

Winter 2012

# Review of Robert C. Post, Democracy, Expertise, and Academic Freedom: A First Amendment Jurisprudence for the Modern State

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### Recommended Citation

Rachel Levinson-Waldman, *Review of Robert C. Post, Democracy, Expertise, and Academic Freedom: A First Amendment Jurisprudence for the Modern State*, 48 *Tulsa L. Rev.* 245 (2013).

Available at: <http://digitalcommons.law.utulsa.edu/tlr/vol48/iss2/9>

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## ***DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE***

Rachel Levinson-Waldman\*

ROBERT C. POST, *DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* (2012). Pp. 177. Hardcover \$30.00.

In 1940, the American Association of University Professors (“AAUP”) published what is considered to be the definitive professional statement on academic freedom.<sup>1</sup> The *Statement of Principles on Academic Freedom and Tenure* declares that academic freedom entitles college and university teachers to “full freedom in research and in the publication of the results,” a privilege that is in furtherance of “the common good.”<sup>2</sup> In the last century, moreover, AAUP has built a multilayered “common law” of academic freedom developed through the accretion of AAUP statements and the reports and decisions of its Committee A on Academic Freedom and Tenure, which is considered by many academics to be the ultimate arbiter on the matter.<sup>3</sup>

The judicial attitude towards academic freedom, by contrast, has generally been a series of gut feelings in search of a coherent philosophy.<sup>4</sup> While the seminal AAUP statements date from 1915 and 1940, the Supreme Court’s first recognition of academic freedom did not come until the McCarthy era, when state loyalty oaths and inquiries into professors’ ideological leanings loomed as existential threats to the academy.<sup>5</sup> In 1957, the Court rather vaguely pronounced “academic freedom and political expression” as

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1. *1940 Statement of Principles on Academic Freedom and Tenure*, in AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, *POLICY DOCUMENTS & REPORTS* 3–11 (10th ed. 2006) [hereinafter *1940 Statement*]; see also *1915 Declaration of Principles on Academic Freedom and Academic Tenure*, in AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, *POLICY DOCUMENTS & REPORTS* 291–301 (10th ed. 2006) [hereinafter *1915 Declaration*].

2. *1940 Statement*, *supra* note 1, at 3.

3. See, e.g., Am. Ass’n of Univ. Professors, *Resources on Academic Freedom*, AAUP, <http://www.aaup.org/issues/academic-freedom/academic-freedom-and-freedom-information-requests-2011/resources-academic> (last visited Dec. 19, 2012).

4. See, e.g., *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967); *Barenblatt v. United States*, 360 U.S. 109 (1959); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957) (plurality opinion).

5. *Sweezy*, 354 U.S. 234.

“areas in which government should be extremely reticent to tread” — an inspiring but not particularly concrete exhortation that would characterize much of the Court’s jurisprudence on academic freedom.<sup>6</sup>

In that case, *Sweezy v. New Hampshire*, the Attorney General of New Hampshire — under pressure from the state legislature — interrogated a guest lecturer at the University of New Hampshire in an attempt to discern whether he was a Communist sympathizer.<sup>7</sup> After the lecturer, Paul Sweezy, refused to answer, he was thrown in jail for contempt of court.<sup>8</sup> Reversing the New Hampshire Supreme Court’s decision affirming the contempt charge (the state supreme court believed there was a constitutional “right to lecture,” but also believed the state had a compelling interest in rooting out communism<sup>9</sup>), a plurality of the U.S. Supreme Court cautioned that the “essentiality of freedom in the community of American universities is almost self-evident.”<sup>10</sup> The Court extolled Sweezy’s individual rights to “academic freedom and political expression,” the importance of those rights to “the future of our Nation,” and the risk that without them, civilization itself might “stagnate and die.”<sup>11</sup>

A decade later, overturning a state loyalty oath it had upheld as constitutional some fifteen years earlier, a majority of the Court in *Keyishian v. Board of Regents* explicitly situated academic freedom within the Constitution, calling it “a special concern of the First Amendment.”<sup>12</sup> Noting that academic freedom “is of transcendent value to all of us and not merely to the teachers concerned,” the Court continued: “[t]he classroom is peculiarly the ‘marketplace of ideas.’ The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, (rather) than through any kind of authoritative selection.’”<sup>13</sup>

In dismissing the notion of an “authoritative selection” of ideas, the Court was presumably referring to the government’s selection of ideas by means of a loyalty oath. What the Court overlooked, however, was that “authoritative selection” is precisely how scholarship operates and how excellence is determined in academia: through the selection by one’s peers of the “correct,” or best reasoned, views. While the classroom may at times be a marketplace of ideas, the classroom, the laboratory, and the university are in fact places where there are often “right” and “wrong” ideas, or at least “right” and “wrong” theories. This makes the classic understanding of the First Amendment — that it protects, in essence, my right to say anything I want — a surprisingly poor fit for academia.

This tension between the public view of the First Amendment and academic freedom, which remained under the surface in the major public employee speech cases of the intervening decades, came to a head in the Supreme Court’s 2006 case, *Garcetti v. Ce-*

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6. *Id.* at 250.

7. *Id.* at 236–38.

8. *Id.* at 244–45.

9. *Id.* at 249.

10. *Id.* at 250.

11. *Id.*

12. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

13. *Id.* (citations omitted).

*ballos*.<sup>14</sup> In *Garcetti*, which involved a retaliation claim by an assistant district attorney in California, the Supreme Court held that when a public employee speaks “pursuant to [his] official duties,” that speech is unprotected by the First Amendment,<sup>15</sup> even when it is — in the words of the Supreme Court’s earlier seminal cases of *Pickering v. Board of Education*<sup>16</sup> and *Connick v. Myers*<sup>17</sup> — on “matters of public concern.”<sup>18</sup> As the *Garcetti* majority ruled, “[r]estricting speech that owes its existence to a public employee’s professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.”<sup>19</sup>

The majority recognized that “additional constitutional interests” might be at stake when it comes to “expression related to academic scholarship or classroom instruction,” and therefore declined to decide whether its “official duties” analysis would apply in those cases.<sup>20</sup> Nevertheless, Justice Souter noted acidly in dissent that he hoped the majority did 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.’”<sup>21</sup>

In the six years since *Garcetti*, Justice Souter’s fears have largely been realized and the majority’s caution largely ignored. Although the Supreme Court has not returned to the question of First Amendment protection for academic freedom, the lower courts have largely failed to see any constitutional sunlight between public employees in general and their academic brethren. One of the many consequences of the increasing restrictiveness of the Supreme Court’s public employee speech jurisprudence has therefore been the constriction of the First Amendment rights of public sector faculty members as well.

Robert Post, the dean of the Yale Law School and an expert on both the First Amendment and academic freedom, offers a radical and powerful answer to this dilemma in his slim new volume, *Democracy, Expertise, and Academic Freedom: A First Amendment Jurisprudence for the Modern State*.<sup>22</sup> He proposes that the constitutional foundations for academic freedom have been misconstrued over the past half-century and offers a ground-breaking solution that would align it with a First Amendment doctrine that has not met the same dispiriting fate as the public employee speech canon: the commercial speech doctrine.<sup>23</sup>

Post starts with what seems to be something of a tautology, but becomes a more convincing method of disentangling First Amendment doctrine as the book unfolds. He posits that “[t]he actual contours of First Amendment doctrine cannot be explained mere-

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14. *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

15. *Id.* at 421.

16. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 574 (1968).

17. *Connick v. Myers*, 461 U.S. 138, 154 (1983).

18. *Garcetti*, 547 U.S. at 420.

19. *Id.* at 421–22.

20. *Id.* at 425.

21. *Id.* at 438 (Souter, J., dissenting) (citations omitted).

22. ROBERT C. POST, *DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* (2012).

23. *Id.* at 38–39.

ly by facts in the world . . . [W]e can learn the purposes we have constructed First Amendment doctrine to achieve by tracing the contours of actual First Amendment coverage.”<sup>24</sup> In other words, the only way to learn about First Amendment doctrine is to study First Amendment doctrine.<sup>25</sup>

Post describes three major rationales for First Amendment protection: (1) cognitive, by which the purpose of First Amendment is to “advanc[e] knowledge and discover[] truth” (that is, the classic “marketplace of ideas”); (2) ethical, by which the purpose is to “assur[e] individual self-fulfillment” so that people can realize their “character and potentialities as a human being;” and (3) political, by which the purpose is to “facilitat[e] the communicative processes necessary for successful democratic self-governance.”<sup>26</sup> He concludes that the third, which he calls “democratic legitimation,” most fully accounts for First Amendment doctrine within public discourse<sup>27</sup> — though he goes on to demonstrate that outside the realm of public discourse, where academic freedom in fact resides, there is an entirely different mechanism at work.<sup>28</sup>

With respect to the marketplace of ideas, Post concedes that it “captures something essential to the growth of knowledge.”<sup>29</sup> As he explains, however, it is incapable of developing expert knowledge, which is the result not simply of aggregation of information but of “intervening in the world through research, theory, and experiment.”<sup>30</sup> The production of expert knowledge relies upon peer judgment and the ability to declare an idea false, an exercise that is rightfully anathema to the egalitarian values of the marketplace of ideas.<sup>31</sup>

Post disposes of the ethical purpose similarly quickly. As he observes, Americans are committed to the equality of *persons*, and “[t]he primary ethical value that has been ascribed to the First Amendment is that of autonomy or individual self-fulfillment” — that is, “all persons ought to be accorded the equal dignity to fulfill their unique individual potential.”<sup>32</sup> He explains, however, that there are many ways to express one’s autonomy, and they are certainly not all protected under First Amendment jurisprudence.<sup>33</sup> Defamation law, for instance, imposes some limits on speech.<sup>34</sup> Moreover, constitutional protection for government employees’ speech has little to do with the speaker’s autonomy and is predicated instead on whether the expression is on a matter of public concern (assuming it is also not “pursuant to official duties”).<sup>35</sup> And he notes that for profession-

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24. *Id.* at 4–5.

25. *Id.* at 1. Notably, Post also distinguishes between First Amendment *coverage* — that is, what government action implicates the First Amendment — and First Amendment *protection*, or how courts will treat that government action in the context of the First Amendment. *Id.*

26. *Id.* at 6 (quotation marks and citations omitted).

27. *Id.* at 17–18.

28. *Id.* at 34–35 (espousing the idea of “democratic competence,” which “refers to the cognitive empowerment of persons within public discourse, which in part depends on their access to disciplinary knowledge”).

29. *Id.* at 6.

30. *Id.* at 7–8.

31. *See id.*

32. *Id.* at 10.

33. *Id.*

34. *Id.* at 11.

35. *Id.*

als like doctors, their speech is constitutionally protected at some times, as when speaking to the public, but not when speaking to their own patients, at which point they are bound by professional malpractice rules.<sup>36</sup>

Post's argument feels slightly underdeveloped here. He does not explore, for instance, whether defamation could represent a conflict, rather than an absence, of autonomy: a contest between the speaker's autonomy to express her (arguably factually false) feelings and the subject's autonomy to maintain her reputation without having to refute the speaker's lies. In this framing, because the value of making false statements is fairly low and the autonomy value of preserving one's dignity is fairly high, the target's autonomy interest wins — but not because it is the only autonomy at stake. Similarly, with respect to protection of government employee speech, one could charitably interpret the Court's emphasis on the employee's status as citizen to reflect the importance of autonomy: when the employee is speaking as a citizen, his autonomy interest is at a peak, and to penalize the employee even when he speaks as a citizen would be to symbolically infringe the autonomy of all citizens.<sup>37</sup>

The real purpose of these explorations, however, is to demonstrate that existing First Amendment protection for public discourse is consistent with a political, not ethical or even cognitive, purpose of the First Amendment — and here Post shines.<sup>38</sup> Pointing out that First Amendment attention is paid to public officials, public figures, and matters of public concern, Post concludes that the real purpose of the First Amendment “is to protect the free formation of public opinion that is the *sine qua non* of democracy.”<sup>39</sup> Given this, First Amendment coverage must extend to all communications that form public opinion so that “those who are subject to law should also experience themselves as the authors of the law” and thus realize democratic legitimation.<sup>40</sup>

Post has the crucial insight, however, that this take-all-comers approach exists only within the realm of public discourse.<sup>41</sup> Outside of public discourse the government often both compels and regulates speech — requiring the labeling of dangerous products or the disclosure of communicable diseases, for instance, and regulating professional advice-giving or securities trading.<sup>42</sup> As Post explains, while all people contributing to the democratic process are viewed as having equal autonomy, outside the realm of public discourse “the law commonly regards persons as dependent, vulnerable, and hence unequal,” and thus intercedes to ensure basic access to accurate information.<sup>43</sup>

Post attributes both values — autonomy protection on the one hand, and dignity protection on the other — to a democratic interpretation of the First Amendment, by which a “political domain of public opinion creation” is distinguished from the “non-political domains of civil society.”<sup>44</sup> This democratic interpretation, however, which re-

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36. *Id.* at 44–45.

37. *See id.* at 13.

38. *Id.* at 15–16.

39. *Id.* at 15.

40. *Id.* at 17.

41. *See id.* at 21.

42. *Id.* at 22–23.

43. *Id.* at 23 (citation omitted).

44. *Id.* at 24.

jects a purely autonomy-focused interpretation of the First Amendment, also sets in relief the central paradox tackled here: democratic engagement requires expert knowledge, but the central value of the First Amendment, the safeguarding of public opinion creation, is incompatible with the rigorous disciplinary conventions that enable the formation of that knowledge.<sup>45</sup>

Post proposes to reconcile the two by positing a separate purpose of the First Amendment that is safeguarded by the development of disciplinary competence and expertise.<sup>46</sup> He calls that purpose “democratic competence,” and one of the groundbreaking insights of his book is that that value is already reflected in a zone of First Amendment jurisprudence that resides outside the sphere of public discourse, and that might suggest an analogous constitutional home for academic freedom as well: the commercial speech doctrine.<sup>47</sup>

The Supreme Court has held that commercial advertising is “covered by the First Amendment because it is relevant to ‘public decision-making in a democracy.’”<sup>48</sup> This, says Post, confirms that “speech can be protected because it serves the value of democratic competence.”<sup>49</sup> Moreover, because advertising is valuable by virtue of the information it conveys, the state has a corresponding right to regulate advertising to ensure that inaccurate or misleading information is not circulated, and even to ensure that vital information is disclosed — quite different from the state’s role when it comes to public expression.<sup>50</sup>

If commercial information bolsters democratic competence, Post reasons, so too does expert knowledge.<sup>51</sup> The trick, then, is to find analogous constitutional protections for the two categories.<sup>52</sup> As he acknowledges, however, there are significant differences between the two categories of speech.<sup>53</sup> As an initial matter, commercial speech has an entire branch of First Amendment law devoted it; expert knowledge does not.<sup>54</sup> In addition, the speech of experts is governed by malpractice law, which does not offer the First Amendment as a defense; commercial speakers, by contrast, may invoke the First Amendment as a defense.<sup>55</sup>

Post concludes that the primary rationale for the different treatment of expert speech and commercial speech rests upon the dissimilar relationships between the speakers and their audience: the commercial speech doctrine presupposes an equality between the advertiser and audience, where the audience is “mature” and “independent,” while a

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45. *Id.* at 25.

46. *Id.* at 33.

47. *Id.* at 33–35.

48. *Id.* at 40.

49. *Id.* at 41.

50. *Id.* at 41–42.

51. *Id.* at 43.

52. Post’s exercise is increasingly vital beyond the academic realm. In the past four years, the executive branch has waged an unprecedented war on government whistleblowers, a group of people who almost by definition have a particular area of unique expertise and incur great personal risk to educate the public. The development of a doctrine that clearly protects expert knowledge is all the more critical against this backdrop.

53. POST, *supra* note 22, at 43–45.

54. *Id.* at 43.

55. *Id.* at 45–46.

person seeking professional advice is presumed to be dependent upon the expert's judgment.<sup>56</sup> As Post neatly puts it, the lack of a First Amendment defense to a malpractice claim in fact "emphasizes the *significance* which law attributes to the circulation of accurate expert knowledge."<sup>57</sup> Moreover, where state laws — abortion statutes, for instance — have compelled experts to give inaccurate information or withhold truthful information, the courts have generally accorded the experts First Amendment coverage.<sup>58</sup>

Unfortunately, one of Post's examples undermines his premise. He cites to a Nebraska statute forcing doctors "to give untruthful, misleading, and irrelevant information to patients."<sup>59</sup> The statute was "held to implicate the 'First Amendment rights of medical providers' and was accordingly enjoined."<sup>60</sup> Given Post's powerful defense of expert knowledge as the foundation for the *public's* democratic competence, his situating of expert knowledge outside the realm of traditional public discourse, and his emphasis on the vulnerability of those relying on expert judgment, it is startling to see him give pride of place to a decision that privileges the First Amendment rights of the doctor, and not her patients.

He also highlights a statute that carries his point more effectively, however. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") prohibited "debt relief agencies" from advising someone contemplating filing bankruptcy to incur more debt, which is a perfectly legal move in most situations.<sup>61</sup> The statute was challenged on the grounds that it kept attorneys from conveying accurate, lawful information to their clients.<sup>62</sup> Every lower court that interpreted the statute as limiting attorney speech found that it violated the First Amendment; when the matter finally reached the Supreme Court, the Court construed the statute narrowly to avoid the main constitutional question, ensuring that attorneys would still be able to provide their clients with accurate legal information in nearly every circumstance.<sup>63</sup> Post concludes that the First Amendment protection for this attorney speech, as well as the regulation of attorney expression via malpractice law, reveal "the constitutional value attributed to the circulation of expert knowledge."<sup>64</sup>

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56. *Id.* at 46–47.

57. *Id.* at 47.

58. *Id.* at 47–48.

59. *Id.* at 48.

60. *Id.* (quoting *Planned Parenthood v. Heineman*, 724 F. Supp. 2d 1025, 1048 (D. Neb. 2010) (emphasis added)).

61. 11 U.S.C. § 526(a)(4) (2012); POST, *supra* note 22, at 48–49.

62. POST, *supra* note 22, at 49.

63. *Id.* at 50.

64. *Id.* A case decided after Post's book was published can be read to further support his point, though it superficially constrains the government from regulating commercial expression. In August 2012, the U.S. Court of Appeals for the District of Columbia ruled that the Food and Drug Administration had acted unconstitutionally in requiring cigarette manufacturers to print graphic warning labels on packages of cigarettes. The appeals court distinguished between, on the one hand, the government's ensuring that consumers receive accurate information so they are not deceived, and, on the other, using commercial speakers to deliver its "point of view on how people should live their lives." *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1211 (D.C. Cir. 2012). In not so many words, the court held that the government can compel expression when it wants to ensure a baseline of democratic competence, but cannot intrude into the public discussion. *See id.* at 1221–22.



Post misses an opportunity here to make a helpful though somewhat dispiriting point. He is building up to a constitutional jurisprudence that protects disciplinary knowledge and academic freedom — the type of knowledge and expertise produced by public sector faculty members, who are otherwise at the mercy of their state employers. As he aptly observes at the beginning, public employee speech is generally under threat, which makes it particularly critical to articulate a distinction between the general run of public employees and those engaged in developing expert knowledge.<sup>65</sup> What he does not note, however, is that even public employees who are not academic experts — scientists at the National Institutes of Health, for instance — may also be uniquely knowledgeable as a result of their public service. If their comments about their areas of expertise are construed to be “pursuant to their public duties” and thus unprotected, public decision-making as a whole will be increasingly impoverished.

In staking out the boundaries of constitutional protection for expert knowledge as revealed through the lens of commercial speech, Post reasons that the “scope of First Amendment coverage” — the categories of expert knowledge that do or do not *implicate* the First Amendment, as a separate matter from which categories are actually *protected* by the First Amendment — must “depend upon judicial assessment of the relevant state of expert knowledge.”<sup>66</sup> That is, courts themselves must use the “disciplinary methods by which expert knowledge is defined,” and thereby “attribute constitutional status to the disciplinary practices by which expert knowledge is itself created.”<sup>67</sup> And this inevitably means that courts will immerse themselves in the granular questions of disciplinary truth to an extent that initially seems beyond the scope of appropriate judicial involvement.

Post provides a neat example of this dynamic. He hypothesizes a state law prohibiting payment for astrological advice.<sup>68</sup> A First Amendment challenge to the statute would rise or fall on a court’s determination of the “truth” of astrological advice, which a court might feel empowered to decide without expert input.<sup>69</sup> In the case of something more difficult, however, such as whether the recommendation of a particular homeopathic remedy can be regulated, the court will have to make a two-step determination.<sup>70</sup> If the court already believes that homeopathic medicine produces valuable knowledge, it will survey experts in homeopathy about the particular treatment in question.<sup>71</sup> If the court has doubts about homeopathy overall, however, it will ask experts in a separate established scientific discipline about homeopathic practice.<sup>72</sup> If it concludes that homeopathic knowledge has value, it will then rely upon experts in that area to resolve the specific question.<sup>73</sup> As Post explains, “[w]hatever discipline a court applies will acquire constitutional status.”<sup>74</sup> And this process creates a “constitutional sociology of

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65. See POST, *supra* note 22, at 11–12.

66. *Id.* at 54.

67. *Id.* at 54–55.

68. *Id.* at 55.

69. *Id.* at 56.

70. *Id.* at 56–57.

71. *Id.* at 57.

72. *Id.*

73. *Id.*

74. *Id.* at 58.

knowledge,” by which certain disciplines become the measure by which courts determine whether regulations interfere with First Amendment rights.<sup>75</sup>

Post reasons that if certain disciplines receive constitutional recognition, so too must the “disciplinary practices and methods that create such knowledge,” as well as the institutions that nurture them, all of which must be “immunized” from political manipulation.<sup>76</sup> This doctrinal structure, he concludes, preserves both public discourse and democratic competence by effectively separating the “sphere of knowledge” and the “sphere of power.”<sup>77</sup>

Post has ably set up his final and perhaps most provocative question: whether constitutional doctrine, in addition to ensuring the flow of expert knowledge to the public, also extends First Amendment coverage to “state actions that inhibit the *creation* of expert knowledge.”<sup>78</sup> Post perceptively notes that the initial judicial articulations of academic freedom pointed to something we can now identify as the value of democratic competence.<sup>79</sup> In *Sweezy*, for instance, the Justices were most offended by the Attorney General’s interrogations about Professor Sweezy’s classroom lectures.<sup>80</sup> Those lectures were not part of public discourse and thus did not implicate democratic legitimation; instead, Sweezy’s relationship to his students (even as a visiting professor) was like the relationship between a lawyer and his clients — that is, he owed them a duty of competence.<sup>81</sup> Indeed, Chief Justice Warren’s plurality opinion and Justice Frankfurter’s concurrence, taken together, invoke the importance of “intellectual leaders”<sup>82</sup> who may “examine, question, modify or reject traditional ideas and beliefs” in the “pursuit of understanding.”<sup>83</sup>

Post also highlights two critical differences between academic freedom and professional speech and the different implications that democratic competence has for the two.<sup>84</sup> First, professionals are required to transmit existing expert knowledge to their clients, whereas academic freedom allows room for experimentation and challenge of existing beliefs; that is, scholars are expected to create *new* knowledge.<sup>85</sup> This expectation results in an unresolvable tension “between, on the one hand, expanding the frontiers of existing knowledge, and, on the other hand, competently exemplifying existing disciplinary standards.”<sup>86</sup> This tension plays out in the distinction between non-tenured faculty, who must constantly prove competence within the confines of existing knowledge, and

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75. *Id.*

76. *Id.* at 59.

77. *Id.*

78. *Id.* at 61.

79. *Id.* at 62.

80. *Sweezy v. New Hampshire*, 354 U.S. 234, 254–55 (1957) (plurality opinion).

81. *See id.* at 247–49.

82. *Id.* at 250.

83. *Id.* at 261–62 (Frankfurter, J., concurring).

84. POST, *supra* note 22, at 67–68.

85. *Id.* at 66.

86. *Id.* at 73.

tenured faculty, who are given much more flexibility to “facilitate the academic freedom necessary for creating new knowledge.”<sup>87</sup>

Post is right to call this particular tension “persistent and without resolution.”<sup>88</sup> One of the sharpest challenges to the system of tenure is that it can ossify disciplines in the ontology of established faculty, while younger faculty — particularly women in traditionally male disciplines or faculty of color in traditionally white disciplines — sometimes struggle in a system where their elders determine the acceptable parameters of disciplinary belief. Tenure-track faculty must often be just creative enough to demonstrate that their work offers something new to the field, but familiar and non-threatening enough to elicit an offer of lifetime employment from their future colleagues.

The second difference that Post identifies is that academic freedom refers both to the faculty and to certain actions of the university, whereas other professions have no institutional analogue.<sup>89</sup> Indeed, as Post notes, the university has historically played a vital and unique role in nurturing and producing disciplinary knowledge; Paul Sweezy’s speech, for instance, was protected even as a guest lecturer because he was “participating in the disciplinary training appropriate to a university setting.”<sup>90</sup>

This tension between institutional and individual academic freedom has at times been the source of both academic inquiry and judicial opinions, some perceptive and sophisticated and some simply misbegotten. Post makes relatively short work of this tension, however, reasoning that individual and institutional academic freedoms are reconcilable:

[I]f we appreciate that the function of First Amendment doctrine is to protect First Amendment values, and . . . the First Amendment value at stake in academic freedom of research and publication is democratic competence. This value encompasses *both* the ongoing health of universities as institutions that promote the growth of disciplinary knowledge *and* the capacity of individual scholars to promote and disseminate the results of disciplinary inquiry.<sup>91</sup>

Thus, he says, the appropriate deference is to “the professional scholarly standards through which knowledge is created.”<sup>92</sup>

This inquiry is fine as far as it goes (and we should be so lucky for courts to see this as clearly as Post does), but Post then overreaches a bit. In support of the suggestion that judicial and state regulation of professional advice is generally acceptable but that the state and courts should tread lightly in the realm of academic expertise, he asserts that “[t]he distinction between competent and incompetent economics scholarship is a great deal more murky than the distinction between competent and incompetent medicine or legal advice.”<sup>93</sup> This is far from obvious. When “Obamacare” was passed, legal scholars who warned that it was open to serious constitutional challenge were practically

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87. *Id.*

88. *Id.*

89. *Id.* at 74.

90. *Id.* at 76.

91. *Id.* at 77.

92. *Id.* at 78.

93. *Id.* at 79.

laughed out of the academy. By the eve of the Supreme Court's decision, however, the betting markets were firmly predicting (wrongly, as it turned out) that the statute would be struck down on constitutional grounds.<sup>94</sup> Similarly, as an astute district court judge observed in a post-*Garcetti* academic freedom case, established medical opinion held for nearly two centuries that leeches were a barbaric relic of an earlier era; they are now commonly used to hasten healing after certain surgical procedures.<sup>95</sup> Indeed, much like tenured professors, the best lawyers and doctors may be those who are creative, stubborn, and unwilling to be bound by dogma.

Post's final point here is well-put notwithstanding these contradictions. Regardless of whether medicine and the law are murky at times, it is certainly appropriate for courts to craft a First Amendment doctrine that safeguards, in the words of the AAUP's *1915 Declaration*, the "freedom of thought, of inquiry . . . of the academic profession."<sup>96</sup> "That freedom," says Post, "is necessary both to the effective functioning of state universities and to the realization of the constitutional value of democratic competence."<sup>97</sup>

Post closes by warning of the inevitable consequences if the Supreme Court's reasoning in *Garcetti* extends to faculty: the "entrench[ment of] a constitutional vision of universities that disciple rather than discipline,"<sup>98</sup> a vision severely at odds with the historical development and public purpose of the university. Post neatly summarizes the tension between the majority's core holding in *Garcetti* and the AAUP's *1915 Declaration of Principles on Academic Freedom and Academic Tenure*, the precursor to the 1940 Statement and one of the foundational statements of academic freedom:

[T]he argument of the *Declaration* is that faculty serve the "public" insofar as they serve the public function of identifying and discovering knowledge. It is this function that triggers the constitutional value of democratic competence. Were faculty to be merely employees of a university, as *Garcetti* conceptualizes employees, their job would be to transmit the views of university administrators. Faculty would then no longer expand knowledge, because they would no longer be responsible for applying independent professional, disciplinary standards. In such circumstances, universities would no longer advance the value of democratic competence.

[This result would] strip this nation of an invaluable resource, one that has propelled us to the forefront of the world stage. In today's information age, intellectual stagnation implies economic and military failure. Much depends, therefore, on the extent to which the Court appreciates the full weight that rides on the casual reservation that it advanced in *Garcetti*.<sup>99</sup>

94. Benjamin Hart, *Obama Health Care Law Predictions: A Roundup*, HUFFINGTON POST (June 27, 2012, 6:09 PM), [http://www.huffingtonpost.com/2012/06/27/obamacare-predictions-supreme-court\\_n\\_1632110.html](http://www.huffingtonpost.com/2012/06/27/obamacare-predictions-supreme-court_n_1632110.html) (identifying several scholars who predicted the Court would hold the law unconstitutional).

95. *Kerr v. Hurd*, 694 F. Supp. 2d 817, 844 n.11 (S.D. Ohio 2010).

96. POST, *supra* note 22, at 80 (quoting *1915 Declaration*, *supra* note 1, at 300).

97. *Id.* at 84.

98. *Id.* at 90.

99. *Id.* at 92–93.

As Post has just proved, the “full weight” riding on the Court’s “reservation” in *Garcetti* is the understanding that scholarly inquiry and expression and the development of scholarly expertise carries the weight of democracy on its back. That inquiry and expertise must therefore be protected not only for its own sake, as is an individual’s speech, but for the sake of us all.