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## Why Bother with Academic Freedom?

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## Why Bother with Academic Freedom?

*Robert Post*\*

It is a wicked pleasure to read *Versions of Academic Freedom*. The field of academic freedom is presently rife with controversy and debate. There are endless animated controversies about its meaning and requirements. Much of the debate is sheer foolishness, and no one is better at exposing its absurdity than Stanley Fish. His book is a page-turner, filled with fresh new material and forceful, evocative analysis. It is both entertaining and educational.

I should say at the outset that I largely agree with the thrust of Fish's thesis. Like Fish, I believe that academic freedom exists to protect the ability of academics to pursue their professional tasks.<sup>1</sup> 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.

Although *Versions of Academic Freedom* is an able and reliable guide to the current landscape of academic freedom, I know that I have been invited to this symposium not merely to praise Fish, but also to engage with him. And to that end I shall make three simple points about salient limitations in Fish's analysis.

The first concerns the function of the concept of academic freedom. Throughout *Versions of Academic Freedom*, Fish assumes that claims of academic freedom are properly addressed to those within the scholarly profession, and this leads him to the disconcerting conclusion that academic freedom can never be justified in terms of goods that exist outside of professional scholarship. Fish believes that this conclusion distinguishes his "it's just a job" school of academic freedom from the "for common good" school of academic freedom, with which I would be associated.<sup>2</sup> But I believe that because Fish is wrong about the function of the concept of academic freedom, his conclusion about the appropriate justifications for

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<sup>1</sup> The content of my views may be found in ROBERT C. POST, *DEMOCRACY, EXPERTISE, ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* (2012) [hereinafter *DEMOCRACY*]; MATTHEW W. FINKIN & ROBERT C. POST, *FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM* (2009) [hereinafter *FOR THE COMMON GOOD*]; Robert C. Post, *The Structure of Academic Freedom*, in *ACADEMIC FREEDOM AFTER SEPTEMBER 11* (Beshara Doumani ed., 2006) [hereinafter *Structure*].

<sup>2</sup> See *FOR THE COMMON GOOD*, *supra* note 1.

academic freedom is misplaced.

My second point follows from the first. If Fish believes that academic freedom can never be justified in terms of values that are external to the academic enterprise, than he must rule out all constitutional understandings of academic freedom. Such understandings must necessarily be justified in terms of *constitutional* values, which must be determined from the external perspective of the Constitution, not from the internal perspective of the scholarly profession. For this reason, *Versions of Academic Freedom* can have very little to say about constitutional principles of academic freedom.

My third point is that defining the content of academic freedom by reference to the professional practices of scholars means that one must have a comprehensive and catholic view of these practices. It is important to Fish, as it is to any student of academic freedom, to be able to identify those who have abandoned these practices for the lure of political engagement. In *Versions of Academic Freedom*, 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.

#### I.

*Versions of Academic Freedom* embraces what Fish calls the “It’s just a job” school of academic freedom. This school is deliberately “deflationary.”<sup>3</sup> It holds not only that “academics are not free in any special sense to do anything but their jobs,”<sup>4</sup> but it also asserts that the value of academic freedom should *never* be explained in terms of “the value of academic work in the service it performs for *another* enterprise.”<sup>5</sup> Fish is quite emphatic about this latter point:

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<sup>3</sup> STANLEY FISH, *VERSIONS OF ACADEMIC FREEDOM: FROM PROFESSIONALISM TO REVOLUTION* (forthcoming 2014) (manuscript at 11) (on file with FIU Law Review).

<sup>4</sup> *Id.* (manuscript at 12).

<sup>5</sup> *Id.* (manuscript at 54).

Higher education is not valuable because of the benefits some non-academics might see in it; that's like valuing the theater or art because they bring people into the inner city. Higher education is valuable (if it is) because of the particular pleasures it offers to those who are drawn to it—chiefly the pleasures of solving puzzles and figuring out what makes something what it is—pleasures that would be made unavailable or rendered secondary if higher education were regarded as the extension of another enterprise. One should not mistake an understanding of why something is supported for an understanding of what that something is.<sup>6</sup>

This point is what distinguishes Fish's "It's just a job" school of academic freedom from the "for the common good" school of academic freedom. Although the latter also believes that academic freedom exists to protect the professional practices of scholars, it makes the mistake of attempting to justify academic freedom in terms of social goods like democracy or the production of knowledge. Fish fears that justifying academic freedom in terms that are external to the scholarly profession will corrupt the profession by bending it to those values.

Fish seems to me correct to affirm that scholars ought to conduct their scholarship according to values that are internal to the practice of scholarship. They ought not to distort their scholarship to pursue alien goods. But it is a non sequitur to fear that justifying academic freedom in terms of external goods will corrupt scholarship. This danger would materialize only if the concept of academic freedom were itself an essential aspect of the practice of scholarship. But this does not seem to be the case.

When academics do their work, they do not typically invoke the concept of academic freedom. The editor of a professional journal who believes that the quality of a submission is poor would not be moved to accept it for publication by an appeal to the "academic freedom" of the author. The tenure committee which believes that the quality of an applicant's work is inadequate would not be moved to recommend tenure by an appeal to the "academic freedom" of a junior colleague. When academics talk to each other about their research, or about the justifications for their research, they do not typically use the language of academic freedom. Instead they talk about the competence of the work, as determined by the scholarly discipline at issue.<sup>7</sup>

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<sup>6</sup> *Id.* (manuscript at 161).

<sup>7</sup> The concept of academic freedom sometimes does enter into the conversation of scholars in the context of evaluating teaching practices. Academic freedom is traditionally divided into four dimensions: freedom of research and publication; freedom of teaching, freedom of extramural speech, and freedom of intramural speech. See FOR THE COMMON GOOD, *supra* note 1. Each of these

Academics do resort to the language of academic freedom, however, when they seek to defend their research from external control. When university administrators seek to suppress research because it will alienate alumni donors, scholars will defend their work by invoking the value of academic freedom. When members of an outraged public demand the suppression of controversial publications, scholars will invoke academic freedom as a shield. When funders or administrators seek to dictate what may or may not be taught in the classroom, scholars will defend their autonomy by insisting upon the prerogatives of academic freedom.

Academic freedom, in other words, is primarily a value used by scholars to defend the autonomy of the scholarly enterprise. Scholars rarely need to defend this autonomy from each other. They routinely need to defend it from the predations of those who are not scholars. The origins of American academic freedom lie in this need. At the outset of the 20<sup>th</sup> Century, scholars like John Dewey, Edwin R.A. Seligman and Arthur O. Lovejoy developed the American concept of academic freedom in order to prevent university trustees and administrators from seeking to control the work of American university professors.<sup>8</sup>

These early pioneers believed that the concept of academic freedom would persuade those outside the scholarly profession to respect the autonomy of the scholarly profession. This purpose remains the primary function of the concept of academic freedom. The traditional justification for academic freedom is that scholars produce knowledge that is valuable to society at large, and that scholars can produce this knowledge only if they are given the freedom to follow the disciplinary norms that define their scholarly enterprise.<sup>9</sup> This is precisely the justification for academic freedom that lies at the core of what Fish labels the “for common good school” of academic freedom.<sup>10</sup>

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dimensions requires its own justification and follows its own logic. (One of the frustrations of *Versions of Academic Freedom* is that it does not distinguish carefully between these distinct dimensions of academic freedom, so that controversies over research are mingled indiscriminately with controversies over teaching.) In this commentary, I focus primarily on freedom of research and publication. I should note, however, that occasionally scholars do make claims to each other that sound in academic freedom when they seek to justify particular teaching practices. My guess is that such claims are more common in the context of teaching because the disciplinary norms of teaching are far less developed and clear than are the disciplinary norms of scholarship. It is thus more difficult simply to appeal to these norms in discussing proper and improper teaching practices. Nevertheless, because claims of academic freedom tend to arise in the context of actual efforts to limit teaching practices, and because administrators rather than academics tend to regulate teaching, it is rare to see claims of academic freedom made in discussions among scholars about the limits of permissible teaching practices.

<sup>8</sup> See FOR THE COMMON GOOD, *supra* note 1.

<sup>9</sup> See Tim Scanlon, *Academic Freedom and the Control of Research*, in THE CONCEPT OF ACADEMIC FREEDOM 237-54 (E. L. Pincoffs, ed. 1975).

<sup>10</sup> See FOR THE COMMON GOOD, *supra* note 1.

If “academic freedom” is a concept designed to persuade those who are outside the scholarly profession, it can be effective only if it is convincing to non-scholars. This means that it must appeal to values that are attractive to non-scholars. By hypothesis these values will be external to the academic profession. There is no logical inconsistency in arguing to outsiders that they should respect the autonomy of the academic enterprise because that autonomy will produce goods that are valuable to them and to society.

Fish is correct to note, however, that this justification of academic freedom is beset with potential tension. The knowledge desired by society at large may not correspond with the knowledge defined and produced by the internal disciplinary norms of the academic profession. A claim of academic freedom may for this reason not be effective. Outsiders may not wish to support the goods that academic freedom can produce, which is to say the goods that an autonomous scholarly enterprise can provide. The possibility of such failure, however, is endemic to making any claim in the public space. The purpose of the concept of academic freedom is to convince the public to respect the autonomous scholarly enterprise, and, conversely, to guide that enterprise in deciding what conditions on public support it should and should not accept.<sup>11</sup>

## II.

Fish’s rejection of external justifications for academic freedom has particularly telling consequences in the context of constitutional law. Academic freedom is typically divided into two aspects. The first is keyed to the professional organization of higher education; it concerns how colleges and universities should organize themselves. The second involves constitutional law; it concerns limitations on state regulations of professors, colleges and universities.<sup>12</sup> Constitutional limitations are by definition justified in terms of constitutional values. These values turn on public and national principles; they do not derive from the internal ideals of the scholarly profession. If academic freedom cannot be justified by values external to the scholarly profession, therefore, academic freedom can have no relevance to constitutional law.

The constitutional principle of academic freedom has a long history, stretching back at least half a century. The Supreme Court has unequivocally declared that that academic freedom is a “special concern of the First Amendment, which does not tolerate laws that cast a pall of

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<sup>11</sup> See *Structure*, *supra* note 1.

<sup>12</sup> See Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265 (1988).

orthodoxy over the classroom.”<sup>13</sup> It is not clear why Fish would seek to repudiate the very possibility of a constitutional law of academic freedom. There is no logical inconsistency in a constitutional principle requiring the state to respect the autonomy of the scholarly profession for the state’s own (constitutional) reasons.

I have argued elsewhere that these constitutional reasons should (and probably do) include our democracy’s need for the creation and distribution of expert knowledge.<sup>14</sup> Constitutional protections for the production and dissemination of expert knowledge are visible in aspects of our First Amendment jurisprudence.<sup>15</sup> Colleges and universities are the *only* institutions in our society that sustain and reproduce the disciplinary standards by which expert knowledge is recognized and certified.

If this is the justification for the constitutional principle of academic freedom, it follows that constitutional law should protect the integrity of disciplinary standards. Courts<sup>16</sup> and commentators<sup>17</sup> currently debate

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<sup>13</sup> *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

<sup>14</sup> See DEMOCRACY, *supra* note 1.

<sup>15</sup> *Id.*

<sup>16</sup> *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n.12 (1985) (“Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, see *Keyishian v. Board of Regents*, 385 U.S., at 603; *Sweezy v. New Hampshire*, 354 U.S. 234, 250, (1957) (opinion of Warren, C.J.), but also, and somewhat inconsistently, on autonomous decision-making by the academy itself, see *University of California Regents v. Bakke*, 438 U.S. 265, 312, (1978) (opinion of Powell, J.)”); *Keen v. Penson*, 970 F.2d 252, 257 (7th Cir. 1992) (“[A]s this case reveals, the assertion of academic freedom of a professor can conflict with the academic freedom of the university to make decisions affecting that professor”); *Piarowski v. Ill. Cmty. Coll. Dist.* 525, 759 F.2d 625, 629 (7th Cir. 1985) (“[T]hrough many decisions describe ‘academic freedom’ as an aspect of the freedom of speech that is protected against governmental abridgment by the First Amendment, . . . the term is equivocal. It is used to denote both the freedom of the academy to pursue its ends without interference from the government (the sense in which it used, for example, in Justice Powell’s opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265, 312 (1978), or in our recent decision in *EEOC v. University of Notre Dame Du Lac*, 715 F.2d 331, 335-36 (7th Cir.1983)), and the freedom of the individual teacher (or in some versions-indeed in most cases-the student) to pursue his ends without interference from the academy; and these two freedoms are in conflict, as in this case.”); *Dow Chem. Co. v. Allen*, 672 F.2d 1262, 1275 (7th Cir. 1982) (“Case law considering the standard to be applied where the issue is academic freedom of the university to be free of governmental interference, as opposed to academic freedom of the individual teacher to be free of restraints from the university administration, is surprisingly sparse.”); *Cooper v. Ross*, 472 F.Supp. 802, 813 (D.C. Ark. 1979) (“The present case is particularly difficult because it involves a fundamental tension between the academic freedom of the individual teacher to be free of restraints from the university administration, and the academic freedom of the university to be free of government, including judicial, interference.”).

<sup>17</sup> J. Peter Byrne, *Academic Freedom: A “Special Concern of the First Amendment”*, 99 YALE L.J. 251 (1989); J. Peter Byrne, *The Threat to Constitutional Academic Freedom*, 31 J.C. & U.L. 79 (2004); Alan K. Chen, *Bureaucracy and Distrust: Germaneness and the Paradoxes of Academic Freedom Doctrine*, 77 U. COLO. L. REV. 955 (2006); Richard H. Hiers, *Institutional Academic Freedom vs. Faculty Academic Freedom in Public Colleges and Universities*, 29 31 J.C. & U.L. 35 (2002); Richard H. Hiers, *Institutional Academic Freedom or Autonomy Grounded Upon the First Amendment: A Jurisprudential Mirage*, 30 HAMLINE L. REV. 1 (2007); Matthew Finkin, *On “Institutional” Academic*

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whether academic freedom is an individual right that attaches to professors, or an institutional right that attaches to universities. My suggestion is that this debate is fundamentally misguided. Constitutional principles of academic freedom protect neither universities nor professors, but instead safeguard the disciplinary standards by which expert knowledge is recognized and produced. If a state university, responding to public pressure, acts to corrupt these standards by (for example) forbidding research on the subject of evolution, professors ought to be able to claim a constitutional right of academic freedom to resist the prohibition. If an individual professor attempts to corrupt disciplinary standards by (for example) seeking tenure at a state university for incompetent work, constitutional academic freedom should protect the decision of the university to deny tenure.

A common legal test used by courts to sketch the parameters of constitutional academic freedom is whether a scholar's speech involves "a matter of public concern." Fish discusses this test extensively in *Versions of Academic Freedom*. If the account of constitutional academic freedom I have offered is correct, however, this test should be irrelevant. The origin and point of the test is to ascertain the limits of state managerial authority.<sup>18</sup> Every state organization must regulate speech within itself in order to accomplish its own goals. But often such regulation conflicts with the ability of employees to participate in public discourse as citizens. Courts developed the "matter of public concern" test to negotiate this tension by determining whether a person is speaking as a citizen or as an employee.

The constitutional value of academic freedom does not turn on the distinction between employees and citizens. By hypothesis, freedom of research and publication concerns the professional practice of scholars. Scholars are hired by universities to engage in research and publication. The constitutional principle of academic freedom protects freedom of research and publication because the knowledge produced by such research and publication is valuable to society, regardless of whether it involves a matter of public concern, and regardless of whether a scholar is speaking in the

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*Freedom*, 61 TEX. L. REV. 817 (1983); Rachel Fugate, *Choppy Waters are Forecast for Academic Free Speech*, 26 FLA. ST. U.L. REV. 187 (1998); Erica Goldberg and Kelly Sarabyn, *Measuring a "Degree of Difference": Institutional Academic Freedom in a Post-Grutter World*, 51 SANTA CLARA L. REV. 217, 217-19 (2011); Elizabeth Mertz, *The Burden of Proof and Academic Freedom: Protection for Institution or Individual?*, 82 NW. U.L. REV. 292 (1988); Michael A. Olivas, *Reflections on Professors' Academic Freedom: Second Thoughts on the Third "Essential Freedom"*, 45 STAN. L. REV. 1835 (1993); David M. Rabban, *Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment*, 53 LAW & CONTEMP. PROBS. 227 (Summer 1990); Frederick Schauer, *Is There a Right to Academic Freedom?*, 77 U. COLO. L. REV. 907 (2006); Mark G. Yudof, *Three Faces of Academic Freedom*, 32 LOYOLA L. REV. 831, 853-57 (1987).

<sup>18</sup> See Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713 (1987).

role of a citizen.<sup>19</sup>

Because the nature of constitutional academic freedom must be determined by reference to the constitutional values that justify it, and because these values are by definition external to the scholarly enterprise, Fish can strictly say nothing whatever about them. He must deny them from the outset. And this disability undermines Fish's discussion of the constitutional aspects of academic freedom. It is why Fish's consideration of the "matter of public concern" test is so uncharacteristically indeterminate.

More importantly, it is why Fish's discussion of *Garcetti v. Ceballos*<sup>20</sup> is riven with disabling ambivalence. In that case, the United States Supreme Court held "that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."<sup>21</sup> In the secondary school context, *Garcetti* has been interpreted to deny all academic freedom in the classroom because a "school system does not 'regulate' teachers' speech as much as it hires that speech. Expression is a teacher's stock in trade, the commodity she sells to her employer in exchange for a salary."<sup>22</sup> In the context of public universities, some courts have interpreted *Garcetti* to mean that "[i]n order for a public employee to raise a successful First Amendment claim, he must have spoken in his capacity as a private citizen and not as an employee."<sup>23</sup>

This conclusion is perverse if the purpose of constitutional academic freedom is to protect the production and dissemination of expert knowledge. Scholars typically produce and distribute this knowledge in their capacity as employees, which is to say as part of what they are hired to do. Taken literally, therefore, the conclusion of *Garcetti* would abolish

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<sup>19</sup> DEMOCRACY, *supra* note 1.

<sup>20</sup> 547 U.S. 410 (2006).

<sup>21</sup> *Id.* at 421.

<sup>22</sup> *Mayer v. Monroe Cty. Cmty. Sch. Corp.*, 474 F.3d 477, 479 (7th Cir. 2007). Yudof observes that: "Unless an abridgement of speech lies in every exercise of governmental authority to speak through individuals—and how else might abstract entities called governments speak?—it is difficult to countenance the view that government control of its own professional speakers violates the historically developed concepts of freedom of expression." Yudof, *supra* note 7, at 839.

<sup>23</sup> *Renken v. Gregory*, 541 F.3d 769, 773 (7th Cir. 2008). *See, e.g.*, *Capeheart v. Hahs*, Slip Copy, No. 08CV 1423, 2011 WL 657848 (N.D. Ill. Feb. 14, 2011); *Isenalumhe v. McDuffie*, 697 F. Supp. 2d 367 (E.D.N.Y. 2010); *Miller v. Univ. of S. Ala.*, No. 09-0146-KD-B, 2010 WL 1994910 (S.D. Ala. May 17, 2010); *Sadid v. Idaho State Univ.*, No. CV-2008-3942-OC, (Idaho 6th Jud. Dist. Dec. 18, 2009). *But see Kerr v. Hurd*, 694 F. Supp. 2d 817, 843-44 (S.D. Ohio 2010); *Sheldon v. Bilbir Dhillon*, No. C-08-03438 RMW, 2009 WL 4282086 (N.D. Cal. Nov. 25, 2009). *See also Adams v. Trustees UNCW*, No. 10-1413 (4th Cir. Apr. 6, 2011); *Savage v. Gee*, 716 F. Supp. 2d 709 (S.D. Ohio 2010); *Gorum v. Sessoms*, 561 F.3d 179 (3d Cir. 2009).

constitutional academic freedom. Aware of this possibility, *Garcetti* itself notes that “[t]here is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court’s customary employee-speech jurisprudence,” and it concludes that “[w]e need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.”<sup>24</sup>

In his discussion, Fish is uncharacteristically unsure about how to react to *Garcetti*. Fish believes that academic freedom always only pertains to what scholars are employed to do. On a literal reading of *Garcetti*, therefore, Fish ought to come down against the possibility of constitutional academic freedom. At times, Fish seems to do just this. He is adamant, for example, that there is nothing “exceptional” about academics as employees. He devotes Chapter IV of *Versions of Academic Freedom* to demolishing “the ‘Academic exceptionalism or uncommon beings’ school” of academic freedom, which seeks to ground academic freedom on the thought that academics are “uncommon, not only intellectually but morally.”<sup>25</sup> He thus seems to agree with the Fourth Circuit in *Urofsky v. Gilmore*<sup>26</sup> that academic freedom does not confer any rights on scholars beyond those to which all citizens are already entitled by virtue of the First Amendment.<sup>27</sup>

Yet Fish also seems to endorse the conclusion of Professor Judith Areen that the research of professors ought to be protected by academic freedom whenever they act as educators rather than as (mere) employees.<sup>28</sup> Since professors are hired to be educators, Fish does not unpack the meaning of this odd distinction. The distinction implies that scholars are “exceptional” when they act as educators, because they are then entitled to constitutional protections that the Constitution withholds from all other state employees. In his discussion of *Urofsky*, Fish seemed to condemn any such “exceptional” treatment of scholars. But then how can he simultaneously endorse Areen’s conclusions? Fish cannot have it both ways.

The root of Fish’s difficulty is that the “exceptional” privilege of academic freedom must sound in constitutional values that limit state action, and yet Fish’s “It’s just a job” school of academic freedom, with its robust refusal to justify academic freedom in terms of any “value of

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<sup>24</sup> *Garcetti*, 547 U.S. at 425.

<sup>25</sup> FISH, *supra* note 3 (manuscript at 13).

<sup>26</sup> 217 F.3d 401 (4th Cir. 2000).

<sup>27</sup> FISH, *supra* note 3 (manuscript at 86).

<sup>28</sup> *Id.* (manuscript at 103).

academic work in the service it performs for *another* enterprise,”<sup>29</sup> would seem incapable of theorizing any such values. He is thus left wandering in the dark when discussing the constitutional dimensions of academic freedom.

### III.

The primary responsibility of those who, like Fish, adhere to the “It’s just a job” school of academic freedom is accurately to identify the nature of the job. Because academic freedom consists only in the freedom to do the job, it is urgently important to delineate the precise parameters of academic work.

A major thrust of *Versions of Academic Freedom* is the effort to distinguish proper academic work from the political activism that occasionally intrudes into university life. Because professional scholarship sometimes involves questions that outside the university are politically controversial (e.g., evolution), the distinction between the political and the academic is not obvious. It is important to maintain this distinction, however, because academic freedom does not include the freedom to politically indoctrinate students or to confuse political activism with scholarship.<sup>30</sup> There is general agreement that the distinction between politics and scholarship can be established only by applying the disciplinary norms that define and constitute legitimate scholarship.

It is thus a question of fundamental significance whether these norms are unitary and shared by all scholarly fields, or whether they vary in different fields. In *Versions of Academic Freedom*, Fish opts for the former approach. He seeks to develop general criteria for separating professional scholarship from political agitation, and he believes that these general criteria should be applicable to all scholars. But Fish is vague about the content of these criteria. In different parts of the book he describes them in different ways.

Early on Fish implies that academics may not themselves make claims of legitimacy, although they may study how claims of legitimacy acquire force or authority. He sharply distinguishes between analyzing how “legitimation” is achieved and issuing a judgment about “whether the claimed legitimacy is really legitimate.”<sup>31</sup> The latter, Fish believes, would be political rather than scholarly. Fish writes, “It is hard to see why

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<sup>29</sup> *Id.* (manuscript at 54).

<sup>30</sup> I myself have elsewhere wrestled with this distinction. See, e.g., Robert C. Post, *Academic Freedom and the “Intifada Curriculum”*, *ACADEME*, May-June 2003, at 16; Richard C. Atkinson, *Academic Freedom and the Research University*, 148 *PROC. AM. PHIL. SOC.* 195 (2004).

<sup>31</sup> FISH, *supra* note 3 (manuscript at 77).

academics are the appropriate persons to be” pursuing the latter claim, “unless academics are regarded as political creatures first and as professionals only incidentally.”<sup>32</sup>

Sometimes Fish describes the difference between scholarship and 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.”<sup>33</sup> Although scholars may seek truth for its “‘own sake’ independently of any call to action,” they must not seek truth “with a view to deciding on and implementing policy.”<sup>34</sup> At other times Fish articulates the difference between politics and scholarship in a slightly different way, declaring that academic work involves “an inquiry into the intellectual coherence of rules and doctrines; it does not (or should not) involve a judgment as to whether those rules and doctrines are morally attractive or politically desirable.”<sup>35</sup>

Fish evidently believes that certain general criteria distinguish scholars who are engaged in an academic enterprise from those who inappropriately use their profession as a platform to engage in political activism. The more one considers Fish’s various formulations, however, the more inapplicable they seem to many perfectly ordinary scholarly fields.

So, for example, academic disciplines like political theory routinely make first order claims of justification. They analyze whether claims of political legitimacy are “really legitimate.” It would not be improper for a political theorist to take a position on whether the Israeli occupation of Palestine is or is not legitimate.

Other 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.

The distinction between analyzing the intellectual coherence of rules and advocating their desirability is not relevant to academic disciplines like political philosophy. Political philosophers characteristically make judgments about whether “rules and doctrines are morally attractive or

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.* (manuscript at 166).

<sup>34</sup> *Id.* (manuscript at 167).

<sup>35</sup> *Id.* (manuscript at 166).

politically desirable.” It is the job of political philosophers to determine whether a system of rules is morally attractive or desirable. Law professors ordinarily engage in analogous forms of overtly normative reasoning.

It is clear from this brief survey that the disciplinary norms that distinguish scholarship from politics differ from field to field. 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. The lesson is that the scholarly profession is complex and variegated, and that someone committed to the “It’s just a job” school of academic freedom must pay careful attention to the diverse practices of distinct scholarly fields.

#### IV.

It is no false generalization to affirm that Stanley Fish is the most vibrant, evocative, and stimulating contemporary voice in the field of academic freedom. His work always repays close attention. It is filled with insights and genius.

But the great pains that Fish takes to distinguish the “It’s just a job” school of academic freedom from the “for the common good” school seem to me misplaced. Both schools believe that the function and content of academic freedom is to protect the autonomy of the scholarly enterprise. Fish takes a step too far when he argues that academic freedom cannot be justified by the values of any enterprise outside of the scholarly profession. This conclusion, which he uses to distinguish between the two schools, misunderstands the historical and practical function of the concept of academic freedom. It threatens entirely to undermine any coherent constitutional principle of academic freedom, a possibility that even Fish seems unwilling openly to embrace.

Fish’s primary goal in *Versions of Academic Freedom* is to distinguish legitimate scholarly work from political indoctrination. This is important, necessary work. Academic freedom is not a license to practice politics.<sup>36</sup> But the distinction between politics and scholarship is frequently neither clear nor easily discerned. It requires care and humility, and in particular it demands close attention to the actual practices of distinct scholarly disciplines.

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<sup>36</sup> There may be an exception to this generalization in the context of freedom of extramural speech. The possible justifications for this exception are explored in FOR THE COMMON GOOD, *supra* note 1.