New York County Clerk's Index No. 23545/84

Court of Appeals

STATE OF NEW YORK

IMMUNO AG,

Plaintiff-Appellant,

against

J. MOOR-JANKOWSKI,

Defendant-Respondent.

BRIEF, ON REMAND, OF WORLD WILDLIFE FUND, CAPITAL CITIES/ABC, INC., CBS INC., HUMANE SOCIETY OF THE UNITED STATES, NATIONAL BROADCASTING COMPANY NEWSDAY, INC., THE NEW YORK TIMES COMPANY, INC. AND THE TIME INC., MAGAZINE COMPANY AS *AMICI CURIAE*

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TABLE OF CONTENTS

Table of Authorities iv

Interests of the Media and Conservation Organizations, as Amici Curiae on Remand 2

Preliminary Statement: The Case for Adherence to the Court's Original Ruling 3

Summary of Argument 6

Argument

POINT I: ARTICLE 1, SECTION 8 OF THE NEW YORK STATE CONSTITUTION INDEPENDENTLY MANDATES BROAD PROTECTION FOR LIBERTY OF EXPRESSION, WITH PARTICULAR REGARD TO THE EXCESSES OF LIBEL CLAIMS 11

A. It is Already Well Established that New York's State Constitution, Including Article 1, Section 8, Independently Protects Civil Rights and Civil Liberties, At Times More Broadly Than the Federal Constitution 14

B. Unlike the Uncertain Intent of the First Amendment, Both Text and History Document the Intimate Linkage Between Limitations on Libel Claims and the Original Intent of Article 1, Section 8 Broadly to Protect Liberty of Expression 17

1. The early history of liberty of expression in New York was written in its law of libel 17

2. The original intent of Article 1, Section 8 was to define liberty of expression in terms of appropriate limits on the law of libel 23

C. This History Provides Persuasive Support for Reading Article 1, Section 8 More Broadly Than the First Amendment With Regard to Limitations on Libel Claims 28

1. In contrast to Article 1, Section 8, the original intent of the First Amendment regarding libel is at best obscure and uncertain 28

2. For 173 years the First Amendment was viewed as having no application to libel 29

POINT II: CONSTRUED IN LIGHT OF ITS HISTORY AND INTENT, ARTICLE 1, SECTION 8 IS MORE THAN BROAD ENOUGH TO SUPPORT THE ABSOLUTE PRIVILEGE FOR PURE OPINION PREVIOUSLY APPLIED IN THIS CASE, EVEN IF NOT REQUIRED BY THE FIRST AMENDMENT 33

A. This Court Has Already Held That the State Constitution Provides a Coordinate Basis for Protecting Pure Opinion in Libel Cases 34

B. History and Original Intent Provide Ample Support for an Independent Constitutional Opinion Privilege Under Article 1, Section 8 35

1. The framers sought effectively to guard against then-existing excesses of libel claims in the Hamiltonian libel clause 35

2. This general intent must be applied in light of modern circumstances 36

C. It Would Be a Misreading of Article 1, Section 8 to Ignore the Framers' Intent By Construing its Libel-Related Provisions as Mandating a Narrow View of Liberty of Expression 39

1. The significance of the Hamiltonian libel clause is not confined to its technically-outdated aspects 39

2. The abuse clause is not an open-ended mandate to narrow liberty of expression; the clear intent of the Hamiltonian libel clause was to narrow -- not to expand -- the scope of sanctionable libel abuse 42

3. Historians who have criticized the Hamiltonian libel clause misunderstand its significance in relation to the original intent of Article 1, Section 8 45

Conclusion 49

Appendix: Excerpts from the Debates on Article 1, Section 8, New York State Constitution of 1821 .... A-1

TABLE OF AUTHORITIES

Cases

Beach v. Shanley, 62 N.Y.2d 241, 476 N.Y.S.2d 765 (1984) 18

Beauharnais v. Illinois, 343 U.S. 250 (1952) 32

Bellanca v. New York State Liquor Auth., 54 N.Y.2d 228, 445 N.Y.S.2d 87 (1981) 16

Booth v. Curtis Publishing Co., 11 N.Y.2d 907, 228 N.Y.S.2d 468, aff'g, 15 A.D.2d 343, 223 N.Y.S.2d 737 (1st Dept. 1962) 40

Brown v. Kelly Broadcasting, Inc., 48 Cal.3d 711, 257 Cal. Rptr. 708, 771 P.2d 406 (1989) .... 44n.

Case of John Peter Zenger, 17 HOW. ST.TR. 675 (1735) 17-18, 23, 27, 47

Chapadeau v. Utica Observer-Dispatch, 38 N.Y.2d 196, 379 N.Y.S.2d 61 (1975) .... 30n.

Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) 31

Fiske v. Kansas, 274 U.S. 380 (1927) 31

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) .... 12, 30n.

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Gobin v. Globe Publishing Co., 531 P.2d 76 (Kan. 1975) ..... 44n.

Hunt v. Bennett, 19 N.Y. 173 (1859) 41

Immuno AG v. Moor-Jankowski, 74 N.Y.2d 548, 549 N.Y.S.2d 938 (1989) 3-4, 34, 38-39

Madison v. Yunker, 589 P.2d 126 (Mont. 1978) .... 44n.

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McCall v. Courier-Journal & Louisville Times, 623 S.W.2d 882 (Ky. 1981) .... 44n.

Milkovich v. Lorain Journal Co., 497 U.S. ___, 110 S. Ct. 2695 (1990) .... passim

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Pauling v. National Review, Inc., 22 N.Y.2d 818, 292 N.Y.S.2d 913 (1968) 40

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People v. P.J. Video, 68 N.Y.2d 296, 508 N.Y.S.2d 907 (1986) 13, 14, 16

Rinaldi v. Holt, Rinehart & Winston, 42 N.Y.2d 369, 397 N.Y.S.2d 943 (1979) .... 12, 34n.-35n.

Rivers v. Katz, 67 N.Y.2d 485, 504 N.Y.S.2d 74 (1986) 16

SHAD Alliance v. Smith Haven Mall, 66 N.Y.2d 496, 498 N.Y.S.2d 100 (1985) 26, 37, 40

Sharrock v. Dell Buick-Cadillac, 45 N.Y.2d 12, 408 N.Y.S.2d 39 (1978) 16

Steinhilber v. Alphonse, 68 N.Y.2d 283, 508 N.Y.S.2d 901 (1986) .... 12, 34n.-35n.

Troman v. Wood, 340 N.E.2d 292 (Ill. 1975) .... 44n.

United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812) 30

Constitutional Provisions and Statutes

Act of April 6, 1805, ch. 90, NEW YORK SESS. LAWS (1805) 19, 20, 25

ALA. CONST., art. I, sec. 4 .... 22n.

ARK. CONST., art. 2, sec. 6 .... 21n.

CAL. CONST., art. I, sec. 9 .... 21n.

COLO. CONST., art. II, sec. 10 .... 22n.

CONN. CONST., art. I, sec. 6 .... 22n.

DEL. CONST., art. 1, sec. 5 .... 22n.

FLA. CONST., Dec. of Rights, sec. 13 .... 21n.

GA. CONST., sec. 2-115 .... 22n.

ILL. CONST., art. 2, sec. 4 .... 21n.

IND. CONST., art. 1, sec. 10 .... 22n.

IOWA CONST., art. I, sec. 7 .... 21n.

KANS. CONST., Bill of Rights, sec. 11 .... 21n.

KY. CONST., sec. 9 .... 22n.

ME. CONST., art. I, sec. 7 .... 22n.

MICH. CONST., art. I, sec. 19 .... 21n.

MISS. CONST., art. 3, sec. 13 .... 21n.

MO. CONST., art. I, sec. 8 .... 22n.

MONT. CONST., art. III, sec. 10 .... 22n.

NEB. CONST., art. I, sec. 5 .... 21n.

NEV. CONST., art. I, sec. 9 .... 21n.

N.J. CONST., art. IV, sec. 9 .... 21n.

N.M. CONST., art. IV, sec. 13 .... 21n.

N.Y. CONST. Art. 1, Sec. 8 .... Quoted at 23-24; *passim*

N.Y. CONST. of 1894, Art. 1, Sec. 8 .... 24n.

N.Y. CONST. of 1846, Art. 1, Sec. 8 .... 24n.

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N.D. CONST., art. I, sec. 9 .... 21n.

OHIO CONST., art. II, sec. 11 .... 21n.

OKLA. CONST., art. II, sec. 22 .... 21n.

PA. CONST., art. I, sec. 9 .... 22n.

R.I. CONST., art. I, sec. 20 .... 21n.

Sedition Act, ch. 74, 1 Stat. 596
(1798) 19, 30, 46n.-47n., 47-48

S.C. CONST., art. I, sec. 21 .... 22n.

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TEX. CONST., art. I, sec. 8 .... 22n.

U.S. Const. Amend. I .... *passim*

U.S. Const. Amend. XIV 31

U.S. Const., Bill of Rights (1791) 19, 38

UTAH CONST., art. I, sec. 1 .... 21n.-22n.

W. VA. CONST., art. VI, sec. 8 .... 22n.

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Index Digest of State Constitutions 700-702, 956-958 (N.Y. State Cons. Conv. Comm. 1915) 21

Kaye, "Dual Constitutionalism in Practice and Principle," 61 St. John's L. Rev. 399 (1987) .... 37n.

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This brief is submitted, pursuant to special leave, on behalf of the World Wildlife Fund ("WWF") and other seven media and conservation organizations, as *amici curiae* in support of the defendant-respondent, on remand from the United States Supreme Court. The same *amici* previously submitted a brief to this Court supporting Respondent on the original appeal.*

* Five additional media and conservation *amici*, by motion being simultaneously made herewith, seek leave to join with the original *amici* in support of this brief on remand. These proposed additional *amici* are: Environmental Defense Fund; The Hearst Corporation; National Audubon Society; New York News Inc.; and Tribune Company.

Interests of the Media and Conservation Organizations, as Amici Curiae on Remand

Descriptions of the media and conservation *amici*, and an extended statement of their interests, was presented on the initial appeal -- see Brief of World Wildlife Fund, *et al*. at 4-16 and A-1 to A-8 -- and need not be repeated here. (Descriptions of the proposed additional media and conservation *amici*, including information as to corporate parents, subsidiaries and affiliates, are included in their pending motion for leave to join this brief.)

The interests of all of the *amici* remain in assuring the continued vitality of the process of open discussion, and the uninhibited airing of views and opinions, on issues of public concern. *Amici* believe that this Court's original ruling has already struck a proper balance between claims of reputation and the overriding need to guard against constriction of such views and opinions within the free marketplace of ideas.

Any narrowing of legal and constitutional protections for publications like the letter to the editor of a scientific journal here at issue, is neither appropriate nor consistent with this State's longstanding tradition of according priority to the protection of liberty of expression, with particular

regard to the excesses of libel claims. As this Court recognized in its original ruling, such protection requires not only the delineation of sufficiently broad substantive rules protecting opinion, but also the establishment of practical means, through the mechanism of summary judgment or other procedures, for their effective and affordable vindication.

To the extent the Supreme Court's decision in Milkovich v. Lorain Journal Co., 497 U.S. ___, 110 S. Ct. 2695 (1990) (hereafter "Milkovich"), diminishes such substantive protections or impedes such procedural mechanisms under the Federal Constitution, then it is all the more appropriate for this Court to consider alternative means to assure those same ends under our State Constitution.

Preliminary Statement: The Case for Adherence to the Court's Original Ruling

Last year this Court unanimously affirmed the order of the Appellate Division granting defendant's motion for summary judgment and dismissing the libel complaint herein. In so doing, the Court eloquently reconfirmed the settled law of this State that, under the facts and circumstances here presented, "elemental constitutional values of freedom," and the need to avoid the "chilling effect" of libel claims, mandated summary

dismissal. Immuno AG v. Moor-Jankowski, 74 N.Y.2d 548, 560, 561, 549 N.Y.S.2d 938, 944 (1989). The Court began by noting the Appellate Division's "meticulous" examination of the "voluminous record" and confirmed that the Appellate Division's "extensive analysis amply establishes that plaintiff raised no threshold assertions as to the falsity of McGreal's letter," id., 74 N.Y.2d at 559, 549 N.Y.S.2d at 943 -- itself a finding dispositive of plaintiff's libel claims.

The Court also chose to analyze this case in terms of longstanding constitutional protection for opinion and the need to assure unrestricted publication of views "on controversial matters" that are "of legitimate public concern." The Court ruled that protection of opinions published in a "public forum," such as "letters to the editor," reflects "core value[s]," flowing from both State and Federal Constitutions, as well as from State common law "privileges of fair comment [and] fair report." And it held that to protect such opinions was consistent with, and would "foster," the "premises of democratic government" and the "spirit [of] 'the marketplace of ideas'." Id., 74 N.Y.2d at 555, 560, 549 N.Y.S.2d at 941, 944.

Now this Court is called upon to examine the impact, if any, on its original ruling of the Supreme Court's decision in Milkovich. It is the media and conservation amici's position

that Milkovich requires no change in the result, the reasoning, or the fundamental legal and constitutional principles applied by this Court in its original ruling. The facts of this case are neither changed nor affected by the Supreme Court's ruling in an unrelated case or by its reconsideration order in this case.* Moreover nothing in Milkovich -- including its shift in the interpretation of Federal constitutional requirements regarding the protection of opinion -- should be considered by this Court as necessarily changing or determining its own position or analysis under State constitutional principles that, properly understood, are the core and determinative issues in this case.

Such an independent course under New York's State Constitution is in no manner precluded by Milkovich. Indeed, the Supreme Court's partial "de-federalization" of the law of

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* The technical impact of a Supreme Court order summarily vacating and remanding the judgment for reconsideration in light of an intervening ruling has no binding, nor necessarily even any suggestive, effect on the original ruling in this case at this juncture. See R. L. Stern, et al., Supreme Court Practice 280 (6th ed. 1986): "the Court does not treat summary reconsideration . . . as the functional equivalent of . . . summary reversal . . . [the order] may or may not compel a different result." One recent study of such orders found that in "a substantial number of . . . remanded cases the courts of appeals adhered to the original ruling, and that very few of these judgments were [later] reversed by the Supreme Court." Id., citing Hellman, "Granted, Vacated, and Remanded***: Shedding Light on a Dark Corner of Supreme Court Practice," 67 JUDICATURE 389, 394-95 (1984).

"opinion" now invites State courts to reassume what Milkovich recognizes has long been their traditional role in the application of State privileges, as "the device employed to strike the appropriate balance between the need for vigorous public discourse and the need to redress injury to citizens wrought by invidious or irresponsible speech." 110 S. Ct. at 2703.

Nothing in this Court's original ruling suggests that it was not fully cognizant of its central and independent role in the protection of free expression in libel cases. And nothing in Milkovich requires or supports a change of position in this Court's thoughtfully articulated and fully fleshed out views on the "appropriate balance" to be struck in this State, regarding substantive and procedural protection for statements of opinion in letters to the editor.

Summary of Argument

There are many persuasive legal and policy considerations that support adherence to the original ruling. This brief focuses on one vital -- and in amici's view largely determinative -- aspect of the analysis. That is the separate and independent effect of Article 1, Section 8 of the New York

State Constitution on the standards of libel law in this State.*

This Court has already established a substantial body of law -- indeed it has taken a leadership role in -- developing separate and at times greater protections for civil rights and liberties under our State, as distinct from the Federal, Constitution. Prominent among such developments have been protections for the freedom and liberty of speech and of the

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* In focusing on this single issue, amici do not intend to suggest that adherence to the Court's original ruling is not also mandated on a variety of other grounds, many of which will be addressed in the remand briefs of Respondent and the other amici groups supporting his position. Among these are the following:

First, even apart from constitutional considerations, New York's common law of fair comment and fair report supports adherence to the original ruling; and the Court's important views regarding the special status of letters to the editor are best viewed as flowing from State law principles, both common law and constitutional.

Second, Milkovich, properly construed, itself supports adherence to the original ruling because it retains a substantial degree of Federal Constitutional protection for opinion and because, as applied to this case, the only aspects of the letter to the editor that have not already been found to be demonstrably true are statements of views that are not provably false.

And finally, summary judgment is also justified at this juncture based on lack of defamatory meaning, failure to establish falsity, and failure to adduce actual malice by clear and convincing evidence.

press, applied in diverse contexts by this Court, under Article 1, Section 8.* (Point I.A.)

The Court has found support for this separate, and often more expansive, State constitutional jurisprudence of liberty of expression in a variety of sources. Early statements of general concern for liberty of the press, a long tradition of tolerating diversity of expression, and solicitude for the vital operations of a publishing and communications industry centered in the State, have been cited. The "expansive" and "affirmative" general language of Article 1, Section 8, when compared to the text of the First Amendment, has been relied upon, as has the fact that the adoption and application of Article 1, Section 8 predated the First Amendment's application to the States.

In this case, the Court's original ruling has already adverted to the State Constitution as a coordinate basis for

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* Throughout this brief reference is made to "liberty," rather than "freedom," of expression. This is for the purpose of distinguishing the commands of Article 1, Section 8 from those of the First Amendment. As elaborated in Point I.B.2., _infra_, our State Constitutional guarantee speaks in terms of "liberty" of "speech or of the press" (in combination, "expression"). It also refers affirmatively to the right "freely to speak, write and publish." The First Amendment speaks only in terms of the abridgement of "freedom" of expression.

broad protection of expression of opinion, citing earlier New York libel cases that had also embraced the doctrine of absolute protection for "pure opinion." However, it has heretofore been the U.S. Supreme Court, beginning with New York Times v. Sullivan, 376 U.S. 254 (1964), and continuing in later cases, that seized the initiative in developing constitutional doctrine, under the First Amendment, protective of free expression in the libel field. As a result, this Court has not had the need to consider in depth the extent to which Article 1, Section 8 of the New York State Constitution independently mandates standards in the libel field more protective than those the Supreme Court has now found to be the minimum requirements of the First Amendment.

The Supreme Court's declination, in Milkovich, to embrace the vitally-important and widely-recognized doctrine of categorical constitutional protection for opinion now squarely presents for resolution the issue of the separate scope of libel standards, under our State Constitution.

An examination of the original intent of Article 1, Section 8, as revealed in constitutional debates that focused almost exclusively on the issue of libel, and of the historic leadership role of New York in developing the American concept of liberty of the press in relation to legal and constitutional

limitations on the enforcement of libel claims, provides powerful justification for separate and broader recognition by this Court of libel privileges under our State Constitution. (Point I.B.)

Indeed, with due respect to the Supreme Court's essential role in defining the minimum standards to be applied under the First Amendment, what an examination of the background of Article 1, Section 8 makes clear is the historic recognition of the importance of State constitutional limitations on libel law and of State competence in controlling the excesses of libel claims for the preservation of liberty of expression. This same background and history also demonstrate why the libel clause of Article 1, Section 8, and the many other state constitutions modelled after it -- often forgotten or ignored during the post-Sullivan period -- in spirit and intent still retain great force in any undertaking to construe and apply State constitutional provisions, as supplements to minimum Federal constitutional protections, in the libel field. (Point I.C.)

Once the role and significance of Article 1, Section 8 in relation to libel is recognized, its application to preclude claims, such as those asserted in this action, against views and opinions on issues of vital public concern published in

traditional forums for opinion such as letters to the editor, naturally follows. The Supreme Court's ruling in Milkovich, itself arguably flowing from a reluctance to federalize all aspects of the traditionally State common law of libel, has no impact or persuasive force in this case other than to require this Court now independently to consider and resolve the question of separate application of State constitutional principles.* (Point II)

In sum, Milkovich simply does not prevent this Court from adhering to its original unanimous ruling.

POINT I: ARTICLE 1, SECTION 8 OF THE NEW YORK STATE CONSTITUTION INDEPENDENTLY MANDATES BROAD PROTECTION FOR LIBERTY OF EXPRESSION, WITH PARTICULAR REGARD TO THE EXCESSES OF LIBEL CLAIMS

In Milkovich the Supreme Court to some uncertain extent unsettled more than fifteen years of near unanimous State and lower Federal court analysis of the opinion issue largely under

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* It is probable that the new Federal doctrine regarding opinion, delineated in Milkovich, will require further clarification by the Supreme Court, quite possibly in a series of cases. In such circumstances the better approach is to avoid dealing with "unsettled" Federal law and "to resolve the issue with clarity and finality for the citizens of this State under the State Constitution." O'Neill v. Oakgrove Construction, 71 N.Y.2d 521, 532, 528 N.Y.S.2d 1, 6 (1988) (Kaye, J., concurring).

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). This Court was one of the many that had embraced the principle of broad constitutional protection for opinion and thus made it an aspect of State law. See, e.g., Steinhilber v. Alphonse, 68 N.Y.2d 283, 289, 508 N.Y.S.2d 901, 903 (1986); Rinaldi v. Holt, Rinehart & Winston, 42 N.Y.2d 369, 380, 397 N.Y.S.2d 943, 950 (1979). See also Point II.A., infra.

Milkovich, and the subsequent order vacating and remanding this Court's judgment in Immuno, thus squarely present for resolution the issue of whether Milkovich should have any impact upon this Court's prior recognition of absolute protection for opinion as a matter of State law, in particular under Article 1, Section 8.*

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* Appellant argues that it would be "inappropriate, at this late stage, to consider State constitutional arguments for the first time" -- see Appellant's Brief on Remand, pp. 17-19. But this Court's original ruling and its reliance on an approach to the law of opinion, fully embraced as an aspect of State law for well over a decade, belie any suggestion that State constitutional principles have not previously been considered or that it would be inappropriate or unfair further to consider such issues in light of the necessity for such consideration at this juncture. In any event, Appellant in its Reply Brief on the initial appeal in fact addressed the merits of the State constitutional issue without any objection as to untimeliness -- see Plaintiff-Appellant's Reply Brief, p. 58. Moreover, even if considered as a separate issue, the State constitutional argument was preserved by Respondent, having been clearly asserted in his Answer (A. 2424 [Sixth Affirmative Defense]), and was clearly presented to this Court in these

Footnote continued --

In determining whether Article 1, Section 8 independently supports reaffirmation of this Court's prior recognition of absolute protection for "pure opinion" in libel actions, notwithstanding the Supreme Court's analysis for Federal purposes under the First Amendment in Milkovich, there are a variety of factors that have traditionally been recognized as appropriate for consideration. Judge Simons, in People v. P.J. Video, 68 N.Y.2d 296, 508 N.Y.S.2d 907 (1986), organized such "considerations and concerns" into two separate approaches to the analysis -- "interpretive" and "non-interpretive."

Under an "interpretive" analysis, the Court seeks to discern differences in language between Federal and State constitutional provisions, the relative "specificity" or "uniqueness" of the provisions, the historical "intent" of the State constitutional framers, and the "structure and purpose" of the state provision as revealed by such a historical-textual

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Footnote continued from previous page --

amici's initial brief -- see WWF Brief at 7-8 n.* and passim. The Supreme Court's order in Milkovich now makes it entirely appropriate to consider State constitutional protection as an alternative ground supporting adherence to the original ruling, based on the very same record and very same arguments for protection of expression as have been before this Court from the outset. No prejudice is threatened by this undertaking -- certainly no further discovery or record development is required for full consideration; judicial economy would be advanced; and under the circumstances any deferral or finding of waiver of constitutional rights would itself be wholly inappropriate.

analysis. Id., 68 N.Y.2d at 302-03, 508 N.Y.S.2d at 911. On the other hand, a "non-interpretive" analysis can also be undertaken, giving consideration to "sound policy, justice and fundamental fairness," and also looking for guidance in relevant statutory or common law approaches to the scope of the right, as well as in the State's general "history and tradition" or "distinctive attitudes" toward the protection of such rights. Id.

In this case, whether an "interpretive" or a "non-interpretive" mode of analysis is applied, all factors that have been given consideration fully support the continued recognition of absolute State constitutional protection for opinion in libel actions. The balance of this brief focuses on "interpretive" factors, which amici submit are both compelling and controlling, even apart from the many "non-interpretive" policy reasons that would also fully justify adherence to the Court's original ruling under Article 1, Section 8.

A. It is Already Well Established that New York's State Constitution, Including Article 1, Section 8, Independently Protects Civil Rights and Civil Liberties, At Times More Broadly Than the Federal Constitution

This Court has for some time now recognized that New York's State Constitution is to be construed independently of

the Federal Bill of Rights. While it is clear that this Court is "bound by Supreme Court decisions defining and limiting Federal constitutional rights," People ex. rel. Arcara v. Cloud Books, 68 N.Y.2d 553, 556, 510 N.Y.S.2d 844, 846 (1986), this preclusion does not carry over into the realm of State constitutional interpretation. Quite the contrary, as Chief Judge Wachtler held in Arcara, "in determining the scope and effect of the guarantees of fundamental rights of the individual in the Constitution of the State of New York, this Court is bound to exercise its independent judgment and is not bound by a decision of the Supreme Court of the United States limiting the scope of similar guarantees in the Constitution of the United States." Id.

Thus, for these purposes the Federal Bill of Rights can be seen as simply "establish[ing] minimal standards for individual rights applicable throughout the Nation." On the other hand, "[t]he function of the comparable provisions of the State Constitution, if they are not to be considered purely redundant, is to supplement those rights to meet the needs and expectations of the particular State." Id.

In previously performing this independent and vital function, this Court has already found, in a variety of civil and criminal contexts, that New York's State Constitution is

not "purely redundant," but that it "define[s] a broader scope of protection than that accorded by the Federal Constitution in cases concerning individual rights and liberties." People v. P.J. Video, Inc., supra. See, also, Rivers v. Katz, 67 N.Y.2d 485, 504 N.Y.S.2d 74 (1986) (right of involuntarily confined mental patients to refuse antipsychotic medication); Sharrock v. Dell Buick-Cadillac, 45 N.Y.2d 152, 408 N.Y.S.2d 39 (1978) (limits on foreclosure of possessory lien); People v. Isaacson, 44 N.Y.2d 511, 406 N.Y.S.2d 714 (1978) (due process limits on police conduct); People v. Hobson, 39 N.Y.2d 479, 384 N.Y.S.2d 419 (1976) (right to counsel); People v. Class, 67 N.Y.2d 431, 503 N.Y.S.2d 313 (1986) (limits on vehicle searches).

One of the important contexts in which the Court has previously recognized broader State constitutional protection is in cases involving the liberty of speech and press under Article 1, Section 8. O'Neill v. Oakgrove Construction, Inc., supra (reporters privilege under N.Y. Constitution for non-confidential materials); Bellanca v. New York State Liquor Auth., 54 N.Y.2d 228, 445 N.Y.S.2d 87, (blanket ban on topless dancing prohibited); People ex. rel. Arcara v. Cloud Books, supra (limits on public nuisance regulations affecting bookstore); People v. P.J. Video, supra (strict requirements for search warrants pertaining to obscenity).

B. Unlike the Uncertain Intent of the First Amendment, Both Text and History Document the Intimate Linkage Between Limitations on Libel Claims and the Original Intent of Article 1, Section 8 Broadly to Protect Liberty of Expression

While this Court has thus actively employed Article 1, Section 8 for such purposes, it has never previously had occasion to consider in depth the extent to which New York's State Constitution is merely redundant to the First Amendment -- in the particular context of libel actions -- or whether our State Constitution may in this context also provide protections more expansive than those that have been found in the First Amendment to the Federal Constitution.

1. The early history of liberty of expression in New York was written in its law of libel

New York has historically been closely associated with the view that overreaching enforcement of libel claims is at war with democratic freedoms. Indeed, this heritage has traditionally been perceived as placing New York at the cutting edge of our Nation's historical quest for liberty of expression.

The Case of John Peter Zenger, 17 HOW. ST. TR. 675 (1735), of course, stands as the first beacon light in this line of development. As a technical legal matter the law applied in the Zenger case represented a continuation of the old strict

liability doctrines that barred the introduction of truth as a defense and precluded any meaningful role for juries in criminal libel prosecutions. However, in Zenger there was no occasion for an appeal because the jury nullified harsh instructions and voted to acquit. J. Alexander, A Brief Narrative of the Case and Trial of John Peter Zenger 74-75 (S.N. Katz ed. 1963); see also Finkelman, "The Zenger Case: Prototype of a Political Trial," in American Political Trials 21 (M. Belknap ed. 1981).

Zenger's value as precedent lay, as Professor Chafee argued so persuasively, in public awareness of the jury's actions in that case, causing it to become a powerful symbol of resistance to strict common law rules of libel inherited from England, which came to be "detested" in the American colonies as odious examples of political repression. See Chafee, "Free Speech in War Time," 32 Harv. L. Rev. 932, 946 (1919); Beach v. Shanley, 62 N.Y.2d 241, 255, 476 N.Y.S.2d 765, 773 (1984) (concurring opinion) (citing the Zenger case as "exemplif[ying]" New York's long tradition of "provid[ing] one of the most hospitable climates for free exchange of ideas").

Less popularly familiar, but even more influential in actually shaping American post-colonial views on free

expression, was the case of People v. Croswell, 3 JOHNS. CAS. 337 (1804).

The period between ratification of the Federal Bill of Rights in 1791, and the consideration and approval of Article 1, Section 8 as a part of our State Constitution of 1821, based on New York's libel statute of 1805, was a pivotal one for the refinement of American legal views toward libel and liberty of expression. New York was, once again, a leader in this movement. Despite passage and ratification of the First Amendment, toward which New York was a prime mover,* and despite the constitutional-political upheaval engendered by passage of the Federal Sedition Act of 1798, ch. 74, 1 Stat. 596, as of the turn of the 19th century state seditious libel prosecutions continued to be pursued. In fact, the Croswell case was a New York criminal prosecution based on an allegedly seditious publication about President Thomas Jefferson, whose party had been swept into office on a platform that included intense criticism of the Sedition Act. See generally, Forkosch, "Freedom of the Press: Croswell's Case," 33 Fordham L. Rev. 415 (1965).

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* New York's vote to ratify the Federal Constitution was accompanied by a detailed proposal urging the express recognition of individual rights and liberties, including "The Freedom of the Press" -- see Appendix at A-1 n.3.

Alexander Hamilton, a leading Federalist, came to the aid of Croswell as defense counsel. Hamilton's legal arguments in Croswell, although technically rejected on appeal by a divided court, were soon thereafter adopted by statute, Act of April 6, 1805, ch. 90, NEW YORK SESS. LAWS (1805),* and the "Hamiltonian" view, defining "liberty of the press" as "consist[ing] in the right to publish, with impunity, truth, with good motives, for justifiable ends, though reflecting on government, magistry or individuals," 3 JOHNS. CAS. at 352, was thereafter constitutionalized in what is today Article 1, Section 8 of the New York State Constitution.

The long-term influence of New York's views on liberty of the press, as formulated by Hamilton, was pervasive. Ultimately the "Hamiltonian libel clause," as it came to be

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* The Bill provided (in Section 1) that the jury should have the right in criminal libel cases "to determine the law and the fact, under the direction of the court" and that the judge should not direct the jury "to find the defendant guilty, merely on the proof of publication." The Bill further provided (in Section 2) that the defendant was permitted "to give in evidence, in his defence, the truth of the matter" subject to the further proof that the matter "was published with good motives and for justifiable ends." People v. Croswell, 3 JOHNS. CAS. at 413 (Statute printed at end of case). Because the framers perceived the 1805 statute as ambiguous regarding the roles of judge and jury in making the initial determination of good motives and justifiable ends, Article 1, Section 8 was amended from its initially proposed language by adding the phrase "to the jury" after "if it shall appear." See Carter & Stone, Reports of the Proceedings and Debates of the New York Constitutional Convention of 1821, 489 (1821).

called, became a benchmark in the law of free expression. Indeed, it is fair to say that the New York rule, as embodied in the libel statute of 1805, and later in Article 1, Section 8, came to be the prevailing definition of liberty of the press in the United States. _See_ Schofield, "Freedom of the Press in the United States," 9 Am. Sociol. Soc. Proc. 67 (1914), _reprinted in_ II H. Schofield, _Constitutional Law and Equity_ 511; 537-52 (1921). Many other states followed New York's lead and incorporated provisions into their State Constitutions identical or similar to the Hamiltonian libel clause. _See_ Z. Chafee, _Free Speech in the United States_ 5 n.2 (1948), _citing_, _Index Digest of State Constitutions_ 700-702, 956-958 (N.Y. State Cons. Conv. Comm. 1915).*

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* By current count 21 other State Constitutions contain provisions essentially identical to the Hamiltonian "truth plus" formulation. All but 3 of these also deal with the jury function in libel cases: ARK. CONST., art. 2, sec. 6; CAL. CONST., art. I, sec. 9; FLA. CONST., Dec. of Rights, sec. 13 (specifically applies to civil trials as well as criminal); ILL. CONST., art. 2, sec. 4 (civil as well as criminal; no provision regarding jury); IOWA CONST., art. I, sec. 7; KANS. CONST., Bill of Rights, sec. 11 (applies to civil as well as criminal); MICH. CONST., art. I, sec. 19; MISS. CONST., art. 3, sec. 13; NEB. CONST., art. I, sec. 5 (civil as well as criminal; no provision regarding jury); NEV. CONST., art. I, sec. 9 (civil as well as criminal); N.J. CONST., art. IV, sec. 9; N.M. CONST., art. IV, sec. 13; N.D. CONST., art. I, sec. 9 (civil as well as criminal); OHIO CONST., art. II, sec. 11; OKLA. CONST., art. II, sec. 22; R.I. CONST., art. I, sec. 20 (civil as well as criminal; no provision regarding jury); S.D. CONST., art. VI, sec. 5 (civil as well as criminal); UTAH

Footnote continued --

Leading commentators are well justified when they trace significant early reforms in the American law of libel, not to the First Amendment, but in fact to post-Bill of Rights State statutory and constitutional developments in which the Croswell case and its aftermath, culminating in Article 1, Section 8, played so decisive a role. See Berns, "Freedom of the Press and the Alien and Sedition Laws: A Reappraisal," 1970 Supreme Court Review 109, 150-59. As Professor Berns noted, "[Chancellor] Kent's opinion in the [Croswell] case, built squarely and solidly on the arguments provided by [Alexander] Hamilton, may be said to constitute the foundation on which the American law of freedom of the press was subsequently built."

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CONST., art. I, sec. 1; W. VA. CONST., art. VI, sec. 8 (civil as well as criminal); WIS. CONST., art. 1, sec. 3; WYO. CONST., art. 1, sec. 20 (civil as well as criminal). Of the 21 Hamiltonian provisions all but 2 were adopted after 1821 and all of the earlier provisions post-dated the 1805 New York statute.

An additional 14 States have constitutional provisions that link limitations on libel claims with regard to both the defense of truth and the submission of libel issues to the jury: ALA. CONST., art. I, sec. 4; COLO. CONST., art. II, sec. 10; CONN. CONST., art. I, sec. 6; DEL. CONST., art. 1, sec. 5 (generally limited to matters of public concern); GA. CONST., sec. 2-115; IND. CONST., art. 1, sec. 10; KY. CONST., sec. 9 (public concern only); ME. CONST., art. I, sec. 7 (public concern only); MO. CONST., art. I, sec. 8; MONT. CONST., art. III, sec. 10; PA. CONST., art. I, sec. 9 (public concern only); S.C. CONST., art. I, sec. 21; TENN. CONST., art. I, sec. 9 (public concern only); TEX. CONST., art. I, sec. 8 (public concern only). Of these 14, all but 4 (Delaware, Kentucky, Pennsylvania and Tennessee) post-dated the statute of 1805.

In the modern libel context, such observations led one authority on the Croswell case to observe, a year after the Supreme Court's landmark ruling in the Sullivan case, that in fact "[t]he practical freedom of the press in the United States was not first established in 1964;" rather, it was cases like Zenger and Croswell, and the criminal and civil doctrines that these cases engendered, which "gradually broadened freedom of the press until the 1964 decision [in Sullivan]." Forkosch, supra, 33 Fordham L. Rev. at 415-16.

2. The original intent of Article 1, Section 8 was to define liberty of expression in terms of appropriate limits on the law of libel

Given this history it is not surprising that unlike the broadly sweeping but nonspecific First Amendment -- see Point I.C., infra, -- the direct linkage between New York's constitutional protection for free expression and the quest for effective limitations on libel claims is apparent textually on the very face of Article 1, Section 8. That Section provides:

> "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions or indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and

the jury shall have the right to determine the law and the fact."*

As can be seen Article 1, Section 8 has two sentences, the first addressing the general and overriding issue of freedom and liberty of expression and the second addressing the particular issue of libel as it relates to liberty of expression.

The first clause of the first sentence speaks in general and affirmative** terms about the right of "every citizen" to freedom of expression. The second, or "abuse" clause, indicates that citizens are "responsible" for "abuse of that right." The third clause of the first sentence is framed in seemingly absolute terms (much like the First Amendment), as a limitation on "use of official authority" which acts to "restrain or abridge the liberty of speech or of the press."***

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* The word "criminal" was added in 1846. Other than this technical revision the text has remained identical to the original. See, R. Carter, New York State Constitution: Sources of Legislative Intent 7-8 (1988); McKinney's Const. Art. 1, sec. 8 (Historical Note: Section was derived from Const. 1894, Art. 1, sec. 8; Const. 1846, Art. 1, sec. 8; Const. 1821, Art. VII, Sec. VIII).

** "Article 1, Section 8 . . . assures, in affirmative terms, the right of our citizens to "freely speak, write and publish." O'Neill v. Oakgrove Construction, supra, 71 N.Y.2d at 529, 528 N.Y.S.2d at 4 n.3. (emphasis added)

*** The quoted characterization is from the O'Neill opinion. Id.

Immediately following the general guarantee of liberty of expression is the second sentence of Article 1, Section 8 -- based on New York's statute of 1805 -- which deals with libel. The first clause of the second sentence recognizes the defense of truth, thus fundamentally modifying the strict common law of England. The second clause of the second sentence limits the truth defense to the extent of also requiring "good motives" and "justifiable ends" (sometimes referred to as the "truth-plus" formulation); it also recognizes the jury's exclusive function in determining "truth-plus." The third clause of the second sentence clarifies the jury's role, eliminating the traditional power of English common law judges stringently to limit the jury's function in libel cases, both as to law and fact. (Hereafter, for brevity, the entire second sentence is referred to as the "Hamiltonian libel clause," or simply the "libel clause," of Article 1, Section 8.)

The obvious textual linkage between the first sentence dealing with general rights of freedom and liberty of expression, and the second sentence dealing with libel, is no accident. It is the result of long experience with excesses in application of libel law during the colonial and early post-colonial period of our State's history. This experience led to the prevailing view that a proper understanding of liberty of expression would flow directly from the definition

of limits on libel law. So understood, it is difficult to imagine a more pertinent or compelling message from the framers of our State's Constitution, in both spirit and original intent, to interpret Article 1, Section 8 expansively in order to protect expression from the excesses of libel claims.

The beginnings of an "interpretive" analysis of the Article 1, Section 8 with regard to libel have already been staked out by this Court, albeit in the context of the separate issue of "state action." In that context, the intimate linkage between libel and the general commands of Article 1, Section 8 has already been noted in the opinion of Judge Titone in SHAD Alliance v. Smith Haven Mall, 66 N.Y.2d 496, 502, 498 N.Y.S.2d 99 n.4 (1985). Judge Titone observed that the Section was essentially "aimed at curbing legislation concerning defamation." And, as noted by Judge Wachtler, in his dissent in SHAD Alliance, the discussion by the framers of Article 1, Section 8 "was confined almost exclusively to . . . prosecutions for libels," id., 66 N.Y.2d at 510, 498 N.Y.S.2d at 108.

The textual focus on libel in Article 1, Section 8, is also reflected in the debates that surrounded its passage. Those debates make clear that the central and overriding preoccupation of the framers of the Constitution of 1821 was

the actual and potential impact of libel on the liberty of speech and of the press in our then still young democracy. The hard lessons of the history of excessive libel claims, from *Zenger* to *Croswell*, are reflected in the mature and well articulated constitutional debate of 1821. What emerges is a clear and unambiguous intent by the framers to define liberty of expression in terms of the appropriate substantive limits on libel as well as in terms of the necessary procedures to effectuate those limits.

Indeed, cognizant as we now are of the many and varied contexts in which free speech claims may arise, what is perhaps most striking throughout the fairly lengthy constitutional debate, is the remarkable extent to which the framers effectively equated limitations on libel claims with the general guarantee of liberty of expression. During that debate, both the proponents of even broader limits on libel claims for fear of "repression," as well as the proponents of narrower limits for fear of press "licentiousness," shared the premise that defining the scope of libel and its limits would, in turn, serve effectively to assure the protection of press freedom and liberty of expression. (Excerpts from the constitutional debate of 1821 regarding Article 1, Section 8, are contained in the Appendix, *infra*.)

C. This History Provides Persuasive Support for Reading Article 1, Section 8 More Broadly Than the First Amendment With Regard to Limitations on Libel Claims

In contrast to the clear intent of New York's State Constitution to define the limits of libel for the protection of liberty of expression, and in contrast to the specificity of language found in Article 1, Section 8 with regard to such libel limitations, stands the First Amendment. Its text, history and intent speak only in generalities whose uncertain meaning was assumed, for almost 175 years, to support a conclusion that the First Amendment had no significant application in the field of libel law.

1. In contrast to Article 1, Section 8, the original intent of the First Amendment regarding libel is at best obscure and uncertain

A vast literature has been written, seeking to discern the original intent of the framers of the First Amendment. Theories have come and gone; myths have been created, exploded and revived; revisionist histories have been written, attacked, defended and themselves revised. See, e.g., L. Levy, Emergence of a Free Press (1985) at 352-72 (bibliography).

For these purposes, the overriding significance of these scholarly debates is that they have never been resolved.

Indeed, probably the only conclusion upon which all of the leading commentators on the First Amendment have been able to agree is that the original intent of the First Amendment is obscure, that it has always been a matter of contention, and that it may never with certainty be known. See Emerson, "Colonial Intentions and Current Realities of the First Amendment," 125 U. Pa. L. Rev. 737 (1977):

> "It is by no means clear exactly what the colonists had in mind, or just what they expected from the guarantee of freedom of speech [and] press . . . as expounded in the . . . Constitution. . . . Moreover, the impact of the first amendment upon the law of seditious libel . . . was not explained. Nor was there any effort to reconcile the first amendment with the law of private libel . . . ." Id. at 737-38; accord, Anderson, "The Origins of the Press Clause," 30 UCLA L. Rev. 455, 486 (1983) ("The legislative history of the press clause is, of course, inconclusive, not only in the sense that history is always inconclusive, but also because the Framers simply did not articulate what they meant by 'freedom of the press'.")

2. For 173 years the First Amendment was viewed as having no application to libel

Despite its inconclusiveness regarding libel, the Supreme Court ultimately came to recognize, in New York Times v. Sullivan, supra, that even the First Amendment's generalized mandate for free expression could not be squared with the excessive enforcement of libel claims. In the more than 25 years since Sullivan, Federal constitutional principles bearing

on libel issues, including protection for opinion, came to dominate the field.*

But history recalls that until 1964, and for 173 years, the First Amendment was held to have no role in limiting libel claims. The Federal Sedition Act of 1798, although bitterly attacked politically, expired in 1801 and was never successfully challenged. The Sedition Act was not expressly held to have represented a violation of the First Amendment, until Sullivan. State common law jurisdiction over libel was confirmed in 1812, when the Supreme Court invalidated a federal libel prosecution, not under the First Amendment, but based on the absence of federal jurisdiction over common law crimes. United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812).

As late as 1907, in Patterson v. Colorado, 205 U.S. 454, the Supreme Court, in an opinion by Justice Holmes, was still adhering to the "Blackstonian" notion that the First Amendment was no more than a bar against "prior restraints." The Court

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* In only one major case since Sullivan, other than Milkovich, did the Supreme Court draw back from application of Federal principles, leaving an area of development to the States with regard to fault standards applicable to claims by private plaintiffs. Gertz v. Robert Welch, Inc., supra. It is noteworthy that, after Gertz, this Court adopted a standard more protective of liberty of expression than that held permissible under the First Amendment. Chapadeau v. Utica Observer-Dispatch, 38 N.Y.2d 196, 379 N.Y.S.2d 61 (1975).

in Patterson rejected a claim that the First Amendment required truth to be permitted as a defense to a conviction for contempt of court. It was not until Gitlow v. New York, 268 U.S. 652, 666 (1925), that the Supreme Court assumed in dictum that the First Amendment would apply to the states through the 14th Amendment. And it was not until two years later, in Fiske v. Kansas, 274 U.S. 380 (1927), that the Supreme Court actually applied the First Amendment, through the 14th Amendment, to overturn an action by a state abridging free expression.

As to libel, even after Gitlow and Fiske the Supreme Court continued to hold that allegedly libelous publications were no part of the expression protected by the First Amendment as made applicable to the states by the 14th Amendment. See, e.g., Chaplinsky v. State of New Hampshire, 315 U.S. 568, 571 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include . . . the libelous. . . . It has been well observed that such utterances are no essential part of any exposition of ideas . . .").

Finally, in light of the recent hegemony of First Amendment versus State constitutional law in this field, it is generally forgotten that only a dozen years before Sullivan, in

Beauharnais v. Illinois, 343 U.S. 250 (1952), the Supreme Court upheld, as against First Amendment challenge, an Illinois criminal group libel prosecution that had arguably not even accorded protections that would clearly have been required under the Hamiltonian libel clause.

Indeed, it was Justice Jackson, in his dissent in Beauharnais, who sought to prevail upon the Supreme Court in effect to incorporate New York's Hamiltonian protections into the First Amendment! Justice Jackson based this reverse approach on the widespread influence of the standards defined by New York's Article 1, Section 8 for press freedom in libel cases. As Justice Jackson observed, "It would not be an exaggeration to say that, basically, this provision of the New York State Constitution states the common sense of American criminal libel law." 343 U.S. at 297. In other words, to Justice Jackson the reversal of Croswell, and the adoption and later constitutionalization of the Hamiltonian libel clause -- and not the First Amendment as it had theretofore been interpreted by the Supreme Court -- symbolized the positive movement of American law away from "[o]ppressive application of English libel law." Id. at 296-98.

In sum, it was New York State that, since 1805 by statute and 1821 by constitutional provision, clearly recognized the

intimate relation between the excesses of libel claims and the protection of liberty of expression under an approach that set the standard for much of the Nation. In contrast, the U.S. Supreme Court until 1964 had never limited libel claims under the First Amendment; and as late as 1952 a majority of the Court had held that protections expressly provided under Article 1, Section 8 of New York's Constitution went beyond the protections that could be implied under the First Amendment to the Federal Constitution.

POINT II: CONSTRUED IN LIGHT OF ITS HISTORY AND INTENT, ARTICLE 1, SECTION 8 IS MORE THAN BROAD ENOUGH TO SUPPORT THE ABSOLUTE PRIVILEGE FOR PURE OPINION APPLIED IN THIS CASE, EVEN IF NOT REQUIRED BY THE FIRST AMENDMENT

Despite the powerful case that can be made -- in the libel context -- for a construction of our State Constitution's free speech guarantees that is broader than the First Amendment, Article 1, Section 8 is not self-executing. By its terms it does not settle such specific issues as State constitutional protection for opinion in libel cases. That is for this Court to determine, as it did in its original ruling. Nonetheless, _amici_ respectfully submit, construed in light of its history and intent, Article 1, Section 8 is more than broad enough independently to support reaffirmation of this Court's

longstanding recognition of broad protection for opinion, even if not required by the First Amendment.*

A. This Court Has Already Held That the State Constitution Provides a Coordinate Basis for Protecting Pure Opinion in Libel Cases

This Court has never had occasion to give extended consideration to the area of libel, under Article 1, Section 8, and has never specifically addressed the history and intent of the framers in that regard. However, the Court has already held the State Constitution to be a source of protection in libel actions coordinate to the First Amendment. Indeed, the Court's opinion in this very case held that "pure opinion" in libel actions "is entitled to the absolute protection of the State and Federal constitutional free speech guarantees," and also referred to "core values protected by the State and Federal Constitutions." Immuno AG v. Moor-Jankowski, supra, 74 N.Y.2d at 555, 560, 549 N.Y.S.2d at 941, 944, (emphasis added).** Whether Milkovich somehow requires a change in the

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* By this, amici do not intend to suggest that the speech at issue here is not also protected by the First Amendment on numerous other grounds. See, e.g., p. 7 n.*, supra.

** In recognizing coordinate state constitutional protection for opinion this Court cited Steinhilber v. Alphonse, supra, 68 N.Y.2d at 289, 508 N.Y.S.2d at 903. In turn, Steinhilber cited, at n.2, Rinaldi v. Holt, Rinehart & Winston, supra, 42

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Court's independent analysis under Article 1, Section 8, is the only question remaining.

B. History and Original Intent Provide Ample Support for an Independent Constitutional Opinion Privilege Under Article 1, Section 8

In considering whether the New York State Constitution independently mandates a constitutional privilege for opinion separate and apart from the First Amendment, the history and original intent of Article 1, Section 8 can be seen as adding strong support for such a result.

1. The framers sought effectively to guard against then-existing excesses of libel claims in the Hamiltonian libel clause

As noted, the Hamiltonian libel clause demonstrates that the framers perceived an intimate relation between excessive libel claims and free expression. Article 1, Section 8 sought specifically to resolve the then-existing threats to free expression as these were informed by the framers' direct

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N.Y.2d at 380, 397 N.Y.S.2d at 950. Neither _Steinhilber_ nor _Rinaldi_ expressly cited Article 1, Section 8. The reliance on these cases thus suggests this Court's view that the principle of constitutional protection for opinion has been so fully and consistently followed, over an extended period of time, that State law has implicitly _embraced_ these principles so as effectively to make them a part of our law for these purposes.

experience with excesses of enforcement of seditious libel claims. In the 18th and early 19th centuries such claims were prosecuted criminally, tried without adequate recognition of the defense of truth, and often marked by legislative and judicial abuse for political ends. Constitutionalization of New York's landmark statutory recognition of the truth defense, and constitutional strengthening of the jury's role as a mechanism to guard against official repression, were the remedies at that time perceived as sufficient to overcome those excesses.

2. This general intent must be applied in light of modern circumstances

The impact of Article 1, Section 8 is not limited to the specific provisions of the libel clause. For textually, as well as by intent, the libel clause also informs any construction of the more general provisions of the first sentence of Article 1, Section 8 relating to freedom and liberty of expression.

Moreover, in applying Article 1, Section 8 to modern circumstances, it must be kept in mind that it is a Constitution we are expounding. The needs of our State have changed in the nearly two centuries since the specific standards of the Hamiltonian libel clause were formulated.

Unlike the experience of the framers, criminal libel prosecutions have fallen into general disuse, certainly for most of this century, and are no longer an active impediment to liberty of expression. However, other threats to free expression have arisen in the libel context -- threats that are no longer amenable to the specific remedies adopted at the beginning of the 19th century. Our constitutional guarantees must thus be considered in light of these modern circumstances.

It has long generally been recognized that "the willingness of courts to interpret constitutional provisions in light of changing conditions has safeguarded both our Constitutions and the freedom they protect." SHAD Alliance v. Smith Haven Mall, supra, 66 N.Y.2d at 504, 498 N.Y.S.2d at 104. And as Chief Judge Wachtler specifically noted in the same case, Article 1, Section 8's "affirmative guarantee . . . [of] freedom of expression . . . is to be interpreted in light of modern conditions so as to preserve its underlying purpose and vitality." Id., 66 N.Y.2d at 508, 498 N.Y.S.2d at 107 (dissenting opinion).*

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* See also Kaye, "Dual Constitutionalism in Practice and Principle," 61 St. John's L. Rev. 399, 423 (1987) ("interpreting a constitution cannot stop with values of the past. It necessarily involves as well a community's present values . . .")

The leading current threat to free expression in the libel field is in fact symbolized by costly and intimidating civil libel claims of the very kind being aggressively pursued in this action. The problems posed by such actions are reviewed at greater length in amici's initial brief (pp. 17-20; 24-29) and were also recognized in the Court's original ruling. Suffice to say that this Court has long recognized, and has eloquently defined and delineated, the dangers and chilling effects of civil libel claims to freedom of expression. As Judge Wachtler recently noted:

> "One of the most serious threats to our First Amendment right to free speech, in this bicentennial year of the Bill of Rights, comes from libel litigation and the consequent award of damages, which has the potential of putting a small publication out of business. As bad as the litigation itself is the fear of litigation, which has the 'chilling effect' of stifling free speech." Wachtler, "Media Intrusiveness Places the First Amendment at Risk," Newsday (April 7, 1989).

Although this Court's recent efforts to protect against such dangers have often been framed in terms of the protections of the First Amendment under Sullivan, a similar analysis is wholly appropriate under Article 1, Section 8 in light of such modern circumstances. Indeed, in this very case the Court has already "stressed the particular role and importance of summary judgment" as a remedy -- under State procedural rules -- for

the "chilling" costs of civil libel litigation. 74 N.Y.2d at 561, 549 N.Y.S.2d at 944.

C. It Would Be a Misreading of Article 1, Section 8 to Ignore the Framers' Intent Regarding Libel By Construing its Libel-Related Provisions as Mandating a Narrow View of Liberty of Expression

1. The significance of the Hamiltonian libel clause is not confined to its technically-outdated aspects

It is hardly surprising, 169 years after its ratification as a remedy for excesses flowing from the ancient strict common law of libel, and dating back in the framers' immediate experience to the colonial and early post-colonial eras, that today the Hamiltonian libel clause would have become outdated, at least as a matter of the technical standards it enunciates. But the significance of the Hamiltonian libel clause is not limited to its technically-outdated provisions. As has been shown the clause is itself reflective of an intent, that transcends its specific terms, to guard against the excesses of libel claims. This clear intent, read back into the more general provisions of Article 1, Section 8, supports a broad construction, in the libel context, of the overriding conceptions of freedom and liberty of expression.

Contrary to this broad spirit and intent, Appellant has offered hyper-technical arguments, based on a narrow reading of

specific terms, in support of the contention that Article 1, Section 8 provides no basis at all for separate State constitutional protection of opinion in libel cases.

Initially, Appellant argues that the judicial enforcement of libel claims does not amount to the "state action" required under Article 1, Section 8, citing SHAD Alliance v. Smith Haven Mall, supra. (See App. Remand Br. pp. 22-23.) But, the judicial enforcement of civil libel claims has long been understood to represent state action for purposes of defining the appropriate constitutionally-based limitations on such claims. New York Times Co. v. Sullivan, supra; Pauling v. National Review, Inc., 22 N.Y.2d 818, 292 N.Y.S.2d 913 (1968; per curiam) (applying Sullivan to dismiss on constitutional grounds civil libel action commenced under New York law); Booth v. Curtis Publishing Co., 11 N.Y.2d 907, 228 N.Y.S.2d 468, aff'g, 15 A.D.2d 343, 223 N.Y.S.2d 737 (1st Dept. 1962) (in a pre-Sullivan case dismissing enforcement of civil privacy claim in order to "preserve" constitutional value of "a strong and free press"). See generally, L. Tribe, American Constitutional Law Section 18-6 at 1713-15 (2d ed. 1988).

Appellant also argues, because the Hamiltonian libel clause by its terms applies only to criminal prosecutions, that

Article 1, Section 8 has no application to civil libel actions. One case, well over a century old, is cited to support this proposition. Hunt v. Bennett, 19 N.Y. 173 (1859). But Hunt merely considered whether a criminal statute modeled after the Hamiltonian libel clause could be applied in a civil libel action. In construing a statute, Hunt has no bearing on the appropriate construction of Article 1, Section 8 with regard to the scope of constitutional protection for liberty of expression and its relation, for that purpose, to the Hamiltonian libel clause. Moreover, Hunt has long since been superceded by developments in both common law and constitutional principles applicable to civil libel claims.

The outdated Hunt case notwithstanding, the acknowledged modern need for limits on chilling civil libel claims strongly supports translating the framers' constitutional concerns with criminal prosecutions to the current civil context. For it has been recognized that "the fear of damage awards [in civil libel actions] may be markedly more inhibiting than the fear of prosecution under a criminal statute." New York Times Co. v. Sullivan, supra, 376 U.S. at 277.

2. **The abuse clause is not an open-ended mandate to narrow liberty of expression; the clear intent of the Hamiltonian clause was to narrow -- not to expand -- sanctionable libel abuse**

Appellant argues in its brief on remand that Article 1, Section 8 "emphasizes individual responsibility for abuse of the right of free speech." (App. Remand Br. p. 20) Focusing solely on the "abuse" clause, and ignoring the overall history and intent of Article 1, Section 8, including the Hamiltonian libel clause, Appellant concludes that "to read the State Constitution as providing immunities wider than the First Amendment provides would be an outright exercise in judicial legislation." (Id.)

Based on the foregoing review of history and intent, it is clear that the obverse is true. While the abuse clause does preserve the possibility of libel enforcement, it does so only to an extent consistent with the overriding precepts of freedom and liberty of expression generally mandated by Article 1, Section 8. Moreover, the abuse clause is neither self-executing nor open-ended; and the concept of actionable abuse is in fact substantially narrowed by the libel clause, as well as by the original intent of the framers to impose significant restrictions on excessive libel claims -- claims the framers clearly perceived as among the primary impediments to liberty of expression.

Under such circumstances, it would be a myopic reading of Article 1, Section 8 to suggest -- as does Appellant -- that because of the abuse clause, our State guarantee of liberty of expression cannot be read more broadly than the First Amendment when applied to libel claims. Indeed, Professor Chafee, although an advocate of a broad reading of the First Amendment, rejected the notion that the absence of the abuse language in the Federal Constitution, or its presence in State Constitutions, has great significance: "[S]ince I regard such an exception [for abuse of the right] as implied in the [First Amendment], I have assumed . . . that there is no difference in legal effect." Free Speech in the United States, supra, at 5 n.2.

Professor Chafee was correct, as Sullivan later rejected an absolute rule against libel claims, under the First Amendment. It thus in effect read into the Federal Constitution an implied exception for libel abuse. Correlatively, State abuse clauses simply reflect an express recognition of the non-absoluteness of freedom of expression under State Constitutions, with regard to matters such as libel.

The abuse clause is thus no more than a safety valve, preserving some undefined area for potential claims against unprotected expression. The clause is not an open-ended

loophole justifying the suppression of expression otherwise deserving of constitutional protection; it represents only the beginning and not the end of the analysis of the scope of liberty of expression under our State Constitution.

Pursuing that analysis, the multiple refinements of Article 1, Section 8 -- an abuse clause combined with the protective Hamiltonian libel clause; and a clearly expressed intent broadly to assure liberty of expression -- powerfully undercuts Appellant's arguments for a narrow reading of our constitutional guarantees based solely on the abuse clause.*

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* In support of its overreaching view of the abuse clause Appellant cites a number of cases decided by courts in other States. All the cases cited, except Brown v. Kelly Broadcasting Inc., 48 Cal.3d 711, 257 Cal. Rptr. 708, 771 P.2d 406 (1989), dealt with the definition of the State's "private figure" standard of "fault" under Gertz, supra. In each of those cases the court adopted a standard less protective than this Court adopted in Chapadeau. In three of the cases the Courts were influenced by separate State constitutional provisions, not contained in New York's Constitution, expressly protecting character, reputation or similar individual rights. Gobin v. Globe Publishing Co., 531 P.2d 76, 83 (Kan. 1975); Madison v. Yunker, 589 P.2d 126, 129 (Mont. 1978); Troman v. Wood, 340 N.E.2d 292, 297 (Ill. 1975). None of these cases, or the others cited by Appellant, Martin v. Griffith Television, Inc., 549 P.2d 85 (Okl. 1976) and McCall v. Courier-Journal & Louisville Times, 623 S.W.2d 882 (Ky. 1981), looked behind the text of their constitutional provisions in order to put them into historical context or to discern original intent. Accordingly, each of the cited cases represented solely a policy judgment regarding the proper balance between liberty and reputation which need not be followed by this Court on the very different question of State protection for opinion. In any

Footnote continued --

3. Historians who have criticized the Hamiltonian libel clause misunderstand its significance in relation to the original intent of Article 1, Section 8

Some historians have criticized the Hamiltonian formulation on the ground that, at the time of its enactment, the libel clause represented only an incomplete effectuation of the so-called "libertarian" view of freedom of expression -- a view that favored clear and outright abolition of seditious libel prosecutions. Such critics have also complained about the Hamiltonian "truth-plus" requirements -- of "good motives" and "justifiable ends" -- preferring to have truth considered a complete "justification." <u>See</u>, most prominently, L. Levy, <u>Emergence of a Free Press</u>, <u>supra</u>, at 339-40 (referring primarily to the New York Statute of 1805).

The fact that other formulations of the Hamilton libel clause might arguably have represented an even more liberal approach to the problem of seditious libel prosecutions does not detract from its significance for these purposes. For what the constitutional debates of 1821 make clear -- regardless of

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event, the failure of these cases to consider the historic significance of the libel clause in relation to the overriding intent of such State constitutional provisions to prevent excessive enforcement of libel claims, substantially undermines their analysis in this regard.

the precise formulation of the Hamiltonian clause -- is that the intent of the framers was severely to constrain, if not to abolish outright, libel prosecutions related to political expression on matters of public concern. A reading of those debates makes plain that proposals to liberalize the libel clause during the debate on Article 1, Section 8 were defeated only out of concern for their effects on purely private libels, either involving private persons or public officials in their private capacities. (<u>See</u> Appendix, <u>infra</u>.) As was well stated by delegate Nathan Williams:

> "Let all public officers, and all who hold themselves up for the suffrages of the people, be exposed to the severest scrutiny; they ought to expect no less. They voluntarily set themselves up as a mark for every assailant. As to such, let the truth be given in evidence to the jury, with the utmost latitude." Carter & Stone, <u>supra</u>, at 493.*

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* This clear focus of the framers, by 1821, on private as opposed to public libels, and the expansive views the debates reveal on the freedom to criticize government and public officials in the performance of their public duties, stands in sharp contrast to the excessive features of earlier seditious libel statutes and prosecutions. For example, the problem with the Federal Sedition Act was not primarily the extent to which it did or did not recognize the defense of truth or the jury function, but the broad and chilling subject matter of the criminal offense. Thus, Section 2 of the Sedition Act made it unlawful to "publish . . . any false, scandalous or malicious writing <u>against the government</u>, <u>or either house of</u> . . . <u>Congress</u>, <u>or the</u> . . . <u>President</u>, <u>or to bring</u> [any of] them . . . into contempt or disrepute." [Sedition Act, ch. 74, 1 Stat. 596

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It is impossible to read the debates of 1821, in light of their express intent to solidify reforms flowing from the New York experience with Croswell's case, and with the Federal Sedition Act and the Zenger case before it, and then to take seriously suggestions, such as that by Professor Levy, that "[t]he infamous Sedition Act of 1798, which did not adulterate or dilute Zengerian principles, better protected the freedom of the press than did the test that emerged from the Croswell case." Id. at 340.

Levy himself has had to admit that "prejudicial enforcement of the Sedition Act hamstrung its Zengerian principles." Id. But Levy has nonetheless adhered to this truly astounding proposition: that the detested Sedition Act was somehow more protective of free expression than the clause

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(1798).] Similarly, even after expiration of the Sedition Act, the State common law indictment in Croswell charged a New York publisher with "malicious and seditious . . . [intent] to represent [President Thomas Jefferson] as unworthy [of] the confidence, respect and attachment of the people of the . . . United States and [to] withdraw from [the President] the obedience, fidelity and allegiance of the citizens of the State of New York, . . . [and] the . . . United States; and wickedly and seditiously to disturb the peace and tranquility [of the State and the Nation]." People v. Croswell, 3 JOHNS. CAS. at 337-38. Nothing could be more at odds with the concerns of the framers of Article 1, Section 8, as revealed during the constitutional debates of 1821, than this kind of attempted repression of criticism of government and public officials on matters of public concern.

New York's framers carefully crafted for the very purpose of barring the excesses of the Sedition Act and similar State seditious libel prosecutions, such as Croswell's case, that followed it! In terms of the practical effect of Article 1, Section 8, in contrast to the Federal Sedition Act, the argument is absurd on its face.*

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* Understandably, Levy has been widely and vigorously criticized for ignoring the significance of actual practice, application and enforcement of speech-related laws on his conceptual framework that rigidly equates freedom of the press with the extreme libertarian position. See, e.g., Anderson, "Levy Vs. Levy," 84 Mich. L. Rev. 777 (1986); accord, Rabban, "The Ahistorical Historian: Leonard Levy on Freedom of Expression in Early American History," 37 Stan. L. Rev. 795 (1985). Indeed, Levy has himself acknowledged this very shortcoming in substantially revising the earlier edition of his leading monograph. Compare L. Levy, Emergence of a Free Press, supra, vii-xix (Preface) with L. Levy, Legacy of Suppression: Freedom of Speech and Press in Early American History (1960).

Conclusion

For all of the foregoing reasons this Court should adhere to its original ruling.

Respectfully submitted,

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October 31, 1990

APPENDIX

APPENDIX:

Excerpts from the Debates on Article 1, Section 8, New York State Constitution of 1821

Introduction

On Tuesday, August 28, 1821, 126 delegates gathered in Albany to create a Constitution for the State of New York. The existing New York Constitution of 1777 had been hastily drafted under the exigencies of the Revolutionary War and was thought ill-equipped to deal with the maturing needs of the State.[1] In the absence of any bill of rights, save a broad grant of religious freedom, the 1777 document was considered defective, especially in light of the ferment in New York's ratifying convention about the general lack of a federal bill of rights and the specific lack of a free speech guarantee.[2] New York's concern with the absence of a free speech guarantee was so strong that the inclusion of such a guarantee was among the demands made in the message accompanying New York's ratification of the U.S. Constitution.[3]

The debate on the proposed State Constitution's Section on liberty of expression took place on two days:[4] Monday, September 17, 1821 and Saturday, October 20, 1821. As has been noted by the New York Court of Appeals, the debate was confined almost exclusively to a discussion of the relationship between libel and free expression.[5]

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1. See generally; J. Dougherty, Constitutional History of the State of New York, The Neale Publishing Co., New York 1915.

2. Z. Chafee, Free Speech in the United States, p.5.

3. See A. Chester, Legal and Judicial History of New York 40-41 (1911). The text of New York's ratification message appears in B. Schwartz, The Roots of the Bill of Rights 911-13 (1980). The ratification message, among many other matters, included a demand "[t]hat the Freedom of the Press ought not to be violated or restrained." Id. at 913.

4. Carter & Stone, Reports of the Proceedings and Debates of the New York Constitutional Convention, 1821, 167-69, 487-95 (1821).

5. SHAD Alliance v. Smith Haven Mall, 66 N.Y.2d 496, 500, 510, 498 N.Y.S.2d 99, 102, 108 (1985) (opinion of Titone, J.; dissenting opinion of Wachtler, C.J.).

The following excerpts, organized by topic, are illustrative of the issues which animated the debates on Article 1, Section 8.

[1] -- The repressive nature of official enforcement of libel claims, legislative or judicial

GENERAL ERASTUS ROOT: "[Article 1, Section 8 -- general provisions as well as libel clause] was doubtless intended to secure the citizen as well against the arbitrary acts of the legislature as against those of the judiciary . . ." (p. 167)*

JOHN DUER: "[to] give the whole power to the courts . . . to judge motives . . . it would be a most dangerous power, and might be exercised with great oppression and injustice . . . arbitrary power in judges . . . might be so extensively abused." (p. 489)

GENERAL ROOT: "Why are judges to be rendered independent of the people? It is that they may play tyrant under the sanction of a constitutional law. . . . after having seen so many usurpations by our judiciary, we ought to provide against the repetition of such unwarranted abuse." (p. 490)

COLONEL SAMUEL YOUNG: "History taught us, that judges were sometimes corrupt, as might be instanced in the character of Lord Bacon. What had been might again occur; and if our judiciary are now upright, it might not always be the case. He cited many instances where the amendment might lead to beneficial consequences. He was for referring libels to a jury, and not to the court." (p. 494)

[2] -- The necessity of the defense of truth

CHANCELLOR JAMES KENT: "[I have] always been opposed to what was once considered the law of libels . . . that . . . the truth could not, under any circumstances be given in evidence . . . [referring to

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* Citations are to Carter & Stone, Reports of the Proceedings and Debates of the New York Constitutional Convention of 1821 (E.E. Hosford, Albany, 1821).

his position in Croswell's case . . . I wish] to preserve the principles [of the Statute of 1805, reflecting Hamilton's contentions in Croswell]." (p. 488)

GENERAL ROOT: "In England it was a maxum that the king can do no wrong . . . but in a republican government, to say that your president and governor can do no wrong, would not be endured. . . . In England, . . . public officers . . . are . . . shielded from popular animadversion through the medium of the papers . . . for the purpose of keeping up the monarchy, and therefore the greater the truth there the greater the libel. . . . In this country . . . our governor and other great men are the subjects of scrutiny . . ." (pp. 489-90)

[3] -- The importance of the jury mechanism in reducing official repression through the arbitrary enforcement of criminal libel claims

NATHAN WILLIAMS: ". . . the gentleman wishes that the jury shall decide . . . the motives of publication, and objects to the determination of this matter by the court, and here I agree with him." (p. 168)

GENERAL ROOT: "We are told . . . that the character of a female may be assailed . . . let [its truth or falsity] be determined by a jury." (p. 491)

NATHAN SANFORD: "[I] would never agree that the judge should have the sole power of deciding the truth of the libel . . . . Is a citizen prosecuted for a libel, to be tried and condemned by the judge alone?" (p. 491)

PETER A. JAY: ". . . experience had shown, that too great latitude on this subject [foreclosing submission of truth to the jury] had been taken by those with whom the power was entrusted, and if we were so liable to err, it was better to err on the safe side. . . . [I am] inclined to deprive [judges] of this power, lest they might be induced to swerve from the path of duty to propitiate the favor of a political dictator." (pp. 493-94)

[4] -- The distinction prevailing among the framers between justifiable expression on matters of public concern and private matters that might not be said to be published with good motives and for justifiable ends

CHIEF JUSTICE AMBROSE SPENCER: "The great difficulty . . . is to render the freedom of the press compatible with the . . . comfort of individuals. The truth from malignant and personal considerations, ought not be told . . . family secrets, personal defects . . . in which the public can have no concern . . ." (p. 168)

NATHAN WILLIAMS: "[in opposition to abolishing criminal indictments] for libels against . . . female[s] . . . the better part of creation" (p. 168); "the characters of private and unassuming individuals would be wantonly arraigned before the public, and the peace and happiness of families might be destroyed forever." (p. 492) ". . . . Let all who hold themselves up for the suffrages of the people, be exposed to the severest scrutiny; they ought to expect no less. . . . But in the cases [of private individuals], he would restrain this liberty [of allowing the truth to be given in evidence to the jury]." (p. 493)

ELISHA WILLIAMS: "inquired whether . . . personal defects and private misfortunes were to be dragged before the public for malicious purposes . . . ?" (pp. 487-88)

CHANCELLOR KENT: "said there were cases, in which truth ought not to be heard . . . for instance . . . a publication . . . charging a female with some personal defect . . . indecent and indelicate . . . [or] a case . . . in England . . . [involving allegations that] a French minister at the English court . . . was a female . .. [or] a defendant who had libelled a female of a family, would call as witnesses . . . the mother and sisters; and would degrade them . . ." (p. 488)

GENERAL ROOT: "When he was surrounded by all this machinery [referring to President Adams' sanctioning of prosecutions for seditious libel under the Sedition Act of 1798] . . . [f]rom a patriot, he became a despot; and instead of a republican, he was considered a tyrant! Are gentlemen anxious for a like state of things at the present day, and in this great and patriotic state?" (p. 491)

WILLIAM I. DODGE: "[I] would wish a distinction between libels upon public, and upon private characters. When a libel was on upon a public character, [I] would be willing to have the motives of the publisher determined by a jury; but if it was a wanton attack upon the character of a female, or a family . . . [I] would leave it in the power of the court to determine . . ." (p. 494)

ELISHA WILLIAMS: "He agreed with the honourable gentleman from Oneida [Nathan Williams], that he would leave the character of public men, and of candidates for public office, open to examination. He would indeed go further, and admit the truth to be given in evidence, where it was possible that the publication <u>might</u> originate from good motives and justifiable ends: but it would not be denied, that cases did occur, where there could be no possible grounds of justification, and where the public had no interest in the investigation of the truth or falsehood of the charge." (emphases in original) (p. 495)

[5] -- <u>And finally, the general and intimate relationship -- indeed the almost one-to-one correspondence -- between necessary limitations on libel claims and the assurance of liberty of expression</u>

[In addition to the general linkage apparent throughout:]

CHIEF JUSTICE SPENCER: "enactment of [the libel clause -- from "Mr. Fox's bill"] I consider a great point gained for liberty of the press." (p. 168)

NATHAN SANFORD: "[It is] of great importance that the freedom of speech and of the press should be secured by the [State] constitution. The freedom of the press is the best security of public liberty. . . . [that] liberty . . . now depends upon the pleasure of the legislature. The existing law of the state [the Hamiltonian libel statute of 1805] may at any time be repealed, and any other regulation abridging the rights of citizens in this respect, may be substituted. . . . But the great question is whether liberty of the press shall depend upon judges or juries . . . [I] wish to confide this great trust of protecting the freedom of the press, and deciding upon its abuses, to the juries of the state." (pp. 491, 492)