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Constitutional Opinions: Aspects of the Bill of Rights

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CONSTITUTIONAL OPINIONS: ASPECTS OF THE BILL OF RIGHTS. By *Leonard W. Levy.* New York: Oxford University Press. 1986. Pp. viii, 272. $32.00.

Throughout Leonard Levy's career the prime focus of his scholarship has been on the origin and development of important constitutional provisions.[1] *Constitutional Opinions* is a collection of twelve independent essays drawn predominantly from Levy's previous works.[2] The book is a survey of Levy's own constitutional interests and scholarship. The themes Levy touches on include freedom of speech, religious toleration and religious establishment, and the right against self-incrimination. The historical time periods he addresses begin in seventeenth century England, move to the period during and

1. Leonard W. Levy is the Andrew W. Mellon All Claremont Professor of Humanities and Chairman of the Graduate Faculty of History at the Claremont Graduate School. His 1968 book, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION won the Pulitzer Prize for History. His numerous other writings include: EMERGENCE OF A FREE PRESS (1985); TREASON AGAINST GOD: A HISTORY OF THE OFFENSE OF BLASPHEMY (1981); AGAINST THE LAW: THE NIXON COURT AND CRIMINAL JUSTICE (1974); and JEFFERSON AND CIVIL LIBERTIES: THE DARKER SIDE. (1963).

2. Only one of the essays is new, the other eleven are revised or exact reprints from earlier books and articles published by Levy. The author identifies the original sources of the reprinted or revised works in his acknowledgements.

immediately following the passage of the United States Constitution and Bill of Rights, and finally turn to the Supreme Court during the Warren and early Burger years. Levy does not dwell on the institutional and economic forces of history as do many modern historians. He instead explores the often complex personal motivations and opinions of historical figures such as John Lilburne, James Nayler, John Peter Zenger, and Thomas Jefferson.[3]

One of the book's most interesting essays, entitled "The Original Meaning of the Establishment Clause," analyzes the intended meaning of the first amendment's establishment of religion clause, at the time of its passage.[4] The Supreme Court has adopted a broad interpretation of this clause, holding that the first amendment prohibits not only government preference of one religion over another, but also impartial government support to all religions.[5] Many scholars support an equal protection interpretation, asserting that the clause was originally intended only to prevent government preference of one religion over another.[6] Levy acknowledges that historical evidence falls short of the crystal clarity that advocates of both positions claim, but concludes that "[a] preponderance of the evidence . . . indicates that the Supreme Court's interpretation is historically the more accurate one" (p. 136). Having revealed to the reader his conclusions, Levy proceeds to present the existing historical evidence for both positions together with his interpretations of the evidence. While Levy would like to convince the reader of the correctness of his position, it is worth noting that he puts forth all the evidence for the reader to draw his own conclusions. The following paragraphs will review the analysis and evidence Levy presents in his essay.

Levy's review of establishment clause history begins with the Constitutional Convention of 1787 and the state ratification controversies that followed. Those who attended the Convention intentionally

3. The titles of the individual essays are good indicators of their content: *Freedom of Speech in Seventeenth-Century Thought; John Lilburne and the Rights of Englishmen; Quaker Blasphemy and Toleration; Did the Zenger Case Really Matter? Freedom of the Press in Colonial New York; Constitutional History, 1776-1789; The Bill of Rights; The Original Meaning of the Establishment Cause; Liberty and the First Amendment: 1790-1800; Jefferson As a Civil Libertarian; History and Judicial History: The Case of the Fifth Amendment; Subversion of* Miranda; and *Judicial Activism and Strict Construction.*

4. Pp. 135-61. Levy does not deal with the conflicts and interaction of the establishment and free exercise clauses of the first amendment. This question, as much as the original intent debate, has engaged the attention of the United States Supreme Court and legal scholars. *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602 (1971); Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT L. REV. 673 (1980).

5. See, for example, Justice Black's influential dictum in Everson v. Board of Educ., 330 U.S. 1, 15-16 (1947); Wallace v. Jaffree, 472 U.S. 38 (1985).

6. *E.g.*, R. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION (1982); M. MALBIN, RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT (1978); C. ANTIEAU, A. DOWNEY & E. ROBERTS, FREEDOM FROM FEDERAL ESTABLISHMENT: FORMATION AND EARLY HISTORY OF THE FIRST AMENDMENT RELIGION CLAUSES (1964).

chose not to include a bill of rights. They believed the negative implications of the enumerated powers and the structure of the federal government itself would be sufficient to safeguard the liberties a bill of rights was intended to protect.[7] Opponents of a strong federal government used the lack of a bill of rights to agitate against passage of the Constitution during the ratification process. In response, many state conventions included recommendations for a bill of rights in their resolutions approving the Constitution (pp. 139-42). The Virginia Convention, for example, recommended an amendment stating "that no Religious Sect or Society ought to be favored or established, by Law, in preference of others" (p. 141; citation omitted). Levy sees recommendations for amendments by the state constitutional conventions as attempts to mollify critics and allay public fears, rather than as attempts to put forth serious proposals for amendments.[8] For this reason Levy chooses to rely more heavily on other evidence to determine what was intended by the establishment clause.

Scholars on both sides of the establishment clause debate cite the congressional debates on the establishment clause in support of their position. Madison's original draft proposal to Congress read: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed" (p. 144; citation omitted). Proponents of an equal protection interpretation view the use of the adjective "national" as strong support for their position (p. 144).

Levy agrees the words on their face might lend themselves to such an interpretation, but believes it would require drastic and unexplained shifts of opinion on Madison's part. In 1785, four years earlier, Madison helped lead the opposition to a Virginia tax for the support of Christian religions generally. Madison repeatedly referred to the proposal as an "establishment of religion" in his famous *Memorial and Remonstrance* (p. 144). Shortly after the Bill of Rights passed Congress, Madison opposed a bill to set aside land for the nonpreferential support of religion in the western territories. Madison vehe-

7. Pp. 105-06, 136-37. This is not to say members of the Constitutional Convention always opposed government interference with matters that ultimately were protected by the Bill of Rights. In the case of religious establishment Levy asserts, "[m]any contemporaries, especially in New England, believed that governments could and should foster religion, or at least Protestant Christianity. All agreed, however, that the matter pertained to the realm of state government and that the federal government possessed no authority to meddle in religious matters." P. 142.

8. Levy concludes:

> They do not even necessarily indicate that preference of one sect over others was all that was comprehended by an establishment of religion. They do indicate that preference of one sect over others was something so feared that to assuage that fear by specifically making it groundless became a political necessity.

P. 142.

mently opposed the measure, describing it as unjust and outside the authority of Congress (p. 144).

The House debates were not recorded verbatim. Levy finds the summary of these debates to be of little value in determining the original meaning of the establishment clause. He concludes: "That the House understood the debate, cared deeply about its outcome, or shared a common understanding of the finished amendment is doubtful" (p. 147). This conclusion stems both from statements made in the course of the debate and from Levy's broader thesis that the Federalists felt the Bill of Rights unnecessary, supporting it only to devalue the political capital of those opposed to the new federal system.[9] The final proposal submitted to the Senate read: "Congress shall make no law establishing religion, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed" (p. 148).

The Senate passed a proposal reading, "Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion" (p. 148). The language appears to have a narrow scope, but the Senate before passing this version rejected versions which clearly stated the clause prohibited only the preference of one religion over another (p. 148).

While the House readily accepted many of the Senate proposals, it rejected the Senate religion amendment. The House stuck to this position in the Conference Committee that followed. Eventually the Chairman of the Senate conferees reported to the Senate that the House would accept the Senate version of all other amendments if the Senate would accept a version of the establishment clause giving it the present phraseology. In Levy's opinion, the House position can be explained only if the House intended to prohibit more than mere preferential treatment of one religion over all others (pp. 148-49). This deal was accepted by both houses and the amendments were sent to the states for ratification (pp. 148-49).

While there are few records of the ratification debates of most states, abundant materials remain from Virginia's deliberations. Eight anti-Federalist state senators attacked the establishment clause of the Bill of Rights as inadequate to prevent even discriminatory federal funding and support of religion. The only effect, according to the Senators, was to prevent the formal designation of a proscribed national religion (p. 150). To many scholars the opposition of these eight Senators is the strongest evidence supporting the narrower, equal protection interpretation (p. 150).

Levy disagrees with this interpretation, believing the opposition's interpretation a political maneuver designed to swing public support against the Bill of Rights. The opposition's real agenda was to force a

9. P. 147. For a more robust development of Levy's thesis that the Federalists did not believe the Bill of Rights to be important, see Chapter Six, *The Bill of Rights,* pp. 105-34.

new Bill of Rights that would include greater limits on Congress's commerce and tax powers (pp. 150-51). Madison, who led the ratification fight in Virginia, wrote to President Washington that the opposition's interpretation was clearly contrary to the intended and commonly understood meaning. Additionally, the eight opposition senators had in the past consistently supported state taxes to support religion. Those supporting passage had been the champions of rigid church-state separation (p. 151). Levy concludes that Virginia's passage of the amendments over the objection of the opposition is best read as a rejection of a narrow reading of the establishment clause (p. 152).

In the final sections of the essay, Levy reviews state constitutional and statutory provisions relating to support for religion in an attempt to understand the colonial American definition of "establishment of religion." Levy believes many scholars have incorrectly looked to the European meaning of establishment in an attempt to understand its usage in the United States. The American tradition, Levy believes, diverges from that of Europe, where establishment meant that a single church enjoyed monopolistic privileges and a legal stamp of approval by the government (p. 152). He concludes that "[a]n establishment of religion in America at the time of the framing of the Bill of Rights meant government aid and sponsorship of religion, principally by impartial tax support of the institutions of religion, the churches" (p. 161; emphasis omitted).

At the time of the passage of the Bill of Rights, six states had constitutional provisions or statutes which allowed state support of religion (p. 161). The religions these provisions supported were not limited to one church but meant state support for "[m]any different churches, or the religion held in common by all of them, i.e., Christianity or Protestantism."[10] These state establishment provisions were in essence establishing a nonpreferential, nondiscriminatory support system for a large number, or in some cases all, of the religions present in the state.

10. P. 161. The experience in New York is illustrative. When the English gained control of New York in 1664, the Dutch Reform Church was disestablished as the official religion. In its place a system developed whereby every township was obligated to support a Protestant church and minister of the town's choice. Many different Protestant religions benefited. P. 153. In 1688 the English government instructed its governor of New York officially to establish Anglicanism as the commonwealth's religion, but the bill that eventually passed in the legislature provided only for the support of "a good and sufficient Protestant Minister." Pp. 153-54; citations omitted. For the next fifty years Anglicans and non-Anglicans argued over whether the bill established only the Anglicans or established all Protestant religions. The confrontation was particularly reflected in the organization of King's College (later Columbia University). Anglicans asserted that they, as the established religion of the Colony, should be given exclusive control of the school. The opposition insisted that the establishment was of no particular church but of the Protestant denomination generally. P. 154. Levy concludes, "the concept of a multiple establishment of religion was not only understood by but also engaged the attention of the inhabitants of colonial New York." Pp. 154-55.

Virginia debated whether to provide for state support of religion officially just four years before the passage of the Bill of Rights. The 1785 confrontations in Virginia over whether the state should pass a bill giving nonpreferential support to all "Christian religions" provides much evidence as to Madison's feelings about even nonpreferential support. In notes for his speech against the measure Madison argued religion was a matter of private, not public concern. He described the nonpreferential system he opposed as an establishment of religion. "The true question, [Madison] declared, was not 'Is religion necessary?', but rather 'Are religious establishments necessary for religion?', to which he argued in the negative" (p. 160; citation omitted). The bill was eventually defeated and the legislature passed instead Thomas Jefferson's "Bill for Religious Freedom" (pp. 160-61). That bill provided in part "that no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever" (p. 160; citation omitted).

Levy's final conclusions about the meaning of the establishment clause are that:

> No member of the First Congress came from a state that supported an exclusive establishment of religion; no such example could have been found in the America of 1789. Of those states that provided public support for religion, half of them had provided for such at least theoretically since the early eighteenth century; the remainder did so from the time of the American Revolution. Their experience told the legislators in 1789 that an establishment of religion meant not state preference for one religion but non-preferential support for many. [p. 161]

Levy's historical essays are for the most part thoughtful, well reasoned, and well researched. Surprisingly, five of the essays contain no footnote references, a weakness for those wishing to do further reading on the subject of those essays.[11] In two essays Levy departs from historical analysis and enters the judicial activism debate.[12] These essays are not as powerful as Levy's historical pieces. Levy does not take the space to develop fully the public policy arguments he is making and fails to acknowledge the existence of opposing arguments. What is left often comes across as a series of shrill, personal attacks on the Burger

11. Those essays are *Freedom of Speech in Seventeenth-Century Thought, Constitutional History, 1776-1789, The Bill of Rights, Jefferson As a Civil Libertarian,* and *History and Judicial History: The Case of the Fifth Amendment.* Other essays contain extensive footnoting.

12. In *Subversion of* Miranda, Levy attempts to show why he believes the opinion of the Court in Harris v. New York, 401 U.S. 222 (1971), was "one of the most scandalous, extraordinary, and inexplicable in the history of the Court." P. 210. In *Harris,* the Court allowed the use of an illegally obtained statement of a criminal defendant against the defendant for the purpose of impeaching the defendant's testimony. In *Judicial Activism and Strict Construction,* Levy defends the Warren Court's "judicial activism" against charges of criminal-coddling and subverting the role of legislatures, which were made by supporters of the Burger Court and "strict construction."

Court and the Court decisions Levy disagrees with.[13]

Overall, the book is written with clarity and enough background information to be accessible even to those unfamiliar with the legal history involved. The rich detail and analysis make most of the essays interesting to those familiar with the topics as well. The book is worth recommending to anyone with an interest in the historical background of many of today's most important and controversial constitutional provisions.

— *Kenneth F. Sparks*

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13. An example from *Subversion of* Miranda will serve to illustrate this point. In describing Chief Justice Burger's majority opinion in *Harris,* 401 U.S. 222,

> [n]ever to be forgotten is that Harris plainly denied the truth, that the defendant did claim his statement was involuntary, and that the Court did permit the use of a statement which it conceded had been illegally obtained. The Court's elephantine misrepresentations and mangling of precedents could not have been deliberately calculated. Incompetence may have some claim to an explanation of *Harris.* But the truth about it, which cannot be known, probably derives from the same sort of zeal that drives the police to become lawless in the act of apprehending and interrogating suspects.

P. 220. This is not to say that Levy is wrong in his conclusions or that he is intentionally malicious. It is only to point out that Levy does not appear to add any new ideas to a debate that has raged for years.