,* 62 N.Y.2d 241, 255-256, 476 N.Y.S.2d 765, 465 N.E.2d 304 [Wachtler, J., concurring]). That tradition is embodied in the free speech guarantee of the

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

New York State Constitution, beginning with the ringing declaration that "[e]very citizen may freely speak, write and publish * * * sentiments on all subjects." (N.Y. Const., art. I, § 8.) Those words, unchanged since the adoption of the constitutional provision in 1821, reflect the deliberate choice of the New York State Constitutional Convention not to follow the language of the First Amendment, ratified 30 years earlier, but instead to set forth our basic democratic ideal of liberty of the press in strong affirmative terms (*see,* Forkosch, *Freedom of the Press: Croswell's Case,* 33 Fordham L.Rev. 415 [1965]).

"The expansive language of our State constitutional guarantee (*compare,* N.Y. Const., art. I, § 8, *with* U.S. Const. 1st Amend.), its formulation and adoption prior to the Supreme Court's application of the First Amendment to the States * * * the recognition in very early New York history of a constitutionally guaranteed liberty of the press * * * and the consistent tradition in this State of providing the broadest possible protection to 'the sensitive role of gathering and disseminating news of public events' * * * all call for particular vigilance by the courts of this State in safeguarding the free press against undue interference." *****914**1278**(*O'Neill v. Oakgrove Constr.,* 71 N.Y.2d 521, 528-529, 528 N.Y.S.2d 1, 523 N.E.2d 277.)

Thus, whether by the application of "interpretive" (*e.g.,* text, history) or "noninterpretive" (*e.g.,* tradition, policy) (*see, People v. P.J. Video,* 68 N.Y.2d 296, 302-303, 508 N.Y.S.2d 907, 501 N.E.2d 556, *cert. denied* 479 U.S. 1091, 107 S.Ct. 1301, 94 L.Ed.2d 156) factors, the "protection afforded by the guarantees of free press and speech in the New York Constitution is often broader than the minimum required by" the Federal Constitution (*O'Neill v. Oakgrove Constr.,* 71 N.Y.2d, at 529, n. 3, 528 N.Y.S.2d 1, 523 N.E.2d 277, *supra*).

Had defendant initially presented the issue as one of independent State constitutional law, instead of as an undenominated argument premised on the assumed identity of State and Federal law, it might have been resolved on that basis a year ago. The intervening occurrence of *Milkovich,* however, does not cause us to change our explicit conclusion that the case was correctly analyzed and decided in accordance with the core values protected by the State Constitution (*see,* 74 N.Y.2d, at 560, 549 N.Y.S.2d 938, 549 N.E.2d 129, *supra; see also, People v. Class,* 67 N.Y.2d 431, 503 N.Y.S.2d 313, 494 N.E.2d 444). ***250** Several considerations impel us to restate those conclusions separately now, underscoring that we decide this case on the basis of State law independently, and that in our State law analysis reference to Federal cases is for the purpose of guidance only, not because it compels the result we reach (*see, Michigan v. Long,* 463 U.S. 1032, 1038, n. 4, 1041-1042, 103 S.Ct. 3469, 3475, n. 4, 3476-3477, 77 L.Ed.2d 1201).

First and foremost, we look to our State law because of the nature of the issue in controversy-liberty of the press-where this State has its own exceptional history and rich tradition (*see,* discussion, at 249, at 913 of 566 N.Y.S.2d, at 1277 of 567 N.E.2d, *supra*). While we look to the unique New York State constitutional text and history, our analysis also is informed by the common law of this State. It has long been our standard in defamation actions to read published articles in context to test their effect on the average reader, not to isolate particular phrases but to consider the publication as a whole (*see, e.g., James v. Gannett Co.,* 40 N.Y.2d 415, 419-420, 386 N.Y.S.2d 871, 353 N.E.2d 834; *Julian v. American Business Consultants,* 2 N.Y.2d 1, 14-15, 155 N.Y.S.2d 1, 137 N.E.2d 1, *supra*).

Second, we are mindful not only of our role in the Federal system but also of our responsibility to settle the law of this State. As has been observed, *Milkovich* may leave an area of uncertainty for future litigation, with courts and authors in the interim lacking clear guidance regarding the opinion privilege; while all of the Supreme Court Justices agreed on the rule, they differed sharply as to how the rule should be applied. If we again assume the identity of State and Federal law, and assume that

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

Milkovich has effected no change in the law, we perpetuate the uncertainty in our State law. Moreover, we are concerned that-if indeed "type of speech" is to be construed narrowly-insufficient protection may be accorded to central values protected by the law of this State. We would begin the analysis-just as we did previously in this case, and just as we did in *Steinhilber,* 68 N.Y.2d, at 293, 508 N.Y.S.2d 901, 501 N.E.2d 550, *supra* -with the content of the whole communication, its tone and apparent purpose. That is a clear and familiar standard that in our view properly balances the interests involved. It has been consistently applied throughout the State for several years, following State common law and following *Steinhilber.*

Finally, the case comes to us in the posture of a summary judgment motion, which searches the record and presents only issues of law. The State law issues have now been fully briefed, and there are no factual questions to be resolved. As the Supreme Court noted in *Milkovich,* the Ohio court remains ***251** free, on remand some 15 years after the challenged article, to address State law issues (497 U.S., at ----, 110 S.Ct., at 2702, n. 5, *supra*); were this case to be heard by the Supreme Court and reversed, that would be equally true on a further remand to this Court. In view of *****915 **1279** the costly,[FN4] sizeable record already amassed, including hundreds of pages of briefs, no purpose is served by compelling *these* parties, on *this* record and *these* briefs, to consider another trip to Washington, with the prospect that State law review before this Court would ultimately be available.

FN4. The affidavit of one of the original parties, dated September 3, 1986, indicates that the insurance company settled with plaintiff over her protest when legal costs exceeded several hundred thousand dollars.

None of the concerns expressed in the Simons concurrence persuade us that the requested State law review should be deferred or denied.

Any independent State law activity in one sense can frustrate the pronouncement of Federal law. In another sense, however, State constitutional law review-which is a responsibility of State courts and a strength of our Federal system-advances the process of pronouncing Federal law; a State can act as a "laboratory" in more ways than one, as indeed Justice Brandeis recognized in *New State Ice Co. v. Liebmann* in his reference to State statutes (285 U.S. 262, 311, 52 S.Ct. 371, 386, 76 L.Ed. 747 [dissenting]; *see also, Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69, *especially,* at 82, n. 1, 106 S.Ct. at 1715, n. 1). By the same token, Federal cases, including Supreme Court cases-even *Milkovich* itself-can act as a source of guidance for State courts in formulating State law, even though interpretation of those cases in State law decisions reached on adequate and independent State grounds will be unreviewable by the Supreme Court (*see, Michigan v. Long,* 463 U.S., at 1041, 103 S.Ct., at 3476, *supra*).

In analyzing cases under the State Constitution, this Court has not wedded itself to any single methodology, recognizing that the proper approach may vary with the circumstances (*see, e.g., Rivers v. Katz,* 67 N.Y.2d 485, 504 N.Y.S.2d 74, 495 N.E.2d 337 [primacy method]; *People v. Stith,* 69 N.Y.2d 313, 316, n. *, 514 N.Y.S.2d 201, 506 N.E.2d 911 [dual method]; *People ex rel. Arcara v. Cloud Books,* 68 N.Y.2d 553, 510 N.Y.S.2d 844, 503 N.E.2d 492, *supra* [interstitial method]). Several times recently we have pointedly rested our decisions on both Federal and independent State constitutional grounds (*see, e.g., O'Neill v. Oakgrove Constr.,* 71 N.Y.2d, at 528, 528 N.Y.S.2d 1, 523 N.E.2d 277, *supra; People v. Stith, supra*).

That analysis is particularly appropriate here because of the unusual procedural posture of the case. The Supreme Court ***252** has specifically directed us to consider the case in light of *Milkovich,* and we comply with that direction, as courts throughout the Nation have done in similar circumstances (*see, e.g., People v. Duncan,* 124 Ill.2d 400, 125 Ill.Dec.

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

265, 530 N.E.2d 423 [1988]). But that does not compel us to ignore our prior decision or the arguments fully presented on remand that provide an alternative basis for resolving the case (*see,* Hellman, *Granted, Vacated, and Remanded-Shedding Light on a Dark Corner of Supreme Court Practice,* 67 Judicature 389, 394-395 [1984]).[FN5] Turning *****916 **1280** our back on the now developed, controlling State law issues would be no service to the Supreme Court, or the litigants, or the law of this State.

FN5. As Professor Hellman indicates in this and his fuller treatment of the subject of Supreme Court orders of "grant, vacate and remand" (the GVR) (*see,* Hellman, *The Supreme Court's Second Thoughts: Remand for Reconsideration and Denials of Review in Cases Held for Plenary Decisions,* 11 Hastings Const. LQ 5 [1983]), the GVR remains a mystery to most of the legal profession (*id.,* at 5-6). Of 90 cases he studied in which there was at least a surface inconsistency between the vacated judgment and the cited decision, the lower court in more than 60 adhered to its original ruling, reviewing the Supreme Court decision but upholding its own earlier judgment on some other ground (67 Judicature, at 394-395). There is no basis for the declaration that the Supreme Court here was "indicating its desire to pass on the issues of Federal law and, as a matter of comity, remitted the case to us before ruling so that we might reconsider it in light of the intervening *Milkovich* decision." (Simons, J., concurrence, at 262, at 922 of 566 N.Y.S.2d, at 1286 of 567 N.E.2d.) Moreover, the word "illegitimate" is taken wholly out of context from Bice, *Anderson and the Adequate State Ground,* 45 S.Cal.L.Rev. 750 (1972) (concurrence, at 261, at 921 of 566 N.Y.S.2d, at 1285 of 567 N.E.2d). Indeed, the author of that article makes clear that foreclosing dual constitutional analysis in all circumstances "would prevent the legitimate efficiency gains that fully deciding the state and federal claims often can provide". (*Id.,* at 758.)

[6] We therefore proceed to resolve this case independently as a matter of State law, concluding that-as we previously held in *Immuno*-the standard articulated and applied in *Steinhilber* furnishes the operative standard in this State for separating actionable fact from protected opinion.

B.

Letters to the editor, unlike ordinary reporting, are not published on the authority of the newspaper or journal. In this case, for instance, defendant's prefatory Editorial Note signaled that the letter was to be given only the weight its readers chose to accord McGreal's views; such reservations may be generally understood even when letters are not accompanied by any editorial note. Thus, any damage to reputation ***253** done by a letter to the editor generally depends on its inherent persuasiveness and the credibility of the writer, not on the belief that it is true because it appears in a particular publication.

Significantly, for many members of the public, a letter to the editor may be the only available opportunity to air concerns about issues affecting them. A citizen troubled by things going wrong "should be free to 'write to the newspaper': and the newspaper should be free to publish [the] letter. It is often the only way to get things put right." (*Slim v. Daily Tel.,* [1968] 1 All ER 497, 503, quoted in *Pollnow v. Poughkeepsie Newspapers,* 107 A.D.2d 10, 16, 486 N.Y.S.2d 11 [Titone, J.], *aff'd on other grounds,* 67 N.Y.2d 778, 501 N.Y.S.2d 17, 492 N.E.2d 125.) The availability of such a forum is important not only because it allows persons or groups with views on a subject of public interest to reach and persuade the broader community but also because it allows the readership to learn about grievances, both from the original writers and from those

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

who respond, that perhaps had previously circulated only as rumor; such a forum can advance an issue beyond invective. Finally, at the least, the public may learn something, for better or worse, about the person or group that wrote such a letter (*see,* Franklin, *Libel and Letters to the Editor: Toward an Open Forum,* 57 U.Colo.L.Rev. 651, 663-664 [1986]). Thus, in determining how the average person would view McGreal's letter, we take into account that it is a letter to the editor and that "[t]he common expectation of a letter to the editor is not that it will serve as a vehicle for the rigorous and comprehensive presentation of factual matter but as one principally for the expression of individual opinion." (145 A.D.2d, at 129, 537 N.Y.S.2d 129.)

Passing from the broader social setting to the immediate context of the letter, we note that the common expectation regarding letters to the editor has particular pertinence here.

As the Appellate Division observed, the Journal of Medical Primatology is directed to a highly specialized group of readers-medical doctors, researchers and the medical and science libraries of academic institutions. The average reader is thus likely not a novice in the field of medical primatology, but brings "a well-developed understanding of the issues facing biomedical researches using primates as research subjects." (145 A.D.2d, at 129, 537 N.Y.S.2d 129.) The prefatory Note additionally called particular attention to the circumstances surrounding the letter, pointing up that this was McGreal's view, and that ***254** plaintiff's attorneys considered her statements to be "wholly inaccurate and reckless" and "not a fair comment" on plaintiff's proposed project.

The letter itself related to a public controversy regarding use of live animals belonging to endangered species, including chimpanzees, in animal experimentation and research. McGreal (a known animal rights activist) and IPPL (whose very name broadcasts its point of view) were fully identified to readers of the letter. The letter made clear that its purpose was to voice the conservationist concerns of this partisan group in order "to draw this situation to the attention of interested parties." *****917 **1281** Thus, like the broader social setting of McGreal's letter, the immediate context of the letter, together with the prefatory Note, would induce the average reader of this Journal to look upon the communication as an expression of opinion rather than a statement of fact, even though the language was serious and restrained.

[7] Given the purpose of court review-to determine whether the reasonable reader would have believed that the challenged statements were conveying facts about the libel plaintiff-we believe that an analysis that begins by looking at the content of the whole communication, its tone and apparent purpose (*Steinhilber v. Alphonse,* 68 N.Y.2d, at 293, 508 N.Y.S.2d 901, 501 N.E.2d 550, *supra*) better balances the values at stake than an analysis that first examines the challenged statements for express and implied factual assertions, and finds them actionable unless couched in loose, figurative or hyperbolic language in charged circumstances (*see generally,* Note, *Fact and Opinion in Defamation: Recognizing the Formative Power of Context,* 58 Fordham L.Rev. 761 [1990]). A media defendant surely has no license to misportray facts; false statements are actionable when they would be perceived as factual by the reasonable person. But statements must first be viewed in their context in order for courts to determine whether a reasonable person would view them as expressing or implying *any* facts.

[8] The difference is more than theoretical. In the present case, for example, we conclude that what plaintiff now characterizes as the "core premise" of the IPPL letter both expressed and implied statements of fact that, if shown to be false (which they were not), would be actionable. That is true as well of other factual reference points considered by the Appellate Division and held to be lacking in demonstrated falsity. Our State law analysis of the remainder of the letter, however, ***255** would not involve the fine parsing of its length and breadth

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

that might now be required under Federal law for speech that is not loose, figurative or hyperbolic (*see, e.g., Unelko Corp. v. Rooney,* 912 F.2d 1049 [9 th Cir.]). Isolating challenged speech and first extracting its express and implied factual statements, without knowing the full context in which they were uttered, indeed may result in identifying many more implied factual assertions than would a reasonable person encountering that expression in context.

[9] We conclude that the body of the letter in issue communicated the accusations of a group committed to the protection of primates, and that the writer's presumptions and predictions as to what "appeared to be" or "might well be" or "could well happen" or "should be" would not have been viewed by the average reader of the Journal as conveying actual facts about plaintiff. It may well be, for example, that McGreal's statements regarding plaintiff's motivations-if studied long enough in isolation-could be found to contain implied factual assertions, but viewed as IPPL's letter to the editor, it would be plain to the reasonable reader of this scientific publication that McGreal was voicing no more than a highly partisan point of view.

Thus, we conclude that an approach that takes into account the full context of challenged speech, as previously set forth in *Immuno* and *Steinhilber,* accords with the central value of assuring "full and vigorous exposition and expression of opinion on matters of public interest." (*Rinaldi v. Holt, Rinehart & Winston,* 42 N.Y.2d 369, 384, 397 N.Y.S.2d 943, 366 N.E.2d 1299, *cert. denied* 434 U.S. 969, 98 S.Ct. 514, 54 L.Ed.2d 456.)

The public forum function of letters to the editor is closely related in spirit to the "marketplace of ideas" and oversight and informational values that compelled recognition of the privileges of fair comment, fair report and the immunity accorded expression of opinion. These values are best effectuated by according defendant some latitude to publish a letter to the editor on a matter of legitimate public concern-the letter's author, affiliation, bias and premises fully disclosed, rebuttal openly invited-free of defamation litigation. A publication that provides a forum for such statements on controversial matters is not acting*****918 **1282** in a fashion "at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected" (*Garrison v. Louisiana,* 379 U.S. 64, 75, 85 S.Ct. 209, 216, 13 L.Ed.2d 125), but to the contrary is fostering those very values.

***256** Finally, we reaffirm our regard for the particular value of summary judgment, where appropriate, in libel cases (*see, Karaduman v. Newsday, Inc.,* 51 N.Y.2d 531, 545, 435 N.Y.S.2d 556, 416 N.E.2d 557). Indeed, this is an additional ground for preferring the independent State law approach to one that might make summary disposition less likely (*see, Milkovich v. Lorain Journal Co.,* 497 U.S., at ----, 110 S.Ct., at 2698, *supra; see also, Florida Med. Center v. New York Post Co.,* 568 So.2d 454 [Fla.Dist.Ct.App.]). The chilling effect of protracted litigation can be especially severe for scholarly journals, such as defendant's, whose editors will likely have more than a passing familiarity with the subject matter of the specialized materials they publish. If required as to every line of a reader's expressed viewpoint to meet the standard of *Chapadeau v. Utica Observer-Dispatch,* 38 N.Y.2d 196, 379 N.Y.S.2d 61, 341 N.E.2d 569, they may as a practical matter have little alternative to lengthy litigation or substantial settlement. In such instances, hypertechnical parsing of a possible "fact" from its plain context of "opinion" loses sight of the objective of the entire exercise, which is to assure that-with due regard for the protection of individual reputation-the cherished constitutional guarantee of free speech is preserved.[FN6]

FN6. A few words are in order about the various concurrences. All of the concurrers joined unanimously in the first *Immuno* opinion (which invoked both the State and Federal Constitutions as the basis for decision), they joined unanimously in the

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

Steinhilber analysis beginning with the content of the whole communication, its tone and apparent purpose (68 N.Y.2d 283, 293, 508 N.Y.S.2d 901, 501 N.E.2d 550), and they all now join unanimously in awarding summary judgment to defendant.

Judge Simons would affirm on Federal constitutional grounds alone, deferring the State constitutional issues that have been fully briefed and argued for a further remand by the United States Supreme Court. Judge Hancock also would affirm on Federal constitutional grounds alone. Unlike Judge Simons, however, he does not view dual constitutional analysis as "illegitimate" (*see, e.g., People v. Cintron,* 75 N.Y.2d 249, 259, 552 N.Y.S.2d 68, 551 N.E.2d 561 [Hancock, Jr., J.]; *People v. Dietze,* 75 N.Y.2d 47, 50, n. 1, 550 N.Y.S.2d 595, 549 N.E.2d 1166 [Hancock, Jr., J.]; *Seawall Assocs. v. City of New York,* 74 N.Y.2d 92, 115-116, 544 N.Y.S.2d 542, 542 N.E.2d 1059 [Hancock, Jr., J.]; *O'Neill v. Oakgrove Constr.,* 71 N.Y.2d 521, 528-529, 528 N.Y.S.2d 1, 523 N.E.2d 277 [Hancock, Jr., J.]; *People v. Stith,* 69 N.Y.2d 313, 316, n. *, 514 N.Y.S.2d 201, 506 N.E.2d 911 [Hancock, Jr., J.]). Judge Titone agrees (Titone, J., concurrence, at 263-264, at 923 of 566 N.Y.S.2d, at 1287 of 567 N.E.2d).

Because the Federal analysis is conclusive, Judges Simons and Hancock would decide this case on Federal law alone. Because the Federal analysis is inconclusive, Judge Titone would decide this case on State law alone. Judge Titone, however, would not decide the case on the basis of State constitutional law, as briefed and argued by the parties. Although he would reach "essentially the same conclusion that the majority has reached" (Titone, J., concurrence, at 266, at 924 of 566 N.Y.S.2d, at 1288 of 567 N.E.2d), he would do so on the basis of State *common* law. Apart from the fact that defendant has not tendered his argument on this basis, the first *Immuno* opinion was expressly premised on State and Federal constitutional grounds. Even on a clean slate, this Court has not previously wedded itself to the primacy methodology (Titone, J., concurrence, at 264-265, at 923 of 566 N.Y.S.2d, at 1287 of 567 N.E.2d), nor have we hesitated to recognize a constitutional right with its source in the common law (*see, e.g., Rivers v. Katz,* 67 N.Y.2d 485, 504 N.Y.S.2d 74, 495 N.E.2d 337).

Among the possible approaches to the single result we all agree is correct-the concurrers have now put the full range of alternatives before the public-we continue to believe that the majority's choice best serves all of the interests at stake.

***257** Accordingly, upon reargument, following remand by the Supreme Court of the United States, we again conclude that the order of the Appellate Division should be affirmed, with costs.

SIMONS, Judge (concurring).

This case is before us on remand from the Supreme Court of the United States for reconsideration in view of its intervening decision in *****919**1283** *Milkovich v. Lorain Journal Co.,* 497 U.S. 1, 110 S.Ct. 2695, 111 L.Ed.2d 1. After reconsideration, the majority has affirmed an order granting summary judgment to defendant. I agree with it that judgment was properly awarded on Federal grounds. In reconsidering the case, however, the majority has rendered an interpretation of *Milkovich* which is narrower than necessary to resolve the matter before us and one which appears, from statements in the *Milkovich* opinions, to be far more constricted than the Supreme Court intended. My purpose in writing is not to resolve these differ-

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

ences over the scope of the protection afforded by *Milkovich.* Only the Supreme Court can do that. My concern is that the Supreme Court will not have the opportunity to do so in this case because the majority has foreclosed review by also resting its decision on independent State grounds (*see, Michigan v. Long,* 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201). I do not agree with the procedure followed, particularly in the circumstances of this case, and I find the majority's reasoning supporting the two theories inconsistent. Accordingly, I cannot join in the opinion of the Court.

I

In pre- *Milkovich* decisions, the Federal and State courts had generally concluded that statements of opinion were protected from libel actions by the First Amendment. These holdings were based in large part on the statement of Justice Powell that "[u]nder the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we ***258** depend for its correction not on the conscience of judges and juries but on the competition of other ideas." (*Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 339-340, 94 S.Ct. 2997, 3007, 41 L.Ed.2d 789.) Despite the sweep of that language, State and lower Federal courts recognized that *Gertz* had not created a blanket exemption for defamatory words merely because they were labeled as "opinion" (*see, Steinhilber v. Alphonse,* 68 N.Y.2d 283, 289-292, 508 N.Y.S.2d 901, 501 N.E.2d 550; *Cianci v. New Times Publ. Co.,* 639 F.2d 54, 61, quoted in *Milkovich v. Lorain Journal Co.,* 497 U.S., at ----, 110 S.Ct., at 2705, 111 L.Ed.2d, at 17). False factual accusations could easily be couched in the language of opinion. Thus, the courts quickly devised methods of distinguishing actionable statements of fact from nonactionable statements of opinion. The test was divided into various methods of determining whether the statements conveyed a precise meaning which could be characterized as true or false and, if the words were ambiguous, by resolving the ambiguity after an examination on the context in which the statements appeared (*see, Ollman v. Evans,* 750 F.2d 970, 976, *cert. denied* 471 U.S. 1127, 105 S.Ct. 2662, 86 L.Ed.2d 278; *Steinhilber v. Alphonse,* 68 N.Y.2d 283, 292, 508 N.Y.S.2d 901, 501 N.E.2d 550, *supra*).

The Supreme Court addressed the issue directly for the first time in *Milkovich,* holding that there is no separate constitutional privilege for statements that might be labeled "opinion". The Court recognized that statements on matters of public concern must be provable as false before they are actionable and that requires a determination of whether they are matters of opinion or fact. Matters of public concern which do not contain a "provably false factual connotation" receive full constitutional protection (*id.,* 497 U.S., at ----, 110 S.Ct., at 2706, 111 L.Ed.2d, at 18). Next, the Court recognized protection for statements that cannot "reasonably [be] interpreted as stating actual facts" about an individual (*Hustler Mag. v. Falwell,* 485 U.S. 46, 50, 108 S.Ct. 876, 879, 99 L.Ed.2d 41). Avoiding literal definitions, the Court stated that prior case law required an examination of the "circumstances" in which the statement was made (*Milkovich v. Lorain Journal Co., supra,* 497 U.S. at ----, 110 S.Ct. at 2704, 111 L.Ed.2d, at 16; *see, Hustler Mag. v. Falwell, supra; Greenbelt Publ. Assn. v. Bresler,* 398 U.S. 6, 13, 90 S.Ct. 1537, 1541, 26 L.Ed.2d 6; *Letter Carriers v. Austin,* 418 U.S. 264, 284-286, 94 S.Ct. 2770, 2781-2782, 41 L.Ed.2d 745). This "assur [es] that public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of our Nation" (*Milkovich v. Lorain Journal* *****920 **1284** *Co.,* 497 U.S., at ----, 110 S.Ct., at 2706, 111 L.Ed.2d, at 19).

It can be argued that the *Milkovich* decision did not change ***259** the law of defamation as it was previously applied by State and lower Federal courts. Justice Brennan did not believe it had and it is notable that the majority did not take exception to his observation that the Court had merely restated the law "lower courts have been relying on for the past

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

decade" (*see, Milkovich v. Lorain Journal Co., supra,* at ----, 110 S.Ct., at 2709, 111 L.Ed.2d, at 21 [Brennan, J., dissenting]). His view is shared by others (*see, e.g., The Supreme Court, 1989 Term-Leading Cases,* 104 Harv.L.Rev. 219, 223). Justice Brennan's disagreement with the result was based simply upon the application of the rule, i.e., what a "reasonable reader" would have understood the statements in *Milkovich* to mean. The majority believed that the challenged statements could be interpreted as either stating or implying defamatory facts; Justices Brennan and Marshall believed that they could not.

II

The majority holds in the first part of its opinion, considering plaintiff's claim under the Federal Constitution, that summary judgment was properly granted to defendant. It then asserts that *Milkovich* creates "uncertainty" as to whether the "context" of a statement may be considered and interprets *Milkovich* as stating a rule which protects opinion only in "special situations" involving "loose, figurative, hyperbolic language" (majority opn., at 245, at 911 of 566 N.Y.S.2d, at 1275 of 567 N.E.2d). Thus, after resolving plaintiff's claim under the Federal Constitution, the majority reopens the issue with its interpretation as justification for its additional ruling on State constitutional grounds recognizing a greater importance for context.

Context is not controlling in this case, however, under either the majority's narrow view of *Milkovich* or our State rules. The Appellate Division, in a unanimous 27-page analysis of plaintiff's claims stated that, for the most part, the McGreal letter was a constitutionally protected expression of opinion. To the extent the court identified unambiguous assertions of fact, it found that they had not been proven false-or indeed were demonstrably true-and therefore ruled that plaintiff failed to meet its burden of proof (*see, Philadelphia Newspapers v. Hepps,* 475 U.S. 767, 776, 106 S.Ct. 1558, 1563, 89 L.Ed.2d 783). We accepted its conclusion when the case was first before us and the majority again accepts it for the purpose of deciding the Federal question (*see,* ***260** majority opn., at 245-246, 248, n. 3, at 911-912, 913, n. 3 of 566 N.Y.S.2d, at 1275-1276, 1277, n. 3 of 567 N.E.2d).[FN1] Thus, plaintiff's claims fail regardless of the "circumstances" or "context" in which the alleged defamatory words appear.

> FN1. For some reason, the majority believes its obligation to examine plaintiff's Federal claim is limited to reviewing the "express and implied factual assertions * * * as they were identified by the Appellate Division" (majority opn., at 248, n. 3, at 913 of 566 N.Y.S.2d, at 1277 of 567 N.E.2d). On a motion for summary judgment, however, the Court is required to pass on the defamatory nature of all the statements alleged to be actionable. Although the majority appears to believe the Appellate Division did not perform this function, it explicitly stated that it had done so (*see,* 145 A.D.2d 114, 143, 537 N.Y.S.2d 129 ["of the many statements cited by the plaintiff * * * there was not one that was actionable"]).

Nevertheless, the majority proceeds to examine the context of the statements under the State Constitution because a different conclusion could conceivably emerge under *Milkovich* (majority opn., at 248, n. 3, at 913, n. 3 of 567 N.Y.S.2d, at 1277, n. 3 of 566 N.E.2d). If certain statements in the McGreal letter alleged to be defamatory may be actionable after *Milkovich* the majority should identify them in its discussion of the Federal claim and deny summary judgment. That is the request made of us by the Supreme Court: examine plaintiff's defamation claim in light of *Milkovich* and determine if a cause of action is stated. The majority has failed to do so, however, hypothesizing that some unspecified statement may be actionable unless considered in context under a broad State rule permitting such evaluation. Its *****921 **1285** grant of

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

summary judgment on Federal grounds, based on a narrow view of *Milkovich* in which context is not controlling, is inconsistent with the discussion on State law in which context becomes critical. It leaves both grounds for the decision suspect and seriously impairs the credibility of the Court's analysis.

III

Aside from these considerations, there are several institutional concerns which should be addressed.

This Court, as the highest court in the State, is primarily concerned with the institutional function of declaring and applying constitutional and common-law principles, authoritatively interpreting statutes and formulating policy on issues of Statewide concern. When the Court reviews a question of Federal constitutional law, however, it acts as part of a larger judicial system embracing not only New York but the Nation as a whole. When Federal questions are presented, its institutional functions are subordinated to the Supreme Court and it ***261** acts, in effect, as an intermediate court. Notwithstanding this different role, it is important that State courts participate in the Nation's court structure. They have much to contribute to the Supreme Court's determination of Federal law by addressing the issues thoroughly and persuasively and providing local perspectives for the development of constitutional rules (*see, Johnson v. Louisiana,* 406 U.S. 356, 376, 92 S.Ct. 1620, 1641, 32 L.Ed.2d 152; *New State Ice Co. v. Liebmann,* 285 U.S. 262, 311, 52 S.Ct. 371, 386, 76 L.Ed. 747 [Brandeis, J., dissenting]). Inasmuch as the Supreme Court is charged with the ultimate responsibility for pronouncing Federal law, however, it should be given the opportunity to accept, modify or reject a State court's determination of what the Federal Constitution requires.

Our unnecessary reliance on State law in this case frustrates that process. Under general principles, Supreme Court jurisdiction to review a Federal question fails if the decision of the State court is also based on adequate and independent State grounds (*see, Michigan v. Long,* 463 U.S., *supra,* at 1038, n. 4, 1041-1042, 103 S.Ct., at 3475, n. 4, 3476-3477; *Fox Film Corp. v. Muller,* 296 U.S. 207, 210, 56 S.Ct. 183, 184, 80 L.Ed. 158; *cf., Delaware v. Prouse,* 440 U.S. 648, 651-653, 99 S.Ct. 1391, 1394-1396, 59 L.Ed.2d 660; *and see, Ohio v. Johnson,* 467 U.S. 493, 499, 104 S.Ct. 2536, 2540, 81 L.Ed.2d 425; Comment, *Ohio v. Johnson: The Continuing Demise of the Adequate and Independent State Ground Rule,* 57 U.Colo.L.Rev. 395, 416). The Supreme Court will not review the matter because it can no longer control the litigation; its decision would constitute merely an advisory opinion. The State court's pronouncements on Federal law, correct or not, thus become judicial dictum because they are not the dispositive reasons for the Court's decision.

Resting the decision on dual grounds also violates established rules of judicial restraint. Traditional doctrine holds that a court should decide no more than necessary to resolve the dispute before it. Constitutional questions should be avoided if possible (*see, Communist Party v. Catherwood,* 367 U.S. 389, 392, 81 S.Ct. 1465, 1467, 6 L.Ed.2d 919; *People v. Felix,* 58 N.Y.2d 156, 161, 460 N.Y.S.2d 1, 446 N.E.2d 757; *Matter of Beach v. Shanley,* 62 N.Y.2d 241, 254, 476 N.Y.S.2d 765, 465 N.E.2d 304). The practice of deciding a case on dual grounds, thereby insulating the Federal question from Supreme Court review has been described as "illegitimate" (*see,* Bice, *Anderson and the Adequate State Ground,* 45 S.Cal.L.Rev. 750, 757; Collins, *The Once "New Judicial Federalism" and Its Critics,* 64 Wash.L.Rev. 5, 7 [quoting Bice and criticisms of the California Supreme Court's practice of dualism by various public officials]). It is said to be not only contrary to the general rules underlying judicial restraint but also a perversion of the "new federalism", pushing State ***262** constitutional power beyond its proper limits by purporting to state Federal law but insulating the analysis from review by the Supreme Court. The inevitable con-

sequence of dual reliance is that the Supreme Court, charged with ultimate authority in the area, loses a measure of control over the law it has created. To the extent that *****922 **1286** we declare Federal law but foreclose review, we undermine the Supreme Court's institutional role, denying it the opportunity to harmonize divergent State court decisions or speak on issues it deems important. The result is much the same as if the four departments of the Appellate Division were to frustrate us in the performance of our institutional responsibilities by deciding State constitutional law issues and then, by procedural means, foreclosing our review of their decisions.

Whether criticisms of the practice of dual reliance are justified as a general proposition, they are valid when the procedure followed in this case is considered.[FN2] Our original decision contained no statement that it rested on independent State grounds (*see,* 74 N.Y.2d 548, 549 N.Y.S.2d 938, 549 N.E.2d 129). With the case in that posture, the Supreme Court granted certiorari, indicating its desire to pass on the issues of Federal law and, as a matter of comity, remitted the case to us before ruling so that we might reconsider it in light of the intervening *Milkovich* decision. We have reviewed the appeal and concluded that under *Milkovich* the plaintiff has failed to satisfy its burden of proving defamation. The majority does not stop there, however. Having previously invited Supreme Court review by ***263** failing to rest our decision on independent State grounds, it now changes course and blocks that review by asserting them.

FN2. As Judge Kaye notes (majority opn., at 251, at 915 of 566 N.Y.S.2d, at 1279 of 567 N.E.2d), neither the Court nor its individual Judges have consistently followed any announced standards for departing from Federal law to adopt a different State rule or settled on any preferred methodology for doing so (*but see, People v. P.J. Video,* 68 N.Y.2d 296, 508 N.Y.S.2d 907, 501 N.E.2d 556). No problem is presented when, as in the first appeal in this case, we perceive Federal and State law to be the same. But when they diverge, we have followed a variety of approaches. Indeed, the Court recently has appeared to shy away from establishing any standards and, without guidance from us, parties have been free in cases asserting both Federal and State constitutional claims to rely on the general equities of the case, to appeal to the subjective views of the individual Judges on what the rule ought to be and to urge adoption of the methodology best suited to arrive at the desired result. Hopefully we will, in time, achieve an articulable consensus on how these matters should be handled. To that end, I first stated my opposition to the dual method in *Matter of Patchogue-Medford Congress of Teachers v. Board of Educ.,* 70 N.Y.2d 57, 71, 517 N.Y.S.2d 456, 510 N.E.2d 325 [Simons, J., concurring] and my opposition to going beyond the necessities of the case to declare new State law in *People v. Vilardi,* 76 N.Y.2d 67, 78, 556 N.Y.S.2d 518, 555 N.E.2d 915 [Simons, J., concurring].

The majority contends this procedure is warranted by concerns of finality and judicial economy. Those are practical concerns present in every case. They rarely justify overriding established rules of judicial restraint and they should hardly control the decision-making process in this case. If the law was such that plaintiff could prevail on Federal grounds but could not prevail on State grounds, then resort to the protection afforded by our State Constitution might be justified. But plaintiff has no cause of action on Federal grounds, even with the narrow protection the majority accords defendant under *Milkovich.* If, notwithstanding this holding, we had proceeded in our Federal analysis to examine the role of context in opinion cases it would represent inexcusable dictum because it would not control the outcome of the case. It becomes no less so because the discussion is cast in terms of State law.

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

The result of reaching both State and Federal grounds is that the discussion of Federal law, under Supreme Court precedent, is dictum because we have relied on independent State grounds. Conversely, the discussion of State grounds is largely dictum because context is not controlling in this case. The process is not in keeping with our institutional responsibility to provide stability and certainty in the development of law.

Accordingly, I concur for affirmance solely on the ground that the plaintiff's claims are not actionable under the holding in *Milkovich v. Lorain Journal Co. (supra).*

TITONE, Judge (concurring).

As do each of the other six members of this Court, I concur in the conclusion that *****923 **1287** plaintiff has not established an actionable defamation and that, accordingly, its complaint was properly dismissed. I also join in many of the concerns addressed in Judges Simons's and Hancock's concurrences about the propriety and wisdom of deciding this appeal on alternative State and Federal constitutional analyses. Judge Simons's extended discussion of the apparent inconsistency in the majority's two-part analysis, as well as his review of the jurisprudential considerations militating against the majority's use of the "dual" approach in this case, are thorough and persuasive, and require no further elaboration here.[FN*] Nonetheless, I have chosen to write separately because, ***264** in my view, the controlling legal principles should, at least in the first instance, be derived from State, rather than Federal, law.

> FN* Like Judge Hancock, I would not rule out the use of the "dual" approach in cases where the posture makes it necessary or appropriate (*see, e.g., People v. Dunn,* 77 N.Y.2d 19, 563 N.Y.S.2d 388, 564 N.E.2d 1054). In this case, however, the approach seems particularly inapt because, as the majority itself admits, its Federal constitutional analysis is inconclusive. Further, to the extent that a tentative conclusion has been reached, the Federal analysis leads to the same conclusion as does the "independent and *adequate* " State law rationale and, consequently, is unnecessary dictum.

Even if, as the majority's opinion suggests, the Supreme Court's recent decision in *Milkovich v. Lorain Journal Co.,* 497 U.S. 1, 110 S.Ct. 2695, 111 L.Ed.2d 1 has changed the contours of what is actionable under the Federal Constitution (*but see,* 497 U.S., at ----, 110 S.Ct., at 2708-2709, *supra* [Brennan, J., dissenting]; *see also,* concurring opns. per Simons, J., at 258-259, at 919-920 of 566 N.Y.S.2d, at 1283-1284 of 567 N.E.2d, Hancock, Jr., J., at 268, at 926 of 566 N.Y.S.2d, at 1290 of 567 N.E.2d), its over-all significance for our present purposes should not be overestimated. *Milkovich* and its predecessor *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789, merely established and shaped the constitutional floor below which State defamation rules may not fall (*see, People ex rel. Arcara v. Cloud Books,* 68 N.Y.2d 553, 557, 510 N.Y.S.2d 844, 503 N.E.2d 492; *see also,* Kaye, *Dual Constitutionalism in Practice and Principle,* 61 St. John's L.Rev. 399, 403). As such, they simply delineated the limitations imposed by the First Amendment on the State-derived common-law rights of defamation plaintiffs. There is nothing in *Milkovich* or any of the related cases that impairs the States' power to impose additional limitations, based on either their own Constitutions or the traditions underlying their previously established common-law doctrines (*see, e.g., PruneYard Shopping Center v. Robins,* 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed.2d 741).

Thus, our first obligation as a State common-law court is to determine whether the dismissal of this plaintiff's complaint is consistent with our State's common-law and constitutional defamation rules. Resolution of this question is, in my view, a necessary and logically prior step that must be taken before any Federal constitutional issue is considered. As one State court has aptly observed: "The proper

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

sequence is to analyze the state's law, including its constitutional law, before reaching a federal constitutional claim. This is required, not for the sake either of parochialism or of style, but because the state does not deny any right claimed under the federal Constitution when the claim before the court in fact is fully met by state law" ***265**(*Sterling v. Cupp,* 290 Or. 611, 614, 625 P.2d 123, 126, quoted in *Massachusetts v. Upton,* 466 U.S. 727, 736, 104 S.Ct. 2085, 2090, 80 L.Ed.2d 721 [Stevens, J., concurring]; *accord, State v. Badger,* 141 Vt. 430, 448, 450 A.2d 336, 347 ["(f)ufillment of this Court's responsibilities as a member of the federalist system requires us to consider the availability of state grounds before federal appeal"]).

Under our system of federalism, the State courts have both the privilege and the responsibility of enunciating the State's law and providing the first line of protection for the people's liberties. "It is also important that state judges do not unnecessarily invite [the Supreme Court] to undertake review of state-court judgments" ****1288 ***924** (*Massachusetts v. Upton, supra,* 466 U.S. at 737, 104 S.Ct. at 2090 [Stevens, J., concurring]).

With these principles in mind, I would decide this case solely by reference to New York State law, specifically its *common-law* defamation precepts. Indeed, in this State there exists a pre- *Gertz* body of case law that remains untouched by *Milkovich* and provides an ample framework for resolving the issue placed before us on this remand.

As this Court observed the first time this case was before it, the roots of the modern, constitutionally based opinion privilege lie in the common-law doctrine according a qualified privilege to "fair comment" (74 N.Y.2d, at 555, 549 N.Y.S.2d 938, 549 N.E.2d 129). This doctrine has existed as part of New York's common law of defamation, albeit in cramped form, since at least 1840, when a journalist named Stone was sued for his vitriolic denunciation of a book authored by James Fenimore Cooper (*Cooper v. Stone,* 24 Wend. 434; *see also, Bingham v. Gaynor,* 203 N.Y. 27, 96 N.E. 84; *Triggs v. Sun Print. & Publ. Assn.,* 179 N.Y. 144, 71 N.E. 739; *Hamilton v. Eno,* 81 N.Y. 116). By 1930, this Court had unequivocally stated that "[e]very one has a right to comment on matters of public interest and concern, provided he does so fairly and with an honest purpose." (*Hoeppner v. Dunkirk Print. Co.,* 254 N.Y. 95, 99, 172 N.E. 139.) And, by the latter half of the twentieth century, the "fair comment" doctrine was being applied expansively so as to make New York's common-law defamation rules consistent with the State and Federal constitutional guarantees of free speech, as well as with the value that society places on the open and free exchange of ideas (*see, e.g., Julian v. American Business Consultants,* 2 N.Y.2d 1, 155 N.Y.S.2d 1, 137 N.E.2d 1; *see also, Cole Fisher Rogow, Inc. v. Carl Ally, Inc.,* 25 N.Y.2d 943, 305 N.Y.S.2d 154, 252 N.E.2d 633).

To be sure, when *New York Times Co. v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 and its progeny introduced a constitutional dimension into the law of defamation, judicial attention shifted away ***266** from the evolving common-law "fair comment" privilege and, in its stead, a parallel body of constitutional case law premised on the dictum in *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 339-340, 94 S.Ct. 2997, 3007, 41 L.Ed.2d 789, *supra,* was developed (*see, e.g., Rinaldi v. Holt, Rinehart & Winston,* 42 N.Y.2d 369, 397 N.Y.S.2d 943, 366 N.E.2d 1299), culminating in our Court's recent decisions in *Steinhilber v. Alphonse,* 68 N.Y.2d 283, 508 N.Y.S.2d 901, 501 N.E.2d 550 and this case (74 N.Y.2d 548, 549 N.Y.S.2d 938, 549 N.E.2d 129, *supra*). However, now that *Gertz* has proven to be a false lead, we may, without serious difficulty, retrace our steps and pick up the path where we left it when *Gertz* was decided. Such a course would lead to essentially the same conclusion that the majority has reached, i.e., that the statements plaintiff challenges are not actionable.

As was true of the line of cases built upon *Gertz v. Robert Welch, Inc. (supra),* the central concern of the "fair comment" cases was to protect both "the

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

right to comment on public affairs" and "the public's access to important information" (*see, Immuno AG. v. Moor-Jankowski,* 74 N.Y.2d 548, 556, 549 N.Y.S.2d 938, 549 N.E.2d 129, *supra*). In furtherance of that concern, it is highly appropriate to consider the context, tone and character of a statement challenged as defamatory when determining whether it constitutes a privileged "fair comment" or an actionable assertion of fact. Indeed, our common-law cases have often included references to reading the challenged work "as a whole" and in their proper context (*e.g., James v. Gannett Co.,* 40 N.Y.2d 415, 419-420, 386 N.Y.S.2d 871, 353 N.E.2d 834; *Julian v. American Business Consultants,* 2 N.Y.2d 1, 14-15, 155 N.Y.S.2d 1, 137 N.E.2d 1, *supra*). The majority's current rationale, which emphasizes "the content of the whole communication, its tone and apparent purpose" (majority opn., at 254, at 917 of 566 N.Y.S.2d, at 1281 of 567 N.E.2d), fits easily and neatly within this analytical framework.

The approach I advocate-considering State common-law principles before looking *****925 **1289** to the State Constitution's strictures-is particularly apt in this context, where the cause of action and the corresponding rights and duties of the parties are themselves creatures of the common law. In most of our prior decisions holding a State constitutional provision to be more protective of individual liberties than its Federal counterpart, the particular right at issue had no source at all other than constitutional law. In *People v. Griminger,* 71 N.Y.2d 635, 529 N.Y.S.2d 55, 524 N.E.2d 409, *People v. P.J. Video,* 68 N.Y.2d 296, 508 N.Y.S.2d 907, 501 N.E.2d 556; *People v. Class,* 67 N.Y.2d 431, 503 N.Y.S.2d 313, 494 N.E.2d 444 and *People v. Bigelow,* 66 N.Y.2d 417, 497 N.Y.S.2d 630, 488 N.E.2d 451, for example, we were called upon to decide the scope of the rights conferred by article I, § 12 of our State Constitution where the only other possible source of the protection was the Fourth Amendment to the Federal Constitution-and that source had been ruled ***267** unavailable (*cf., People v. Johnson,* 66 N.Y.2d 398, 497 N.Y.S.2d 618, 488 N.E.2d 439; *see also, People ex rel. Arcara v. Cloud Books,* 68 N.Y.2d 553, 510 N.Y.S.2d 844, 503 N.E.2d 492, *supra* [constitutional free speech guarantee]; *People v. Bethea,* 67 N.Y.2d 364, 502 N.Y.S.2d 713, 493 N.E.2d 937 [constitutional privilege against self-incrimination]; *Sharrock v. Dell Buick-Cadillac,* 45 N.Y.2d 152, 408 N.Y.S.2d 39, 379 N.E.2d 1169 [constitutional due process guarantee]; *People v. Hobson,* 39 N.Y.2d 479, 384 N.Y.S.2d 419, 348 N.E.2d 894 [constitutional right to counsel guarantee]). In such circumstances, there is no choice but to invoke the State Constitution, and we properly did not hesitate to do so.

Here, in contrast, the controversy concerns the scope of, and restrictions upon, private rights whose immediate source is a judicially created common-law cause of action, i.e., defamation. In this context, it seems more than a little anomalous to leap directly to an inquiry into what the State Constitution forbids. Implicit in such an inquiry is the assumption that were it not for the constitutional restraints, the law would permit what is determined to be constitutionally forbidden. While such an approach may be required when the court is called upon to enforce an unambiguous rule established by another branch of government, such as a legislative enactment, it seems out of place when the rule to be enforced is a common-law rule *of the courts' own making.* In the latter circumstance, the sounder approach is to simply shape the common-law rule so as to avoid a constitutional clash. Such an approach is particularly appropriate in an area where, as here, the common law has not developed and hardened to the point where a constitutionally compatible rule is foreclosed by clear precedent.

Whether we use common-law principles to "inform" our constitutional analysis (majority opn., at 250, at 914 of 566 N.Y.S.2d, at 1278 of 567 N.E.2d) or instead reverse that order of priority as I suggest (*see also, People v. Conyers,* 52 N.Y.2d 454, 438 N.Y.S.2d 741, 420 N.E.2d 933) is not merely a matter of semantics. The approach I suggest has the advantage of being in harmony with the well-established principle that courts should avoid

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

passing upon constitutional questions when the case can be disposed of in another way (*e.g., Matter of Beach v. Shanley,* 62 N.Y.2d 241, 254, 476 N.Y.S.2d 765, 465 N.E.2d 304; *People v. Felix,* 58 N.Y.2d 156, 161, 460 N.Y.S.2d 1, 446 N.E.2d 757). It also avoids a problem I have previously mentioned in connection with constitutionally based decision making, i.e., the practical difficulty of reversing or modifying the rule that the judiciary has adopted (*see,* Titone, *State Constitutional Interpretation: The Search for an Anchor in a Rough Sea,* 61 St. John's L.Rev. 431, 439, and n. 39; *see also,* Maltz, *The Dark Side of State Court Activism,* 63 Tex.L.Rev. 995, 1000).

***268** In summary, I agree with the majority's ultimate conclusion that the statements contained in the McGreal letter do not constitute express or implied assertions of fact and are therefore not actionable under our State's law. That conclusion, for me, ends the inquiry. Accordingly, I vote to affirm the decision below dismissing plaintiff's complaint.
*****926 **1290** HANCOCK, Judge (concurring).
I agree with Judge Simons (concurring opn., part II) that this appeal is properly resolved under *Milkovich v. Lorain Journal Co.,* 497 U.S. 1, 110 S.Ct. 2695, 111 L.Ed.2d 1 without addressing the issue of context. Were a discussion of this issue warranted, however, I would hold that nothing in *Milkovich* suggests that the Supreme Court has altered its attitude toward the context of and circumstances surrounding written or spoken words as an obvious and ordinarily indispensable consideration in deciding the legal question "of what the average person hearing or reading the [words] would take [them] to mean" (*Steinhilber v. Alphonse,* 68 N.Y.2d 283, 290, 508 N.Y.S.2d 901, 501 N.E.2d 550). On the contrary, the majority's opinion in *Milkovich* and its discussion of the "context" cases (*see particularly, Greenbelt Publ. Assn. v. Bresler,* 398 U.S. 6, 13-14, 90 S.Ct. 1537, 1541-1542, 26 L.Ed.2d 6; *Letter Carriers v. Austin,* 418 U.S. 264, 284-286, 94 S.Ct. 2770, 2781-2782, 41 L.Ed.2d 745; *Hustler Mag. v. Falwell,* 485 U.S. 46, 53-57, 108 S.Ct. 876, 880-883, 99 L.Ed.2d 41) as well as Justice Brennan's dissenting opinion in *Milkovich* (*see particularly,* 497 U.S., at ----, 110 S.Ct., at 2708-2710) lead me to the conclusion that context continues as a factor of undiminished significance and that the Federal law as summarized in *Steinhilber v. Alphonse,* 68 N.Y.2d 283, 289-292, 508 N.Y.S.2d 901, 501 N.E.2d 550, *supra*) is essentially unchanged (*accord, The Supreme Court, 1989 Term-Leading Cases,* 104 Harv.L.Rev. 219, 223; *see also,* concurring opn. of Simons, J., at 258-259, at 919-920 of 566 N.Y.S.2d, at 1283-1284 of 567 N.E.2d).

There are cases, in my opinion, where basing a decision on both Federal and State constitutional grounds may be entirely appropriate. For the reasons stated by Judge Simons (concurring opn., at 262-263, at 921-922 of 566 N.Y.S.2d, at 1285-1286 of 567 N.E.2d), however, I am persuaded that this is not such a case. Accordingly, I would affirm solely on the ground that plaintiff has no cause of action under Federal law.

WACHTLER, C.J., and ALEXANDER and BELLACOSA, JJ., concur with KAYE, J.
SIMONS, TITONE and HANCOCK, JJ., concur in result in separate opinions.
Upon reargument, following remand by the Supreme Court of the United States, order affirmed, with costs.

N.Y.,1991.
Immuno AG. v. Moor-Jankowski
77 N.Y.2d 235, 567 N.E.2d 1270, 566 N.Y.S.2d 906, 59 USLW 2459, 18 Media L. Rep. 1625

END OF DOCUMENT

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.