

The Quest to Find the Meaning of the First Amendment

FIRST AMENDMENT CASES AND MATERIALS, 2d Edition. By William W. Van Alstyne.[†] Westbury, New York: Foundation Press, 1995. Pp. xi, 1156.

*Reviewed by Mark C. Alexander**

I. INTRODUCTION

A. *A Master's Perspective*

Professor William Van Alstyne is a leading First Amendment scholar with a long, distinguished career in the law. He started as an attorney in both the California and United States Departments of Justice, then joined the academy at a young age. He has served as a law professor for nearly forty years, including over thirty years at Duke, with visitorships at almost every leading law school in the country. He has been on the Board of Directors of the ACLU and was the President of the American Association of University Professors; he has filed numerous briefs and other pleadings with the United States Supreme Court on behalf of these groups.

Van Alstyne is far more than just an impressive resume. He has been a prolific and influential scholar, discussing First Amendment questions throughout his career. He has authored dozens of law review articles that are frequently cited in varying contexts, including at least twenty cites in U.S. Supreme Court opinions. He also has done what few others have done with his scholarly agenda by writing consistently and powerfully on the major aspects of the First Amendment—Free Speech, Press, and Religion—and their interrelation. He has added to

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* Assistant Professor, Seton Hall University School of Law. B.A., J.D., Yale University. Mark Denbeaux, Brian Landsberg, Charles Sullivan, John Wefing, Jim Weinstein, Steve Wermiel and Michael Zimmer deserve much credit for helping me sort out my ideas and approach to this review (but the blame for any shortcomings rests with me).

his numerous contributions by providing a thorough and insightful casebook which is the subject of this review.¹

In these pages, I will review Part I of the Van Alstyne casebook (hereinafter Casebook),² covering Free Speech and Press. On the whole, while the Casebook successfully compiles highly valuable materials illustrating the rich history of opinions³ addressing the meaning of the First Amendment, its organization and style are so unique to the author that it is at times hard to follow by those with different perspectives and teaching goals. In addition, the discussion of media is a bit disjointed, the highly current topic of the Internet is notably under-developed (even in the Supplement), and individual notes in the book would benefit from more editing.⁴

*B. A Teacher's Perspective—The Call for a Casebook and
Van Alstyne's Response*

I have had the good fortune of teaching and writing about the First Amendment at an early point in my career as a law professor. It is a broad and exciting area in which to focus, presenting ever-

1. WILLIAM W. VAN ALSTYNE, *FIRST AMENDMENT CASES & MATERIALS* (2d ed. 1995 & Supp. 1997).

2. Part I includes Chapters 1-4, spanning pages 1-845, comprising the bulk of the Casebook; the principal text of the entire casebook is 1,156 pages long. *Id.* Unlike the other casebooks reviewed in this edition of the law review, Van Alstyne's casebook is not a comprehensive constitutional law casebook—its sole focus is the First Amendment.

3. The Casebook is limited, however, because it contains almost exclusively U.S. Supreme Court cases and little from lower federal or state courts. See VAN ALSTYNE, *supra* note 1. This is generally true of other First Amendment compilations. This may be the case because authors prefer not to supplement or redo the casebook frequently to address the lower and state court opinions as they are eclipsed by more recent U.S. Supreme Court cases. In addition, unlike U.S. Supreme Court opinions, these lower court opinions do not present the controlling case law.

4. No matter who prepares the materials, organizing a First Amendment casebook will be invariably difficult, at best. The Supreme Court has taken many different and often fractured approaches to free speech issues in such areas as cable and broadcast television, see for example, *Turner Broadcasting System v. FCC*, 512 U.S. 622 (1994), reprinted in VAN ALSTYNE, *supra* note 1, at 548; *Turner Broadcasting System v. FCC*, 117 S. Ct. 1174 (1997), reprinted in VAN ALSTYNE, *supra* note 1, at 4 (2d ed. Supp. 1997); *Denver Area Educ. Telecomm. Consortium v. FCC*, 518 U.S. 727 (1996), reprinted in VAN ALSTYNE, *supra* note 1, at 6 (2d ed. Supp. 1997); or campaign finance, see, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1976), reprinted in VAN ALSTYNE, *supra* note 1, at 638; *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981), reprinted in VAN ALSTYNE, *supra* note 1, at 661; *F.E.C. v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480 (1985), reprinted in VAN ALSTYNE, *supra* note 1, at 664; *Colorado Republican Fed. Campaign Comm. v. F.E.C.*, 518 U.S. 604 (1996), reprinted in VAN ALSTYNE, *supra* note 1, at 17 (2d ed. Supp. 1997). Even if the Court were more consistent in its approach, scholars and commentators will naturally take different angles on the subject. Not only will scholars vary, but I also expect that individuals will change their views over time. Thus, my perspective as a junior faculty member may well become different after several decades of teaching and scholarship in such a way as benefits Professor Van Alstyne.

changing challenges to the teacher. The First Amendment itself has been closely scrutinized and interpreted by many different individuals with widely varied perspectives; the absence of a consensus as to its central meaning both frustrates students and energizes them.⁵ From my vantage point, an ideal First Amendment casebook should recognize the triangular relationship it creates between author, student, and teacher. It should both present the student and teacher with the author's perspective and simultaneously help both to develop their own ideas as to the meaning and importance of the First Amendment. Perhaps more importantly, it also must help the teacher accomplish the goals of the course. Van Alstyne has ample experience and insight to develop a refined sense of the meaning of the First Amendment in a casebook well-suited to both teacher and student.

Professor Van Alstyne has prepared a casebook which offers all students⁶ the opportunity to examine this formidable area of law through the eyes of one of its leading experts. The book is a thorough and intelligent compilation of First Amendment cases and materials, organized from the viewpoint of a master. But that very strength is also a weakness in the sense that the materials do not work very well if the reader does not share Van Alstyne's style or approach.

The Casebook mirrors the course that Van Alstyne himself would teach, including not only the cases, articles, and other reading materials he might assign, but also the lecture notes and diagrams he might use in class. The Casebook primarily includes U.S. Supreme Court cases, and the notes and questions suggest a Socratic dialogue, with the overall effect being that the reader may feel as though she is attending class with Van Alstyne himself. Perhaps because Professor Van Alstyne is the sole editor, his particular style dominates.⁷ Although this makes for a more personal approach than other casebooks, I have at times found myself looking for more.⁸

5. See, e.g., Craig A. Stern, *Foreign Judgments and the Freedom of Speech: Look Who's Talking*, 60 BROOK. L. REV. 999, 1009-1010 (1994). ("This brief review of First Amendment scholarship demonstrates that the Free Speech Clause has enjoyed no single authoritative interpretation. . . . Thus, the scholarly understanding of the freedom of speech yields no clear counsel.")

6. Professors should be ultimate students of the law.

7. Van Alstyne even includes his favorite "bawdy verses," VAN ALSTYNE, *supra* note 1, at 831, to punctuate the Socratic dialogue.

8. A number of my students have shared a similar perspective with me. In a sense, the Casebook is like the course that is the perfect fit for some students, but for others it is a missed opportunity for an interesting and challenging semester of study of a fascinating subject.

Van Alstyne views the Casebook as a comprehensive classroom resource,⁹ but it does not carry my speech seminar¹⁰ from the first day to the last. My seminar covers only the Free Speech and Free Press Clauses, which are presented in Part I of the Casebook. This review therefore covers only the materials on freedom of speech and the press found in that Part. Also, my seminar, by its nature, considers ways in which the law might develop in the future, while the Casebook examines past cases and doctrines.

I chose Van Alstyne's Casebook in part because I knew his work and reputation, and I knew he would compile a fine collection of resources. Having taught from the Casebook, I have come to understand better the breadth and depth of the materials, and I enjoy the rewards of this complex work. Still, some aspects of the Casebook do not seem to match with what I am looking for. Given these broader comments, I shall now take a brief tour through Part I of the Casebook, devoted to the Free Speech and Free Press Clauses, discussing my perspective on how the book teaches and reads.

II. GAINING PERSPECTIVE ON THE FIRST AMENDMENT WITH VAN ALSTYNE'S CASEBOOK

A. *A Walk Through the Casebook*

The first chapter provides "an introduction to the First Amendment,"¹¹ and it presents an overview of basic First Amendment principles and methodology. Van Alstyne has written most of the text of this chapter and offers useful comparisons with other countries' free speech provisions, discussions of fundamental constitutional protections, and an introductory look at certain Justices' perspectives on the interpretation of the Amendment. The great strength of the first chapter is that Van Alstyne uses his wisdom and insight to indicate why the protection of speech and the press is so important and how this country's tradition of protection is unique. This chapter introduces (or reintroduces) the reader to the basic idea of the need for and

9. VAN ALSTYNE, *supra* note 1, at v.

10. The seminar, entitled *The First Amendment in the Twenty-First Century*, is very specific; it is not a First Amendment survey course. The course description reads, "This course will explore the First Amendment's free speech guarantees in the context of new avenues of communication. We will consider whether and to what extent the government can and should regulate communication, asking what is "speech" and what is a "public forum" in modern society? We will examine the struggle to apply an 18th century clause to such modern institutions as the modern shopping mall, the Internet, and cable television, in order to create a fuller understanding of the applications of the First Amendment as we move forward into the twenty-first century."

11. VAN ALSTYNE, *supra* note 1, at 3.

power of the First Amendment. It thus is both generally informative and also relays Van Alstyne's sense that the First Amendment provides strong protection for individuals against governmental attempts to regulate speech and the press.

Van Alstyne brings this introductory information together in part through the use of certain illustrative figures¹² which provide the first significant clue that the Casebook will read like an insider's guide to Van Alstyne and his course. These figures are primarily boxes identifying particular perspectives on the First Amendment and what it protects, with parts shaded, halves broadly defined, or portions generally identified. I find that even after countless reviews, the figures do not clearly convey the information Van Alstyne intended, as though something were lost in the translation. So the raw information in the chapter is useful and helpful at this point, but the screen through which it is filtered obscures as it clarifies. Despite these flaws, Chapter 1 successfully whets the appetite, just as would a first lecture with a few roughly drawn figures.

Chapter 2 begins the long process of developing the history and early theories of the First Amendment. At first, Van Alstyne seems to start the reader on a directed historical journey, as he begins with early case law and theories and discussions of balancing, legislative deference, and the clear and present danger test. He then begins to explore the rich and varied First Amendment traditions that make the subject compelling. After presenting *Schenck v. United States*,¹³ *Abrams v. United States*,¹⁴ and other early cases, Van Alstyne offers a discussion of the First Amendment and incorporation. This sensible approach is consistent with the general chronological development of the law, but what should be a brief note, becomes a long and ultimately disengaging detour. The incorporation materials suggest a class that Van Alstyne may have taught on the subject, but this segment in the Casebook would probably be better handled in a shorter, more concise manner. Ironically, this is a very thoughtful and important discussion of First Amendment incorporation, one of the best to be found. It is simply too lengthy and too dense for the Casebook. More strenuous

12. The Casebook refers to these illustrations as "figures." They are like charts and graphs, but, lacking in rows and columns and specific point headings; perhaps "figure" or "diagram" is the only appropriate label. The text and figures originally appeared in Van Alstyne's article, *A Graphic Revue of the Free Speech Clause*, 70 CAL. L. REV. 107 (1982). The original text is scattered throughout the casebook, and most of the explanatory material is eliminated or reduced. The figures read more clearly in the context of the original text in the California Law Review.

13. 249 U.S. 47 (1919), reprinted in VAN ALSTYNE, *supra* note 1, at 35.

14. 250 U.S. 616 (1919), reprinted in VAN ALSTYNE, *supra* note 1, at 46.

editing would make the topic more accessible to the student reader and keep it in proportion to the role it plays today in First Amendment law. Because of this discussion's length and wandering pace, it interrupts what had been the chapter's originally promising development of the law. After fifteen pages, Van Alstyne seems to acknowledge this by observing, "we have concluded about as much as we can on the questions that first raised this inquiry, at least for the moment, and it is time to resume where we left off."¹⁵ Had the note on incorporation been more closely edited, the return to the text would not be such a noted occasion; Van Alstyne is right to remind the reader that he has gone off course.

The Casebook then moves forward rapidly in time, from other cases establishing the need for First Amendment protections of political, controversial, and offensive speech, through more recent cases on political advocacy and symbolic dissent (such as flag burning). The Casebook includes the seminal cases which help frame the inquiry into the meaning of the First Amendment, but I would suggest a different organization.¹⁶

Specifically, certain material from Chapter 4 would appear to fit better in Chapter 2, and I do not understand the separation. Chapter 2 presents case law and theory showing the reader the principal ways in which the nation has struggled to define what is protected speech and what is not. The chapter discusses "the centrality of untrammelled advocacy in the United States,"¹⁷ including leading cases like *New York Times v. Sullivan*,¹⁸ *United States v. O'Brien*,¹⁹ and *Texas v. Johnson*,²⁰ and it provides much material that is central to the development and limits of modern free speech analysis, emphasizing the democracy model of First Amendment theory. The Chapter also indicates how the Court has set aside certain categories of speech as undeserving of First Amendment protection, but it fails to discuss how nonpolitical speech falls outside the realm of protected speech. The nonpolitical speech material is reserved for Chapter 4, over three hundred pages later, where the Casebook presents materials on commercial speech and obscenity. Thus, such cases as *Roth v. United*

15. VAN ALSTYNE, *supra* note 1, at 73. The writing style of such a comment further emphasizes my point about the Casebook being personal and reminiscent of being in class with Van Alstyne himself.

16. As with Chapter 1, more "figures" invade these pages.

17. This actually is part of the Chapter's title. VAN ALSTYNE, *supra* note 1, at 35.

18. 376 U.S. 254 (1964), *reprinted in* VAN ALSTYNE, *supra* note 1, at 190.

19. 391 U.S. 367 (1968), *reprinted in* VAN ALSTYNE, *supra* note 1, at 286.

20. 491 U.S. 397 (1989), *reprinted in* VAN ALSTYNE, *supra* note 1, at 315.

*States*²¹ and *Miller v. California*²² are reserved for Chapter 4 and separated from the related cases discussed in Chapter 2. It would make more sense to keep these materials together so as to give a unified overview of what is protected speech and what is not. Van Alstyne's approach leaves me grasping for more²³ and does not fully develop the law and the rise of the Free Speech Clause.²⁴

The next chapter, "The First Amendment In Specific Environments," presents its materials in a more helpful format.²⁵ This chapter reads like a series of lectures that Van Alstyne may have presented over his career. It provides an opportunity for discussions on a wide variety of specific topics²⁶ and is presented in a manner conducive to manageable assignments and a flexible syllabus. As two examples of this, the Casebook pays significant attention to forum analysis²⁷ and presents other materials to draw out the boundary between public and private property.²⁸ These materials may be assigned and taught in sequence or shifted in order, depending upon the instructor's desire; the presentation is well-designed to accommodate individual needs. This flexibility also allows the Casebook to

21. 354 U.S. 476 (1957), *reprinted in* VAN ALSTYNE, *supra* note 1, at 763.

22. 413 U.S. 15 (1973), *reprinted in* VAN ALSTYNE, *supra* note 1, at 806.

23. As a comparison, Shiffrin and Choper's First Amendment casebook presents these cases in a sequence similar to what I would suggest. See STEVEN H. SHIFFRIN & JESSE H. CHOPER, FIRST AMENDMENT: CASES, COMMENTS, QUESTIONS (1991). While a broader constitutional law book, the Gunther and Sullivan Constitutional Law casebook (13th ed., Foundation Press, 1997) also takes a similar organizational approach. GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW (13th ed. 1997).

24. The presentation is also weakened stylistically by rambling notes and awkward figures, but the division of material between Chapter 2 and Chapter 4 more significantly erodes the foundation and function of the Casebook.

25. VAN ALSTYNE, *supra* note 1, at 330.

26. The sections are entitled as follows: A. The Government as Employer, Contractor, Purchaser of Services, and Provider of Benefits; B. A Return to Early Holmes and the Right-Privilege Distinction of *McAuliffe v. Mayor of New Bedford*; C. The Unconstitutional Conditions Doctrine; D. A Reprise on the Problem: Applying the "Connick" Test; E. The Government's Management of Public Property: First Amendment Rights of Access and Use; F. Coerced Expression and Freedom Not to Speak; G. Equalizing Freedom of Speech by Leveling Expenditures and Contributions—Regulating the Uses of Money and Speech; and H. Anonymity and the First Amendment.

27. These materials include *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975), *reprinted in* VAN ALSTYNE, *supra* note 1, at 482, and the *Krishna Consciousness* cases, 505 U.S. 672 (1992), *reprinted in* VAN ALSTYNE, *supra* note 1, at 522.

28. This discussion includes *Marsh v. Alabama*, 326 U.S. 501 (1946), *reprinted in* VAN ALSTYNE, *supra* note 1, at 589; and the shopping center cases (*Hudgens v. NLRB*, 424 U.S. 507 (1976), *reprinted in* VAN ALSTYNE, *supra* note 1, at 594; and *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), *reprinted in* VAN ALSTYNE, *supra* note 1, at 599, are presented as principle cases).

serve as an excellent resource for those who do not use it for a course and instead refer to specific readings.

While the materials in this chapter are well-organized and presented, I still see two areas for improvement. First, the organization of the discussion of the media is a bit disjointed. *Miami Herald Publishing Co. v. Tornillo*²⁹ and related notes and questions are presented in Chapter 2.C, but *Red Lion Broadcasting Co. v. FCC*,³⁰ the *Turner Broadcasting* series,³¹ and other cases are reserved for separate discussion in Chapter 3. Instead, I think that all these materials would fit better together in Chapter 3, thus providing a complete picture in one place of the treatment of the media by the Court. Taken together, these cases indicate the protections afforded the press and the centrality of the media in the development of our democracy. They also reveal the differing ways in which print and broadcast³² are analyzed, primarily raising issues of scarcity, barriers to entry, costs of publication, and government regulation of media. While the Casebook refers the reader back to the prior discussion in Chapter 2, the three-hundred-page separation again reveals organizational flaws.

Second, the Casebook does not discuss computers and the First Amendment. This specific topic certainly deserves its own discussion, one that would fit well within the context of the discussions in Chapter 3. It is amazing that legal events have proceeded so rapidly that a book that came out in 1995 needs updating in this area. The rising prominence of the Internet and its legal treatment leaves a large hole in the book. *Reno v. ACLU*³³ (which, without a home of its own, is instead placed in the Supplement materials on obscenity) and the district court opinions³⁴ would provide a start, and the "little CDA" cases³⁵ and some other on-line prosecution cases³⁶ would nicely round out a presentation on what is sure to be one of the key

29. 418 U.S. 241 (1974), *reprinted in* VAN ALSTYNE, *supra* note 1, at 233.

30. 395 U.S. 367 (1969), *reprinted in* VAN ALSTYNE, *supra* note 1, at 536.

31. VAN ALSTYNE, *supra* note 1, at v.

32. Broadcast may be broadly defined in this context to include radio, television, and cable.

33. 117 S. Ct. 2329 (1997), *reprinted in* VAN ALSTYNE, *supra* note 1, at 47 (2d ed. Supp. 1997).

34. *ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996); *Shaw v. Reno*, 930 F. Supp. 916 (E.D.N.Y. 1996).

35. *ACLU v. Miller*, 977 F. Supp. 1228 (N.D. Ga. 1997) (granting injunctive relief in constitutional challenge to Georgia statute regulating the Internet); *American Library Ass'n, et al. v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997) (same, but for New York statute).

36. *See, e.g., United States v. Jake Baker*, 890 F. Supp. 1375 (E.D. Mich. 1995).

developing areas in First Amendment law.³⁷ The third chapter would greatly benefit from these additional materials.³⁸

Since I have already suggested that the materials in Chapter 4 should be moved into Chapter 2, I have come to the end of my brief walk through Part I of the Casebook. The raw material in the Casebook is important and compelling, yet I find its presentation and organization to be lacking at times. To its credit, any shortcomings in Van Alstyne's Casebook may be easily remedied by (1) preparing a flexible syllabus that might jump around the Casebook and (2) supplementing the Casebook with other texts and materials.³⁹ The anthology compiled by Lively, Roberts & Weaver⁴⁰ or the reader put together by Garvey & Schauer⁴¹ would serve the task well. Alternatively, my own practice is to supplement the Casebook with selected cases, law review articles, and other readings⁴² tailored to course specifics.

B. Conclusion

Over time, the Court and commentators have struggled to define the meaning of the First Amendment, with widely divergent results. Many different approaches have come and gone. The current Court has developed standards that focus upon whether a statute in question is content-based or content-neutral. The recent debate in the academy has been more concerned with whether the goals and values served by the First Amendment are those of individual expression or the enhancement of collective democratic self-governance.⁴³ While there

37. Plus, there is one quick reference to these questions in a note on page 16 of the 1997 Supplement.

38. I do not doubt that Van Alstyne might choose to incorporate—and reorganize—these materials in Chapter 3 in the next edition.

39. And because First Amendment courses may tend to be more specific in focus, professors are likely to need to supplement any text. In fact, I doubt that any professor is ever fully satisfied with every page of a casebook.

40. DONALD E. LIVELY ET AL., *FIRST AMENDMENT ANTHOLOGY* (1994).

41. FREDERICK F. SCHAUER, *THE FIRST AMENDMENT: A READER* (John H. Garvey ed., 2d ed. 1996).

42. As a modern alternative to handouts, the professor may assign these materials simply by providing cites and letting the students pull the cites from the on-line services.

43. With this debate, one school of thought suggests that the First Amendment is designed primarily to ensure that the individual is free to speak without interference from the state. The leading competing theory posits that the First Amendment protects not so much the individual but instead promotes and preserves values of collective self-governance and democracy. To me, while the democracy approach has greater appeal, I believe that one need not “choose” between these allegedly competing theories. Instead, I believe that the democracy approach incorporates the value of individual self-expression. For a compilation of articles comparing these perspectives, see generally LIVELY ET AL., *supra* note 40, at 1.

is no clear answer as to the meaning of the First Amendment, Van Alstyne gives us a casebook that helps us to ask the right questions to move toward a greater understanding.

I expect that Van Alstyne's classes are very interesting and certainly unique to his style and viewpoint. However, his personal presentation style and organization are lost a bit in the Casebook, and the reader may not always get a full sense of the Court's or Van Alstyne's well-developed vision of the First Amendment. I wish for more, because I care so much about the subject, and I know that Professor Van Alstyne has so much to offer. Above all, despite any criticisms, the fact remains that Van Alstyne has put together materials that are highly valuable. He has taken on a daunting task, and he has done masterful work in presenting the information comprehensively and sharing his insights. There is no correct way to do so, and these comments may be seen more as suggested edits than anything else. Given the centrality of the First Amendment and its role in preserving the uninhibited robust public debate⁴⁴ that defines our nation, I am glad to have such a book.

Professor Owen Fiss has suggested a powerful metaphor, involving the basic concepts of education and the teacher. "The duty of the state is to preserve the integrity of public debate—in much the same way as a great teacher—not to indoctrinate, not to advance the 'Truth,' but to safeguard the conditions for true and free collective self-determination." OWEN M. FISS, *LIBERALISM DIVIDED* 20 (1996).

44. See *New York Times v. Sullivan*, 376 U. S. 254, 270 (1964).