

First Amendment Spring 2012

CONTACT INFORMATION

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CLASS INFORMATION

Room: 241

M, W 1:40-3:05

3 credits

COURSE DESCRIPTION

In this course, we will discuss the doctrines and history surrounding the First Amendment, with a particular focus on freedom of speech. The goal of the course is to understand the extent to which our complex history has influenced our understanding of freedom of speech, and the role that speech has played in shaping our democracy.

COURSE MATERIALS

- VAN ALSTYNE, THE FIRST AMENDMENT IN THE TWENTY-FIRST CENTURY [VanAlstyne or VA];
- MICHAEL KENT CURTIS, FREE SPEECH, THE PEOPLE'S DARLING PRIVILEGE [Curtis Free Speech];
- BARRON AND DIENES, FIRST AMENDMENT LAW [Barron];
- Cases as assigned

ATTENDANCE AND CLASSROOM PARTICIPATION POLICY

You are required to come to class prepared and on time. Attendance is mandatory. The College of Law requires each student to attend a minimum of 80% of class meetings to receive credit for the course. Roll will be taken at each class. If you must miss a class, it is your responsibility to obtain the materials, notes, and assignments from that class.

You are expected to be fully prepared and ready to discuss the reading assigned. **If I call on you during class and you are unprepared, then you will be marked absent for that day.** Excessive tardiness will also result in being marked absent for the day. I strongly encourage each of you to do your part to make our discussions a rewarding experience for us all.

GRADING POLICY

Grades will be based on class participation and written assignments, which will count for 30% of your grade, and the final exam, which will count for 70% of your grade.

WRITTEN ASSIGNMENTS ARE DUE BY EMAIL (FTOLSON@LAW.FSU.EDU)

BY 5:00P.M. THE DAY BEFORE THE CLASS IN WHICH THE ASSIGNMENT WILL BE DISCUSSED. For example, the writing assignment for Class 2, which is Wednesday, January 11, will be due on Tuesday, January 10 at 5:00p.m.

I reserve the right to adjust grades up or down to reflect extraordinary contributions to class discussion or extraordinary disinterest. An upward adjustment reflects high quality, not just quantity. A downward adjustment will be based on failure to participate in class discussion, a failure to turn in assignments, and/or poor attendance/tardiness.

PART I. INTRODUCTION: THE HISTORIC BACKGROUND OF THE FIRST AMENDMENT

Class 1

Read: Curtis, Free Speech 52-79; 94-104.

Class Discussion:

The Debate over the Sedition Act; theories of James Madison and others.

The case made for the Sedition Act

The case against the Act. Problem with the act in the eyes of its critics.

The relation of the Act to popular sovereignty and republican (representative) government.

Adequacy of truth as a defense and the jury as judge of law and fact.

The analogy to the Speech and Debate Clause

Content or viewpoint discrimination. How are these ideas expressed in the debates?

Class 2

Read *Patterson* in the Van Alstyne text 6-15, including discussion; Curtis, Free Speech, 24-51. If you like, for fun, read the discussion of the *Patterson* case by Scott Powe in the Appendix 1. Optional, but highly recommended, Van Alstyne 22-30. [Coda].

PROBLEM 1. Assume you are a justice of the Most Supreme Court which can review decisions of the U.S. Supreme Court. After reading the *Patterson* case write a portion of an opinion in which the *Patterson* decision is reversed and *Patterson* wins based on text, the function of free speech and press, and *history*. Deal in this first paper with the meaning of the First Amendment, mainly from an historical and a functional perspective. Leave incorporation to a later class. Confront and respond to the problems with your approach and to the doctrine the

Court embraces in *Patterson*. You may use any argument (supported by something in your reading) but not authority later than *Patterson*. Suggested length: 4-5 pages. (More if necessary, less if that works better. No more than 8 pages.) This is due Tuesday evening before the second class by 5 p.m.. Your statement of facts can be just a sentence or two and of course you will relate facts to your proposed rule in your opinion. Note that *Patterson* is charged with contempt. Most of your reading is about Seditious Libel. How do you deal with that in terms of analogy? Does Holmes *Patterson* opinion help with this? As students who have studied constitutional law know, history is one of the methods courts use in reaching decisions and that lawyers use in advocacy.

For class discussion:

What free speech & press ideas do you see the chapter on the English background and in the Sedition Act debate? Do you see any ideas similar to modern free speech law?

Other subjects for discussion:

- Holmes opinion in *Patterson*
- Your opinion in *Patterson*. The type of speech involved. Categorization. Framing.
- Seditious libel; truth as a defense.
- Prior restraint
- Blackstone on press freedom
- Levellers on liberty and press freedom
- Cato's Letters
- James Burgh
- Zenger
- Role of the jury and the judge in Seditious Libel cases
- The crime with which *Patterson* is charged: is it related to seditious libel? If so, how?

* * * * *

Class 3

PROBLEM 2. Continue your opinion for *Patterson*, this time dealing with application to the states.

Van Alstyne, 6-22. Curtis, Free Speech 271-288, 296-299 Controversy over Helper book.

Class 4

Curtis, Free Speech 289-299 (Worth trial) and 357-372. Van Alstyne 55-68—if pressed for time you may omit the footnotes.

Excerpt from the brief for the New York Times in the Appendix 2. What part of the history is omitted?

PART II. FIRST AMENDMENT CONCEPTS: AN OVERVIEW

Overview of Doctrine:

Class 5 (Bad Tendency)

Van Alstyne, 12-15 (C. up to D.); Curtis, Free Speech, 385 (The Bad Tendency Test)-402 (up to “Speech and the Especially Susceptible”); First Amendment Flow Chart and explanation (from Constitutional Law in Context 1121-1124); Pervasive Limits on Government Regulation of Speech: Vagueness, Overbreadth & Prior Restraint (Constitutional Law in Context 1218-1222; 1234-1236); Content Discrimination (from Constitutional Law in Context 1261); Barron and Dienes, First Amendment Law in a Nutshell 19-66

PART III. ADVOCACY OF VIOLENCE, CLEAR AND PRESENT DANGER, TRUE THREATS

Class 6

Van Alstyne. 68-72 [*Whitney*]. 117-133 [*Dennis-Brandenburg*]; Barron: Advocacy of Illegal Conduct 67-80.

PROBLEM 3. Nuremberg files. Write an opinion (3-5 pages or so) explaining why the Website is or is not protected speech. The facts are set out below. **Assume a prosecution under the statute set out below.**

The following facts have been gathered from news reports. You may supplement them by the facts in the 9th Circuit decision in *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 290 F.3d 1058 (9th Cir. 2002). Portland Planned Parenthood and five doctors who perform abortions have sued creators and promoters of the website called “The Nuremberg Files: Visualize Abortionists On Trial” (<http://www.christiangallery.com/atrocities/>). The suit is based on 18 USCS sec. 248, set out below. The Nuremberg website explains that doctors who perform abortions are likely Nazi war criminals and it announces that it seeks to collect

information on doctors who perform abortions so they can be prosecuted at some future date in Nuremberg type trials, just as the Nazis were prosecuted. Graphics at the site show a damaged fetus and dripping blood. A headline reads: "ABORTIONISTS: the Baby Butchers." The site lists some 225 doctors and abortion clinic owners as criminals and includes addresses, car license plate numbers, names and occupations of spouses and children, and information about abortions performed. Doctors and their homes are sometimes pictured. Four doctors and two clinic workers killed by anti-abortion activists since 1993 are cross off of the website. The wounded are shaded in gray.

Almost 200,000 people visited the website per month in the last two years.

According to the National Law Journal, the site also lists 46 jurists, 29 state judges, nine federal district judges, one Court of Appeals judge and six active and one retired U.S. Supreme Court Justice.

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TITLE 18. CRIMES AND CRIMINAL PROCEDURE

PART I – CRIMES; CHAPTER 13 – CIVIL RIGHTS

Sec. 248. Freedom of access to clinic entrances

(a) Prohibited activities. – Whoever –

(1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services;

(2) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship; or

(3) intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services, or intentionally damages or destroys the property of a place of religious worship,

shall be subject to the penalties provided in subsection (b) and the civil remedies provided in subsection (c), except that a parent or legal guardian of a minor shall not be subject to any penalties or civil remedies under this section for such activities insofar as they are directed exclusively at that minor.

(b) Penalties. – Whoever violates this section shall –

(1) in the case of a first offense, be fined in accordance with this title, or imprisoned not more than one year, or both; and

(2) in the case of a second or subsequent offense after a prior conviction under this section, be fined in accordance with this title, or imprisoned not more than 3 years, or both; except that for an offense involving exclusively a nonviolent physical obstruction, the fine shall be not more than \$10,000 and the length of imprisonment shall not be more than six months, or both, for the first offense; and the fine shall, notwithstanding section 3571, be not more than \$25,000 and the length of imprisonment shall be not more than 18 months, or both, for a subsequent offense; and except that if bodily injury results, the length of imprisonment shall be not more than 10 years, and if death results, it shall be for any term of years or for life.

(c) Civil remedies. –

(1) Right of action. –

(A) In general. – Any person aggrieved by reason of the conduct prohibited by subsection (a) may commence a civil action for the relief set forth in subparagraph (B), except that such an action may be brought under subsection (a)(1) only by a person involved in providing or seeking to provide, or obtaining or seeking to obtain, services in a facility that provides reproductive health services,

18 USCA s 248

* * *

Is the Website protected speech or press under the First Amendment or state constitutional guarantees? Focus on exactly what the statute forbids. Does it cover the conduct in this case? Why or why not? If it does cover it, is the statute constitutional on its face and as applied? Assume you wish to reach such conduct by a statute punishing expression. Would a statute making it both criminal and a tort to intentionally publish material plainly likely to cause others to engage in acts causing death or serious bodily harm be constitutional? Could the statute constitutionally be applied to the Nuremberg website?

Class 7

238-245 [*Virginia v. Black*] *NAACP v. Cleburne Hardware*, 458 U.S. 886 (1982); *Rice v. Paladin Enterprises*, 128 F.3d 233 (4th Cir. 1997). Barron, True Threats 97-100. **Read Planned Parenthood, 290 F.3d 1058)**

For class discussion: Faced with rioting like that which has wracked London and other parts of Great Britain, the City of Houston, Texas passes an ordinance providing that on order of the chief of police, email, cell phones, Twitter, and Facebook and similar sites will be indefinitely suspended in the city which has suffered rioting. Assume that this

feat is technologically feasible. Are the ordinance and the Chief's order following it, consistent with the First and Fourteenth Amendments?

APPENDIX 1.

Patterson v. Colorado: Background

1. Is there a historical pattern of using the criminal justice system and laws to limit speech and press as a way to suppress political opponents? Is the pattern replayed once again in *Patterson v. Colorado*, 205 U.S. 454 (1907), which is set out below? Consider that question in light of the account of *Patterson* given in Lucas A. Powe, Jr.'s *The Fourth Estate and the Constitution*. The story which follows is from Professor Poe's book:

John Peter Zenger's name is synonymous with freedom of the press; Tom Patterson's is not. Zenger, a New York printer, achieved fame when his lawyers left him in jail while they won his seditious libel case in 1735. Patterson, the owner-editor of the *Denver Times* and the *Rocky Mountain Daily News*, was a United States senator who dared to protest a judicial coup d'état at the turn of the twentieth century. Unlike Zenger, he is obscure. At best, he is forgotten; at worst, his fame never extended through a collection of colonies or an entire nation. History, as losers are wont to learn, is not always fair, and Patterson lost.

The facts of the Zenger and Patterson cases provide an excellent point of departure for discussing freedom of the press as well as an appropriate context for exploring the content of the First Amendment's guarantee. Each raises issues – limits of dissent and the locus of decision making about those limits – that go to the heart of a democratic society. Although Zenger was by far the earlier of the two – Patterson's case was decided over a century after ratification of the First Amendment – an achronological discussion allows us to inquire what, at a minimum, freedom of the press must protect. Once that is established, we can proceed to question how much more than the minimum the First Amendment encompasses and to what extent, if any, society can compel the press to perform its appropriate roles.

Without local control, Denver suffered under de facto colonial rule where formal state control dovetailed with the socioeconomic control emanating from the Denver Club, the bastion of the business elite who dominated the Colorado Republican party, which in turn dominated the state government. The principal local issues concerned the lucrative utility monopolies that fattened the business elite while slighting details such as service.

Home rule was at the vortex of money, power, and legal control. Reformers saw it as a means of bringing better government and breaking the utility monopolies. The Denver Club perceived it as a threat. The reformers, with Patterson's active

editorial support, prevailed in 1902 with a home rule amendment to the state constitution. Its immediate impact, however, was to create a pair of symbiotic cottage industries: Denver elections and Colorado Supreme Court decisions on the validity of those elections. The multifaceted elections of November 1904 proved the most interesting and provided the occasion for Patterson to learn that a protester against electoral theft might be at the legal mercy of those benefitting from the challenged transactions.

In that election the voters enlarged the membership of the state supreme court and apparently sent the unpopular incumbent Republican governor, James Peabody, to a 9000-vote defeat at the hands of the two-time former Democratic governor, Alva Adams. With the state about to pass to the Democrats, William G. Evans, president of the Denver City Tramway Company and the principal Republican boss of the state, masterminded a dazzling stratagem, utilizing all three branches of government, to preserve Republican political and economic power. Just days before Adams's inauguration, Peabody nominated Republicans for the newly created supreme court seats, and the Republican state senate immediately confirmed the appointments even though the seats would not come into existence for two months.

[T]his is even more outrageous than John Adams's lame-duck appointments in 1801 that led to the famous United States Supreme Court case of *Marbury v. Madison*, for at least Adams was filling positions currently in existence. Evans's plan, however, was to do the century-old Federalist effort one better.

Almost simultaneously, through injunctions involving the vote count, the Colorado Supreme Court cast a cloud over a number of Denver precincts, with the immediate result that six Denver Democratic legislators were disabled from taking their seats when the legislature convened. Alva Adams took office, but the Republicans carried their claim that Peabody had won to the legislature – which they still controlled, thanks to the supreme court action preventing the six Denver Democrats from taking their seats. The legislature, after investigation of the vote count, determined that Peabody had won. But no one besides Peabody himself wanted him to be governor; part of the deal required that he tender a postdated resignation prior to his inauguration. The resignation was effective the next day, at which time his lieutenant governor took office. Colorado thus had three governors in the twenty-four hours of March 16-17, 1905. It is as if the Congress in 1801 had declared John Adams, not Thomas Jefferson, elected, and Charles C. Pinckney had become the third president.

Validating Evans's plan was only part of the Colorado Supreme Court's involvement in guaranteeing that it was good business to control as many branches of government as possible. The state government, including the newly enlarged supreme court, now resembled an operating subsidiary of the mining and smelting interests, railroads, and Denver utility companies. The first dividend came due in June 1905, when the court voted to set aside a home rule election of

county judges on the grounds that the state constitutional requirement of a republican form of government was violated when Denver set the number and terms of such judges (as the home rule amendment permitted). The decision, whereby parts of a voter-approved constitutional amendment were held unconstitutional as a violation of the very document that was being amended, seemed so obviously wrong that it had to portend a worse future. It looked like the first step in wholly eliminating home rule and Denver's ability to control its own destiny – and its private utility monopolies.

Patterson, a leading supporter of home rule, was outraged by the supreme court's theft of the Denver elections. He immediately editorialized in his *Denver Times*: "The people of St. Louis and San Francisco, who have been enjoying the full benefits of just such a system of government as the [home rule] amendment provides, will be astonished to learn that they no longer live in a republic – for the Colorado supreme court holds that such a government is so unrepublican that it cannot be tolerated in Colorado." Patterson's irony was well directed; the supreme court's decision was absurd. He asked, "What next?" and suggested how to find out: "If someone will let us know what next the utility corporations of Denver and the political machine they control will demand, the question will be answered."

The following day the *Rocky Mountain News* carried a cartoon of the five members of the court majority beheading the losing litigants in the home rule election case. The caption read: "If the Republican Party has overlooked anything from the Supreme Court, it will now proceed to ask for it."

Next came a letter to the editor of the *Times*. "Publicus" had the answer. The Republican sponsors of the supreme court were acting to protect "millions upon millions" from their municipal investments. The home rule requirement of voter approval for refranchising municipal utilities created a major obstacle to securing the booty. The Republican bosses therefore planned the "total destruction" of home rule so that a compliant city council that could "always be depended upon to give them what they demand and will pay for" would renew the money-making franchises.

Given the enormity of the Colorado Supreme Court's actions, and the typical excesses of turn-of-the-century journalism, Patterson's response was amazingly restrained, especially for a prominent populist who loathed the utility monopolies. Restrained or not, those supporting the status quo could hardly be pleased with a figure as prominent as Patterson publicly stating that the supreme court was subservient to the utility companies, which, rather than the people, ran the Colorado government.

Denver's two Republican newspapers called for the supreme court to hold Patterson in contempt of court for his statements that impermissible political considerations were motivating the court. In response, Patterson published a

reaffirming editorial that took personal responsibility. He had either written or approved each of the pieces: “I believe they were fair and just criticism, and fully warranted by what has transpired.” That same day the Colorado attorney general, acting on instructions from the chief justice, issued an order for Patterson to show cause why he should not be held in contempt of court. Patterson’s forum shifted from the city of Denver to the Colorado Supreme Court.

If either William G. Evans or the term-and-a-day James Peabody had sought redress against Patterson, their only recourse would have been a libel suit. In such an action the Colorado Constitution guaranteed the right to defend a libel suit on the grounds that the alleged libel was true. Although Patterson might have had a difficult time proving truth, the public would have been treated to a spectacular trial; and if Patterson had prevailed, the legitimacy of the Denver Club’s control over the state might have been weakened or destroyed. But neither Evans nor Peabody sued Patterson. Instead, the attorney general acting for the Colorado Supreme Court mounted the assault. And the legal issue was not libel but contempt of court. yet on the facts “contempt” was nothing but a label for criticism that stung; indeed, to use the old common-law term, what Patterson had done was akin to seditious libel, where truth was no defense either. Patterson had effectively criticized government, thereby diminishing its authority – a point underscored by his response to the contempt charge; he stated that, because he believed in the truth of all he wrote, he was never more convinced of the justice and necessity of publication. Taking advantage of his situation, as only a person headed for defeat can, Patterson argued that the judiciary, as the “sacred” guardian of liberty in the country, retains the confidence of the people only by staying within the limits prescribed by law. If there is integrity and reciprocity between the people and the courts, “there will be little provocation for criticism either of the courts, or by the courts, of the public press.”

Everything turns on the if. Patterson held that the court had broken the sacred trust and therefore provocation was proper, and he grasped the opportunity to repeat his charges and reassert their truth. It was on the issue of truth he wished to fight; the contempt charge gave him the legal necessity to do so, and on its face the Colorado Constitution gave him the legal right: “Every person shall be free to speak, write or publish *whatever he will on any subject*, being responsible for all abuse of that liberty; and in all suits and prosecutions for libel the truth thereof may be given in evidence.”

In holding that part of the home rule amendment was unconstitutional, the Colorado Supreme Court had begun to behave as if its motto were “What’s the constitution among friends?” And now events had gone too far for constitutional niceties to intrude. Patterson may have had all the persuasive points, but he had put the supreme court’s very legitimacy at issue, and the court had all the power. Although the court’s long opinion is short on the reasoning that might support its various conclusions, it explicitly held that the truth was not a defense to a charge of contempt. The conclusion that an action for contempt was not covered by the

quoted constitutional provision seems to flow from the nature of the action. The court reasoned that because the power to punish contempt of court is an inherent power, not granted or even mentioned by the constitution, it is therefore not limited by the constitution. Thus, had he criticized anyone but judges, Patterson would have been allowed his defense of truth; but when the facts required Patterson to point his finger at the judiciary, the state constitution became a piece of irrelevant parchment.

If the Colorado Supreme Court justices appeared overly assertive of their prerogatives, their sentencing of Patterson showed remarkably good judgment. The court was hardly in need of a powerful and articulate martyr; escalating this fight would have jeopardized whatever popular respect the justices retained. Patterson's punishment was a \$1,000 fine – a slap on the wrist for a man of his wealth.

Seeking the more neutral forum of the United States Supreme Court, Patterson appealed, but to no avail. Justice Oliver Wendell Holmes concluded for the Court that the First Amendment has nothing to do with protecting truth. The First Amendment protects only against prior restraints (that is, having to seek approval before publishing); it does not prohibit subsequent punishments. Thus Patterson did not need to seek approval from governmental censors before he wrote his editorials; but the First Amendment, as Holmes viewed it, incorporated the Blackstonian English view that there was no bar on legislation punishing the printed word. Holmes offered a typically pithy epigram summarizing the law on truth and falsity: “The preliminary freedom extends as well to the false as to the true; the subsequent punishment may extend as well to the true as to the false.” In 1769 William Blackstone in his classic *Commentaries on the Laws of England* had similarly written: “The liberty of the press is indeed essential to the nature of a free state: but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published.” Even false information can be purveyed without prior governmental approval, but should a government believe that certain information is contrary to the public welfare it may punish its spread – even if the information is 100 percent true. That was the English common law; that, Holmes said, was American constitutional law.

Therefore, Colorado had legitimately punished Patterson even if his message was wholly true. It did not matter if the Colorado Supreme Court had participated in a coup d'état; if the justices wished to silence their critics, the United States Constitution was no bar. And if it was no bar in Patterson's case, when would it be?

2. What are the issues in *Patterson v. Colorado*? Does the case suggest any special reasons to provide strong protection for free speech, at least in certain cases?
3. What is the status of incorporation at the time *Patterson* is decided?

4. Holmes' opinion refers to prior restraint in defining the meaning of free speech. Historically a prior restraint made it a crime to publish a book, newspaper, etc. unless it was approved by the government in advance. It was a system of prior censorship. Note that publication without prior government approval, even of an otherwise innocent book or newspaper, would be a crime – just as driving without a license is a crime, though the driving may be perfect. In *Near v. Minnesota*, 283 U.S. 697 (1931), the Court ruled that (with some exceptions) injunctions against publication constitute a prior restraint.

5. Does it make sense to limit the First Amendment to a prohibition on prior restraint? Why or why not? The result would be that government could outlaw any speech or press, provided it did not impose a prior restraint.

6. Is there any area of speech absolutely protected by *Patterson*? When can speech or press be punished under *Patterson*? Must you prove actual interference with the administration of justice is a “tendency” to interfere enough? Should a “tendency” be enough?

7. Who is correct, Justice Holmes or Justice Harlan? What authority does Justice Holmes cite for his more limited conception of freedom of speech?

APPENDIX 2.

From the Brief for the New York Times in *New York Times v. Sullivan* ...

The decision rests upon a rule of liability for criticism of official conduct that abridges freedom of the press.

Under the law of libel as declared below, a public official is entitled to recover "presumed" and punitive damages for a publication found to be critical of the official conduct of a governmental agency under his general supervision if a jury thinks the publication "tends" to "injure" him "in his reputation" or to "bring" him "into public contempt" as an official. The place of the official in the governmental hierarchy is, moreover, evidence sufficient to establish that his reputation has been jeopardized by statements that reflect upon the agency of which he is in charge. The publisher has no defense unless, as respondent noted in his Brief in Opposition (p. 18, n. 10), he can persuade the jury that the publication is entirely true in all its factual, material particulars. *Ferdon v. Dickens*, 161 Ala. 181, 185, 200-201 (1909); *Kirkpatrick v. Journal Publishing Company*, 210 Ala. 10, 11 (1923); *Alabama Ride Company v. Vance*, 235 Ala. 263, 265 (1938); *Johnson Publishing Co. v. Davis*, 271 Ala. 474, 495 (1960). Unless he can discharge this burden as to stated facts, he has no privilege of comment. *Parsons v. Age-Herald Pub. Co.*, 181 Ala. 439, 450 (1913). Good motives or belief in truth, however reasonable, are relevant only in mitigation of punitive damages if the jury chooses to accord them weight. *Johnson Publishing Co. v. Davis* at 495. A claim of truth which is regarded as unfounded affords evidence of malice, fortifying the presumption that applies in any case (R. 1178).

We submit that such a rule of liability works an abridgment of the freedom of the press, as that freedom has been defined by the decisions of this Court.

First: The State Court's Misconception of the Constitutional Issues. The reasons assigned by the Court below give no support to its rejection of petitioner's constitutional objections.

The accepted proposition that "[t]he Fourteenth Amendment is directed against State action and not private action" (R. 1160) obviously has no application to the case. The petitioner has challenged a State rule of law applied by a State court to render judgment carrying the full coercive power the State, claiming full faith and credit through the Union solely on that ground. The rule and judgment are, of course, State action in the classic sense of the subject of the Amendment's limitations. See *N.A.A.C.P. v. Alabama*, 357 U. S. 449, 463 (1958); *Barrows v. Jackson*, 346 U. S. 249, 254 (1953); *Shelley v. Kraemer*, 334 {J. S. 1, 14 (1948).

There is no greater merit in the other reason stated in the Court's opinion, that "the Constitution does not protect libelous publications." Statements to that effect have, to be sure, been made in passing in opinions of this Court. See *Konigsberg v. State Bar of California*, 366 U. S. 36, 49 (1961); *Times Film Corporation v. City of Chicago*, 365 U.

S. 43, 48 (1961); *Roth v. United States*, 354 U. S. 476, 486 (1957); *Beauharnais v. Illinois*, 343 U. S. 250, 266 (1952); *Pennekamp v. Florida*, 328 U. S. 331, 348-349 (1946); *Chaplinsky v. New Hampshire*, 315 U. S. 568, 572 (1942); *Near v. Minnesota*, 283 U. S. 697, 715 (1931). But here, no less than elsewhere, a "great principle of constitutional law is not susceptible of comprehensive statement in an adjective." *Carter v. Carter Coal Co.*, 298 U. S. 238, 327 (1936) (dissenting opinion of Cardozo, J.).

The statements cited meant no more than that the freedom of speech and of the press is not a universal absolute and leaves the States some room for the control of defamation. None of the cases sustained the repression as a libel of expression critical of governmental action or was concerned with the extent to which the law of libel may be used for the protection of official reputation. The dictum in *Pennekamp* that "when the statements amount to defamation, a judge has such remedy in damages for libel as do other public servants, left at large what may amount to defamation and what remedy a public servant has. *Beauharnais* alone dealt with the standards used in judging any kind of libel, sustaining with four dissenting votes a state conviction for a publication held to be both defamatory of a racial group and "liable to cause violence and disorder". Mr. Justice Frankfurter's opinion took pains to reserve this Court's "authority to nullify action which encroaches on freedom of utterance under the guise of punishing libel— "adding that "public men are, as it were, public property," that "discussion cannot be denied and the right, as well as the duty, of criticism must not be stifled." 343 U. S. at 263-264. Those reservations, rather than the judgment, are apposite here.

Throughout the years this Court has measured by the standards of the First Amendment every formula for the repression of expression challenged at its bar. In that process judgment has been guided by the meaning and the purpose of the Constitution, interpreted as a "continuing instrument of government" (*United States v. Classic*, 313 U. S. 299, 316 [1941]), not by the vagaries or "mere labels" of state law. *N. A. A. C. P. v. Button*, 371 U. S. 415, 429 (1963). See also Mr. Chief Justice Warren in *Trop v. Dulles*, 356 U. S. 86, 94 (1958). Hence libel, like sedition; insurrection; contempt, advocacy of unlawful acts, breach of the peace, disorderly conduct, obscenity or barratry, to name but prime examples, must be defined and judged in terms that satisfy the First Amendment. The law of libel has no more immunity than other law from the supremacy of its command.

Second: Seditious Libel and the Constitution. If libel does not enjoy a talismanic insulation from the limitations of the First and Fourteenth Amendments, the principle of liability applied below, resting as it does on a "common law concept of the most general and undefined nature" (*Cantwell v. Connecticut*, 310 U. S. 296, 308 [1940]), infringes "these basic constitutional rights in their most pristine and classic form." *Edwards v. South Carolina*, 372 U. S. 229, 235 (1963).

Whatever other ends are also served by freedom of the press, its safeguard, as this Court has said, "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U. S. 76, 48 (1957). Its object comprehends the protection of that "right of freely examining

public characters and measures, and of free communication among the people thereon," which, in the words of the Virginia Resolution, "has ever been justly deemed the only effectual guardian of every other right." 4 *Elliot's Debates* (1876), p. 554. The "opportunity for free political discussion" and "debate" secured by the First Amendment (*Stromberg v. California*, 283 U. S. 359, 369 [1931]; *DeJonge v. Oregon*, 299 U. S. 353, 365 [1937]; *Terminiello v. Chicago*, 337 U. S. 1, 4 [1949]), extends to "vigorous advocacy " no less than " abstract " disquisition. *N. A. A. C. P. v. Button*, 371 U. S. 415, 429 (1963). The "prized American privilege to speak one's mind, although not always with perfect good taste," applies at least to such speech "on all public institutions." *Bridges v. California*, 314 U. S. 252, 270 (1941). "To many this is, and always will be, all folly; but we have staked upon it our all." L. Hand, J., in *United States v. Associated Press*, 52 F. Supp. 362, 372 (S. D. N. Y. 1943). That national commitment has been affirmed repeatedly by the decisions of this Court, which have recognized that the Amendment "must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow" (*Bridges v. California, supra*, at 263); and that its freedoms "need breathing space to survive". *N. A. A. C. P. v. Button, supra*, at 433.

It is clear that the political expression thus protected by the fundamental law is not delimited by any test of truth, to be administered by juries, courts, or by executive officials, not to speak of a test which puts the burden of establishing the truth upon the writer. Within this sphere of speech or publication, the constitutional protection does not turn upon "the truth, popularity, or social utility of the ideas and beliefs which are offered." *N. A. A. C. P. v. Button, supra*, at 445. See also *Speiser v. Randall*, 357 U. S. 513, 526 (1958). The Amendment "pre-supposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection." *United States v. Associated Press, supra*, at 372. As Mr. Justice Roberts said in *Cantwell v. Connecticut*, 310 U. S. 296, 310 (1940):

"In the realm of religions faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy."

These affirmations are the premises today of any exploration of the scope of First Amendment freedom undertaken by this Court. It is implicit in those premises that speech or publication which is critical of governmental or official may not be repressed upon the ground that it diminishes the reputation of the officers whose conduct it deplors or of the government of which they are a part.

The closest analogy in the decided cases is provided by those dealing with contempt.¹ It is settled law that concern for the dignity and reputation of the bench does not support the punishment of criticism of the judge or his decision (*Bridges v. California*, *supra*, at 270), though the utterance contains "half truths" and "misinformation" (*Pennekamp v. Florida*, *supra*, 328 U. S. at 342, 343, 345). Any such repression must be justified, if it is justified at all, by danger of obstruction of the course of justice; and such danger must be clear and present. See also *Craig v. Harney*, 331 U. S. 367, 373, 376, 389 (1947); *Wood v. Georgia*, 370 U. S. 375, 388, 389, 393 (1962). We do not see how comparable criticism of an elected, political official may consistently be punished as a libel on the ground that it diminishes his reputation.² The supposition that Judges are "men of fortitude, able to thrive in a hardy climate" (*Craig v. Harney*, *supra*, at 376) must apply to commissioners as well.

These decisions are compelling not alone for their authority but also for their recognition of the basic principle involved. If political criticism could be punished on the ground that it endangers the esteem with which its object is regarded, none safely could be uttered that was anything but praise.

The point was made in classic terms in Madison's report on the Virginia Resolutions (4 *Elliot's Debates*, p. 575)

". . . it is manifestly impossible to punish the intent to bring those who administer the government into disrepute or contempt, without striking at the right of freely discussing public characters and measures; because those who engage in such discussions, must expect and intend to excite these unfavorable sentiments, so far as they may be thought to be deserved. To prohibit the intent to excite those unfavorable sentiments against those who administer the government, is equivalent to a prohibition of the actual excitement of them; and to prohibit the actual excitement of them is equivalent to a prohibition of discussions having that tendency and effect; which, again, is equivalent to a protection of those who administer the government, if they should at any time deserve the contempt or hatred of the people, against being exposed to it, by free animadversions on their characters and conduct . . ."

If criticism of official conduct may not be repressed upon the ground that it is false or that it tends to harm official reputation, the inadequacy of these separate grounds is not surmounted by their combination. This was the basic lesson of the great assault on the short-lived Sedition Act of 1798, which first crystallized a national awareness of the

¹ Cf. Kalven, *The Law of Defamation and the First Amendment, in Conference on the Arts, Publishing and the Law* (U. of Chi. Law School), p. 4: "It is exactly correct to regard seditious libel, which has been the most serious threat to English free speech, as defamation of government and government officials. It is at most a slight extension of terms to regard contempt of court by publication as a problem of defamation of the judicial process."

² Statements about officials dealing with purely private matters unrelated to their official conduct or competence might raise different questions, not presented here.

central meaning First Amendment. See, *e.g.*, Levy, *Legacy of Suppression* (1960), p. 249 *et. seq.*; Smith, *Freedom's Fetters* (1956).

That Act declared it a crime "if any person shall write, print, utter or publish . . . any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress . . . or the President . . . with intent to defame the said government, or either house of the said Congress, or the said President, or to bring them or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States...." It specifically provided that the defendant might "give in evidence in his defence, the truth of the matter contained in the publication charged as a libel", a mitigation of the common law not achieved in England until Lord Campbell 's Act in 1843. It also reserved the right of the jury to "determine the law and the fact, under the direction of the court, as in other cases", accepting the reform effected by Fox's Libel Act of 1792. Act of July 14, 1798, Secs. 2, 3; 1 Stat. 596. These qualifications were not deemed sufficient to defend the measure against a constitutional attack that won widespread support throughout the nation.

In the House debate upon the bill, John Nicholas of Virginia warned that a law ostensibly directed against falsehood "must be a very powerful restriction of the press, with respect to the publication of important truths." Men "would be deterred from printing anything which should be in the least offensive to a power which might so greatly harass them." They would not only refrain from publishing anything of least questionable nature, but they would be afraid of publishing the truth, as, though true, it might not always be in their power to establish the truth to the satisfaction of a court of justice." 8 *Annals of Congress* 2144. Albert Gallatin delineated the same peril, arguing that "the proper weapon to combat error was truth, and that to resort to coercion and punishments in order to suppress writings attacking ... measures ... was to confess that these could not be defended by any other means.," *Id.* at 2164. Madison's Report reiterates these points, observing that some "degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press." 4 *Elliot's Debates*, p. 571. Summing up the position in words that have echoed through the years, he asked (*ibid.*):

"Had Sedition Acts, forbidding every publication that might bring the constituted agents into contempt or disrepute, or that might excite the hatred of the people against the authors of unjust or pernicious measures, been uniformly enforced against the press, might not the United States have been languishing, at this day, under the infirmities of a sickly Confederation? Might they not, possibly, be miserable colonies, groaning under a foreign yoke?"

Though the Sedition Act was never passed on by this Court, the verdict of history surely sustains the view that it was inconsistent with the First Amendment. Fines levied in its prosecutions were repaid by Act of Congress on this ground. See, *e.g.*, Act of July 4, 1840, c. 45, 6 Stat. 802 (fine imposed on Congressman Matthew Lyon refunded to his

heirs)³. Its invalidity as "abridging the freedom of the press" was assumed by Calhoun, reporting to the Senate on February 4, 1836, as a matter "which no one now doubts." Report with Senate bill No. 122, 24th Cong., 1st Sess. p. 3. The same assumption has been made upon this Court. Holmes, J., dissenting in *Abrams v. United States*, 250 U. S. 616, 630 (1919); Jackson, J., dissenting in *Beauharnais v. Illinois*, 343 U. S. 250, 288-289 (1952). See also Cooley, *Constitutional Limitations* (8th ed. 1927), p. 900; Chafee, *Free Speech in the United States* (1941), pp. 27-29. These assumptions reflect a broad consensus that, re have no doubt, is part of present law.

Respondent points to Jefferson's distinction between the right of Congress " to control the freedom of the press, " which Jefferson of course denied, and that remaining in the States, which he admitted. Brief in Opposition, p. 19; see *Dennis v. United States*, 341 U. S. 494, 522, n. 4 (1961) (concurring opinion). That distinction lost its point with the adoption of the Fourteenth Amendment and the incorporation of the First Amendment freedoms in the "liberty" protected against state action. See, e.g., *Bridges v. California*, 314 U. S. 252, 268 (1941); *Edwards v. South Carolina*, 372 U. S. 229, 235 (1963). The view that there may be a difference in the stringency of the commands embodied in the two Amendments (Jackson, J., in *Beauharnais v. Illinois*, 343 U. S. at 288; Harlan, J., concurring in *Alberts v. California*, 354 U. S. 476, 501, 503 [1957]) has not prevailed in the decisions of this Court. Even if it had, we think it plain that there could be no reasonable difference in the strength of their protection of expression against "frontal attack or suppression" (Harlan, J., dissenting in *N. A. A. C. P. v. Button*, 371 (U. S. at 455) of the kind with which we are concerned.

The rule of liability applied below is even more repressive in its function and effect than that prescribed by the Sedition Act. There is no requirement of an indictment and the case need not be proved beyond a reasonable doubt. It need not be shown, as the Sedition Act required, that the defendant's purpose was to bring the official "into contempt or disrepute") a statement adjudged libelous *per se* is *presumed* to be "false and malicious", as the trial court instructed here (R. 824). There is no limitation to one punishment for one offensive statement, as would be required in a criminal proceeding. Respondent is only one of four commissioners' including one former incumbent, not to speak of the former Governor, who claim damages for the same statement. The damages the jury may award them if it deems the statement to apply to their official conduct are both general and punitive, the former for a "presumed" injury to reputation (R. 1160) and the latter "not alone to punish the wrongdoer, but as a deterrent to others similarly minded" (R. 1 176). Such damages, moreover, are fettered by "no legal measure" of amount (R. 1177). It does not depreciate the stigma of a criminal conviction to assert that such a "civil" sanction is a more repressive measure than the type of sentence the Sedition Act permitted for the crime that it purported to define. Here, as in *Bantam Books, Inc. v.*

³ The Committee reporting the bill described its basis as follows (H.R. Rep. No. 86, 26th Cong., 1st Sess., p. 3 (1840)): "All that now remains to be done by the representatives of a people who condemned this act of their agents as unauthorized, and transcending their grant of power, to place beyond question, doubt, or cavil, that mandate of the constitution prohibiting Congress from abridging the liberty of the press, and to discharge an honest, just, moral, and honorable obligation, is to refund from the Treasury the fine thus illegally and wrongfully obtained from one of their citizens...."

See also Acts of June 17, 1844, cc. 136 and 165, 6 Stat. 924 and 931.

Sullivan, 372 U. S. 58, 70 (1963), the "form of regulation ... creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law."

It should be added that the principle of liability, as formulated by the Supreme Court of Alabama, goes even further than to punish statements critical of the official conduct of individual officials; it condemns the critique of government as such. This is accomplished by the declaration that it is sufficient to sustain the verdict that in "measuring the performance or deficiencies" of governmental bodies, "praise or criticism is usually attached to the official complete control of the body" (R. 1157). On this thesis it becomes irrelevant that the official is not named or referred to in the publication. The most impersonal denunciation of an agency of government may be treated, in the discretion of the jury, as a defamation of the hierarchy of officials having such "complete control." A charge, for example, of "police brutality", instead of calling for investigation and report by supervising officers, gives them a cause of action against the complainant, putting him to proof that will persuade the jury of the truth of his assertion. Such a concept transforms the law of defamation from a method of protecting private reputation to a device for insulating government against attack.
