Book Reviews

Helpful History and Poetic Mischief

PRESS AND SPEECH UNDER ASSAULT: THE EARLY SUPREME COURT JUSTICES, THE SEDITION ACT OF 1798, AND THE CAMPAIGN AGAINST DISSENT. By Wendell Bird. New York, NY: Oxford University Press, 2016. 568 pages. $74.00.

MADISON'S MUSIC: ON READING THE FIRST AMENDMENT. By Burt Neuborne. New York, NY: The New Press, 2015. 272 pages. $25.95.

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Some constitutional scholars uncover new historical information that forces us to revise our understanding of the Constitution. Some just suggest a different way of looking at well-known history. Among the many notable examples of the first category is Leonard Levy, whose historical research convinced him that the framers understood freedom of speech to permit punishment of seditious libel.[1] Another example is David Rabban, who showed that we were wrong to think there was no significant free speech jurisprudence between the Sedition Act crisis of 1798–1801 and the Espionage Act of 1917.[2] Levy's work cramped our understanding of the First Amendment for a generation, and Rabban's expanded it.

Our understanding has also been shaped by scholars who offered new ways of thinking about the First Amendment rather than new historical information. One example is Zechariah Chafee, the first important scholarly interpreter of the First Amendment, who influenced the Supreme Court's development of First Amendment law in person as well as through his scholarship.[3] Another is Thomas Emerson, who helped us see that there are

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1. *See* LEONARD W. LEVY, LEGACY OF SUPPRESSION 236–38 (1960) [hereinafter LEGACY] (contending that the framers did not consider seditious libel to be protected speech).

2. *See* DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 132–39 (1997) (discussing and evaluating Supreme Court free speech jurisprudence).

3. *See generally* ZECHARIAH CHAFEE, FREE SPEECH IN THE UNITED STATES (1941) (discussing contemporary free speech jurisprudence and the conditions of speech in the United States and extolling the virtue of a robust, protective interpretation of the First Amendment).

distinct strands of First Amendment law serving different free speech purposes.[4]

Bird's book is transformative historical research. It aims to debunk a myth that has hobbled First Amendment jurisprudence for generations.[5] The myth is that the framers could not have understood freedom of speech and press to mean anything more than freedom from licensing because that's all it meant on both sides of the Atlantic in 1789.[6] Two principal "facts" are cited in support of that thesis. The first is that William Blackstone, an accepted authority in both England and America, said it was so in 1769; Blackstone's view of freedom of the press was that one who "publishes what is improper, mischievous, or illegal . . . must take the consequences of his own temerity."[7] The second is that less than a decade after Congress proposed the First Amendment, it enacted the Sedition Act,[8] which would have been unconstitutional under any robust reading of the Amendment.[9] Bird argues that neither of these claims supports the myth,[10] and even if his proof isn't quite conclusive, the book requires a substantial rethinking of received wisdom about the framers' intentions.

Neuborne's book is what in journalism is called a "think piece,"[11] a rumination that aims to shed new light on old information. His theme is that we should read the Bill of Rights, and the First Amendment in particular, not as "a set of isolated, self-contained commands," but as a harmonious whole.[12] "[E]ach amendment is carefully structured to tell a story of individual

4. *See generally* THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970) (describing the various strands of the First Amendment).

5. WENDELL BIRD, PRESS AND SPEECH UNDER ASSAULT: THE EARLY SUPREME COURT JUSTICES, THE SEDITION ACT OF 1798, AND THE CAMPAIGN AGAINST DISSENT at xxi–ii (2016).

6. *See id.* at xxi (arguing that scholars have incorrectly concluded that the Framers shared Blackstone's understanding of free speech rights, which did not include the protection of antigovernment speech).

7. 4 WILLIAM BLACKSTONE, COMMENTARIES *151–52; *see, e.g.*, S.F.C. MILSOM, STUDIES IN THE HISTORY OF THE COMMON LAW 198 (1985) (describing Blackstone's *Commentaries* as influencing a century of legal thought in Britain after its publication and as being treated as a "classic venerated by professional tradition"). *See generally* Dennis R. Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact*, 51 N.Y.U. L. REV. 731 (1976) (discussing the impact of Blackstone's *Commentaries* on American law and politics).

8. Sedition Act of 1798, ch. 74, 1 Stat. 596 (1798) (expired 1801).

9. *See id.* § 2 (criminalizing "false, scandalous and malicious writing . . . against the government"). Nevertheless, the Sedition Act's criminalization of writing against the government is slightly less repressive than Blackstone's "improper, mischievous, or illegal" standard because the latter was not confined to false speech. BLACKSTONE, *supra* note 7, at *152.

10. *See* BIRD, *supra* note 5, at 11, 89–91 (contending that the framers did not follow Blackstone's understanding of free speech). Succeeding chapters provide detailed evidence that that the Sedition Act did not reflect the framers' views. *See generally* BIRD, *supra* note 5.

11. Or more irreverently, "a thumb-sucker."

12. BURT NEUBORNE, MADISON'S MUSIC 1 (2015).

freedom and democratic order. Not an idea or word is out of place. In short, Madison's poem to individual freedom and democratic self-government is as carefully wrought as a Wallace Stevens poem."[13]

Perhaps we should read Neuborne's book as poetry; it certainly takes a good deal of license with history, as I shall show shortly.

I. Blackstone's Authority Impugned

The modern iteration of the claim that the framers could not have intended more than freedom from prior restraint traces principally to Leonard Levy, who shocked the First Amendment world in 1960 by asserting that Blackstone's crabbed definition of freedom of the press[14] had to be the meaning that the framers intended to ensconce in the First Amendment because it was "the only definition known in Anglo-American thought and law" at the time.[15] Although he claimed to be a reluctant revisionist,[16] Levy plainly enjoyed tugging the whiskers of Oliver Holmes, Louis Brandeis, Zechariah Chafee, and other icons who in the first half of the twentieth century had succeeded in giving the First Amendment some muscle.[17]

In the face of a great deal of critical scholarship to the contrary in the next twenty-five years,[18] Levy receded, but only grudgingly and incompletely. When he published a revision of *Legacy* in 1985, he changed

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13. *Id.* at 16.

14. Levy focused on freedom of the press because that was the framers' focus. *See* David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 487–88, 487 n.197 (1983) (contending that throughout the framers' generation, freedom of speech was generally subsumed in the term "freedom of the press," and that only later did courts and scholars begin to speak of freedom of speech or "freedom of speech and press" as a single right encompassing various modes of communication).

15. LEGACY, *supra* note 1, at 68. Levy insisted on this despite the fact that the Senate had defeated an attempt to specify that freedom of the press was to be protected only "in as ample a manner as hath at any time been secured by the common law." S. JOURNAL, 1st Cong., 1st Sess. 70 (1789).

16. LEGACY, *supra* note 1, at viii ("[T]he facts have dictated conclusions that violate my predilections . . . .").

17. *See* LEGACY, *supra* note 1, at 1–4, 246–48 (criticizing Holmes, Brandeis, and Chafee's interpretation of the framers' intentions regarding the First Amendment).

18. *See* GEORGE ANASTAPLO, THE CONSTITUTIONALIST 110 (1971) (noting that the "birth" of the United States depended on a broad understanding of free speech); JEFFERY A. SMITH, PRINTERS AND PRESS FREEDOM: THE IDEOLOGY OF EARLY AMERICAN JOURNALISM 58 (1988) (suggesting that the Sedition Act brought the debate over seditious libel to a head); Anderson, *supra* note 14, at 496–97 (condemning Levy's interpretation, but acknowledging that deciphering the intent behind legislation is a difficult task); William T. Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 COLUM. L. REV. 91, 93 (1984) (challenging Levy's conclusions directly); David M. Rabban, *The Ahistorical Historian: Leonard Levy on Freedom of Expression in Early American History*, 37 STAN. L. REV. 795, 795–96 (1985) (book review) (same); *see also* Merrill Jensen, Book Review, 75 HARV. L. REV. 456, 457 (1961) (arguing that Levy's conclusions overstate the evidence).

the title to *Emergence of a Free Press*,[19] which seemed to signal a change of heart as to what the framers intended. But in fact he backed away from his original thesis only a little. He now claimed only that Blackstone's was "the standard definition,"[20] not that it was the only definition known, and he no longer insisted that freedom of speech meant only what Blackstone said it meant.[21] He acknowledged what his critics had shown: that the twin scourges of seditious libel and parliamentary privilege, which had suppressed the press in England, had never been widely employed in America,[22] and that the late-eighteenth-century press in America behaved as if freedom of the press was a meaningful reality.[23] But he continued to insist that the First Amendment could not have been intended to mean very much because no libertarian idea of freedom of speech emerged until the Sedition Act controversy[24]—this despite numerous expressions of vigorous free speech ideas in the 1790s and earlier, well before the Sedition Act was passed.[25] Most importantly, he continued to defend the main thrust of *Legacy*: that the First Amendment was not intended to protect freedom of the press (including freedom of speech) from the principal threats known at the time, seditious libel and parliamentary privilege.[26]

Bird challenges even Levy's reduced claim. He says Blackstone's definition was not even an authoritative statement of the English common law; when Blackstone published his *Commentaries* in 1769, the definition had never appeared in any English common law decision,[27] and the idea had been criticized and challenged in scores of extrajudicial writings.[28] Since at least 1731, counsel in seditious libel cases had urged that the crime was inconsistent with freedom of speech, but the courts had not decided that issue.[29] Blackstone's summary was not necessarily wrong; it was just unsupported.

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19. LEONARD W. LEVY, EMERGENCE OF A FREE PRESS vii (1985) [hereinafter EMERGENCE].

20. *Compare id.* at 65 (quoting Massachusetts Chief Justice Hutchinson's Blackstone-inspired definition of freedom of the press and describing it as "the standard definition in Anglo-American thought"), *with* LEGACY, *supra* note 1, at 68 (describing the same quotation as "the only definition known in Anglo-American thought and law").

21. EMERGENCE, *supra* note 19, at xi.

22. *Id.* at 17.

23. *Id.* at x.

24. *Id.* at 297–301.

25. *See* Rabban, *supra* note 18, at 841–47 (discussing the 1794 Whiskey Rebellion and the growth of Democratic Societies and connecting both to a change in American free speech thought).

26. EMERGENCE, *supra* note 19, at xii.

27. BIRD, *supra* note 5, at 66.

28. *Id.* at 10–11.

29. *See, e.g.*, R v. Francklin (1731), 17 St. Tr. 625, 655 (K.B.) (rejecting defendant's argument that the prosecution for seditious libel threatened "suppression of the liberty of the press").

That difference was ignored by Lord Mansfield, the English Chief Justice. The year after Blackstone's *Commentaries* were published, Mansfield claimed that Blackstone's definition reflected "uniform judicial practice since the Revolution [of 1688]."[30] It was Mansfield who insisted that Blackstone's definition was unquestioned. He claimed that "every lawyer for near hundred years has so far acquiesced" in Blackstone's definition and "[n]o counsel ever complained" of that definition.[31] Blackstone was just extravagant; Mansfield was disingenuous.[32]

Thanks to Mansfield, Blackstone's inaccurate description of the common law was accurate as to England by 1789, but that would hardly have commended it to the draftsmen of the First Amendment. It led to numerous repressive decisions by the Crown courts and was widely criticized.[33] And in any event, America was quite different; numerous scholars have shown that Blackstone's definition was not what freedom of the press meant in eighteenth-century America.[34] Neither the courts nor the press accepted that view.[35] By showing the questionable legitimacy of Blackstone's definition even as to England, Bird further erodes the first myth that the framers could not have intended a meaning of freedom of press and speech more extensive than Blackstone's.[36]

II. The Sedition Act Argument

The second myth is facially plausible. The Sedition Act made it a crime to "write, print, utter, or publish . . . any false scandalous and malicious writing" against the government, the Congress, or the President "with intent

30. R v. Shipley (The Case of the Dean of St. Asaph) (1784) 99 Eng. Rep. 774, 824; 4 Dougl. 73, 170.

31. *Id.* at 821, 823; 4 Dougl. at 166, 169.

32. *See* BIRD, *supra* note 5, at 67–69, 69 nn. 284–85 (discussing Mansfield's "rewriting [of] the English common law of liberties of press and speech" and citing cases in which counsel challenged the Blackstone–Mansfield definition).

33. *See* Wendell Bird, *Liberties of Press and Speech: 'Evidence Does Not Exist To Contradict the . . . Blackstonian Sense' in Late 18th Century England?*, 36 OXFORD J. LEGAL STUD. 1, 8–11 (2016) (describing the Crown judges' decisions and the criticism they occasioned).

34. *See, e.g.*, STEPHEN D. SOLOMON, REVOLUTIONARY DISSENT 4–6 (2016) (emphasizing the diversity of early American opinion regarding the appropriate understanding of freedom of the press while noting that eighteenth-century American newspaper editors nevertheless "acted as if the law punishing dissent did not exist"); *supra* note 18.

35. There were few seditious libel cases in American courts after the trial of John Peter Zenger in 1735 in which the judge instructed the jury in accordance with Blackstone's view but the jury refused to convict. *See* BIRD, *supra* note 5, at 22. For rejection of Blackstone's view by American newspapers, see generally SMITH, *supra* note 18.

36. Levy's narrow view of the original meaning of the First Amendment dies hard. *See* BIRD, *supra* note 5, at 83 n.63 (citing five opinions by Supreme Court Justices that cite Levy's 1960 book, as recently as 2010).

to defame."[37] That was certainly inconsistent with any expansive understanding of the First Amendment. The argument that the framers' generation couldn't have held any broader view goes like this: (1) the First Amendment was promulgated in 1789 by "Federalists"; (2) the Sedition Act was the capstone of the Federalist Party's policy in 1798 and was opposed by the Republicans, who were the successors to the Antifederalists; (3) the Federalists unanimously supported the Sedition Act, and since they had been the proponents of the First Amendment, they must have thought the two were compatible.[38]

The argument is built on several fallacies. The Sedition Act was not passed by the same people who proposed the First Amendment. In 1789 "federalist" meant only that the subject was a supporter of a strong national government. By 1798 a Federalist was a member of a highly partisan political party that was determined to hold onto power.[39] None of the sponsors of the Sedition Act had been members of Congress in 1789,[40] and a slight majority of the representatives who had been in Congress in 1789 voted *against* the Act.[41] Passage of the Sedition Act tells us very little about the views of the framers.

Nor is it true that the Sedition Act was supported by all of the federalists or even all of the Federalists. One of the most influential federalists in 1789 was James Madison; by 1798 he was a Republican who emphatically rejected the narrow view of freedom of speech and press and proclaimed the unconstitutionality of the Sedition Act.[42] His Virginia Resolutions, together with the Kentucky Resolution drafted by Jefferson, were eloquent and influential rebuttals of those who claimed the Act was consistent with the First Amendment.[43] The significance of these resolutions has been minimized by the claim that no other state joined Virginia and Kentucky in condemning the Act.[44] But Bird shows that two other states passed similar

37. Sedition Act of 1798, ch. 74, § 2, 1 Stat. 596 (1798) (expired 1801).

38. The most extended exposition of this argument was made by Leonard Levy. *See* LEGACY, *supra* note 1, at 245–48.

39. Anderson, *supra* note 14, at 518–19.

40. BIRD, *supra* note 5, at 395.

41. *Id.*

42. The Republican Party emerged in 1792 when Madison and Jefferson broke with Alexander Hamilton and the Federalists. *See generally* JOHN C. MILLER, THE FEDERALIST ERA: 1789–1801, at 84–125 (Harper & Row 1963) (1960). Madison's expansive view of freedom of speech and press and his conviction that the Sedition Act was unconstitutional were most fully developed in the Virginia Report of 1799–1800. JAMES MADISON, THE VIRGINIA REPORT OF 1799–1800, *reprinted in* FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON 197, 214 (Leonard Levy ed., 1996) (1966).

43. MILLER, *supra* note 43, at 239–41.

44. *See* BIRD, *supra* note 5, at 323 (declaring that the claim that the Virginia and Kentucky Resolutions were not supported by any other state is incorrect).

resolutions; in two others, legislative chambers divided on the question; two other states failed to act; and "only half of the sixteen states responded negatively to the Virginia and Kentucky Resolutions."[45]

Another tenet of the received wisdom is that the Sedition Act was supported by all the Federalists except John Marshall.[46] Marshall opposed it on nonconstitutional grounds,[47] but as Bird points out he also said it was "view[e]d by a great many well meaning men, as unwarranted by the Constitution."[48] Levy assured us that "[n]ot a single Federalist in the United States opposed the constitutionality of the Sedition Act."[49] In fact, four Federalist house members and one senator voted against initial passage of the Act, and despite vilification by party leaders, more joined them in subsequent votes.[50] In all, eighteen Federalist members of Congress cast votes against the Act on various motions to repeal or defend it.[51] The reasons for their opposition were not always recorded, but Bird notes that "speakers whose remarks were preserved focused on First Amendment reasons and related concerns."[52]

Bird's book casts new light on other aspects of the Sedition Act crisis. He shows that prosecutions under the Sedition Act were far more numerous than previously recognized. James Morton Smith and John C. Miller, authors of standard works on the Sedition Act, counted fourteen or fifteen Sedition Act cases from its enactment in 1798 to its expiration in 1801.[53] There have been occasional hints of other prosecutions, but most subsequent writers have accepted the fourteen or fifteen figures.[54] Bird found eleven additional Sedition Act prosecutions; eleven more prosecutions for criminal conspiracy in violation of the Sedition Act; three attempted indictments under the Sedition Act (thwarted when grand juries refused to indict); and six other instances in which the Secretary of State or the Secretary of War gave

45. *Id.* at 323, 325.

46. *See id.* at 399 (noting the "conventional wisdom" that no Federalist questioned the constitutionality of the Sedition Act and that only Marshall did not favor its enforcement). For an exploration of Marshall's views on freedom of the press, see generally Gregg Costa, Note, *John Marshall, The Sedition Act, and Free Speech in the Early Republic*, 77 TEXAS L. REV. 1011 (1999) (analyzing Marshall's views on free speech and the First Amendment).

47. BIRD, *supra* note 5, at 400–01.

48. *Id.* at 404 (alteration in original).

49. EMERGENCE, *supra* note 19, at 280.

50. BIRD, *supra* note 5, at 404, 409.

51. *Id.* at 405.

52. *Id.*

53. JAMES MORTON SMITH, FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES 185 (1956) (reporting fourteen indictments under the Sedition Act); JOHN C. MILLER, CRISIS IN FREEDOM: THE ALIEN AND SEDITION ACTS 65–66, 98–130, 194–220 (1952) (discussing fifteen prosecutions).

54. BIRD, *supra* note 5, at 332 nn.16–19.

instructions to prosecute under the Act.[55] These additional instances, like the previously identified Sedition Act prosecutions, all targeted Republicans, mostly newspaper editors.[56] Bird concludes:

> The assault on the First Amendment by the Sedition Act restrictions and prosecutions was even more serious than has been realized before. In that context, the Republican outrage and eruption of First Amendment theory, the public concern and shift to the Republican party, the Jeffersonian revolution of 1800, and the rapid demise of the Federalist Party, become more intelligible.[57]

Bird describes the Act as "the most widely hated law yet passed in America, except perhaps the tax that provoked the Whiskey Rebellion."[58] He said it "propelled more leaders and voters across the divide from the Federalist to the Republican Party, and assisted Jefferson in the close presidential election of 1800."[59]

Possibly the strongest evidence that the early understanding of the First Amendment was narrow is the fact that the early Justices of the Supreme Court did not directly question the constitutionality of the Sedition Act. The full Court never ruled on the question.[60] In fact, the Court has not done so explicitly to this day, although it has said the Act has been judged unconstitutional "in the court of history."[61] But the main job of early Justices was to sit individually on circuit courts, and during the three years the Sedition Act was in effect some of them urged their grand juries to indict seditious libelers, heard Sedition Act cases, and upheld convictions.[62] Five of the Justices presided over Sedition Act cases, and six gave advisory opinions upholding its constitutionality.[63] Relying on the positions of these Justices, Levy, among others, claimed that the early Supreme Court Justices "unanimously" believed the Sedition Act constitutional.[64] But twelve Justices sat on the Supreme Court from 1789 to 1801, and half of them did not preside over Sedition Act cases or otherwise voice support for the Act—

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55. *Id.* at 336–37 tbl.7.1, 359–61 tbl.7.2, 367 tbl.7.3, 374 tbl.7.4.

56. *See id.* at 336–55 (describing the factual and legal background of the eleven newly discovered prosecutions).

57. *Id.* at 390.

58. *Id.* at 251.

59. *Id.* at 326.

60. New York Times Co. v. Sullivan, 376 U.S. 254, 276 & n.10 (1964) (noting that the Sedition Act was "never tested" in the Supreme Court before it expired by its own terms in 1801).

61. *Id.* at 276.

62. BIRD, *supra* note 5, at 248–50.

63. *See id.* at 268–320 (describing in detail the treatment of specific Sedition Act cases brought before each of the sitting Justices).

64. EMERGENCE, *supra* note 19, at 280.

Bird calls these the "nonsitting justices."[65] Bird plausibly suggests that at least three, and possibly five, of those Justices believed the Act was unconstitutional,[66] or at least expressed broader understandings of freedom of speech and press.[67]

None of the nonsitting Justices is known to have expressly challenged the constitutionality of the Act.[68] Bird relies on inferences from their statements and positions on related issues. For example, he cites the following indications that Justice Thomas Johnson viewed the Act as unconstitutional: "in the Maryland ratification convention, Johnson split from the federalist majority, becoming the only early Justice to publicly call for a bill of rights including protection for freedom of the press"; he declined one of President Adams's "midnight appointments" to a circuit court and delayed notifying the President of his decision, thereby enabling Jefferson rather than Adams to fill the post; he went out of his way to avoid being labeled a Federalist (probably, in Bird's opinion, because he disagreed with Federalist policies).[69] The example illustrates the perils of relying on indirect evidence of a judge's views on a specific law: support for freedom of the press doesn't tell us *how much* press freedom he envisioned; preferring Jefferson to Adams would be heresy in the eyes of leaders of the Federalist Party, but it doesn't prove that he was on Jefferson's side in the Sedition Act controversy; and disdaining the Federalist label doesn't necessarily mean he thought the Federalists were wrong about the constitutionality of the Sedition Act.

Bird's evidence as to the views of the other Justices who didn't rule on Sedition Act cases is subject to similar objections. But it does show that the opposite claim—that all of the Justices viewed the Act as constitutional—is equally problematic; no one can be sure of the views of Justices who did not hear Sedition Act cases. They may have refrained from condemning the Act because they believed it was constitutional or because they preferred not to unnecessarily incur the wrath of the Federalist Party.

Bird leaves some intriguing questions unanswered. For example, if some of the early Justices believed the Sedition Act was unconstitutional, was it mere coincidence that none of them presided in Sedition Act cases? At least part of the answer no doubt lies in the role that Justices riding circuit

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65. BIRD, *supra* note 5, at xxxvi tbl.0.1. Bird devotes an entire chapter to these Justices. *Id.* at xxxvi tbl.0.1, 394–458.

66. *Id.* at 454.

67. *Id.* at 458.

68. *See id.* at 398–99 (stating that Justices Jay, Rutledge, Wilson, Johnson, and Moore "left no correspondence and no newspaper articles even intimating support of the Act, and instead left a number of largely unnoticed indications of their opposition").

69. *Id.* at 446–48.

played through the charges they gave to grand juries. One of a Justice's duties upon convening a grand jury was to give it marching orders, and Justices were allowed to tell the grand jury what crimes it should look for.[70] Some of the Justices urged their grand juries to ferret out sedition and return indictments. For example, Justice William Paterson read the Sedition Act to his grand jury and told them "that the very survival of government and freedom depended on crushing seditio[n]."[71] He went on to say that those who publish false, defamatory, and malicious writings or libels against the government "destroy confidence, excite distrust, disseminate discord and the elements of disorganization, alienate the affections of the people from their government, disturb the peace of society, and endanger our political union and existence."[72] It could hardly be a coincidence that Paterson presided over six Sedition Act cases.[73]

On the other hand, Justice Alfred Moore, one of the Justices that Bird believes probably questioned the constitutionality of the Act, gave the Sedition Act only a perfunctory mention in his charge to the grand jury and seemed to suggest that pursuing indictments under the Act would only divert them from their "proper business."[74] Moore presided over no Sedition Act cases.[75]

By examining in detail the views of all the early Justices, Bird casts grave doubt on the claim that the Justices sitting on the Supreme Court at the time of the Sedition Act unanimously believed it was constitutional. He can't be said to have conclusively disproved that claim, but he provides a preponderance of evidence to the contrary.

First Amendment history has long suffered from the belief that the framers' conception of freedom of speech was so toothless that it did not preclude prosecution for seditious libel.[76] Advocates of robust freedoms of press and speech have been forced to argue that even though the framers did not intend to protect those freedoms vigorously, courts should do so because it is a good idea.[77] After Bird's book, that back-footed approach should no longer be necessary.

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70. 2 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 5 (Maeva Marcus et al. eds., 1988).

71. BIRD, *supra* note 5, at 272.

72. *Id.*

73. *Id.* at 271.

74. *Id.* at 449.

75. *Id.*

76. *See supra* notes 5–9 and accompanying text.

77. *See, e.g.*, LEGACY, *supra* note 1, at 309 (advocating for broad freedom of speech, even if that was not the framers' understanding of the First Amendment).

III. It Wasn't Madison's Music

Neuborne's book compels no similar rethinking of First Amendment history. His metaphors are inspiring and imaginative; one only wishes that history supported them. His thesis is that "a careful study of the order, placement, meaning, and structure of the forty-five words in Madison's First Amendment will trigger a responsive poetic chord in you that will enable us to recapture the music of democracy in our most important political text."[78]

But Madison didn't compose a poem. He didn't envision a First Amendment at all; he wanted to insert the various guarantees that became the First Amendment into Article I, Section Nine, of the original Constitution, between the clause prohibiting bills of attainder and the clause prohibiting direct taxation.[79] Madison didn't originate the language in his proposal to protect freedom of speech and press; he lifted it almost verbatim from the Virginia Declaration of Rights of 1788.[80]

Neuborne says the amendment begins with the Establishment Clause because that's where "any poem celebrating individual freedom and self-government must begin."[81] "The First Amendment's narrative then moves naturally" to the Free Exercise Clause, turns next to free speech "as the next logical step in the evolution of a democratic idea,"[82] then "turns chronologically and logically" to freedom of the press,[83] and then "turns naturally to the fifth chronological foundational component of democracy—collective action in support of an idea" with the assembly and petition clauses.[84]

It wasn't Madison who conjoined the speech and press clauses with the petition and assembly clauses; that was done by a committee in the House of

78. NEUBORNE, *supra* note 12, at 1.

79. *See* RICHARD LABUNSKI, JAMES MADISON AND THE STRUGGLE FOR THE BILL OF RIGHTS app. 1 at 266–67 (2006) (reprinting the amendments Madison proposed on June 8, 1789 as insertions into Article I, Section Nine).

80. Madison was one of five members of a committee that drafted the Virginia Declaration, but George Mason was the primary author. BIRD, *supra* note 5, at 187–88, 187 n.576; 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 764–65 (1971). The Virginia Declaration paraphrased a provision from the 1776 Pennsylvania constitution. *See* Pennsylvania Declaration of Rights No. XII (1776), *reprinted in* 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 262, 266 (1971) ("That the people have a right to freedom of speech, and of writing, and publishing their sentiments: therefore the freedom of the press ought not to be restrained.").

81. NEUBORNE, *supra* note 12, at 18.

82. *Id.* at 18–19.

83. *Id.* at 19.

84. *Id.* at 19–20.

Representatives.[85] Madison wanted to protect secular as well as religious rights of conscience, but the Senate rejected that.[86] The guarantee that Madison considered most important—an amendment prohibiting the states from infringing on freedom of the press[87]—was also rejected by the Senate.[88] The final language of what became the First Amendment was chosen by a House–Senate conference committee.[89]

Neuborne says Madison's First Amendment "deploys the six ideas in a rigorous chronological narrative of free citizens governing themselves in an ideal democracy."[90] But Madison did not present these as part of a single narrative. He articulated the six rights in three separate, more verbose provisions. The religion clauses and the ill-fated right of secular conscience were in one, speech and press were in another, and assembly and petition were in the third.[91] If proximity is enough to make them part of a single narrative, then the right to bear arms must be part of the same narrative as the right to petition because those too are next-door neighbors in his draft.[92] The most that can be said for the "rigorous chronological narrative" idea is that the six expression-related rights that eventually became the First Amendment were listed there in the same order as Madison had listed them in his separate amendments.[93]

Although Madison gave no indication that he considered that order important, it is entirely plausible that he saw the logical progression that Neuborne identifies. Reading "Madison's entire First Amendment as a meticulously organized road map of a well-functioning egalitarian democracy"[94] might be a good idea even if it isn't historically commanded. The idea is that self-government begins logically with freedom of mind, and

85. LABUNSKI, *supra* note 79, at app. 2 at 269–70 (reprinting House Select Committee Amendments from July 28, 1789).

86. *Compare id.* app. 1 at 266 (reprinting Madison's proposed addition of a clause protecting "the full and equal rights of conscience"), *with id.* app. 4 at 275 (showing that the amendment passed but that the Senate rejected Madison's language and replaced it with "Congress shall make no law establishing articles of faith, or a mode of worship, or prohibiting the free exercise of religion").

87. 1 ANNALS OF CONG. 783–84 (1789) (Joseph Gales ed., 1834).

88. *See* S. JOURNAL, 1st Cong., 1st Sess. 105, 121 (1789) (reporting that an amendment proposing that "[n]o State shall infringe . . . the freedom of speech" was "passed in the [n]egative" by the Senate).

89. *See* LABUNSKI, *supra* note 79, at 239 (explaining that the language that became part of the First Amendment was chosen by a conference committee appointed by the House that included Representatives Madison, Roger Sherman, and John Vining as well as Senators Oliver Ellsworth, William Paterson, and Charles Carroll).

90. NEUBORNE, *supra* note 12, at 11–12.

91. LABUNSKI, *supra* note 79, app. 1 at 266 (reprinting Madison's proposed amendments).

92. *Id.*

93. *Id.*

94. NEUBORNE, *supra* note 12, at 22.

then requires freedom to speak, freedom to communicate to a larger audience, freedom to assemble with other citizens, and freedom to petition for redress of grievances, in this order.[95] This conception is quite plausible. Neuborne, who believes such a reading offers a way out of the dysfunctional democracy that he says the Supreme Court has created,[96] isn't the first scholar to endow a pet idea with a questionable historical pedigree.[97] But the idea has been around for a long time, and it hasn't prevailed.

The view that the purpose of the First Amendment is to facilitate self-government was espoused famously by Alexander Meiklejohn in his 1948 book, *Free Speech and Its Relation to Self-Government*.[98] Neuborne does not mention Meiklejohn, but many of the democracy-enhancing virtues that Neuborne sees were identified by Meiklejohn. The First Amendment, Meiklejohn asserted, is not intended to protect freedom for all kinds of speech, but only "to make men free to say what, as citizens, they think, what they believe, about the general welfare."[99] But that seemed to deny First Amendment protection to art, literature, and other species of expression that many people wished to protect, and that the Supreme Court had in fact protected. Meiklejohn responded thirteen years later by adopting an expansive view of what speech is relevant to self-government. Literature and the arts must be protected by the First Amendment, he said, because "[t]hey lead the way toward sensitive and informed appreciation and response to the values out of which the riches of the general welfare are created"; for similar reasons, education, the sciences, and philosophy must be protected.[100] What this expansion showed was that relevance to self-government is largely in the eye of the beholder.

Neuborne's proposed reading of the First Amendment faces a similar problem, and he resolves it similarly—by arguing that the First Amendment also protects "a steady flow of unfiltered information, ideas, and opinions about art, philosophy, literature, science, technology, history, ethics,

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95. *Id.* at 18–20.

96. *Id.* at 22.

97. *See, e.g.*, Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 206–08 (1890) (proposing the modern tort of invasion of privacy and claiming that courts had already recognized it under other names, such as a violation of one's intellectual property or a breach of an implied contract).

98. *See generally* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948) (rejecting a narrow interpretation of the First Amendment and instead arguing that a more robust understanding of the First Amendment is necessary in order to secure the self-governance intended by the framers).

99. *Id.* at 104.

100. Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 257.

economics, psychology, sociology, sex, leisure, and business."[101] Ascribing to the six clauses of the First Amendment the single, overarching purpose of facilitating democracy might very well have discouraged some of the Court's dubious recent forays, such as extending constitutional protection to snuff videos,[102] games,[103] and lying,[104] but if facilitating democracy includes the additional subjects Neuborne lists, that seems doubtful.

There is also the problem of deciding what the self-government rationale tells us to do in specific cases. Neuborne says it would empower the courts to ask whether the outcome of a decision will be good or bad for democracy.[105] Unfortunately, in constitutional litigation, that question rarely has a self-evident answer. It's clear to Neuborne that corporate funding of politics does not enhance democracy,[106] but that was not clear to Justice Scalia, who thought that "to exclude or impede corporate speech is to muzzle the principal agents of the modern free economy."[107] It is clear to Neuborne that the Occupy Wall Street movement was suppressed in violation of the Assembly Clause of the First Amendment,[108] but it is probably equally clear to many motorists that blocking traffic on the Brooklyn Bridge is the kind of "severe interference[] with public order" that he agrees should trump freedom of assembly.[109]

Neuborne is not so pedestrian as to suggest that his interpretation of the First Amendment can actually tell us which speech deserves protection. His ambition is more subtle. After noting the many instances in which the First Amendment failed to protect the freedoms that it is supposed to guarantee, he acknowledges that, as Madison said, the words of the Bill of Rights are just "parchment barriers."[110] Neuborne believes that seeing the First

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101. NEUBORNE, *supra* note 12, at 97.

102. *See* United States v. Stevens, 559 U.S. 460, 482 (2010) (holding that a statute criminalizing videos containing certain depictions of animal cruelty was unconstitutionally overbroad and therefore invalid under the First Amendment).

103. *See* Brown v. Entm't Merchs.' Ass'n, 564 U.S. 786, 805 (2011) (holding that a California statute restricting the sale of video games to minors was unconstitutional under the First Amendment).

104. *See* United States v. Alvarez, 132 S. Ct. 2537, 2543, 2547–51 (2012) (holding that a law making it illegal to falsely claim receipt of military decorations or medals constituted a content-based restriction on free speech, making the Act unconstitutional under the First Amendment).

105. NEUBORNE, *supra* note 12, at 74.

106. *See* NEUBORNE, *supra* note 12, at 70–75 (criticizing the extension of First Amendment rights to corporations and deploring corporations spending "unlimited sums on electoral speech").

107. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 393 (2010) (Scalia, J., concurring).

108. *See* NEUBORNE, *supra* note 12, at 127–29 (citing the disruption by police of the Occupy Wall Street movement as an example of the impotence of the Assembly Clause).

109. *Id.* at 128.

110. *Id.* at 185.

Amendment as an integrated poem to democracy would help to forestall such lapses. Ultimately, his mission is not to provide answers to constitutional questions, but to elevate our sensibilities:

> The aesthetic force of Madison's lost poetry could be of incalculable value in rallying the level of public support needed to sustain the practical vitality of the Bill of Rights, especially the First Amendment, in storm-tossed times. It's possible, of course, to attempt to rally popular support for fragments of the Bill of Rights displayed as isolated slogans. But if the isolated slogans were understood by the people as threads in a harmonious tapestry, interacting with and reinforcing each other as the elements of a magnificent poem to human freedom and political democracy, it would be much easier to rally "We the People" to defend the Bill of Rights, for it would speak to them in the coherent voice of poetry.[111]

IV. The "Music" Is Not Just the First Amendment

Although the subtitle indicates the book is about the First Amendment, Neuborne extends the "Madison's Music" theme to the Bill of Rights generally. He says Madison's "poetic voice speaks to us in the harmony of the 462 words, thirty-one ideas, and ten amendments—each in its perfectly chosen place and all interacting to form a coherent whole—that constitute the magnificent poem to democracy and individual freedom called the Bill of Rights."[112] He says "what finally came out of Madison's quill pen in the summer of 1789 was a precisely organized textual blueprint for a robust democracy."[113] By reading the Bill of Rights as a series of unconnected verbal commands, "we have lost the ability to hear Madison's music."[114]

This is even less supportable than his claim about the First Amendment poem. Madison was not always enthusiastic about creating a Bill of Rights. As late as 1788, he had argued that it was unnecessary.[115] He drafted his proposed list of rights only after realizing that the required plurality of states would not ratify the Constitution unless Congress acceded to their demand

111. *Id.* at 196.

112. *Id.* at 2.

113. *Id.* at 11.

114. *Id.* at 15.

115. Letter from James Madison to George Washington (Feb. 15, 1788), *in* 10 THE PAPERS OF JAMES MADISON 510, 510 (Robert A. Rutland et al. eds., 1977).

for protection of individual rights,[116] and even then he described it as a "nauseous project."[117]

He didn't want to create a separate Bill of Rights; he wanted to insert the various guarantees into the original Constitution at various places where he thought they would counterbalance grants of power.[118] He fought for that throughout the framing process; the Bill of Rights as we know it emerged only because his colleagues rejected Madison's preference.[119] He proposed nineteen amendments, not ten.[120] As mentioned above, the amendment he considered the most important of all his proposals was deleted by the Senate.[121]

As for the claim that Madison's Bill of Rights was carefully structured with not an idea or word out of place, we should consider the first, second, and third of Madison's proposals. The first was a preamble declaring that the people have an indefeasible right to change their government.[122] The second provided that there should be at least one member of the House for every 30,000 of population.[123] The third provided that any pay raise for members of Congress would not take effect until after the next election.[124] For better or worse, the First Congress didn't share Madison's enthusiasm for protecting the right to revolution; his preamble died in the Senate.[125] His second and third proposals survived the framing process and became the first and second amendments in the Bill of Rights as it was submitted to the states.[126] The 30,000-per-district provision mercifully was never ratified; today, that ratio would require a House of 10,760 members.[127] The importance of the pay-raise provision in Madison's carefully wrought poem to democratic self-government apparently wasn't appreciated for 200 years;

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116. *See* Paul Finkelman, *James Madison and the Bill of Rights: A Reluctant Paternity*, 1990 SUP. CT. REV. 301, 303 (noting that James Madison did not support the addition of a Bill of Rights until he realized the political realities at stake).

117. James H. Hutson, *'A Nauseous Project,'* WILSON Q., Winter 1991, at 57, 69.

118. *See* LABUNSKI, *supra* note 79, at 200 (arguing that Madison wanted his amendments to be directly woven into the sections of the Constitution that the amendments modified, as opposed to being appended at the end).

119. *See id.* at 219 (reporting that Madison acquiesced to the placement of the amendments at the end because he could see that he was "losing the battle").

120. *Id.* at 198.

121. *Id.* at 237.

122. *Id.* app. 1 at 265.

123. *Id.*

124. *Id.* app. 1 at 266.

125. *Id.* at 237.

126. *Id.* app. 5 at 278.

127. As of Jan. 1, 2016, the United States' population was 322,761,807. That number divided by 30,000 equals about 10,760. *U.S. and World Population Clock*, U.S. CENSUS BUREAU, http://www.census.gov/popclock/ [https://perma.cc/46CD-GC5Y].

that amendment wasn't ratified until 1992 when it became the Twenty-Seventh Amendment.[128] It is only because of these non-Madisonian events that the Bill of Rights consists of the ten amendments that we know. Inexplicably, Neuborne asks rhetorically, "Why did Madison and his friends put the First Amendment first . . . ?,"[129] and then acknowledges in an endnote that they put it third.[130]

Neuborne argues that a proper reading of the Bill of Rights would result in "judicial recognition of a First Amendment right to vote."[131] His argument relies not just on the First Amendment, but on an expansive interpretation of the Ninth Amendment. That amendment says only that enumeration of certain rights in the Constitution should not be construed to deny others retained by the people, but Neuborne says it should be interpreted to authorize courts to recognize extratextual rights.[132] But wait: if the Bill of Rights was "a precisely organized textual blueprint for a robust democracy,"[133] wouldn't it explicitly guarantee something as basic to democracy as the right to vote? If the First Amendment "narrates the odyssey of a democratic idea"[134] from freedom of religion to freedom of speech and press to the right to assemble and the right to petition, shouldn't it take the logical next step and guarantee the right to vote? Would a "blueprint" rely instead on creative interpretations of two different amendments?

Much of the book is an extended criticism of the Supreme Court's "fateful strategic blunder"[135] in 1962 when it decided to base the rights to vote and hold office on the Equal Protection clause instead of the First Amendment.[136] Neuborne blames that choice for subsequent decisions that he considers "judicially imposed democratic disasters," including *Bush v. Gore*[137] and *Citizens United v. FEC*.[138] He notes that extending the franchise to African-Americans, women, eighteen-year-olds, and the poor has required multiple constitutional amendments, numerous Supreme Court decisions,

128. LABUNSKI, *supra* note 79, at 315 n.1.

129. NEUBORNE, *supra* note 12, at 14.

130. *Id.* at 226 n.1.

131. *Id.* at 76.

132. U.S. CONST. amend. IX; *see* NEUBORNE, *supra* note 12, at 29–31 (arguing that the Ninth Amendment encompasses additional rights not explicitly included in the Constitution).

133. NEUBORNE, *supra* note 12, at 11.

134. *Id.* at 76.

135. *Id.* at 42.

136. *See id.* (bemoaning the Supreme Court's use of the "unstable" Fourteenth Amendment "equality jurisprudence" instead of the First Amendment to resolve political rights questions).

137. 531 U.S. 98, 110 (2000) (halting a recount in the 2000 general election that the Supreme Court of Florida had ordered); NEUBORNE, *supra* note 12, at 75.

138. 558 U.S. 310, 372 (2010) (overturning statutory restrictions on corporate-financed, campaign-related speech); NEUBORNE, *supra* note 12, at 75.

and a century or two of waiting.[139] The reality, of course, is that the framers weren't enthusiastic about voting rights for people different from themselves.[140] Whether that casts doubt on the perfection of their blueprint for democracy seems worthy of consideration.

After insisting for nine chapters that the First Amendment and the Bill of Rights is Madison's poetry, Neuborne adds a curious tenth chapter in which he acknowledges many of the contrary facts mentioned above. In this chapter, he actually looks at the processes of framing and ratification, and acknowledges that this history makes many of his preceding claims untenable.[141] "Too many other important players, including Roger Sherman and Elbridge Gerry, were involved to claim that Madison's intentions controlled everything."[142] But not to worry:

> What should matter today, though, is not what a group of long-dead, slave-owning white men of substantial property may have been thinking about in 1789. . . . [G]reat poems aren't beautiful because poets have willed them so. The unique beauty of great poetry is found in the text itself, in the imagery, emotions, and meaning produced by the order, cadence, structure, and content of the words.[143]

In other words, it's beautiful music, even if it was the product of legislative sausage making.[144]

It's hard to know what to make of Neuborne's book. He says at the outset that it is not a work of history and he doesn't claim to know Madison's mind.[145] Then he writes two hundred pages telling us how Madison wanted us to understand what the first Congress wrote two centuries ago. Maybe we should see the book as an extended hyperbole, a metaphorical way of seeing history which, though not accurate, might contain truths in the way that

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139. *See* NEUBORNE, *supra* note 12, at 35–36 (describing the process of achieving voting rights for the aforementioned groups).

140. *See* U.S. CONST. amends. XV, XIX (establishing voting rights that were not previously guaranteed because the Constitution as drafted by the framers did not forbid discrimination on the basis of race, color, or sex).

141. NEUBORNE, *supra* note 12, at 197–223. The chapter begins with this sentence: "The story of the textual evolution of the Bill of Rights during that febrile summer of 1789 makes it difficult, if not impossible, to claim that the structure and organization of the Bill of Rights was driven by a single person's vision." *Id.* at 197.

142. *Id.*

143. *Id.*

144. *See News of the Day*, DAILY CLEV. HERALD, Mar. 29, 1869 (quoting lawyer–poet John Godfrey Saxe: "Laws, like sausages, cease to inspire respect in proportion as we know how they are made.").

145. NEUBORNE, *supra* note 12, at 1.

fiction does. Maybe he intends to do for Madison what the musical "Hamilton" does for Madison's rival, Alexander Hamilton.[146]

The extent to which constitutional history should influence decision-making today is of course debated, but few judges or scholars consider it irrelevant.[147] For that reason, it's helpful to see that history clearly. Bird's book corrects a fundamental misunderstanding about the original understanding of the First Amendment. He looks closely at the twin pillars of the theory that freedom of speech meant little to the framers, and finds that neither is a pillar at all—Blackstone's was *not* the dominant view of free speech in America, and the Sedition Act did *not* prove that the framers shared Blackstone's limited view.

Neuborne's book, on the other hand, has the potential to do mischief. It creates new misunderstandings about the Bill of Rights and the First Amendment in particular. They are not perfect products of Madison's poetic genius; rather, they are proof that long-dead, slave-owning white men, acting through the push and pull of legislative politics, produced good, if imperfect, results.

146. Because of the musical, Hamilton's reputation is "trending" in a way that Madison's fans can only envy. The musical won a Pulitzer Prize, a Grammy, and many other awards; was sold out for 119 performances off-Broadway; sold 200,000 advance tickets when it moved to Broadway; and became one of the most acclaimed critical successes in Broadway history. Erik Piepenburg, *Why 'Hamilton' Has Heat*, N.Y. TIMES (June 12, 2016), http://www.nytimes.com/interactive/2015/08/06/theater/20150806-hamilton-broadway.html?_r=0 [https://perma.cc/6RA4-55UL].

147. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2586–87 (2012) (analyzing the Constitution's Commerce Clause in light of historical understandings of commerce); Jeffrey S. Sutton, *The Role of History in Judging Disputes About the Meaning of the Constitution*, 41 TEX. TECH L. REV. 1173, 1174 (2009) (discussing increased use of historical analysis in recent Supreme Court opinions).