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Interpretations of the First Amendment

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INTERPRETATIONS OF THE FIRST AMENDMENT. By *William W. Van Alstyne*. Durham, N.C.: Duke University Press. 1984. Pp. x, 136. $24.75.

It is not entirely clear why so many people write about the first amendment. Granted, the freedoms contained therein are significant bulwarks of the American way, and, certainly, there is much to be said in terms of legal theory and ethical philosophy about these freedoms. Nonetheless — and this observation really applies only to the speech and press clauses of the first amendment[1] — there appears to be a powerful force of analytic reduction at work in most first amendment scholarship. Everyone agrees, though often for different reasons, that the freedoms of speech and press are good things; everyone agrees, though often with different problems in mind, that these freedoms are not absolutes, but can be limited by certain public interests (even Hugo Black would have approved of laws against perjury); and everyone agrees, though often not explicitly, that at some point in the analysis a balance must be struck between the freedom in question and the countervailing public interest.[2] This analytic reduction (to a balancing test) does leave much work to be done in the trenches. The ferreting out of reasons why we protect the freedoms of speech and press, the elucidation of how the exercise of these freedoms may on occasion collide with the interests of others, and the assigning of weights to the opposing freedoms and interests so that one side may be granted the protection of the law and the other side left to lick its wounds, are all socially (and academically) productive enterprises. But at a metatheoretical level ("How do we think about the first amendment?") and at a subtheoretical level ("What's really going on when people think about the first amendment?"), the analytic reduction appears unavoidable. The problem for the reader then becomes one of determining what each new piece adds to the overcultivated field. Upon encountering so much that seems familiar in a first amendment essay, the reader may wonder, "What is it that *this* work has to say?"

In his book *Interpretations of the First Amendment,* Professor William W. Van Alstyne of Duke Law School has three, perhaps four,

1. The observation may also apply to some extent to the religion clauses, but because these clauses generally pose additional, different sorts of problems, and because Professor Van Alstyne does not discuss them, they are not included here.

2. *See, e.g.,* F. SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 132 (1982) ("There is no way around the difficult task of evaluating the strength of the free speech interest, the strength of the opposing interests, and the balance between the two."); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 583 (1978) ("it is impossible to escape the task of weighing the competing considerations"); Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment,* 78 NW. U. L. REV. 1212, 1283 (1983) (arguing that general theories of the first amendment abstract from the delicate balancing considerations that must take place).

things to say about the freedoms of speech and press.[3] First, he provides a general formulation of the free speech clause, in the manner of a test:

> The question in each case is whether the circumstances were sufficiently compelling to justify the degree of infringement resulting from the law, given the relationship of the speech abridged to the presuppositions of the first amendment, and the relationship of the law to the responsibilities of the level of government that has presumed to act. [p. 48]

Second, he contends that the press should not be given a preferred first amendment position. He suggests that "[s]hould newspapers succeed in creating special first amendment . . . privileges that set them uniquely apart, they may thereafter discover that they have also paved the way for the loss of some of their own editorial freedom and for the escalation of their legal liabilities" (p. 65). Finally, he argues against regulating the electronic media:

> [I]sn't it possible to convert airwave-frequency scarcity essentially to an ordinary problem of mere economic scarcity, pursuant to which . . . the fact of economic scarcity per se is not a sufficient justification for requiring a private party to use his speech-property (whether a newspaper or a broadcast station) as an unwilling carrier of other people's messages? [p. 86]

He notes, however, that "it is not obvious that *the* freedom of speech would be appropriately enhanced by exclusive reliance upon a private property system that would literally drive out all those unable to compete effectively with dollars" (p. 88).

The first chapter, "A Graphic Review of the Free Speech Clause," presents a series of arguments accompanied by a series of graphic depictions of what the first amendment might and might not protect. "Might and might not" rather than "ought and ought not" is descriptive of Van Alstyne's rather carefully non-normative method of presentation. Even when he states his general formulation of the free speech clause (quoted above), Van Alstyne is merely recounting how the Court has behaved. His descriptive conclusion — there are certain categories of speech (*e.g.*, criminal solicitation, perjury) that never receive first amendment protection ("definitional balancing"), and there are certain instances of otherwise protected speech that sometimes lose first amendment protection (*e.g.*, clear, present, and serious danger; "ad hoc balancing") — is indeed nothing new. His task here appears

3. The book is comprised of an introduction called "Interpreting *This* Constitution," which essentially argues against noninterpretivist theories of judicial review, and three chapters. Chapter 1 is an adaptation of an article previously appearing in 70 CALIF. L. REV. 107 (1982) as *A Graphic Review of the Free Speech Clause.* Chapter 2 is not an adaptation from a previous article, but is derived from some related works that appeared in 9 HOFSTRA L. REV. 1 (1980) as *The First Amendment and the Free Press: New Trends and Old Theories,* and in 28 HASTINGS L.J. 761 (1977) as *The Hazards to the Press of Claiming a "Preferred" Position.* Chapter 3 originally appeared in different form in 29 S.C. L. REV. 539 (1978) as *The Möbius Strip of the First Amendment: Perspectives on Red Lion.*

to be one of synthesis and restatement, not one of "original" affirmative argument. As such, the first chapter is a cogent review of the free speech clause.

The second chapter, "The Controverted Uses of the Press Clause," presents the arguments for and against a preferred first amendment position for the press. Agency theory is central here; the argument in favor of a preferred position is that the press acts as the public's agent, as the "fourth estate," against the government. But Van Alstyne finds two arguments against a preferred position more persuasive. First, the preferred position's factual predicate is false — the press acts often out of a profit motive and not from a sense of fiduciary duty. Second, and significantly, if the press wants to be treated specially *because* it acts as the public's agent, then the press must also bear the heavy accountability of a fiduciary, thereby losing editorial autonomy and gaining legal liability.

But Van Alstyne fails to consider that what's special about the press may be a constitutional grant of rights *without* duties, that is, that the first amendment's separate phrase "or of the press" was meant to secure to the press a broader scope of legal protection, both as a sword (*e.g.*, access rights) and as a shield (*e.g.*, libel defense), and that the only way to secure such protection is by not burdening the press with a commensurate set of duties to match its rights. The press may, in the end, serve a stronger public agency function by being permitted to roam free.

In his third and most provocative chapter, "Scarcity, Property, and Government Policy: The First Amendment as a Möbius Strip," Van Alstyne details the arguments for and against treating electronic media differently from print media. The basic argument in favor of different treatment is the familiar one of spectrum scarcity and public trust: There is more demand for broadcast frequencies than there are frequencies, the government "owns" the airwaves, and therefore with the rights of a license come the duties of regulation. Van Alstyne neatly sidesteps the problem of unconstitutional conditions, that is, the argument that the government can't impede constitutional rights (here, freedom of the press) by granting a privilege (here, a broadcast license) conditioned on the relinquishment of those rights (here, by the imposition of the various Federal Communications Act regulations[4]). In a footnote, Van Alstyne points out that the doctrine of unconstitutional conditions does not invalidate *all* conditions on governmental privileges; rather,

> it imposes upon government the burden to demonstrate a constitution-

4. These regulations include the duty to devote broadcast time to relevant public issues, the duty to provide equal time to the opposition when a partisan perspective on a controversial public issue is broadcast, and the duty to permit local programming during a portion of prime time. The Federal Communications Act appears at 47 U.S.C. §§ 151-609 (1982) (originally enacted as the Communications Act of 1934, ch. 652, 48 Stat. 1064).

> ally significant difference sufficient to account for a condition (namely, the duty to carry other people's messages) distinguishably relevant to this context. Here, of course, the "distinguishably relevant" fact is the exclusivity of use-rights granted the successful applicant, and the justification of mitigating the excluded use-rights of others [who were denied, or lack, a license]. [p. 123 n.65]

But, as in Chapter Two, both a factual and a theoretical flaw exist in the argument supporting different treatment (here, of electronic media from print media; there, of the press from other free speech agents), and Van Alstyne finds these flaws irreparable. The factual problem is that as a result of technological developments there may not actually be more demand for broadcast frequencies than there are frequencies. The theoretical problem is that, even with spectrum scarcity, the government could allocate broadcast frequencies as it does real property — by selling on the open market. For the reader who is concerned about wealth distribution problems in this free market scenario, Van Alstyne adds a few pages of distressed acknowledgment that people without money will, indeed, have trouble competing under this new, deregulated regime. He admits that *some* airwave use might be best set aside from the open market auction.

Van Alstyne frames this last chapter with the image of a Möbius strip, defined as "Topology, a one-sided surface that can be formed from a rectangular strip by rotating one end 180° and attaching it to the other end" (p. 68). Van Alstyne quotes approvingly from a student's paper: "Deriving a consistent theory of the First Amendment from the myriad opinions of the Supreme Court represents a task similar to the problem of defining the inside and outside of a Möbius strip; that which appears logical at one point evaporates from another perspective" (p. 68). First amendment jurisprudence is, on this view, paradoxical, endorsing at various moments seemingly contradictory values.

Regarding electronic media, Van Alstyne's point is that the first amendment can be invoked to argue both for and against regulation. But surely this is not news; Rawls, for example, made quite clear that one's ability to speak — which is influenced by one's wealth — affects the value of the otherwise abstract "freedom of speech."[5] Furthermore, that the derivation of a consistent first amendment theory leads to a paradox because neoclassical and Keynesian economics can both be invoked in defense of a reasonable interpretation of the amendment does not appear to distinguish the problematic nature of first amendment theory from that of other constitutional provisions, or from other areas of law. Wealth is often necessary for the exercise of freedom; regulation of one person's freedom is often necessary for another's to flourish. This is so with speech and press — and beyond.

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5. J. RAWLS, A THEORY OF JUSTICE 221-28 (1971).

Perhaps Van Alstyne would agree. But *Interpretations of the First Amendment* remains a work limited by its place within the analytic reduction of free speech and free press scholarship. At a metatheoretical level, there is nothing very paradoxical going on at all, merely an acknowledgment (albeit often tacit) that interests must be balanced. One wishes that the image of the elusive Möbius strip would appear at this level; as it is, the topology is rather flat.

— *Abner S. Greene*