THE GUARDIANS OF KNOWLEDGE IN THE MODERN STATE: POST'S REPUBLIC AND THE FIRST AMENDMENT

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> *On some grave questions, there is no difference to be split; one does not look for a synthesis between verity and falsehood; the sun does not rise in the east one day and in the west the next.*[1]

Christopher Hitchens's maxim could be the epigraph quote to Robert Post's thought-provoking new book, *Democracy, Expertise, and Academic Freedom: A First Amendment Jurisprudence for the Modern State*.[2] While many might laud the democratization of knowledge and the ideal of free and equal competition of ideas in the proverbial marketplace, there are certain lines that cannot be crossed if the sun is to continue to rise in the east. This is but another way of saying that egalitarian principles cannot be allowed to run amok when it comes to how we understand truth or, if you will, expert knowledge.

Robert Post's examination of the First Amendment is reminiscent, if only in broad strokes, of the late Allan Bloom's critique of what he saw

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1. CHRISTOPHER HITCHENS, LETTERS TO A YOUNG CONTRARIAN 21 (2001).

2. ROBERT C. POST, DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE (2012). The text of the book, including the introduction, runs 104 pages. The endnotes constitute fifty-nine pages. The book grew out of the Julius Rosenthal lectures, which Dean Post delivered at Northwestern University School of Law on April 16–18, 2008. *Id.* at vii. For an early critique of some of Post's ideas, rendered before publication of Post's work, see generally Martin H. Redish & Abby Marie Mollen, *Understanding Post's and Meiklejohn's Mistakes: The Central Role of Adversary Democracy in the Theory of Free Expression*, 103 NW. U. L. REV. 1303, 1321–50 (2009). Presumably, Post's reply to Redish's commentary is incorporated in his disapproving assessment of the autonomy or self-realization theories of First Amendment normative value. *See* POST, *supra*, at 10–13, 23–25, 59, 112 n.78. Finally, it bears noting that Post was the general counsel to the American Association of University Professors between 1992 and 1994.

as the assault on the academy owing to invasive egalitarian principles. The liberal dean of the Yale Law School and the conservative professor of political philosophy of the University of Chicago share some conceptual ground.

If truth be known (Dare we put it that way?), this should not be surprising. For where excellence (what the ancients called *arete*) is the criterion, there has to be some rupture, at some point, of egalitarian norms.[3] One mark of a dauntless thinker is a willingness to defend the verity of the earth's circularity in a democratic culture in which the flat-earth crowd demands compromise or synthesis. However much one may agree or disagree with eye-opening books such as Post's *Democracy, Expertise, and Academic Freedom* or Bloom's *The Closing of the American Mind*, it is hard to deny one thing: that they force us to be pensive, to pause and reflect on what we heretofore may have considered to be gospel. Metaphorically, they are akin to Socrates speaking to his Athenian jury—they alert us even as they challenge us. One of the nobler purposes of the First Amendment is to inspire us to *think* critically, including the way we think about the First Amendment. By that measure, Dean Post has done us a great service: he has written a book that pricks the mind at many a turn where feeble thinking passes for received wisdom.

In his discussion of justice in *The Republic,* Plato's Socrates insists on a distinction between truth and opinion.[4] Drawing on the thought of the political theorist Hannah Arendt,[5] Dean Post does something of the same in his discussion of the First Amendment. He writes: "Arendt allows us to see that First Amendment protections guarantee the specifically political character of *public opinion*. To the extent that law enforces claims of *truth*, it suppresses 'political thinking' by excluding from political participation those who embrace a different truth from the

3. *See* ALLAN BLOOM, THE CLOSING OF THE AMERICAN MIND 25, 88–90 (1987) ("There is one thing a professor can be absolutely certain of: almost every student entering the university believes, or says he believes, that truth is relative. If this belief is put to the test, one can count on the students' reaction: they will be uncomprehending."); *id.* at 89 ("Harvard, Yale and Princeton are not what they used to be—the last resorts of aristocratic sentiment within the democracy."). By suggesting this general analogy, we do not mean, of course, to imply that Dean Post would endorse all or even many of the ideas advanced by the late Professor Bloom. Still, there is a similarity between the two works, if only in the concern with the leveling effects that democracy can have on how we view knowledge. In this respect, there is a bond among the liberal Robert Post, the conservative Allan Bloom, and the radical Oxford-educated Christopher Hitchens.

4. THE REPUBLIC OF PLATO, bk. VI, at 188–90 (Allan Bloom trans., Basic Books 1968).

5. POST, *supra* note 2, at 118 n.10 (noting a distinction between "the philosopher" and "the citizen" and therefore a distinction between expert knowledge and public opinion).

state."[6] Hence, we are told, "'[t]ruth . . . carries within itself an element of coercion.'"[7] We will soon say more about this general dichotomy. For now, it is enough to suggest a larger point, namely, the nexus in Dean Post's thinking between political philosophy and free speech.

Throughout his book Post turns time and again to the thoughts of philosophers such as Jurgen Habermas, Georg Wilhelm Hegel, Immanuel Kant, Charles Sanders Peirce, John Rawls, Jean Jacques Rousseau, and Carl Schmidt, to list but a few.[8] Speaking broadly, this juxtaposition of philosophy and free speech theory calls to mind the approach that Alexander Meiklejohn takes in his seminal book *Free Speech and Its Relationship to Self Government*.[9] Whatever his conceptual allegiance to Meiklejohn,[10] Post does something similarly bold—he ventures a theory of free speech. And that theory very much concerns the role and rule of the First Amendment in a modern democracy.

It is an old problem. Democracy is tied to *doxa* (the Greek word for opinion), which affects how we perceive truth or understand knowledge. And Dean Post is aware of that problem: "Within public discourse, traditional First Amendment doctrine systematically transmutes claims of expert knowledge into assertions of opinion."[11] If doctrine does so, however, it may be that an all-too-accommodating egalitarian culture often demands it. So why is that a problem? Consider, as Post has,[12] the case of state abortion laws that in effect require doctors "to give untruthful, misleading and irrelevant information to patients."[13] For those who demand accurate medical information, such laws are anathema to the doctor-patient truth-telling relationship. Then again, to those adamantly opposed to abortion, virtually anything that obstructs the "murder" of unborn "babies" is justifiable and such laws surely further that end. Thus, what subsidizes the unrestrained anti-abortion agenda to set truth aside, what gives it wide currency, is religious belief,

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6. *Id.* at 119 n.10 (emphasis added).

7. *Id*. at 118 n.10 (quoting HANNAH ARENDT, BETWEEN PAST AND FUTURE 239 (1968)).

8. *Id.* at 21, 113 n.80 (Habermas); *id*. at 27, 28 (Hegel); *id*. at 6, 146 n.29, 152 n.60, 154 n.82 (Kant); *id*. at xii, 107 n.34 (Peirce); *id*. at 5 (Rawls).

9. ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATIONSHIP TO SELF GOVERNMENT (1948).

10. *See generally* Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109 (1993).

11. POST, *supra* note 2, at 44.

12. *See id.* at 48, 131 n.67.

13. Planned Parenthood of the Heartland v. Heineman, 724 F. Supp. 2d 1025, 1048 (D. Neb. 2010).

which quite frequently is at odds with expert knowledge.[14] Conceptually, what is important here is that in a democratic regime, truth or scientific knowledge is not always the coin of the realm.

Should the opinions of the many prevail over the knowledge of the few? What to do? Enter Robert Post, who offers some thoughts for our consideration. He posits a way to navigate the First Amendment's value of safeguarding public opinion from governmental censorship while at the same time preserving a safe haven for knowledge (properly understood). In the process, Post has a keen insight: though the First Amendment is often hailed for the pursuit of truth or expert knowledge, certain of its applications war against the force of that knowledge. Phrased differently, free speech theories such as the marketplace of ideas[15] or doctrines such as content neutrality[16] run counter to the production of disciplinary knowledge, which presumes discrimination as to the worth of ideas. If such theories and doctrines were unleashed in the precincts of the academy, they would threaten the Enlightenment

14. This point is driven home remarkably well in Dean Post's fascinating hypothetical about a state's attempt to ban misleading or false information concerning representations made by clerics to their clergy that transubstantiation occurs during Holy Communion. *See* POST, *supra* note 2, at 134 n.83. Demands of scientific corroboration would never trump such assertions, even if linked to some form of fundraising for the church. That is, inherent in the First Amendment itself is an anti-rational value, that of the free exercise of religion, however unscientific. But the rationalist Post, if we may tag him such, seems understandably hesitant to extend that irrational realm. Thus, he does not see constitutional free speech protection extending to astrology or fortune-telling. *See id.* at 55, 136 nn.89–90 ("First Amendment scrutiny is not triggered by the censorship of deceptions, only by the suppression of actual knowledge or information" *unless religious beliefs are involved, in which case such knowledge defers*.). By contrast, consider *Spiritual Psychic Science Church of Truth, Inc. v. Azusa*, 703 P.2d 1119 (Cal. 1985), a case Post does not mention. Although the particular posture of the case arose out of a fortune-telling ad placed in a newspaper, the majority spoke quite liberally in how it understood the constitutional question before it, noting one "persuasive rationale" for extending free speech protection to fortune-telling as being "that the life of the *imagination* and intellect is of comparable import to the presentation of the political process." *Id.* at 1124 (emphasis added). Elsewhere, the majority painted with a broad brush and did not confine its constitutional discussion to *public* expression: "[t]he City maintains that fortunetelling does not fall within the protection of the Constitution because it does not concern or affect the political process. But this argument fails to comprehend the *broad scope* and purpose of the constitutional guarantee of free speech." *Id.* (emphasis added). Similarly, the court concluded that "fortunetelling deserves protection." *Id*. at 1124–25. Finally, the following passage suggests, yet again, that the court's analysis of the matter did *not* hinge on the communication being made in the public sphere: "some persons believe they possess the power to predict what has not yet come to pass. *When such persons impart their beliefs to others*, they are not acting fraudulently; they are communicating opinions which, however dubious, are unquestionably protected by the Constitution." *Id*. at 1126 (emphasis added). While the court did not discount the possibility of a fraud analysis, it confined it to those who practiced fortune-telling for a profit and did not believe in what they were doing. *See id.* at 1128–29.

15. *See* POST, *supra* note 2, at 6–8, 138 (rejecting marketplace of ideas theory).

16. *See id.* at 9–10 (rejecting certain applications of content-neutrality doctrine).

raison d'etre of the university. This all points to Post's understandable concerns for and proposals to protect academic freedom.

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One of the preconditions for a vibrant and operational First Amendment is a salutary degree of toleration, a willingness to step down off of one's pedestal and permit (or even invite) a generous dollop of differing views. By that standard, Dean Post's display of goodwill is apparent in his exchange with the contributors to this Symposium.[17] After all, he prefaces his replies to each of them with kindly characterizations, labeling their contributions as "illuminating,"[18] or "concise and lucid,"[19] or "fascinating and comprehensive,"[20] or "fine and careful"[21] or even "shrewd and canny."[22] Taking our cue from such generosity of spirit, we welcome the opportunity to comment in kind and to raise a few affable questions (and tease out an occasional germ of an idea) in response to some of the points discussed in Dean Post's discerning book and in his instructive reply to the contributors to this Symposium. In these ways and others, we agree with Dean Post as to the importance of honoring the Holmesian injunction of squaring what we *say* about the law (how it is pigeonholed) with what we *do* with the law (how the courts and culture actually use it). In this regard, it would be most helpful to consider another injunction: others will tell you what the world should be, but I will tell you what it is.[23]

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17. Robert Post, *Understanding the First Amendment*, 87 WASH. L. REV. 549 (2012). In an important respect, Post's reply may be viewed as a quasi-introduction to this symposium, insofar as it synthesizes some of the main themes of each contributor. Of course, some contributors may take exception to his summary and characterization of their ideas. Nonetheless, if for no other reason than to avoid duplication, we need not undertake a similar synthesis here.

18. *Id.* at 549 (citing Bruce E. H. Johnson & Sarah K. Duran, *A View from the First Amendment Trenches: Washington State's New Protections for Public Discourse and Democracy*, 87 WASH. L. REV. 495 (2012)).

19. *Id.* at 551 (citing Judge Thomas L. Ambro & Paul J. Safier, *The First Amendment, the Courts, and "Picking Winners*,*"* 87 WASH. L. REV. 397 (2012)).

20. *Id.* at 553 (citing Paul Horwitz, *The First Amendment's Epistemological Problem*, 87 WASH. L. REV. 445 (2012)).

21. *Id.* at 557 (citing Stephen I. Vladeck, *Democratic Competence, Constitutional Disorder, and the Freedom of the Press*, 87 WASH. L. REV. 529 (2012)).

22. *Id.* at 560 (citing Joseph Blocher, *Public Discourse, Expert Knowledge, and the Press*, 87 WASH. L. REV. 409 (2012)).

23. This idea derives, if only in a qualified sense, from Machiavelli. *See* NICCOLÒ MACHIAVELLI, THE PRINCE 61 (Harvey C. Mansfield, Jr., trans., Univ. Chi. Press 1985) (1532) ("[It is] more fitting to go directly to the effectual truth of the thing than to the imagination of it."). For a related Machiavellian maxim concerning Fortuna, consider what is set out in RONALD K.L. COLLINS &

CLEARING SOME TERMINOLOGICAL BRUSH

If certainty is the end, clarity is the means. Words matter. And how words are used and understood very much determines whether or not we value ideas. This is particularly true for experts who trade in words, such as legal scholars. After all, what is legal education if not a discipline in careful writing and reading? Key to the art of legal reasoning is the deliberate and critical parsing of text.

One of the potential challenges in appreciating Dean Post's book is grappling with some of the terminology central to his thesis. The clearer one is about that terminology, the better one stands to evaluate Post's theories. If terms are unduly abstract, unnecessarily vague, inexplicably contradictory, or uncommonly used, the interpretive process suffers. Without venturing an opinion on that score, we wonder whether Post's audience may struggle in the attempt to attain clarity.

In order to develop his theory of free speech in such a way as to rescue a modicum of truth or to safeguard expert knowledge, Robert Post invites us to think about the ways in which a well-working democracy requires protection for opinion and likewise demands protection for the work product of the "[g]atekeepers" and "evaluators" of knowledge.[24] He does so by creating a dichotomy, but one that is oppositional and complementary at the same time:

- *Democratic legitimation*: "Democracy requires that government action be tethered to public opinion. Because public opinion can direct government action in an endless variety of directions, it is impossible to specify in advance which aspects of public opinion are 'political' and which are not . . . . It is for this reason that First Amendment coverage presumptively extends to all communications that form public opinion."[25]

- *Democratic competence*: This "refers to the cognitive empowerment of persons within public discourse, which in part depends on their access to disciplinary knowledge.

DAVID M. SKOVER, THE DEATH OF DISCOURSE 122 (2d ed. 2005).

24. POST, *supra* note 2, at 103 n.12 (quoting approvingly Ellen Messer-Davidow, *Book Review*, 17 SIGNS 676, 679 (1992)).

25. POST, *supra* note 2, at 19–20; *see also id.* at 28 (noting that public opinion must remain open to the "subjective engagement of all, even of the idiosyncratic and eccentric. Fools and savants are equally entitled to address the public").

> Cognitive empowerment is necessary both for intelligent self-governance and for the value of democratic legitimation."[26]

That democracy should legitimate the robust realm of public opinion seems sound enough. After all, everyone from fools and savants[27] to priests and professionals should have an equal voice in the marketplace of ideas, however imaginary the "truths" may be. Fair enough. But with *democratic competence* the fit between the two words is far less obvious. We need to stop and think about why that might be so.

It is a rule of rhetoric:[28] If you associate one word with another, a single thought might emerge no matter how irreconcilable the two words otherwise are. In this respect, consider carefully how words are being used here. On the one hand, if something is democratic, that means that the *demos* (the many) have their way. On the other hand, if something is deemed competent, it is because it is fitting (*competere*) to take the word of the professional few (the knowledgeable experts) over that of the uninformed many. By that lexical measure, competence cannot be common. Therefore, democratic competence would seem to be an oxymoron, something akin to "bright darkness" or "deafening silence." Such contradictory usage is acceptable as a matter of poetic license. But is such license to be granted in the realm of legal language?

After all, oppositional terminology invites oppositional consequences. If law's language frowns upon poetic license, it is because terminology such as "democratic competence" may be incongruous, obfuscatory, or even sophistic. The way Dean Post presents it, competency itself is not democratic; it is anti-democratic. That is, the rule of expertise does not turn on democratic will. Moreover, aligning competency with democracy obfuscates the paternalism inherent in the rule of elite experts. In other words, the fact that something is labeled democratic does not necessarily make it so. To this, Dean Post might respond that

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26. *Id.* at 33–34. Importantly, Post adds:

> To theorize the value of democratic competence is to confront a seeming paradox. Democratic *legitimation* requires that the speech of all persons be treated with toleration and equality. Democratic *competence*, by contrast, requires that speech be subject to a disciplinary authority that distinguishes good ideas from bad ones. Yet democratic competence is necessary for democratic legitimation. Democratic competence is thus both incompatible with democratic legitimation and required by it. This is an awkward conclusion that should prompt us to think hard about how democratic competence can be reconciled with democratic legitimation.

Id. at 34 (emphasis in original).

27. *See* COLLINS & SKOVER, *supra* note 23, at 9–24 (discussing the irrational excesses of the American popular commercial entertainment culture).

28. To be precise, perhaps it is more a functional rule than a formal one. The Aristotelian understanding of rhetoric, however, would not countenance such usage.

the juxtaposition of democratic competency derives from the notion that the populace is the beneficiary of expertise. But this may prove to be an unstable alliance. As we will discuss later, the uninformed *demos* has done and may do much to undermine the norms of the informed professionals, if only because the many may not view their self-interest as do the few. And when that occurs, the domain of democratic legitimation (the realm of opinion) trumps the domain of democratic competence (the realm of expert knowledge).

A similar demand for greater clarity might be made as to other key terminology in Post's work. For example, consider the following:

- *Expert knowledge*: What is it? Dean Post tells us what it is not: "Expert knowledge is neither practical reason nor is it a collection of atomistic facts."[29] He then tells us what it is: "Expert knowledge arises from the capacity to arrange experience in dependable and useful ways. It is produced through the application of complex disciplinary practices."[30] To this, he adds, "[w]hereas within public discourse the political imperatives of democracy require that persons be regarded as equals and as autonomous, outside public discourse the law commonly regards persons as dependent, vulnerable, and hence unequal"[31]—thus, they must rely on expert knowledge. Finally, this all points to a basic question: "How then should we conceive the relationship between the First Amendment and the production and dissemination of expert knowledge?"[32]

At the outset, one might wonder: who is an "expert" and whose expertise counts for democratic competency? Although Dean Post clearly values academic experts, what about governmental experts[33] or

29. POST, *supra* note 2, at 95; *see also id.* at ix (discussing the distinction between practical reason, which may be self-acquired, and expert knowledge, which is obtained from third parties with disciplinary expertise).

30. *Id.* at 95.

31. *Id.* at 23 (endnote omitted).

32. *Id.* at 25.

33. For example, what about national security experts at the Department of Defense? In the famous *Pentagon Papers Case*, 403 U.S. 713 (1971), such experts argued that national security would be seriously compromised by the release of a Defense Department study on American relations with Vietnam circa 1945–1967. *See id.* at 718. Had federal judges deferred to the expert knowledge of these officials, the First Amendment press claim vouchsafed in that case would have lost. *See generally* RONALD K.L. COLLINS, NUANCED ABSOLUTISM: FLOYD ABRAMS AND THE

experts in the institutional press? As to the latter, Post appears reluctant to endorse the following proposition that Professor Stephen Vladeck tenders:

> It is relatively easy to envision journalism as one of the disciplines whose practices should receive First Amendment coverage under Post's framework. After all, journalism makes a substantial contribution to the value of democratic competence; in many respects, there may be *no* field that more directly advances "the cognitive empowerment of persons within public discourse."[34]

In contrast, Post is ambivalent about the status of the press, calling it "a deeply ambiguous institution"[35] that serves both as "a mouthpiece for partisan politics"[36] and other opinion mongers and as a disinterested and professional organization "whose mission is to educate the public about newsworthy matters."[37] Post would rather have the institutional autonomy of the press "justified without appealing to the value of democratic competence,"[38] if only because "we cannot determine the substance of our constitutional doctrine [regarding press expertise] until we are first clear about the 'social ends' we wish [the press] to achieve."[39] Could not the same argument be leveled against many experts, particularly those outside the academy?

Dean Post's "mouthpiece" argument raises other intriguing questions. What happens when experts, even within the academy, act as partisan mouthpieces? Or what happens when university research experts become

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FIRST AMENDMENT (forthcoming 2012) (discussing the conflicting expertise of the press and governmental officials in the *Pentagon Papers Case*). In his contribution to this Symposium, Professor Stephen Vladeck makes a similar point, when he proposes that Dean Post's theory of democratic competence might have "a downside with regard to freedom of the press, at least where national security secrets are concerned," because "it is not difficult to imagine government arguments that *government officials*, rather than journalists, possess the relevant disciplinary knowledge when it comes to disseminating national security secrets." Vladeck, *supra* note 21, at 533–34 (emphasis in original). As to this challenge to his theory, Post remains silent in his reply.

34. Vladeck, *supra* note 21, at 540 (emphasis in original) (quoting POST, *supra* note 2, at 34). Importantly, two other contributors offer similar arguments for the inclusion of the press as institutional sites for the generation of expert knowledge. *See* Blocher, *supra* note 22, at 439–40; Horwitz, *supra* note 20, at 440.

35. Post, *supra* note 17, at 558.

36. *Id.*

37. *Id.*

38. *Id.* at 559. Calling on the "checking value" of the institutional press first articulated by Professor Vincent Blasi, Post notes that the First Amendment might protect the press because it could "'check' the possibility of governmental abuse." *Id.*

39. *Id.* at 560 (paraphrasing Justice Holmes).

mouthpieces for corporate interests? Put otherwise, if there is credible evidence that an expert, within or outside of the academy, is not genuinely disinterested[40] or not functionally defining and nourishing disciplinary knowledge itself, does that individual thereby lose his or her Postian credentials?[41]

- *Constitutional sociology of knowledge*: To protect democratic competence, Post tells us, courts must "attribute constitutional status to the disciplinary practices by which expert knowledge is itself created."[42] To do so, they must develop "a constitutional sociology of knowledge."[43] That is, to establish which disciplinary practices produce knowledge (e.g., medicine, chemistry, and law) and which do not (e.g., astrology and palmistry),[44] judges must articulate determinative "criteria."[45] The corpus of such criteria is, we assume, what is meant by a "sociological construction of knowledge,"[46] which itself involves courts in the enterprise of understanding and evaluating "epistemic cultures."[47] Such an

40. *See* Gary Edmond, *Judging the Scientific and Medical Literature: Some Legal Implications of Changes to Biomedical Research and Publication*, 28 OXFORD J. LEG. STUD. 523, 523 (2008) (noting that "[o]ver the last two decades, judges (and regulators) . . . have increased their reliance on published medical and scientific [research]," and asserting that they should take account of recent studies indicating that corporate sponsorship heavily biases such research). Two cursory points: first, this is not the contemporary judicial practice; and second, if it were, what would that portend for First Amendment adjudication regarding democratic competence in scenarios where university research is underwritten by corporate subsidies?

41. *See* POST, *supra* note 2, at 75 ("[U]niversities foster the *disinterested* pursuit of disciplinary knowledge." (emphasis in original)); *id.* at 150 n.53 ("Common sense identifies the term *discipline* with the content of an academic enterprise." (emphasis in original) (quoting approvingly David Shumway, *Disciplinarity, Corporatization, and the Crisis: A Dystopian Narrative*, J. MIDWEST MODERN LANGUAGE ASS'N, Winter–Spring 1999, at 2)).

42. POST, *supra* note 2, at 55.

43. *Id*.

44. *Id.* at 96. Notably, at one point Dean Post declares that law "*probably* would" be deemed a disciplinary practice. *Id*. (emphasis added). At another point, however, he maintains that "the professional practices of lawyers produce the kind of knowledge that advances the value of democratic competence . . . ." *Id.* at 56. Given the doctrinal confusion that Post himself flags in the First Amendment realm—where "[d]octrine proliferates endlessly and meaninglessly"—is it any wonder that Post equivocates over law's status as a discipline analogous to medicine or chemistry? Post, *supra* note 2, at 549. After all, for Post, some of First Amendment decisional law is a "barrage of inconsistent and abstract doctrine." *Id*.

45. POST, *supra* note 2, at 96.

46. *Id.* at 56.

47. *Id*. at 116 n.100 (quoting KAREN KNORR CETINA, EPISTEMIC CULTURES: HOW THE SCIENCES MAKE KNOWLEDGE 8 (1999)).

> undertaking, Dean Post concedes, will involve the judiciary in "deep and intractable questions."[48]

In light of the above, is it not likely that judges might pause before accepting the obligations that development of a sociology of knowledge would impose upon them? Would the product of this arduous endeavor be any less abstract than the First Amendment doctrines that are so unsettling to Dean Post? Understandably, in this admittedly murky area, Judge Thomas Ambro and Paul Safier are troubled by the prospect of establishing such a sociology of knowledge[49]—one that would require deciding, for example:

- which disciplinary practices are credible and which not;
- which experts might be authoritative and which not;
- which bodies of expert knowledge are relevant or not to the adjudication of a specific First Amendment claim;
- or what the constitutional status of expert knowledge is over time as it is challenged by competing theories.

Are such inquiries really analogous to the well-developed standards of care in the garden-variety torts case? Dean Post appears to believe so,[50] when he argues that courts "must pick a 'winner' in order to ascertain liability" whenever "expert testimony conflicts."[51] Can the matter be left

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48. POST, *supra* note 2, at 58. While it may be apparent that a constitutional sociology of knowledge will involve "deep" theoretical and doctrinal questions, is Dean Post serious when he also claims that it poses "intractable" questions?—that is, questions that may, by some definitions of the word, prove to be judicially unmanageable?

49. *See* Judge Thomas L. Ambro & Paul J. Safier, *The First Amendment, the Courts, and "Picking Winners*,*"* 87 WASH. L. REV. 397, 402 (2012).

50. *See* Post, *supra* note 17, at 552. Arguing that judges are accustomed to evaluating expert testimony, Dean Post refers to dicta in a passage of Judge Ambro's opinion in *Natale v. Camden County Correctional Facility*, 318 F.3d 575, 579 (3d Cir. 2003), in the following way: Judge Ambro "accurately observes that 'in the typical malpractice case, the duty of care, or the standard of practice to which the defendant-practitioner failed to adhere must be established by expert testimony.'" Post, *supra,* at 552 (quoting *Natale*, 318 F.3d at 579) (citations omitted). Though Post does not mention it, the *Natale* Court held that there was no need to assess the reliability of claims to expertise, since that particular case was governed by the "common knowledge" exception to the affidavit requirement. *Natale*, 318 F.3d at 578.

51. Post, *supra* note 17, at 552. Courts appear to be doing much more than just picking winners among expert witnesses called by the parties to a lawsuit. Even at the loftiest level of our nation's judiciary, it is not uncommon for the justices to look beyond the expert record and rely on their own "in-house" research derived mainly from the Internet. *See, e.g.*, Alli Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. (forthcoming 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2009904 (arguing generally that changes in electronic technology have and will alter judicial fact-finding processes). To what extent, one

thus? Consider, for example, Justice Stephen Breyer's cautionary note: "[M]ost judges lack the scientific training that might facilitate the evaluation of scientific claims or the evaluation of expert witnesses who make such claims."[52] Do those to whom the burden of developing a sociology of knowledge is assigned have the requisite expertise to accomplish the task?

In fairness to Dean Post, his undertaking is a Herculean one in which it is difficult to move a weighty conceptual rock along the steep terrain of our modern First Amendment. Given the enormity of his task, definitional precision is difficult to attain. Hopefully, the questions we raise will aid Post's readers to untangle a few knotty threads of thought.

THE HARM PRINCIPLE

Democracy, Expertise, and Academic Freedom identifies two normative values for our system of freedom of speech to serve. Theoretically, the First Amendment should aim both to promote the democratic legitimation of opinions and to buttress the domain of truth or expert knowledge. What Dean Post rejects as a worthy *telos* for expressive liberties, however, is the protection of speech for speech's sake. "Misled by the seeming simplicity and generality of First Amendment doctrine," he asserts, "we imagine that the goal of First Amendment doctrine is to protect speech itself. But in fact nothing could be further from the truth."[53]

Our modern constitutional culture, however, might appear to value speech for its own sake. As Chief Justice John Roberts put it: "*Most* of what we say to one another lacks 'religious, political, scientific,

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wonders, will judicial reliance on online sources invite factual errors, unanticipated biases, and serious credibility issues—and all of this without any meaningful check from the parties' experts. What is one to make of this? Can we assume that such in-house knowledge is tantamount to Dean Post's "expert knowledge" in the realm of democratic competence? Moreover, in the judicial construction of a "sociology of knowledge," might it not be necessary, as Professor Larsen recommends, to develop a new set of procedural standards to govern the digital path of the law?

52. *See* Stephen Breyer, *Introduction* to COMM. ON SCI., TECH., AND LAW, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 4 (3d ed., 2011). This point is further illustrated by the admonition of U.S. District Court Judge William Acker, Jr., who charged:

> Unless and until there is a national register of experts on various subjects and a method by which they can be fairly compensated, the federal amateurs wearing black robes will have to overlook their new gatekeeping function lest they assume the intolerable burden of becoming experts themselves in every discipline known to the physical and social sciences, and some as yet unknown but sure to blossom.

Id. at 8 (quoting Letter from Judge William Acker, Jr., Federal District Court Judge, Northern District of Alabama, to the Judicial Conference of the United States et al. (Jan. 2, 1998)).

53. Post, *supra* note 17, at 551.

educational, journalistic, historical, or artistic value' (let alone serious value), but it is still sheltered from government regulation."[54] Thus, in recent times the Supreme Court has sustained the First Amendment claims of those who traffic in animal cruelty videos[55] and in violent video games.[56] It is within this rough and tumble realm that Dean Post's system of democratic legitimation operates; it is within this sphere that public opinion, no matter how vile or mindless, is allowed to be formed and have its say. That is what the First Amendment legitimates in Post's republic.

Nonetheless, Dean Post maintains that "[e]ntrenched First Amendment doctrine affirms that 'there is no constitutional value in false statements of fact.'"[57] As far as "[e]ntrenched First Amendment doctrine" goes, it is not at all clear that statements of fact, regardless of their value, are likely to be denied free speech protection simply because of their falsity. Robert Corn-Revere, a noted First Amendment lawyer who recently filed an amicus brief in *United States v. Alvarez*[58] on behalf of the Reporters Committee for Freedom of the Press and twenty-three news organizations, offered a different explanation. He argued in his brief: "It is not enough for a statement to be false or even knowingly false to exclude it from First Amendment protection. This Court has 'never held that a person can be liable for defamation merely for spreading knowingly false statements.'"[59] The point, he added, is that "First Amendment exceptions for untruthful speech, such as defamation or fraud, exist not just because the expression is false, but because of some *demonstrable harm*."[60] Moreover, Corn-Revere emphasized, "*Gertz* underscores this point. The Court stressed that the state interest underlying the law of libel 'is the compensation of individuals for the

54. United States v. Stevens, 559 U.S.__, 130 S. Ct. 1577, 1591 (2010) (emphasis in original) (quoting Cohen v. California, 403 U.S. 15, 25 (1971)).

55. *Stevens*, 130 S. Ct. 1577.

56. Brown v. Entm't Merchants Ass'n, 564 U.S.__, 131 S. Ct. 2729 (2011).

57. POST, *supra* note 2, at 29 (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974)).

58. No. 11-210 (U.S. argued Feb. 22, 2012); *see* Jeffery C. Barnum, Comment, *False Valor: Amending the Stolen Valor Act to Conform with the First Amendment's Fraudulent Speech Exception*, 86 WASH. L. REV. 841, 859–61 (2011) (describing *Alvarez*'s history and reasoning).

59. Brief for Reporters Committee for Freedom of the Press and Twenty-Three News Media Organizations as Amici Curiae Supporting Respondents at 15, United States v. Alvarez (U.S. No. 11-210 argued Feb. 22, 2012) [hereinafter "Reporters Committee Amicus Brief"] (internal citations omitted).

60. *Id.* (emphasis added) (citing United States v. Alvarez, 617 F.3d 1198, 1206–09 (9th Cir. 2010)).

harm inflicted on them by defamatory falsehood.'"[61] Finally, Corn-Revere counsels, even where torts involving false statements are involved, there must be some kind of real injury, some actual harm.[62]

We stress what we label as "the harm principle" because we think it better explains much of the First Amendment doctrine that Dean Post views as unconvincing or meaningless. If, indeed, those in the free speech community suffer from a kind of "First Amendment hypertrophy,"[63] might it be that First Amendment theories are so swollen with value-laden norms that they fail to take sufficient account of the obvious? Could it be that the presence or likelihood of real harm, even if obliquely addressed, is what ultimately drives much, if not all, of free speech analysis?[64] Even in Post's realm of democratic legitimation, can

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61. Reporters Committee Amicus Brief, *supra* note 59, at 16 (emphasis added) (quoting *Gertz*, 418 U.S. at 341).

62. *See* Reporters Committee Amicus Brief, *supra* note 59, at 17–18. Reporting on the oral arguments in the case, Lyle Denniston observed: "The Solicitor General had claimed that the Court had declared that 'calculated falsehoods' are entitled to no constitutional protection, but Kennedy retorted: 'I can't find that in our cases; it is a sweeping proposition.'" Lyle Denniston, *Argument Recap: Rewriting a Law to Save It*, SCOTUSBLOG (Feb. 22, 2012, 1:28 PM), http://www.scotusblog.com/?p=139371. Perhaps this explains why it is that, during the oral arguments in *Alvarez*, some of the justices felt the need to analogize the so-called harm in the case to that suffered in a trademark violation. *See id.*

63. Post, *supra* note 17, at 549.

64. In this regard, First Amendment scholar Frederick Schauer might well respond that formal free speech doctrine has been *too little* driven by rigorous judicial consideration of consequential harms. In an insightful article forthcoming in *The Supreme Court Review*, Professor Schauer posits that "the question of harm is one of huge First Amendment significance, and it has been one that has largely been avoided" by the Supreme Court. Frederick Schauer, *Harm(s) and the First Amendment*, (forthcoming 2012) (manuscript at 42) [hereinafter *Harm(s) and the First Amendment*], *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2009344. Providing a typology that characterizes the different harms involved in *United States v. Stevens*, 559 U.S.__, 130 S. Ct. 1577 (2010) (classifying the injury to animals in crush videos as "participant harm"), *Snyder v. Phelps*, 562 U.S.__, 131 S. Ct. 1207 (2011) (classifying the emotional distress alleged by the family arising from the anti-gay protest at a military funeral as "listener harm"), and *Brown v. Entertainment Merchants Associations*, 564 U.S.__, 131 S. Ct. 2729 (2011) (classifying the violence purportedly fostered by video games as "third-party" or "persuasion harm"), Schauer explains that "[d]isaggregating the domain of speech-associated harms" is crucial for conscientious and effective First Amendment analysis. Schauer, *supra*, at 35. Notably, he concludes:

> We take an important [first] step when we recognize that much First Amendment argument is about consequential and often harmful speech, but the necessary second step is to understand the nature of those harms, for without that we cannot hope to evaluate (or generate) the data that would enable courts to determine the extent of the harms involved, and whether the doctrine should allow any redress against them.

Id. at 37–38. To the extent that our discussion here implicates the topic of harm, we are in meaningful agreement with Professor Schauer's first step of analysis. In contrast, his concerns that the Court has too severely downplayed the significance of harms are less germane to our immediate purposes. While we may disagree with him over the relative magnitude and legal significance of any purported harm, we believe that Professor Schauer begins his First Amendment analysis at the

it be reasonably denied that the *demos* can only have its say as long as it causes no harm sufficient to trigger a compelling governmental interest to override it? Would not the same harm principle hold true in the realm of democratic competence? If so, one might ask: Would not the same doctrinal results be produced in both domains even without Dean Post's theories, provided one could point to some real harm?

The examples Post tenders as to law's regulation of falsity flowing from the lips of doctors, dentists, lawyers, corporate directors, and the like[65] are offered to support the claim that the public needs to depend on reliable and truthful information from experts. Fair enough. But, as with the line of First Amendment cases discussed above, does such regulation have less to do with simple falsity than with the expectation that reliance on that falsity would be detrimental, would likely cause real harm? Could a plaintiff prevail in a medical or dental malpractice case if there were lying without physical injury? Or could a plaintiff win a securities fraud case simply by proving falsity without demonstrating economic losses? Is it not fair to assume that what best explains the doctrinal results in all of these cases is the presence or absence of real harm rather than the valueless character of falsehoods?

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right place. *See also* SPEECH AND HARM: CONTROVERSIES OVER FREE SPEECH (Ishani Maitra & Mary Kate McGowan, eds., forthcoming, 2012) (studying the relationship between speech and harm from various perspectives—e.g., philosophy, sociology, political science, feminist theory, and legal theory).

65. *See* POST, *supra* note 2, at 12, 23. There is a curiously old-fashioned quality in many of Dean Post's paradigmatic examples for governmental regulation of falsity, at least insofar as he primarily focuses on face-to-face, for-fee, and in-office consultations between professional experts and their individual clients. After all, we live in the age of the Internet, as is evidenced by the ascendancy of Wikipedia, the people's online encyclopedia, over the 244 year-old print-based Encyclopaedia Britannica. *See* Joe Palazzolo, *Which Federal Appeals Court Cites Wikipedia Most Often?*, WALL ST. J. L. BLOG (Apr. 23, 2012, 7:35 PM), http://blogs.wsj.com/law/2012/04/23/which-federal-appeals-court-cites-wikipedia-most/ (reporting on incidence of citations to Wikipedia in federal cases); Julie Bosman, *After 244 Years, Encyclopaedia Britannica Stops the Presses*, N.Y. TIMES, (Mar. 13, 2012, 5:54 PM), http://mediadecoder.blogs.nytimes.com/2012/03/13/after-244-years-encyclopaedia-britannica-stops-the-presses/ (reporting that Encyclopaedia Britannica has ceased publishing). For many of the denizens of the Internet, are the paradigms for "expert knowledge" not substantially transfigured? For example, rather than pay for in-office expert medical advice, are the less affluent or the young not more likely to turn, first and foremost, to free online sites such as www.webmd.com, www.myelectronicmd.com, or www.askthedoctor.com in order to diagnose their allergies, asthma, fibromyalgia, depression, osteoporosis, or venereal diseases? Ironically, given the capacity to cross-check multiple resources, is it not conceivable that web-based medical information may sometimes prove more reliable than that of affordable, second- or third-rate medical providers? Assuming such websites would fall outside of Post's domain of democratic competence, is it not possible that much of our future medical diagnosis and treatment will occur within the realm of democratic legitimacy, in which governmental regulation of falsity is not to be tolerated?

TRADING IN TRUTH

Decades before Robert Post came to Yale Law School to serve as its dean, a visionary scholar, Robert Maynard Hutchins, held that position. After serving as dean of the law school[66] for a short period in the 1920s, Hutchins went on to become a famed educator[67] and president of the University of Chicago, which he helped to transform into one of this nation's great universities. Unafraid of real diversity in thought, Hutchins launched bold ideas[68] and recruited many great teachers and scholars to Chicago, ranging from the political philosopher Leo Strauss[69] to the constitutionalist C. Herman Pritchett.[70] And Hutchins was a vigorous defender of academic freedom;[71] for example, he steadfastly opposed faculty loyalty oaths in the 1950s.[72] More than others, either then or now, Hutchins championed the values of higher education. Precisely because he felt so strongly about the future of education, Hutchins minced no words when it came to confronting ruinous forces that compromised the pursuit of unfettered knowledge. As he put it in 1958:

> In the last generation the universities have become service stations rather than beacons. Their principal interest appears to be money, and they will engage in any activity that seems likely to provide it. So we are without centers of independent thought and criticism. The highly specialized and diffuse character of the universities prevents them from becoming centers, and their eagerness to sell themselves prevents them from being

66. *See* MILTON MEYER, ROBERT MAYNARD HUTCHINS: A MEMOIR 59–80 (1993). Hutchins became dean of the Yale Law School, from which he graduated, at age 29. *Id.* at 61.

67. *See* MARY ANN DZUBACK, ROBERT M. HUTCHINS: PORTRAIT OF AN EDUCATOR (1991).

68. For example, Hutchins suggested that law might be taught in conjunction with economics. *See* HARRY S. ASHMORE, UNSEASONABLE TRUTHS: THE LIFE OF ROBERT MAYNARD HUTCHINS 305, 536 (1989).

69. In 1949, Strauss accepted a position at the University of Chicago, where he taught until his retirement in 1967. He wrote many books on political philosophy and enjoyed a devoted and influential following. *See* ANCIENTS AND MODERNS: ESSAYS IN THE TRADITION OF POLITICAL PHILOSOPHY IN HONOR OF LEO STRAUSS (Joseph Cropsey, ed., 1964); LEO STRAUSS, THE STRAUSSIANS, AND THE AMERICAN REGIME (Kenneth L. Deutsche & John A. Murley, eds., 1999).

70. Pritchett was chairman of the Political Science Department at Chicago from 1948 to 1955 and again from 1958 to 1964. In later years, he taught at the University of California, Santa Barbara. His writings include CIVIL LIBERTIES AND THE VINSON COURT (1954), THE AMERICAN CONSTITUTION (1959), THE AMERICAN CONSTITUTIONAL SYSTEM (1963), and THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES (1948).

71. *See* ASHMORE, *supra* note 68, at 128–32, 242–43, 245, 248 (1989).

72. *See, e.g.*, ROBERT M. O'NEIL, ACADEMIC FREEDOM IN THE WIRED WORLD: POLITICAL EXTREMISM, CORPORATE POWER AND THE UNIVERSITY 24–25 (2008).

> independent. This process has gone very far and seems irreversible. It is altogether unlikely that the American universities can become centers of independent thought.[73]

Strong words, indeed. But if the "vitality of an intellectual community" was to survive, argued Hutchins, universities must construct a wide and deep moat between themselves and the captains of commerce, who would have universities "limit themselves" to the business of business.[74] Unless the caretakers of universities—especially its presidents, deans, and heads of departments and professional schools—committed themselves to keeping their institutions largely free of such corrupting influences, the result would be nothing short of a "crisis in values,"[75] one so profound as to compromise the value of "pursuing the truth for its own sake."[76] The problem of commerce demeaning the pursuit of knowledge in a university was especially troublesome insofar as it invited the "excesses of experts and specialists,"[77] who were too often willing to place self-profit over the collective good of liberal education.

The issue of the commercialization of knowledge, raised by President Hutchins more than a half-century ago, is far more serious today than it was in his day. By comparison, his era seems like an age of innocence. We think it salutary to rekindle Hutchins's message because it speaks forcefully to a point inextricably linked to Dean Post's interest in a theory of free speech designed to advance knowledge and safeguard academic freedom. Such a theory, if it is to have any meaningful staying power, cannot be oblivious to the obvious: it cannot ignore the commercialization of knowledge. It cannot venture to defend education and knowledge in a setting that restructures the former by redefining the domain of the latter. That is, if we are to be genuinely serious about conserving (and that is the word) the kind of values Dean Post urges us to preserve, we must not conflate academic freedom with entrepreneurial freedom. Hence, for example, when medical[78] and pharmaceutical[79]

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73. Robert Maynard Hutchins, *Ideas, Institutions, and American Liberty*, *in* ASPECTS OF LIBERTY: ESSAYS PRESENTED TO ROBERT E. CUSHMAN 3, 10–11 (Milton R. Konvitz & Clinton Rossiter, eds., 1958) (emphasis added).

74. ROBERT M. HUTCHINS, THE LEARNING SOCIETY 117 (1968).

75. *See id*. at 35.

76. *Id.* at 116.

77. *Id*. at 108.

78. *See* Patricia C. Kuszler, *Curing Conflicts of Interest in Clinical Research: Impossible Dreams and Harsh Realities*, 8 WIDENER L. SYMP. J. 115, 115–16, 118 (2001) ("Studies demonstrate that physician prescriptive practices are significantly affected by dollars and other benefits provided to them by the pharmaceutical industry. . . . Although the federal government has been the primary

schools become more concerned with securing corporate research funding than with advancing the knowledge of science, education is undermined. More importantly, expert knowledge is commercialized to the point of creating real ethical conflicts in values.[80] Worse still, some of the values most in jeopardy are those of academic freedom.[81] When commercialized knowledge masquerades as independent thought, it soon lays claim to protection in the name of academic freedom. Genuine knowledge suffers an opaque death whenever such things occur. Given that, why would any authentic educator defend the excesses of these commercial enterprises?

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source of funding for clinical research in the past, it has been superseded by private industry in the last decade." (citations omitted)); *see also* Marcia Angell, *Is Academic Medicine for Sale?,* 342 NEW ENG. J. MED. 1516, 1516 (2000) ("Academic medical institutions are themselves growing increasingly beholden to industry.").

79. *See* Jeff Stier, *Does Pharmaceutical Industry Funding Bias Research?*, CARDIOLOGY NEWS (Feb. 1, 2009), http://www.ecardiologynews.com/index.php?id=8736&type=98&tx_ttnews[tt_news]=86829&cHash=da03e20e36 ("The pharmaceutical industry funds slightly more than half of the research being done today. . . . Industry-sponsored studies, when published in peer-reviewed journals, are four times more likely to be favorable to the sponsor's drug, device, or treatment than are non-industry sponsored studies, according to a meta-analysis of 30 studies." (citation omitted)). As to the question of experts, the following is noteworthy:

> The [Food and Drug Administration] convened a panel to look at the question of whether or not VIOXX should be marketed. The non-industry connected members of the panel voted 14–8 to keep the drug off the market until the issue was sorted out. The panelists who came from industry voted to bring it back to the market.

Id. See also John Abramson & Barbara Starfield, *The Effect of Conflict of Interest on Biomedical Research and Clinical Practice Guidelines: Can We Trust the Evidence in Evidence-Based Medicine?*, 18 J. AM. BOARD FAM. MED. 414, 414 (2005) ("[A]mong even the highest quality clinical research . . . [,] the odds are 5.3 times greater that commercially funded [pharmacology] studies will support their sponsors' products than noncommercially funded studies.").

80. *See* Barbara J. Bird et al., *Conflicts in the Commercialization of Knowledge: Perspectives from Science and Entrepreneurship*, 17 ENTREPRENEURSHIP: THEORY & PRAC., Summer 1993, at 57.

81. *See, e.g.*, William Graham, *Academic Freedom or Commercial License?*, *in* THE CORPORATE CAMPUS: COMMERCIALIZATION AND THE DANGERS TO CANADA'S COLLEGES AND UNIVERSITIES 23, 30 (James L. Turk ed., 2000) (addressing the failure of universities to protect real academic freedom when doing so would conflict with the interests of private corporations that give money to universities); *see also* Wendy S. Pachter et al., *Corporate Funding and Conflicts of Interest: A Primer for Psychologists,* 62 AM. PSYCHOL. 1005, 1005 (2007) (recommending, among other things, that the American Psychological Association "develop explicit policies . . . to preserve the independence of psychological science"); Stephen D. Sugarman, *Conflicts of Interest in the Roles of the University Professor*, 6 THEORETICAL INQUIRIES IN LAW 255, 261–64 (2005) (describing increased university-imposed disclosure requirements to make conflicts of interest more transparent). Notably, law journals are among the very few of scholarly periodicals that uniformly lack any conflict of interest rules and disclosure requirements. *See* Ronald K.L. Collins, *A Letter on Scholarly Ethics*, 45 J. LEGAL EDUC. 139, 141–42 (1995) (calling on law reviews to create conflict-of-interest policies).

We will return to this issue in a moment. Before we do, however, we think it fair to let Dean Post weigh in on his own, at least in a general sense. Stressing the point, Post lauds the idea that universities should "foster the *disinterested* pursuit of disciplinary knowledge . . . ."[82] Like Hutchins before him, Post endorses the notion of independent centers of learning in which the primary goal is the "preservation, advancement, and dissemination of knowledge."[83] Faithful to that principle, Post argues that faculty experts should be no more beholden to the trustees of their college than "are . . . judges subject to the control of the president, with respect to their decisions . . . ."[84] In other words, there needs to be a firewall, which the First Amendment may sometimes buttress. It is precisely that firewall that makes universities, in Post's words, "unique institutions"[85] worthy of the public trust.

Against that backdrop, let us now revisit the topic of the commercialization of knowledge. We begin with Derek Bok, the former president of Harvard University. Like President Hutchins before him, President Bok was blunt in his assessment of the problem: "The commercialization of higher education is not a terrible disaster looming on the near horizon, but an accomplished fact—or, in the language of business, a done deal."[86] In the mind of the man who once served as head of the most prestigious college in the land for more than two decades, the problem that Robert Maynard Hutchins warned against had come into full bloom.

Colleges and universities, once seen as bastions of ideas serving the common good, have increasingly transformed into citadels of industry serving the cause of private profit. In this commercialized environment, medical schools produce bio-medical studies that are unduly influenced by industry;[87] brilliant researchers earn lucrative consulting fees;[88] and

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82. POST, *supra* note 2, at 75 (emphasis in original); *see also supra* text accompanying notes 41–42.

83. POST, *supra* note 2, at 63 (quoting David Madsen, *Review Essay: The American University in a Changing Society: Three Views*, 91 AM. J. EDUC. 356, 361 (1983)) (internal quotation marks omitted).

84. *Id.* at 92 (quoting AM. ASS'N OF UNIV. PROFESSORS, 1915 DECLARATION OF PRINCIPLES ON ACADEMIC FREEDOM AND ACADEMIC TENURE (1915) (internal quotation marks omitted), *reprinted in* AM. ASS'N OF UNIV. PROFESSORS, POLICY DOCUMENTS AND REPORTS 291, 295 (9th ed. 2001)).

85. *Id.* at 75.

86. DEREK BOK, UNIVERSITIES IN THE MARKETPLACE: THE COMMERCIALIZATION OF HIGHER EDUCATION 18 (2003).

87. *See, e.g.*, Justin E. Bekelman et al., *Scope and Impact of Financial Conflicts of Interest in Biomedical Research: A Systematic Review*, 289 JAMA 454, 454 (2003) ("Financial relationships among industry, scientific investigators, and academic institutions are widespread. Conflicts of interest arising from these ties can influence biomedical research in important ways.").

distinguished professors take title to industry-endowed chairs.[89] For Bok, blurring the line between the academy and the marketplace "threatens to change the character of the university in ways that limit its freedom, sap its effectiveness, and lower its standing in . . . society."[90] Furthermore, secrecy is often demanded by corporate entities that pay dearly for certain kinds of scientific investigation that can give rise to patents or trade secrets. When that occurs, Bok added, the effect is to "inhibit scientific progress . . . by limiting the flow of information and ideas that investigators need in order to advance their work."[91]

To be sure, the brave new entrepreneurialism that has become so commonplace in higher education can produce some societal benefits, even important ones. We do not deny that. Our point is a measured one: the coin of commerce is overvalued in the academy today; too often there are neither effective checks on such power nor even much incentive to curb it in meaningful ways.[92] A report from a Pennsylvania State University (Penn State or PSU) professor (affiliated with the Center for the Study of Higher Education) to the Office of the Vice

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88. *See, e.g.*, Gardiner Harris & Benedict Carey, *Researchers Fail to Reveal Full Drug Pay*, N.Y. TIMES, June 8, 2008, at A1 (revealing that a renowned, university-employed child psychiatrist "whose work has helped fuel an explosion in the use of powerful antipsychotic medicines in children earned at least $1.6 million in consulting fees from drug makers from 2000 to 2007 but for years did not report much of this income to university officials.").

89. *See, e.g.*, Duff Wilson, *Patching a Wound: Working to End Conflicts at Harvard Medical*, N.Y. TIMES, Mar. 3, 2009, at B1 (noting three industry-endowed chairs created with $8 million from sleep research companies).

90. BOK, *supra* note 86, at 207. Even those somewhat sympathetic to university-industry alliances believe that too much ground has already been lost to commercialization. *See, e.g.*, ROBERT ZEMSKY ET AL., REMAKING THE AMERICAN UNIVERSITY: MARKET-SMART AND MISSION-CENTERED 87 (2005); Adrianna Kezar, *Is There a Way Out?: Examining the Commercialization of Higher Education*, 79 J. HIGHER EDUC. 473, 479 (2008) (book review) ("Without frameworks for navigating the problems of commercialization that take into account a systems and cultural perspective and that are a bit skeptical of markets, I believe we will continue to merely tweak the edges and never address the core of the problem.").

91. BOK, *supra* note 86, at 65, *quoted in* Sara Rimer, *A Warning Against Mixing Commerce and Academics*, N.Y. TIMES, April 16, 2003, at D9 (interview with Bok). Ms. Rimer began her article with the following illustration: "College presidents always need more money, and in the 1980's [sic], during Derek Bok's tenure as president of Harvard, a major pharmaceutical firm made him a tempting financial offer." Rimer, *supra*. That offer is set out below:

> [The pharmaceutical company] would pay $1 million a year to Harvard Medical School, along with generous fees for participating faculty members, to produce a series for cable television on recent developments in cardiology. It was willing to allow a disclaimer during every program making it clear that Harvard was not endorsing any of the company's products as long as it could run its advertisements during various points in each episode.

Id. Bok declined the offer. *Id.*

92. *See, e.g.*, ELLEN SCHRECKER, THE LOST SOUL OF HIGHER EDUCATION: CORPORATIZATION, THE ASSAULT ON ACADEMIC FREEDOM, AND THE END OF THE AMERICAN UNIVERSITY (2010).

President for Research illustrates the problem. There is an entrepreneurial pride manifest on the pages of the document, which is entitled "Corporate-Sponsored Research at Penn State."[93] The report, early in its analysis, boasts that "Penn State has long been a leader in industry-sponsored research, registering the second or third largest expenditures. The top university for some time has been Duke ($133 million in 2006)," followed by "Ohio State ($106 million)."[94] Two objectives of the report were to "gain understanding of corporative motives for partnering with PSU" and to "identify strategies for increasing participation by industry in PSU research."[95] In this public document, the report was all too candid about its mission and how it should be understood:

> The purpose of this report is to provide a different viewpoint, a long-range, more general perspective. In this relationship, corporations are the buyers and universities the sellers. Thus, it is essential to appreciate the point of view and the motives of the purchasers, for whom university research represents only a small input to large [research and development] operations. Above all, this project aimed to comprehend what corporations sought from university research and what arrangements served to fulfill those needs.[96]

While there is more, much more, that we might excerpt from the Penn State report from the Center for Higher Education, we will add only the following item, which we think bears mightily on the question of academic freedom *and* academic integrity:

> [F]ocused basic research . . . promises to contribute to the development of new products [and] is probably the area having the greatest potential for stimulating additional demand for university research. This rationale would fit the PSU-Chevron partnership for coal-conversion technologies or the

93. ROGER L. GEIGER, CTR. FOR THE STUDY OF HIGHER EDUC., CORPORATE-SPONSORED RESEARCH AT PENN STATE: REPORT TO THE OFFICE OF THE VICE PRESIDENT FOR RESEARCH (2008), *available at* http://www.personal.psu.edu/rlg9/tappingtherichesofscience/Geiger_Corporate_reasearch_at_psu.pdf. Professor Geiger was then a senior scientist affiliated with the Center for the Study of Higher Education at Pennsylvania State University. The past head of the University's higher education program (1996–2000, 2003–2007), Geiger is now the Distinguished Professor of Education at PSU. His two principal fields of study are the history of American higher education and research universities. Faculty Directory: Roger Geiger, PENN STATE C. EDUC., http://www.ed.psu.edu/educ/eps/higher-education/directory/roger-geiger (last visited May 4, 2012).

94. GEIGER, *supra* note 93, at 2.

95. *Id*.

96. GEIGER, *supra* note 93, at 2–3 (emphasis added).

> [Massachusetts Institute of Technology (MIT)]-Novartis pact for continuous manufacturing. DuPont's partnership with MIT similarly represents initiatives in biomaterials that have yielded publications and patents—knowledge and potential products.[97]

To its credit, Penn State was open about its commercial objectives and how best to attain them. In the present culture, such objectives are held out to be realist goals worthy of any institution of higher education concerned about its survival in these ever-difficult economic times. Tellingly, educators such as Robert Maynard Hutchins and Derek Bok stand to obstruct such goals. Their messages pose a clear and present danger to the Entrepreneurial Academy.[98]

Recall that we have been talking about experts and expert knowledge and how the First Amendment might be recalibrated so as to protect, in certain instances, the work product of such experts and the knowledge they produce. This is true whether the disciplinary knowledge concerns pharmaceutical research,[99] findings on the effects of smoking,[100] climate change studies,[101] or any host of other areas where expert knowledge is

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97. *Id*. at 27.

98. *See* PATRICIA A. PELFREY, ENTREPRENEURIAL PRESIDENT: RICHARD ATKINSON AND THE UNIVERSITY OF CALIFORNIA, 1995–2003, at xiv, 102–14 (2012) (noting the expansion of the University's research enterprise into new forms of scientific research with industry).

99. *See, e.g.*, Eric G. Campbell, *Doctors and Drug Companies—Scrutinizing Influential Relations*, 357 NEW ENG. J. MED. 1796, 1796 (2007) ("[R]esearch has shown that physician-industry relationships do influence prescribing behavior." (citation omitted)). In this regard, note that one of the reasons Dean Post accords special protection to certain experts, such as doctors, POST, *supra* note 2, at 44–46, is because of the public need to obtain *reliable* information from these experts. *Cf. id.* at 129–30 n.62 (noting malpractice standards). Is the malpractice hurdle always enough to protect the well-being of patients in light of the problems Dr. Campbell identified? *See also* MARCIA ANGELL, THE TRUTH ABOUT THE DRUG COMPANIES: HOW THEY DECEIVE US AND WHAT TO DO ABOUT IT xviii–xix (2004) (noting, among other things, that much industry research in this area is "seriously flawed, leading doctors to believe that new drugs are generally more effective and safer than they actually are").

100. *See, e.g.*, Rycharde Manne, *Smoking and Alzheimer's Disease: Tobacco Companies* [sic] *Research Bias Revealed*, SCIENCE 2.0 (Feb. 20, 2010), http://www.science20.com/florilegium/blog/smoking_and_alzheimers_disease_tobacco_companies_research_bias_revealed (noting that a "University of California at San Francisco [(UCSF)] team reviewed 43 published studies from 1984 to 2007" and that the authors of "a quarter of the studies had an affiliation with the tobacco industry. The UCSF team determined that . . . smoking nearly doubled the risk of [Alzheimer's Disease (AD)]." And it found, by contrast, "that studies authored by individuals with tobacco industry affiliations [suggested] that . . . smoking protects against AD").

101. *See, e.g.*, INTEGRITY IN SCI. PROJECT, CTR. FOR SCI. PUB. INTEREST, BIG OIL U., at v (2008), *available at* http://cspinet.org/new/pdf/bigoilu.pdf (commenting that, as far as oil companies are concerned, "universities . . . are accepting extensive industry controls over the research process—controls that violate hallowed traditions of academic independence"). After detailing some of the notable abuses that occur owing to the marriage of oil money and university research, the Center for Science in the Public Interest (CSPI) report offers five recommendations for preserving real

shaped by industry imperatives. All of the above prompts us to ask:

> (1) Will industry-financed and -controlled research at universities be entitled to the special protection Post envisions?
>
> (2) If so, why?—and if not, will that not affect much of the research done today in universities?
>
> (3) How are judges, such as Judge Ambro, to evaluate the democratic competence of industry-funded experts (both within and outside of the university) against that of less well-financed experts?

The irony should not escape us: if the problems associated with the alliance between industry and the academy are not remedied in some *significant* way, the possible result is First Amendment protection for the research produced by for-profit experts—even though pecuniary influences corrupt the integrity of the educational endeavor.

This dilemma is indicative of a larger issue relating to certain tenets of First Amendment jurisprudence, such as those concerning the commercial speech doctrine.[102] The issue to which we refer is the need (typically ignored in the legal academy) to understand law in the culture in which it is rooted. That is, can one fashion a realistic and effective jurisprudence of commercial speech or academic freedom[103] without

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academic integrity and independence. *Id.* at 15. In the interest of full disclosure, it should be mentioned that one of the authors of this Foreword (Ron Collins) once worked with CSPI and was one of the co-founders of the Integrity in Science Project, though he did not work on the report herein cited.

102. *See* COLLINS & SKOVER, *supra* note 24, at xxx–xxxviii, 67–135 (discussing, with some satirical flair, how modern capitalism shapes our commercial culture and the law of free speech governing it). In this regard, we question whether the contemporary commercial speech doctrine is actually grounded in the truth-falsity informational soil that Dean Post suggests. *Compare id*. at 67–77, *and* Ronald K.L. Collins & David M. Skover, *Foreword: The Landmark Free-Speech Case that Wasn't: The* Nike v. Kasky *Story*, 54 CASE W. RES. L. REV. 965, 1024–1042 (2004), *with* POST, *supra* note 2, at 40–41, 126–128 nn.47–53. The *Central Hudson* test that governed at the time that Dean Post wrote his book, *see* POST, *supra*, at 127 n.52, has now been eclipsed by another test, one yet more favorable to commercial speakers. *See Sorrell v. IMS Health Inc.*, 564 U.S. __, 131 S. Ct. 2653, 2675–76 (2011) (Breyer J., dissenting).

103. A culture that does not value truth and knowledge for its own sake is more inclined to discount the value of the pursuit of uninhibited knowledge; therefore, it is more likely to view professors as no more than public employees subject to the censorial whims of their employers. Hence, the fear is real that the principle of *Garcetti v. Ceballos*, 547 U.S. 410 (2006), that public employees speaking pursuant to their official duties do not enjoy First Amendment free-speech

being duly mindful of the demands of a highly capitalistic culture such as ours? In that culture, is it likely that the ideal of disciplinary knowledge in the academy and outside of it would be readily aligned with black and white doctrinal formulas for truth and falsity?

Even in the doctor-patient realm, where malpractice standards seem to demand a strict dichotomy between truth and falsity, an ever-increasing body of counter-measures passed in the name of "tort reform" routinely undercut the norm of democratic competence. Is not the noble paradigm that Dean Post offers concerning such standards of medical competence emasculated each time a law enacted in the name of "tort reform" renders it more difficult to prevail in malpractice actions?[104] The fact is, for better or worse, that some people would willingly sacrifice a measure of truth guaranteed to them by way of a malpractice action if they thought (however mistakenly) that the skyrocketing cost of their medical care would decrease.[105] Here again, the operational norms of our commercial culture must be taken into account.[106] To ignore the demands of the popular culture is to be fanciful, to create a false sense of normative value, and ultimately to invite (albeit unintentionally) undemocratic consequences that could even be seen, in some quarters, as elitist.

It might be said, and understandably so, that the answer to the questions raised above concerning the commercialization of knowledge is the sort of thing that Post would flesh out in his sociology of knowledge. After all, such a sociology would require a process of discerning which particular expert-knowledge practices best fit into the disciplinary norm and which do not, or which might not be given much

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protections, might extend to the academic realm. As Dean Post astutely puts it: "The idea is apparently that public universities are proprietary institutions which hire faculty in order to communicate a proprietary message." POST, *supra* note 2, at 91. While we certainly agree with Dean Post as to the undesirability of thus applying *Garcetti*, is it entirely unreasonable for the Court to see the academy through a proprietary lens when many of those who govern it so often act in proprietary ways?

104. For example, consider the impact of caps on damages, limits on contingency fees, introduction of collateral source rules, stricter statutes of limitation rules, changes in burden of proof rules, and mandatory arbitration requirements, among other "reforms."

105. *See* Ronen Avraham, *An Empirical Study of the Impact of Tort Reforms on Medical Malpractice Settlement Payments*, 36 J. LEGAL STUD. S183, S209 (2007) (noting that because of certain kinds of tort reform, "doctors may (rationally) exercise a lower level of care[, knowing] that they are partially insulated from liability").

106. In this respect, we concur in the opinion of Dean Post as to the value of the essay by Bruce Johnson and Sarah Duran, *supra* note 19, which he appropriately characterizes as "direct[ing] our attention to the reality that underlies [First Amendment] doctrine." Post, *supra* note 18, at 550. That basic maxim informs much of what we have written in this Foreword.

professional credence. That process, complicated as it would be, could thus speak to the kinds of issues we have been discussing. Even so, there seems to be a larger issue at stake here. That is, would not a certain architectonic theory of education[107] have to exist antecedent to the kind of sociology of knowledge Dean Post calls for? And would not that theory of education have to be shaped in such a way that it would be compatible with the vision of academic freedom that Post values? Thus understood, some overarching theory of education[108] would be a necessary blueprint for any sociology of knowledge concerned about safeguarding academic freedom, properly understood.

WHAT WE VALUE AND WHY

> *The voice of the intellect is a soft one, but it does not rest till it has gained a hearing.*[109]

The most glorious of utopian roads are spotted with realist potholes, which obstruct the noblest of idealistic journeys. This is not to deny the uplifting value of idealism without which our world would be dull and dreadful. Most assuredly, idealism has its place in life and law. But unless its steel is tested time and again, it may prove counterproductive to the very ends to which it aspires. When that occurs, the pursuit of utopian ideals can produce dystopian misfortunes. This is no less true in the area of contemporary First Amendment law as its jurisprudence plays out in our culture.

All said, is there not something admirable in Robert Post's attempt to preserve academic freedom, properly understood, in our modern world? Similarly, is there not something venerable in his attempt to secure a safe harbor for knowledge? Such questions answer themselves. On that score we have no quarrel with Dean Post's laudable objectives. If we display some intermittent pause, if we raise a few genial questions, it is

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107. Given Dean Post's objectives, it would seem that such educational architecture would have to be considerably freer of commercial taint than it is now.

108. Consider, in this regard, the Hutchins-like view of education offered in Martha C. Nussbaum's instructive book, entitled NOT FOR PROFIT: WHY DEMOCRACY NEEDS THE HUMANITIES 13-26 (2012).

109. SIGMUND FREUD, THE FUTURE OF AN ILLUSION 53 (James Starchy, ed., trans., W.W. Norton & Co., Inc. 1961) (1928). In this small but thought-provoking work, the father of psychoanalysis took aim at religious ideas, which he saw more as the product of wish fulfillment than rationalist judgment. "Thus," Dr. Freud explained, "we call a belief an illusion when a wish-fulfillment is a prominent factor in its motivation, and in doing so we disregard its relations to reality, just as the illusion sets no store by verification." *Id.* at 31.

because we are concerned how to best secure his goals without forfeiting our values. Much of that same spirit informs the illuminating commentaries that follow in this Symposium.

Democracy, Expertise, and Academic Freedom forces those of us in the First Amendment and constitutional communities to confront difficult questions in ways that most other works have not.[110] It is one thing to raise questions, as we have done here; it is yet another to attempt to answer them in some relatively coherent and satisfactory ways. Too often academics demand too much of their scholarly counterparts in the works they author. There is an unrealistic and unfair sense that an author must, in a single work, say *all* that needs to be said and cure *all* that needs to be cured. If such a work is lacking in this regard, it is in jeopardy of being discounted. In the spirit of the First Amendment, we reject such summary judgments. A work is better judged, in important part, by its ability to point to problems we have not heretofore viewed as problematic. If that is the evaluative yardstick, Dean Post has done us a good turn by alerting us to the fact that smugness about First Amendment doctrine generally, and about its applicability to academic freedom in particular, might be little more than a case of conceited folly.

Justice Holmes once quipped: "The thing I . . . want to do is to put as many new ideas into the law as I can, to show how particular solutions involve general theory."[111] In that respect, Dean Post may have his Holmesian side. And like the great jurist before him, Post has ventured to do something of the same. While it is easy to overlook, part of Holmes's enduring greatness is the controversy his ideas still spark in the minds and hearts of so many. Thus, his legacy lives. When one views that fact from a First Amendment perspective, what becomes apparent is that uniformity of thought is the graveyard where ideas go to die.

As we have suggested, the most worthwhile books on free speech inspire readers to deliberate on both their goals and the means by which

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110. One exception, however, is ERIC BARENDT, ACADEMIC FREEDOM AND THE LAW: A COMPARATIVE STUDY 15–49, 161–201 (2010), which is a most thoughtful work, one that would make for a welcome companion volume to Dean Post's book. Given the constraints of this Foreword, we did not feel it prudent to compare and contrast the respective ideas of Professors Barendt and Post, which could well require yet another symposium. Even so, a dialogue between the two has already begun. *See id*. at viii ("Professor James Weinstein invited me to a workshop and panel discussion at Arizona State University . . . in March 2009, where aspects of academic freedom and the freedom to raise unorthodox ideas in universities were treated to vigorous debate." Apparently, Dean Post was a part of that dialogue.).

111. Letter from Oliver Wendell Holmes, Jr., to Patrick Sheehan (Dec. 15, 1912), *in* HOLMES—SHEEHAN CORRESPONDENCE: THE LETTERS OF JUSTICE OLIVER WENDELL HOLMES AND CANON PATRICK AUGUSTINE SHEEHAN 56 (David H. Burton ed., 1976).

they might be secured. Such works attract minds, not converts; they begin inquiry, not end it; they invite diversity, not uniformity;[112] and they may even help us to realize what was once thought unrealizable. True to its worth, *Democracy, Expertise, and Academic Freedom* first prods us to think about an issue that most have not really considered, at least not in any serious and extended way.[113]

With all of the above as our lodestar, we embarked upon the journey that led to this Foreword. In what follows, lawyers from different walks of life (the academy, the bench, and the bar) come together to partake in an old Madisonian ritual. It is one in which free men and women exchange ideas in the hope that they might clarify their thought, remedy their problems, preserve their values, and thereby improve their lot. For helping to make that possible, a debt of gratitude is owed to all of the scholars contributing to this Symposium, and to Dean Robert Post especially.

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112. Something of the same mindset was at work in a recent symposium centered on the topic of free speech and participatory democracy. *See* Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477 (2011) and the articles following it; *see also* James Weinstein, *Introduction*, 97 VA. L. REV. vii, viii (2011) ("The group [that constitutes this symposium] was formed to critically examine in written discussion two leading theories of contemporary free speech doctrine, one based on participatory democracy and the other on individual autonomy. The discussion began with Robert Post and me writing separate statements defending our somewhat different conceptions of participatory democracy as the best overall theory of free speech. The other members of the group then filed critiques of these target articles."). Happily, the editors of the *Washington Law Review* have seen fit to compile a listing of Dean Post's many writings on free speech. *See Robert C. Post, Selected Bibliography First Amendment Scholarship*, 87 WASH. L. REV. 565 (2012).

113. *Cf. supra* text accompanying note 111. We suspect that the topic of academic freedom and free speech will garner yet further attention in the future, in which case Dean Post's book and this Symposium will likely draw added notice. Meanwhile, Professor David Rabban is among the more thoughtful scholars now tilling these fields and is sure to offer more by way of adding his own insights to the mix. Consider the following works by Professor Rabban: *Academic Freedom, Individual or Institutional?*, 87 ACADEME 16 (2001); *Academic Freedom, Professionalism, and Intramural Speech*, *in* ACADEMIC FREEDOM: AN EVERYDAY CONCERN 77 (Ernst Benjamin & Donald R. Wagner eds.,1994); *Does Professional Education Constrain Academic Freedom?*, 43 J. LEGAL EDUC. 358 (1993); *Does Academic Freedom Limit Faculty Autonomy?*, 66 TEX. L. REV. 1405 (1988); and *A Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment*, 53 LAW & CONTEMP. PROBS. 227 (1990).