

INTERPRETATIONS OF THE FIRST AMENDMENT.

By W. Van Alstyne.¹ Durham, N.C.: Duke University Press. 1984. Pp. 130. \$24.75.

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There is something refreshing (and these days rare) about a piece of persuasive legal writing which graciously invites readers to accept some conclusions rather than attempting to overbear their will with inexorable logic. Van Alstyne's *Interpretations of the First Amendment* is of this rare, refreshing genre.³ Its prose is lucid, its tone measured, and its style serene. It exudes reasonableness and good sense.

This thoughtfulness is brought to bear on a number of seemingly disparate first amendment problems.⁴ The first chapter is a leisurely stroll through a small museum of conventional interpretations of the free speech clause. Each interpretation can claim some basis in the text of the Constitution, its history, and its past judicial exposition. While the various interpretations diverge in some respects, they can nonetheless ultimately be seen to cohere. The second chapter is a sustained argument against construing the press clause more generously than the free speech clause. Van Alstyne's examination of the consequences of adopting a contrary position makes this conclusion seem sensible as well. The last chapter explores the different treatment accorded to the electronic and printed press under the first amendment. Here, too, Van Alstyne's conclusion seems reasonable: "[E]ven on the bicentennial of our Constitution, we have not yet reconciled the interpretive difficulties of the first amendment in respect to scarcity, property and government policy."⁵

From whence does all this reasonableness and good sense spring? In large part, it can be attributed to a first rate display of

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3. W. VAN ALSTYNE, *INTERPRETATIONS OF THE FIRST AMENDMENT* (1984).

4. Van Alstyne's book is a collection of previously published essays. The introduction is an abridged version of *Interpreting This Constitution: The Unhelpful Contributions of Special Theories of Judicial Review*, 35 U. FLA. L. REV. 209 (1983). Chapter 1 is an adaptation of *A Graphic Review of the Free Speech Clause*, 70 CALIF. L. REV. 107 (1982). Chapter 2 is an amalgamation of two previous articles, *The First Amendment and the Free Press: A Comment on Some New Trends and Old Theories*, 9 HOFSTRA L. REV. 1 (1980), and *The Hazards to the Press of Claiming a "Preferred Position,"* 28 HASTINGS L.J. 761 (1977). Chapter 3 is a reincarnation of *The Mobius Strip of the First Amendment: Perspectives on Red Lion*, 29 S.C.L. REV. 539 (1978).

5. W. VAN ALSTYNE, *supra* note 3, at 90.

legal advocacy. Van Alstyne takes great pains not to overstate his conclusions, to recognize counterarguments and to admit the limitations of his own contributions. But more importantly, Van Alstyne's positions are animated by a vision of constitutional interpretation which itself seems quite reasonable—and appears all the more so once situated in the intellectual context of alternative constitutional theories.

In the introduction, Van Alstyne advises us to abandon efforts at judicial revision or improvement of the Constitution and invites us, instead, to make sense of "*this* Constitution."⁶ In making sense of *this* Constitution, we should be guided first and foremost by its text, though we may be allowed to draw insight (and authority?) from "a fair assessment of its history [and] its past judicial exposition."⁷ Van Alstyne never quite tells us what he means by "the text," "its history," and "its past judicial exposition"—nor does he tell us quite how these materials are to be interpreted. Of course, Van Alstyne could claim that his three essays on the first amendment demonstrate the appropriate interpretive approach. Maybe. If so, then the most readily discernible features of this demonstration consist in a penchant for consequentialist arguments and a tendency to begin interpretation with the text only to finish with what judicial precedent has bequeathed. Van Alstyne strives for a minimal coherence in his interpretive efforts: "coherence" in the sense that he tries to make the text, history, and precedent hang together in a bundle of good sense, and "minimal" in the sense that he refuses to dissolve controversy, ambiguity, and conflict in a finished theory.

Van Alstyne's approach might be described as "consequentialist textualism." His is no miserly textualism: while the text enjoys a privileged position in the interpretation of *this* Constitution, it is not so authoritative that it must be observed without regard for the consequences. Quite the contrary, textual exegesis is to be performed with a view towards the consequences that any proposed interpretation will yield. Nor is this textualism mechanistic: even when aided by history and judicial precedent, it will not always yield unambiguous answers. Indeed, Van Alstyne is to be praised for his sensitive treatment of a fundamental tension in his outlook. On one level, he is clearly calling us back to trying to make sense of the text. On another level, he is also telling us that when we look at the Constitution, there is a point at which we should stop making

6. *Id.* at 3-20. For another attack on attempts to improve the Constitution by judicial channels, see Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981).

7. W. VAN ALSTYNE, *supra* note 3, at 47.

sense. Both of these positions are animated by his criticisms of scholars who cannot stop trying to make sense of the Constitution and are therefore led to abandoning the text.

In order to understand why a general move towards textualism might seem appealing, it is necessary to appreciate the current intellectual context. In marked contrast to Van Alstyne's serene style, current theoretical constitutional scholarship appears to exhibit increasingly desperate gestures aimed ostensibly at reaching solid footing for normative analysis. The gestures become ever more frantic as successive attempts to ground constitutional theory fail to uncover a solid footing. Soon the purveyors of this literature (as well as their consumers) succumb to the vertigo of an infinite regress. For instance, if one asks questions about the scope of judicial review, one might feel compelled to answer questions about political theory, which in turn might require that one refer to political philosophy, whose claims in turn can only be redeemed by epistemological inquiries, which must perforce be limited by ontological givens, which in the (not truly) final analysis are rooted in the way in which we talk about things. So maybe the mistake was in framing a question about judicial review in the first place?⁸ Perhaps, the initial inquiry should be reformulated?⁹ And then one begins the regress again, from a new starting point.

My point here is quite simply that theoretical inquiry about the Constitution is increasingly willing to draw larger and larger circles around the text in order to find a secure footing from which the text might definitively (or at least satisfactorily) be read. The desperation of this scholarship is a function of two variables: its insistence upon finding a secure footing (to which, as reasonable persons, we must all assent) and paradoxically, its willingness to seek out this secure footing in treacherous and largely unmapped foreign territory that seems far removed from the text. The practice of this type of scholarship yields some ironic results. First, the more one is willing to entertain fundamental questions, the less obvious it is that one can provide noncontroversial answers. Hence, the more fundamental one gets, the less secure the footing one can find. Second, the further away one is from the text, the less obvious it is that one can get back to say anything meaningful or determinate (let alone, judicially useable) about the text. Indeed, by the time one begins to translate epistemological insights or philosophical breakthroughs

8. Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037 (1980).

9. Chemerinsky, *The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review*, 62 TEX. L. REV. 1207 (1984).

into the stuff of constitutional case law or doctrine, these epistemological and philosophical achievements have begun to acquire a remarkably indeterminate character.

It is in this climate of intellectual disarray that Van Alstyne offers his sober advice to get back to the text. In his introduction, Van Alstyne takes aim at what he calls "nonstandard" or "special" theories. Within his sights are Ely's representation-reinforcing concept, Choper's severance of certain federalism and separation of powers concerns from the Court's calendar, Michelman's elaboration of the Rawlsian principles, and Chief Justice Marshall's early contributions.¹⁰ Within range of Van Alstyne's arsenal are those theories which view the Constitution as all too clearly disappointing (and thus in need of judicial revision) and those theories which view the Constitution as too indefinite (and thus in need of improvisation).¹¹

Van Alstyne's basic objection to these "nonstandard" or "special" theories is that they are constitutional adventures. As these theoretical escapades come to an end, they give way to new interpretive escapades, but not without leaving behind a residue of precedent.¹² As if this were not bad enough in itself, Van Alstyne blames the "special" theories for their contribution to the relative desuetude of the amendment process: given the liberties which the Justices seem to take with the existing text, lord knows what they would do if we gave them any more raw material to work with. In the parent article to the introduction, he attacked the special theories because "each requires too much suspension of one's own grounds for disbelief."¹³ And in an article published after his book, Van Alstyne challenges special theories by asking how well each would fare if "it were already a clear and an established feature of the Constitution?"¹⁴ Van Alstyne suggests that, once placed in this context, support for the special theories would be less than unrestrained enthusiasm. All in all, Van Alstyne opines, most of the special theories "will eventually be seen at a later date as but the academic residue of yet another period in which American constitutional law records its native propensity for instability and rank politicization."¹⁵

10. More victims of Van Alstyne's assaults could be cited. See W. VAN ALSTYNE, *supra* note 3, at 7 nn.21-26.

11. For an argument that Van Alstyne's attacks on special theories do not address the work actually done by his targets, see Saphire, *Constitutional Theory in Perspective: A Response to Professor Van Alstyne*, 78 NW. U.L. REV. 1435, 1443-55 (1984).

12. W. VAN ALSTYNE, *supra* note 3, at 6.

13. Van Alstyne, *Interpreting This Constitution*, *supra* note 4 at 233 n.63.

14. Van Alstyne, *Notes on A Bicentennial Constitution*, 1984 U. ILL. L. REV. 933, 953.

15. W. VAN ALSTYNE, *supra* note 3, at 14.

One of Van Alstyne's objections seems to be that the special theorists are fundamentally uninterested in the conscientious interpretation of this Constitution and simply view the document as one more vehicle for the furtherance of their political programs. It strikes me that no one is immune to this charge and that it is thus not a useful one to make—save as against those who intone that their approach to the Constitution does not partake of politics.

Ironically, Van Alstyne's questioning of the desirability of incorporating the special theories into the constitutional text suggests implicitly that his objection may be not so much that these theories are animated by politics, but rather that they practice politics badly. Van Alstyne seems to think that the special theories are simply too fantastic to be believed. Perhaps these theories are simply too utopian to be taken seriously; their adoption would require too much stretching of the legal and national culture? Of course, the question of how much the culture can be changed (or maintained) by altering our conceptions of the Constitution (or more broadly, the legal system) is profoundly political. But even if Van Alstyne has left himself no (nonpolitical) place from which to charge the special theories with bad politics, the charge might be correct.

Why might the special theories be such bad politics? One could focus on their content and argue that as far as utopias go, the ones offered by the special theorists are particularly ugly or undesirable. Van Alstyne's dismantling of Thayer's theory might be an example of this approach.¹⁶ But generally, Van Alstyne focuses on the inadequacy of the form of the special theories. For instance, the "representationalist" political process theories, such as John Hart Ely's, are reduced by Van Alstyne to helpless blobs of indeterminacy and triviality.¹⁷ These theories are viewed as providing no guidance and no constraint on the Court's articulation of constitutional law.

I think that the plausibility of Van Alstyne's attack on special theories here derives from the form in which some of the purveyors of this literature present their theories. Theoretical schemes are advanced, as if somehow, their ruling categories and concepts will dictate appropriate decisions as the Supreme Court works through its constitutional calendar.¹⁸ This allows Van Alstyne and others to

16. *Id.* at 95-96 n.37. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

17. W. VAN ALSTYNE, *supra* note 3, at 9-11. J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

18. For a discussion of the same point as regards "categorical" theories of freedom of speech, see Schlag, *An Attack on Categorical Approaches to Freedom of Speech*, 30 UCLA L. REV. 671, 706-39 (1983).

justifiably point out that the special theories are indeterminate, that they do not compel conclusions and outcomes in concrete cases.¹⁹ If constitutional theory were more modest in its ambitions, less concerned with its potential for immediate translation into judicial opinions, Van Alstyne's attacks would seem far less powerful.

Another of Van Alstyne's objections to special theories seems to concern the sources of interpretation used by the special theorists; the special theories do not pay sufficient attention to the traditional sources of constitutional authority (e.g., the text) or they pay too much attention to nontraditional sources of interpretation (e.g., German philosophers).²⁰ The first claim is hard to prove—particularly since Van Alstyne's vision of the traditional sources of authority (the text, its history, and its judicial exposition) is left generously vague. No doubt, it is easier for Van Alstyne to pursue the second claim—that the special theories improperly rely on nontraditional sources. After all, the proof can easily be found in a special theory's citation of Kant or Marx or Rawls, etc. Van Alstyne could certainly object that none of these folks can be considered an *authority* on the Constitution of the United States. It all depends, of course, upon what one means by the term "authority." That, in turn, depends upon one's theory. In any case, it is difficult to dismiss the thought (and I am not sure Van Alstyne does) that these nonlegal luminaries might provide some useful insights into or a frame of reference for the interpretation of the Constitution.

Still, Van Alstyne's attack might be on the right track: some commentators seem to treat the nonlegal folks (Kant, Rawls, Derrida, etc.) as if these had already been anointed in fact as the ultimate sources of authority in our legal system. This somewhat comic, and sometimes ironic, canonization of such unlikely figures can hardly be considered integral to the use of nontraditional sources of interpretation; rather it might more sensibly be ascribed to the fascination of American legal academics with authority and endless documentation. In any case, I fail to see why an interpretive insight into the Constitution is to be automatically tainted (or rejected?) simply because it is traceable to Kant, Marx, or Foucault, or for that matter, Aristotle, Hume, or Austin.

Ultimately, Van Alstyne's central objection to the special theories is not philosophical but consequentialist. Special theories are not appropriate because they have no staying power and because they allow too much license in the judiciary to do as it pleases with *this* Constitution. Of course, these arguments can be turned back

19. W. VAN ALSTYNE, *supra* note 3, at 10-11; Tushnet, *supra* note 8, at 1051-56.

20. W. VAN ALSTYNE, *supra* note 3, at 18.

on Van Alstyne's textualism. Indeed, one might argue that the adoption of so many special theories by the Supreme Court at various times suggests that it is the text which has no staying power. Moreover, if history shows anything (and that certainly is in question), it is that the text can be made to mean a great many things.

Van Alstyne does, however, suggest some limitations on how we might interpret the text. He invites us to follow Justice Roberts's dictum to apply the Constitution as a T-square to the actions of government.²¹ In each case, the question is whether one line squares with the other. So far so good. The burden of showing where the constitutional line lies is not with the court but with the litigants. Which litigant? The one who has the burden of proof.²² Which one is that? We can tell from the text of *this* Constitution: if the claim is that a statute is beyond the scope of federal power, for instance, it is incumbent upon the claimant advocating the validity of the legislation to show that it is pursuant to the Constitution. On the other hand, if the claim is that the statute violates the first amendment, it is incumbent upon the rights claimant to show where the first amendment line lies and that it has been overreached by the government. Van Alstyne's allocation of the burden of proof requires us to distinguish that which the Constitution authorizes from that which it forbids. This suggestion, of course, is of no help where the issue is precisely whether a piece of constitutional text establishes an authorization or a prohibition or something else.

More problematic is the question of how the litigants might go about making arguments to support their view of where the constitutional line lies and whether it has been overreached. Here one can take either an unkind view of Van Alstyne's proposition or a more sympathetic one. The unkind view: Van Alstyne has solved the problem of constitutional interpretation; he has put the burden of its invention on the litigants. The sympathetic account: the way one defends or attacks an interpretation of the text is ultimately a contextual matter that works itself out in practice and not one which can usefully (nor indeed ought to) be answered by generalizations. None, that is, save one: special theories should not serve as the context from which the text is to be interpreted.

Van Alstyne's first chapter, "A Graphic Review of the Free Speech Clause," corroborates indirectly that his position lies on some fence between my unkind and sympathetic accounts. This first chapter has two main points: first, that a number of divergent interpretations of the first amendment are consistent with the text,

21. *Id.* at 12-18.

22. *Id.* at 15, 17.

and second, that this is not so bad as one might think.²³ In a series of eleven graphics, Van Alstyne paints a series of possible interpretations of the freedom of speech clause—all arguably consonant with the text. The chapter moves from the simplest absolutist position to more complicated visions including the two speech theories, the clear and present danger permutations, and the subcategorization of first amendment speech. Each move from one interpretation to the next is impelled by the “irresistible counterexample” (for instance, shouting fire in a crowded theater), or by some perceived inadequacy of the previous interpretation.²⁴ In virtually all cases the movement from one interpretation to the next is motivated by consequentialist concerns. In other words, we notice that any given interpretation will have some effect which for some reason we are not supposed to like, and thus we move on to the next interpretation which solves our problem but in turn produces new ones.

Van Alstyne assures us that the divergences among the competing or supplementary interpretations are no reason for cynicism or despair. For one thing, all these interpretations are but specifications of a single comprehensive interpretation of the first amendment:

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.²⁵

This standard, obviously, will not reassure those who are concerned about the indeterminacies of the textualist mode.²⁶ On the contrary, they will take it as confirmation that their worst fear is correct: the text can be made to mean just about anything. Similarly, this standard is not likely to win over anyone who views judges as other than wholly benevolent and insightful.²⁷ Van Alstyne has a message for the cynics and the skeptics: much more than this standard is not to be expected from the Constitution.²⁸ Don’t expect so much, it’s only law.

For those who remain troubled that the free speech clause might mean so many things, Van Alstyne offers the palliative:

23. *Id.* at 22, 47-48.

24. *Id.* at 24-46.

25. *Id.* at 48.

26. See Van Alstyne, *Interpreting This Constitution*, *supra* note 4, at 228 (Van Alstyne acknowledges the ambiguity of language and concedes that even conscientious commitments to textualism will yield different interpretations).

27. See W. VAN ALSTYNE, *supra* note 3, at 49 (Van Alstyne assumes “a conscientious willingness in the judiciary to try” to make this formulation work).

28. *Id.*

"[T]he free speech clause's good faith administration has nonetheless very probably provided the United States with a greater measure of actually protected free speech than we would otherwise have had."²⁹ What do statements like this mean? Think about this one, for instance: "The inclusion of the violin as a major instrument in the symphony orchestra has very probably provided the western world with greater actual virtuosity than we would otherwise have had." I would not want to argue against this claim. On the other hand, I would want to point out that there is no significant movement trying to get orchestra companies to fire their violinists. It's just not an issue.

But perhaps Van Alstyne does think it is an issue. He might be concerned, for instance, that as the personnel of the Court changes, more of its music will begin to sound in the key of some very strange and undesirable special theory.³⁰ Viewed from this perspective, Van Alstyne's work might be seen, not so much as a plea for textualism, but as an attempt to vindicate, rationalize, and entrench conventional judicial interpretations of the free speech and press clauses.

Indeed, perhaps this review has put Van Alstyne's cart before its horse. Perhaps the real message of Van Alstyne's work is not, "Let us return to the text and this is how to do it," but rather, "Let us protect the received judicial wisdom on the first amendment and rationalize and preserve it by means of an enlightened consequentialist textualism."

There is much to support this latter reading of Van Alstyne's work. After all the bulk of the interpretations he derives from the consequentialist examination of the text coincide rather well with conventional judicial interpretations of both the free speech and press clauses. Indeed, radical or exotic visions of the text are conspicuously absent from his interpretive efforts. The problem is that a renewed commitment to making sense of this text of the Constitution clearly does not require that interpretations be limited to such conventional stuff. Why does Van Alstyne derive nothing but this conventional stuff from the text? I think there are two possible answers.

First, Van Alstyne might believe that plausible interpretations of the first amendment must be confined to a fairly narrow reading

29. *Id.* at 47.

30. Van Alstyne disavows such political concerns: "[T]he suggestion that the judicial task of constitutional review should be performed with the same undissembling interest in accuracy as one would bring to his or her own workbench is, nonetheless, a proposal of enormous and lasting appeal." *Id.* at 12.

of judicial precedent. But if a narrow reading of precedent is to inform the interpretation of the first amendment, then it is the authority and the interpretation of precedent which require explanation and justification, not textualism. While, indeed, Van Alstyne's interpretations of the free speech and free press clause seem consistent with much of the judicial interpretation of those clauses, I do not believe that Van Alstyne relies upon precedent to justify his interpretations.³¹ It is more the other way around. Van Alstyne's interpretations can be seen to rationalize and justify the mass of precedent.³²

If so, we are brought to the second possible explanation for the conventionalism of Van Alstyne's interpretations. This conventionalism can be seen to result from the consequentialist approach Van Alstyne adopts. The consequentialist approach to the text requires the positing of both good and bad effects resulting from any given interpretation. At its simplest level, the practicing consequentialist must possess a schedule of good and bad effects as well as a rudimentary understanding of how legal interpretations cause effects. Van Alstyne does not elaborate either his schedule of good and bad effects, nor does he pause to consider how interpretations cause effects. Either would require something very much like a special theory.

In the introduction, Van Alstyne offers, I think, powerful reasons for rejecting "special" theories and adopting textualism. But as soon as he begins to put textualism into practice at the beginning of the first chapter, it becomes apparent that he will have to develop something like special theories. So there it is: when one is ruled by special theories, it makes good consequentialist sense to return to the text. When one practices textualist interpretation, it makes good consequentialist sense to develop special theories. And so on.

31. *See id.* at 22 (where Van Alstyne directs his interpretive strategy away from plunging into precedent and attempting to sort things out from there).

32. *Id.* ("The different interpretations of the clause to be reviewed . . . include virtually all principal interpretations . . . and, treated as they will be here, they may . . . turn out to be less at odds with one another than one might suppose.")