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## Book Review: Constitutional Opinions: Aspects of the Bill of Rights. by Leonard W. Levy.

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the presence of competing group interests.”<sup>10</sup>

What this book could and should have been is a serious examination of the role played by the various conservative organizations currently part of today's legal scene. Are they simply covers for business organizations? Do some of them simply echo the positions taken by law enforcement officials? Are there groups that truly represent individuals who otherwise have no representation, the criterion that those of us in the liberal public interest movement believe describes the proper role of the public interest lawyer? Who exactly are these conservative groups, what are they doing, how effective are they, and what would be lost to the system if not another penny went to support them? Where do judicial activism and restraint fit into long-term conservative strategy? I do not know the answers to many of these questions, but I do know that I cannot find them in *Conservatives in Court*.

**CONSTITUTIONAL OPINIONS: ASPECTS OF THE BILL OF RIGHTS.** By Leonard W. Levy.<sup>1</sup> Oxford University Press. 1986. Pp. 272. \$29.95.

*Donald O. Dewey*<sup>2</sup>

When a historian's second volume of essays is published, you know he is both prolific and influential. If that historian is Leonard Levy, you also know the essays will be trenchant, controversial, and often witty.

This selection of twelve essays concentrates primarily on first and fifth amendment freedoms—especially those concerning speech, press and religion and the freedom against compulsory self-incrimination. Most of the essays come from the 1980's, though one was printed as early as 1961 and another in 1962. Two have never

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10. In several places Epstein tries to draw a distinction between conservative groups and their liberal counterparts by statements, such as the following, that set up contrasts that are meaningless to me: "Its founders believed that the [Pacific Legal Foundation] would handle legal issues rather than advocate specific causes arising in California and dealing with the environment, in particular" (p. 121). *See also* (or perhaps *compare*) at 122-23: the PLF "has not attempted to bring test cases to court. Rather, PLF attorneys 'have been involved in systematic [litigation] campaigns . . . from the other side' . . . by putting liberal groups on the defensive." (The example cited is an amicus brief supporting the Navy.) *See also* discussion on page 50 contrasting the strategy of the NAACP Legal Defense and Education Fund and the Right to Work Legal Defense Fund and the discussions of various strategies on page 132.

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before been printed.<sup>3</sup>

The essays which are not already available elsewhere merit first consideration in a review. "Constitutional History, 1776-1789" is a fairly straightforward account, as an encyclopedia entry probably should be, of the Constitution-building era. It emphasizes nationalism and centralism in 1776, in the Virginia Plan and even in the New Jersey Plan. While many stress the compromises of the federal convention, Levy is more impressed by an overwhelming consensus. Such crucial provisions as the taxing, necessary and proper, and supremacy clauses were, for instance, accepted unanimously by the states. Considering our level of certainty regarding events in the federal convention, he might better have added the words "so far as can be determined from records of the convention." Levy rejects the economic emphasis of Charles A. Beard and his followers, and finds the Constitution extraordinarily democratic for its time.<sup>4</sup>

Levy jumps on Chief Justice Burger with both feet—and his spikes high—in the other essay that has not been published previously. The first sentence of "Subversion of *Miranda*" describes Burger's majority opinion in *Harris v. New York*<sup>5</sup> as "one of the most scandalous, extraordinary, and inexplicable in the history of the Court." Even that extraordinary sentence falls short of setting the tone of anger that is to follow. Phrases such as "shocking distortion," "verbal trickery," "flagrant misuse," "his own lies," "odious doctrine," "elephantine misrepresentations and mangling of precedents," and "incompetence" abound in his description of *Harris*. The article can best be summed up in these angry lines: "'Monstrous' was the right word to describe the fundamentally immoral opinion by Burger. It was based on deceit and distortion."

Since Chief Justice Burger is obviously not one of Levy's heroes, it is no surprise that Burger is likewise the "heavy" of "Judicial Activism and Strict Construction," an essay which contrasts the Warren and Burger Courts' handling of criminal justice opinions. Levy asserts that the Nixon appointees have engaged in stump speeches that have "elevated the lapse and the gaffe to familiar events on decision day." Playing with a quote from the eminently quotable Oliver Wendell Holmes, Levy asserts that the Burger ma-

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3. One of these will be in the bicentennial *Encyclopedia of the American Constitution* which he is editing and which is scheduled for publication soon.

4. One hopes that before the encyclopedia goes to press he will have corrected the impression he gives that it was "unanimous consent for amendments" of the Articles of Confederation which made it possible for Maryland to hold out for a national domain. A careful rereading demonstrates that Levy was not factually incorrect, but hopefully he will revise the sentence so that even the less careful reader, as I evidently was the first two times, will not be misled.

5. 401 U.S. 222 (1971).

jority are "no damn good as judges." He scoffs at the "foolish or deceptive" belief that Nixon appointed strict interpreters of the Constitution. That they are conservative activists is taken for granted now, but it was not so obvious in 1974 when Levy first published this article. Indeed, Levy regards strict constructionism as a "faintly ridiculous usage" in light of the imprecision of the Constitution itself.

Earl Warren, on the other hand, was an activist in order to transmit a "better Bill of Rights." Levy is not convinced that decisions of the Warren Court have had significant impact on the nation's crime wave, despite frequent attacks on the Court for the procedural safeguards which it has provided to suspects. Nor could Nixon have prevented a crime wave even if he had written all the decisions himself.

"The Bill of Rights," from a provocative 1984 encyclopedia entry, manages to make everyone who had argued for—or against—a Bill of Rights look misguided and somewhat dishonorable. This remark sums up the tone of political expediency accompanying the struggle for amendments: "Our precious Bill of Rights . . . resulted from the reluctant necessity of certain Federalists to capitalize on a cause that had been originated, in vain, by the Anti-Federalists for ulterior purposes. The party that had first opposed the Bill of Rights inadvertently wound up with the responsibility for its framing and ratification, while the party that had at first professedly wanted it discovered too late that it not only was embarrassing but disastrous for those ulterior purposes."

He is especially hard on the specious arguments used by the Federalists to justify their failure to provide the protections which were demanded. The perennial argument that to protect some rights would imply that all rights that were omitted would be thereby sacrificed is rejected out-of-hand. If this point were valid, then the framers themselves had already committed that atrocity by including the *ex post facto*, attainder and treason clauses within the Constitution itself. Their argument that a Bill of Rights was "un-American" or applicable only to monarchies was, to Levy, a blunder and "botching" of constitutional theory. Yet elsewhere he indicates that the record of state governments had already demonstrated the inadequacies of bills of rights as a protection of essential freedoms. He highlights the inadequacies of the highly-touted Virginia Declaration of Rights, which we so often regard as the blueprint for the United States Bill of Rights.

Levy attempts to distinguish between natural rights and "rights modified by society," the latter being "means for the protec-

tion of natural rights.” It must be said, however, that the distinction fades away during his lengthy list of borrowings from the various state constitutions.

“Freedom of Speech in Seventeenth-Century Thought,” first published a quarter-century ago, highlights one of Levy’s recurrent themes: freedom of expression was grossly limited both in Europe and America prior to the first amendment. Under the doctrine of seditious libel the state could and did punish its critics. Locke, Milton and Spinoza, for example, never questioned the state’s ability to put down seditious libel.

“Liberty and the First Amendment, 1790-1800” welcomes Republican reaction to the Sedition Act of 1798 as a “new promontory of libertarian thought jutting out of a stagnant Blackstonian sea.” Republicans argued then—though not always later after the “good guys” had prevailed in the election of 1800—for an extensive freedom of the press. Until then freedom of the press had been limited to the prevention of prior suppression.

The (sometime) freedom of press is also the issue in “Did the Zenger Case Really Matter? Freedom of the Press in Colonial New York.” Discussions of the trial of John Peter Zenger have given a false impression that free speech applied even to unpopular views in eighteenth century America. On the contrary, Levy argues, Zenger was “tried by a jury and acquitted because he symbolized a popular cause.” Had the journal for which he was a lowly printer attacked the legislature rather than a despised royal governor, the outcome would have been quite different. The legislative manhandling of Alexander McDougall in the same state thirty-four years later justified Levy’s comment that “no cause was more honored by rhetorical declamation and dishonored in practice than that of freedom of expression during the revolutionary period.”

“Jefferson As a Civil Libertarian” is a reminder of the vigor with which Levy trampled on Thomas Jefferson’s reputation in his iconoclastic book, *Jefferson and Civil Liberties*.<sup>6</sup> Jefferson wrote so beautifully and inspiringly about liberty that, when his actions belied his writings, historians and other Americans wanted to look the other way and assume that there must be some mistake; as Levy put it, “his pen was mightier than his practice.” Jefferson was also a “thin-skinned, fierce political partisan,” who found it very difficult to admit that he ever erred. Where others cite with embarrassment Jeffersonian “lapses” such as the Josiah Philips attainder, the high-handed implementation of the Embargo, the heartless treatment of

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6. L. LEVY, *JEFFERSON AND CIVIL LIBERTIES: THE DARKER SIDE* (1963).

Aaron Burr, and his views of slavery, Levy does so with glee. Levy argues that "the notion of Jefferson's perfection as a libertarian must be relinquished if he is to be kept as a model of values to which we aspire as a nation. The only worthy Jefferson must also be finite." In Levy's grasp, Jefferson becomes infinitely finite!

He characterizes Jefferson as a great popularizer who brilliantly restated popular principles but who made no significant breakthrough in liberal thought. The one issue on which Levy finds Jefferson philosophically sound and consistent is that of religious freedom.

The argument of "History and Judicial History: The Case of the Fifth Amendment" is the "notorious fact" that "The Supreme Court has flunked history." The Court, as usual with lawyers, uses its facts for advocacy more than to seek historical truth. Levy argues that history has been misused by both sides on the issue of self-incrimination. He finds *Miranda v. Arizona*<sup>7</sup> "beyond all precedent, yet not beyond its historical spirit"; Miranda warnings (as distinct from the decision itself) were, however, "an invention of the Court, devoid of historical support." The warnings converted the right of counsel from a fighting right which offered no protection unless it was specifically invoked, to a "pampered" right. He argues that, despite the basic—and early—significance of the concept of self-incrimination, history does not "exalt the right against the claims of justice."

"The Original Meaning of the Establishment Clause" is obviously one of Levy's favorites, since this is its third appearance (at least) in a book of essays. He dredges up every conceivable historical source to demonstrate that Madison and his contemporaries intended to prevent an establishment of *religion* (just what the clause says) rather than merely to prevent the establishment by Congress of a single official church.

"John Lilburne and the Rights of Englishmen" is an exciting tale of the seventeenth century Leveller's success in intimidating courts to the point where the right against self-incrimination was established almost out of self-defense. "Quaker, Blasphemy and Toleration" is another largely biographical essay which vividly describes George Fox and James Naylor's unceasing conflicts with the British government.

Seven of the twelve essays are accompanied by extensive footnotes. The text would have profited from more careful proofread-

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7. 384 U.S. 436 (1966).

ing, but fortunately the errors are minor ones that do not confuse Levy's line of argument.

**NAZIS IN SKOKIE: FREEDOM, COMMUNITY, AND THE FIRST AMENDMENT.** By Donald Alexander Downs.<sup>1</sup> Notre Dame, Indiana: University of Notre Dame Press. 1985. Pp. xii, 227. \$20.00.

*John H. Garvey*<sup>2</sup>

There have only been two significant events in the life of the group libel doctrine: the 1952 decision in *Beauharnais v. Illinois* and the litigation arising out of the Nazis' attempt to march in Skokie, Illinois in 1977. We are now accustomed to think of *Beauharnais* as a derelict, cast off by the Supreme Court in *New York Times v. Sullivan*. This book argues that it would be unwise to abandon the concept of group libel, and that a properly limited rule against racial vilification would forbid expression such as the Nazi march.

The Nazis (thirty to fifty of them) wanted to march up and down for half an hour in front of the Skokie Village Hall on a Sunday afternoon, to protest an ordinance requiring demonstrators to carry insurance. They said they would carry signs with catchy slogans like "White Free Speech" and, more to the point, they would wear storm-trooper uniforms with swastika armbands. Most of Skokie's residents are Jewish, and many are survivors of persecution by Hitler's regime. The Nazis stirred things up in advance with some vile leaflets announcing their coming. Frank Collin, their leader, told Professor Downs that

I used it [the first amendment] at Skokie. I planned the reaction of the Jews. They [were] hysterical.

The Village sued in a state court to enjoin the march on the theory that it would cause distress to the Jewish population, incite religious hatred, and provoke violent retaliation. This ultimately failed.<sup>3</sup> The Village also enacted three ordinances to provide more

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3. In the Cook County circuit court the Village got an injunction that forbade the Nazis to march in uniform, display the swastika, or distribute materials that would incite religious hatred. The Supreme Court ordered the state appellate courts either to allow an expedited appeal or to stay the injunction. *National Socialist Party v. Skokie*, 432 U.S. 43 (1977). The Illinois Appellate Court then modified the injunction to forbid only display of the swastika. *Village of Skokie v. National Socialist Party*, 51 Ill. App. 3d 279, 366 N.E.2d 347 (1977). After some more wrangling about a stay (see *National Socialist Party v. Skokie*,