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Ellen K. Solender

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BOOK REVIEW

EMERGENCE OF A FREE PRESS. By *Leonard W. Levy*. * New York: Oxford University Press, 1985. Pp. xxii, 383. \$29.95.

If You Haven't Read the Preface,
You Haven't Read the Book
*Reviewed by Ellen K. Solender***

The Framers of the Constitution wrote the speech and press clause¹ so simply and directly that it does not seem possible it can mean exactly what it says. Thus, most lawyers and constitutional law professors look to its history in order to interpret the clause. The textbooks used in constitutional law courses usually have an historical introduction before they delve into the legal analysis of speech and press theory.² Lawyers must rely on historians to provide them with the information that these historical sections contain. The publication of a new historical study, such as *Emergence of a Free Press*³ by Leonard W. Levy is, therefore, a most important work.

Emergence of a Free Press is a major contribution to the historical literature of the first amendment because it relies on a wide variety of primary sources. No serious scholar can fail to read it. The book also, perhaps unwittingly, enhances the cause of an expansive view of the first amendment through its emotionally charged preface.

The book does demonstrate the difference, when writing about history, between reading original sources, and relying on "contemporary" anecdotes⁴ or conjecture as to what the Framers of the Constitution were thinking when they drafted the Bill of Rights.⁵ The author's selection and arrangement of original sources leads him to conclusions concerning the meaning of the Constitution. These selections can be the result of unconscious bias.⁶ The book teaches that, because of this problem, one should be extremely cautious when forming conclusions after reading

* Andrew W. Mellon Professor of Humanities and Chairman, Graduate Faculty of History, Claremont Graduate School.

** Professor of Law, Southern Methodist University. A.B., Oberlin College; J.D., Southern Methodist University.

1 Congress shall make no law . . . abridging the freedom of speech or of the press. U.S. CONST. amend. I.

2 See, e.g., T. B. CARTER, M. FRANKLIN & J. WRIGHT, *THE FIRST AMENDMENT AND THE FOURTH ESTATE*, 11-18 (3rd Ed. 1985) [hereinafter cited as Carter, Franklin & Wright]; G. GUNTHER, *CONSTITUTIONAL LAW, CASES AND MATERIALS*, 974-985 (11th Ed. 1985); J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW*, 830-834 (3rd Ed. 1986).

3 L. LEVY, *EMERGENCE OF A FREE PRESS* (1985), [hereinafter cited as EMERGENCE].

4 The best known and perhaps most cherished example of anecdotal or fabricated history is Parson Weems' story about George Washington and the cherry tree. See M.L. WEEMS, *THE LIFE OF GEORGE WASHINGTON: WITH CURIOUS ANECDOTES, EQUALLY HONOURABLE TO HIMSELF AND EXEMPLARY TO HIS YOUNG COUNTRYMEN*. . . (9th ed. 1809).

5 U.S. CONST. amend. I-X.

6 See, e.g., Rabban, *The Ahistorical Historian: Leonard Levy on Freedom of Expression in Early American History*, 37 STAN. L. REV. 795, 800 (1986).

original sources. After all, what colonial printers and editors actually printed and distributed differed greatly from what the contemporary followers of Blackstone⁷ stated to be within their right to print.

Emergence of a Free Press is an important book not only because it supplements current information about the period in the American colonies just prior to the adoption of the first amendment, but also because it seriously erodes the credibility of its author's earlier book, *Legacy of Suppression*.⁸ Constitutional scholars received *Legacy* (published in 1960) with wide acclaim and considered it to be the definitive work on the historical background of the first amendment.⁹ The book was cited and often quoted in most constitutional law textbooks.¹⁰ Levy had done enormous research, checking original sources and reading the writings of various individuals who were alive during the period just prior to and immediately after the adoption of the first amendment. Levy based his conclusions on his interpretations of these original sources, and not on the later writings of James Madison, et al.¹¹ Levy did not rely on these later writings, written around the time that Congress passed the Sedition Act of 1798,¹² because he considered them to be "untrustworthy."¹³

According to Levy, *Legacy* was a revisionist interpretation.¹⁴ It pounded the thesis that the Framers of the Constitution intended to codify the concept of "no prior restraint" that Blackstone enunciated.¹⁵ It claimed that any larger libertarian intent of the Framers of the Constitution was "not proven."¹⁶ Constitutional scholars based the credibility of these propositions on the eminence of Levy as an historian and on his known personal bias in favor of an expansive view of the first amendment.¹⁷ Thus, Levy's conclusion that nothing indicated that the Framers intended the constitutional guarantee of a free press to mean that the government could not prosecute anyone for seditious utterances¹⁸ was extremely persuasive.

It is true that Levy tried to mitigate a possible harsh result of his

7 EMERGENCE, *supra* note 3, at 119-123.

8 L. LEVY, LEGACY OF SUPPRESSION, (1960) [hereinafter cited as LEGACY].

9 See, e.g., Berlin, Book Review, 72 YALE L.J. 631 (1963); Cound, Book Review, 36 N.Y.U. L. REV. 253 (1961); Jensen, Book Review, 75 HARV. L. REV. 456 (1961); Lewis, Book Review, 29 GEO. WASH. L. REV. 608 (1961); Meiklejohn, Book Review, 35 S. CAL. L. REV. 111 (1961); Whyte, Book Review, 3 WM. & MARY L. REV. 540 (1962).

10 See, e.g., Carter, Franklin & Wright, *supra* note 2, at 16-18; W. COHEN & J. KAPLAN, CONSTITUTIONAL LAW, CIVIL LIBERTIES AND INDIVIDUAL RIGHTS, 20, 25, 26, 27 (2nd Ed. 1982); G. GUNTHER, CONSTITUTIONAL LAW, CASES AND MATERIALS, 975 (11th Ed. 1975); J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW, 834 (3rd Ed. 1986).

11 LEGACY, *supra* note 8, at 248-297.

12 Ch. 74, 1 Stat. 596 (1845).

13 LEGACY, *supra* note 8, at 245.

14 *Id.* at vii.

15 "The liberty of the press is indeed essential to the nature of a free state; but this consists of laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published." *Id.* at 14.

16 *Id.* at 237.

17 "This has been a difficult book to write, because the facts have dictated conclusions that violate my predilections. . .", *id.* at viii.

18 *Id.* at 236.

interpretation¹⁹ by stating in the concluding sentence of the main text "That . . . [just because the Framers] were Blackstonians does not mean that we cannot be Brandeisians."²⁰ He wanted, perhaps, to tell judges and legal scholars that his conclusions concerning the intent of the Framers should not constrain them when they interpret the speech and press clause. While this suggestion expresses the view of many United States Supreme Court Justices, such as William Brennan, Harry Blackmun, and William O. Douglas, it certainly does not persuade those Justices that believe that the Court should interpret the Constitution on the basis of "original intent."²¹

If the "original intent" of the Framers really could be proven to be as narrow as Levy had concluded it to be, any expansion of speech and press rights would be without historical foundation. Thus, the views of scholars such as Zachariah Chaffee, Jr.,²² who believed that the Framers wrote the first amendment in order to eliminate the common law of seditious libel and prevent prosecution for criticism of the government, could be considered merely hortatory.²³ Levy did state that the meaning of the first amendment's provision for freedom of speech and press at the time of its framing and ratification is quite obscure,²⁴ but in the end he concluded that the evidence indicated that it was Blackstone's limited concept of freedom of speech and press which was in the Framers minds.²⁵

During the late nineteen-seventies and early nineteen-eighties, a number of articles questioned the absoluteness of Levy's conclusions.²⁶ These articles did not question the research which Levy had done, but rather questioned the conclusions that Levy reached from the facts that his research uncovered.²⁷ Meanwhile Levy, after some twenty years, was rethinking, but not really revising his own conclusions in light of the new research which had been done in the interim.²⁸ Finally, in 1985, he published *Emergence of a Free Press*. While constitutional scholars should probably consider the new book as merely an updated version of *Legacy of Suppression*, with additional source material, the fact that Levy gave it a new title strongly indicates that he intended it to supplant the earlier

19 In fact, Justice Brennan cited LEGACY to support his decision in *New York Times Co. v. Sullivan*, 376 U.S. 254, 273 (1963).

20 LEGACY, *supra* note 8, at 309.

21 "Rehnquist summed up his belief in the centrality of original intent as a search for what 'the words . . . [the Framers] used meant to them.'" Howard, *Justice William H. Rehnquist, A Key Fighter in Major Battles*, 72 A.B.A. J. 46, 48 (Special Issue June 15, 1986).

22 Z. CHAFFEE, *FREE SPEECH IN THE UNITED STATES* (1941).

23 LEGACY, *supra* note 8, at 1-3.

24 *Id.* at 4.

25 *Id.* at 201-202, 215-216.

26 See, e.g., Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455 (1983); Buel, *Freedom of the Press in Revolutionary America: The Evolution of Libertarianism 1760-1820* in B. BAILYN & J. HENCH, *THE PRESS AND THE AMERICAN REVOLUTION* 59 (1980); Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 COLUM. L. REV. 91 (1984); Smith, *A Reappraisal of Legislative Privilege and American Colonial Journalism*, 61 JOURNALISM Q. 97 (1984).

27 See, e.g., Anderson, *supra* note 26, at 472, 486, 505, 508.

28 See the Bibliography in EMERGENCE, *supra* note 3, at 351-372, which includes unpublished student papers and doctoral dissertations from 1963-1977, at 371-372.

work and that it is therefore not a revised second edition.²⁹ This proposition is difficult to believe. The change in title is misleading, since the organization³⁰ and most of the sources³¹ of the two works are quite similar. Even the conclusion, while less absolute, remains essentially the same.³² The concluding sentences in the later work replace the references to Blackstone and Brandeis with "What . . . [the Framers] said is far more important than what they meant. It is enough that they gave constitutional recognition to the principle of freedom of speech and press in unqualified and undefined terms."³³

It is not this softened conclusion, however, which should hearten the expansive civil libertarians. It is that this later work, while not denigrating the pioneering research contribution of the earlier work, destroys the credibility of its conclusions. Remarkably, it is Levy who discredits himself. This happens in two ways. First of all, in Levy's startling revelation contained in the Preface to *Emergence of a Free Press*, he claims: "I wrote *Legacy of Suppression* to spite [Robert M.] Hutchins and The Fund [for the Republic, Inc.] and as a result of a chance opportunity to explore the subject."³⁴ This description of the author's state of mind at the time he wrote *Legacy of Suppression* does support his claim that his "conclusions" were antithetical to his personal predilections.³⁵ What is now suspect, however, is his motivation. The Preface raises serious questions regarding Levy's ability to fairly evaluate the original historical data. The fact that the later work continues to press the same conclusions in the face of this confession only increases the doubt as to the impartiality of Levy's earlier findings. The reader must now question the relevance of this confession to the purpose of both the first and second book.

The second discrediting factor to the author's new book is the strident and, at times violent, tone which Levy uses when he attempts to deny the validity of any, even mild, differences of opinion.³⁶ Since some of the opinions which he attacks are in unpublished manuscripts,³⁷ it is hard to understand why he even mentions them. Levy's critics might have been guilty of misinterpreting sources,³⁸ but the vehemence of his rebuttals causes the reader to think that the author "doth protest too

29 The change in title means, however, that both works will be freestanding in library catalogs and readers of LEGACY will not necessarily be informed of the existence of EMERGENCE.

30 The tables of contents are very similar, some of the chapter headings are identical (e.g. Chapters I and II), and while EMERGENCE has ten chapters against LEGACY's six, the six chapter headings of LEGACY are repeated in EMERGENCE and in the same order.

31 See the bibliographies in EMERGENCE, *supra* note 3, at 351-372, and LEGACY, *supra* note 8, at 321-339; only the addition of lists of newspapers, unpublished student papers and a few new entries distinguishes EMERGENCE from LEGACY.

32 "I am still convinced, however, that the revolutionary generation did not seek to wipe out the core idea of seditious libel", EMERGENCE, *supra* note 3, at xii.

33 *Id.* at 349.

34 *Id.* at ix.

35 See *supra* note 17.

36 See, e.g., EMERGENCE, *supra* note 3, at 38 n.79 ("putative reply"); at 83 ("Another historian . . . after looking at only a dozen cases, which he counted as twenty and after *botching* his presentation"); *id.* at 87 n.70 ("who *perverts* what I said . . . yet freely borrows *without giving credit*"); *id.* at 259 n.106 ("Apart from the fact that his *ipse dixit* proves nothing, he was *wrong in fact.*") (Emphases added).

37 See, e.g., *id.* at 65 n.8 ("purports to be a repudiation of Legacy").

38 "Wilson was not being hypothetical as some recent scholars have argued." *Id.* at 240-241.

much."³⁹ It is as if Levy is saying that only Levy can be right. But since Levy, in the Preface to *Emergence of a Free Press*, states that "I was wrong,"⁴⁰ his unnecessary attempts to discredit others only damages his own credibility. Thus, constitutional scholars are left in the perhaps fortunate position of no longer being able to rely on Levy's conclusion concerning the meaning of the speech and press clause of the Constitution as *the* definitive conclusion. Levy's conclusion has become only one among many.

Levy has made a most important contribution to our understanding of American history and the background of the first amendment. He has forced us to focus on the happenings and the documents of the period, not on some imaginary picture of pre-revolutionary times.⁴¹ His work should, therefore, not be disregarded and forgotten. But we will probably never know the exact intent of the Framers when they declared that "Congress shall make no law abridging freedom of speech or of the press." Levy contends that he has proved that the Framers narrowly construed these words. Yet others believe that the Framers intended them to be expansively construed.⁴² Still others believe that the Framers had no intent at all, and therefore the words have meaning only as courts give it to them.⁴³ The fact that Levy's own statements have undermined his firm position is the great contribution of his second work. Textbook authors, therefore, should not cite his conclusions as definitive. Scholars no longer need to attempt to refute his proposition that we can find the entire meaning of the first amendment in Blackstone. That has neither been proven nor disproven. The background of the words remains ambiguous, although the words themselves are clear. We should, therefore, give the meaning to the words of the first amendment that is appropriate for the current times.

39 W. Shakespeare, *Hamlet*, Act III, scene 2, line 233.

40 EMERGENCE, *supra* note 3 at x.

41 *Id.* at xii.

42 T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* (1970).

43 Bevier, *The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 307 (1978).

