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## Academic Freedom and the Common Good: A Review Essay<sup>1</sup>

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### Abstract:

Books discussed in this essay:

Michael Bérubé and Jennifer Ruth. *The Humanities, Higher Education, and Academic Freedom: Three Necessary Arguments*. New York: Palgrave Macmillan, 2015.

Akeel Bilgrami and Jonathan Cole, eds. *Who's Afraid of Academic Freedom?* New York: Columbia University Press, 2015.

Stefan Collini. *What Are Universities For?* New York: Penguin, 2012.

Alice Dreger. *Galileo's Middle Finger: Heretics, Activists, and the Search for Justice in Science*. New York: Penguin, 2015.

Stanley Fish. *Versions of Academic Freedom: From Professionalism to Revolution*. Chicago: University of Chicago Press, 2014.

Greg Lukianoff. *Unlearning Liberty: Campus Censorship and the End of American Debate*. New York: Encounter, 2012.

Robert Post. *Democracy, Expertise, and Academic Freedom: A First Amendment Jurisprudence for the Modern State*. New Haven, CT: Yale University Press, 2012.

Hans-Joerg Tiede. *University Reform: The Founding of the American Association of University Professors*. Baltimore: Johns Hopkins University Press, 2015.

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<sup>1</sup> I am grateful to Joan Scott for her comments and suggestions on a draft of this essay.

What do we mean when we use the term *academic freedom*? The concept would appear to be widely accepted, but its interpretation is often disputed. The AAUP's 1915 *Declaration of Principles on Academic Freedom and Academic Tenure* first defined three basic elements of academic freedom: freedom in the classroom, in research, and in extramural utterance. These remain central to most understandings of the concept. But the application of these standards has varied over time and often been contested. Equally contested have been the various justifications offered in support of academic freedom, including for its employment in jurisprudence. These often have dramatically different practical implications.

The variety—and richness—of such justifications is on display in several recent books that discuss academic freedom as both a theoretical and legal concept. These works suggest a polar opposition between two fundamental approaches to justifying academic freedom. In one approach, academic freedom is conceived, for example by David Bromwich in “Academic Freedom and Its Opponents,” his contribution to *Who's Afraid of Academic Freedom?*, a sprawling and stimulating collection of essays edited by Akeel Bilgrami and Jonathan Cole, as “a category of political freedom. It belongs to the larger class of rights enjoyed by citizens of a free society.” The other approach, according to its most extreme advocate, Stanley Fish, views academic freedom as “peculiar to the academic profession and limited to the performance of its core duties.” In this view, academic freedom is founded on professional autonomy and enjoys no direct link to the broader freedoms to which the citizenry as a whole may lay claim.

Bromwich and Fish expound purist versions of their respective positions, but in between lie approaches that blur the boundary between them. Most significant are those who seek to link the professional and the political—sometimes awkwardly but, I will argue, in the end persuasively—by joining professional privilege to higher education's contribution to “the common good.”

Fish's *Versions of Academic Freedom* announces in the author's customarily confrontational manner “the inauguration of a new field—Academic Freedom Studies.” The assertion is as false as it is arrogant; the pages and pages devoted to the subject before Fish ever weighed in are sufficient evidence of that.<sup>2</sup> Fish's role is to

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<sup>2</sup> If there is a starting point for “academic freedom studies,” it is likely Richard Hofstadter and Walter P. Metzger, *The Development of Academic Freedom in the United States* (New York: John Wiley, 1955). A selection of other important books would include, in addition to those reviewed here, William Van Alstyne, ed., *Freedom and Tenure in the Academy* (Durham, NC: Duke University Press, 1993); Louis Menand, ed., *The Future of Academic Freedom* (Chicago: University of Chicago Press, 1996); Beshara Doumani, ed., *Academic Freedom after September 11* (New York: Zone, 2006); John K. Wilson, *Patriotic Correctness: Academic Freedom and Its Enemies* (New York: Paradigm, 2008); Robert M. O'Neil, *Academic Freedom in the Wired World* (Cambridge: Harvard University Press, 2008); Matthew W. Finkin and Robert C. Post, *For the Common Good: Principles of American Academic Freedom* (New Haven, CT: Yale University Press, 2009); Cary Nelson, *No University Is an Island: Saving Academic Freedom* (New York: NYU Press, 2010); Ellen Schrecker, *The Lost Soul of Higher Education: Corporatization, the Assault on*

advance an interesting if flawed taxonomy of five distinct “theories” of academic freedom, conceived largely as ideal types, ranging on a continuum from the most to the least professional, with the former stressing the “academic” and the latter the “freedom.”

Fish’s own view, which he calls the “It’s just a job’ school” (a “school,” he acknowledges, of which he may be the only member), defines academic freedom as little more than “a guild slogan that speaks to the desire of the academic profession to run its own shop.” For him, academic freedom

rests on a deflationary view of higher education. Rather than being a vocation or holy calling, higher education is a service that offers knowledge and skills to students who wish to receive them. Those who work in higher education are trained to impart that knowledge, demonstrate those skills and engage in research that adds to the body of what is known. They are not exercising First Amendment rights or forming citizens or inculcating moral values or training soldiers to fight for social justice. Their obligations and aspirations are defined by the distinctive task— the advancement of knowledge— they are trained and paid to perform, defined, that is, by contract and by the course catalog rather than by a vision of democracy or world peace. . . . That latitude does not include the performance of other tasks, no matter how worthy they might be. According to this school, academics are not free in any special sense to do anything but their jobs.

What Fish calls the “For the common good” school “has its origin in the AAUP *Declaration of Principles* (1915), and it shares some arguments with the ‘It’s just a job’ school, especially the argument that the academic task is distinctive.” However, Fish explains, “the ‘For the common good’ school moves away from the severe professionalism of the ‘It’s just a job’ school and toward an argument in which professional values are subordinated to the higher values of democracy or justice or freedom; that is, to the common good.”

Fish’s third school is the “Academic exceptionalism or uncommon beings” school—exemplified largely by the somewhat unfortunate and unsuccessful legal arguments made by some Virginia professors who, in the case of *Urofsky v. Gilmore*, sought exemption from statutory limits on their access to pornography—which he sees as “a logical extension of the ‘For the common good’ school.” For, he argues, “if academics are charged not merely with the task of adding to our knowledge of natural and cultural phenomena, but with the task of providing a counterweight to the force of common popular opinion, they must themselves be uncommon.” Fish’s two final schools—the “Academic freedom as critique” school and the “Academic freedom as

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*Academic Freedom, and the End of the American University* (New York: New Press, 2010); and James L. Turk, ed., *Academic Freedom in Conflict: The Struggle Over Free Speech Rights in the University* (Toronto: James Lorimer, 2014). Journal articles are too numerous to mention, as a quick search in Google scholar will demonstrate. Moreover, there is a vast literature among legal scholars on the law governing academic freedom, as demonstrated by the many examples cited by Michael LeRoy in his 2016 article “How Courts View Academic Freedom,” *Journal of College and University Law* 42, no. 1 (2016): 3n8.

revolution” school—are conceived largely as products of a slippery-slope progression from the “For the common good” school and provide easy if rather uninteresting targets for Fish’s hyperprofessional polemic.

There is much to be said for Fish’s emphasis on *academic* freedom as essentially a right belonging to a profession; indeed, this is a stance that the AAUP has endorsed over the years. In a symposium on Fish’s book, Yale Law School dean and former AAUP general counsel and Committee A chair Robert Post, a prominent theorist of Fish’s “common good” theory,<sup>3</sup> expressed basic agreement “with the thrust of Fish’s thesis.” He writes, “Like Fish, I believe that academic freedom exists to protect the ability of academics to pursue their professional tasks. Academic freedom does not concern human freedom generally, but rather the autonomy of the scholarly profession. This simple premise is sufficient to cut through much of the bluster that envelops so many modern disputes about academic freedom.”<sup>4</sup> Post, however, objects to Fish’s extreme version of this thesis, beginning with his assumption that “claims of academic freedom are properly addressed to those within the scholarly profession,” which “leads him to the disconcerting conclusion that academic freedom can never be justified in terms of goods that exist outside of professional scholarship.” For if academic freedom can be justified only in terms of strictly academic values, then there is no basis for a constitutional or legal concept of academic freedom. Moreover, “Fish proposes criteria for distinguishing scholarship from politics in ways that fail to account for the breadth and diversity of the scholarly practices that actually characterize the modern university.”<sup>5</sup>

This final point is crucial. One of the most striking features of Fish’s book is its strenuous insistence that scholarly practice must be strictly apolitical, that there must be a clear and bright line drawn between proper academic work and any taint of political activism.<sup>6</sup> Fish quotes approvingly William Van Alstyne’s claim that a faculty “is employed professionally to test and propose revisions in the prevailing wisdom, not to inculcate the prevailing wisdom in others.”<sup>7</sup> But Fish’s narrow academicism suggests that even, perhaps especially, proposing revisions in prevailing wisdom could prove unacceptably “political.” As John K. Wilson points out,

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<sup>3</sup> Finkin and Post, *For the Common Good*.

<sup>4</sup> Robert Post, “Why Bother with Academic Freedom?,” *FIU L. Rev.* 9 (2013): 9, <http://collections.law.fiu.edu/lawreview/vol9/iss1/4>. In “Academic Freedom and the Constitution,” his contribution to the Bilgrami/Cole collection, Post distinguishes academic freedom from a broader intellectual freedom: “All persons are entitled to intellectual freedom, but only academics are entitled to academic freedom. Intellectual freedom does not presume the responsibility of competence, but academic freedom does. Intellectual freedom is not bound to any specific institution, like a university, but academic freedom is.”

<sup>5</sup> Post, “Why Bother with Academic Freedom?,” 9–10.

<sup>6</sup> Fish has advanced these arguments before, as in his *Save the World on Your Own Time* (New York: Oxford University Press, 2008). For a balanced and persuasive assessment of that book, see Joan W. Scott, “Back to Basics,” *History and Theory* 49, no. 1 (February 2010): 147–52.

<sup>7</sup> William W. Van Alstyne, “Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review,” *Law and Contemporary Problems* 53, no. 3 (1990): 87.

the irony is that, despite his professed concern with avoiding the political, “Fish’s theory requires an obsession with politics, so that it can be sniffed out and suppressed. There are two fundamental problems with this idea. First, testing professors for the political content of their work invariably diverts attention from a focus on academic work. Second, the prohibition on politics leaves faculty with controversial ideas vulnerable to political retaliation.”<sup>8</sup>

To be sure, academic freedom should not protect indoctrination, nor should students—or for that matter faculty—ever be compelled to embrace political, ideological, or religious positions in the name of scholarship. However, it must be asked, what norms can be applied to distinguish the inappropriately political from acceptable scholarly practice? Fish has no real answer other than, to be blunt, his own prejudices. Sometimes Fish differentiates scholarship from politics in terms of the distinction between theory and action. Professional scholarship, he writes, is “a realm where contemplation with no end beyond itself is mandated and ‘practical activities’ are admitted only as the objects of that contemplation.” But does this realistically describe what scholars in many fields actually do? Are there no practical activities in which they might appropriately engage? Post observes that some “academic disciplines study the world precisely in order to act on it. This is true of practical disciplines, like medicine or dentistry or nursing, which study the best ways to intervene in the world to create better outcomes. The research of academic doctors is often directed to new forms of action, like new surgical procedures. Policymaking disciplines (like environmental studies) may have a similar structure. For such disciplines, the distinction between theory and action will not divide scholarship from politics.”<sup>9</sup>

Indeed, reading Fish’s book one is struck by his cramped notion of what constitutes faculty work in different fields. His examples of appropriate scholarship are drawn almost uniformly from literary studies, a discipline in which he has long advocated a vigorously apolitical approach. In his presentation, academic work is, well, strictly “academic,” in the popular sense of lacking both practical utility and broadly meaningful import. According to Fish, literary studies as well as law, history, philosophy, and, “yes, even politics,” are simply professional activities in which knowledge is “disassembled” for dry-as-dust analysis. While that knowledge may be “reassembled by others and put to worldly uses . . . that’s not the academic’s job.”

But in many—some might even say all—disciplines that is precisely one of the academic’s jobs. In 1902, John Dewey observed how social science disciplines often “deal face-to-face with problems of life, not problems of technical theory. Hence the right and duty of academic freedom are even greater here than

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<sup>8</sup> John K. Wilson, “Stanley Fish and the Politics of Academic Freedom,” *FIU L. Rev.* 79 (2013), 79, <http://ecollections.law.fiu.edu/lawreview/vol9/iss1/28>.

<sup>9</sup> Post, “Why Bother with Academic Freedom?,” 19.

elsewhere.”<sup>10</sup> Fish also seems oblivious to academic freedom issues in the hard and applied sciences. Employing Fish’s approach it would be nearly impossible to confront the complex issues involved in, say, the growing controversy over the use of Institutional Review Boards as prior licensing agents in human subjects research, a problem powerfully explored by Philip Hamburger in the Bilgrami/Cole collection. As Hamburger explains in his essay “IRB Licensing,” “Academic studies of human subjects traditionally were uncensored, and through their radical critique of government, these studies did much to shape the establishment of government health services. Now, however, the very government department that imposes health-care regulations also imposes licensing on much of the academic study of health care. It thereby profoundly limits the studies that draw information at a personal level from doctors, nurses, administrators, patients, and their families.” To be sure, the “It’s just a job” school opposes government intervention in scholarship, but it is precisely because in these fields scholarship directly serves the common good and involves action, as well as thought with evident political ramifications, that an external justification for the academic freedom essential to progress is essential.

Take another example: The AAUP in 2012 placed Louisiana State University on its censure list after the school dismissed Ivor van Heerden, a researcher serving since 1992 in a non-tenure-track appointment. For years, his work in coastal erosion and in hurricane- and flood-related issues brought him public prominence and consistently favorable evaluations. But after van Heerden found that a main cause of flooding and resulting loss of lives after Hurricane Katrina was structural failure of the levees overseen by the US Army Corps of Engineers, university administrators moved to distance LSU from his work, which was clearly political in Fish’s sense, and ultimately fired him. But in Fish’s scheme van Heerden’s research was never scholarly in the first place because it involved practical action from its very initiation and hence, in Fish’s conception, his dismissal, while perhaps ill-advised, did not violate his academic freedom.

In her highly engaging and personal book *Galileo’s Middle Finger*, Alice Dreger recounts a number of episodes in the biosciences in which the kind of separation between scholarship and politics posited by Fish would be impossible to establish. According to Dreger, “Science and social justice require each other to be healthy, and both are critically important to human freedom. Without a just system, you cannot be free to do science, including science designed to better understand human identity; without science, and especially scientific understandings of human behaviors, you cannot know how to create a sustainably just system.” Dreger’s book is an extended appeal to both scientists and social activists to pay “attention to evidence in the service of the common good.” In fact, as Dreger demonstrates, without such a foundation for academic

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<sup>10</sup> John Dewey, “Academic Freedom,” in *John Dewey: The Middle Works, 1899–1942*, ed. Jo Ann Boydston (Carbondale and Edwardsville: Southern Illinois University Press, 1976), 57.

freedom professional norms themselves would become unenforceable and closed to both internal and external critique, about which more later.

In short, as Post argues, “There is no unified set of criteria that can mechanically be applied to all departments of a modern university. The criteria that attract Fish may make perfectly good sense when describing the difference between politics and scholarship in fields like English or comparative literature, but they would make hash of many other respectable academic fields.”<sup>11</sup>

In his conclusion Fish belatedly acknowledges that “there is no ‘intrinsic’ form of the academy.” Indeed, he adds, “there is no reason in nature for the category of academic work not to include the direct taking up of charged political questions with a view to pronouncing on them and thus prompting students to action.” In other words, Fish’s ivory tower version of academic work is precisely that: his personal preference, based on a foundation “no firmer than its self-assertion.”

But another literary scholar, Stefan Collini, in his eloquent and incisive *What Are Universities For*, offers a more nuanced and vibrant picture of the academy that allows plenty of space for the kind of disinterested scholarship favored by Fish but still succeeds in justifying on external grounds both the university and, by implication, academic freedom, thereby providing a useful basis for defending the “common good” approach.

Curiously, Fish’s litany of flawed external justifications for academic freedom and the academic enterprise itself—promoting democracy, inculcating values, preparing fighters for social justice—omits the most common justification for higher education offered today by university administrators and politicians alike: its economic utility. Collini, however, focuses on this justification. He begins with the essential proposition that “higher education is a public good, not simply a set of private benefits for those who happen to participate in it.” Yet he also acknowledges “one of the great strengths of the university and one of the keys to its remarkable longevity: while serving other needs, it also simultaneously provides a supportive setting for the human mind’s restless pursuit of fuller understanding.” In fact, “subjects which were initially introduced for broadly practical purposes have outlived those purposes and gone on to establish themselves as scholarly disciplines in their own right.” Further, Collini adds, “It is sometimes said that in universities knowledge is pursued ‘for its own sake,’ but that may misdescribe the variety of purposes for which different kinds of understanding may be sought.”

Like Fish, Collini strains to avoid any instrumentalist vision of the contemporary university. Addressing the increasingly intense pressure for universities to justify their existence in terms of economic improvement, he writes,

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<sup>11</sup> Post, “Why Bother with Academic Freedom?,” 20.

a society does not educate the next generation in order for them to contribute to its economy. It educates them in order that they should extend and deepen their understanding of themselves and the world, acquiring, in the course of this form of growing up, kinds of knowledge and skill which will be useful in their eventual employment, but which will no more be the sum of their education than that employment will be the sum of their lives. . . . If we find ourselves saying that what is valuable about learning to play the violin well is that it helps us develop the manual dexterity that will be useful for typing, then we are stuck in a traffic-jam of carts in front of horses.

Collini makes the perceptive observation that universities often appeal quite differently to their government funders than they do to alumni donors. Unlike governments, alumni are assumed to be open to appeals to intellect and curiosity. They respond to requests for donations “because they precisely want to support something that they feel has more intrinsic and lasting value” than material improvement and economic activity. For these reasons Collini vigorously champions the university not as the sort of scholastic ivory tower that Fish would embrace but as a distinctive “public good,” serving the entire society in multiple ways, including the political. Although his focus is on his native Britain, he marshals in support of this position a marvelous quotation from John Adams, the second US president, that should perhaps become a Twitter meme: “The whole people must take upon themselves the education of the whole people, and must be willing to bear the expense of it.”<sup>12</sup>

One important distinction that Fish draws between his own views and those of the “common good” school concerns the value of shared governance to academic freedom. Because Fish “conceives of the academy as a guild,” he “recognizes as natural the desire of guild members to regulate their own affairs.” Yet he dismisses the faculty’s aspiration to have a say in the university’s governance (and not just its curriculum and scholarly standards) as a mere “desire for power” with no true relevance to the protection of academic freedom. According to Fish, “The production of good scholarship does not depend on the political organization of the university within which scholarly inquiry is conducted; no matter what the lines and direction of authority might be, scholarly work can flourish.”

Fish concedes sympathy with a line of reasoning that would privilege faculty expertise in strictly educational decisions. But at the same time he throws up his hands in despair at ever determining which decisions are truly educational and which administrative; indeed, his attempt to clearly distinguish the two parallels his equally artificial severance of the “academic” from the “political.” Still, he seems convinced that

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<sup>12</sup> Collini’s book reprints several occasional pieces published in response to various British government initiatives. Are these works of scholarship? Collini seems to think so, and I agree. But I suspect that to Fish such crassly political interventions, incapable of being judged by strictly disciplinary norms, lie beyond the scholarly pale and would hence by his logic be unprotected by academic freedom.



many decisions are in fact merely bureaucratic, and where these are concerned faculty need have no say at all. The point, however, is that precisely because the distinction between educational and administrative decision-making is not always obvious the faculty need to be involved to some degree in virtually all aspects of governance. For example, while few faculty members are expert in architecture and design, building construction may have important implications for an institution's educational mission. For example, at my own university a new building was constructed recently comprised exclusively of faculty offices. Departments whose classes are offered on the other side of campus were relocated there, but their classroom assignments remained largely unchanged. The potentially harmful impact of this move on student-faculty interaction and thereby on the broader educational experience should be obvious.

Hence Collini argues more broadly that as “organizations for the maintenance, extension, and transmission of intellectual enquiry” universities are “a collective enterprise and one which transcends the needs or interests of the present generation, let alone of the individual scholar. This enterprise requires, among other things, active citizenship on the part of the long-term inhabitants of the scholarly republic.” Of course, where faculty responsibilities end and administrative prerogatives begin may not always be well-defined and will vary according to the size, purpose, and history of a given institution. And it is certainly true that shared governance may be “cumbersome and awkward at best.”<sup>13</sup> Nonetheless, a dedication not only to scholarship but to academic freedom and to the broader “common good” demands shared governance.<sup>14</sup>

In both Fish's extreme version and in the “common good” approach, efforts to define academic freedom on professional grounds must confront internal contradictions. These are highlighted in useful contributions to the Bilgrami/Cole collection by Bromwich, Joan W. Scott, and Michelle Moody-Adams. Bromwich, in “Academic Freedom and Its Opponents,” is the most critical of the professional approach, urging readers “to resist the narrower and more profession-centered definitions of academic freedom that have arisen in recent years—above all, the view that academic freedom can be practiced only relative to a disciplinary consensus. Such a tacit redefinition plucks freedom from the conscience of the individual scholar and lodges it in an official locus of oversight, a professional corporate body.” In Bromwich's view, founding academic freedom on professional expertise as determined by disciplinary and professional bodies means faculty are effectively

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<sup>13</sup> James Duderstadt, “Governing the Twenty-first Century University,” in William G. Tierney, ed., *Competing Conceptions of Academic Governance: Negotiating the Perfect Storm* (Baltimore: Johns Hopkins University Press, 2004), 145, as quoted by Fish.

<sup>14</sup> On the connection between shared governance and academic freedom, see Larry Gerber, “‘Inextricably Linked’: Shared Governance and Academic Freedom,” *Academe*, May–June 2001; and Gerber, *The Rise and Decline of Faculty Governance: Professionalization and the Modern American University* (Baltimore: Johns Hopkins University Press, 2014).

licensed “by the previous and ever-to-be-renewed consensus of experts in the field. Knowledge turns into the name of something commanded by administrators and produced by professors.”

This is a powerful argument and it must be acknowledged that the extension of political freedom in the polity as a whole does yield the most conducive atmosphere to the defense of academic freedom. And the due process rights that faculty members have secured, however tenuously, in support of academic freedom should surely be extended to most other categories of employment. There can be little doubt as well that reliance on disciplinary standards and credentialed expertise in the determination of what is acceptable academic work will tend to privilege the status quo and disadvantage the iconoclastic and the novel. But the problem, as Post has repeatedly argued, is that “the marketplace of ideas . . . is radically incompatible” with academic freedom’s professional task. “The point of the professional ideal of academic freedom is to ensure that universities are organized to advance their mission of producing expert, disciplinary knowledge,” he argues in the Bilgrami/Cole collection. “But if, as the theory of the marketplace of ideas holds, ‘the First Amendment recognizes no such thing as a “false” idea,’ then it cannot sustain, or even tolerate, the disciplinary practices necessary to sustain the truth claims to which the ideal of expert knowledge aspires.” For instance, it is perfectly acceptable under the First Amendment for a politician, preacher, or an average citizen today to declare evolution a Satanic “theory,” but such a declaration would be wholly unacceptable coming from a college biology instructor, in class or, arguably, out of class as well.

Scott, in “Knowledge, Power, and Academic Freedom,” her contribution to the Bilgrami/Cole collection, identifies the contradiction well: “Disciplinary communities provide the consensus necessary to justify academic freedom as a special freedom for faculty,” she writes. “But the inseparable other side of this regulatory and enabling authority is that it can suppress innovative thinking in the name of defending immutable standards. Paradoxically, the very institutions that are meant to legitimize faculty autonomy can also function to undermine it.” Or, as Moody-Adams puts it in “What’s So Special about Academic Freedom?,” her essay in the collection, “Many critics argue that far from being a defense against the coercive force of external orthodoxies, academic freedom more often insulates the academy’s internal orthodoxies from critical scrutiny.”

Can this paradox be resolved? Scott doesn’t think so, but she sees the very essence and desirability of academic freedom in its mediation of these sorts of tensions, which are inherent to modern scholarship. She points out that the theory of academic freedom emerged in the early twentieth century as an attempt to

address “a tension at the heart of the modern university: that between corporate power and intellectual inquiry, between instrumental knowledge production and open-ended inquiry.”<sup>15</sup>

The founding and first years of the AAUP provide important experience in this regard. The organization has sometimes been accused of straying from a studied position of political neutrality that should supposedly permeate the spirit of both “objective” inquiry and academic freedom. But the AAUP’s founders, as Hans-Joerg Tiede’s fastidiously researched book on these years, *University Reform*, demonstrates convincingly, were actually not at first chiefly concerned with academic freedom, which they saw as both an instrument of and a precondition for professional autonomy, their true goal. Their concern was not only to identify means and methods of insulating the scholarly enterprise from corporate power but also, as Tiede shows especially in the case of John Dewey, to unleash scholarship to challenge that power and its growing influence in the polity.<sup>16</sup>

“It is precisely because the tensions evident a century ago continue to trouble the relationships among faculty, administrators, and boards of trustees,” writes Scott, “because the value of critical thinking is regularly under siege in the disciplines, the universities, and the nation; and because the[se] tensions . . . are not susceptible to final resolution,” that we need academic freedom, which is “an ideal that we reach for, even as its attainment never seems quite complete.”

Moody-Adams addresses the problem from a slightly different angle. She argues that “freedom of speech and academic freedom must, indeed, be justified on very different grounds. Yet the two kinds of freedom raise similar questions about how to distinguish offensive expression that deserves protection from harmful expression that might not.” Still, she admits, “democratic values and the values of academic life are sometimes in conflict.”

Academic freedom must be acknowledged, Moody-Adams argues, to be an “exclusionary” concept. “Communities of academic inquiry are constituted by exclusionary practices governing membership, and standards of argument and inquiry evolve as shared understandings that are internal to these exclusive

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<sup>15</sup> This point is also made for a rather different purpose by Judith Butler in “Exercising Rights: Academic Freedom and Boycott Politics,” her own contribution to the Bilgrami/Cole collection: “Academic freedom is not just the name for the freedom we exercise when we teach and write, but also the name for this entire conundrum: we are dependent on a funded infrastructure to exercise academic freedom at the same time that academic freedom requires protection against the incursions by those very funding sources into the domain of teaching, writing, and scholarship.”

<sup>16</sup> The AAUP’s mission today is still not restricted to defense of academic freedom, which the organization continues to conceive as one facet, albeit a critical one, of a broader professional defense. Hence, the complaint by Matthew Goldstein and Frederick Schaffer in “Academic Freedom: Some Considerations,” their essay in the Bilgrami/Cole collection, that “there is hardly any aspect of university life on which the AAUP has not expressed an opinion and which, according to the AAUP, is not an aspect of academic freedom,” is misguided. AAUP policies and statements address multiple aspects of academic life, and not only academic freedom, as is wholly appropriate for a professional association of college and university faculty.

‘communities of the competent.’” But this leads critics to conclude that academics merely prohibit views that threaten their power. In other words, challenges to academic freedom are often constituted as claims against the very authority of the academy to reject certain judgments and ideas and to impose disciplinary standards. Can we “provide a compelling counterweight to unsympathetic critics who treat the academy’s claims to authority as the mere monopoly of an arrogant and self-righteous professional guild?” Moody-Adams asks. Yes, she concludes, but that “reply must start from an idea that informed the 1915 founding of the AAUP: the idea that academic freedom must be seen as a public trust, rooted in the belief that those to whom its rights and privileges are granted can be safely accorded a wide-ranging freedom to regulate themselves.”

Both Scott and Moody-Adams point to the emergence of feminist approaches in a variety of disciplines as examples of how, as Moody-Adams puts it, “structures that might impede” recognition of dissident or innovative scholarship “ultimately protect their rights and privileges . . . when (and if) they make their way into the academy.” Conflicts over what is legitimate scholarship and what may be excluded from the scholarly consensus are central to Dreger’s book, which recounts in chilling detail how various dissident voices in science have been silenced both by the often stodgy and weak-willed conservatism of the academy and the crusading zeal of external activists. Yet what becomes clear from Dreger’s accounts of her tussles with those who would mute dissenting voices on controversial topics like transsexual identity and in fields as different as anthropology and endocrinology is that iconoclastic views may be marginalized most readily not when disciplinary standards are enforced but when they are disregarded.

For some theorists of academic freedom, efforts to ground the concept in professional autonomy, even where that is tempered by commitment to the “common good,” are inherently and irreparably flawed. Academic freedom, they argue, is nothing if it does not protect critical thought. In a widely read 2006 exchange with Post, Judith Butler argued that unless the very questioning of professional norms is protected by academic freedom, the concept will be hollow.<sup>17</sup> And she suspected that most academic norms, or at least those that she alleged underpin Post’s conception of academic freedom, are excessively resistant to challenge, much less change. Not surprisingly, Fish criticizes Butler’s approach, which he treats as the prime exemplar of the “Academic freedom as critique” school. Butler assumes, he writes, that norms are “rigid and block change, whereas in fact they are engines of change.”

Here Fish is more right than wrong, although his account underestimates the power of tradition and, frankly, fear of the new and different in academia. He and Butler renew the debate in the Bilgrami/Cole collection, by offering diametrically opposed views of the movement for an academic boycott of Israel. Fish,

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<sup>17</sup> See Judith Butler, “Academic Norms, Contemporary Challenges: A Reply to Robert Post on Academic Freedom,” in *Academic Freedom after September 11*, ed. Beshara Doumani (New York: Zone, 2006).

in "Academic Freedom and the Boycott of Israeli Universities," opposes the boycott as a violation of academic freedom, a position shared (if on a somewhat different foundation) by the AAUP. Butler supports it. The debate over academic boycotts lies beyond the scope of this review essay and was treated most thoroughly in a previous issue of this journal largely devoted to the topic.<sup>18</sup> What is relevant here is Butler's contention that "academic freedom is a conditional right"; that "academic freedom is a good under those conditions when it does not conflict with greater goods."

To be sure, it is undeniable that under authoritarian, nondemocratic conditions academic freedom in any sense of the term will be imperiled if not entirely restricted. And the fight to restore it may well be subordinated to more encompassing aspirations. But that is not because academic freedom is a "lesser" good than others but because it is an essential element of the pursuit of a broader "common good." While Butler recognizes the tension that Scott identified as inherent to the practice of academic freedom, her approach neither accepts that tension (as does Scott) nor resolves it; instead, she reduces the tension to what must in the end be a personal choice. For if academic freedom is to be subordinated to "greater goods," what and who determines which goods are greater? For Butler clearly the emancipation of the Palestinians from Israeli domination is such a greater good, even if she casts this as simply a struggle to maintain the economic conditions essential to facilitate academic freedom in Palestinian educational institutions. I find that contention arguable, but the larger point is, why stop with Palestine? Why not prevent scholars from engaging with any country that fails to meet some intangible standard of "freedom"? More important, why not restrict academic freedom for the sake of other "greater goods," for example, the "good" of enforcing "civility" and protecting students from presumptive "dangers"? Once we step down the path of trying to rank academic freedom in a hierarchy of "goods" or "freedoms," the entire concept is essentially lost.

Those who understand academic freedom as part of a broader category of political freedom have generally sought to ground that freedom in First Amendment jurisprudence. But as Post demonstrates in his contribution to the Bilgrami/Cole collection, while the Supreme Court has declared academic freedom "a special concern of the First Amendment," as a constitutional doctrine the concept is "incoherent because courts lack an adequate theory of why the Constitution should protect academic freedom."

This incoherence poses a major challenge to the viability of the "common good" justification advocated by Post. Under the Fish "it's a job" approach, it doesn't much matter what the courts say, so long as they recognize narrowly professional prerogatives, although Fish's book includes an extensive, if confused,

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<sup>18</sup> *Journal of Academic Freedom* 4 (2013), <http://aaup.org/reports-publications/journal-academic-freedom/volume-4>. For arguments critical of the boycott movement, some of which address issues of academic freedom, see Cary Nelson and Gabriel Noah Brahm, eds., *The Case against Academic Boycotts of Israel* (Detroit: Wayne State University Press, 2014).

discussion of academic freedom jurisprudence. But the “common good” approach demands external validation that the courts could conceivably supply. The “marketplace of ideas” conception most associated with the First Amendment, however, provides no support for academic freedom and indeed for professional and expert speech more generally.

Post’s solution, elaborated with admirable thoroughness in *Democracy, Expertise, and Academic Freedom*, rests on the linked concepts of “democratic legitimation” and “democratic competence.” The argument, greatly simplified, goes something like this: In a democracy decisions must be made in ways that are responsive to public opinion. Hence, “First Amendment coverage should extend to all efforts deemed normatively necessary for influencing public opinion.” This legitimation of decision-making, however, will only be successful if public opinion is informed by expert knowledge. Indeed, “reliable expert knowledge is necessary not only for intelligent self-governance, but also for the very value of democratic legitimation.” Post calls this necessity “democratic competence.” But such competence conflicts with legitimation. Under the First Amendment all opinions are equally valid. Under the First Amendment the expert judgment of, say, a doctor is just an opinion. But it is an opinion that can be regulated. Post offers this example:

Consider a dentist who wishes to advise her patients to remove their dental amalgams and who is prohibited from doing so by local regulation. Imagine that the dentist charges that the regulation violates the First Amendment. The question of whether the regulation blocks the transmission of knowledge and hence triggers First Amendment coverage depends upon whether dental amalgams actually endanger the health of patients. How can a court answer this question? It must necessarily apply the disciplinary knowledge of medical experts. It follows that First Amendment coverage depends upon the application of the very disciplinary practices that government regulation seeks to control. A court will have no option but to apply the authoritative methods and truths of medical science in order to determine whether prohibiting the dentist’s advice triggers First Amendment review. It follows that the value of democratic competence can be judicially protected only if courts incorporate and apply the disciplinary methods by which expert knowledge is defined. This is the kernel of truth at the core of the new institutional approach to the First Amendment.

He thus concludes, “When courts protect the circulation of expert knowledge, they also extend constitutional recognition to the disciplinary practices and methods that create such knowledge. In effect this immunizes such practices and methods from unrestricted political manipulation.”

Post’s concept of democratic competence comes as close as possible to resolving, at least in the legal arena, the tension between academic freedom’s narrowly professional foundation and its justification through appeal to a democratic “common good.” But it is at least questionable whether the courts will resolve the

“incoherence” of academic freedom jurisprudence in the manner Post recommends. A recent study by Michael LeRoy suggests they may not. After reviewing 210 court cases generating 339 decisions, LeRoy found that 73 percent of cases brought by faculty on First Amendment grounds were unsuccessful. On this basis he concludes that “First Amendment jurisprudence does not protect the most controversial ideas expressed by faculty in higher education.” As a result, he urges “professors to be more realistic about the limits of First Amendment protection” and counsels them to “think more deeply about strategies to preserve academic freedom. Courts are not suited for this task.”<sup>19</sup>

Whether or not LeRoy’s conclusions are valid, it is clear that the First Amendment may not always be the best vehicle for defending academic freedom. For one thing, although Post labors hard to craft a constitutional theory to protect the academic freedom of individual scholars, Philip Lee points out that in the courts “First Amendment protections exist to protect academic institutions, not the academics themselves.” Lee therefore argues that “while constitutional law is still the proper mechanism for defending institutional rights from government interference, contract law should be the primary mechanism for protecting professorial academic freedom.”<sup>20</sup> Under Lee’s approach AAUP policies would be enforceable under contract law if specifically covered by either collective bargaining agreements or institutional employment contracts. This is, of course, a route that the AAUP has been urging for years and one that ultimately provides the best assurance that academic freedom will enjoy legal protection.

At the same time, if it is questionable whether the courts will embrace Post’s jurisprudence of “democratic competence,” it is at least equally questionable whether faculty will be in a position to win the kinds of contractual protections that Lee recommends. That is because, as I have argued elsewhere, the state of academic freedom today is at the least imperiled.<sup>21</sup> Fredrik deBoer, for one, finds “a pervasive sense of fear” to be “endemic on many campuses.”<sup>22</sup> A 2010 survey of twenty-four thousand undergraduate students and nine thousand campus professionals (academic administrators, faculty, and student affairs professionals combined) at twenty-three colleges and universities found only 16.7 percent of faculty members strongly

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<sup>19</sup> Michael H. LeRoy, “How Courts View Academic Freedom,” *Journal of College and University Law* 42, no. 1 (2016). I am grateful to Professor LeRoy for sharing a prepublication version of his article.

<sup>20</sup> Philip Lee, “A Contract Theory of Academic Freedom,” *Saint Louis University Law Journal* 59 (2015). Lee develops his ideas more fully in his *Academic Freedom at American Universities: Constitutional Rights, Professional Norms, and Contractual Duties* (Lanham, MD: Lexington, 2014). I regret that I lack space to review this important contribution to the literature on academic freedom.

<sup>21</sup> Henry Reichman, “Does Academic Freedom Have a Future?,” *Academe*, November–December 2015.

<sup>22</sup> Fredrik deBoer, “Watch What You Say: How Fear Is Stifling Academic Freedom,” *Chronicle of Higher Education*, January 22, 2016.

agreeing that “it is safe to hold unpopular opinions on campus.” (The figure for students was 35.6 percent.)<sup>23</sup> DeBoer attributes this in part to an employment situation in which “openings for full-time faculty members are few and adjuncts fill the gaps,” putting all leverage in the hands of institutions. “With so many underemployed PhDs, controversial faculty can be swiftly replaced. The difficulty of obtaining a new job, meanwhile, compels employees to keep their mouths shut.”

This is also an argument of Michael Bérubé and Jennifer Ruth in their brief but powerful book, *The Humanities, Higher Education, and Academic Freedom*. It is not simply that faculty without tenure are easily replaced but that professionalism itself has been undermined. “With the erosion of the professionalism once institutionalized by the tenure system,” they contend, “the university community has not blossomed into a vibrant democracy but reverted to the kind of demeaning and resentful culture typical of patronage systems.” Indeed, there can be little question that deprofessionalization and loss of academic freedom go hand in hand. Recognition of academic freedom as founded on professional autonomy should make that clear.

But there is another factor at play that relates to academic freedom’s link to broader societal freedoms. In “Academic Freedom: A Pilot Study of Faculty Views,” a summary in the Bilgrami/Cole collection of a survey of Columbia University faculty members, Jonathan R. Cole, Stephen Cole, and Christopher C. Weiss report some disturbing data. Based on responses to a series of hypothetical scenarios involving issues of academic freedom, they found a “deep commitment” to academic freedom among only about half the respondents in a reputedly quite liberal faculty. “Other norms that the faculty valued trumped the academic freedom value in a significant proportion of the cases,” they report. “In percentage terms, 62 percent of the responses indicated a strong commitment to academic freedom when we looked at the scenarios in their totality.” The authors suggest that “if an erosion of the norms of academic freedom and free inquiry has taken place at American universities and colleges, it may well be the result of abridgements of the freedom of speech that we have seen on university campuses over the past several decades.”

The extent of such abridgement is well documented in Greg Lukianoff’s frightening *Unlearning Liberty*. Lukianoff is executive director of the Foundation for Individual Rights in Education (FIRE), known for its vigorous stance against “political correctness.” Although many view FIRE as a conservative group, Lukianoff himself is a self-proclaimed liberal Democrat and professed atheist. Whatever his politics, however, his book should serve as a clarion call to all concerned about the health of our colleges and universities. Lukianoff is not directly concerned with academic freedom, although a chapter dedicated to assaults on faculty free speech

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<sup>23</sup> Eric L. Dey, Molly C. Ott, Mary Antonaros, Cassie L. Barnhardt, and Matthew A. Holsapple, *Engaging Diverse Viewpoints: What Is the Campus Climate for Perspective-Taking?* (Washington, DC: Association of American Colleges and Universities, 2010), [https://www.aacu.org/sites/default/files/files/core\\_commitments/engaging\\_diverse\\_viewpoints.pdf](https://www.aacu.org/sites/default/files/files/core_commitments/engaging_diverse_viewpoints.pdf).



is certainly bracing. His fear is that restriction of student rights and even the forced indoctrination of students (yes, this is happening!) have “made us all just a little bit dumber.”

Lukianoff begins with these statements: “Colleges and universities were built on the recognition that you have to leave knowledge open to continuous debate, experimentation, critical examination, and discussion. Ideas that don’t hold up to this scrutiny should be discarded. It is a ruthless and tough system in which ideas that once gave us great comfort can be quickly relegated to the dustbin of history. It isn’t concerned with your feelings or your ego, as it has a much more important job: discerning what is true and wise.” To accomplish that task, “colleges are supposed to provide at least as much, if not more, freedom of speech and thought as society at large, not the other way around. Campus administrators have been successful in convincing students that the primary goal of the university is to make students feel comfortable. Unfortunately, comfortable minds are often not thinking ones.”

No doubt many will find such a blanket indictment a bit extreme and perhaps unfair; aren’t violations of student free expression relatively rare? After reading Lukianoff it is difficult to sustain that judgment. In chapter after chapter he documents how campus administrations, often with the acquiescence and even cooperation of students, work to limit expression through unconstitutional speech codes and harassment policies, heavy-handed orientation and residence-hall training programs, free speech zones, and denial of due process. Although Lukianoff does identify several faculty culprits, one of the great strengths of his book is his refusal to pin the blame, as many conservatives do, on supposedly weak-kneed liberal faculty members. Instead, his target is “administrators who present themselves as benign philosopher-kings.” To be sure, “many professors have played an unforgivable role in propagating speech codes and seriously undermining the philosophy of free speech, and of course some professors engage in questionable pedagogy.” However, Lukianoff repeatedly stresses that “the actual regimes of censorship on campus are put in place primarily by the ever-growing army of administrators.”

Administrative bloat is, in Lukianoff’s opinion, a major driver of campus censorship. “The rise in cost is related to the decline in rights on campuses in important ways,” he argues. “Most importantly, the increase in tuition and overall cost is disproportionately funding an increase in both the cost and the size of campus bureaucracy, and this expanding bureaucracy has primary responsibility for writing and enforcing speech codes, creating speech zones, and policing students’ lives in ways that students from the 1960s would never have accepted.”

With respect to the academic freedom of faculty, Lukianoff embraces the “common good” school’s justification of such freedom. Citing Post, he sees “education’s role in serving the proper functioning of democracy as the primary reason for the existence of academic freedom.” Hence, “by propagating speech

codes, universities are lying to their students about what their rights are and misinforming them about how speech relates to the functioning of democracies, thus undermining the very reason for academic freedom.”

Students, of course, do not have academic freedom *per se*.<sup>24</sup> As Moody-Adams puts it, “students must be free to learn, free to speak about what they learn, and free to disagree with their instructors in appropriate ways and contexts. But there is neither a moral nor a legal imperative to extend the full range of rights and privileges of academic freedom to all who may want it.” But Lukianoff’s work suggests that the state of student expressive rights is intimately linked to that of faculty academic freedom. Moreover, insofar as university administrations have abandoned the defense of academic freedom—or simply pay lip service to the principle<sup>25</sup>—faculty members who wish to defend their own freedom as scholars will need to join with students in opposing restrictions on their freedom to speak.

The picture drawn by Lukianoff and others of the state of freedom on campus is sobering at the least. But as the books considered here demonstrate, discussion and reflection on that freedom remain vigorous and engaged. The essays in the Bilgrami/Cole collection testify to the rich variety of thought-provoking perspectives to be found on the topic.<sup>26</sup> Fish’s book offers a sobering corrective to some more extreme notions of academic freedom, but its cramped conception of the distinction between the “academic” and the “political” fails to offer a meaningful justification for academic freedom. In the end the most persuasive arguments are ones, like those offered by Post and Scott, that embrace the internal tensions and paradoxes of academic freedom by rooting it in professional autonomy, but linking that autonomy to broader expressive rights in the service of a common good that provides the necessary justification for professional autonomy. Now if only we could convert the theoretical vigor and intellectual engagement of these works into more practical organized actions in defense of that common good. For academic freedom is hardly a mere “academic” concern.<sup>27</sup>

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<sup>24</sup> In 1967, the AAUP and several other organizations sought to more precisely define “student academic freedom” in a *Joint Statement on the Rights and Freedoms of Students*. See *AAUP Policy Documents and Reports*, 11th ed. (Baltimore: Johns Hopkins University Press, 2015), 381–85. See also Henry Reichman, “On Student Academic Freedom,” *Inside Higher Ed*, December 4, 2015, <https://www.insidehighered.com/views/2015/12/04/what-does-student-academic-freedom-entail-essay>.

<sup>25</sup> The Bilgrami/Cole collection includes essays by university administrators that might be considered in this category.

<sup>26</sup> I regret that space limitations prevent consideration of interesting contributions to this collection by Geoffrey Stone, Akeel Bilgrami, Jonathan Cole, Jon Elster, Richard Shweder, Robert Zimmer, John Mearsheimer, and Noam Chomsky.

<sup>27</sup> Here I must observe that most of the contributors to the Bilgrami/Cole collection are not members of the AAUP. Would it be too surly to remind these scholars of Marx’s Eleventh Thesis on Feuerbach?

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