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## Is Free Speech an Academic Value? Is Academic Freedom a Constitutional Value?

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## IS FREE SPEECH AN ACADEMIC VALUE? IS ACADEMIC FREEDOM A CONSTITUTIONAL VALUE?

*Daniel Gordon\**

Stanley Fish is a leading commentator on the First Amendment. But when it comes to the topic of academic freedom, he is in a class by himself. “I am announcing the inauguration of a new field—Academic Freedom Studies,” he declared in *Versions of Academic Freedom*.<sup>1</sup> Before Fish, scholars generally celebrated the invention of the modern doctrine of academic freedom by the American Association of University Professors in the early twentieth century. In contrast, Fish construes academic freedom as ambiguous—not as a rising arc of liberty but as a bone of contention in the campus culture wars. Chapter three of *The First* is entitled “Why Freedom of Speech is Not an Academic Value.” It is worth isolating this chapter in order to do justice, in a brief review, to at least one component of Fish’s superb book. I will start by explaining how Fish insists on a stark separation between academic freedom and the First Amendment. I will then contrast how Fish de-constitutionalizes academic freedom with how William W. Van Alstyne portrayed academic freedom as a subset of the First Amendment.

Fish underscores that free speech is not in fact a pervasive social value: “no one really believes in free speech.”<sup>2</sup> A commitment to achieving excellence and getting things done in any professional sphere involves limits on speech. A nurse, as Fish notes, cannot lobby for higher wages during an operation.<sup>3</sup> For Fish, the university is much like an operating room. The university’s distinctive function is to support research and to expose students to the questions and findings of the disciplines. The ethos of the university is incompatible with many forms of speech, such as the promotion of political ideology in the classroom—an object of attack throughout Fish’s *Save the World on Your Own Time*<sup>4</sup>, and the target of criticism at the end of Chapter three of *The First*.

Nor is political advocacy in the classroom protected by academic freedom. For academic freedom, as Fish understands it, is the freedom to

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<sup>1</sup> STANLEY FISH, *VERSIONS OF ACADEMIC FREEDOM: FROM PROFESSIONALISM TO REVOLUTION* 6–7 (2014) [hereinafter FISH, *VERSIONS OF ACADEMIC FREEDOM*].

<sup>2</sup> STANLEY FISH, *THE FIRST: HOW TO THINK ABOUT HATE SPEECH, CAMPUS SPEECH, RELIGIOUS SPEECH, FAKE NEWS, POST-TRUTH, AND DONALD TRUMP* 35 (2019).

<sup>3</sup> FISH, *VERSIONS OF ACADEMIC FREEDOM*, *supra* note 1, at 77.

<sup>4</sup> STANLEY FISH, *SAVE THE WORLD ON YOUR OWN TIME* (2008).

engage in activities that are internal to one's discipline. Fish, then, does not see academic freedom as translatable into First Amendment doctrine. The First Amendment does not give an extra margin of freedom to academics as compared to other citizens. However, Van Alstyne purports to show how "academic freedom has found a niche in the hard law of the Constitution."<sup>5</sup> A survey of Van Alstyne's account of how academic freedom figures in Supreme Court discourse will put us in a position to ask probing questions about Fish's effort to distinguish academic freedom and the First Amendment.

The term "academic freedom" made "its first express Supreme Court appearance,"<sup>6</sup> as Van Alstyne puts it, in Justice Douglas's dissent<sup>7</sup> in *Adler v. Board of Education*. Later in the same term Justice Frankfurter's concurrence in *Wieman v. Updegraff* solidified, according to Van Alstyne, "the identification of academic freedom protection as a subset of first amendment law."<sup>8</sup> Both Douglas and Frankfurter referred to the educational sphere as a zone in which free speech should have an extra margin of liberty. At issue in these cases was state legislation which scrutinized educators on the basis of their political allegiance. Justice Douglas spoke of the public school as "the cradle of our democracy."<sup>9</sup> Imagining a school in which students, parents, and outsiders policed the political ideology of teachers, he described the repressive atmosphere that would ensue:

What was the significance of the reference of the art teacher to socialism? Why was the history teacher so openly hostile to Franco Spain? Who heard overtones of revolution in the English teacher's discussion of the Grapes of Wrath? What was behind the praise of Soviet progress in metallurgy in the chemistry class?<sup>10</sup>

And he added, "There can be no real academic freedom in that environment . . . . The teacher is no longer a stimulant to adventurous thinking; she becomes instead a pipeline for safe and sound information."<sup>11</sup> In other words, the classroom is not the same as the operating room.

In *Wieman*, Frankfurter wrote the following—the italics are Van Alstyne's:

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<sup>5</sup> William W. Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Review*, 53 L. & CONTEMP. PROBS. 79, 81 (1990).

<sup>6</sup> *Id.* at 105.

<sup>7</sup> *Adler v. Bd. of Educ.*, 342 U.S. 485, 508 (1952) (Douglas, J., dissenting).

<sup>8</sup> Van Alstyne, *supra* note 5, at 107–08; *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring).

<sup>9</sup> *Adler*, 342 U.S. at 508.

<sup>10</sup> *Id.* at 510.

<sup>11</sup> *Id.*

The Fourteenth Amendment protects all persons, no matter what their calling. *But, in view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of teachers, brings the safeguards of those amendments vividly into operation . . . . It has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice.*<sup>12</sup>

Of the many subsequent cases Van Alstyne discusses in which the Court acknowledged academic freedom to be a subset of the First Amendment, the one posing the deepest challenge for Fish is *Bakke*. The landmark affirmative action case considerably modified the scope of academic freedom.<sup>13</sup> First, because the racial background of a student is not in itself an academic consideration in a traditional sense. Secondly, because Justice Powell was clear that what diversity enhances is the quality of the university's *social* environment rather than its specifically academic functions. To illustrate "the benefits derived from a diverse student body,"<sup>14</sup> Justice Powell cited Princeton president William G. Bowen. Bowen affirmed that "a great deal of learning occurs informally"—in "unplanned, casual encounters" with roommates, fellow workers in the library, and teammates. The experience of diversity in these encounters improves "personal growth," according to Bowen.<sup>15</sup> In *Bakke*, then, academic freedom is the right of university administrators to decide what is conducive to the moral and social development of the students.

It would be fascinating to hear Fish respond to the line of cases elicited by Van Alstyne, a line which seems to prove that academic freedom has been constitutionalized. Fish might sustain his distinction between academic freedom and constitutional law by noting that most of the cases pertain to institutional academic freedom as opposed to individual academic freedom. That is, the Supreme Court has protected the right of universities to function on their own, but universities may well be free to restrict the speech of their faculty for professional reasons—for example, to ban political advocacy in the classroom, as Fish has advised universities to do. The problem, however,

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<sup>12</sup> Van Alstyne, *supra* note 5, at 108 (citing *Wieman*, 344 U.S. at 195 (Frankfurter, J., concurring)).

<sup>13</sup> Van Alstyne includes *Bakke* among those cases in which the Supreme Court recognizes academic freedom as a First Amendment concern. But the analysis of *Bakke* here is my own. Van Alstyne was reluctant to acknowledge that *Bakke* changed the connotation of academic freedom in any way. See Van Alstyne, *supra* note 5, at 137.

<sup>14</sup> *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 n.48 (1978).

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

is that in the course of defending institutional academic freedom, the Court, since *Adler*, has repeatedly deployed a rhetoric that configures the university as a special free speech zone.

Additionally, *Bakke* inscribed, under the rubric of academic freedom, pursuits that are not academic. *Bakke* constitutionalizes and thus considerably enhances the prestige of that area of the university known as Student Affairs and Campus Life. I am not sure if the important point here is that *Bakke* wreaks havoc with Fish's conception of academic freedom, or if Fish's conception should make us concerned about how *Bakke* configures academic freedom. Fish appears to be mistaken about academic freedom not being a constitutional value, but he helps us to see that we might be better off if it weren't.