the Bill of Rights should prevent: "[h]eresy trials are foreign to our Constitution,"[23] and there is nothing more erosive of the spiritual fabric of American public law than to exile any group from the basic rights of all Americans on the ground that their beliefs, or speech, or way of life is a heresy to the true American tradition. We need to be more, not less, sensitive to the constitutional claims of homosexuals today precisely because they are unjustly targeted as vulnerable political exiles from the constitutional community of equal rights under law.[24]

SUING THE PRESS. By Rodney A. Smolla.[1] New York, N.Y.: Oxford University Press. 1986. Pp. 277. $19.95.

Mark Silverstein[2]

Rarely is a Supreme Court decision greeted as enthusiastically as was *New York Times v. Sullivan*. For years, Supreme Court dicta had placed libel and slander outside the protection of the first amendment, leaving the print and broadcast media subject to potentially huge libel judgments under the vagaries of state libel laws. Concluding that a rule of law that required newspapers to guarantee the truth of all assertions inhibited public debate, the Court in *New York Times* held that the first amendment bars public officials from recovering damages for defamatory statements without proof that the challenged statements were made with knowledge of their falsity or with reckless disregard for whether they were true or false. In repudiating the old doctrine of seditious libel and proclaiming the free and unfettered exchange of ideas to be the hallmark of a society dedicated to self-government, the Court won overwhelming approval for a decision considered by knowledgeable observers to be an important step toward the ideal of an open and democratic society. Moreover, the decision appeared to herald the emergence of the media, the federal courts and the black civil rights movement as a powerful coalition destined to change the very nature of American politics. Hence the decision in *New York Times* not only nationalized the libel laws of the fifty states in the name of more effective self-government, but it also symbolized the dynamic political and social changes of the 1960s. Small wonder that as astute a critic as

23. United States v. Ballard, 322 U.S. 78, 86 (1944) (Douglas, J., writing for the Court).

24. I develop this argument at greater length in Richards, *Constitutional Legitimacy and Constitutional Privacy*, N.Y.U. L. REV. (forthcoming).

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Harry Kalven characterized *New York Times* as potentially "the best and most important opinion [the Court] has ever produced in the realm of freedom of speech."[3]

Two decades later, unanimous praise has turned to universal displeasure; everyone, it seems, is unhappy with the current state of American libel law. The public, distrustful or even contemptuous of the media, punishes media defendants in libel cases through gigantic damage awards. Although many of these verdicts are reversed or reduced on appeal, the media assert that the verdicts inhibit robust debate. Public officials and public figures, however, protest the heavy burden they face in protecting personal reputation and privacy against the onslaught of what they regard as increasingly irresponsible media. The dissatisfaction extends to the Supreme Court where at least two Justices have called for reexamination of the *New York Times* standard.[4] Given all these criticisms, one might conclude that the *only* interest currently served by the law of libel is that of the lawyers who profit from the multiplicity of libel actions.

Drawing from a host of recent cases, Professor Rodney Smolla attempts to make sense of the complexities of libel law and litigation. With a cast of characters ranging from Jerry Falwell to Henry Kissinger to Elizabeth Taylor, the book is lively reading and, at the same time, an important and informative discussion of the law of defamation. Making legal doctrine accessible to a wide audience is no small accomplishment, particularly in an area as arcane as defamation, and Professor Smolla has accomplished this feat in grand style.

Professor Smolla's goals, however, extend beyond mere description; not only does he seek to tell us what transpired in the years following *New York Times*; he also wants to explain why those developments took place. The national fascination with libel cases, he writes, "is worth studying for what it reveals about current American culture, and for what it reveals about the influences of cultural trends on the fabric and workings of the American legal system." What caused the apparent rise in libel actions? What do plaintiffs hope to accomplish? What accounts for the huge verdicts delivered by many juries? Are journalistic practices or subjects so different from those of previous generations? Has America become, as Smolla puts it, "too thin-skinned?" In light of the fact that every

3. Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 194.

4. *See* Dun & Bradstreet v. Greenmoss Builders, 472 U.S. 749, 764, 767 (1985) (Burger, C.J. and White, J., concurring).

week seems to bring forth yet another libel suit in which the rich or famous (or both) confront the corporate media in a battle to the death that has become America's newest spectator sport, the questions posed by Smolla appear ripe for scholarly analysis.

Smolla's premise is "that the evolution of American law is always much more deeply influenced by changing cultural moods than by changes in technical legal doctrine." In locating the prime source of legal development outside of the law, Smolla is following the lead of a host of distinguished scholars. It is a more sophisticated and more exciting endeavor than narrowly doctrinal analysis. But it is also more likely to go astray, when an author imagines causal chains that are vague or unconvincing. Professor Smolla does not always avoid this danger. Consider, for example, this explanation of the proliferation of libel suits:

> [T]he greater sensitivity to injuries inflicted by the media is a manifestation of the best shared values between those who fought in Vietnam for "duty, honor and country" and those who lived through the Vietnam era protesting the war and who emerged later looking for some deep psychic peace. What the two groups appear to share is a conviction that human beings are more than their visible parts, more than the material aggregate of their bodies, their property and their bank statements. The heart of the matter for William Westmoreland, and for sympathetic juries in other libel suits across the United States, may have been that in some circumstances the libel suit provides one of the last hopes for vindicating one's dignity and for preventing an impersonal corporate media from assuming the big brother role that Americans so often fear from government.

We may grant that the libel explosion in the United States tells us a good deal about developments in American culture, yet doubt that it tells us quite this much.

Overblown statements aside, Smolla is correct in stressing that traditional structures and patterns of authority in the United States are changing, precipitating a crisis of confidence in the body politic.[5] The growth in libel litigation is one manifestation of this development. Polls reveal that many Americans consider the media to be biased and inaccurate. Many believe that the "news" has become a blend of fact and entertainment produced by impersonal divisions of huge corporate conglomerates. Smolla asserts that a growing public perception that the mainstream media exercise great power without public accountability produces, at the very least, a subconscious desire on the part of media's victims to attempt to redress that balance. In short, Smolla sees libel litigation as one battleground in which individuals seek to reassert human values in

5. A fascinating description of this crisis of confidence appears in M. LEVIN, TALK RADIO AND THE AMERICAN DREAM (1987).

a cold, impersonal, corporate world. That may not be the last word on modern libel law, but it is a good beginning.

POLITICS, DEMOCRACY, AND THE SUPREME COURT: ESSAYS ON THE FRONTIER OF CONSTITUTIONAL THEORY. By Arthur S. Miller.[1] Westport, Ct.: Greenwood Press. 1985. Pp. viii, 368. $35.00.

GOD, COUNTRY AND THE SUPREME COURT. By James K. Fitzpatrick. Chicago, Il.: Regnery Books. 1985. Pp. x, 217. $18.95.

Scott G. Knudson[2]

Professor Arthur Miller's most recent book is a collection of essays, all but one of which were first published in various legal periodicals from 1974 to 1984. Some of the topics are fairly narrow. Several, however, raise the most sweeping jurisprudential issues. In an introductory essay, Professor Miller suggests that constitutional jurisprudence is dominated by several myths—for example, the myth of separation of powers. More broadly, Miller argues that scholars should recognize that the Supreme Court is one of the political branches of the government, to be analyzed as such.

In his central essay in the second chapter, Miller lays out his thesis that constitutional study should not focus simply on the Constitution of 1787, but on three "constitutions"—political, economic, and corporate—which determine how America is organized and directed. Miller carries this theme throughout the book, arguing in the third essay that we are moving from a constitution of powers to a constitution of control, under which modern technology will increase the concentration of state power, resulting in an increased emphasis on state security and mass control measures.

Miller asserts that orthodox constitutional thought is permeated by a basic myth: that ours is a government of limited powers, as set forth in the Constitution. Borrowing a concept from Professor Michael Reisman, Professor Miller calls this myth the *jurisprudential publique*, the orthodox constitutional law of lawyers, judges and most scholars. The reality, he says, is a *jurisprudence confidentielle*, the private and largely unwritten set of rules that govern the

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