Torts: Striking a Balance: Minnesota's Minority Stance on the Privilege to Defame—Zutz V. Nelson, 788 N.W.2d 58 (Minn. 2010)

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TORTS: STRIKING A BALANCE: MINNESOTA'S MINORITY STANCE ON THE PRIVILEGE TO DEFAME—ZUTZ V. NELSON, 788 N.W.2D 58 (MINN. 2010).

Erica Holzer†

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† J.D. Candidate, William Mitchell College of Law, May 2013; B.A., Psychology, University of Minnesota, 2006. I would like to thank Professors J. David Prince, Michael K. Steenson, and Mary Patricia Byrn for their invaluable guidance in writing this Note. I dedicate this Note to my wife, Jane Holzer, for her unyielding encouragement and support.
The Purest Treasure mortal times afford
Is spotless reputation . . . .

I. INTRODUCTION

Society has long considered one’s reputation an interest worth protecting. At the same time, the law protects an equally important interest in free, uninhibited political speech. At the intersection of these two competing interests lies the doctrine of privilege: the freedom, enjoyed by certain public officials, under certain circumstances, to defame others with impunity.

Effective democracy is rooted in 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.” Free, uninhibited speech by government officials allows voters to make informed decisions, influence policy makers, and check abuse of power by public officials by voting those members out of office. Freedom of speech is also essential for the discovery of truth.

It is thought that any threat of defamation liability will cause responsible government officials to perform their duties more timidly, thus inhibiting the free flow of ideas we deem essential to

1. WILLIAM SHAKESPEARE, RICHARD II, act 1, sc. 1.
2. See 1 RODNEY A. SMOLLA, LAW OF DEFAMATION § 1:2 (2d ed. 2011). The pre-thirteenth century remedy for defamation was to cut out the offender’s tongue. Id. For an overview of the history of defamation law, see generally Van Vechten Veeder, The History and Theory of the Law of Defamation, 4 COLUM. L. REV. 33 (1904).
4. 30 DUNNELL MINN. DIGEST, LIBEL AND SLANDER § 4.00 (2011).
7. See infra notes 34–38 and accompanying text.
8. See Expeditions Unlimited Aquatic Enters., Inc. v. Smithsonian Inst., 566 F.2d 289, 293 (D.C. Cir. 1977) (“The nation’s welfare is dependent upon officials who are willing to speak forthrightly and disclose violations of the law and other activities contrary to the public interest. Their voices will be stilled if they perceive or fear that the person involved has the resources or disposition to defend with all affirmative tactics. When millions may turn on regulatory decisions, there is a strong incentive to counterattack.”); see also Comment, Absolute Immunity: Too Broad a Protection for the “Public Interest”? 10 STAN. L. REV. 589, 590 (1958) [hereinafter Absolute Immunity] (“It is further suggested that responsible men will not assume government office, or will perform their duties timidly, if they are open to
the effective functioning of our democracy. Therefore, certain government officials are granted the privilege to make defamatory statements—not in a desire to protect individual government officials for their own benefit, but rather to protect the rights of the people they represent.

The privilege to make defamatory statements is divided into two categories: absolute and qualified. Absolute privilege provides immunity to certain government officials, even when statements are knowingly false and expressly malicious. Qualified privilege provides immunity only upon a showing of good faith and lack of malice. Additionally, qualified privilege is destroyed if the privilege is abused. In determining what type of privilege, if any, to apply, courts must examine the consequences and benefits of limiting speech by certain government officials. According to Judge Learned Hand, “As is so often the case, the answer must be

9. Expeditions Unlimited Aquatic Enters., Inc., 566 F.2d at 293.
11. See infra note 56.
13. Id. at 223, 67 N.W.2d at 416.
15. W. Page Keeton ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 115, at 832 (5th ed. 1984) (“[Qualified] immunity is forfeited if the defendant steps outside of the scope of the privilege, or abuses the occasion.”); see also Matthis, 243 Minn. at 223, 67 N.W.2d at 416 (“[A] qualified or conditional privilege grants immunity only if the privilege is not abused and defamatory statements are publicized in good faith and without malice.”). The Restatement (Second) of Torts provides four ways qualified privilege may be abused:

[1] because of the publisher’s knowledge or reckless disregard as to the falsity of the defamatory matter; [2] because the defamatory matter is published for some purpose other than that for which the particular privilege is given; [3] because the publication is made to some person not reasonably believed to be necessary for the accomplishment of the purpose of the particular privilege; or [4] because the publication includes defamatory matter not reasonably believed to be necessary to accomplish the purpose for which the occasion is privileged.

RESTATEMENT (SECOND) OF TORTS § 599 cmt. a (1977) (citations omitted).
found in a balance between the evils inevitable in either alternative.\textsuperscript{16} Because absolute privilege comes at the cost of denying relief to victims of intentionally malicious defamatory statements,\textsuperscript{17} absolute privilege was historically limited to members of the U.S. Congress and the highest legislative bodies of a state.\textsuperscript{18} In the last thirty years, however, a growing trend has evolved in favor of expanding absolute privilege to subordinate government officials.\textsuperscript{19} During this period, Minnesota has consistently declined to adopt this broad application of privilege.\textsuperscript{20}

Recently, in \textit{Zutz v. Nelson},\textsuperscript{21} the Minnesota Supreme Court was faced with the decision to maintain its minority stance or join the growing majority. Ultimately, the Minnesota Supreme Court declined to adopt the majority position on the issue, holding that qualified, rather than absolute, privilege is appropriate for subordinate government officials.\textsuperscript{22}

This case note first outlines the origins and development of absolute privilege.\textsuperscript{23} It then details the Minnesota Supreme Court’s holding in \textit{Zutz},\textsuperscript{24} followed by an analysis of the decision.\textsuperscript{25} Finally, the note concludes by asserting that the Minnesota Supreme Court continues to strike the right balance between two important, competing public interests by maintaining its minority stance on privilege.\textsuperscript{26}

II. HISTORY

This Part first discusses the tension between the two competing policies of free, uninhibited political speech, and providing a

\textsuperscript{16} Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949).
\textsuperscript{17} See infra text accompanying notes 162–166.
\textsuperscript{18} \textit{RESTATEMENT (FIRST) OF TORTS § 590 cmt. c} (1938).
\textsuperscript{19} See \textit{Zutz v. Nelson}, 788 N.W.2d 58, 66 (Minn. 2010) (Anderson, Paul H., J., dissenting); \textit{RESTATEMENT (SECOND) OF TORTS § 590 cmt. c} (1977); cf. \textit{RESTATEMENT (FIRST) OF TORTS § 590 cmt. c} (1938) (reflecting the majority rule of that era).
\textsuperscript{20} See \textit{RESTATEMENT (SECOND) OF TORTS § 590 cmt. C}, reporter’s note (1977) (listing Minnesota among jurisdictions not extending absolute privilege to subordinate legislative bodies).
\textsuperscript{21} 788 N.W.2d 58 (Minn. 2010).
\textsuperscript{22} Id. at 63.
\textsuperscript{23} See infra Part II.
\textsuperscript{24} See infra Part III.
\textsuperscript{25} See infra Part IV.
\textsuperscript{26} See infra Part V.
remedy for the tort of defamation. It then traces the origins of absolute privilege, how that privilege has expanded across various jurisdictions, and Minnesota’s minority stance on the issue.

A. The Tension Between Uninhibited Political Speech and Defamation

The drafters of the U.S. Constitution established a legacy of condemning the practice of prosecuting individuals for speech, especially speech that is critical of government or government officials. However, absolute freedom of speech for everyone, under all circumstances, is simply untenable. Courts must make value judgments as to what speech is protected, under what circumstances, and when and how the government can regulate speech. Informing these judgments are the underlying goals of free speech: furthering self-governance and aiding the discovery of truth via the “marketplace of ideas.”

Political speech is at the core of what is protected by the U.S. Constitution. Effective self-governance is rooted in 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.” Freedom of speech allows voters to make informed decisions, influence policy makers, and check abuse of power by public officials by voting those members out of office.

Freedom of speech is also thought to be essential for the discovery of truth. Justice Oliver Wendell Holmes argued, “[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . . .” The notion behind this so-called “marketplace of ideas” metaphor is that the remedy for false speech is “more speech, not enforced silence.” There is much

28. CHEMERINSKY, supra note 6, at 925.
29. Id.
30. See id. at 926.
31. Id. at 927; see also Snyder v. Phelps, 131 S. Ct. 1207, 1215–17 (2011) (discussing what constitutes political speech); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 273–74 (1964) (stating, in obiter dictum, that the “central meaning of the First Amendment” is to allow criticism of government and government officials).
32. N.Y. Times Co., 376 U.S. at 270.
33. CHEMERINSKY, supra note 6, at 926.
35. See Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J.,
flawed about this metaphor—namely, that it erroneously presupposes that everyone is equal and that access to the ideological marketplace is free from imposed boundaries. But, giving government the power to decide what is true and right—and the power to suppress all else—would be much worse. Therefore, until a better method is introduced, free speech is the best way to discover the truth. Justice Brandeis, in his concurring opinion in Whitney v. California, offers a compelling explanation for protecting freedom of speech:

Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

However, alongside these benefits, free speech has the potential to cause devastating consequences. Victims of defamatory speech, for example, are subject to hatred, ridicule, obloquy, and contempt. Defamatory speech is a published, false statement that disparages another by reflecting unfavorably upon his personal morality or integrity, or discrediting his financial standing in the

37. See Chemerinsky, supra note 6, at 926.
38. See id. at 928–29 (citing Melville Nimmer, Nimmer on Freedom of Speech 1–12 (1984)).
community. Defamation necessarily involves the element of disgrace. Therefore, while calling someone a Republican may arouse adverse feelings toward him by Democrats, and even diminish him in their esteem, it lacks the necessary element of personal disgrace to be considered defamation.

The law provides a remedy for the very real damage caused by false, defamatory statements. The interest in protecting one’s reputation against the personally crushing and career-ending potential of defamatory speech provides one occasion to place limits on free, uninhibited speech. As long as the law protects both reputational interests and free speech interests, there will be a perpetual balancing of these two competing policies.

B. The Origins and Development of Absolute Privilege

Absolute privilege is granted to various officials in all three branches of government. The Middle Snake Watershed District Board at issue in Zutz falls under the legislative branch. As such, this Part focuses on absolute privilege in the legislative branch, followed by a brief discussion of absolute privilege in the judicial and executive branches.

1. Legislative Privilege

Members of the U.S. Congress enjoy the absolute privilege of free, uninhibited speech. This privilege is fundamental to our democratic system of government. Officially originating in the Parliament of England in 1688, absolute privilege was established

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42. KEETON ET AL., supra note 15, § 111, at 773.
43. Id. Nor is it defamatory to impute to someone perfectly legitimate conduct in which one is entitled to engage. ELDER, supra note 40, § 1:7. Thus, it is not defamatory to state that a city council member played golf with a developer, Riley v. Moved, 529 A.2d 248, 253 (Del. 1987), or that a plaintiff declined to be interviewed by the media, Brewer v. Capital Cities/ABC, Inc., 986 S.W.2d 636, 643 (Tex. App. 1998), or that a legislator voted otherwise than he had on expenditures and taxes, Tatur v. Solsrud, 498 N.W.2d 232, 234–35 (Wis. 1993).
44. See Zutz v. Nelson, 788 N.W.2d 58, 65 (Minn. 2010).
45. See SMOLLA, supra note 2, § 1:21.
46. See id. (pointing out the constant trade-offs between free expression and reputation).
47. Yankwich, supra note 10, at 961–62.
48. Id.
49. It is unclear exactly when legislative immunity for parliamentary speech was officially granted in England. See id. at 962–64. Until what the English call
to maintain an independent legislative branch of government, free from the prerogatives of the King. Similarly, the drafters of the U.S. Constitution recognized the value of an independent legislative branch and thus ratified what is referred to as the speech or debate clause:

[Senators and Representatives] shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

Every state has affirmed this principle by including provisions similar to the speech or debate clause in their state constitutions. In so doing, state senators and representatives enjoy absolute privilege, just like members of Congress, to make defamatory statements with impunity. For example, the Minnesota Constitution provides, “For any speech or debate in either house [members of each house] shall not be questioned in any other place.”

The justification for absolute legislative privilege lies not in a

“the glorious Revolution” in 1688, any privilege to speak with impunity was considered an act of grace by the King. At the beginning of every session of Parliament, the Speaker of the House of Commons requested the right to speak with impunity, along with other rights (such as access to the King), which the King granted. Section 19 of the Bill of Rights, granted by William and Mary, stated, “That the freedom of speech, and debates or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament.”

50. Yankwich, supra note 10, at 962. During the reign of Queen Elizabeth I, members of the House of Commons who attempted to discuss matters in Parliament distasteful to the crown often found themselves confined to the Tower of London. Comment, Brestler, Gravel, and Legislative Immunity, 73 COLUM. L. REV. 125, 126 (1973).
52. Yankwich, supra note 10, at 965; see, e.g., MASS. CONST., Declaration of Rights, art. XXI (“The freedom of deliberation, speech and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever.”). Interestingly, in Hawaii, state legislators enjoy a greater privilege than the privilege granted to Congress by the U.S. Constitution. See Abercrombie v. McClung, 525 P.2d 594, 597 (Haw. 1974) (holding that a state legislator was privileged for statements made outside the legislative process).
53. ROBERT D. SACK, SACK ON DEFAMATION § 8:2.2 (4th ed. 2011).
54. MINN. CONST. art. IV, § 10.
desire to protect individual legislators for their own benefit. But rather, by enabling legislators to conduct the functions of their office without fear, the rights of the people are protected.

The notion that “the public” is protected when legislators are given absolute privilege to make maliciously false defamatory statements is supported by two main arguments. First, in order to govern effectively, officials must be able to devote their full time and attention to the responsibilities of their office without being tied up in litigation. Any litigation arising out of the performance of official duties impairs officials from performing duties that are of importance to the public.

Next, it is suggested that any threat of liability for actions taken within the scope of their authority will cause responsible government officials to perform their duties more timidly. If a legislator is inhibited from freely disclosing facts, it limits the public’s access to the truth. And, as discussed above, it is access to the truth which ensures the functioning of our democracy by allowing voters to make informed decisions, influence policy makers, and check abuse of power by public officials by voting.

55. Yankwich, supra note 10, at 968 (quoting Coffin v. Coffin, 4 Mass 1, 27 (1808)); see also Barr v. Matteo, 360 U.S. 564, 572–73 (1959) (“The privilege is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government.”).

56. James Wilson, one of the principal architects of the federal Constitution’s speech or debate clause, stated:

In order to enable and encourage a representative of the publick [sic] to discharge his publick [sic] trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offence.


58. Absolute Immunity, supra note 8, at 590; Defamation, supra note 57, at 918.

59. See Expeditions Unlimited Aquatic Enters., Inc. v. Smithsonian Inst., 566 F.2d 289, 293 (D.C. Cir. 1977) (“The nation’s welfare is dependent upon officials who are willing to speak forthrightly and disclose violations of the law and other activities contrary to the public interest. Their voices will be stilled if they perceive or fear that the person involved has the resources or disposition to defend with all affirmative tactics. When millions may turn on regulatory decisions, there is a strong incentive to counterattack.”); see also Absolute Immunity, supra note 8, at 590 (detailing the policy arguments for and against this broad immunity).

60. Expeditions Unlimited Aquatic Enters., Inc., 566 F.2d at 293.
those members out of office.\footnote{56}{See supra notes 34–39 and accompanying text.}

This privilege for legislators to speak and debate is absolute.\footnote{57}{Yankwich, supra note 10, at 967.} This means that even when statements are knowingly false and expressly malicious, no liability can be imposed.\footnote{58}{Matthis v. Kennedy, 243 Minn. 219, 223, 67 N.W.2d 413, 416–17 (1954).} That being said, it is not difficult to imagine the injustice that abuse of this privilege makes possible.\footnote{59}{See Brewster, Gravel, and Legislative Immunity, supra note 50, at 127 (offering an in–depth analysis of legislative immunity); Yankwich, supra note 10, at 973 (referring to possible abuse of privileges).} Presumably, the drafters of the U.S. Constitution were aware of the abuses that could flow from safeguards that are too sweeping.\footnote{60}{United States v. Brewster, 408 U.S. 501, 517 (1972).} However, the public benefits derived from open communication by Congress were, and are, thought to be sufficient to outweigh the policy in favor of compensating victims of defamation.

In an attempt to curb abuses, however, the scope of absolute legislative privilege has generally remained limited to actions that are related to law making and the legislative process itself.\footnote{61}{See Restatement (Second) of Torts § 590 cmt. a (1977) (“The privilege does not protect a legislator who in private or public discussion outside of his legislative function explains his reasons for voting on past, pending or proposed legislation or who otherwise discusses the legislation, or who engages in other activities incidentally related to legislative affairs but not a part of the legislative process itself.”); see also Chastain v. Sundquist, 833 F.2d 311, 314 (D.C. Cir. 1987) (“The Speech or Debate Clause protects all lawmaking activities undertaken in the House and Senate, but affords no constitutional immunity beyond its carefully defined scope.”).} Accordingly, the test when determining whether the speech or debate clause applies is whether or not the activity qualifies as a “legislative act.”\footnote{62}{See Michael R. Seghetti, Speech or Debate Immunity: Preserving Legislative Independence While Cutting Costs of Congressional Immunity, 60 Notre Dame L. Rev. 589, 594 (1985) (pointing out that courts generally have not extended protection to the conduct of congressmen beyond the walls of Congress).}

To illustrate, in \textit{Hutchinson v. Proxmire}, Senator Proxmire made allegedly defamatory statements about Richard Hutchinson’s...
research in a newsletter. Proxmire argued that informing his constituents was an essential part of his duties as a member of Congress and that this communication, therefore, should be protected. The Court disagreed. While Proxmire’s statements would have been protected if made in the Senate, they were not protected in the context of published newsletters or press releases. Private publication of defamatory matter is simply not “essential to the deliberations of the Senate,” nor is it a part of the deliberative process.

The Court in *Proxmire* concluded that the drafters of the U.S. Constitution did not make a conscious choice to grant immunity for “defamatory statements scattered far and wide by mail, press, and the electronic media.” Thus, absolute privilege was not extended to activities that merely relate to the legislative process.

2. **Judicial Privilege**

The U.S. Supreme Court extended absolute privilege to judges in 1871. The policy of granting judicial privilege is rooted in a nearly identical philosophy to that of granting legislative privilege:

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69. 443 U.S. 111, 116 (1979). Senator Proxmire awarded the funders of Hutchinson’s research his so-called “Golden Fleece of the Month” award for what he perceived to be the most egregious example of wasteful governmental spending that month. *Id.* at 114. Hutchinson was developing an objective measure of aggression by studying how certain animals clench their jaws in response to aggravating stimuli. *Id.* at 115.

70. *Id.* at 124.

71. *Id.* at 130. The Court came to this conclusion after surveying the existing case law on the matter. *E.g.*, Doe v. McMillan, 412 U.S. 306, 314–15 (1973) (“A Member of Congress may not with impunity publish a libel from the speaker’s stand in his home district, and clearly the Speech or Debate Clause would not protect such an act even though the libel was read from an official committee report. The reason is that republishing a libel under such circumstances is not an essential part of the legislative process and is not part of that deliberative process ‘by which Members participate in committee and House proceedings.’”); Gravel v. United States, 408 U.S 606, 625 (1972) (“[P]rivate publication by Senator Gravel . . was in no way essential to the deliberations of the Senate; nor does questioning as to private publication threaten the integrity or independence of the Senate by impermissibly exposing its deliberations to executive influence.”).


73. *Id.; see also 2 J. Story, Commentaries on the Constitution* 329 (1833) (“Therefore, although a speech delivered in the house of commons is privileged, and the member cannot be questioned respecting it elsewhere; yet, if he publishes his speech, and it contains libelous matter, he is liable to an action and prosecution therefor, as in common cases of libel.”).


that the truth can best be determined and justice can best be served by encouraging maximum freedom of communication.\textsuperscript{76} Again, it is important to note that this privilege was not created for the protection or benefit of a malicious or corrupt judge, but rather for the benefit of the public, whose interest is that judges be at liberty to exercise their functions with independence, and without fear of consequences.\textsuperscript{77}

Today, this privilege applies to nearly all participants in a judicial proceeding.\textsuperscript{78} It is seen as indispensable to the public interest that attorneys, jurors, witnesses, parties, and judges be able to speak freely and fearlessly, uninfluenced by the possibility of being brought to account in an action for defamation.\textsuperscript{79}

3. Executive Privilege

Absolute privilege was judicially extended to the executive branch in the late nineteenth century.\textsuperscript{80} Relying on an analogy to judicial privilege, the U.S. Supreme Court in \textit{Spalding v. Vilas} held that the head of a federal executive department was absolutely privileged to make defamatory statements, as long as the comments were made while acting within his official capacity.

Spalding, the Postmaster General, accused the plaintiff, a lawyer, of being a “common swindler.”\textsuperscript{82} While the words were allegedly published with malicious intent,\textsuperscript{83} the Court granted absolute privilege in a desire to best serve the public interest.\textsuperscript{84} The Court concluded that “it would seriously cripple the proper and
effective administration of public affairs” if high-ranking executive officials were subject to apprehension of liability for acts taken under the limits of their authority. Following the holding in *Spalding*, states have extended executive privilege to high-ranking state executive officials, such as the governor, the attorney general, or the heads of state departments whose rank is the equivalent of cabinet rank in the federal government.

C. Expanding the Scope of Privilege

Approximately sixty years after *Spalding*, in the landmark case of *Barr v. Matteo*, the Supreme Court altered the legal landscape by extending absolute privilege to low-level federal executive officials. In *Barr*, employees of the Federal Office of Rent Stabilization sued the acting director for defamatory statements contained in a press release, which criticized the employees’ actions in devising and implementing a budgetary plan that had come under congressional attack.

The Court in *Barr* departed from the traditional rank-based rule and greatly broadened the scope of immunized activity by adopting a “functional approach” to determine immunity. The Court concluded that privilege should not depend on the rank of the government official, but rather on the duties involved in that particular office. In making this analytical shift, the Court clearly intended to extend the parameters of absolute privilege:

> We do not think that the principle announced in [*Spalding v.] Vilas can properly be restricted to executive officers of cabinet rank . . . . The privilege is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government.

In the fifty years since the *Barr* decision, “[L]ower federal courts have extended immunity to public officials of virtually every rank.”

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88. *Id.* at 565–67.
89. Batchelder, Jr., *supra* note 56, at 393.
91. *Id.* at 572–73.
92. Batchelder, Jr., *supra* note 56, at 393 (citing *Bush v. Lucas*, 462 U.S. 367 (1983)) (NASA center director); *see also* Strothman v. Gefreh, 739 F.2d 515 (10th Cir. 1984) (administrative law judges); George v. Kay, 632 F.2d 1105 (4th Cir.
The modern trend in federal jurisdictions appears to favor free speech over the rights of the defamed.93 Many state courts have followed suit.94 By the time Zutz v. Nelson was decided by the Minnesota Supreme Court in 2010, the majority of state jurisdictions were using this new functional analysis to extend absolute privilege to individuals in lower-level government positions.95 Within Minnesota, courts have repeatedly faced the decision of whether to join this growing trend, or maintain the “narrow limits” Minnesota has placed on absolute privilege since it became a state.96

D. Minnesota’s Minority Stance

For over a century, whether or not a government official in Minnesota enjoyed absolute privilege depended on the rank of his or her position.97 Because absolute privilege provides immunity to those who make intentionally false and malicious statements, 1980) (postal inspector); Expeditions Unlimited Aquatic Enters., Inc. v. Smithsonian Inst., 566 F.2d 289 (D.C. Cir. 1977) (en banc) (Smithsonian department chairman); Mandel v. Nouse, 509 F.2d 1031 (6th Cir. 1975) (Army commander); Sowders v. Damron, 457 F.2d 1182 (10th Cir. 1972) (Internal Revenue Service officers).

93. See sources cited supra note 92.


95. Interestingly, authorities are inconsistent on which stance is, in fact, the majority. Compare Restatement (Second) of Torts § 590 cmt. c. (1977) (recognizing that the majority of jurisdictions extend absolute privilege to subordinate legislative bodies), with Kieeton et al., supra note 15, § 114, at 821 (“A scant majority have held that [subordinate legislative] proceedings are not within the policy underlying the immunity, and that the members of such bodies are sufficiently protected by a qualified privilege in the exercise of good faith.”) (emphasis added), and 2 Smolla, supra note 2, § 8:25 (“The decisions appear to be about evenly divided between those holding that an absolute privilege applies to members of [subordinate legislative] bodies, and those holding that only a qualified privilege applies.”). However, it is rather certain that the growing trend is to expand immunity. See Zutz v. Nelson, 788 N.W.2d 58, 69 n.1 (Minn. 2010) (Anderson, Paul H., J., dissenting).

96. See, e.g., Johnson v. Dirkswager, 315 N.W.2d 215, 225 (Minn. 1982) (citing Matthis v. Kennedy, 243 Minn. 219, 223, 67 N.W.2d 413, 417 (1954)).

97. Zutz, 788 N.W.2d at 62; see, e.g., Bauer v. State, 511 N.W.2d 447, 450 (Minn. 1994) (declining to extend absolute privilege to mid-level state employees acting in their official capacities); Jones v. Monico, 276 Minn. 371, 375, 150 N.W.2d 213, 215–16 (1967) (declining to extend absolute privilege to a member of a county board).
Minnesota has a history of confining this privilege within “narrow limits.” Absolute privilege in Minnesota has been historically limited to high-ranking judicial, legislative, and executive officials.

The notion of extending absolute privilege to members of subordinate government bodies—such as city councils, municipal councils, and county boards—was first addressed in 1897, in 

Wilcox v. Moore. In Wilcox, the Minnesota Supreme Court refused to extend absolute privilege to members of a city council. Since then, Minnesota has consistently refused to extend absolute privilege beyond high-ranking legislative, judicial, and executive officials. Minnesota courts have determined that members of subordinate government bodies are sufficiently protected by qualified privilege.

In 1994, the Minnesota Supreme Court departed from its bright-line, rank-based rule and extended absolute privilege to police officers for statements made in arrest reports in 

Carradine v. Johnson, 315 N.W.2d at 220 (quoting Matthis, 243 Minn. at 223, 67 N.W.2d at 417).

Matthis, 243 Minn. at 223–24, 67 N.W.2d at 417; accord RESTATEMENT (SECOND) OF TORTS § 585 (1977).

See MINN. CONST. art. IV, § 10 (granting absolute privilege to members of the legislature); RESTATEMENT (SECOND) OF TORTS § 590 cmt. c, reporter’s note (1981). The legislative privilege was extended in 1994 to the Regents of the University of Minnesota by reason of separation of powers. Bd. of Regents of Univ. of Minn. v. Reid, 522 N.W.2d 344, 348 (Minn. Ct. App. 1994) (“[T]his instance is one in which the public’s right to know weighs more heavily [than a defamed individual’s right to seek compensation].”).

Johnson, 315 N.W.2d at 223 (extending absolute privilege to “top-level cabinet-type” executive officials). The U.S. Supreme Court extended absolute privilege to high-level executive officials almost a century earlier in Spalding v. Vilas, 161 U.S. 483, 498–99 (1896).


69 Minn. 49, 71 N.W. 917 (1897).

Id. at 52, 71 N.W. at 919. The defendants in Wilcox accused a judge of activities “highly unbecoming a man.” Id. at 51, 71 N.W. at 918.

In 1909, the court denied absolute privilege to a city council member who accused the plaintiff of “running nothing but a damn whorehouse.” Burch v. Bernard, 107 Minn. 210, 211, 120 N.W. 33, 33 (1909). In 1967, in Jones v. Monico, the Minnesota Supreme Court again held that subordinate government bodies, such as municipal councils or town meetings, were not protected by absolute privilege. 276 Minn. 371, 375–76, 150 N.W.2d 213, 216 (1967). Almost 100 years after Wilcox, the court of appeals once more affirmed that Minnesota does not extend absolute immunity to city council members. Johnson v. Northside Residents Redevelopment Council, 467 N.W.2d 826, 830 (Minn. Ct. App. 1991).

Jones, 276 Minn. at 375, 150 N.W.2d at 216. This position places Minnesota in the minority. See supra note 95 and accompanying text.
Police officers are not high-ranking executive officials, but the court reasoned that any threat of defamation liability would “deter the honest officer from fearlessly and vigorously preparing a detailed, accurate report . . . .” In Carradine, the court granted absolute privilege because the policy of obtaining accurate police reports outweighed the policy of protecting the arrestee from potentially damaging defamatory statements.

Rather than treating police officers writing police reports as a narrow exception to the established rule, the Carradine court adopted a new two-factor analysis to justify its decision. To determine if absolute privilege was warranted, the court considered (1) the nature of the function assigned to the officer; and (2) the relationship of the statements to the performance of that function.

This left the Minnesota Supreme Court with the following dilemma: should Carradine be read broadly as creating a new rule to determine when absolute privilege applies? Or, should Carradine be read as a narrow exception to the existing rank-based rule, applicable only to police officers making arrest reports? The answer would have to wait until Zutz v. Nelson, a case that involved the potential extension of absolute immunity to watershed

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107. 511 N.W.2d 733, 736–37 (Minn. 1994).
108. Id. at 735.
109. Id. at 736. This report is later used by the prosecutor to determine whether to charge the arrestee and, if so, for what offense(s). Id. Therefore, accurate arrest reports are essential to ensure justice for the accused. Id. at 735–36. The report is also vital at trial, as it is used to refresh the officer’s memory and possibly impeach the officer. Id. at 736. Additionally, threat of liability may cause an officer to wait to bring up certain details until trial (under the judicial privilege), and thus submit the accused to “trial by surprise.” Id.; see also Handler & Klein, supra note 3, at 59 (“[I]t is sound policy to ‘protect the honest communication of misinformation in order to insure the availability of correct information . . . .’” (quoting 1 FOWLER V. HARPER & FLEMING JAMES, JR., THE LAW OF TORTS § 5.25, at 437 (1956))).
110. Carradine, 511 N.W.2d at 736. The court in Carradine made clear that should the police officer make statements beyond what was contained in the report, only a qualified privilege would apply. Id. at 734; see also Redwood Cnty. Tel. Co. v. Luttman, 567 N.W.2d 717, 720 (Minn. Ct. App. 1997) (holding that absolute privilege applied to statements made by a sheriff).
111. Carradine, 511 N.W.2d at 736.
112. Id.
114. Id.
The four parties involved in this suit were board members of the Middle Snake Tamarac Rivers Watershed District (hereinafter Middle Snake Watershed District) in northern Minnesota. Watershed districts are created by statute “[t]o conserve the natural resources of the state by land use planning, flood control, and other conservation projects . . . .” These special-purpose units of local government operate in a “quasi-legislative capacity” and are given extensive authority, including the power of eminent domain, to carry out their operations. Each watershed district in Minnesota is operated by a board ranging from three to nine managers, all appointed by the county commissioners of the counties served by the watershed district.

Two members of the Middle Snake Watershed District Board, Loren Zutz and Elden Elseth, suspected improprieties regarding payments to various district employees. Zutz and Elseth obtained the district’s bank records to further investigate the matter. At a board meeting on June 18, 2007, John Nelson and Arlyn Stroble, two other board members, believed Zutz and Elseth’s investigation violated the Minnesota Government Data Practices Act and allegedly made statements to that effect. First, in

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115. 788 N.W.2d at 59–60.
116. Id. at 60.
117. Minn. Stat. § 103D.201, subdiv. 1 (2010). Watershed boards carry out specific purposes, such as, inter alia, controlling flood waters, diverting watercourses, regulating the use of ditches and watercourses, and regulating improvements by riparian property owners. Minn. Stat. § 103D.201, subdiv. 2 (2010).
118. Zutz, 788 N.W.2d at 60.
120. Id. § 103D.205, subdiv. 2(b) (2010); Id. § 103D.225, subdiv. 4(a) (2010) (“The number of managers may not be less than three nor more than nine, except that a proposed watershed district entirely within the metropolitan area may not have fewer than five managers.”). Board members serve three-year terms. Id. § 103D.315, subdiv. 6 (2010).
122. Brief of Appellants at 2, Zutz, 788 N.W.2d 58 (No. A08-1764). Watershed District boards have authority to hire employees to facilitate “the works and improvements undertaken by the district.” Minn. Stat. § 103D.325, subdiv. 3 (2010).
123. Zutz, 788 N.W.2d at 60.
response to a question about whether Zutz and Elseth had violated Minnesota law, Nelson allegedly stated, “I don’t think there is much question that [they] did.” Nelson also allegedly stated, “Laws are being broken by Board Members—enough is enough!” Finally, Stroble, implying that Zutz and Elseth violated Minnesota law, allegedly asked, “Why should we provide legal counsel for actions that are against the law?” After these accusations, a “lengthy and heated discussion” ensued.

Zutz and Elseth then brought an action against Nelson and Stroble for defamation. Nelson and Stroble raised absolute privilege as an affirmative defense and moved for judgment on the pleadings. The district court granted the motion, holding that Nelson and Stroble enjoyed absolute privilege from defamation claims, and the complaint was dismissed.

Zutz and Elseth appealed on the grounds that Minnesota law does not grant absolute privilege to subordinate bodies such as watershed district boards. However, relying primarily on the Minnesota Supreme Court’s decision in Carradine v. State, the court of appeals affirmed the lower court’s ruling, reasoning that the public interest is best served by “open, frank communication from district board members.”

On appeal, the Minnesota Supreme Court reversed. The court declined to read Carradine as a new way of analyzing absolute privilege. Instead, the court saw Carradine as supporting the traditional rule in Minnesota: that absolute immunity is only

has access, see Paul R. Hannah, Minnesota Data Practices Act, in MINNESOTA INSTITUTE OF LEGAL EDUCATION, MEDIA LAW: DEFAMATION/GOVERNMENT DATA AND RELATED ISSUES I (1995).

125. Zutz, 788 N.W.2d at 61.
126. Id.
127. Id.
128. Id.
129. Watershed District Board Meeting Minutes, 3 (June 18, 2007) available at http://www.mstrwd.com/wp-content/uploads/07-06r2.min_2.DOC.
130. Zutz, 788 N.W.2d at 61. The meeting, which commenced at 7:00 p.m., did not adjourn until approximately 12:48 a.m. Meeting Minutes, supra note 129, at 8.
131. Zutz, 788 N.W.2d at 61.
132. Id.
133. Id.
134. 511 N.W.2d 733, 735–36 (Minn. 1994).
136. Zutz, 788 N.W.2d at 66.
137. Id. at 63.
granted to high-ranking officials, and any extension beyond high-ranking government officials is treated as an exception to the rule, based on public policy. Ultimately, the Minnesota Supreme Court concluded that limiting watershed district board members to qualified immunity “better serves the people of Minnesota.”

The court provided three main reasons for this conclusion. First, extending absolute privilege is not—and should not be—done lightly, as it provides immunity for potentially devastating defamatory speech without adequate recourse. Second, the court concluded that members of these bodies are sufficiently protected by qualified privilege. Third, the court found that the defendants did not produce a sufficiently compelling reason to overrule long-standing Minnesota precedent.

The case law in Minnesota, while perhaps not a model of clarity, is relatively consistent in refusing to extend absolute immunity to subordinate government bodies. Holding otherwise would mark a departure from Minnesota’s stance on the issue. Ultimately, the court—in spite of the dissent’s urging—refused to make the shift. Watershed district board members enjoy a qualified, not absolute, privilege to make defamatory statements in

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138. *Id.* at 65–66 (citing Matthis v. Kennedy, 243 Minn. 219, 223, 67 N.W.2d 413, 417 (1954)).
139. *Id.* at 63. During oral argument, Justice Dietzen expressed concern that the unintended consequences of broadly extending absolute privilege were not sufficiently considered by the lower courts. Oral Argument, supra note 113, at 16:32.
141. *Zutz*, 788 N.W.2d at 62. “[D]efamatory speech . . . can be personally crushing and career-ending.” *Id.* at 64.
142. *Id.* at 63; see also *infra* text accompanying notes 162–66.
143. *Zutz*, 788 N.W.2d at 62–63 (citing Jones v. Monico, 276 Minn. 371, 375, 150 N.W.2d 213, 216 (1967)).
144. *Id.* at 64. Overruling Minnesota precedent requires a “compelling reason” to do so. State v. Martin, 773 N.W.2d 89, 98 (Minn. 2009) (quoting State v. Lee, 706 N.W.2d 491, 494 (Minn. 2005)).
145. See *Zutz*, 788 N.W.2d at 63 n.2 (admitting the presence of confusing statements in Minnesota common law).
146. *Id.* at 63; see also RESTATEMENT (SECOND) OF TORTS § 590 cmt. c, reporter’s note (1977).
147. *Zutz*, 788 N.W.2d at 63.
148. *Id.* at 73 (Anderson, Paul H., J., dissenting) (“[A] change in Minnesota’s law regarding absolute legislative privilege should be made in this case.”).
149. *Id.* at 66 (majority opinion).
Minnesota. 150

IV. ANALYSIS OF THE ZUTZ DECISION

The Minnesota Supreme Court confirmed Minnesota’s place in the minority by deciding that qualified, not absolute, privilege applies to members of watershed district boards. 151 This Part first discusses how the Zutz ruling strikes a better balance between the competing policies of free, uninhibited speech and providing relief to victims of intentionally malicious defamatory statements when it comes to subordinate government officials. 152 It then discusses how Zutz provides a more certain, and thus preferable, test in determining the applicability of absolute or qualified privilege. 153

A. The Zutz Rule Strikes a Better Balance Between Competing Interests

Extending absolute privilege to essentially all levels of government without limit strikes the wrong balance between the competing interest of free, uninhibited debate and the often irreparable damage caused by leaving victims of unbridled defamatory statements without an adequate opportunity for redress. 154 Cases granting such extension generally fail to fully explore the complete ramifications of expanding immunity.

This section first discusses why absolute privilege is not appropriate for subordinate government officials. 156 It then discusses why these subordinate officials are sufficiently protected by qualified privilege. 157

150. Id.
151. Id.
152. See infra Part IV.A.
153. See infra Part IV.B.
154. See Zutz, 788 N.W.2d at 65; see also Barr v. Matteo, 360 U.S. 564, 585 (1959) (Warren, C.J., dissenting) (arguing that the modern rule “can only have the added effect of deterring the desirable public discussion of all aspects of our Government and the conduct of its officials”); Elder, supra note 40, § 2:13 (explaining that the expansion of absolute privilege has been “criticized . . . by most legal commentators”). But see Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949) (“[I]t has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.”).
156. See infra Part IV.A.1.
157. See infra Part IV.A.2.
1. Absolute Privilege is Not Appropriate for Subordinate Government Officials

There are three primary reasons why absolute privilege is not appropriate for unelected, volunteer watershed district board members. First, these officials are not directly accountable to the public in the way high-level elected officials are. Elected members of Congress play a unique role in the effective functioning of a democratic government. Senators and Representatives are sent by their constituents to represent the collective will of the people. While these legislators are given absolute privilege to participate in free, uninhibited speech and debate, they are also subject to the checks and balances of the voters who guard against abuse of power by retaining the ability to vote these members out of office.

Because absolute privilege deprives individuals of a remedy for wrongdoing, “[i]t should be bestowed only when and at the level necessary.” A key element to consider in determining whether absolute immunity strikes the right balance is the availability of alternate remedies for victims of defamation. Even if an official with absolute privilege cannot be sued, victims of defamation—or citizens who believe the official is abusing his or her privilege—can obtain adequate redress by voting that person out of office. However, citizens who disapprove of the actions of watershed district boards cannot vote those members out of office. Nor can these citizens necessarily vote out of office those who appointed

158. See Zutz, 788 N.W.2d at 64–65.
159. See U.S. Const. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”).
160. See M’Culloch v. Maryland, 17 U.S. 316, 404–05 (1819) (“The government of the Union, then . . . is, emphatically and truly, a government of the people. In form, and in substance, it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.”).
161. Chemerinsky, supra note 6, at 926.
163. See Recent Cases, 37 Minn. L. Rev. 139, 142 (1952–1953); see also Freier v. Indep. Sch. Dist. No. 197, 356 N.W.2d 724, 733 (Minn. Ct. App. 1984) (expanding absolute privilege to school board members in decisions to discharge teachers was justified, in part, because of the adequate remedies of judicial review and reinstatement with back pay available to potentially defamed teachers). Veeder, supra note 66, at 470–71 (discussing various alternate remedies for victims of privileged defamation and their importance).
164. Zutz v. Nelson, 788 N.W.2d 58, 64 (Minn. 2010).
these board members.\textsuperscript{165} The majority in \textit{Zutz} appropriately rejects the dissent’s argument that “public scrutiny and criticism” sufficiently hold such subordinate government officials accountable.\textsuperscript{166}

Second, if all government officials could make blatantly false, defamatory statements without inhibition, members of the general public may hesitate to voice opinions about these officials for fear of an unrestrained counterattack.\textsuperscript{167} Imagine, for example, that zoning board members enjoyed absolute privilege to defame.\textsuperscript{168} A citizen making an appeal to the board might hesitate before speaking, to prevent an unrestrained counterattack to his character.\textsuperscript{169} While public policy favors high-level members of the executive branch, legislature, and judiciary enjoying the fullest liberty of speech,\textsuperscript{170} unelected, volunteer members of a watershed district board ought not to enjoy such unbridled liberty.\textsuperscript{171}

Finally, Minnesota already imposes various limitations on one’s ability to recover for defamation, making it relatively difficult to recover for defamation in Minnesota.\textsuperscript{172} Therefore, subordinate governmental officials already enjoy substantial security from defamation suits.\textsuperscript{173} As such, additional protection for government officials in Minnesota is unnecessary.

\textsuperscript{165} \textit{Id.} at 64–65.
\textsuperscript{166} \textit{Id.} at 65.
\textsuperscript{168} \textit{See Zutz}, 788 N.W.2d at 65.
\textsuperscript{169} \textit{See Zutz}, 788 N.W.2d at 72 (Anderson, Paul H., J., dissenting) (citing 2 Works of James Wilson 38 (James De Witt Andrews ed., 1896)).
\textsuperscript{170} Zutz, 788 N.W.2d at 65.
\textsuperscript{167} \textit{Zutz}, 788 N.W.2d at 72 (Anderson, Paul H., J., dissenting) (citing 2 Works of James Wilson 38 (James De Witt Andrews ed., 1896)).
\textsuperscript{171} Zutz, 788 N.W.2d at 65.
\textsuperscript{172} \textit{See}, e.g., Richie v. Paramount Pictures Corp., 544 N.W.2d 21, 28 (Minn. 1996) (holding that damages for emotional distress “are not compensable absent [proof of actual] harm to reputation”); \textit{see also} Longbehn v. Schoenrock, 727 N.W.2d 153, 160–62 (Minn. Ct. App. 2007) (discussing the requirements for special damages, general damages, and punitive damages in a defamation claim).
\textsuperscript{173} \textit{See Richie}, 544 N.W.2d at 28.
2. **Subordinate Government Officials Are Sufficiently Protected by Qualified Privilege**

Uninhibited speech promotes the discovery of truth and the maintenance of an effective democracy. However, the consequences of providing unelected citizens absolute freedom of speech ought to be examined more closely before absolute privilege is extended. The notion that absolute privilege is essential at all levels of government for effective democracy “manifest[s] an unfortunate tendency to be mesmerized by resounding phrases and to ignore the fallibility of a priori notions about psychological phenomena.” The *Zutz* court debunked the popular notion that nothing less than absolute privilege is sufficient to ensure the free flow of information in subordinate legislative proceedings. Considering the two competing interests at stake, many courts and commentators have concluded that lower-level government officials are sufficiently protected by qualified privilege.

Qualified privilege allows subordinate government officials to vigorously carry out their official duties without entirely eliminating protection against intentionally false statements made with

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174. Chemerinsky, supra note 6, at 926.

175. See Handler & Klein, supra note 3, at 50 n.24; see also Laura Oren, *Immunity and Accountability in Civil Rights Litigation: Who Should Pay?*, 50 U. Pitt. L. Rev. 935, 984 n.204 (1989) (“In other contexts courts have found that similarly dire predictions [of the consequences of qualified privilege] were not borne out by events.”).

176. Handler & Klein, supra note 3, at 50 n.24.

177. See id. at 52.


malice.\footnote{180} Subordinate government officials are protected against the consequences of honest mistakes, but will be held liable for comments made “from ill will and improper motives, or causelessly and wantonly for the purpose of injuring the plaintiff.”\footnote{185} Furthermore, qualified privilege can be lost if statements are not made in furtherance of the purpose that the privilege protects\footnote{182} or if the privilege is abused.\footnote{183} As such, the fear of an unrestrained counterattack is diminished, and citizens will be more apt to speak out against subordinate officials.\footnote{184} When it comes to subordinate government officials, qualified privilege strikes the appropriate balance between promoting free, uninhibited speech and providing a mechanism for direct accountability to the citizens they serve.

Proponents of extending absolute immunity claim that exposing subordinate government officials to potential litigation will have a chilling effect on the free and open debate required to serve the public interest.\footnote{185} However, this statement is “an exceedingly questionable assumption for which there is little or no empirical or other support.”\footnote{186} Since Minnesota became a state, subordinate government officials have enjoyed qualified, rather than absolute, privilege.\footnote{187} There is no evidence that a lack of

\begin{footnotesize}
\begin{enumerate}[180.]
\item See Howard v. Lyons, 360 U.S. 564, 586 (1959) (Brennan, J., dissenting); \cite{Zutz2009} at 66; Matthys v. Kennedy, 243 Minn. 219, 222-23, 67 N.W.2d 413, 416 (1954).
\item Bahr v. Boise Cascade Corp., 766 N.W.2d 910, 920 (Minn. 2009) (quoting \cite{Stuempges2000} at 252, 257 (Minn. 1980)).
\item \cite{Keeton2004} note \ref{15}, § 115, at 834.
\item See \cite{supra note 15}.
\item Barr v. Matteo, 360 U.S. 564, 584–85 (Warren, C.J., dissenting). Chief Justice Warren believed such an expansion would wrongly serve to “sanctify the powerful and silence debate.” Id. at 585; see also \cite{Jones1948} note 167, at 797–98 (discussing the negative ramifications of absolute privilege).
\item Barr, 360 U.S. at 575 (citing Tenney v. Brandhove, 341 U.S. 367, 377 (1951)); see also \cite{Barr1949} at 577 (Black, J., concurring); \cite{Gregoire1949} at 581 (2d Cir. 1949). But see Howard, 360 U.S. at 588 (Brennan, J., dissenting) (“[T]his is stretching the argument pretty far to say that the mere inquiry into malice would have worse consequences than the possibility of actual malice (which we would not, for a minute, condone.
\item Elder, supra note 1540, § 2:13 (footnote omitted); see also \cite{Howard1959} note 3, at 48 (pointing to the Court’s minimal analysis of why government officials should be afforded absolute privilege).
\item See, e.g., \cite{Burch1909} Minn. 210, 211, 120 N.W. 33, 34 (1909) (providing that a subordinate government official may enjoy immunity from statements made in the course of their employment, but statements not made in
\end{enumerate}
\end{footnotesize}
absolute privilege has hindered zoning boards, city councils, or watershed district boards from executing their duties with vigor.\footnote{See Zutz v. Nelson, 788 N.W.2d 58 (Minn. 2010); Chamberlain v. Mathis, 729 P.2d 905, 912 (Ariz. 1986).} It is simply injudicious to establish a rule that eliminates both the availability of compensation to victims of defamation and the deterrent to public officials from making knowingly false and malicious statements on such speculative grounds.\footnote{See Chamberlain, 729 P.2d at 912.}

Proponents of extending privilege also claim that absolute privilege is necessary to ensure that public officials are able to devote their full time and attention to the responsibilities of their office without being tied up in litigation.\footnote{Defamation, supra note 57, at 918.} However, this fear is mitigated by the fact that qualified privilege places the difficult burden of proving malice on the plaintiff.\footnote{55 C.J.S. Libel and Slander; Injurious Falsehood § 111 (2011).} Also, as discussed in the next section, the \textit{Carradine} rule actually increases the amount of litigation involving public officials due to its post-hoc factor analysis, as opposed to a bright-line rule.\footnote{See infra Part IV.B.}

Ultimately, courts must determine whether an extension of privilege is warranted by balancing “the public interest in free exchange of information . . . and the individual rights of people who might be defamed by unscrupulous participants in that process.”\footnote{See, e.g., Barr v. Matteo, 369 U.S. 564, 571 (1959).} For the reasons stated above, \textit{Zutz} sets out a better, more balanced rule.\footnote{Zutz v. Nelson, 788 N.W.2d 58, 70 (Minn. 2010) (Anderson, Paul H., J., dissenting).}

\section*{B. The Zutz Rule Provides Certainty}

A bright-line, rank-based rule with narrow exceptions is better than the case-by-case, post-hoc factor analysis set forth in
Carradine. The Zutz rule provides certainty to government officials to know in advance whether they enjoy absolute immunity to make defamatory statements, or if they must act in good faith and without malice in the course of their duty. In contrast, the Carradine rule requires a de novo evaluation of nearly every defamation suit involving a government official to determine if absolute privilege exists for the particular position and duty. Ironically, as stated supra, this creates the very increase in litigation proponents are seeking to avoid.

One—perhaps unforeseen—consequence of adopting a Carradine-like rule is that it creates a de facto “presumption that the challenged action is within the officer’s scope of duty unless the plaintiff can prove otherwise.” All that typically exists in the record are mere “assertions that a specific official has the power to do what resulted in the defamation.” As admitted by the dissenting opinion in Barr, rarely are functions of an official position specifically enumerated. This has the effect of improperly shifting the burden of proof onto the plaintiff to prove that absolute privilege does not apply, rather than the defendant having to establish that absolute privilege does apply.

Therefore, the Zutz rule not only provides government officials with a clear rule in determining whether or not one enjoys absolute privilege, but also limits litigation by avoiding the post hoc factor analysis required with the Carradine test.

196. See Barr, 360 U.S. at 578–79 (Warren, C.J., dissenting). But see id. at 573–74 (majority opinion). The majority in Barr rejected the rank test, stating that analysis should instead focus on “the duties with which the particular officer . . . is entrusted” to determine whether or not to expand immunity. Id.
197. See id. at 578 (Warren, C.J., dissenting).
198. See id. at 578–79.
199. See, e.g., id. at 571.
200. See id. at 579.
201. Id. In Barr, for example, in response to the defendant’s assertion that the press release was authorized by his position, the court concluded, “we cannot say that it was not an appropriate exercise of the discretion with which an executive officer of petitioner’s rank is necessarily clothed.” Id. at 574 (emphasis added).
202. See id. at 579 (Warren, C.J., dissenting).
203. See, e.g., RESTATEMENT (FIRST) OF TORTS § 613 cmt. f (1938); KEETON ET AL., supra note 15, § 111, at 772; WILLIAM L. PROSSER, HANDBOOK ON THE LAW OF TORTS 629 and cases cited (2d ed. 1955).
V. CONCLUSION

By the time Zutz was decided in 2010, a growing number of jurisdictions were extending absolute privilege to lower-level government positions. The Minnesota Supreme Court had to decide whether to join this trend or maintain the “narrow limits” Minnesota has placed on absolute privilege since it became a state.

Ultimately, the Minnesota Supreme Court correctly maintained that while high-ranking legislators ought to “enjoy the fullest liberty of speech,” providing unelected citizens such unbridled liberty strikes the wrong balance between the competing policies at stake. When it comes to subordinate government officials in Minnesota, qualified privilege provides adequate protection to all interests involved.

204. See supra note 95.
205. Compare Johnson v. Dirkswager, 315 N.W.2d 215, 223 (Minn. 1982) (holding that a top-level cabinet-like official enjoys absolute immunity, even from communicating defamatory material), with Matthis v. Kennedy, 243 Minn. 219, 223, 67 N.W.2d 413, 417 (1954) (stating that the recognized class of occasions where the publication of defamatory material is absolutely privileged is confined within “narrow limits”).
207. See Zutz v. Nelson, 788 N.W.2d 58, 64–66 (Minn. 2010).
208. See id.