

12-15-2015

The Social Value of Academic Freedom Defended

J. Peter Byrne

Georgetown University Law Center, byrne@law.georgetown.edu

Follow this and additional works at: <https://www.repository.law.indiana.edu/ilj>



Part of the [First Amendment Commons](#), and the [Scholarship of Teaching and Learning Commons](#)

Recommended Citation

Byrne, J. Peter (2015) "The Social Value of Academic Freedom Defended," *Indiana Law Journal*: Vol. 91 : Iss. 1 , Article 2.

Available at: <https://www.repository.law.indiana.edu/ilj/vol91/iss1/2>

This Symposium is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in *Indiana Law Journal* by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact rvaughan@indiana.edu.



JEROME HALL LAW LIBRARY

INDIANA UNIVERSITY
Maurer School of Law
Bloomington

The Social Value of Academic Freedom Defended

Erratum

Note: This Early Winter issue replaces the normal Fall issue of the Indiana Law Journal.

The Social Value of Academic Freedom Defended

J. PETER BYRNE*

In his recent book, *Versions of Academic Freedom: From Professionalism to Revolution*,¹ Stanley Fish renewed his arguments for an “it’s just a job” account of academic freedom, begun in his 2008 book, *Save the World on Your Own Time*.² He claims that academic freedom consists of nothing more than the conditions necessary to follow the established criteria for scholarship and teaching within each discipline.³ He complains chiefly against the invocation of academic freedom to protect or glorify political advocacy by academics.⁴ There is a lot in Fish’s account to admire and agree with. The appropriate sphere of academic freedom needs to be distinguished from general First Amendment rights enjoyed by public employees and from standard teaching or scholarship, which can and should be sanctioned.⁵ But he also continues to deny that academic freedom fosters any important public values broader than the interests of academics themselves, a position I view as both incoherent and disastrous for the preservation of academic freedom.

Fish’s new book expressly disagrees with criticisms I have offered of his arguments in the past.⁶ While a parochial dispute between Fish and me hardly merits a reader’s time, our disagreement raises squarely the social value of academic freedom, a value emphatically affirmed by the American Association of University Professors’ seminal 1915 Statement,⁷ which is the single most important document

* Professor of Law, Georgetown University Law Center.

1. STANLEY FISH, *VERSIONS OF ACADEMIC FREEDOM: FROM PROFESSIONALISM TO REVOLUTION* (2014).

2. STANLEY FISH, *SAVE THE WORLD ON YOUR OWN TIME* (2008).

3. *Id.* at 81 (“My deflationary definition of academic freedom is narrowly professional rather than philosophical, and its narrowness, I contend, enables it to provide clear answers to questions . . . blurred by more ambitious definitions.”).

4. In *Versions of Academic Freedom*, Fish presents, as an illustrative case study, an email sent by a professor to his students in a class on the sociology of globalization, condemning in strong terms the Israeli occupation of Gaza. FISH, *supra* note 1, at 8–9. Fish concludes:

What was inappropriate was [the professor’s] treating the topic not as a matter of academic study but as the occasion for parading a political judgment that immediately became the course’s orthodoxy. . . . Inquiry the conclusion of which is ordained before it begins is not academic; it is something else, and because it is something else it does not deserve the protection of academic freedom.

Id. at 18.

5. See *infra* notes 11–24 and accompanying text. I have addressed these issues in a series of articles dating back twenty-five years, beginning with J. Peter Byrne, *Academic Freedom, A “Special Concern of the First Amendment,”* 99 *YALE L.J.* 251 (1989). This Article will not engage with the issue of how constitutional academic freedom should be conceptualized legally, but the reader should know that I advocate that constitutional academic freedom protect primarily the good faith academic decisions of universities, so long as they incorporate appropriate peer review. See *id.* at 311–39.

6. See J. Peter Byrne, *Neo-orthodoxy in Academic Freedom*, 88 *TEXAS L. REV.* 143, 161–63 (2009) (reviewing MATTHEW W. FINKIN & ROBERT C. POST, *FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM* (2009) and FISH, *supra* note 2).

7. Comm. on Academic Freedom & Academic Tenure, Am. Ass’n of Univ. Professors,

on academic freedom in the United States and the subject of the panel discussion for which this essay was prepared.⁸ But the social value of academic freedom is now perhaps more questioned than at any time since before World War II. This essay attempts to further defend and clarify the social value of academic freedom and offer some examples of its vital role in preserving a liberal polity.

Fish and I agree about the core meaning of academic freedom: faculty members should be largely free in pursuing their scholarship and teaching subject only to evaluation on academic grounds and primarily by peers.⁹ Academic freedom, as described in the 1915 Statement, differs significantly from a general right of free speech. The authors of the 1915 Statement tied appropriate freedom to the function of academic work:

[Professors require] freedom to perform honestly and according to their own consciences the distinctive and important function which the nature of the profession lays upon them.

That function is to deal at first hand, after prolonged and specialized technical training, with the sources of knowledge; and to impart the results of their own and of their fellow-specialists' investigations and reflection, both to students and to the general public, without fear or favor.¹⁰

Thus, the essence of academic work is the careful employment of intellectual methods appropriate to a discipline and the subjecting of such work to evaluation and criticism by disciplinary peers. The threat to academic work comes from interference by nonacademics, whether trustees or government officials. Such interference derails peer consideration and debate of new work, frustrating the sorting of truth from error, or of accounts that more fully fulfill disciplinary ideals from those that do so less successfully.

The special character of academic freedom can be seen in contrast to the general right of free speech enjoyed by all citizens. The core of free expression is that the government cannot penalize speakers for the content of their speech regardless of how socially pernicious or inane it may seem.¹¹ But within the system of academic

General Report of the Committee on Academic Freedom and Academic Tenure, 1 BULL. AM. ASS'N U. PROFESSORS 15 (1915).

8. The panel was held on January 4, 2015, at the 2015 Annual Meeting of the Association of American Law Schools. It was entitled "Academic Freedom for the Next 100 Years," and reflected on the continuing relevance of the 1915 Statement. The panel followed immediately after Dean Robert Post's luncheon speech. Robert C. Post, Dean, Yale Law Sch., Academic Freedom and Legal Scholarship, Address Before the Association of American Law Schools 2015 Annual Meeting (Jan. 4, 2015).

9. "What is crucial is . . . whether the classroom, the research laboratory, personnel decisions, and curricular decisions are insulated from the illegitimate pressures brought to bear by donors, grantors, and political operatives." Fish, *supra* note 1, at 41.

10. Comm. on Academic Freedom & Academic Tenure, *supra* note 7, at 25.

11. The Supreme Court has repeatedly proclaimed that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972).

freedom, it is commonplace that faculty can be penalized when peers judge that their scholarship or teaching fall below professional standards:¹² judgments that First Amendment cases in other contexts condemn as “content discrimination.”¹³ Indeed, without this collective judgment, the distinctive value of scholarship as tested knowledge, the systematic efforts to distinguish truth from falsehood and better from weaker normative judgments, would be lost.¹⁴ Our scholarship would essentially resemble blog posts, but with more footnotes. Academic freedom protects this disciplined system of scholarship and teaching.

A vivid example of this distinction is presented by the actions of the University of Colorado against Ward Churchill, then a tenured professor and chair of the Ethnic Studies Department at that school, after he made himself notorious by writing a nonacademic essay comparing the victims of the World Trade Center destruction to Adolph Eichman, a chief manager of the Holocaust in Nazi Germany, who was executed as a war criminal.¹⁵ A faculty committee that investigated the case concluded that Churchill’s writings on this subject were protected against reprisal by the First Amendment.¹⁶ That seems right, because the First Amendment generally protects against employer reprisals for the nonprofessional speech of all public employees, not just professors, when they speak as citizens on a matter of public importance.¹⁷ This aspect of the First Amendment, in my view, is entirely distinct from academic freedom, which deals only with what might be called professional speech, primarily teaching and scholarship.¹⁸

However, the same faculty investigation surfaced allegations that Churchill had otherwise committed egregious acts of academic fraud in his scholarship. A different faculty committee investigated and found several serious instances of academic fraud.¹⁹ The chancellor of the university issued a notice to dismiss Churchill for cause and an evidentiary hearing, at which Churchill, as represented by counsel, was held before the Faculty Senate Committee on Privilege and Tenure. The Committee unanimously found that the university had shown by clear and convincing evidence that Churchill’s academic conduct fell below the minimum standards for academic

12. See Byrne, *supra* note 5, at 258–59.

13. See, e.g., *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995).

14. See ROBERT C. POST, *DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE*, 61–68 (2012).

15. *Churchill v. Univ. of Colo.*, 285 P.3d 986, 991 (Colo. 2012) (en banc).

16. *Id.* at 992.

17. See *generally* *Garcetti v. Ceballos*, 547 U.S. 410 (2006) (holding that when public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline); *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968) (holding that statements made by public officials on matters of public concern must be accorded First Amendment protection).

18. See Byrne, *supra* note 6, at 163–70.

19. “Among the violations that the committee found Churchill had committed were falsification, fabrication, plagiarism, failure to comply with established standard regarding author names on publications, and a ‘serious deviation from accepted practices in reporting results from research.’” Scott Jaschik, *The Ward Churchill Verdict*, *INSIDE HIGHER ED.* (May 16, 2006), <https://www.insidehighered.com/news/2006/05/16/churchill> [<https://perma.cc/6HWD-CE9Q>].

integrity.²⁰ Although a bare majority of the committee recommended a lesser penalty, the university terminated Churchill's employment.²¹

Churchill sued, claiming his dismissal was a violation of the First Amendment, arguing essentially that his termination was retaliation for his constitutionally protected speech. A jury found for Churchill but awarded him only one dollar nominal damages; the judge denied all equitable remedies, including reinstatement.²² Churchill pursued an appeal to the Colorado Supreme Court, which affirmed.²³ The court rejected the claims of retaliatory investigation on the grounds that the Regents of the University enjoyed qualified immunity, so they could not be held liable for an action that was not clearly unconstitutional.²⁴

The Churchill saga illustrates two important principles. First, it well illustrates the sharp distinction between the protections offered by the First Amendment to a faculty member's speech outside their scholarship and teaching, and the role of academic freedom in protecting the truth values of scholarship. When speaking informally on a matter of public concern, Churchill could rely on robust constitutional protections regardless of how reckless or idiotic his views were. But his scholarly work could be held to reasonable standards of honesty and professional care as determined by his academic peers. Not only does enforcement of such academic norms by a university not violate the First Amendment, but in my view, such institutional action on academic grounds is protected by the First Amendment. Academic freedom is an essential component of the institutional organization of learning and scholarship; it promotes the reliability of scholarship through balancing individual professional creativity and collective scrutiny. I have long argued that the First Amendment should safeguard academic freedom by shielding good faith academic judgments by universities against interference from other governmental actors.²⁵ While the

20. "[The] report found that Churchill had committed three acts of evidentiary fabrication by ghostwriting and self-citation, two acts of evidentiary fabrication, two acts of plagiarism, and one act of falsification in his academic writings." *Churchill*, 285 P.3d at 993–94.

21. *Id.* at 994.

22. *Id.* at 996.

23. The Supreme Court described the trial judge's reasoning on reinstatement before affirming:

The trial court reasoned that forcing the University to reinstate Churchill would result in a substantial distraction that would negatively impact the University's core mission to educate its students and advance academic and scientific research. In his trial testimony, Churchill stated that he disagreed with the University's standards of scholarship. The trial court found that this made it especially likely that reinstatement would only serve to risk further instances of academic misconduct.

Given that the University committees that investigated Churchill found that he had engaged in repeated, flagrant acts of academic misconduct and dishonesty, the trial court also stated that reinstatement would greatly undermine the University's efforts to hold its students and faculty to the highest standards of personal and academic integrity.

Id. at 1008.

24. *Id.* at 1009–11.

25. See, e.g., J. Peter Byrne, *Constitutional Academic Freedom After Grutter: Getting Real About the "Four Freedoms" of a University*, 77 U. COLO. L. REV. 929 (2006); Byrne,

Colorado courts did not explicitly invoke a First Amendment privilege of institutional academic freedom, its more technical holdings embody deference to the university's academic judgment, based on peer review, and the safeguarding of the integrity of scholarship.

Integral to any discussion of why or how the First Amendment protects this collective system of expression peculiar to highly educated faculty members must be an understanding of its value to society at large. The eminent drafters of the 1915 Statement had little doubt about the value of academic freedom: they saw scholarly methods producing new knowledge and fostering habits of thought necessary for social progress.

An inviolable refuge from [the] tyranny [either of an autocratic ruler or of public opinion] should be found in the university. It should be an intellectual experiment station, where new ideas may germinate and where their fruit, though still distasteful to the community as a whole, may be allowed to ripen until finally, perchance, it may become a part of the accepted intellectual food of the nation or of the world. Not less is it a distinctive duty of the university to be the conservator of all genuine elements of value in the past thought and life of mankind which are not in the fashion of the moment. . . . One of its most characteristic functions in a democratic society is to help make public opinion more self-critical and more circumspect, to check the more hasty and unconsidered impulses of popular feeling, to train the democracy to the habit of looking before and after.²⁶

The drafters thus relied upon a capital "P" Progressive faith in the value of disinterested, expert analysis for democratic governance. Despite several waves of postmodern skepticism, the kernel of this view still prevails within a pragmatic and ethical epistemology.²⁷ Disciplinary knowledge provides society its most reliable pool of knowledge about the natural and social world. I cannot determine whether smoking causes cancer by looking at cigarettes; I need to rely on the tested inquiries of scientists. This is true even though, and even because, disciplinary knowledge remains subject to critique and revision. The capacity of the university to generate such reliable knowledge provides the basis for the social value of academic freedom. A liberal society needs to appreciate and act upon the difference between knowledge and opinion, a striving that goes back at least to Socrates. Robert Post has given a sophisticated contemporary rendition of this claim: "Democratic competence refers to the cognitive empowerment of persons within public discourse, which in part depends on their access to disciplinary knowledge. Cognitive empowerment is necessary both for intelligent self-governance and for the value of democratic

supra note 5, at 311–17, 331–39; see also Aziz Huq, *Easterbrook on Academic Freedom*, 77 U. CHI. L. REV. 1055, 1066–67 (2010) ("[T]he persistence of the university as a going intellectual concern rests partially on sustained and committed application of professional standards.").

26. Comm. on Academic Freedom & Academic Tenure, *supra* note 7, at 32.

27. See J. Peter Byrne, *The Threat to Constitutional Academic Freedom*, 31 J.C. & U.L. 79, 124–29 (2004); David M. Rabban, *Can Academic Freedom Survive Post-Modernism?*, 86 CALIF. L. REV. 1377 (1998) (book review).

legitimation.”²⁸ By contrast, Stanley Fish rejects any attempt to justify academic freedom on any values extrinsic to the academy: “[A]cademics do not set out to aid democracy or help build the economy or produce good citizens; these things may contingently happen, but achieving them is not the point. . . . [T]hey cannot be cited as the justification for an activity that did not have them in contemplation.”²⁹

Admitting that his views are “deflationary,”³⁰ Fish criticizes Post and me, among others, for arguing that academic freedom supports democracy.³¹ Central to Fish’s academic “minimalism”³² seems to be an epistemological skepticism that, he thinks, renders obsolete the 1915 Statement’s claim that academic freedom advances the public interest by providing expertise for public decision making. In essence, he fears that the distance between any given disciplinary standard of quality and an external criterion of truth or reason leaves academic freedom vulnerable to dissolution into mere politics.³³ While admiring many aspects of Fish’s writing on academic freedom, I believe, and have written, that here he is dangerously wrong.³⁴ Academic freedom is essential to a liberal society and deserving of constitutional protection because scholarship and teaching governed by disciplinary norms represents modernity’s best secular effort at separating truth from falsehood.

Before pursuing more abstract arguments, let’s consider a recent example. The value of academic freedom to governance can be seen clearly within a topic of importance: climate change. Notoriously, loud voices still deny that humans are contributing crucially to global warming, despite the scientific consensus that human activity, primarily the emission of carbon, methane, and other so-called greenhouse gases, contributes importantly to an unprecedented rise in global temperatures, with consequences that may be disastrous for many human societies.³⁵ A few deniers are scrupulous skeptics, but most speak out of ignorance or the meretricious protection of vested interests.³⁶ That’s all part of the difficult, predictable politics of climate

28. POST, *supra* note 14, at 33–34. A pithier expression lies in the well-known aphorism of Daniel Patrick Moynihan: “Everyone is entitled to his own opinion but not to his own facts.” Steven R. Weisman, *Introduction* to DANIEL PATRICK MOYNIHAN, DANIEL PATRICK MOYNIHAN: A PORTRAIT IN LETTERS OF AN AMERICAN VISIONARY 2 (Steven R. Weisman ed., 2010).

29. FISH, *supra* note 1, at 48.

30. *Id.* at 20.

31. “An argument like Post’s or Byrne’s succeeds in doing that [i.e., persuading nonacademics that academic privileges make sense] but ends up abandoning an internal justification of academic freedom, a justification that flows from the nature of the task rather than from the contribution the task makes to other tasks.” *Id.* at 49.

32. *Id.*

33. FISH, *supra* note 2, at 157–58; *see also* STANLEY FISH, THERE’S NO SUCH THING AS FREE SPEECH AND IT’S A GOOD THING, TOO 238–42 (1994).

34. Byrne, *supra* note 6, at 157–58.

35. *See generally* 2014 *State of the Climate: Highlights*, CLIMATE.GOV (July 14, 2015), <https://www.climate.gov/news-features/understanding-climate/2014-state-climate-highlights> [<https://perma.cc/4C7U-DNEA>] (providing links to summaries of the present scientific conclusions regarding topics such as “carbon dioxide” and “sea level”).

36. *See, e.g.*, Douglas Fischer, “Dark Money” Funds Climate Change Denial Effort, SCI. AM. (Dec. 23, 2013), <http://www.scientificamerican.com/article/dark-money-funds-climate-change-denial-effort/> [<http://perma.cc/8H8S-HDYG>]. Recent investigations have shown the

change, reflecting the large changes in social behavior and economic distribution that a large reduction of emissions will entail. What gives one hope is the patient work of independent, largely academic scientists working toward the best understanding of how the atmosphere and oceans are changing and why. Method and peer review are essential, as can be seen in the careful procedures for reports by the Intergovernmental Panel on Climate Change.³⁷

The value of this work for society to understand what is happening and how to address it seems palpable. This is not just a story about academic disciplines following their own protocols just because they do, but about methods of investigation that aim to, and do, give us the best understanding of complex phenomena that actually exist in the world and will impact the future of humanity. It is significant that the scientists examining climate change work in several disciplines, and their work is subject to critique within each discipline, but the composite of their work creates overall understanding of climate change and has social value quite beyond the mores of each discipline.

Entrenched interests have sought to diminish this consensus by claiming that scientists are making it up to enhance their research budgets, as was charged in the so-called Climategate episode, a media-generated scandal that cast no reasonable doubt on the scientific consensus about climate change.³⁸ Political mobilization through media shaping to disparage science has become a common tactic of our political life.³⁹ Such common features of our politics, mostly themselves protected by the First Amendment, demonstrate the precious value of disciplined inquiry.

extent of ExxonMobil's campaign to combat scientific knowledge about climate change long after it knew its validity. See *Exxon: The Road Not Taken*, INSIDE CLIMATE NEWS, <http://insideclimatenews.org/content/Exxon-The-Road-Not-Taken> [<http://perma.cc/W987-5AYP>] (compiling several investigative articles regarding Exxon's climate research and subsequent climate denial).

37.

Review is an essential part of the IPCC process to ensure objective and complete assessment of the current information. In the course of the multi-stage review process—first by experts and then by governments and experts—both expert reviewers and governments are invited to comment on the accuracy and completeness of the scientific, technical and socio-economic content and the overall balance of the drafts. The circulation process among peer and government experts is very wide, with hundreds of scientists looking into the drafts to check the soundness of the scientific information contained in them. The Review Editors of the report (normally two per chapter) make sure that all comments are taken into account by the author teams. Review comments are retained in an open archive on completion of a report.

Principles and Procedure, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, http://ipcc.ch/organization/organization_procedures.shtml [<http://perma.cc/7ZTN-5XVE>].

38. For a sample of the assault, see Patrick J. Michaels, *The Climategate Whitewash Continues*, WALL ST. J. (July 12, 2010, 12:01 AM) <http://www.wsj.com/articles/SB10001424052748704075604575356611173414140> [<http://perma.cc/F67L-3TUD>].

39. See NAOMI ORESTES & ERIK M. CONWAY, *MERCHANTS OF DOUBT: HOW A HANDFUL OF SCIENTISTS OBSCURED THE TRUTH ON ISSUES FROM TOBACCO SMOKE TO GLOBAL WARMING* (2010) (detailing successive episodes of interest groups exploiting media access to foster public doubt on scientific consensuses from tobacco to global warming).

Scholarship reveals the data, assumptions, and methods of analysis and offers them for careful review and critique by the best qualified peers, leading to progressively more convincing accounts of climate change.⁴⁰ The political campaign denying climate change employs rhetoric of disparagement and innuendo and willfully inflates scraps of evidence to match its predetermined position.⁴¹ While such tactics are fair game in the political arena, and usually will be protected by the First Amendment, they do not aim for truth but for power.

The conflict between the science of climate and its political opposition created an explicit problem of academic freedom in the 2010 subpoena served on the University of Virginia by a politically ambitious Attorney General of Virginia to turn over documents related to grants for climate research by a former professor, Michael Mann.⁴² The underlying claim was that Mann may have violated a state statute, the Fraud Against Taxpayers Act,⁴³ in requests for grants to support his climate research by relying on past papers where “some of the conclusions . . . demonstrate a complete lack of rigor regarding the statistical analysis of the alleged data, meaning that the result reported lacked statistical significance without a specific statement to that effect.”⁴⁴ The subpoena sent shock waves through the academic scientific community⁴⁵ because litigation to disprove climate change could imperil investigation by subjecting research to evaluation by judges and juries and subjecting professors to ruinous liability and attorney’s fees for ordinary science. The University, usually represented by the Commonwealth’s Attorney General, obtained outside counsel and contested the demand. Leading higher education and civil liberties organizations filed an amicus brief highlighting the dangers to academic freedom.⁴⁶ Virginia courts eventually quashed the subpoena on statutory grounds, interpreting the Act to exempt the state universities from such demands.⁴⁷ Like the Colorado court’s decision in the *Churchill* case, the Virginia court strongly defended

40. This claim does not purport to deny the reality that advocates can in various ways “bend science,” to seek to generate “junk science” to support predetermined views. *See generally* THOMAS O. MCGARITY & WENDY E. WAGNER, *BENDING SCIENCE: HOW SPECIAL INTERESTS CORRUPT PUBLIC HEALTH RESEARCH* (2008).

41. *See id.* at 181–228. Climate change denial may be becoming a rearguard action. *See* Katrina vanden Huevel, *Cracks Appear in the Climate Change Deniers’ Defenses*, WASH. POST (June 16, 2015), https://www.washingtonpost.com/opinions/cracks-appear-in-the-climate-change-deniers-defenses/2015/06/15/8b0e42b4-137a-11e5-89f3-61410da94eb1_story.html [<https://perma.cc/5TKD-SFEM>].

42. OFFICE OF THE ATTORNEY GEN., COMMONWEALTH OF VA., CIVIL INVESTIGATIVE DEMAND TO THE RECTOR AND VISITORS OF THE UNIVERSITY OF VIRGINIA (2010) (CID No. 3-MM), *available at* http://www.ucsus.org/sites/default/files/legacy/assets/documents/scientific_integrity/2010-9-29-Cuccinelli-CID.pdf [<https://perma.cc/manage/vest/R8EA-3VR8>].

43. VA. CODE ANN. §§ 8.01-216.1 to -216.19 (2015).

44. OFFICE OF THE ATTORNEY GEN., COMMONWEALTH OF VA., *supra* note 42 at 2.

45. *E.g.*, Rosalind S. Helderman, *U-Va. Goes to Court to Fight Cuccinelli’s Subpoena of Ex-Professor’s Documents*, WASH. POST (May 28, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/05/27/AR2010052705374.html> [<http://perma.cc/H6BV-3KTP>].

46. Brief for Amici Curiae American Ass’n of University Professors et al. in Support of Affirmance, *Cuccinelli v. Rector & Visitors of the Univ. of Va.*, 722 S.E.2d 626 (Va. 2012) (No. 102359), 2011 WL 9694348.

47. *Cuccinelli*, 722 S.E.2d at 630–31.

the principle of academic freedom while resting its decision on narrower grounds. It is a curious feature of judicial defenses of academic freedom that courts have placed their holdings on narrow or obscure grounds in some of the most significant cases.⁴⁸

The Virginia case highlights the public values of academic freedom. Mann's research remains subject to testing and refutation by other scientists as further research tackles continuing questions about climate change. This process will yield both firmer knowledge and new questions. Academic freedom protects this process from assault by money and power. It thus furthers public values in both the actual knowledge created by scholarship and in the model that this process of determining knowledge provides for rational thinking. Disciplinary scholarship produces the most reliable knowledge available to us, because the facts, methods, and reasoning are transparent, the scholars are select and trained, and all results and approaches remain subject to criticism. For these reasons it is capable of producing new knowledge about many of things we need most to understand, such as climate, disease, and electronic data. Forming opinions about policies on the basis of reliable knowledge seems indisputably necessary for the survival of an advanced technological society.

This is obviously the case with the physical sciences,⁴⁹ but is true in only slightly different ways for the social sciences and humanities, where subjective perspective and normative judgment play inevitable roles. The truth values of subjects outside the physical sciences is a complex subject that Dean Post addressed in his remarks.⁵⁰ Literature scholars, for example, demand that interpretations be based on accurate texts and quotation, and correct understandings of secondary facts, as well as cultural and verbal sophistication. Thus, for example, Stanley Fish would not be a leading Milton scholar if his work were based on demonstrably false claims that Milton was closet Roman Catholic or had never read Virgil. Humanities scholars embrace truth values not just because those are the mores of the discipline but because they want to improve understanding of actual literary works and authors.

The processes of scholarship also provide a model for thinking for educated leaders. Scholarship demands skepticism, humility, care, and honesty. Most of the students educated by scholars at universities will not themselves become scholars but

48. See, e.g., *Keyishian v. Bd. of Regents of the Univ. of N.Y.*, 385 U.S. 589 (1967) (decided on vagueness); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957) (decided on state's separation of powers).

49. For example, in recent years, academic scientists studying the environmental effects of natural gas drilling involving hydraulic fracturing (i.e., fracking) have faced significant pressures from industry, university donors, and others. See Paul Voosen, *Fracking Researchers Under Pressure*, CHRON. HIGHER EDUC., Feb. 6, 2015, at A18.

50. Post, *supra* note 8. Law professors also can require the protection of academic freedom to publish professional scholarship on subjects that rile powerful interests. For example, Professor Debra Donahue of the University of Wyoming College of Law has published carefully documented scholarship criticizing the effects of cattle grazing on the public lands. See DEBRA L. DONAHUE, *THE WESTERN RANGE REVISITED: REMOVING LIVESTOCK FROM PUBLIC LANDS TO CONSERVE NATIVE BIODIVERSITY* (1999). Responding to pressure from grazing interests, state legislators threatened to close the law school and freeze state support for the university, but the university president and several trustees invoked academic freedom in defense of Donahue. Katharine Collins, *A Prof Takes on the Sacred Cow: Wyoming's Cowboy Joes Jump on a Grazing Critic*, HIGH COUNTRY NEWS, Feb. 28, 2000, at 3, available at <http://www.hcn.org/issues/173/5582> [<http://perma.cc/4XLP-JEGA>].

citizens. To exercise that function they need both a foundation of reliable knowledge and an independent habit of mind sensitive to facts and persuasive arguments presented by others. Fish is right to criticize university teachers who seek to proselytize students to their political views rather than teach students the tools to form independent judgments.⁵¹ A liberal society necessarily presumes that individuals can freely govern themselves and exercise leadership by rising above a flood of prejudice and self-interest.⁵² As I have written previously:

A pluralistic and democratic society can be distinguished from a fundamentalist or authoritarian one by persistent, competing arguments about both ends and means, respect for facts, and a willingness to revise assumptions. Commitments to rationality and freedom necessarily intertwine. A liberal education aims to teach people to engage arguments independently and critically, to separate good reasons from bullshit, and, crucially, to be open to revise their own positions upon learning new facts or hearing persuasive arguments. These are the methods of every academic discipline and essential learning for the leaders in the kind of society we wish to be. . . . The university is a holy place for a liberal society, one where the larger society's values about discourse and knowledge are observed in a purer manner, which serves both as a release from and reproach to the compromised realities of politics and interests.⁵³

Fish insists that what justifies public support for academic work cannot be relevant for the content of academic freedom because it “has nothing to do . . . with what is distinctive about the academy. . . . One should not mistake an understanding of why something is supported for an understanding of what that something is.”⁵⁴ This formulation incoherently confuses a description of the content of an activity with a justification of its value. Those are different issues. Academic freedom has had to be established and protected by providing reasons why persons of power, whether priests, plutocrats, or attorneys general, should respect it. That requires an appeal to shared values.

Fish does give some account of the value he finds in academic work. He emphasizes “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 . . . if higher education were regarded as the extension of another enterprise.”⁵⁵ This is lame. It puts scholarship and teaching on the same level as fantasy baseball. The pleasure of the participants in any activity does not provide a reason why outsiders who may find it incomprehensible or dangerous should refrain from interfering with it, let alone motivate them to support it with money or administrative talent. Nor does it matter, contrary to Fish, that individual scholars and teachers focus on satisfying disciplinary criteria rather than on external values like citizenship or democratic competence; what matters is that those disciplinary criteria embody liberal values of open engagement in rational disputes.

51. *See supra* note 4 and accompanying text.

52. Byrne, *supra* note 5, at 334–39.

53. Byrne, *supra* note 6, at 157–58 (citations omitted).

54. FISH, *supra* note 1 at 130.

55. *Id.*

The Virginia case bears a striking resemblance to the U.S. Supreme Court's first constitutional academic freedom case, *Sweezy v. New Hampshire*, where another state attorney general, investigating subversive persons, sought to question a guest lecturer about the content of his lecture at the University of New Hampshire.⁵⁶ After the state courts affirmed the lecturer's conviction for contempt in refusing to answer the questions, the U.S. Supreme Court reversed on a peculiar technicality while emphasizing the danger to academic freedom from such a "governmental intervention in the intellectual life of a university."⁵⁷ Justice Frankfurter wrote:

Progress in the natural sciences is not remotely confined to findings made in the laboratory. Insights into the mysteries of nature are born of hypothesis and speculation. The more so is this true in the pursuit of understanding in the groping endeavors of what are called the social sciences, the concern of which is man and society. The problems that are the respective preoccupations of anthropology, economics, law, psychology, sociology and related areas of scholarship are merely departmentalized dealing, by way of manageable division of analysis, with interpenetrating aspects of holistic perplexities. For society's good—if understanding be an essential need of society—inquiries into these problems, speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible. Political power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and the people's well-being, except for reasons that are exigent and obviously compelling.⁵⁸

Chief Justice Warren wrote for the Court:

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.⁵⁹

When I was younger, these passages from 1957 struck me as hyperbolic, even a little hysterical. But time has made the wisdom in them more compelling, even if the rhetoric seems dated. Just as political actors used red-baiting in the 1950s to mobilize political action, interested parties continue to seek to suppress scholarly research and critical analysis when threatening to their interests and ideologies. As much political discourse in our nation continues to employ provocative slogans and calculated

56. 354 U.S. 234, 243–44 (1957).

57. *Id.* at 262 (Frankfurter, J., concurring).

58. *Id.* at 261–62.

59. *Id.* at 250 (majority opinion).

vituperation, powered by money and technology, and as universities themselves become ever more complex, bureaucratic, vocational, and commercial, scholarship and liberal education seem ever more essential to the promise of a humanistic future.⁶⁰ Academic freedom has provided the defense of that promise.

The American Association of University Professors' 1915 Statement made a bold claim to the autonomy of science and scholarship from political opinion and economic interest.⁶¹ A more modest epistemology today may render the truth claims for scholarship relative rather than absolute. We may also see the commitment to disinterested truth more as an ethical precept than an operational reality. Nonetheless, contemporary controversies affirm the continuing value to society of painstaking academic inquiry after the truth, subject to careful expert critique, which will result in the improved understanding of complex realities upon which the human future may depend. Education according in these methods of inquiry and critique can foster adults able to distinguish between reason and desire. Fish's minimalism reflects a loss of moral confidence in the social value of scholarship and teaching that imperils the ability of universities to contribute their most valuable assets to the wider world.

60. See Emma Brown, *Texas Officials: Schools Should Teach That Slavery Was "Side Issue" to Civil War*, WASH. POST (July 5, 2015), https://www.washingtonpost.com/local/education/150-years-later-schools-are-still-a-battlefield-for-interpreting-civil-war/2015/07/05/e8fbd57e-2001-11e5-bf41-c23f5d3face1_story.html [<https://perma.cc/3ME6-X698>].

61. See *supra* note 26 and accompanying text.