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FISH ON FIRST*

Larry Alexander**

The First is vintage Stanley Fish.¹ Anyone who has had, as have I, the pleasure of reading Stanley's books and articles and watching him perform at conferences and colloquia will immediately recognize both the style and the substance of *The First*. And in my case, I agree with virtually all of Stanley's substantive points—which is fortunate, given that I am laboring under a 1,000-word limit.

Given my space constraints, I am only going to comment at length on Chapter Three—*Why Freedom of Speech Is Not an Academic Value*. But I shall make some very brief remarks about the other chapters.

The bottom line of Chapter One is that there is no principle that undergirds freedom of speech. I, of course, agree, and Stanley quotes from my book, *Is There a Right of Freedom of Expression?*, in reaching the same conclusion I reached in the book.² I immodestly recommend my book to the reader who is looking for further support for Stanley's conclusion.

In Chapter Two, Stanley argues that hate speech cannot be defined in any neutral way, for whether an expression is hateful bigotry or a hard truth depends upon one's inevitably partisan point of view. I wholeheartedly agree, but I will add a couple of points in addition to Stanley's, points I made in my two prior articles on hate speech.

First, in commenting on Jeremy Waldron's case for banning hate speech, I pointed out that hate speech might be deemed objectionable for two different reasons.³ It might be thought dangerous because of its potential to persuade its audience to engage in violent or discriminatory conduct. Or it might be an evil solely because it psychically wounds its targets. If it is objectionable because of its persuasive effects, then we already have a jurisprudence in place to deal with incitements to lawlessness.⁴

* This title is not attributable to Bud Abbott, Lou Costello, or Dennis Martinez.

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¹ STANLEY FISH, *THE FIRST: HOW TO THINK ABOUT HATE SPEECH, RELIGIOUS SPEECH, FAKE NEWS, POST-TRUTH, AND DONALD TRUMP* (2019).

² *Id.* at 20 (quoting LARRY ALEXANDER, *IS THERE A RIGHT OF FREEDOM OF EXPRESSION?* (2005)).

³ Larry Alexander, *Fighting for Words*, NAT'L REV., Dec. 17, 2012, at 36.

⁴ See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444 (1969). I have written a lot about *Brandenburg* and its ilk, most recently in a symposium on the 100th anniversary of the clear and present danger test. See Larry Alexander, *Inciting, Requesting, Provoking, or Persuading Others to Commit Crimes: The Legacy of Schenck and Abrams in Free Speech Jurisprudence*, 72 S.M.U. L. REV. 389 (2019).

Second, if hate speech is to be banned because it is psychically wounding, a problem immediately becomes apparent. For, as I wrote in my other article on hate speech, it is not the words of hate speech that wound but the thoughts in the mind of the speaker they reveal.⁵ That is why, for example, the same words would not wound if they were spoken by, say, an actor in a movie portraying a Nazi. They would not wound because no one would assume that they revealed what the actor actually thought. But given that insight, it becomes obvious both that banning hate speech only bans evidence of the hateful thoughts that wound but not the thoughts themselves. Moreover, as Henry Louis Gates pointed out in an article I cited, hateful thoughts can be expressed in ways that are not typically thought of as hate speech.⁶ And as I illustrated, a button worn on one's lapel on which was written "you know what I would call you if use of the N-word were not banned" would be as effective as the N-word in revealing hateful thoughts, as would a Ku Klux Klan tie clasp or a white hood on the coat rack.⁷

I have written quite a bit about the religion clauses of the First Amendment, the topic of Chapter Four. I argued in Chapter Eight of *Is There a Right of Freedom of Expression?* that, like freedom of expression, the religion clauses have no principled basis, the same conclusion Stanley reaches. But I want to comment on one aspect of Chapter Four, the discussion of the *Masterpiece Cakeshop* case and the compelled speech claim of Jack Phillips, the baker.⁸ If the clients wanted a cake with icing that spelled out "Celebrate Same-Sex Marriage," and the law compelled Phillips to comply, then there would be no doubt that he would have a valid compelled speech claim. My difficulty, which I have written about, is figuring out just what is wrong with compelled speech.⁹ If we are aware of the compulsion, then why would we consider the marks and sounds that are being compelled speech at all or speech that represents the thoughts of the "speaker"? Why would we think Phillips is speaking through his cake icing? Why would Phillips think he is, contrary to his religious beliefs, affirming same-sex marriages? If a student had to recite lines in a play to get credit in her drama class, would we think her "compelled speech" was objectionable?¹⁰

⁵ See Larry Alexander, *Banning Hate Speech and the Sticks and Stones Defense*, 13 CONST. COMMENT. 71, 76–79 (1996).

⁶ Henry Louis Gates, Jr., *Let Them Talk*, NEW REPUBLIC, Sept. 20, 1993, at 37.

⁷ Alexander, *supra* note 5, at 77–78.

⁸ See generally *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (Colo. App. 2015), *rev'd sub nom.* *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018).

⁹ See Larry Alexander, *Compelled Speech*, 23 CONST. COMMENT. 147, 147 (2006).

¹⁰ I would raise the same questions about the claims, upheld by the Supreme Court, in the progenitor compelled speech cases, *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) (compelled Pledge of Allegiance), and *Wooley v. Maynard*, 430 U.S. 705 (1977) (New Hampshire

I turn to Chapter Three, *Why Freedom of Speech Is Not an Academic Value*, my principal focus, and not merely because Stanley uses something I experienced to make one of his points.¹¹ I generally agree with the points Stanley makes. Constitutional freedom of speech has no place in the classroom or in applying disciplinary standards to faculty scholarship. I agree, moreover, with Stanley's views about university administrators: when speaking as representatives of their institutions, they should stick to extolling the virtues of their students, faculty, and basketball team and avoid endorsing the partisan positions that they may hold and advocate when not speaking in their official capacity. I do not want my university to be for sustainability, diversity, or social justice; nor, when I donate to its endowment, do I want the endowment's managers to invest or divest for any reason other than to maximize the return.

On the other hand, if the university is private and not governed by constitutional provisions, it may, if it wishes, act other than how I believe it should. It may adopt an ideology that permeates all its activities. It may be a Marxist university, a libertarian university, or a fill-in-an-ideology university. It may require that its classes be taught from an ideological perspective, that its faculty's research be conducted from an ideological perspective, that only speakers who endorse the ideology be permitted to speak on campus, and, indeed, that all faculty and students agree not to dispute the ideology when speaking publicly. I would not want to teach at such a university, even if its ideology were the same as mine. I would not want my children to attend it. I would resist even giving it the dignity of being called a university. Nonetheless, if it is a private institution, I see no constitutional impediment to its being thoroughly ideological.

But what if it is a public university and, thus, subject to constitutional restrictions? May the University of California, for example, endorse, in addition to the academic values Fish and I regard as the University's *raison d'être*, say, diversity or sustainability and require faculty and students to do so as well?¹² Here, we enter one of the murkiest areas of First Amendment law, that of government speech. On the one hand, we want the government to speak—to tell us what laws it has passed, what policies it has pursued, and why those laws and policies are justified. We may even want it to tell us to be all we can be and join the army. On the other hand, it seems a short step and one of logical entailment from “what we are doing is justified” to “you should re-elect us.” But spending, with taxpayers' money, endorsements of incumbents' campaigns seems quite problematic. What would we think if our

state motto on its license plates). Misattribution seems a farfetched danger. So, too, does coming to believe what one is forced to recite.

¹¹ See FISH, *supra* note 1, at 88–90.

¹² Fish clearly would oppose it. But it is not clear what he thinks about its constitutionality.

third grader came home and reported that her teacher told the class their parents should vote Republican and elect Sara Smith as head of the school board?

The line between proper government speech and improperly partisan government speech is controversial.¹³ It may be a classic Sorites puzzle.¹⁴ My colleague Steve Smith has quipped, as a pertinent analogy, that the government may perhaps endorse the proposition that baseball is our national pastime, but it should not take a position on which franchise is the best or on the designated hitter.¹⁵

It is not even clear whether government speech is a First Amendment issue or just a political one. Because freedom of speech supposedly requires the government to be viewpoint neutral, government speech arguably violates freedom of speech. But the government cannot act at all, much less speak, without violating viewpoint neutrality, so requiring viewpoint neutrality of the government seems absurd. This is the core dilemma and paradox of freedom of speech as well as the other liberal freedoms, such as religion and association.¹⁶ It is a paradox that Stanley knows well and surfaces again and again in *The First*.

So, I leave it unresolved whether government speech is a First Amendment issue and, thus, whether a partisan public university is unconstitutional. And I conclude by strongly recommending this book. There are many excellent points Fish makes that I do not have the space to deal with at length—though, I must remark that Fish does a wonderful job of skewering those campus activists who show up on campuses already knowing everything important and much more than those whom they are paying to teach them.

¹³ See LARRY ALEXANDER, *IS THERE A RIGHT OF FREEDOM OF EXPRESSION?* (2010).

¹⁴ See Dominic Hyde & Diana Raffman, *Sorites Paradox*, STAN. ENCYCLOPEDIA PHIL. (Mar. 26, 2018), plato.stanford.edu/entries/sorites-paradox.

¹⁵ Steven D. Smith, *Why Is Government Speech Problematic? The Unnecessary Problem, The Unnoticed Problem, and The Big Problem*, 87 DENV. U. L. REV. 945, 966 (2010).

¹⁶ See ALEXANDER, *supra* note 13.