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The First Amendment Reconsidered: New Perspectives on the Meaning of Freedom of Speech and Press

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THE FIRST AMENDMENT RECONSIDERED: NEW PERSPECTIVES ON THE MEANING OF FREEDOM OF SPEECH AND PRESS. Edited by *Bill F. Chamberlin* and *Charlene J. Brown.* New York: Longman Inc. 1982. Pp. ix, 218. $27.95.

The range of potential first amendment topics obviously prevents any single-volume attempt at comprehensive treatment. Yet the common theoretical bases underlying freedom of speech and press provide a vehicle for cohesive presentation of divergent viewpoints under the general heading of the first amendment. *The First Amendment Reconsidered* consists of four articles[1] selected from a national competition on first amendment theory, and three presentations[2] by first amendment scholars and attorneys. The book is essentially a grab-bag of essays which address widely divergent speech and press topics. The preface, however, encourages readers to view the collection as a "symposium" which will enhance their understanding of the first amendment (p. xv). While the book does not provide as many instances of the implicitly promised interactions as might be desired, it does assemble scholarly thought surrounding similar basic themes.

The first selection is Margaret Blanchard's *Filling in the Void: Speech and Press in State Courts Prior to Gitlow* (pp. 14-59). Blanchard seeks to refute the "traditional notion"[3] that there was no important development of speech and press issues during the period between the Alien and Sedition Acts of 1798 and the Supreme Court's entry into the area in 1925 with *Gitlow v. New York*.[4] She examines state court decisions involving speech and press issues from 1798 to 1925 and concludes that these decisions laid a firm foundation for later Supreme Court activity and had a "significant impact" on the freedom of speech and press (p. 42).

Blanchard regards her work as "skim[ming] the surface of the possible areas for investigation" (p. 43). This is accurate; the article fails to establish how much influence these state court decisions have had on later developments in first amendment law. Her article should thus be viewed as only a starting point for those interested in first amendment history.

In *The Deceptive "Right to Know": How Pessimism Rewrote the First Amendment*, Baldasty and Simpson suggest that the first amendment primarily protects individual freedom. They argue that "[f]ree speech is pre-

1. Blanchard, *Filling in the Void: Speech and Press in State Courts prior to Gitlow*; Baldasty & Simpson, *The Deceptive "Right to Know": How Pessimism Rewrote the First Amendment*; Stonecipher, *Safeguarding Speech and Press Guarantees: Preferred Position Postulate Reexamined*; Hodge, *Democracy and Free Speech: A Normative Theory of Society and Government*.

2. Howard, *The Burger Court and the First Amendment: Putting a Decade into Perspective*, pt. 1: *A Framework*; Abrams, *The Burger Court and the First Amendment: Putting a Decade into Perspective*, pt. 2: *An Analysis*; Watts, *A Major Issue of the 1980's: New Communication Tools*.

3. *See* Z. CHAFEE, JR., FREE SPEECH IN THE UNITED STATES 14-15 (1941); T.EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 5 (1970); T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 35-36 (1966).

4. 268 U.S. 652 (1925).

cisely that: a right to speak" because "we always have understood the fundamental linkage between individual freedom and a healthy, self-governing society" (p. 80). On the other hand, Baldasty and Simpson acknowledge that the first amendment's protection of free speech is based on the need for public information (p. 82). They fear, however, the loss of ideas that might result if speakers are regulated to provide listeners with diverse information, for "[i]t is the speaker who is more highly motivated to secure his right, will press harder to achieve it, and may have more power to succeed . . . ." (p. 81).[5] Baldasty and Simpson thus assume that sufficiently diverse sources will channel information to the public if all speakers are free to deliver their messages and that all speakers have the same ability to deliver their messages to the public.

In *Safeguarding Speech and Press Guarantees: Preferred Position Postulate Reexamined*, Stonecipher claims that a preference for both speech and press is deeply rooted in United States history (pp. 89-128). The "preferred position postulate" generally holds that freedom of expression, so essential to the exercise of many other basic freedoms, needs to be weighted by the "judicial thumb" in the balancing of interests process (p. 90). Stonecipher approvingly identifies a variety of devices used by the Supreme Court to maintain the preferred position of speech and press.[6] But the very tradition of special protection to which Stonecipher points suggests that his comments do more to celebrate the status quo than to break new ground in first amendment theory.

In *The Burger Court and the First Amendment: Putting a Decade into Perspective*, A. E. Dick Howard and Floyd Abrams each examine the performance of the Burger Court (pp. 129-45). Howard finds that the Burger Court of the early seventies was "less activist, less aggressive, less egalitarian, (and) more deferential to the country's legislative and political process" than was the Warren Court (p. 131). By the late seventies, he says, the Burger Court's performance became "so episodic as sometimes to seem random" (p. 131). Howard describes the Court's fluid voting pattern and general distaste for categorical rulemaking, concluding that the Court's behavior reflects its feeling that there are no neat and simple answers to the problems it confronts (p. 134).

Abrams focuses on the Burger Court's treatment of freedom of the press cases and finds a consistent pattern. He asserts that the Court reviews press victories and refuses to review press losses. Moreover, the Court "reaches" for freedom of expression cases that the press has won in lower courts — even when these cases are ones that the Court would not otherwise hear (pp. 139-41). This is an interesting and plausible speculation, but, like many constitutional partisans, Abrams may read too much into patterns of Supreme Court case selection. One wonders, too, whether Abrams would applaud the court for *affirming* rather than declining to review lower court decisions he finds unpalatable.

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5. Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U. L.Q. 1, 4.

6. Among these is the "actual malice" rule in libel law. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964). Although Stonecipher shares the concerns of Baldasty and Simpson about the limitations of the rule (pp. 70-74), he says that the rule generally places the press and citizen critic in a preferred position. Pp. 103-04.

In *Democracy and Free Speech: A Normative Theory of Society and Government*, Hodge argues that the Supreme Court must adopt a carefully articulated theory of the first amendment before it can decide first amendment cases clearly or consistently (pp. 148-80). He proposes a "normative theory of government" and applies his theory to the right of free speech. Hodge explains that any speech which directly affects the electoral process is at the core of the basic free speech right. There must be sufficient communication about the electoral process to prevent any voter from being denied reasons for voting in any particular way (pp. 156-59). Hodge assumes that the government must actively promote voter access to political information. He criticizes the laissez faire "marketplace of ideas" concept as a "faulty analogy" (p. 163). Not only is the laissez faire model an unsound economic theory, but its application to the realm of speech and ideas obscures the harm worked by unrestrained private forces (pp. 162-63).

Finally, in *A Major Issue of the 1980's: New Communication Tools* (pp. 181-93), Watts examines the effect of new technologies upon first amendment doctrine. He sees the preservation of an uninhibited marketplace of ideas as the goal of the first amendment (p. 190). Watts asserts that the new communications technologies have the capacity to expand the diversity of viewpoints flowing to the public far beyond current limits (p. 186). However, current government regulation and Supreme Court doctrine have failed to keep pace with the rapid technological advancement. The result, he says, is a slew of unanswered first amendment questions in such areas as ownership and control of the new communications systems, access to the systems, and protection of the privacy of users of new two-way systems (pp. 185-91).[7]

Although these articles address a broad array of topics, there are some consistent themes. One of the interesting issues that emerges from the collection is whether the first amendment protects the rights of speakers, the communication process itself, or the listener's right to information. Baldasty and Simpson argue that the first amendment protects the right to speak, not the right to know (pp. 62-88). Hodge, on the other hand, develops a first amendment right of free speech which differs from the speaker's right advocated by Baldasty and Simpson (pp. 148-80). He states at the beginning and at the end of his essay that his free speech right includes the rights of both speakers and listeners (pp. 152, 171). But in the body of the article Hodge makes it clear that his free speech right is primarily a protection of the communication process (p. 163).[8]

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7. Watt agrees with Professor Bollinger that because regulation of electronic media has been traditionally justified by the scarcity rationale, technological advances that have increased access threaten the theoretical base of the fairness doctrine. P. 188. *See* Bollinger, *Elitism, The Masses And The Idea Of Self-Government: Ambivalence About The "Central Meaning Of The First Amendment*," in CONSTITUTIONAL GOVERNMENT IN AMERICA 99, 103 (R. Collins ed. 1980). While Watt does not develop this theory further, Bollinger suggests that broadcast regulation can be explained by the remnant scarcity rationale as well as an elitist desire to protect a citizen from messages that are regarded as dangerous or harmful. Under this view, the demise of media scarcity would lay bare the paternalistic distrust of the citizenry and its ability to discern and reject unworthy messages. Although Professor Schmidt has defended this elitism on its own merits, B. SCHMIDT, JR., FREEDOM OF THE PRESS VS. PUBLIC ACCESS (1976), the result of such an exposure may be future relaxation of the fairness doctrine.

8. Professor O'Brien provides well-reasoned agreement with Hodge. D. O'BRIEN, THE

Another recurring theme is the appropriate form and scope of media regulation. Baldasty and Simpson adhere to a laissez faire view of a free marketplace of ideas, maintaining that only the right to speak need be protected by appropriate constitutional safeguards. Baldasty and Simpson criticize the fairness doctrine[9] of broadcast regulation, which they view as the result of the Supreme Court's "parental, almost condescending view of the audience" as myopic and gullible (p. 76).[10]

Watt, on the other hand, argues that increased and updated government regulation is necessary to "preserve an uninhibited marketplace of ideas" in this time of rapid technological advancement (pp. 190-91).

Hodge criticizes the laissez faire marketplace of ideas concept as a "faulty analogy" (p. 163). Hodge thus goes beyond Professor Barron's view that if a self-operating marketplace of ideas ever existed, it has long since disappeared.[11] He agrees with Barron that modern day concentration of media ownership[12] requires active government intervention to preserve the diversity of opinions (p. 166).

The contributions to *The First Amendment Reconsidered* offer thought-provoking and informative comments on a range of contemporary issues in the law of free expression. But the absence of unifying theory or of wider perspectives on basic political theory and the dynamics of regulation precludes any satisfying conceptualization of the first amendment's basic mission. What the book makes clear is that modern first amendment theory works backwards from agreed conclusions; hard cases reveal the inadequacy of current doctrine, bringing devoted defenders of free expression in general into profound conflict over the application of that principle in unanticipated situations. What is needed now, perhaps, is not another demonstration that thoughtful people may assign different purposes to the first amendment, but wider searchings toward a comprehensive theory of how and why society should protect the unfettered exchange of ideas in a modern technological environment.

PUBLIC'S RIGHT TO KNOW: THE SUPREME COURT AND THE FIRST AMENDMENT (1981). According to one commentator, the Supreme Court interprets the first amendment as a regulatory principle protecting the "freedom of those activities of thought and communication by which we 'govern' rather than the freedom to speak." Meiklejohn, *The First Amendment Is An Absolute*, 1961 SUP. CT. REV. 245, *cited in* O'BRIEN at 144. O'Brien carefully distinguishes protection of the communication process, which he praises, from protection of a public right to know, which he criticizes. Baldasty and Simpson fail to draw this distinction, or to explain exactly what their "right to know" encompasses. The reader interested in pursuing the issue of what the free speech guarantee primarily protects will find the O'Brien book a better-reasoned and more complete source than anything *The First Amendment Reconsidered* has to offer.

9. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

10. This echoes Professor Bollinger's point that paternalism or "elitism" is a factor behind the elaborate government regulation of broadcasting. *See* Bollinger, *supra* note 7.

11. Barron, *Access to the Press — A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967).

12. *Id.* at 1643, 1655-56. *See generally* Schmidt, *supra* note 7, at 37-54.