BOOK REVIEWS

CONGRESSIONAL POWER AND FREE SPEECH: LEVY'S *LEGACY* REVISITED

EMERGENCE OF A FREE PRESS. By Leonard W. Levy.[1] New York: Oxford University Press. 1985. Pp. xxii, 383. $29.95.

Reviewed by William W. Van Alstyne[2]

I. FIRST IMPRESSIONS

In the preface to *Emergence of a Free Press*, Leonard Levy tells a wonderful story of the book's original appearance twenty-six years ago, in 1960.[3] In 1957 the Fund for the Republic under Robert Hutchins commissioned Levy to write a memorandum on the original meaning of the first amendment's clauses. The twenty-five pages he produced on the free speech and free press clauses turned out surprisingly, to Levy as well as to the Fund. The conclusions did not vindicate the liberal optimism of the project's sponsors that these clauses were a triumph of early libertarianism. Accordingly, Levy reports, Hutchins "made it clear to me that the pamphlet [which the Fund meant to publish] would not include that section of the work" (p. viii).

The Fund's effective censorship of Levy's work was unseemly and unwise. It misjudged the character of the man; it so angered Levy as to drive him to an academic's revenge. From what might have been a mere "*but see*" minor pamphlet citation against Zechariah Chafee's famous *Free Speech in the United States*, Levy's memorandum eventually became a tremendously controversial counterweight to Chafee's work. Enormously expanded and deepened in its research, the unprepossessing memorandum became *Legacy of Suppression: Freedom of Speech and Press in Early American History*. Its principal conclusion, pugnaciously explicit in its title, was devastating.[4]

Leonard Levy schooled the Fund for the Republic in the poet's claim that "Truth, crushed to earth, shall rise again."[5] Levy's fallen

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[3] It then appeared as L. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY (1960).

[4] Chafee's principal conclusion was that the drafters and ratifiers of the first amendment intended "to wipe out the common law of sedition, and make further prosecutions for criticism of the government, without any incitement to law-breaking, forever impossible in the United States of America." Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 21 (1941). Levy's principal conclusion was virtually the opposite. *See* L. LEVY, *supra* note 3, at 247–48.

[5] William Cullen Bryant, *The Battle-field* (1837), *in* THE POETICAL WORKS OF WILLIAM CULLEN BRYANT 181, 182 (1916).

bird, his original memorandum, had become a phoenix — a firebird of skeptical scholarship reborn in the ashes of foundational censorship. It was a deeply impressive work. Its principal thesis, delivered by a reluctant but resolute scholar, was that the first amendment did not renounce, but rather received, the full common law of seditious libel.[6]

A quarter of a century has elapsed since *Legacy of Suppression* first appeared. Its author thought it needed revision, and sixty percent of *Emergence of a Free Press* is apparently new material (p. vii). In the preface to *Emergence*, Levy explains that his earlier work may have been somewhat overstated, partly from unconscious "indignation at Hutchins and the Fund for attempting to suppress my work" (p. ix). Further, Professor Levy makes clear that some of the material provided by scholars who were disturbed by his earlier work has contributed to some rethinking on his own part.[7] *Emergence*, then, is *Legacy* revised — the mature scholar's more reflective ruminations on the origins of the free speech and free press clauses.

How different is *Emergence* from *Legacy*? Not significantly in terms of substantive conclusions, despite the welcome addition of new material.[8] Nor does Professor Levy say otherwise.[9] Indeed, the single most critical conclusion that made *Legacy* dramatic and controversial in 1960 is verbatim the same:

> If . . . a choice must be made between two propositions, first, that the [freedom of speech and press] clause substantially embodied the

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[6] Since the preparation of this book review, Professor Levy has published an article severely criticizing another author for a similar description of *Legacy*. *See* Levy, *The* Legacy *Reexamined*, 37 STAN. L. REV. 767, 770 n.11 (1985). I am concerned lest Professor Levy also think he has been misconstrued here, despite efforts in the course of this review to supply the reader with quotations and references. Given the circumstances, I think it of more than ordinary importance to encourage the reader to read the work under review rather than to trust substitute descriptions.

[7] *Legacy* provoked a large number of reviews, many of which Levy cites in his preface to *Emergence* (p. xiv n.11). For two of the most recent and critical reviews, see Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455 (1983); Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 COLUM. L. REV. 91 (1984). For Levy's response to Anderson, see Levy, *On the Origins of the Free Press Clause*, 32 UCLA L. REV. 177 (1984). For his response to Mayton, see Levy, *supra* note 6.

In addition to the reviews, a number of scholarly books exploring particular aspects of speech and press history have appeared since *Legacy*, and Levy acknowledges these works in *Emergence*. Among the best of these books is E. HUDON, FREEDOM OF SPEECH AND PRESS IN AMERICA (1963). For a most helpful earlier work, see F. SIEBERT, FREEDOM OF THE PRESS IN ENGLAND 1476–1776 (1952).

[8] Although I had read *Legacy* three times, I read *Emergence* with little sense that it differed from *Legacy* in anything but the elaborate footnotes responding to reviews and criticisms of the original work. Only on going back over *Emergence* carefully could I see how sixty percent might be new. The figure is doubtless accurate, and I have no interest in suggesting otherwise. My point is that the main conclusions and general development are so similar to the original as to encourage the illusion that *Emergence* is a nearly identical work.

[9] "My principal thesis remains unchanged" (p. xii).

> Blackstonian definition and left the law of seditious libel in force, or second, that it repudiated Blackstone and superseded the common law, the evidence points strongly in support of the former proposition. (P. 281).

On this central point, Levy has expanded the new edition principally to restate the original material, to enlarge upon it, and to defend it against its critics. The author has essentially not budged on the principal question.

The primary change (which figures prominently in the retitling of the book) is a factual concession, which has little effect on Levy's main thesis. Levy acknowledges that, given his description of the prevailing state of the law, the original work may have implied that the early press in America was an intimidated and cowed collection of ineffective newspapers. He is now at pains to correct that misimpression. Despite the received law of seditious libel, Levy notes, a robust and vituperative press thrived. Further research into the early history of newspapers in America confirmed that prosecutions of the press, although not infrequent, scarcely affected the onrush of derogatory newsprint. Indeed, he acknowledges, a fractious American press developed as an influential fourth estate much earlier than one might have supposed — but it did so within the context of "a system characterized by legal fetters and the absence of a theory of political expression that justified those press practices" (p. xvii). Early press practices, Levy insists, thus had no immediate impact upon the substantive law. Rather, it is Levy's point that such practices left the law substantially unaffected. Exactly as John Stuart Mill observed of English law in 1858, the early American law remained servile to the rationale of state interest and thus remained available to governmental officials whenever the right occasion might demand.[10]

The second notable modification from the original edition concerns the influence of the strict Blackstonian view of the free press on American common law practice and the first amendment. Blackstone's belief, one will recall, was that "the freedom of the press" consisted solely in exemption from licensing and some other forms of prior restraint. This view offered the press no shelter from subsequent criminal accountability for "mischievous" or "offensive" utterances or

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[10] In the first paragraph of the chapter entitled "Of the Liberty of Thought and Discussion" in *On Liberty*, Mill wrote:

> Though the law of England, on the subject of the press, is as servile to this day as it was in the time of the Tudors, there is little danger of its being actually put in force against political discussion, except during some temporary panic, when fear of insurrection drives ministers and judges from their propriety; and, speaking generally, it is not, in constitutional countries, to be apprehended, that the government, whether completely responsible to the people or not, will often attempt to control the expression of opinion, except when in doing so it makes itself the organ of the general intolerance of the public.

J. MILL, ON LIBERTY 17 (D. Spitz ed. 1975) (1st ed. London 1859) (footnotes omitted).

for statements "of a pernicious tendency," distressing to "government and religion, the only solid foundations of civil liberty."[11] Under this view, Parliament's decision of 1694 not to renew the infamous press licensing regime against which John Milton had inveighed a half-century earlier[12] marked the sole, allegedly ample boundary of protection for a free press. Consistent with that position, four varieties of criminal libel were fully punishable in the common law courts: blasphemous, obscene, private, and seditious libel. In *Emergence*, Levy retreats somewhat from the stringency of his previous judgment that the framers adopted the Blackstonian view whole. Although he continues to maintain that the framers assumed that seditious libel — the most threatening of the common law forms — would survive the first amendment, he now suggests that some of the worst common law features of this kind of libel had already been partly discredited (pp. ix–xi).

At common law, prosecutions for seditious libel initially inhered in virtually any act that might estrange the people from their government — including accusations of governmental wrongdoing or corruption. Most important, the truth of the statements critical of the government was no defense. Indeed, at one point the Star Chamber went so far as to suggest that truth might be an aggravating factor of the crime, because a true statement regarding governmental misconduct might well pose more of a danger than an easily rebuttable false one. Additionally, even after the inquisitorial Star Chamber was abolished in 1642 and the common law courts took up an expanded jurisdiction over seditious libel prosecutions,[13] the role of the jury in those courts was extremely limited. For example, the presiding judge, and not the jury, determined whether the words used by the defendant possessed a seditious tendency and whether they were published with malice.[14] The jury merely found whether the defendant was a publisher of the words and whether the words expressed or implied such innuendo as the prosecutor alleged would make them seditious as a matter of law. With the role of the jury so slight, and that of the crown-favoring judges so great, publishers were at enormous risk.

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[11] 4 W. BLACKSTONE, COMMENTARIES *151–52.

[12] *See* J. MILTON, AREOPAGITICA 58 (R. Jeeb ed. 1918) (1st ed. London 1644) ("[T]hough all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength."). Milton's views are critically reviewed in *Emergence* at pp. 93–97. Levy notes that Milton's essential thought had already been put forward thirty years earlier by Leonard Busher, an obscure Baptist layman (p. 101).

[13] For a recent article suggesting that the demise of licensing led to expansive adaptations of seditious libel in the English courts, see Hamburger, *The Development of the Law of Seditious Libel and the Control of the Press*, 37 STAN. L. REV. 661, 714–25 (1985).

[14] The requirement of "malice," moreover, was in effect no requirement at all because judges routinely inferred malice from the mere nature of the defendant's statements.

In *Emergence*, however, Levy notes that by the time Congress considered the Bill of Rights in 1789, both legal practice and legal theory in the United States had undergone some degree of change. Juries were permitted a larger role and, indeed, jury nullification practices sometimes saved publishers who doubtless would have been convicted in a bench trial. Some jurisdictions also acknowledged the defense of truth. Accordingly, Levy notes that the freedom of speech and of the press defined by the first amendment may have absorbed these new limitations upon the law of seditious libel.[15] Indeed, the major congressional action bearing on freedom of the press in the early years of the republic, the Sedition Act of 1798, was quite in accord with these developments.[16]

But in this slightly softened form — that is, softened from the original position in *Legacy* — Levy still concludes that the first amendment was adopted to co-exist with the common law legacy of seditious libel and did not represent its repudiation. Thus, although much more elaborate than *Legacy*, *Emergence* fundamentally reaffirms that work's skeptical first amendment thesis. At least it appears to do so when judged by the author's own expressed assessment of the times.[17]

Yet it is not clear to me that the whole of the book really supports this thesis. Some of the parts of *Emergence* are not altogether well accounted for in what we have thus far reviewed. Indeed, the sum of the work's parts is in many ways extremely different; it frankly does not support the existence of a wide-ranging power in Congress to regulate speech and the press. To the contrary, it suggests a decision on the part of the framers that Congress would have nothing to say in determining the latitude of speech or press in the United States. Thus, in significant respects *Emergence* provides a thesis set against itself — a thesis at odds with a weak view of the first amendment. To see how this may be so, we need to begin again.

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[15] Levy terms these limitations "Zengerian principles" (p. 219), a nice turn of phrase that pays tribute to the impact of the jury's decision to acquit Peter Zenger in 1735, despite apparently incontrovertible evidence and a straightforward instruction from the judge concerning the applicable law of seditious libel. The case is well presented at pp. 37–44.

It should be noted, however, that Professor Levy retains some doubts about whether the first amendment incorporated these changes in the common law of seditious libel (pp. 274–77). The reason for his uncertainty lies in the words of the first amendment; the amendment applies to "Congress," but not necessarily to judge-made federal common law.

[16] Levy suggests that the Sedition Act "incorporated everything that the libertarians had demanded: a requirement that criminal intent be shown; the power of the jury to decide whether the accused's statement was libelous as a matter of law as well as of fact; and truth as a defense, an innovation not accepted in England until 1843" (p. 297).

[17] "The thought and experience of a lifetime, indeed the taught traditions of law and politics extending back many generations, supplied an *a priori* belief that freedom of political discourse, however broadly conceived, stopped short of seditious libel" (p. 269).

II. Second Impressions

Laying Leonard Levy's book aside for a moment, I suppose it is true that, roughly speaking, there are two broad categories of theses about the relationship between the law of seditious libel and the framing of the first amendment. Within the first category are claims that the two subjects are directly connected — that the law of seditious libel figured prominently in the framing of the first amendment and that one of the amendment's principal objects was to settle whether seditious libel could be used as an instrument of national power. Within the second category, no such resolving claim is made. Rather, the claim is that the two subjects are only indirectly related, although related nonetheless. Under the latter supposition, the framers of the first amendment were not principally concerned with seditious libel, yet their determinations as set forth in the amendment have certain logical consequences with respect to a large number of subjects, including (but not limited to) seditious libel.

Based on first impressions, Leonard Levy's book might seem to support a thesis that would fall in the first category. Indeed, that is surely why *Legacy* initially provoked such a large number of deeply critical reviews — reviews dismayed by the thought that the crabbed Blackstonian view of a free press was congenial to the framers and was therefore preserved among the powers of Congress in the framing of the first amendment.

In the beginning of *Emergence*, Levy takes care to state that this is *not* in fact his contention. He sets before himself a much more limited task: the critical reexamination of the assertive affirmative thesis that "in both law and history . . . it was the intent of the American Revolution or the Framers of the First Amendment to abolish the common law of seditious libel" (p. xii). That thesis is, of course, a "category one" kind of thesis — it asserts (or assumes) that the subject of seditious libel figured prominently in the framing of the first amendment and attempts to establish that the object of the amendment was to repudiate the common law legacy. In *Emergence*, Levy makes an extremely solid case that *this* thesis claims too much — that the "category one" libertarian claim is subject "to the Scottish verdict: not proven" (p. 269).

In the course of discharging what was at first a very limited burden, however, Levy seems to go far toward adopting the opposite view — that the framers of the first amendment intended to concede to Congress the power to enact legislation directed against the forms of speech included within the common law definition of seditious libel. At the end of *Emergence*, Levy — whose personal preference is for a first amendment worthy of some distinction — makes a suggestion that he thinks will save the amendment, but that itself implies the amendment meant to favor Congress. "What [the framers] said," Levy

writes, "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" (p. 349). This advice is in fact very heavy, for it plainly asserts that there is a disparity between what the framers meant and what they said. Here, then, in the ultimate and penultimate sentences of his work, Levy tends to confirm his critics' description of what Leonard Levy thinks history *really* shows: that the relationship between seditious libel and the first amendment is indeed a "category one" kind of relationship, but that the framers of our first amendment meant to grant (rather than to deny) Congress a broad power to enact repressive legislation.

Perhaps that negative thesis is correct, but taken as an original thesis, with its own burden to carry, there is much reason to doubt it.[18] In fact, little evidence sustains it as an affirmative brief, and a great deal supports the view that it is false. What is more, Professor Levy himself furnishes much of the best evidence that it is false. It is for this reason that his book is more complicated than it first appears to be and, indeed, is a book that in some measure undermines its own thesis.

Leaning strongly against any claim of substantial power in Congress over the press are, first of all, the disclaimers of leading Federalists. As Levy himself observes, even such noted Federalists as James Wilson and Alexander Hamilton generally denied the very possibility of national legislation regulating the press. The new na-

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[18] There is good reason to be concerned with this question, because Professor Levy's suggestion for rescuing the first amendment from its history by relying upon what the framers said (as distinct from what they meant) may not be sustainable.

Like a number of other modern writers, Levy presumes to describe the first amendment as an amendment that grants constitutional recognition to "*the* principle" of free speech. Like some other writers also, he says the framers "gave constitutional recognition to the principle of free speech . . . in *unqualified* . . . terms" (p. 349) (emphasis added). Looking solely to what the framers said (and laying aside all evidence of what they may have meant), the first amendment provides no firm support for either of these suggestions. The first suggestion begs its own question respecting what principle the framers recognized in the amendment. The second suggestion must struggle against the text of the first amendment itself.

What the framers said is merely that "Congress shall make no law . . . abridging the freedom of speech or of the press." Who says these words "recognize" a "principle"? What principle is it? The amendment does not speak to the issue at all. It is utterly uninstructive on that point. The assertion may be correct or it may be incorrect; nothing on the face of the amendment makes the one possibility more likely than the other. The appeal to "the principle" thus "recognized" is entirely circular.

The second assertion — that the first amendment speaks in "unqualified" terms — is most puzzling. Such freedom of speech and of the press as may be protected is not described by the first amendment in unqualified terms; rather it is described in circumscribing terms. "[T]he" freedom of speech (whatever that may be) is protected, nothing more. The locution of the first amendment is thus not the locution of unqualified terms. Rather, the amendment seems to say that a certain freedom of speech ("the" freedom) is protected and that in regard to all else, Congress may do what it will.

tional government, Wilson declared, would have "'no power whatsoever'" concerning the press (p. 270).[19] And "'why declare that things shall not be done,'" Hamilton wrote, "'which there is no power to do?'" (p. 270).[20] Indeed, Levy notes that "[o]nly *after* the new government had gone into operation and *after* the ratification of the First Amendment did many of the Framers and their associates begin to speak and act as if freedom of speech and press could be prosecuted in federal courts and be abridged by Congress as well" (p. 274) (emphasis added). The material scarcely supports the view that the framers intended to give Congress wide-ranging power to adopt the kind of legislation that the Sedition Act of 1798 represents.

As Levy notes, it was only the Sedition Act of 1798 that stimulated self-serving Federalist claims of congressional power over the press. He is surely correct in noting that the factional politics of the Act make it an "unreliable" (p. 282) and "untrustworthy" (p. 279) source of first amendment insight. And insofar as its debates do reveal anything about the intention of the framers, it is noteworthy that "[e]very Democratic-Republican with the possible exception of James Sullivan believed it to be unconstitutional" (p. 280). Included within this substantial group of opponents was James Madison, the principal author of the first amendment. In Levy's own opinion, Madison was "the most influential of all the Framers" and was "possibly the one person of outstanding distinction whose record [was] clean and consistent" (p. 281). What, then, was Madison's view? As Levy reports it, Madison's view was that the first amendment flatly forbade the enactment of a national sedition act. Indeed, "[t]he amendment, Madison declared, was intended to have the broadest construction on freedom of the press as well as religion. It 'meant a positive denial to Congress of any power whatever on the subject'" (p. 318).

What does this material prove? Does it prove that in fact there was a robust libertarian repugnance to everything even mildly akin to seditious libel (and thus that the Chafee thesis may be correct after all)? In context, the material does not prove this thesis because it says nothing about the extent to which the several *states* might enact or otherwise proceed in accordance with seditious libel law. The evidence does indicate, however, a deep distrust of Congress and a

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[19] Wilson, Levy notes, attempted at other times to rely on an extraconstitutional body of continuing federal criminal common law. As to that claim, however, Levy himself concludes that "the evidence is contradictory" (p. 275), and the Supreme Court rejected the general notion the first time it came up on review, *see* United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812).

[20] Further support can be found in James Madison's account of the constitutional convention. On Friday, Sept. 14, 1787, in convention, "Mr. Pinkney & Mr. Gerry, moved to insert a declaration 'that the liberty of the Press should be inviolably observed.' Mr. Sherman. It is unnecessary. The power of Congress does not extend to the Press." J. MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 640 (A. Koch ed. 1966).

determination that the first amendment would prevent any significant congressional regulation of speech and the press. The evidence tends also to make credible the claim that the objections to the Sedition Act of 1798 were not feigned or contrived, but genuine and profound. None of this material, on the other hand, provides any support whatever for the view that there was an acknowledged design to carry into the original Constitution, much less into the first amendment, a significant congressional power over the press.

What in fact the evidence suggests most strongly is that the relationship between seditious libel and the first amendment was not a "category one" kind of relationship at all. At the time of the debate about the first amendment, the principal issue to be settled was quite different. It was the federalism issue: not *what* speech was worth protecting, but rather *who*, as between Congress and the state governments, would have definitive power over that subject. It is because of the way in which that question was settled that the first amendment debate was such a desultory affair. If it were agreed (as it was agreed) that the states would have virtually exclusive power over the entire subject, it is less to be wondered that the scope of "the freedom" itself went substantially unattended. No clash of libertarian and antilibertarian views took place, because the framers' sole concern was to secure the subject from Congress.

There was no speech or press crisis in 1787 or 1789 or 1791, when the first amendment was born. And as the "who" question appeared to be so congenially resolved, it is not odd that the answer to the "what" question was virtually subsumed in the answer to the "who" question: *the* freedom of the press would be whatever decentralized centers of power (the state governments) felt appropriate to allow, no matter what Congress might think, for it was Congress and its power, no one else's, that the amendment was designed to forestall. The scope of the first amendment must therefore be worked out in light of *that* understanding, rather than on the basis of some other view.

Professor Levy acknowledges the importance of the federalism issue, but then takes a wrong turn in suggesting how it plays out. After insisting that "we should recognize that the Framers cared less about giving unqualified immunity to all speech than they cared for states' rights" (p. 268),[21] Levy proceeds at once to suggest that the scope of speech the states generally valued under their *own* laws would exhaust the scope of speech they would likewise wish to keep from Congress. Thus, immediately following his statement on the federalism issue, he tends to dismiss that issue's significance in the following remark: "The big question persists, however; even had Congress

[21] It should be noted again, however, that the two did not need to be mutually exclusive; the framers were able to provide both for full states' rights and for unqualified immunity from Congress.

passed, and the states ratified, an amendment imposing upon the states the same prohibition laid by the First Amendment upon the national government, what did the Framers understand by freedom of speech and freedom of press?" (p. 268). But this inquiry serves only to muddle the issue by failing to recognize the distinction the framers drew between the powers of the states and the powers of Congress.

The question is not (as Levy implies) what the framers would have understood by "freedom of speech and press" had they imposed "the same" restrictions on the states as they did impose on Congress. The framers were neither interested nor willing to limit the states' police powers by doing anything of the sort. Neither is the question how the framers would have defined freedom of speech and freedom of the press for the purpose of framing a separate amendment addressed only to the states, and not at all to Congress. Rather, the question is what they presumably meant to reserve for the states by denying to Congress a preemptive power to regulate differently, and that, one may suppose, would be virtually the entire field of speech, rather than simply some small, uncontroversial part of it.

The consequence of this view, which Professor Levy's evidence strongly supports, is that it does not require evidence of some prevailing eighteenth-century libertarianism for a fair-minded historian to regard the first amendment as nonetheless a massive and deliberate denial of power in Congress over speech and press. The question that Leonard Levy states was "the big question" — namely, how much speech and press actually to protect — was deliberately left to each state largely to settle for itself without any preemptive authority in Congress to impose its own will. The foremost concern of the first amendment, indeed its sole concern, was to keep such determinations from Congress.

In keeping with this understanding, it is conceivable that a few marginal measures might nonetheless be seen as sufferable for Congress to impose — for example, laws punishing acts of perjury in federal proceedings or laws forbidding false advertising in interstate trade — but assuredly nothing significantly beyond measures of such relatively trivial application or scope as these would represent. Anything more would seem entirely inconsistent with the basic thrust of the amendment, exactly as Madison had maintained.

Accordingly, the federalism auspices of the first amendment provided their own foundation for the "checking function"[22] view of the amendment, notwithstanding the outrage of the Sedition Act of 1798

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[22] *Cf.* Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RESEARCH J. 521 (discussing the function of the first amendment in checking the abuse of official power); Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191 (same).

and its administration (principally by Federalist judges). Nor does this view require any romanticized interpretation of the first amendment, but merely an interpretation by persons possessing an intelligent skepticism of centralized government. Such persons we know were abundant in 1787, 1789, and 1791, exactly as Levy's scholarship well concedes. May we not, then, treat the first amendment as the consequential by-product of *their* successful campaign and read it appropriately as *they* proposed? I think a fair case can be made that we may — as indeed, somewhat despite himself, Leonard Levy has shown.

III. Final Impressions

The subject to which Professor Levy has devoted himself has been one of enormous contention from 1798 (the date of the Sedition Act) to the present, and Levy's painstaking review is among the best that can be found. Overall, it is exceptionally clear-eyed, comprehensive, and perceptive. Indeed, in my own view it is the single best critical history of the first amendment that has been written. Until one has grappled with what Levy has to say on this subject, one can scarcely claim to know the subject at all. *Emergence of a Free Press* is indispensable reading for the serious student of free speech in America.

Of course, one might assert that books of this sort do not much matter except as a source of cultural interest — that the first amendment is what the judges say it is and that they are not bound (indeed, they seem scarcely inclined) to pay history any mind. Even if this assertion were wholly true, it would be no reason to forgo the experience of this book, which speaks so well to its subject and merits one's interest entirely for its own sake. More important, however, it is gross error to suppose that history does not matter. Indeed, it matters greatly.

Even granting the flexibility of constitutional construction, it is surely true that judges are human and will generally prefer to think that what they say is not a falsification of the document they are called upon to apply, but is at least in reasonably close keeping with its spirit. On this basis alone, history is scarcely avoidable. Unless one takes an interest in what the first amendment was meant to do, at least in a general way, one cannot know whether the interpretation one proposes to place upon the amendment comes reasonably close to the spirit of the thing. And once one does turn even a little in that direction — that is, in the direction of *this* amendment, in *this* Constitution — it is hard to lay aside one's inquiry until one feels one has indeed caught at least the essence of the thing itself.[23]

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[23] For further discussion, see Van Alstyne, *Interpreting* This *Constitution: The Unhelpful Contribution of Special Theories of Judicial Review*, 35 U. Fla. L. Rev. 209 (1983).

On the basis of *Emergence*, I think the essence of the first amendment was a resolve to cut Congress off from claims it might otherwise have made to regulate speech and press in America. The reason for this resolve may have had more to do with states' rights concerns than with libertarian concerns as such, but the end point was nonetheless the same. If this conclusion is true, then the logical consequence is that the amendment should probably be applied even more tightly by the courts than it traditionally has been, rather than more loosely as some judges are now inclined to do. The history Levy sets out thus does suggest an appropriate modern-day interpretation of the first amendment. His work thereby enriches our understanding not only of what we have been, but also of what we may yet become.