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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. 136. \$24.75.

Reviewed by Matthew S. Greenberg*

In this book, Professor Van Alstyne writes about the first amendment in a manner designed to instruct the "general reader." He attempts to review the standard interpretations of the first amendment, to analyze similarities and differences between the freedoms afforded speech and press, and to distinguish the impact of the amendment on the commercial air-waves from that on private commercial publications.

In Chapter I, the author utilizes graphic illustrations to reify the variety of approaches courts have taken in interpreting the speech clause of the first amendment. Figure 1 is a perfect unblemished square representing speech as inviolate from acts of Congress. In Figure 2, the square is split between speech which is immune from acts of Congress and that which is susceptible to governmental regulation. Figure 3 further divides the square into levels depicting speech that is always, conditionally or never protected. Eight additional models, of greater complexity, are presented. One portrays the "gravity of evil" analysis made by the Supreme Court in *Dennis v. United States*,¹ another renders a visual interpretation of the "clear and present danger" position expounded by Justice Holmes in *Schenck v. United States*.²

Further and more sophisticated illustrations emerge from the author's synthesis of distinct though not inert theories which courts have combined in deciding issues arising from first amendment controversies. For example, he merges the factors of "gravity" and "possibility" into one figure to demonstrate that speech manifesting both is the least protected. In later illustrations, Van Alstyne introduces degrees of first amendment protection: criminal speech or obscenities almost never receive pro-

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1. 341 U.S. 494 (1951).

2. 249 U.S. 47, 52 (1919).

tection; scientific comments or social conversations sometimes receive protection; political stumping or religious preaching consistently warrant constitutional protection. These graphic illustrations are a technique which permit the reader to successfully visualize the concepts of combination, balancing, and degree.

In the second chapter, Van Alstyne focuses on the protection afforded by the amendment to the press, asserting that, at present, courts are solicitous to the first amendment defenses of the press. He attributes this "special concern" to an adequate textual basis, supportive history, analogical reinforcement, manageability, and recurrent foreshadowing of general principle in judicial dicta. However, the author maintains that the press still lacks a "breakthrough" opinion from the Supreme Court tendering the institutional affiliation of a journalist a "separate and compelling weight" in the calculation of his or her right of free speech. Until that position is secured, Van Alstyne warns that the independence claimed, at times flaunted, by the press may backfire. A public dissatisfied with the representation it receives from the press may demand a better accounting. Van Alstyne fears that demands for a better accounting may lead to legislative

moves for balance and access. Such statutes would result in incalculable, but certain, governmental interference with the "free press."

In the third chapter, the author explores the dynamics of first amendment application to the electronic media and, in particular, the government's supervision of commercial airwaves. He questions the inconsistency of two relatively recent Supreme Court decisions, contending the outcomes were based on the nature of the medium rather than the content of the issue.³ Van Alstyne opposes the legal distinction among the forms of media and asserts that the electronic media should be subject to the same first amendment protections and commercial liabilities as the print media. By way of illustration, he challenges the government to bid-auction broadcast frequencies but suspend their regulation by the government, and hypothesizes that in the absence of governmental regulation, the first amendment and free

3. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, and *Miami Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

market will effectively apply. Van Alstyne sees two immediate first amendment benefits to his proposal. First, it would remove the government from the program-content business. Second, it would ensure that no broadcaster could rely on government subsidization, thereby relieving the media from the governmental control attendant to financial contributions. The broadcaster would have to broadcast what the people wanted to hear in the same way that the print media must publish what the people want to read.

In his Preface, Professor Van Alstyne suggests that many readers would be best to ignore his Introduction, "Interpreting *This Constitution*," because "[i]n some respects it does not fit the balance of the book." The reader would be wise to follow the advice of the author for the reason given. In fact, the problem with the Introduction may be symptomatic of the rest of the book. The chapters were originally published as law review articles. The style and subject of each chapter is significantly different from the subject and style of the other chapters. The reader should be aware that he or she is buying a book of three essays interpreting the first amendment rather than a definitive or exhaustive study.

