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My Response

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My Response

*Stanley Fish**

I. THE THESIS

The book under discussion begins by noting that the literature of academic freedom is a literature of persistent and basic questions.¹ Is academic freedom a subset of the First Amendment and, therefore, something that affords legal protection to those who qualify as academics? Or is academic freedom a subset of freedom in the larger philosophical sense and therefore a political rather than a legal project? Or (a third possibility) is academic freedom a less exalted concept, neither a legal right nor a philosophical imperative, but the name of a guild desire, the desire to be free from external monitoring and discipline in the workplace. (This, of course, is the desire of all professions.) If that's all there is to it—a claim of special privilege—what, if anything, justifies affirming the claim? Do academics who work in public universities enjoy a status superior to that of other public employees? Are academics, unlike other employees, free to criticize their superiors without fear of retaliation? Does academic freedom attach to the university, or does it attach to the individual professor? Do students have academic freedom rights? Do courts recognize academic freedom, and do they base decisions on the doctrine? Do classroom teachers have an academic freedom right to depart from strictly academic concerns?

As I explored these questions, each of which has a literature of its own, I noticed that the answers to them varied depending on whether academic freedom was conceived narrowly—as a freedom conditioned by the particular obligations of the academic task—or conceived expansively as a general obligation to support the cause of freedom wherever it is under threat. Is academic freedom intelligible only within the confines of a singular profession—is it a professional norm?—or it is a norm that guides, or should guide, the actions of all right-thinking men and women, whether

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¹ STANLEY FISH, *VERSIONS OF ACADEMIC FREEDOM: FROM PROFESSIONALISM TO REVOLUTION* (forthcoming 2014) (on file with the *FIU Law Review*).

they are standing in front of a classroom or standing in front of the barricades. These alternate conceptions, and the gradations between them, can be captured by a simple formula: as one moves from a restrictive to an expansive notion of academic freedom—as one moves from right to left—the force of “academic” as a limiting adjective is less and less felt, and the scope of the word freedom more and more enlarged. Hence the subtitle of the book: “From Professionalism to Revolution.”

In my analysis one moves from professionalism to revolution in five stages, and I call these stages the five schools of academic freedom. Here they are.

- 1) The “it’s just a job” school (to which I belong). This school is deflationary; it regards higher education not as a vocation or holy calling, but as a provider of services. Colleges and universities offer disciplinary knowledge and skills to students who wish to receive them. Faculty members are trained to impart that knowledge, demonstrate those skills and engage in research that adds to the body of what is known. They are professionals, not moralists, or therapists or change agents, and when they are engaged in professional activities, narrowly defined, they should be accorded the latitude—call it freedom if you like—necessary to their proper performance. When they depart from their professional responsibilities they merit blame, not freedom.

- 2) The “for the common good” school. This school has origin in the 1915 AAUP Declaration of Principles on Academic Freedom and Academic Tenure,² and it shares some arguments with the “it’s just a job” school, especially the argument that the freedom accorded academics is conditioned on their hewing to academic responsibilities and not using their position in the university as a “shelter . . . for uncritical and intemperate partisanship.” However, the “for the common good” school departs from the severe professionalism of the “it’s just a job” school when it links the performance of responsible scholarship to the flourishing of democracy. The reasoning is that democracy requires credentialed experts in order to check “the tyranny of public opinion” and thus “train” the less expert citizenry. By using an external measure—the health of democracy—to justify the academy, this school opens the way to the de-emphasizing of “academic” in favor of the more

² See American Association of University Professors, 1915 Declaration of Principles on Academic Freedom and Academic Tenure (1915), *available at* <http://www.aaup.org/file/1915-Declaration-of-Principles-o-nAcademic-Freedom-and-Academic-Tenure.pdf>.

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abstract value of freedom.

- 3) The “for uncommon beings” or “academic exceptionalism” school. If academics are charged not merely with the task of adding to our knowledge, but with the task of providing a counterweight to common popular opinion, they must themselves be uncommon, not only intellectually, but morally. They must be, in the words of the 1915 Declaration, “men of high gift and character.” Such men (and now women) not only correct the errors of popular opinion; they escape popular judgment and are not to be held accountable to the same laws and restrictions that constrain ordinary citizens.
- 4) The “academic freedom as critique” school. If academics have the special capacity to see through conventional public wisdom and expose its contradictions, exercising that capacity—the capacity of critique—is their real job. While the “it’s just a job” school and the “for the common good” school insist that the freedom academics enjoy is limited by the norms of the profession, those who identify academic freedom with critique insist that professional norms should be interrogated and regarded as objects of critical scrutiny rather than as the unexamined parameters within which scrutiny is performed. Schools (1), (2), and (3) elevate and celebrate professionalism, albeit in different ways; this fourth school is deeply suspicious of professionalism and of all established structures of authority.
- 5) The “academic freedom as training for revolution” school. This school takes the obligation of critique seriously and turns the suspicion of established structures into a program for overturning them. If school (4) urges us not to accept professional norms without inquiring into their source, members of school (5) know in advance where that inquiry will lead—to the discovery that professional norms have their source in the corrupt motives of agents who are embedded in the corrupt institutions that serve and reflect the corrupt values of a corrupt neoliberal society. With the emergence of this school, the shift from “academic” as a limiting adjective to freedom as an overriding and global concern is complete; frankly political actions take the place of actions performed within professional constraints. “Academic freedom” is still a phrase that can be invoked, but its meaning is radically changed, as it is when Grant Farred declares that “academic

freedom has to be conceived of as a form of political solidarity.”³ If that is what academic freedom really is, adhering to a narrowly professional view of one’s responsibilities in the classroom amounts to a betrayal of both one’s political being and one’s pedagogical being. One can be true to the academy only by breaking free of its ideologically based constraints.

Recent events provide a nice illustration of the distance between the “it’s just a job” version of academic freedom and the “it’s for revolution” version of academic freedom. In November of 2013, members of the American Studies Association voted two to one to support the academic boycott of Israeli universities.⁴ The boycott movement began in Britain in 2002.⁵ Boycotters argue that because Israel is a rogue state engaged in acts of apartheid and oppression, and because Israeli universities are public and administered by the state, it must be assumed that those universities further the ends of a repressive regime, either by actively supporting its policies or by remaining silent in the face of atrocities. Therefore it is entirely appropriate and a matter of moral urgency for academics in other countries to exercise the only power they really have by refusing to engage in intellectual discourse with the Israeli academy. If you have an exchange program with an Israeli university, suspend it; if you are the editor of a scholarly journal and an Israeli researcher is a member of your editorial board, dismiss him.

Those opposed to the boycott complain that it violates the academic freedom of Israeli academics who are being cut off from the intellectual conversation at the heart of academic life. Boycotters reply that Palestinian academics and students have been cut off from that same conversation by the action of the state that houses the universities they are boycotting. Tit for tat. You guys did it to them, and now we are going to do it to you. The arguments fly back and forth and many points—largely in my view irrelevant, like the point that Israel is being unfairly singled out among nations—are made. From the perspective of the “it’s just a job” school, the only point worth making is that boycotters are basing academic decisions—like the decision to invite or not invite someone to a conference—on a political calculation: we dislike the policies of your government and therefore we will exclude you from the academic contexts over which we have control. Academic work has been declared an extension of political judgment and academic freedom has been sacrificed in order to make a

³ Grant Farred, *The Art of Politics Is to Divide*, 26/27 WORKS & DAYS 355 (2008-09).

⁴ *ASA Members Vote to Endorse Boycott of Israeli Academic Institutions*, AM. STUDIES ASSOC., http://www.theasa.net/from_the_editors/item/asa_members_vote_to_endorse_academic_boycott/ (last visited Apr. 29, 2014).

⁵ *Id.*

political point. Boycotters, in turn, say that the scope of academic freedom extends far beyond the routine activities we engage in while teaching and researching and encompasses the right and obligation to do whatever one can when the freedom of others is being abrogated by the actions of a repressive regime. The historian Howard Zinn makes the point concisely: “[t]o me, academic freedom has always meant the right to insist that academic freedom be more than academic.”⁶ To *me* the expansion of academic freedom into a doctrine of political intervention means the end of academic freedom because in the course of such an expansion, academic concerns have not only been bypassed, but also made to disappear in a puff of moralistic smoke.

II. THE COMMENTARIES

In their commentaries, Larry Alexander and Fred Schauer try to open up some distance between themselves and me. Alexander is openly looking for something to disagree with and thinks he finds it in my refusal to tie academic freedom to goals external to the academy’s everyday workings.⁷ (This is a sticking point for several of the commentators.) Alexander correctly makes a distinction between an academic’s *intention* to “produce goods extrinsic to disciplinary knowledge,”⁸ and the contribution academic work indirectly and uniu makes to “the world beyond the academy.”⁹ A better informed citizenry, he points out, is a public good to which the academy arguably contributes, but academics do not do what they do *in order to* produce a better informed citizenry. It is, Alexander says, a “byproduct.”¹⁰ I agree, and I put it this way in the book: one should not “confuse the reasons that lead society to pay for an activity with the reasons that impel its practitioners to engage in it.”¹¹ Alexander makes the additional point that if such byproducts did not exist—if there were no evidence that the greater world benefited from the existence of colleges and universities—there would be little or “no reason” for the public to support the academy. “Why should others spend scarce resources on activities that are only of benefit to those who engage in them?”¹² Again, I agree. If we pitch ourselves to members of the public by sharing our scholarly

⁶ HOWARD ZINN, HOWARD ZINN SPEAKS: COLLECTED SPEECHES, 1962-2009 46 (Anthony Armove ed., 2012).

⁷ See Lawrence Alexander, *Fish on Academic Freedom: A Merited Assault on Nonsense, But Perhaps a Bridge Too Far*, 9 FIU L. REV. 1 (2013).

⁸ *Id.* at 8.

⁹ *Id.*

¹⁰ *Id.*

¹¹ FISH, *supra* note 1 (manuscript at 85).

¹² Alexander, *supra* note 7, at 8.

obsessions with them, the funds will probably not roll in.

That, however, is a point without intellectual interest. It speaks to the public-relations problem faced by the academy at a time when the once taken-for-granted value of higher learning must be argued for and the arguments likely to be persuasive—contributions to the state's bottom line, career training, the production of political leaders, etc.—are only obliquely related, if related at all, to the aspirations that lead men and women, first, to get JD's and PhD's and, second, to teach classes, write essays, and engage in research. How should we respond to this unhappy situation? What can we do to shore-up our increasingly precarious position? Many people are asking and trying to answer these questions, but I am not one of them, and I feel no obligation to be one. I'm just trying to figure out what academic freedom is which involves of course figuring out what academic work is. The fact that the account of academic life I come up with may be unsustainable if the public relations problem I ignore is not solved is not my concern; or, rather, is only my concern as someone who wants to be paid an academic salary and see his students get jobs, and at my age those concerns are less and less pressing. But the fact is of no concern whatsoever to the argument I make in this book. Indeed the argument I make in the book—that academic work must be engaged in and valued on its own terms and not in the terms nominated by some external constituency—is implicitly made again when I refuse to take to heart the criticism that my thesis pays insufficient attention to the material conditions of academic work. To rehearse once again my oft-intoned mantra, “that's not my job.”

Alexander emphasizes another point of agreement between us—that the post-modern critique of academic norms doesn't lay a glove on them.¹³ That critique (offered most notably by Judith Butler) says that the norms on which the traditional notion of academic freedom rests are socially constructed; they did not come along with the planets, and the rocks, and trees; they were instituted by men and women like you and me; therefore they are suspect and vulnerable to challenge. Well, academic norms may very well be vulnerable to challenge (what isn't?), but it won't be because they are socially constructed. For if everything is social constructed as postmodernism tells us it is, the fact that something, say an academic norm, is socially constructed cannot constitute a criticism of it. The space for criticism exists only if some things are socially constructed and some others are not—are natural, free-standing, indubitably real—the very possibility postmodernism denies. So, as Alexander memorably says, “the view that our categories are socially constructed is an ‘is’ from which absolutely no

¹³ *Id.* at 5-8.

‘ought’ follows;”¹⁴ and, he adds, anyone who relies on postmodernism to fight his battles “has enlisted an unarmed soldier.”¹⁵

I would say the same of theory in general, postmodern or any other kind. A theoretical pronouncement like “everything is socially constructed” or “the measure of the truth of a statement is its correspondence with a piece of an independent reality” or “the measure of the truth of a statement is its coherence with other statements we already warrant as true” or “the meaning of a text is what its author or authors intend” gives you neither help nor direction in deciding how to act or what to say in a particular situation. Suppose you are debating whether it’s true that Edward Snowden’s actions harmed national security and someone says, “truth is a matter of correspondence with reality.” Will that be received as a helpful contribution to the conversation? I don’t think so. You cannot get from it to the truth or falsehood of any proposition about what Snowden did. It does not tell you how to gather the evidence that might be brought forward in support of any proposition. It does not do anything except declare (by implication) that any other account of truth is wrong. In short, it is a statement in another game, the game of high theory or philosophy, and while it might have weight and relevance in the precincts of that game, when it is transported into another game like the game of making real world decisions, it is, as Alexander says, “inert;” it does no work.

I have belabored the point because it allows me to respond to Fred Schauer’s contention that my view of academic freedom is theory-laden despite my long-time deprecation of theorizing.¹⁶ Well, it depends what you think a theory is and I don’t regard the statements of mine Schauer cites as theoretical, as being on the level of “truth is a matter of correspondence with reality” or its opposite. Schauer quite accurately rehearses my preferred picture of academic work: “[t]o be an academic is for Fish *not* to be a political activist, and not to be an actor in an ideological theat[re], and not to be a crusader for an ideological or social goal, even though one might be a crusader for one’s view of truth, academically defined.”¹⁷ As Schauer notes, this vision of academic life is “not the only one” in the field and is therefore contestable; what it will be contested by, however, is not some theory but an alternative account of what academics do when they are being academics and not something else. If I describe and, in describing, prescribe what a teacher who is being properly academic in the classroom does, have I offered a theory of teaching? No, I have offered an account of teaching as a distinctive practice—teaching not politics, teaching not

¹⁴ *Id.* at 6.

¹⁵ *Id.* at 7.

¹⁶ See Frederick Schauer, *Fish’s Five Theories*, 9 FIU L. REV. 21 (2013).

¹⁷ *Id.* at 24.

therapy, teaching not patriotic cheerleading, teaching not spiritual counseling—and if I am challenged it will be by an alternative account of what higher-education teaching involves, one that argues, perhaps, that the expression of political views, if labeled and flagged in advance, can legitimately be a component of a professor’s academic freedom. I reject that argument—it just gets politics in by the back door—but in rejecting it, I am not rejecting a theory; I’m rejecting a practice.

Or more precisely, I am rejecting the claim that you can be a political actor and a pedagogical actor at the same time. There is, to be sure, something strongly normative—not the same thing as theoretical—about my position, which Schauer under-describes as the view that “university education might be better with less political interference.”¹⁸ That I think is a weak statement. The stronger statement, the one I make throughout the book, is that university education inflected, from the outside or inside, by political interference is not really university education. Let politics in from any direction and education is no longer what is going on. So it is not quite right to say as Schauer does that what is involved in debates about higher education is a “policy determination.”¹⁹ The policies at odds are not just alternative recommendations of how to do something; they are recommendations about alternative things to do. One, mine, says, let’s do academic work; the other says, let’s be political. And again, neither is a theory.

Still the point, and the difference it marks between Schauer and me, is largely terminological. He inserts the word “theory” where I would use “account,” and in one place he acknowledges the interchangeability of the two for him: “[i]n order to make the ‘[i]t’s just a job claim’ . . . one needs an account—that is a theory—of just what a job is.”²⁰ If he means that we need a general account of what it means to do a job, I agree, if he means that we need a theory of jobs on the level of “truth is a matter of correspondence with the facts of the world,” I disagree. A general account of what a job is would provide a checklist that would allow one to enumerate the components of an activity and decide if it amounted to a job. A theory of what a job is—I cannot even imagine one; “jobness” is not the kind of thing one has theories about—would provide nothing.

I’m a bit surprised by Schauer’s fondness for “theory,” given that for most of the time he presents himself as being even more deflationary than I am. He is in a particularly deflationary mood when he discusses the term “academic freedom” and says of it, “it’s just a label.” By that he means

¹⁸ *Id.* at 26.

¹⁹ *Id.* at 26-27.

²⁰ *Id.* at 22.

(and I agree with him wholeheartedly) that we shouldn't think that "anything deeply moral is going on" when the label "academic freedom" is being invoked. All that is going on is that academics who (like anyone else) want "to do their jobs with a minimum of external interference"²¹ have figured out that attaching the word "freedom" to what they want increases their chances of getting it. Suppose "academic freedom" were replaced as a label with "optimal conditions for performing professorial work as defined by the professors." No one would be arguing that there is a constitutional right to such conditions or that they included the right and obligation of professors to act as international whistleblowers and monitor political conditions in this country or abroad. "Academic freedom" is a misleading label in that it suggests that something noble, abstract, and large is on offer. But it is a misleading label that has done effective rhetorical work for an academy that is always on the defensive; it is politically useful even though, properly understood, it does not have a political content. So while I wouldn't counsel giving up the phrase academic freedom, I would counsel those who use it against believing in it too strongly.

Speaking this way is in keeping with the deflationary style of my argument—I want to remove the high gloss and the sanctimony that more than occasionally attends invocations of academic freedom, invocations that, more often than not, are performed by professors who have been told either that they must do something they don't want to do or that they can't do something that they want to do, and have already done. What I'm saying in the book is that academic freedom is a narrow, even technical concept to be understood in terms of tasks, contracts, and working conditions, and that it is not, or should not be, the rallying cry of a disadvantaged, and supposedly virtuous, minority. Academic freedom is merely the (too grandiose) name given to the argument that because academic work has as its goal the discovery of truths about the natural and human world, academics must be free to go down any path that seems promising in their search for those truths; they must be free, that is, from external interference with their internal practices.

Robert Post disagrees, in part. He does agree with me that "scholars ought to conduct their scholarship according to values that are internal to the practice of scholarship,"²² but he does not think that the concept of academic freedom is "an essential aspect of the practice;"²³ rather, he contends, it is "primarily a value used by scholars to defend the autonomy of the scholarly enterprise;"²⁴ and given that "it is a concept designed to

²¹ *Id.* at 30.

²² Robert Post, *Why Bother with Academic Freedom?*, 9 *FIU L. REV.* 9, 11 (2013).

²³ *Id.*

²⁴ *Id.* at 12.

persuade those who are outside the scholarly profession, it can be effective only if it is convincing to non-scholars.”²⁵ Moreover, in order to be convincing to this constituency, academic freedom “must appeal to values . . . that will be external to the profession.” It would seem, then, that Post takes academic freedom even less seriously than I do; in his account, it is largely a public-relations device (of the kind I dismissed earlier) that has little to do with the internal structure of academic work.

In response, I would make two points. First, academic freedom is, in fact, part of the scholar’s understanding of what he or she does; it organizes the task by distinguishing it from other, non-academic tasks that do not require for their performance the latitude claimed (and to some extent enjoyed) by academics; and it identifies as part of the price of this latitude a restriction on the means available for the doing of the academic task. An academic, for example, knows that in the course of a scholarly dispute one should not employ *ad hominem* arguments, even though such arguments would be accepted (and even encouraged) in the context of other endeavors. An academic also knows that this restriction is not a matter merely of good manners; *ad hominem* attacks on an opponent’s position, rather than directly confronting the position with counter-evidence, make everything turn on the opponent’s character: you must not be persuaded by him because he cheats on his wife. That simply is not an academic argument, and the doctrine of academic freedom tells you why: the task is the identification of truth by means of impartial methods of inquiry, and *ad hominem* arguments are the every antithesis of impartiality; because the path of truth’s discovery must be left open—must be free to find its own course—the performance of the task must not involve arguments and strategies that close it down, and that is surely what *ad-hominem* arguments do. In short, rather than being external to everyday academic practice, academic freedom is constitutive of, is “an essential aspect of,” that practice; it tells you what is to be done, how to do it, and how not to do it.

My second point in response to Post’s relegation of academic freedom to a public-relations strategy is to observe that its nature and scope are hotly contested *within* the practice. Post wants to make a sharp distinction between the norms governing academic work on the inside, and the academic freedom arguments directed to outside constituencies. But one’s understanding of what the internal norms are will be a function, in large part, of one’s understanding of what academic freedom is. The disputes I report on and engage with in the book are *simultaneously* disputes about the nature of academic freedom and academic work. Those who argue, as Judith Butler does, for a more expansive, less narrowly liberal view of

²⁵ *Id.* at 13.

academic freedom are at the same time arguing for a more expansive, less narrowly liberal view of what academic work does. The dispute about whether academic freedom includes the freedom to actively debate political issues with a view to resolving them is, again at the same time, a dispute about what can properly (i.e. academically) go on in a classroom.

Post has two other major points. The first is that by exiling goals and values external to the internal academic enterprise, I deprive myself (and the profession) of a justification based on the contribution the academy makes to constitutional goals, “VERSIONS OF ACADEMIC FREEDOM can have very little to say about constitutional principles of academic freedom.”²⁶ That is because I don’t think there are any. (I give the same answer to Saby Ghoshray’s question, “[w]hy have the aspiratory ideals of free speech become extrinsic to the core values of academic freedom?”²⁷ Because they always have been.) I understand the attractiveness of tying academic values to constitutional values, but I remain unpersuaded by the efforts, including Post’s, to do so. The underlying question is posed by Andrew Koppleman: is there anything intrinsically good about inquiry and its orientation?²⁸ A “yes” answer, says Koppleman, would mean that such inquiry “is something that society ought to recognize and promote,”²⁹ and he identifies the intrinsic good of liberal education with “the capacity to reflect on what one is doing.”³⁰ No doubt reflecting on what one is doing is good for some people in some circumstances, but there are other circumstances in which reflection would be out of place and distracting, and there are some people for whom reflection is uncongenial and they are none the worse for that. Promoting and protecting reflection would amount to putting society (and perhaps the Constitution) behind philosophy as a national priority. That won’t happen, and I don’t think it should happen.

A better defense of academic work is put forward by Jack Sammons when he says that every practice “seeks to foster within the broader culture the ability to appreciate what the practice has on offer.”³¹ That is, a practice does not win public support by having it guaranteed in advance by a normative argument; rather, it does its work, sings its song, and hopes that many who hear it will be moved to join in. “Try it, you’ll like it” is the message, not, “this is an intrinsic good and you are obliged by virtue or by law to ensure its flourishing.” The practice’s flourishing is its own

²⁶ *Id.* at 10.

²⁷ Saby Ghoshray, *Narrative of Academic Freedom Post-9/11: Deconstruction via Symmetry, Corporatization and American Exceptionalism*, 9 FIU L. REV. 47, 48 (2013).

²⁸ Andrew Koppleman, *Stanley Fish as Lord Grantham*, 9 FIU L. REV. 57 (2013).

²⁹ *Id.* at 58.

³⁰ *Id.*

³¹ Jack L. Sammons, *The Common Good of Practices*, 9 FIU L. REV. 69, 69 (2013).

responsibility, a responsibility it meets “through its elaboration” by “initiating people into its ways of thinking,” by, in other words, “teaching.” As academics we have to take our chances, and the best chance we have, I would argue, is to do what we do—pursue disinterested inquiry with no concern for any practical outcomes or applications—and trust (it may be a trust misplaced) that in the end enough people find it compelling.

Post’s third point is that this description of academic practice as something walled off from real world payoffs fails “to account for the breadth and diversity of the scholarly practices that actually characterize the modern university.”³² He has in mind both departments, like political science which, he says, are properly engaged in formulating a position “on whether the Israeli occupation of Palestine is or is not legitimate” and “practical disciplines like medicine, dentistry or nursing, which study the best ways to intervene in the world in order to improve it.” These I think should be distinguished. Political science departments are dedicated to the *study* of situations like the Israeli occupation of Gaza; it is not their job, nor the job of their members, to formulate policy or to declare which of the parties to a dispute is right or wrong. To be sure, professors of political science can hire themselves out as advisors and consultants, and in those roles they might very well participate in the formulation of policy and lend their analytical skills to a partisan strategy. But when they are doing that they are no longer being academics, and when they return to their departments, partisan advocacy must be put to the side.

As for “practical disciplines” like medicine and, yes, law, insofar as they seek to “intervene in the world in order to improve it,” they are not academic units; they are job training programs, trade schools, and change engines and consequently they do not come under the protection of academic freedom. Brian Gilmore is absolutely correct when he observes that my argument is not friendly to the claims and aspirations of clinicians in law schools.³³ He implies that I am on the wrong side of history because traditional teaching methods are under siege from those who call for “legal training of students that focuses more on actual lawyer-skills training.”³⁴ He may be right that clinical education, which is, he says, “highly political in nature” and subject to the “judgment and scrutiny” of outside constituencies, will be central “to the trade’s immediate future.”³⁵ The conclusion, however, is not, as he would have it, to “expand/and or reconfigure the very notion of ‘academic freedom,’”³⁶ but to recognize that

³² Post, *supra* note 22, at 10.

³³ Brian Gilmore, *Clinical Legal Education and Academic Freedom*, 9 FIU L. REV. 51 (2013)

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

if law schools continue to move in that direction, “academic” will not be an adjective they merit.

Scott A. Anderson implicitly reaches that conclusion when he observes that the “law professor’s guild has determined that not only contemplative, but also practical knowledge and skills must be imparted to its students.”³⁷ Therefore, he concludes, according to Fish, “being a law professor is not . . . an academic job” because “it is a job that prepares its students to enter and to succeed in another profession: the profession of law.”³⁸ Even doctrinal professors “who teach bar examination subjects (such as Contracts, Torts and Criminal Procedure) would have to be excluded” given that “they would be imparting the knowledge and skills necessary to pass the bar exam, a motive extrinsic to ‘advancing knowledge and discovering truth.’”³⁹ That’s not quite right. It depends on whether the contracts or torts professor is teaching the structure, history, and normative foundations of the subject or is, instead, “teaching to the test,” making decisions about assignments and discussion topics on the basis of what he believes will be the bar-exam questions. If it is the first, the professor is still an academic doing an academic job; if it is the second, the professor is the equivalent of a drill sergeant. It is a question, as Anderson recognizes, of motive. It may be the case that when teaching the subject in an academic rather than a “practical” way, practical knowledge—knowledge useful to bar-exam takers—will be imparted, but that will not have been the professor’s primary purpose. (It may be the purpose motivating a student’s choice to take a course, but that is another, and irrelevant, matter).

Purpose, as Joshua Youngkin sees, is the engine of my analysis.⁴⁰ When thinking about academic work and academic freedom everything depends on it. This is what John K. Wilson misses when he finds problems with my “testing professors for the political content of their work.”⁴¹ That is precisely what I do not do. No content, political or otherwise, is out of bounds; what is out of bounds is any content that is made the vehicle of a political purpose. I do not reject politics as the subject of a professor’s work. I reject politics as the form of a professor’s action. The question is not, what are you talking about—you can talk about anything so long as there is something interestingly analytic to say about it—the question is, what are you trying to do by talking about it? Are you trying to add to the sum of knowledge, or are you trying to get your students (or your readers)

³⁷ Scott A. Anderson, *We Represent the Law Prof Guild*, 9 FIU L. REV. 33, 33 (2013).

³⁸ *Id.*

³⁹ *Id.* at 34.

⁴⁰ See Joshua Youngkin, *Fish on Purpose*, 9 FIU L. REV. 81 (2013).

⁴¹ John K. Wilson, *Stanley Fish and the Politics of Academic Freedom*, 9 FIU L. REV. 79 (2013).

to assume a political stance preliminary to their taking a political action? If you're doing the one, you're being an academic; if you're doing the other, you're not, and no question of your *academic* freedom could possibly arise.

Ernest Weinrib says that I am not entitled to my position as just stated, because I refuse to claim any normative status for it.⁴² That is, while I insist on the autonomy of the academic enterprise and the importance of keeping it free of politics, I also insist that no realm can be free of politics in a strong sense. Weinrib says that I cannot “hold both of these incompatible positions.”⁴³ I think I can because they are asserted at different levels of generality. When I say that no realm of organization or thought can be free of politics in a strong sense, I am speaking of the unavailability of a perspective or point of view that is not hostage to controversial substantive propositions: the academy I envision and argue for—the academy that enforces a distinction between disinterested contemplation and action—is undergirded by assumptions and values one might reasonably contest, and is, therefore, in a very general sense, political; it did not come down to us from God or from some Platonic/Aristotelian identification of universals. But, as Weinrib points out, this notion of the political is so broad that it “excludes nothing” and disables the making of distinctions; and, as he says, “[t]hinking involves distinguishing one thing from another.”⁴⁴

Yes it does, and that is why the mantra “everything is political” is at once true and trivial. After you have run it up the flagpole, there is nothing you can do with it (it is another version of Alexander’s inert and unarmed soldier); and if you want to do something you have to put it to one side. That’s what I do when I say in effect, okay, in a very general sense alternative conceptions of the academy and academic freedom are political, but within that very general and toothless category of the political, there are on-the-ground differences that are real—they imply different forms of action and judgment—and we can sort them out and affirm some and reject others. The difference I am interested in is the difference between an academy where the task is to analyze ideas and propositions and an academy where analysis is valuable only insofar as it leads to or provides support for an action designed to alter the world. I believe that I can at once maintain the reality of that difference, catalog the gains and losses that accompany the two visions of academic life, and *still*, in a more theoretical vein, affirm the inescapability of politics on a level so general that it doesn’t matter.

My question is, do you want academic decisions and partisan political

⁴² Ernest Weinrib, *Academic, Not Political*, 9 FIU L. REV. 77 (2013).

⁴³ *Id.*

⁴⁴ *Id.*

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decisions to be discontinuous—basically different things—or do you want them to bleed into each other? (Do you want, for example, decisions to invite speakers to a conference to turn on the nationality of the candidates?) My book answers that nitty-gritty question by: (a) looking at the practices of the academy; (b) identifying the internal good that animates them and makes them intelligible; and (c) arguing that the internal good will be lost if we do not maintain the distinctiveness of the academic task, a distinctiveness that rests on its insulation from politics in the small “p” partisan sense. I was taught how to do that by Weinrib, who explains in his brilliant article *Legal Formalism: On the Immanent Rationality of Law*, that the first step in intellectual work is to identify the “immanent intelligibility” of whatever we are trying to understand, the “determinate content” that makes it a “this” not a “that.”⁴⁵ He asks, ‘what is the thisness of tort law?’ I ask, ‘what is the thisness of academic work?’ He believes, I think, that in coming up with an answer, he has uncovered an intrinsic normative essence. I believe that in coming up with an answer, I have pin-pointed the constituent features of a form of social organization that could have been otherwise, but is in its present form worth preserving because of the activity—disinterested inquiry—it makes possible. He says that he likes my conclusions; they follow from his premises.

⁴⁵ See Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 Yale L.J. 949 (1988).