2009

Neo-orthodoxy in Academic Freedom

J. Peter Byrne
Georgetown University Law Center, byrne@law.georgetown.edu

This paper can be downloaded free of charge from:
https://scholarship.law.georgetown.edu/facpub/25

88 Texas L. Rev. 143 (2009)

This open-access article is brought to you by the Georgetown Law Library. Posted with permission of the author. Follow this and additional works at: https://scholarship.law.georgetown.edu/facpub

Part of the Constitutional Law Commons, and the Education Law Commons
Neo-orthodoxy in Academic Freedom

88 Texas L. Rev. 143 (2009)

J. Peter Byrne
Professor of Law
Georgetown University Law Center
byrne@law.georgetown.edu

This paper can be downloaded without charge from:
Scholarly Commons: http://scholarship.law.georgetown.edu/facpub/25/
SSRN: http://ssrn.com/abstract=1516385

Posted with permission of the author
Book Reviews

Neo-orthodoxy in Academic Freedom


Reviewed by J. Peter Byrne*

A robust system of academic freedom protects the most important values and functions of higher education. The scholar’s freedom to choose topics and methods of investigation and the teacher’s ability to shape assignments and pedagogy, subject to the criteria of their fields and the evaluation of their peers, have provided the necessary conditions for the intellectual success of American higher education. Yet, how poorly understood and feebly defended has been this indispensable norm of academic life! Smug indifference of professors, extravagant claims by defenders, bad faith or paranoid criticisms by outsiders, epistemological skepticism, and the boom and bust economic fortunes of our many and various colleges and universities have combined to cast a pall of doubt and distrust over this signal achievement of our intellectual culture.

These two books, so different in tone and moral orientation, embrace a common strategy: they protect academic freedom against contemporary threats by grounding it in its original function of protecting professorial control over the evaluation of teaching and scholarship. Stanley Fish, literary theorist, Milton scholar, polymath academic controversialist, dean, and now NYTimes.com columnist, argues colorfully and vigorously for professors to fulfill only their jobs of instruction and scholarship, leaving political persuasion and moral guidance to others, or at least to their own spare time. Matthew Finkin and Robert Post, eminent law professors and veteran leaders in the American Association of University Professors (AAUP), calmly explain and defend the AAUP’s approach to protecting the academic freedom of professors through investigation and judgment. Both books take as foundational the AAUP’s famous 1915 Declaration of Principles on

---

* Professor of Law, Georgetown University Law Center. Thanks for helpful comments to Robin West, Karen Byrne, and participants at a summer workshop at Georgetown Law.
Academic Freedom and Academic Tenure, although they take different interpretative stances toward the 1915 Declaration’s prim defense of professorial competence against meddling trustees. Both books react to external critics and gesture toward internal reforms of our vast, wonderful, and paradoxical structure of higher education. I term their positions “neo-orthodoxy” because they reground academic freedom in the original AAUP tradition, updating its rationale to some extent for current intellectual assumptions and defending it against rival contemporary accounts and external criticisms. As will be seen, I largely agree with this move but have concerns about how to give it effect within the law.

This Review seeks to both celebrate and criticize these books. Curiously, these books that praise the norms of scholarship cannot be considered themselves to constitute scholarship. Though smart and learned, they do not place themselves within the existing literature or confront recalcitrant data. Rather, they make arguments to persuade general readers, even if ones within the academy. Indeed, they stimulate a discussion that all who care about universities should join. This Review first provides some background about academic freedom and the tradition these books revive. Second, it assesses how well they address internal doubts and external criticisms. Third, it considers the implications of their arguments for ongoing and looming questions about the constitutional status of academic freedom. My goal, like theirs, is to strengthen academic freedom for an uncertain future.

I. Academic Freedom as a Professional Norm

Academic freedom exists both as a reasonably determinate academic norm and as some kind of constitutional right. The norm has grown from the crucial pronouncements of the AAUP and the commitment to it by nearly every entity within the world of higher education. University faculty, administrators, and trustees largely have internalized this ethic of academic freedom, however shaky their understanding of its premises and reach.


2. The analogy I have in mind is the neo-orthodox theology associated with Reinhold Niebuhr, which sought at once to fend off fundamentalists on one side and those liberals on the other who dissolved the distinctive perspective of the Christian tradition. See GARY DORRIEN, THE MAKING OF AMERICAN MODERN LIBERAL THEOLOGY: IDEALISM, REALISM, AND MODERNITY, 1900–1950, at 459–64 (2003) (illustrating how Niebuhr distinguished his position from both the liberal Chicago school and conservative Barthian positions).
Committee A of the AAUP continues to expound its meaning through occasional statements but even more importantly through investigations and reports about specific complaints. The core of the scholarly norm of academic freedom is that nonacademics such as trustees and administrators should refrain from interfering with scholarship and teaching, and leave evaluation of academic quality to scholarly peers (i.e., other professors primarily within the relevant discipline). The individual faculty member thus enjoys freedom to choose subjects and methods for research, publication, and teaching, constrained primarily by the expectations and structures of the profession. The norm presumes that the function of a scholar is to search for truth, which will redound to the benefit of society at large, and that lay interference for political or other motives will distort or derail the scholarly enterprise. These general propositions command near universal allegiance, but the application of them to marginal cases generates disagreement and sometimes passion.

The constitutional right has been more obscure and accepted only gingerly. It dates only to Sweezy v. New Hampshire in 1957, where the Supreme Court invalidated on cryptic grounds a contempt conviction against a visiting classroom lecturer for refusing to answer questions posed by the state attorney general about the political content of his lecture. The Court stressed, however, the “grave harm resulting from governmental intrusion into the intellectual life of a university.” Primarily, constitutional academic freedom has shielded the university as an institution from government meddling with core academic decisions, which has protected the autonomous operation of the norm within universities. Commentators disagree about whether the Constitution incorporates the norm itself so that aggrieved faculty can seek resolution of disputes with their institutions about the substance of academic freedom in federal courts. This question has become much more pressing since the Supreme Court held in Garcetti v. Ceballos.

3. REDBOOK, supra note 1, at 1.
5. Id. at 261 (Frankfurter, J., concurring).
6. See J. Peter Byrne, Academic Freedom: A “Special Concern of the First Amendment,” 99 YALE L.J. 251, 311 (1989) (“In the last decade, the Supreme Court’s decisions concerning academic freedom have protected principally and expressly a First Amendment right of the university itself—understood in its corporate capacity—largely to be free from government interference in the performance of core educational functions.”); Walter P. Metzger, Profession and Constitution: Two Definitions of Academic Freedom in America, 66 TEXAS L. REV. 1265, 1322 (1988) (concluding that the centerpiece of the constitutional definition of academic freedom is institutional autonomy).
7. Compare David M. Rabban, A Functional Analysis of “Individual” and “Institutional” Academic Freedom Under the First Amendment, 53 LAW & CONTEMP. PROBS. 227, 280 (1990) (arguing that the Supreme Court’s designation of institutional academic freedom as a First Amendment right does not support the inference that the Court has rejected a constitutional right of individual professors against “trustees, administrators, and faculty peers”), with Byrne, supra note 6, at 329 (defining the constitutional incarnation of academic freedom such that it includes only the core academic affairs of the university itself and not the autonomy of individual faculty).
that the First Amendment does not protect government employees against employer reprisals for speech within their official duties, while postponing consideration whether such a rule should apply to university teaching and scholarship.\(^9\)

Both books under review here address academic freedom as a norm or ethical principle more than as a constitutional matter. They offer almost no analysis of legal or structural issues. But they undertake their expositions in light of these legal uncertainties. After engaging them on their own terms, I will consider the implications their approaches have for outstanding legal controversies.

The centrality of the AAUP’s 1915 Declaration for any discussion of academic freedom has long been recognized. Academic freedom was in some real sense invented and fostered by the AAUP, initially an organization of academic elites formed primarily for that purpose.\(^10\) The 1915 Declaration addressed the situation of emerging universities at the beginning of the twentieth century: professors employing sophisticated, modern research methodologies sought professional stature in institutions legally controlled by lay trustees sometimes suspicious of the political or religious tendencies of modern thought. It conceived of knowledge as objective and politically neutral. Good progressives of their era, the authors of the 1915 Declaration founded academic freedom upon the positive structures of scientific inquiry, arguing that professors should present their research either in scholarship or the classroom without influence from untoward motives and be evaluated by other professionals solely on the academic value of their work. Trustees were admonished to treat the university as a public trust and refrain from injecting their political or other ideological prejudices into academic matters. Public opinion was treated as a threat to the advancement of knowledge, particularly at state universities. Universities were to be “inviolable refuge[s] from such tyranny” and “intellectual experiment station[s], where new ideas may germinate.”\(^11\)

The 1915 Declaration did not view academic freedom as establishing a personal freedom of expression for professors, but only the right to engage in professional speech within a discipline without extraneous restraint. “The claim to freedom of teaching is made in the interest of the integrity and of the progress of scientific inquiry; it is, therefore, only those who carry on their work in the temper of the scientific inquirer who may justly assert this claim.”\(^12\) Personal views of the professor, divorced from disciplinary

\(^9\) Id. at 425.
\(^10\) The authors adapted ideas current in Germany, just as did developing research universities more broadly, to the quite different conditions of higher education in the United States. RICHARD HOFSTADTER & WALTER P. METZGER, THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES 385–89 (1955).
\(^11\) 1915 DECLARATION, supra note 1, at 172.
\(^12\) Id. at 173.
expertise, or expressed in the classroom in an educationally incompetent manner would not count, although speech by professors outside their professional sphere was gingerly extended protection so long as they refrained from “hasty or unverified or exaggerated statements,” as well as “intemperate or sensational modes of expression.” The 1915 Declaration predated any modern First Amendment doctrine and applied equally to public and private schools.

The 1915 Declaration anticipated that its academic goals would be accomplished by internal structural reforms, primarily peer review and tenure. The growing professionalism of academic life and increasing competition for eminence pushed leading universities to incorporate these reforms and the scholarly aspirations that inspired them. Acceptance of the AAUP position in fact soon reached a tipping point so that failure to formally embrace or adhere to its core marked a school as marginal or maverick. In 1940, the AAUP and the Association of American Colleges issued the 1940 Statement of Principles on Academic Freedom and Tenure, a brief, joint statement of basic principles, which soon gained approval by hundreds of educational associations and has been incorporated in many faculty handbooks.

Although the model of higher education embedded in the 1915 Declaration and the 1940 Statement prevailed through midcentury, it began to show strain under the dramatic changes affecting higher education thereafter. The higher education sector grew massively, both in the number and diversity of students and employees, as well as in the subjects taught and researched, and in the economic significance and social prestige of university degrees. The federal government became far more enmeshed in higher education financing and regulation. As the size of the faculty has grown, the percentage covered by tenure systems has decreased. In all, universities have become far more the loci of political struggles, through McCarthyism, the Sixties, revolutions in racial and sexual diversity, and the culture wars. The traditional focus of the 1915 Declaration on the relations between faculty and trustees could seem quaint compared to new claims, frequently in court, about government interventions, political protests, affirmative action, and politicization of departments. The AAUP has developed thoughtful statements on many of these issues, but it has become one voice among many, distracted by unionization disputes, and weakened by internal dissension.

Both books largely ignore changes in the size, scope, and social context of

13. Id. at 177–78.
higher education, and concentrate on more direct conceptual challenges to academic freedom.¹⁶

Both books embrace the essence of the 1915 Declaration, understanding scholarship as the production of knowledge shaped by relevant disciplines. Fish claims to be “merely rephrasing” the 1915 Declaration.¹⁷ He writes, “My deflationary definition of academic freedom is narrowly professional rather than philosophical, and its narrowness, I contend, enables it to provide clear answers to questions . . . blurred by more ambitious definitions.”¹¹⁸ Finkin and Post’s whole argument builds on the 1915 Declaration, which they describe as the first and “arguably the greatest” articulation of the professional norm of academic freedom.¹⁹ They both understand teaching to be enabling students to consider the truth of complex ideas using critical methods. Finkin and Post write, “[I]t is precisely the pedagogical purpose of higher education to introduce critical distance between students and their own ideas.”²⁰ Fish claims, “If you’re not in the pursuit-of-truth business, you should not be in the university.”²¹

Finkin and Post provide a lawyerly account of what the AAUP has considered to be academic freedom, giving a clear if unoriginal account of the 1915 Declaration, emphasizing the context in which it was adopted, and then summarizing investigation reports by Committee A that bear upon the controversies of our time. They describe this accumulated body of Committee A reports as “the most authoritative available source for the professional meaning of academic freedom today.”²² Their distillation of these reports may be the greatest contribution of the book. There is a substantial amount of nuanced wisdom buried among lengthy, painstaking accounts of otherwise forgotten academic imbroglios. The reports themselves are not readily accessible, having been published in old issues of AAUP publications, so the authors are engaged in a kind of salvage operation. The approach and principles set forth could guide thinking about academic freedom even if Committee A were to disappear. Such a distillation, however, obscures the centrality of Committee A’s factual inquiry and its focus on structural remedies for institutional failures, usually recommending greater faculty participation at some decision point.

Finkin and Post accomplish two objectives here. First, they present an unusually comprehensive account of the norm of academic freedom by describing Committee A decisions on difficult points. In this they resemble

¹⁶. See generally Andrew Delbanco, The Universities in Trouble, N.Y. REV. BOOKS, May 14, 2009, at 36, 38 (analyzing how the financial crisis has impacted higher education and magnified “the widening disparity of wealth and opportunity in American society”).
¹⁷. STANLEY FISH, SAVE THE WORLD ON YOUR OWN TIME 80 (2008).
¹⁸. Id. at 16.
¹⁹. FINKIN & POST, supra note 1, at 30.
²⁰. Id. at 105.
²¹. FISH, supra note 17, at 20.
²². FINKIN & POST, supra note 1, at 52.
common law treatise authors extracting rules of law from the reports of cases. Second, they convey the impression that the AAUP approach employs nuanced and dispassionate wisdom remote from contemporary ideological divides. The AAUP principles thus gain an aura of authoritative objectivity because they transcend today’s partisanship.

Their approach can be illustrated by an important example: they offer several cases concerning the limits on faculty discretion to introduce into the classroom controversial matter having no relation to the subject matter of the course. In one case, a professor at Evansville College frequently referred to contemporary political disputes to illustrate logical fallacies, conveying in the process a personal aversion to President Truman and an allegiance to Henry Wallace. Committee A rejected claims that the professor used his philosophy classroom for propaganda because his statements were in aid of stimulating discussion on matters properly within the sphere of the class. It wrote:

[J]udgments concerning the handling of controversial material will frequently depend not so much on the what as the how. . . . The total effect of what a teacher says on controversial subjects in the classroom depends a great deal upon the manner, the spirit in which he says it, and the emphasis he places upon it. It depends also upon the previous existence of a relationship of confidence and understanding between the teacher and his students.

Finkin and Post then relate the fate of another professor teaching a class in the history of American foreign policy at Ohio State, who reacted to the assassination of Martin Luther King by dropping his topic, speaking for forty-five minutes about the assassination, and then burning his draft card. Committee A concluded that the professor had “no right to commandeer the class for a ‘teach-in’ on his personal political views.” Based on these and other cases, Finkin and Post argue for an underlying principle:

A pedagogical intervention bears a “relation” to a subject under consideration if it is educationally relevant. . . . The standard is whether material from a seemingly foreign field of study illuminates the subject matter under scrutiny, bearing in mind that the overall design of a modern curriculum is to provide a general education, which is to say, the ability to think systemically and in an independent and informed manner.

23. *Id.* at 97.
24. *Id.* at 98.
25. *Id.* at 98–99.
26. *Id.* at 99.
27. *Id.* at 100.
28. *Id.* at 93.
The authors thus treat Committee A decisions and opinions as authority. Their role is to explain the underlying principles, which they present as having normative weight.

Fish, by contrast, argues passionately for a vision of teaching that he terms, “academicizing.” He would limit the aspirations of the university teacher to training students in the intellectual practices pertinent to their subject and exclude all extraneous ideological debate.

College and university teachers can (legitimately) do two things: (1) introduce students to bodies of knowledge and traditions of inquiry that had not previously been part of their experience; and (2) equip those same students with the analytical skills—of argument, statistical modeling, laboratory procedure—that will enable them to move confidently within those traditions and to engage in independent research after a course is over.

Fish argues that teachers should not attempt more than this; in particular, they should not attempt to guide or instruct students to follow moral or political principles, “tasks that belong properly to other agents—to preachers, political leaders, therapists, and gurus.” He denies that teachers have competence for these roles and, more persuasively, that doing so can embroil academia in controversy.

Fish’s account of academic freedom builds upon this “deflationary” or minimalist account of the role of the university teacher and tracks a narrow reading of the 1915 Declaration. He argues that only academics can have competent views on issues within academic disciplines, so lay constraints on genuinely academic work can only impair the discipline and are as illegitimate as they are unnecessary. He characterizes academic freedom as “the freedom to do one’s academic job without interference from external constituencies like legislators, boards of trustees, donors, and even parents.” On the other hand, professors have no warrant for ever discussing issues outside their subjects in class and no special protection for doing so outside. “[O]ne violates academic freedom by deciding to set aside academic purposes for others thought to be more noble or urgent.” While Fish seems largely uninterested in issues of institutional design, he seems to feel that professors who stay within the lines he draws should be protected absolutely, while those who go outside them can and should be checked by institutional authorities.

While Finkin and Post articulate standards that can encompass different approaches and circumstances, Fish writes from personal conviction to
persuade individuals to agree with his approach. Their differences can be seen in their disagreement about whether a professor may advocate personal views on controversial subjects in class. Fish argues never; he would limit teachers to analysis or contextualization of arguments advanced by others.35

If an idea or a policy is presented as a candidate for allegiance—aided by the instructor, students are to decide where they stand on the matter—then the classroom has been appropriated for partisan purposes. But if an idea or a policy is subjected to a certain kind of interrogation—what is its history? how has it changed over time? who are its prominent proponents? what are the arguments for and against it? with what other policies is it usually packaged?—then its partisan thrust will have been blunted, for it will have become an object of analysis rather than an object of affection.36

While he claims to draw a workable line between teaching about a subject and using it as an occasion for political mobilization, he advances the extreme view that, for example, neither faculty nor students addressing the ethics of withdrawing life support from a vegetative patient or assessing the Bush presidency should advocate positions on the issues but instead should examine the nature of the question and of the arguments advanced by others.37

As this is happening—as the subject is being academicized—there will be less and less pressure in this class to come down on one side or the other and more and more pressure to describe accurately and fully the historical and philosophical antecedents of both sides. . . . Not only is it possible to depoliticize issues that have obvious political content; it is easy.38

Finkin and Post largely agree with Fish, writing that “it is precisely the pedagogical purpose of higher education to introduce critical distance between students and their own ideas.”39 They argue, however, that faculty should “be free to structure and discuss classroom material as they deem most pedagogically effective, so long as they do not indoctrinate their students or violate professional standards of pedagogical relevance and substantive competence.”40 They explicitly accept that strong faculty advocacy on controversial subjects in the classroom meets “the heuristic necessity of actively arousing student attention and interest.”41 Finkin and Post start

35. Id. at 24–25.
36. Id.
37. Id. at 27–28. He argues that what makes great ethical writers, such as Plato or William James, “worth studying” is not their substantive views but “the verbal, architectonic, or argumentative skills they display.” Id. at 102–03. Plato and James certainly would be disappointed.
38. Id. at 28.
39. FINKIN & POST, supra note 1, at 105.
40. Id. at 104.
41. Id. at 94. Finkin and Post also quote from an earlier article:
from the same point that students should not be indoctrinated, but they move
to the broader principle that university faculty should teach students to think
for themselves. They claim that the 1915 Declaration presupposes a partic-
ular “pedagogical purpose . . . to instill in students the mature independence
of mind that characterizes successful adulthood.”^42 They argue, however,
that different professors properly advance this goal in very different ways:
some refrain from revealing their own views; others state them forcefully and
invite debate. “It is difficult if not dangerous to attempt to lay down bright
and abstract rules because the quality of the connection that professors forge
with their students depends so heavily on individual style and personality.”^43

These excerpts capture both the shared values and different approaches
of these two books. Both view higher education as liberal education, which
teaches students to think carefully and competently for themselves. Fish
argues emphatically in the first person for drawing strict limits around
academic competence. His prose snaps and sizzles, but sacrifices nuance for
vigor. He lacks any institutional perspective or tolerance for divergence
from his precepts. Finkin and Post, on the other hand, present themselves as
the impersonal expositors of an old and successful tradition. Because they
wisely view academic freedom as a regulatory norm that must apply in vari-
ous contexts, they seek to provide flexible standards that embrace a range of
pedagogical approaches. They proscribe teaching that amounts to
“indoctrination” rather than prescribe how everyone should teach. While
their arguments shine less brightly than Fish’s, they also seem more sensible
and workable. They seem to address Fish directly when they argue that
judgments about inappropriate teaching are “necessarily contextual” and
“cannot be governed by mechanical and inflexible rules.”^44

II. Considering Postmodernism

One project both books share is burying the notion that the epistemological skepticism associated with postmodernism threatens
academic freedom. The authors of the 1915 Declaration expressed conven-
tional views of their time about the objectivity of the scientific method and
the solidity and neutrality of the knowledge gained thereby. Peer review insulated from external political control was justified by the commitment to

There is no academic norm that prohibits scholarship from communicating definite viewpoints about important and controversial questions, like democracy, human rights,
or the welfare state. Faculty must be free to communicate these viewpoints in their pedagogy. Political passion is in fact the engine that drives some of the best scholarship and teaching[,] . . . and this is particularly true in the humanities and social sciences.

Id. at 202 n.1 (quoting Robert C. Post, Academic Freedom and the “Intifada Curriculum,”
^42. FINKIN & POST, supra note 1, at 61.
^43. Id. at 82.
^44. Id. at 99.
truth of those trained in disciplinary methods, as compared with the self-interest and ideology of outsiders. As theorists have argued persuasively about the situatedness of understanding and the influence of convention and social power in knowledge, the confidence of the AAUP pioneers has seemed naïve. Some powerful voices have argued that academic freedom needs to get along without reliance on any claim that scholarship advances knowledge toward an external goal of truth. Defenders of academic freedom have worried whether academic freedom can survive without some persuasive warrant that scholarly knowledge rests on something other than institutional inertia. These concerns have been heightened by campaigns from the right demanding that faculties reflect political balance and diversity of viewpoint; their arguments often reflect at least tactical appropriations of postmodern skepticism.

Finkin and Post worry that such skepticism about the bases for disciplinary criteria and a concomitant concern for those who dissent from the prevailing paradigms has pushed understandings of academic freedom away from protection of peer review and toward protection of individual voices. They express the fear that such “antinomianism” will erode public respect for faculty self-governance. “The external defense of academic freedom will collapse if faculty lose faith in the professional norms necessary to define and generate knowledge.” Their response to this threat is pragmatic; universities should adhere to an understanding of academic freedom based on protection of peer review because only that will nurture public faith in

45. The 1915 Declaration exhibits at least two attitudes that lack credibility today: expansive optimism about what the social sciences can discover, and the claim that social scientists deserve deference because they stand apart from political interests. “[I]f the universities are to render any such service toward the right solution of the social problems of the future, it is the first essential that the scholars who carry on the work of the universities shall not be in a position of dependence upon the favor of any social class or group, that the disinterestedness and impartiality of their inquiries and their conclusions shall be, so far as is humanly possible, beyond the reach of suspicion.” 1915 DECLARATION, supra note 1, at 169–70.

46. The literature on this is voluminous, but the key work is THOMAS S. KUHN, THE STRUCTURES OF SCIENTIFIC REVOLUTIONS (2d ed. 1970).

47. See, e.g., Judith Butler, Academic Norms, Contemporary Challenges: A Reply to Robert Post on Academic Freedom, in ACADEMIC FREEDOM AFTER SEPTEMBER 11, at 107, 126–28 (Beshara Doumani ed., 2006) (arguing that the external-truth-driven conception of academic freedom is simply one of a competing pool of professional norms, many of which are dissenting and all of which must be subject to criticism and debate); Richard Rorty, Does Academic Freedom Have Philosophical Presuppositions?, in THE FUTURE OF ACADEMIC FREEDOM 21, 21–27 (Louis Menand ed., 1996) (arguing that belief in an objective truth is not presupposed by the practices of academic freedom and that adopting sociopolitical justifications for academic freedom will lead to more honest and clear-headed inquiry than currently exists under the epistemological justifications).

48. See Byrne, supra note 6, at 286–88 (noting that if, as some have argued, academic speech on any subject is merely political speech then academic freedom would be only the result of inertia and traditionalism); David M. Rabban, Can Academic Freedom Survive Postmodernism?, 86 CAL. L. REV. 1377, 1378 (1998) (reviewing THE FUTURE OF ACADEMIC FREEDOM, supra note 47) (questioning whether academic freedom can survive without its historic epistemological support and arguing that the essays in Menand’s book fail to provide a satisfactory answer).

49. FINKIN & POST, supra note 1, at 60.
professional norms. Moreover, universities actually have structures of peer review and historically have acted as if these structures advance knowledge. While Finkin and Post acknowledge that the public will support such faculty prerogatives only if they “over time produce credible forms of knowledge,” they seem to argue for internal adherence to these norms primarily to promote external deference to them.50

Practically speaking, I believe that they are correct. I have written: “If [academic] speech is believed to have no autonomy from political power, political power will not long brook contradictory speech.”51 But it is disappointing that Finkin and Post do not offer a more substantive defense of the pursuit of truth as the basis for academic freedom. Their argument rests too heavily on the self-interest of the academic community in keeping public interference at bay. They seem to argue that we need to hold onto ideas of truth in order to protect academic freedom, whereas we need academic freedom because all scholarship presupposes a goal of truer knowledge that may conflict with prevailing ideology.52

Scholarship, in fact, has largely digested postmodernism. Chastened from absolute claims or assumptions about objective truth and alert to methodological limitations, scholars continue to attempt to give more satisfying accounts of the problems recognized within or among their disciplines. On the one hand, scholars do not need conclusive philosophical accounts of what truth means in scholarly pursuits to recognize that careful and accurate work can improve existing accounts of issues without regard to their political tendency. Fish writes that one can fully accept postmodernism and “still hold firmly to judgments of truth, accuracy, correctness, and error as they are made in the precincts of some particular realm of inquiry.”53 On the other, contemporary philosophers do provide impressive nonfoundationalist accounts of knowledge that emphasize the very ethical practices of honesty, accuracy, and critique that characterize scholarly work.54 It is hard to see why we should lose confidence because we view knowledge as

50. Id. at 61.
51. Byrne, supra note 6, at 287.
52. See J. Peter Byrne, The Threat to Constitutional Academic Freedom, 31 J.C. & U.L. 79, 125 (2004) (“[I]t seems likely that such institutional arrangements will and, perhaps, should decay without the animating vitality of hard truth as a goal and test for academic discourse.”).
53. Fish, supra note 17, at 134.
54. See generally Bernard Williams, Truth and Truthfulness (2002) (reconciling the tension between demanding truthfulness while rejecting notions of absolute truth, and providing an account of knowledge that relies heavily on the importance of accuracy and sincerity); Michael Williams, Problems of Knowledge: A Critical Introduction to Epistemology (2001) (arguing for a contextualist theory of knowledge, which recognizes that knowledge arises in community endeavors such as academic disciplines). I discuss the importance of this work for academic freedom in Byrne, supra note 52, at 124–29. Arguments for epistemic relativism, which posits that claims to truth can be validated only within epistemic systems that themselves cannot be justified by external criteria, are skewered in Paul A. Boghossian, Fear of Knowledge: Against Relativism and Constructivism 81–110 (2006).
provisional rather than absolute, or disciplinary criteria as revisable rather than final. On the contrary, this “pragmatic realism” about knowledge makes persuasive a neo-orthodox account of academic freedom based upon the value of professional standards.55

Fish grasps concerns about postmodernism by both lapels. He recognizes that external pressure groups for political balance both criticize and rely upon postmodernism. His main argument, however, is that epistemological skepticism is irrelevant to the truth value of scholarship and reflects only minor adjustments in certain disciplinary norms. Fish long has argued for the primacy of disciplinary norms in providing the necessary self-understandings of any intellectual practice.56 Here, he gets traction through his larger strategy of minimizing the claims about what teaching or scholarship can accomplish.

[O]bjectivity is just another name for trying to get something right in a particular area of inquiry.... [T]he researcher begins in some context of practice, with its received authorities, sacred texts, exemplary achievements, and generally accepted benchmarks, and from within the perspective (and not within the perspective of a general theory) of that context—thick, interpersonal, densely elaborated—judges something to be true or inaccurate, reasonable or irrational, and so on.57

Fish thus deploys his academic minimalism, which separates academic practices from any larger social value. He argues that the conventional, historically situated criteria of merit operative in any academic discipline have no necessary relation to any broader notion of truth. Invocations of general truth or morality by outsiders are simply irrelevant to the specific practices and professional criteria of insiders. Indeed, he goes so far as to claim (implausibly) that “[t]here is no necessary or even likely correlation between the political views of a faculty member and the views he or she may have on a disputed issue in an academic field.”58 Moreover, he argues rather subtly that deconstruction is an ancient and normal mental process, “a practice engaged in by anyone who for some reason is struck by the oddity of

55. Appleby, Hunt, and Jacob provide a pithy definition of practical realism:
   Practical realists are stuck in a contingent world, using language to point to objects outside themselves about which they can be knowledgeable because they use language.... More important, practical realism thwarts the relativists by reminding them that some words and conventions, however socially constructed, reach out to the world and give a reasonably true description of its contents.


56. See, e.g., STANLEY FISH, THERE’S NO SUCH THING AS FREE SPEECH AND IT’S A GOOD THING, TOO 238–42 (1994) (arguing that although disciplinary boundaries are artificial, they are necessary insofar as they provide the conditions that make academic discourse possible).

57. FISH, supra note 17, at 139–40.

58. Id. at 145.
a piece of behavior accepted uncritically by society.” Fish is a postmodern-ist who clings to disciplinary norms as structures that make sense in a sea of general incoherence or at least radically inconsistent perspectives. This gives his argument a curious cast: he embraces disciplinary practices while disclaiming any interest in justifying them before any external standard.

There is much to admire in Fish’s argument and in the rhetoric that advances it. He normalizes postmodernism—his humor gently mocking fear of the abyss. He makes disciplinary norms seem more like valuable signposts rather than betrayals of some larger truth, more havens of coherence than structures of oppression. He contributes to a neo-orthodox defense of academic freedom as properly resting on the autonomy of scholarship by providing a twist to the long-standing claim that scholarship should be understood as autonomous from lay opinion. Rather than relying on a scientific belief that scholarship has a privileged relation to objective Truth unavailable to laymen, he argues that it has its own truths coherent and relevant only to insiders. The trick has been to reestablish a claim to academic self-governance against a vastly different epistemological background.

But his academic minimalism has the same defects here as elsewhere in his book. Fish insists that higher education has no social value, no “extracurricular payoff.” In response to suggestions that a liberal education will foster economic, political, or cultural values, his answer is “no, no, no.” He insists that “fashioning citizens for a pluralistic society has nothing to do with the pursuit of truth.” He argues further that any such benefits would be only “the unintended consequences of an enterprise which, if it is to remain true to itself, must be entirely self-referential, must be stuck on itself, must have no answer whatsoever to the question, ‘what good is it?’”

Fish seems here to conflate persuasive arguments for the inherent value of liberal education, such as classically articulated by John Henry Newman, with the tendentious corollary that it has no extrinsic or social value. He makes two serious mistakes.

59. Id. at 137.
60. Id. at 55.
61. Id. at 54.
62. Id. at 120.
63. Id. at 55.
64. Fish rather casually appropriates Newman, acknowledging, “Cardinal Newman[’s] formulation . . . anticipates everything I have written here.” Id. at 177. Newman certainly defined liberal education to be the training of the intellect for its own sake, but, unlike Fish, he also advocated it both for what it gave the student and for what it contributed to society. He thought that a liberal education could develop the character of a “gentleman,” that it engendered, “a cultivated intellect, a delicate taste, a candid, equitable, dispassionate mind, a noble and courteous bearing in the conduct of life.” JOHN HENRY NEWMAN, THE IDEA OF A UNIVERSITY 89 (Frank M. Turner ed., Yale Univ. Press 1996) (1899). Newman also defended it for its broad usefulness in society: “[A] cultivated intellect, because it is a good in itself, brings with it a power and a grace to every work
First, American higher education is imbedded in a democratic society, upon which it depends for financial, moral, and political support. The unique legal structure of the American university, where legal control rests with lay trustees, encapsulates this tension. This arrangement developed at the very beginning because of the difficulty of founding new schools without resources, but it also expressed a Protestant urge for lay control over the clerical privilege that characterized faculty-governed English universities.

Similarly, the spur to state universities provided by the Morrill Act and many subsequent federal programs and the historic generosity of state legislatures have always been justified by the contributions to the practical value of new and more widely dispersed knowledge. Such structures indicate that academic work must always justify itself to the wider public. If academic practices have no relation to larger concerns of life, why should a trustee, taxpayer, or parent provide resources to carry them on? The professional norm of academic freedom mediates between the scholar’s need to pursue academic criteria as ends in themselves and the public’s desire to secure socially valuable outcomes. Indeed, public support for academic freedom rests on the belief that giving faculty their professional freedom will result in valuable knowledge and a better prepared citizenry. Finkin and Post correctly argue, “In the long run, public support for academic freedom will endure as long as the public need for the creation of such knowledge.”

Second, Fish is wrong that a liberal education does not contribute to developing citizenship. A pluralistic and democratic society can be distinguished from a fundamentalist or authoritarian one by persistent, and occupation which it undertakes, and enables us to be more useful, and to a greater number.” Id. at 119.

65. Fish’s rigid disjuncture between academic work and wider values also leads him to make some repulsive arguments about university governance. He argues against universities making any ethical judgments in their nonacademic operations, such as retailing embossed merchandise produced by sweated labor. “[B]usiness questions . . . should be decided in business terms, not in terms of global equity,” Fish, supra note 17, at 31. Maintenance workers should be paid “the lowest possible wages.” Id. Such practices would soon alienate both internal and external constituencies upon which universities depend.

66. See Judith Areen, Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance, 97 GEO. L.J. 945, 951–52 (2009) (describing how early American universities did not follow the English model of faculty governing boards simply because there were not enough scholars in the New World to reproduce it).

67. See FINKIN & POST, supra note 1, at 25 (“[I]n America nonscholars retained the right to decide what should and should not be taught, what should and should not be published.”).

68. Morrill Act, ch. 130, 12 Stat. 503 (1862) (codified as amended at 7 U.S.C. §§ 301–308 (2006)). The Act provided federal land grants to states to develop universities “where the leading object shall be . . . to teach such branches of learning as are related to agriculture and the mechanic arts . . . .” 7 U.S.C. § 304.


70. FINKIN & POST, supra note 1, at 42; see also LOUIS MENAND, THE METAPHYSICAL CLUB 417 (2001) (claiming that American society has accepted the AAUP’s position that it should abstain from interfering in university affairs out of its own self-interest in preserving disinterested scholarship).
competing arguments about both ends and means, respect for facts, and a willingness to revise assumptions. Commitments to rationality and freedom necessarily intertwine. A liberal education aims to teach people to engage arguments independently and critically, to separate good reasons from bullshit,71 and, crucially, to be open to revise their own positions upon learning new facts or hearing persuasive arguments.72 These are the methods of every academic discipline and essential learning for the leaders in the kind of society we wish to be.73 Students studying Milton with Professor Fish will learn the sophisticated questions and methods of contemporary literary criticism, but they also will learn more generally how to make and critique arguments about their cultural tradition. The Supreme Court’s “special concern” for academic freedom may well be based on such a view.74 Justice Brennan wrote, “The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas . . . ‘rather than any kind of authoritative selection.’”75 Chief Justice Warren also wrote, “Teachers and students must always remain free to inquire, to study, and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.”76 Such statements, as well as innumerable others delivered by university presidents over the years, employ a somewhat hyperbolic rhetoric. But they also convey a faith that the methods of scholarship and education within the university provide a crucial model for thinking and discourse and training for participation in a liberal society. The university is a holy place for a liberal society, one where the larger society’s values about discourse and knowledge are observed in a purer manner, which serves both as a release from and reproach to the compromised realities of politics and interests.77

Fish offers an impoverished defense of higher education by denying its social value.

72. See MARTHA C. NUSSBAUM, CULTIVATING HUMANITY: A CLASSICAL DEFENSE OF REFORM IN LIBERAL EDUCATION, 36 (1997) (“Logical analysis is at the heart of democratic political culture.”).
73. See Byrne, supra note 6, at 335–38 (espousing the value liberal education contributes to society). The literature on this is vast, from Thomas Jefferson to Amy Gutmann. See, e.g., THOMAS JEFFERSON ET AL., REPORT OF THE COMMISSIONERS FOR THE UNIVERSITY OF VIRGINIA (1818), reprinted in THOMAS JEFFERSON: WRITINGS 457, 459–60 (Merrill D. Peterson ed., 1984) (listing various objects of education, including the need “[t]o develop the reasoning faculties of our youth, enlarge their minds, cultivate their morals, and instill into them the precepts of virtue and order”); AMY GUTMANN, DEMOCRATIC EDUCATION 172–93 (1987) (extolling the democratic purposes served by higher education).
74. Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (“Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.”).
75. Id.
77. Amy Gutmann aptly captures the analogous theme of serving democracy by being set aside from it:
III. Responding to Critics

Both books embrace the 1915 Declaration’s emphasis on scholarly expertise to deflect or refute criticism of university faculties for leftist bias. Complaints about “tenured radicals” have waxed and waned for two decades now, to some extent within the university but far more virulently from outside.78 Rightist pundits have gained traction in public opinion by combining hair-raising anecdotes about faculty politicizing classrooms with caricatures of postmodernism that reduce it to claims that all knowledge represents structures of oppression by powerful entities.79 Whatever the merits of specific complaints, the overall impetus seems more part of a larger political and cultural struggle than considered critiques of new trends in scholarship and teaching.80 Some critics have argued that state legislators and trustees need to step in to restore traditional academic values abandoned by faculty themselves. They have advocated for legislative or administrative mandates that faculties represent the entire political spectrum and that

Universities are more likely to serve society well not by adopting the quantified values of the market but by preserving a realm where the nonquantifiable values of intellectual excellence and integrity, and the supporting moral principles of nonrepression and nondiscrimination, flourish. In serving society well by preserving such a realm, a university acts as an educator of officeholders rather than simply a gatekeeper of office.

GUTMANN, supra note 73, at 183.

78. See, e.g., ROBERT O’NEIL, ACADEMIC FREEDOM IN THE WIRED WORLD 79–81 (2008) (describing several comments made by professors post-9/11 that raised the ire of state legislators, alumni, and citizens-at-large to a much greater degree than they did among the administration and faculty).

79. See, e.g., DINESH D’SOUZA, ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS (1991) (suggesting that various diversity and multiculturalism efforts instituted by American universities, while well-intentioned, are ultimately misplaced and even counterproductive); DAVID HOROWITZ, THE PROFESSORS: THE 101 MOST DANGEROUS ACADEMICS IN AMERICA (2006) (arguing that the modern university has been politicized by primarily left-leaning academics and stressing the need to remove political bias from higher education); ALAN CHARLES KORS & HARVEY A. SILVERGLATE, THE SHADOW UNIVERSITY: A BETRAYAL OF LIBERTY ON AMERICA’S CAMPUSES (1998) (complaining that many modern universities curtail their students’ liberties by forcing upon them certain, mostly left-leaning, ideological beliefs and suppressing dissent, particularly that which is socially or politically unpopular). The Foundation for Individual Rights in Education carries on the tedious struggle, fanning occasional trivial disputes about marginal student speech without intellectual value. See FIRE: The Found. for Individual Rights in Educ., http://www.thefire.org/ (contending that various universities have curtailed assorted forms of politically and socially controversial speech by students and student organizations).

80. See id. at 92–94 (comparing the diminution of academic freedom during the McCarthy Era and the period since 9/11). While these critics do express some understandable concerns, adequate explanation of the intensity of their rhetoric will require a historian of political ideas possessing the sensitivity to social psychology of a Richard Hofstadter. Cf. RICHARD HOFSTADTER, THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS 29–30 (1965) (“The paranoid spokesman sees the fate of this [vast and sinister] conspiracy in apocalyptic terms—he traffics in the birth and death of whole worlds, whole political orders, whole systems of human values. He is always manning the barricades of civilization.”).
individual teachers present all sides of controversial matters. Such political intervention to correct university teaching would surely violate academic freedom as a raw “governmental intrusion into the intellectual life of a university.”

These campaigns have failed politically to achieve their stated goals; no legislature or private board has instituted agencies to oversee faculty appointments. But their charged portrayals of academic excess probably have undermined public confidence in the integrity of teaching and scholarship, and in university self-governance. Even some sophisticated federal judges rely on these exaggerated accounts to urge active judicial protection for faculty “whose method or speech is found offensive by those who usually dominate our institutions of higher learning.” In this environment, fundamentalist, faux universities without academic freedom or serious academic life can rise to prominence, and state legislatures have gradually withdrawn financial support from state universities. Both books under review here deploy their neo-orthodoxy regarding academic freedom and its underlying scholarly values to push back against demands for a new approach to academic speech.

Finkin and Post’s response to calls for political balance relies on their reinvigoration of the standard of professional autonomy stemming from the 1915 Declaration. Their discussion of Committee A cases concerning politically controversial material in the classroom casts their position as the established academic tradition. As a rhetorical matter this seems like a good move—it removes claims for autonomy from current ideological disputes. Finkin and Post try to persuade us that Committee A considered all these issues long ago within the terms of historic political controversies and reached modest, responsible outcomes. They specifically argue that calls for political balance are “flatly incompatible with a scholar’s accountability to professional standards.” “Balance” may require biologists to present the case for intelligent design despite a professional consensus that it lacks validity. “The whole point of academic freedom is to insulate professional

---

81. The so-called Academic Bill of Rights and the political battles it engendered are discussed in J. Peter Byrne, Constitutional Academic Freedom After Grutter: Getting Real About the “Four Freedoms” of a University, 77 U. COLO. L. REV. 929, 941–44 (2006).
82. Sweezy, 354 U.S. at 261 (Frankfurter, J., concurring). For a discussion of a similar loss of confidence in academic leaders by the judiciary, which has resulted in a decline in constitutional academic freedom, see Byrne, supra note 52, at 132–33.
83. Vega v. Miller, 273 F.3d 460, 471 (2d Cir. 2001) (Cabranes, J., dissenting). The footnote accompanying this casual disparagement justifies judicial activism against universities because of “disheartening developments” and “the politicization of higher education” as chronicled in popular books. Id. at 471 n.2.
84. See, e.g., University Bans Club for Democrats, N.Y. TIMES, May 24, 2009, at A24 (reporting Liberty University’s banning of the College Democrats club due to its incompatibility with the school’s conservative Christian principles).
85. See supra note 16.
86. FINKIN & POST, supra note 1, at 103.
judgments from this kind of crude political control. Academic freedom obligates scholars to use disciplinary standards, not political standards, to guide their teaching.”

Finkin and Post plausibly show how an insistence on balance can undermine the scholarly values that critics claim to care for. Their case contains serious weaknesses, however. Their Committee A case discussions do not give the reader enough information to judge whether they have reported or assessed the facts and judgments fairly or have ignored internal conflicts; as such, the case discussions can be dismissed as superficial anecdotes. The explicit arguments against balance take up only relatively easy issues, like creationism in a science class, rather than truly divisive issues, like the ethics or constitutionality of a U.S. President authorizing torture. Disciplinary norms may frame but do not settle many issues that rage within a field; some methodological choices overlap substantially with political values. While any external mandate or intrusive procedure to promote “balance” surely threatens indispensable academic autonomy and causes more harm than gain, Finkin and Post do not adequately consider whether the professional ethics of teaching require some level of political even-handedness in handling controversial matters when different positions are consistent with scholarly criteria. The book more stakes a claim to the value of the tradition than fully establishes that it settles contemporary concerns.

Fish directly engages specific critics of the university, arguing that they violate academic norms as much or more than the dreaded tenured radicals they abhor. He has serious fun with claims associating postmodernism with immorality and left-wing politics: “[P]ostmodernism is a series of arguments, not a way of life or a recipe for action.” He skewers pundit William Bennett, for example, arguing that, by calling for a reinstatement of truth and honesty in history, Bennett “means a study of history that tells the same story he and his friends would tell if they were in control of the nation’s history departments.”

This is great fun and convincing up to a point. Its weakness stems from Fish’s reductive minimalism. At bottom, Fish’s defense of academic autonomy rests on his claims that academic work does not engage larger social issues. But, we cannot and should not confine the values served by higher education to those that contribute directly to disciplinary goals, like the prohibition of plagiarism. American universities were founded and continue to embrace values not subsumed in disciplinary criteria. As discussed above, the most persistent claim is that they foster democracy by

87. Id. at 103–04.
88. Fish, supra note 17, at 141.
89. Id. at 142.
90. Fish expressly argues that “the whole of academic morality” consists of those prohibitions implicit in immanent rationality, such as against cheating, fraud, and plagiarism. Id. at 101–02.
educating leaders to engage arguments on their merits rather than resort to force or lies: the mutually supporting commitments of a liberal education and liberal society. But most schools have other commitments as well. My own institution has endeavored over many years to interpret its heritage as a Catholic and Jesuit university with unstinting commitment to academic freedom, arguably improving the education it offers because of those values.191 Law schools, too, educate students for activity in the world, often combining scholarly analysis of legal issues with skills development and an ethical commitment to justice integral to professionalism.192

Fish ignores the extent to which the actual traditions of American higher education neither can nor should be fully separate from public values. Practically speaking, most constituents of universities may care as much or more for the attachment to these values than for disciplinary norms. Critics of undergraduate education persistently call for greater curricular coherence, which requires some subordination of disciplinary norms to educational or ethical goals.193 External criticisms of trends in scholarship or the quality of teaching will not be silenced by Fish’s claims that academic work has no bearing on society. The tension between disciplinary norms and social demands has fueled the dynamism of American universities.194 Material and moral support for teaching and scholarship depends on the belief that they contribute to some notions of social good.


94. Former Yale President Giamatti warned that universities that seek to be “sanctuaries from society” deserve scorn. A. BARTLETT GIAMATTI, A FREE AND ORDERED SPACE: THE REAL WORLD OF THE UNIVERSITY 50 (1990) (“To wish only to be removed from the culture, and not to be part of its renewal, is to long for the atrophy, not the exercise, of the imagination and its works.”).
The inevitable and desirable entanglement of higher education with social goals and values makes academic freedom even more important. Entrusting the evaluation of teaching and scholarship to disciplinary peers provides insulation (not isolation) for intellectual accomplishment from the pursuit of moral or practical ends by trustees or administrators. Academic freedom provides a safety valve regulating the interplay between disciplinary criteria and the broader concerns of the university, protecting the highly structured search for scholarly truth that engenders intellectual integrity to multifarious projects of the modern university. The absence of hierarchical command and the lateral distribution of authority required by academic freedom render any integration of disciplinary criteria and educational or social values only partial and periodic. Ordinary academic work needs to and can go forward without interference, but academics occasionally do need to argue beyond their fields that their work has both intellectual merit and social value. This dialogue is explicit in the scientific grants process and also implicit in the legal control of universities by nonacademics. Tension among the goals of higher education has mostly been creative, and academic freedom protects intellectual integrity from being overwhelmed by more immediate or popular concerns.

IV. Legal Implications: The Paradox of Garcetti

While neither book purports to wrestle with legal issues as such, their treatment of the norm of academic freedom has important implications for its constitutional status. As indicated above, the Supreme Court’s decision in Garcetti tees up the question whether the First Amendment protects faculty from reprisals by their institutions for speech within the duties of their job. 95 The Court there held that a county prosecutor would not be protected from adverse actions by his superiors in the office in response to a “disposition memo” prepared as part of his official duties. 96 The Justices thus established another limitation on the right of a public employee to address matters of public concern without reprisals by their government employer. 97 In dissent, Justice Souter expressed the “hope that today’s majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write ‘pursuant to . . . official duties.’”98 The Court in response, however, explicitly saved for future consideration whether such a limitation on the scope of employee

95. See Garcetti v. Ceballos, 547 U.S. 410, 425 (2006) (“There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court’s customary employee-speech jurisprudence.”).
96. Id. at 424.
97. See id. (“We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”).
98. Id. at 438 (Souter, J., dissenting).
freedom of speech should apply to academic scholarship or teaching. 99 A few lower courts have applied the Garcetti rule to professors without discussing the Supreme Court’s reservation about doing so, but only in the context of governance disputes rather than in teaching or scholarship. 100

Both Finkin and Post’s and Fish’s books help explain why the teaching and scholarship of a university professor enjoy a different relation to First Amendment values than does the speech of other professionals working within hierarchical public organizations. Garcetti assumes plausibly that many supervisors need to control the speech of their subordinates, so speech within the sphere of one’s employment lacks the values attributed to speech by citizens. 101 Fish illuminates how the different nature of a professor’s job requires a different structure of authority:

The limited freedom academics do enjoy follows from the task they perform. That task—extending the boundaries of received knowledge—does not have a pre-established goal; the open-endedness of intellectual inquiry demands a degree of flexibility not granted to the practitioner of other professions, who must be responsive to the customer, or to the bottom line, or to the electorate, or to the global economy. 102

Scholarship is carried out by highly trained individuals employing methodology and responding to prior work within (or near) organized disciplines, and subjecting the product to professional criticism and peer review. A professor cannot be considered an organ of the state; indeed, a scholar’s primary duty is to the truth, which would be betrayed by following any official state line established by any superior. The 1915 Declaration

99. See id. at 425 (majority opinion) (“We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.”).

100. Renken v. Gregory, 541 F.3d 769, 773–74 (7th Cir. 2008) (characterizing Renken’s speech as that of a public employee rather than a private citizen because registering a grant falls within the teaching and service duties that he was employed to perform); Hong v. Grant, 516 F. Supp. 2d 1158, 1165–66 (C.D. Cal. 2007) (defining the key issue as whether Hong’s statements were made pursuant to his official duties as a faculty member, without first questioning whether faculty members should be evaluated under the Garcetti rule). In Gorum v. Sessoms, 561 F.3d 179 (3d Cir. 2009), the court applied the Garcetti rule to a professor’s statements in various governance and administrative disputes, finding that his “actions so clearly were not ‘speech related to scholarship or teaching,’” and noting that “such a determination here does not ‘imperil First Amendment protection of academic freedom in public colleges and universities.’” Id. at 186 (quoting Garcetti, 547 U.S. at 425; id. at 438 (Souter, J., dissenting) (internal citations omitted)). The extension of Garcetti to universities threatens shared governance. See Areen, supra note 66, at 1000 (“[Extending] the holding of Garcetti to faculty at public colleges and universities [will] thereby effectively eliminate constitutional protection for their scholarship, teaching, and governance activities.”).

101. Dean Post has written several sophisticated articles explicating the differences for First Amendment purposes between the realms of public discourse and that of government managerial authority. E.g., Robert C. Post, Between Governance and Management: The History and Theory of the Public Forum, 34 UCLA L. REV. 1713 (1987).

102. FISH, supra note 17, at 81–82.
expressed this sense that professors do not serve within a chain of command, insisting that they are “appointees” not “employees.” If professors’ work requires independent judgment and expression, subject to evaluation by peers who apply academic criteria that largely transcend any local peculiarities, the cosmopolitan standards for an academic discipline practiced across the nation and often around the world. Hierarchical control of speech defeats the goals of scholarship and liberal education, so universities have quite different systems for coordination of effort.

The Garcetti formulation turns the principle of academic freedom on its head. The First Amendment, as expounded in Garcetti, protects only a public employee’s speech as a citizen outside professional duties. Academic freedom essentially protects only academic speech within the sphere of a professor’s professional responsibilities; any extension to the professor’s speech as a citizen outside his or her professional duties is derivative and debatable. Fish captures the nub of this in his argument that when professors speak on topics outside their academic competence, they have no more claim to authority than anyone else; thus, academic freedom should give them no more and no less liberty than anyone else. While professors at public universities long have enjoyed the same First Amendment protections for extramural speech as other public employees, academic freedom addressed the conditions necessary for success in teaching and scholarship, the core of professional duties. No wonder the Supreme Court hesitated! From this perspective, the Garcetti rule perversely eviscerates academic freedom by depriving it of any constitutional protection.

Finkin and Post take a somewhat different tack; they argue that academic freedom does protect the “extramural” speech of an academic from institutional reprisal. Their view tracks the AAUP position, which has evolved from some waffling in the 1915 Declaration, when the First Amendment did not protect any speech by government employees, to its definite 1970 interpretation that “a faculty member’s expression of opinion as a citizen cannot constitute grounds for dismissal unless it clearly demonstrates the faculty member’s unfitness for the position.” Finkin and Post incorporate citizen speech within academic freedom because professors at private universities cannot invoke the First Amendment against their institutions. They forthrightly acknowledge that the rationales for academic freedom itself, professional competence and autonomy, do not

103. See 1915 DECLARATION, supra note 1, at 295 (proclaiming that members of university faculties are the appointees, rather than the employees, of the university trustees).
104. 547 U.S. at 421.
105. FISH, supra note 17, at 82.
106. See FINKIN & POST, supra note 1, at 7 (arguing that First Amendment rights and academic freedom are separate rights, and that extramural speech is a distinct dimension of academic freedom).
107. 1940 STATEMENT, supra note 14, at 6.
108. FINKIN & POST, supra note 1, at 132–33.
directly justify protection of speech outside a professor’s realm of competence. Rather, they argue that extending academic freedom to extramural speech provides “prophylactic protection” for core freedom in scholarship and teaching; it fosters a “climate of trust and autonomy necessary for faculty to contribute optimally to the mission of higher education.” While this argument has practical merit, it recognizes, as does Fish’s, that academic freedom arises from and has been shaped by professional requirements for teaching and scholarship.

So the *Garcetti* limitation would seem to be inconsistent with academic freedom. But the issue is not that simple. The freedom that citizens have under the First Amendment also may be inconsistent with academic freedom, which not only tolerates but requires that peers evaluate the quality of speech on the merits and penalize professionally those found lacking. Finkin and Post recognize that the professional criteria for academic speech, requiring methodological care, hardly resembles the “‘uninhibited, robust, and wide-open’ speech that characterizes the public debate of citizens.” They argue further that the First Amendment presumes that every person has an equal right of expression, but “this premise is inconsistent with the advancement of knowledge, which requires precisely that ideas be treated unequally, that they be assessed and weighted, accepted and rejected. The kind of individual freedom that underlies the structure of the First Amendment is . . . ill suited to the production of knowledge.” Within academic freedom, individual teachers are subject to “retaliation” for weaknesses in speech within their professional duties, so long as the judgment is made by academic peers pursuant to appropriate procedures. Both books stress the inherently professional purposes and limitations of academic freedom, demonstrating that it arises from the logic of scholarly and educational purposes rather than being deduced from the principles that justify free-speech protections for citizens in a democracy. That is the neo-orthodoxy that they revive, which restores the coherence of academic freedom. Entrusting the elaboration and application of such inherently academic principles to judges and juries threatens the intellectual system that the principles exist to foster.

The public-employee free-speech cases before *Garcetti* frequently were absurd, as courts and juries struggled to decide whether some professor’s writing or utterance touched on a matter of “public concern.” But this is

109. *Id.* at 135–36.
110. *Id.* at 140.
111. *Id.* at 135 (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).
112. *Id.* at 43.
113. *See id.* at 59 (explaining how universities employ peer-review procedures in making hiring and tenure decisions).
114. *See Byrne, supra* note 52, at 108–09 (detailing the inconsistent application of the “public concern” test). Compare *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 679 (6th Cir. 2001) (“[C]lassroom instruction will often fall within the Supreme Court’s broad conception of ‘public
the wrong question being answered by the wrong persons. Academic freedom insists that academic work be evaluated only for its professional value by other scholars competent to make such a judgment. These First Amendment cases bring academic work to the bar of public opinion, but the thrust of academic freedom is to protect it from the force of public opinion. As Finkin and Post state, “[T]here is a fundamental distinction between holding faculty accountable to professional norms and holding them accountable to public opinion. The former exemplifies academic freedom; the latter undermines it.”

Of course, constitutional adjudication involves more than public opinion. But the First Amendment, interpreted by judges and applied by juries, will slight academic values in favor of civic values. For this reason, I long have argued that constitutional academic freedom protects primarily the university as an institution from government interference with core academic functions. Thus, the academic freedom of the individual professor should be left to nonlegal academic and institutional arrangements, such as the tenure system; the investigations and judgments of Committee A of AAUP; and the professional incentives and ethics of professors, academic administrators, and even trustees. Legalizing disputes about the appropriateness of teaching and scholarship empowers their resolution by nonacademics. Judges can protect the system of academic freedom by protecting the institutional autonomy of universities from inappropriate intrusions by political actors. When they settle disputes among academics about collective and individual authority, such as departmental control over curriculum or grading, or the reasonableness of tenure decisions, they tend to replace academic with civic norms.

The remedial purpose of adjudication also may be unsuitable for the vindication of academic freedom. Both books emphasize that academic freedom protects the system of scholarship and teaching rather than protecting the individual interests of each professor. Finkin and Post state, “If the First Amendment protects the interests of individual persons to speak as they wish, academic freedom protects the interests of society in having a professoriat that can accomplish its mission.” Fish argues that a teacher “violates academic freedom by deciding to set aside academic purposes for...”

---

115. FINKIN & POST, supra note 1, at 154.
116. Byrne, supra note 6, at 255.
117. Id. at 307–11.
118. See FINKIN & POST, supra note 1, at 154 (“[T]here is a fundamental difference between holding faculty accountable to professional norms and holding them accountable to public opinion.”). Judicial scrutiny of a professor’s nonprofessional speech against institutional retaliation ordinarily does not threaten peer review.
119. Id. at 39.
others thought to be more noble or urgent.”¹²⁰ This tilt is strongly evident in Committee A reports, which examine and recommend changes in institutional decision-making processes rather than seek remedies for wronged individuals. The system of academic freedom is more important than any individual professor. Redressing wrongs to individuals is humane but not necessary to preserve the functioning of the beneficial system.¹²¹ Employing an outside force such as a court may secure redress in one case but weaken or destroy the system.

_Garcelti_ may provide the right rule for professional speech by professors, but for reasons different than those for hierarchical organizations. Academic freedom as a norm and practice already protects individual professors from arbitrary or politically motivated retaliation. The exemplary Committee A reports recounted by Finkin and Post demonstrate how well academics can resolve their own disputes. First Amendment litigation risks bringing unsuitable principles and practices to bear on a well-functioning informal system. Finkin and Post, nonetheless, likely would resist _Garcelti_—and for good reasons. Although we largely agree on the neo-orthodox principles that justify academic freedom, they take a different approach to implementing them. While they justifiably extol the virtues of Committee A’s work, AAUP leaders know the practical barriers to fostering academic freedom without judicial protection. Faculty at leading institutions take it for granted, while many of those at more marginal institutions serve as adjuncts without the protections of tenure or even regularity.¹²² The AAUP has been weakened. Economic pressures encourage institutions to curtail faculty privileges, promote “business methods,” and fear conflict with funders.¹²³ Indeed, their book can be read as an attempt to salvage the

¹²⁰. _Fish_, supra note 17, at 81.

¹²¹. A university that adheres to academic freedom, of course, must provide academic due process to individuals through peer review and faculty-grievance procedures. _See generally_ AM. ASS’N OF UNIV. PROFESSORS, RECOMMENDED INSTITUTIONAL REGULATIONS ON ACADEMIC FREEDOM & TENURE (2006), http://www.aaup.org/NR/dyn/lyres/43B77A60-BA80-4155-B61B-FF76743B5048/0/RecommendedInstitutionalRegulationsonAcademicFreedomandTenure.pdf (outlining the AAUP’s model tenure, grievance, and dismissal procedures).

¹²². _See_ EMMY FORREST CATALDI ET AL., U.S. DEP’T OF EDUC., 2004 NATIONAL STUDY OF POSTSECONDARY FACULTY: BACKGROUND CHARACTERISTICS, WORK ACTIVITIES, AND COMPENSATION OF INSTRUCTIONAL FACULTY AND STAFF: FALL 2003, at 7 tbl.1, 13 tbl.7 (2005) (reporting that only 5% of part-time faculty have any tenure opportunity, and that the percentages of part-time faculty in various institutions were 22% at public doctoral institutions, 31% at private not-for-profit doctoral institutions, 37% at public master’s and private not-for-profit baccalaureate institutions, 55% at private not-for-profit master’s institutions, 67% at public associate’s institutions, and 51% at all other types of institutions); J. Peter Byrne, _Academic Freedom of Part-Time Faculty_, 27 J.C. & U.L. 583, 592 (2001) (“Part-time faculty cannot enjoy as full a protection for academic freedom as do full-time faculty . . . because they are too far removed from the system of peer review.”).

¹²³. _See_ e.g., Naomi Schaefer Riley, _Tenure and Academic Freedom: College Campuses Display a Striking Uniformity of Thought_, WALL ST. J., June 23, 2009, at A3 (describing a failed plan by the Metropolitan College of Denver to ease the firing of tenured professors to control education costs).
principles that have animated the AAUP’s approach to academic freedom for application in new contexts.

Although these books well serve academic freedom by clarifying the values upon which it is based and the purposes that it serves, neither offers a sense of how to strengthen and preserve that system. Fish offers little more than arguments to individuals about how to behave. His interest in institutional arrangements amounts to arguments that administrators should pretend to listen to faculty and that faculty should treat administrators more respectfully. He does not offer helpful suggestions about how to provide incentives or compel academics to abide by the academic ideals he passionately advocates. Although they are legal experts, Finkin and Post also concentrate on principles. Their discussion of process and jurisdiction is backward-looking to what the AAUP has accomplished. The effectiveness of what they accomplished leaves us wanting all the more their detailed engagement with the institutional choices that can safeguard those principles.

The looming question posed by Garcetti of the relation between our tradition of academic freedom and the First Amendment makes the need to address these issues acute. Those who worry that judicial enforcement of individual academic freedom against public institutions will undermine the values intended to be protected need most to suggest alternatives. Here are a few suggestions. First, judicial enforcement of constitutional academic freedom as a right of universities themselves to be free from political interference in their core academic functions creates space where academics can govern those matters embraced by our tradition of academic freedom. Second, this right of institutional autonomy can be shaped to provide incentives for the governors of universities to adhere to the tradition of academic freedom. For example, I have argued that a systematic institutional failure to follow the tradition of academic freedom should deprive an institution of the status of a university and the constitutional shield that accompanies it.124 Third, faculty members must either support the reform efforts of the AAUP or create a new organization to perform its vital functions. As noted above, membership in AAUP has decreased, and some feel that its unionization efforts are inconsistent with its role as guardian of academic freedom.125 Nonetheless, the AAUP has taken significant steps recently to address these issues.126 Although some disciplinary associations, such as the Association of American Law Schools, have made useful efforts

124. See Byrne, supra note 6, at 338 (“[C]onstitutional academic freedom ought not to protect institutions resembling universities but which do not . . . respect the academic freedom of professors . . . or the essential intellectual freedom of students . . . .”).

125. See, e.g., Wilson, supra note 15 (“Others believe that the AAUP’s union activities corrupt its high-minded professional policies [such as protecting academic freedom].”).

126. See generally Am. Ass’n of Univ. Professors, Resources on Academic Freedom, http://www.aaup.org/AAUP/newsroom/ (providing recent policy statements, reports, and analysis on pressing issues).
to address academic freedom, faculty need an organization that transcends disciplines and holds academic freedom as its central mission in engaging with ever larger and more powerful higher-education administrations. Those who think courts are the answer should address the concern expressed ably by the 1915 Declaration itself, that judgments about the scope of academic freedom should not “be vested in bodies not composed of members of the academic profession.”

V. Conclusion

American universities are dazzlingly diverse, full of conflicting purposes, and the envy of the world. Our norm of academic freedom has grown out of the needs and power structures of our universities to safeguard the intellectual excellence at the core of their success. Rather than a civil liberty or an individual interest, academic freedom systematically preserves the precedence of professional judgment about what counts as success in scholarship and teaching. As such it protects knowledge and the search for truth, as well as we can collectively establish it. The academic work of a university provides an exemplar for a liberal society, which values addressing issues on the merits and supporting leaders who appropriately acknowledge facts and respond to conflicting arguments.

The books under review make impressive contributions to understanding academic freedom and its relation to the search for truth. Finkin and Post hold out reasonable hope that the traditional approach of the AAUP to controversies about academic freedom provides enduring principles that preserve professional standards while permitting individual creativity and adapting to new methods. I wish they had gone further in defending their approach and placing it within current controversies and institutional arrangements. Fish argues for a faculty role limited to performing core professional competencies, the better to exclude from academic decision making those with political agendas. While he is half right—we must teach our subjects as matters of intellectual inquiry—he unjustifiably denies much that makes university education valuable to students and to society at large. Both books clarify what is distinct and precious about academic freedom, and we need to get those principles right to successfully apply them in law or new institutional structures.

127. The AALS Committee on Academic Freedom and Tenure investigates complaints in a manner analogous to that of Committee A of the AAUP, but its proceedings are largely confidential. See Executive Committee Regulations of the Association of American Law Schools, ch. 4, http://www.aals.org/about_handbook_regulations.php#4 (providing the Committee’s procedures for resolving complaints).

128. 1915 Declaration, supra note 1, at 174.