CONCURRING OPINIONS

FAN 161 (First Amendment News) Nadine Strossen's Next Book — "Hate: Why We Should Resist it With Free Speech, Not Censorship"

Ronald K. L. Collins

September 13, 2017

In a forthcoming book, New York Law School Professor Nadine Strossen returns to a topic she explored 27 years ago in an insightful *Duke Law Journal* article titled "Regulating Racist Speech on Campus: A Modest Proposal?" This spring, Oxford University Press will publish her latest book: *Hate: Why We Should Resist it With Free Speech, Not Censorship.* (This book is part of the "Inalienable Rights" Series, of which University of Chicago Law Professor Geoffrey Stone is editor.)

→ Dedication*: The book is dedicated to "Norman Dorsen and Aryeh Neier, key leaders of the ACLU during the Skokie controversy, inspiring human rights champions, and revered mentors."*

I read an advance version of the manuscript and will say this: Strossen has accomplished something remarkable in this slim book — she has ventured into a complex and heavily examined field and produced a book that is original, insightful, and clear-headed. My guess: this book will become the go-to work in the field.

Prof. Nadine Strossen

Abstract: One of Donald Trump's signal successes in the 2016 election campaign was his unrelenting attack on 'political correctness.' While the phenomenon of political correctness is certainly very polarizing, it is also a capacious and somewhat amorphous concept. At root, though, it centers on speech and expression-the idea that since certain words and arguments are hurtful to those less powerful, they should therefore be viewed with suspicion and even opprobrium.

As the eminent scholar and activist Nadine Strossen shows, this is not a new idea. Long before anyone had heard of political correctness, the term ‘hate speech’ was in broad circulation. Indeed many of the controversies swirling around alleged political correctness are really claims and counterclaims about hate speech. Some say that Black Lives Matter engages in hate speech against cops. Some say evangelicals engage in hate speech against the LGBT community. The list of aggrieved populations is long, which begs a question: when is speech truly ‘hate speech’ or, alternatively, simply a cherished right protected by the Constitution?

In this book Strossen dispels the many misunderstandings that have clouded the perpetual debates about this topic, including the equally erroneous assertions that it is either absolutely unprotected or absolutely protected. She explains the more nuanced approach that U.S. law actually embodies: allowing hateful or discriminatory speech to be outlawed in many situations, including when it directly causes specific imminent serious harm; but not empowering government to punish such speech solely because its message is disfavored, disturbing, or feared to possibly contribute to some harm.

Prof. Geoffery Stone (series editor)

Strossen shows that such principles have been especially important for sheltering dissenting views, minority speakers, and advocates of equal rights causes. Conversely, she shows that the “hate speech” laws in many other countries, including those comparable to the U.S., have punished and chilled vital speech about public issues, leading many human rights activists in those countries and in international agencies to criticize those laws and to advocate the U.S. approach: counterspeech and other non-censorial alternatives, including strong enforcement of anti-discrimination laws. Beyond the constitutional arguments, Strossen makes a compelling, evidence-rich case that the “more speech” approach is more effective than censorship in countering the harms that “hate speech” is feared to cause: discrimination, violence, and psychic injuries.

→ This from Professor Stone’s Introduction: “In this work, Strossen stakes out a bold and important claim about how best to protect *both* equality and freedom. Anyone who wants to advocate for ‘hate speech’ laws and policies in the future now has the “Devil’s Advocate” right at hand. No one can address this issue in the foreseeable future without taking on this formidable and compelling analysis. It lays the foundation for all debates on this issue for years to come.”

TABLE OF CONTENTS

Acknowledgements

Editor's Note

Essential Concepts

Introduction

Chapter 1: Overview

Chapter 2: "Hate Speech" Laws Violate Fundamental Free Speech and Equality Principles

Chapter 3: When "Hate Speech" is Protected and When it is Punishable

Chapter 4: Because of Their Intractable Vagueness and Overbreadth, "Hate Speech" Laws Undermine Free Speech and Equality

Chapter 5: Is it Possible to Draft a "Hate Speech" Law That is Not Unduly Vague or Overbroad?

Chapter 6: Does Constitutionally Protected "Hate Speech" Actually Cause the Feared Harms?

Chapter 7: "Hate Speech" Laws Are at Best Ineffective and at Worst Counterproductive

Chapter 8: Non-Censorial Methods Effectively Curb the Potential Harms of Constitutionally Protected "Hate Speech"

Chapter 9: Conclusion: Looking Back – and Forward

Corn-Revere files Amicus Brief in *Masterpice Cakeshop*

First Amendent lawyer Robert Corn-Revere (of the DC office of Davis Wright Tremaine) recently filed an amicus brief in *Masterpiece Cakeshop v. Colorado Civil Rights Commission* in support of the Petitioners' First Amendment free speech (but not free exercise) calims. He filed the brief (joined by Ronald G. London) on behalf of the First Amendment Lawyers Association. His main arguments are:

— The First Amendment Prohibits Enforcing Anti-Discrimination Laws to Compel the Creation of Expressive Works:

A. The Parties Agree That the Colorado Anti-Discrimination Act Could Not Be Applied to Compel Speech.

B. The First Amendment Prohibits State Action Compelling the Creation of Artistic Works, Including Wedding Cakes

C. Upholding Petitioners' Right to be Free From Compelled Expression Under the First Amendment's Free Speech Clause Helps Avoid a Constitutional Morass

→ Here are a few excerpts from the brief:

"The First Amendment protects both the right to speak and the right to refrain from speaking as part of a broader concept of "individual freedom of mind." *Wooley v. Maynard* . . . (1977). . . . There is no disagreement about whether the Constitution prohibits the state from compelling

speech, but the Court of Appeals errone- ously held that creating a custom, artistic design is not expression protected by the Free Speech Clause."

Robert Corn-Revere

"As if channeling Samuel Goldwyn's immortal line "if you want to send a message, call Western Union," the court based its ruling on a too literal-minded understanding of First Amendment protections for symbolic speech. Citing Spence, it asked whether 'Masterpiece conveys a particularized message celebrating same-sex marriage, and whether the likeli- hood is great that a reasonable observer would both understand the message and attribute that message to Masterpiece.'"

"But this is the wrong question. When it comes to artistic expression, First Amendment protection does not depend on having a "particularized message." If it did, much of what we commonly regard as art – including non-representational painting or sculpture, instrumental music, dance, mime, or other non- verbal expression would be excluded from constitutional immunity. Thus, the relevant questions for purposes of deciding this case are whether art is "speech" within the meaning of the First Amendment, and if so, can the government require a person to create it?"

"Once properly framed, the answers are clear: Artistic expression most certainly is protected and it offends the First Amendment to compel its creation or performance. Contrary to the decision below, this Court held in *Hurley* that First Amendment protection is not conditioned on the existence of a "narrow, succinctly articulable message," [citation], and the Court of Appeals cited no authority for the proposition that acts of creative expression can be compelled by the state."

"The Court should decide this case under the Free Speech Clause of the First Amendment and not the Free Exercise Clause. Applying the compelled speech doctrine to bar the government from requiring individuals to create expressive works will resolve the issue while avoiding doctrinal confusion. It is thus unnecessary to address whether the Free Exercise Clause precludes enforcement of the Colorado public accommodation law."

Court Urged Not to Reach Free Exercise Claim

"[T]his Court should not reach the question of whether Petitioners' refusal to design a cake for a same-sex wedding is protected under the Free Exercise Clause. The analysis under the Free

Speech Clause is fully dispositive and presents far fewer difficult implications than if this were treated as a religious question."

"Any exemption based on the Free Exercise Clause would be far broader. For example, if the Westboro Baptist Church opened a diner, a religiously-based right to refuse service would permit the group to deny a seat at their lunch counter to anyone the members of the church dislike – which in their case is pretty much everyone. And such a right would not require determining whether the service they provided is in any way expressive. An exemption to public accommodation laws based on the Free Exercise Clause thus would be virtually limitless, because it would create a potential loophole for any bigot who waves a Bible or Koran at the law. Perhaps because of the inherent difficulties of resolving such religious questions, the Court did not address the Free Exercise Clause issue presented in *Snyder v. Phelps* . . . , and decided the case under the Free Speech Clause. . . ."

→ For a contrary view re the Free Excercise claim, see:

- Amicus Brief in Support of Petitioners filed by The Becket Fund for Religious Liberty (Eric Rassback, counsel of record)
- Amicus Brief in Support of Petitioners filed by The Conference of Catholic Bishops, et al (John J. Bursch, counsel of record)

→ The amicus brief filed by the United States in support of the Petitioners raises *only* a First Amendment free-speech claim (Jeffrey B. Wall, Acting Solicitor General, counsel of record)

→ *Select Commentaries*

- Ilya Shapiro & David McDonald, Stop Forcing Wedding Vendors—or Anyone Else—to Create Expressive Art for You, *Cato at Liberty,* Sept. 6, 2017 (see also Cato's amicus brief in support of Petitioners here)
- Erica Goldberg, Masterpiece Cakeshop's Opening Brief: The Free Speech Arguments, *In a Crwoded Theater* Sept. 4, 2017
- Sen. Mike Lee: Christian Baker Case About First Amendment, 'Compelled Speech', *The Daily Signal*, Sept. 7, 2017