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THE FIRST AMENDMENT, THE COURTS, AND “PICKING WINNERS”

Judge Thomas L. Ambro* & Paul J. Safier**

Dean Robert Post’s book—*Democracy, Expertise, and Academic Freedom*¹—reflects and requires serious thought about our First Amendment. This Essay addresses just two of the many interesting assertions Dean Post makes. The first is his claim that the advancement of knowledge in a democracy springs primarily from the knowledge that experts gather in discerning good from bad ideas, and that recognizing this value requires courts to develop criteria for determining which viewpoints are better in ongoing debates among experts. The second is Dean Post’s contention that the U.S. Constitution protects an individual right to academic freedom, which requires enforcing this right against academic institutions. The concern we have in each instance is with the role his theory assigns to courts in promoting some “experts” over others.

I. EXPERT KNOWLEDGE AND THE COURTS

Dean Post focuses much of his book on a contrast between the universal tolerance of expression traditionally associated with the First Amendment and the disciplinary practices that experts employ to produce knowledge. Proper appreciation of this contrast, he argues, requires revising many of our traditional conceptions of the First Amendment.

To illustrate this contrast, Dean Post begins his work by noting that his knowledge of an oak tree in his backyard is simply a trusting of his senses, while his knowledge of the cancerous effects of cigarette

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1. ROBERT C. POST, *DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* (2012).

smoking is based on deference to the conclusions of “experts”² who “deployed the full and elaborate apparatus of modern epidemiological and statistical science.”³ He argues that if the First Amendment protects the dissemination of knowledge to the public, then its application cannot be wholly characterized by “the egalitarian tolerance that defines the marketplace of ideas paradigm of the First Amendment.”⁴ That is because determining whether an expression is worthy of protection because it promotes knowledge requires determining whether that expression actually does so. And this in turn requires that “courts apply the disciplinary methods by which expert knowledge is defined.”⁵ Thus, Dean Post argues, “disciplinary practices that create expert knowledge [should be] invested with constitutional status.”⁶ That means that courts should develop “criteria to determine *which* disciplinary practices”⁷ are best so that they may adequately “distinguish[] good ideas from bad ones.”⁸

In a nutshell, while the traditional marketplace-of-ideas model “requires that the speech of all persons be treated with toleration and equality”⁹ so that advancements in knowledge and ideas may occur,¹⁰ the democratic competency model Dean Post develops as a counterpoint does not demand such treatment.¹¹ Ultimately, he argues as follows:

2. *Id.* at ix. Dean Post includes within the expert group primarily those who acquire knowledge by scientific inquiry, though he also includes those who are proficient in a profession such as law. *See, e.g., id.* at 47–53.

3. *Id.* at ix.

4. *Id.* at xii.

5. *Id.* at 54.

6. *Id.* at 96.

7. *Id.* (emphasis in original).

8. *Id.* at 34.

9. *Id.*

10. *See* *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (“It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . .”); *see also* *R.A.V. v. City of St. Paul*, 505 U.S. 377, 387 (1992) (explaining that “content discrimination ‘raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace’” (quoting *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991))).

11. *See* POST, *supra* note 1, at 34 (contrasting traditional First Amendment doctrine that “requires that the speech of all persons be treated with toleration and equality,” with the creation of expert knowledge that “requires that speech be subject to a disciplinary authority that distinguishes good ideas from bad ones”). Dean Post does not deny that the traditional conception of how the First Amendment operates captures the bulk of First Amendment doctrine. He simply argues that the egalitarian approach is particular to the public realm, where democratic legitimacy demands that all persons have at least “the opportunity to make public opinion responsive to their own subjective, personal views.” *Id.* at 27–28. He contends that in the private realm the First Amendment primarily

insofar as the First Amendment is fundamentally egalitarian in its application, it is not concerned with the promotion of knowledge; and, insofar as the First Amendment is concerned with the promotion of knowledge, it is not necessarily egalitarian in its application.

We have two concerns with this position. First, it seems to rest on an implausible account of the theory behind the marketplace model, which is more focused on worries about the harmful effects of state power on free and open debate than on the criteria by which true knowledge is identified and produced. Second, Post's suggestion that courts should take sides in ongoing factual controversies to promote the First Amendment value of "democratic competence" neglects an important aspect of First Amendment jurisprudence: the emphasis on minimizing the footprint of state regulation of speech.

First, the contrast Dean Post draws between traditional First Amendment tolerance and the standards by which experts produce knowledge cannot carry the weight he attributes to it. Contrary to what he implies,¹² there is nothing in the traditional First Amendment faith in the value of "uninhibited, robust, and wide-open" debate¹³ that requires any corresponding belief in the particular value—let alone *equal* value—of each and every submission to that debate. The concern underlying this emphasis on robust and uninhibited speech is with the potential systemic effects on the quality of public debate where the government may suppress even speech that most listeners confidently view as "valueless." As Chief Justice John Roberts recently noted in *Snyder v. Phelps*,¹⁴ the suppression of speech whose "contribution to public discourse may be negligible" can nonetheless have the general effect of "stifl[ing] public debate."¹⁵

Similarly, that private institutions do not produce knowledge by adhering to norms of content neutrality does not mean that a governmental norm of content neutrality cannot itself serve the purpose of advancing knowledge. It has never been part of the marketplace

serves a different value, one based on protecting sources of actual knowledge, not on the equal right of all to shape public opinion no matter how erroneous or wrongheaded their views. *See id.* at 34.

12. *See id.* at 10 (arguing that equal tolerance for all contributions to debate cannot be accounted for in epistemic terms because "[i]t is not intelligible to believe that all *ideas* are equal" (emphasis in original)).

13. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

14. 562 U.S. ___, 131 S. Ct. 1207 (2011).

15. *Id.* at 1220; *see also* *United States v. U.S. Dist. Ct. for the Cent. Dist. of Cal.*, 858 F.2d 534, 541 (9th Cir. 1988) ("The distaste we may feel as individuals toward the content or message of protected expression cannot, of course, detain us from discharging our duty as guardians of the Constitution.").

theory to demand that private actors and institutions govern themselves along the lines of that theory. In fact, in *Miami Herald Publishing Co. v. Tornillo*,¹⁶ the U.S. Supreme Court specifically rejected the notion that a general commitment to fostering a “marketplace of ideas” justifies requiring private institutions to open themselves up to opposing viewpoints.¹⁷ The First Amendment protects the right of private actors and institutions to exclude disfavored speech and to enforce their own conceptions of orthodoxy.¹⁸ In other words, the marketplace of ideas that the First Amendment protects, properly understood, is made up of actors and institutions that do not internally operate under a marketplace model.

What these last two points reduce to is that the First Amendment is peculiarly concerned with state action. Above all else, the Amendment expresses a fear of the dangers uniquely associated with government interference in the development and expression of ideas.¹⁹ It specifically bars “government control over the search for political truth.”²⁰ Accordingly, defending the pervasive First Amendment norm of content neutrality on the ground that it promotes the growth of knowledge does not require any sophisticated theory of the nature of knowledge. It only

16. 418 U.S. 241 (1974).

17. *See id.* at 258 (“The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.”).

18. *See, e.g., id.*; *R.C. Maxwell Co. v. Borough of New Hope*, 735 F.2d 85, 88 (3d Cir. 1984) (“The [F]irst [A]mendment is not ordinarily implicated when private actors design . . . restrictions on expression; indeed, in many instances the [F]irst [A]mendment has been held to guarantee private actors the right to make such restrictions.”); *see also, e.g., Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995) (The First Amendment prohibits state accommodation law from requiring inclusion of particular group within a parade because it is a “fundamental rule of protection under the First Amendment, that a [private] speaker has the autonomy to choose the content of his own message.”).

19. *See, e.g., Citizens United v. FEC*, 558 U.S. ___, 130 S. Ct. 876, 898 (2010) (“Premised on mistrust of government power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints.”); *see also* Frederick Schauer, *Facts and the First Amendment*, 57 *UCLA L. REV.* 897, 918 (2010) (suggesting that the First Amendment “was designed to serve a quite limited purpose in preventing government suppression, rather than serving as a guarantor of the accuracy (or quality in general) of public debate”).

20. *Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm’n*, 447 U.S. 530, 538 (1980) (emphasis added); *see also* *N.Y. State Bd. of Elections v. López Torres*, 552 U.S. 196, 208 (2008) (The First Amendment guarantees “an open marketplace where ideas, most especially political ideas, may compete *without government interference*.” (emphasis added)); *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring) (observing that “the forefathers did not trust any government to separate the true from the false for us”).

requires some belief that a society in which government coercion is used to “pick winners” in public controversies, including factual controversies, would in the long run be one in which the development of knowledge did not advance as much as it otherwise would.²¹ Others can decide whether that belief is empirically correct, but it is central to the First Amendment as we understand it.

Second, Dean Post’s suggestions as to how courts should protect expert knowledge from political intrusion reflect a one-sided account of First Amendment values. The traditional conception of the First Amendment is that it mandates that government, including courts, refrain from “regulat[ing] speech based on its substantive content or the message it conveys.”²² As Chief Judge Alex Kozinski recently put it, “[t]he one guiding light of our First Amendment law is that government officials, and *courts in particular*, are not allowed to make judgments about the value of speech.”²³ Dean Post rejects this, asserting that to promote the citizenry’s access to truthful information, courts must “attribute constitutional status to the disciplinary practices by which expert knowledge is itself created.”²⁴

Dean Post is, of course, correct that the First Amendment protects, among other things, the right of audiences to be exposed to valuable information, especially in the commercial speech context.²⁵ But we have concerns about how, under his understanding, courts should enforce this right. An example Dean Post discusses in Chapter Two of his book highlights these worries. He poses a hypothetical state law prohibiting “persons from offering fee-for-service advice about a particular

21. *See, e.g., United States v. Stevens*, 559 U.S. ___, 130 S. Ct. 1577, 1585 (2010) (“The First Amendment . . . reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs.”).

22. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995); *see also Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“[T]he government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”).

23. *United States v. Alvarez*, 638 F.3d 666, 677 (9th Cir. 2011) (Kozinski, J., concurring in the denial of rehearing en banc) (emphasis added), *cert. granted*, 132 S. Ct. 457; *see also Dible v. Chandler*, 515 F.3d 918, 928 (9th Cir. 2008) (“[T]he degree of protection the [F]irst [A]mendment affords speech does not vary with the social value ascribed to that speech by the courts.” (quoting *Kev, Inc., v. Kitsap Cnty.*, 793 F.2d 1053, 1058 (9th Cir. 1986))).

24. POST, *supra* note 1, at 55.

25. *See id.* at 38–43; *see also, e.g., Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. ___, 130 S. Ct. 1324, 1339 (2010) (“First Amendment protection for commercial speech is justified in large part by the information’s value to consumers”); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976) (“It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.”).

homeopathic medical remedy.”²⁶ A court confronted with a challenge to this prohibition “must determine whether First Amendment coverage is triggered by deciding whether prohibiting advice about the remedy does or does not suppress the circulation of knowledge. And it must make that determination by applying the methods of one discipline or another.”²⁷ But it is not clear how a court should do this. How does it choose which expert in homeopathic medicine to treat as authoritative?²⁸ Why should a court defer to an expert in homeopathic medicine at all, rather than an expert in traditional medicine, who might be skeptical of the whole enterprise? Most importantly, what if the state of expert knowledge on this subject changes, such that a homeopathic remedy that was thought by many experts to be bogus turns out to be highly beneficial? In that case, does the constitutional status of the prohibition change as well? Or does a court’s prior judgment become constitutionally entrenched?

In suggesting that courts aggressively take sides in “expert” disputes in this fashion, Dean Post underplays a central aspect of First Amendment doctrine—that even speech that serves no constitutional value must be *under*-regulated so as to avoid any possible chilling effect on protected expression. For instance, in *New York Times Co. v. Sullivan*,²⁹ the Court famously observed that “erroneous statement is inevitable in free debate” and that such statements “must be protected if the freedoms of expression are to have the ‘breathing space’ that they need . . . to survive.”³⁰ This is so even though the Court has also held that there is not necessarily any “constitutional value in false statements of fact” per se.³¹ The same spirit animates the “overbreadth doctrine,” which “prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the

26. POST, *supra* note 1, at 56.

27. *Id.* at 57–58.

28. Dean Post suggests that courts should be comfortable with assessing the reliability of claims to expertise, as Rule 702 of the Federal Rules of Evidence already requires such determinations. *See id.* at 8–9. But the reliability test under Rule 702 is not very stringent by design. *See, e.g., Pineda v. Ford Motor Co.*, 520 F.3d 237, 244 (3d Cir. 2008) (stating that Rule 702’s requirements are applied inclusively not to pick the better argument, but to determine who is qualified to testify as an expert). That courts can—and, where possible, should—admit competing experts who qualify as such does not appear to be an option under the analysis Dean Post advocates.

29. 376 U.S. 254 (1964).

30. *Id.* at 271–72 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)) (internal quotation marks omitted); *see also Gertz v. Welch*, 418 U.S. 323, 341 (1974) (“The First Amendment requires that we protect some falsehood in order to protect speech that matters.”).

31. *Gertz*, 418 U.S. at 340; *see also Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 (1976) (“Untruthful speech, commercial or otherwise, has never been protected for its own sake.”).

process.”³² This concern seems neglected in Dean Post’s theory, which counsels favoring some disciplinary practices over others.

His response appears to be that the doctrines articulated in *Sullivan* and its progeny apply to speech on matters of public concern, whereas the recommendations he makes primarily concern expression in the private realm. But this overstates the contrast between how the First Amendment operates in the two contexts. While Dean Post is correct that, outside the context of public speech, the First Amendment allows for a more aggressive policing of the boundaries between truth and falsity,³³ concern for allowing “breathing space” for freedom is nonetheless still a part of the analysis. Thus, for instance, the U.S. Supreme Court has held that even in the context of regulating fraud, legal standards must be crafted in a manner that allows “sufficient breathing room for protected speech.”³⁴ These concerns are present even in the commercial-speech context, albeit typically with the caveat that commercial speech is less susceptible to chilling effects than other forms of speech because it is financially motivated.³⁵

In short, it is a fundamental aspect of the First Amendment that courts must construct and apply standards that not only correctly decide the cases before them, but also minimize any harmful effects their decisions will have on speech and debate outside the courtroom. Underlying this approach is a kind of intellectual humility that, while perhaps alien to the production of expert knowledge, is nonetheless central to First Amendment values. This is the other side of the coin from Dean Post’s analysis.

As the U.S. Supreme Court has repeatedly emphasized, the marketplace generally sorts out ideas better and with more lasting effect than judges. The job of the latter is clearly cabined, for “the ultimate good desired is better reached by free trade in ideas—that the best test of

32. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 255 (2002).

33. *See* POST, *supra* note 1, at 41 (“Because the constitutional value of commercial speech lies in the information that it carries, the state can engage in content discrimination to regulate and suppress the circulation of ‘misleading’ information. The contrast to permissible regulation[] of public discourse is stark. It would be forbidden content discrimination for the state to suppress ‘misleading’ speech within public discourse.”); *see also, e.g.*, *Rushman v. City of Milwaukee*, 959 F. Supp. 1040, 1044 (E.D. Wis. 1997) (“If truth were a test for censoring noncommercial speech, the government could ban books that proclaim the earth is flat . . .”).

34. *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 620 (2003).

35. *See, e.g., Va. State Bd.*, 425 U.S. at 771 n.24 (noting that particular features of commercial speech “may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker”); *see also Nike, Inc. v. Kasky*, 539 U.S. 654, 681 (2003) (Kennedy, J., dissenting from dismissal of writ of certiorari as improvidently granted) (questioning the constitutionality of a state false-advertising law on the ground that it might “chill” speech).

truth is the power of the thought to get itself accepted in the competition of the market.”³⁶ The result may be messy and often exasperating, but it is how democracies work. Citizens in democratic societies best counter bad ideas from the ground up rather than with ill-informed judges making pronouncements from seemingly *ex cathedra* seats of judgment.

II. THE REGULATION OF ACADEMIC FREEDOM

In addition, we have practical worries regarding Dean Post’s treatment of academic freedom as an object of First Amendment protection. As he notes, the U.S. Supreme Court on occasion has spoken of academic freedom as a special First Amendment concern.³⁷ For example, speaking specifically about research in the social sciences in his concurring opinion in *Sweezy v. New Hampshire*,³⁸ Justice Felix Frankfurter declared:

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.³⁹

In *Keyishian v. Board of Regents*,⁴⁰ which came out nearly ten years later, Justice William Brennan, writing for the majority, was even more explicit in making this connection between the First Amendment and academic freedom, stating that “[academic] freedom is . . . a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.”⁴¹

Yet, as Dean Post points out, courts have eschewed developing special doctrines for protecting academic freedom as a constitutional ideal.⁴² For him, “the doctrine of academic freedom stands in a state of shocking disarray and incoherence.”⁴³ He notes that at least one source of this lack of doctrinal clarity is a tendency to decide academic freedom

36. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

37. *See* POST, *supra* note 1, at 68–80.

38. 354 U.S. 234 (1957).

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

40. 385 U.S. 589 (1967).

41. *Id.* at 603.

42. POST, *supra* note 1, at 62.

43. *Id.*

cases with reference to the public employee free speech cases like *Pickering v. Board of Education*⁴⁴ and, more recently, *Garcetti v. Ceballos*.⁴⁵ Under that line of cases, the speech of government employees can only receive First Amendment protection if that speech is essentially extramural; that is, if it is speech employees make as citizens rather than as part of their employment.⁴⁶ Dean Post contends this framework is inadequate in the academic-freedom context.⁴⁷ He argues that there is a distinct First Amendment interest in shielding from political intrusion the work scholars perform pursuant to their official duties, as this protects the creation and dissemination of expert knowledge (or, in Dean Post's parlance, "democratic competence").⁴⁸ On Dean Post's theory, "First Amendment coverage should be triggered whenever [scholarship] is inhibited for reasons that do not depend upon ensuring disciplinary competence as determined by disciplinary experts."⁴⁹

We agree that *Garcetti* and the public employee speech cases that preceded it do not account for the special interest in academic freedom identified in *Sweezy* and *Keyishian*.⁵⁰ Nonetheless, Dean Post's analysis

44. 391 U.S. 563 (1968).

45. 547 U.S. 410 (2006); see POST, *supra* note 1, at 80–85 (discussing *Pickering* and *Garcetti*).

46. See, e.g., *Garcetti*, 547 U.S. at 424 ("[T]he First Amendment does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities.").

47. See POST, *supra* note 1, at 80–85. The majority in *Garcetti* expressly declined to answer whether "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." *Garcetti*, 547 U.S. at 425.

48. See POST, *supra* note 1, at 72, 77. One of the rationales articulated in *Garcetti* is that any public employee's free-speech rights that were not limited to off-duty speech would interfere with the government's interest, as an employer, in controlling what is and is not said on behalf of the government. See 547 U.S. at 422–23. This emphasis on crafting a unified, official message runs counter to the pedagogical mission of the university. See POST, *supra* note 1, at 92 ("Were faculty to be merely employees of a university, as *Garcetti* conceptualizes employees, their job would be to transmit the views of university administrators. Faculty would then no longer expand knowledge, because they would no longer be responsible for applying independent professional, disciplinary standards."); see also Judith Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 GEO. L.J. 945, 991–92 (2009) ("The job of faculty is to produce and disseminate new knowledge and to encourage critical thinking, not to indoctrinate students with ideas selected by the government."). In addition, there is a problem with even identifying what counts as extramural speech in the context of university faculty, whose job is in part to engage the broader public as public intellectuals. See, e.g., *Adams v. Trs. of Univ. of N.C.—Wilmington*, 640 F.3d 550, 564 (4th Cir. 2011) (holding that opinion pieces published by a criminology professor were not legitimate bases for denying tenure even though they were submitted as part of his tenure file).

49. POST, *supra* note 1, at 90.

50. That is not to suggest that the *Garcetti* framework has no role to play in First Amendment cases involving public university faculty. Not all aspects of such employment trigger academic

may underplay the practical difficulties presented by the tension between academic freedom as an institutional right and as an individual right. As the U.S. Supreme Court has observed, “[w]here . . . government attempts to direct the content of speech at public educational institutions, complicated First Amendment issues are presented because government is simultaneously both speaker and regulator.”⁵¹ Dean Post argues that this tension is illusory because the specific “First Amendment value at stake in academic freedom”—democratic competence—“encompasses *both* the ongoing health of universities as institutions that promote the growth of disciplinary knowledge *and* the capacity of individual scholars to promote and disseminate the results of disciplinary inquiry.”⁵² The touchstone, he contends, for *all* attempts to regulate academic speech—whether coming from inside or outside the university—is that “a qualified faculty member cannot be reduced to the mouthpiece of non-professional, non-scholarly assessments of relevant knowledge.”⁵³ With that understanding, “[n]othing in the concept of academic freedom requires deference to university administrators who possess neither the capacity nor the pretense of exercising professional judgment.”⁵⁴

True enough, this last statement applies “when universities make executive decisions that do not purport to reflect professional standards.”⁵⁵ But few cases will actually take that form, or at least do so in a manner that makes itself evident in the courtroom. An academic freedom case will rarely be as straightforward as a faculty member, who does valuable work, being denied tenure for transparently political reasons. Moreover, given the political disagreements that so often underlie legitimate academic disputes, it is not clear that even that kind of case would easily lend itself to judicial resolution. In practice, the issue often comes with facts set in shades of gray. For example, what about a case in which a faculty member is denied tenure at a public university based on a shoddy assessment of her scholarship? Would a

freedom concerns, or at least not academic freedom concerns that potentially implicate the First Amendment. *See, e.g.,* *Gorum v. Sessoms*, 561 F.3d 179, 185–87 (3d Cir. 2009) (Ambro, J.) (analyzing the allegations of a public university professor that he was terminated based on his participation in the academic discipline process under the *Garcetti* framework).

51. *Univ. of Pa. v. EEOC*, 493 U.S. 182, 198 n.6 (1990); *see also* *Hosty v. Carter*, 412 F.3d 731, 736 (7th Cir. 2005) (“Let us not forget that academic freedom includes the authority of the university to manage an academic community and evaluate teaching and scholarship free from interference by other units of government, including the courts.”).

52. *POST*, *supra* note 1, at 77 (emphasis in original).

53. *Id.* at 89.

54. *Id.* at 79.

55. *Id.*

First Amendment claim in that context succeed? While there is no doubt a strong public interest in allowing unpopular ideas to be tested and developed in an academic setting, does not a university have the right to sort out (even, at times, incorrectly) those unpopular academic ideas that merit protection from those that are simply bad scholarship? Though it seems unlikely Dean Post necessarily disagrees with that, it is not clear that he has fully dealt with the practical consequences of that division of labor.

In at least one case, a court followed the path it appears Dean Post advocates. In *Kerr v. Hurd*,⁵⁶ a federal district court held that the plaintiff stated a valid First Amendment claim in alleging that the public medical school in which he taught disciplined him based on his advocacy of forceps deliveries over Cesarian sections.⁵⁷ The court held that “where . . . the expressed views are well within the range of accepted medical opinion, *they should certainly receive First Amendment protection*, particularly at the university level.”⁵⁸ The underlying ruling in *Kerr* may have been appropriate in the context in which it arose. Nonetheless, we are wary of taking constitutional sides in academic debates involving knowledge gleaned from scientific inquiry. That would seem to violate the First Amendment rights of academic institutions, and do so in a way that could cut off an important source of intellectual development: namely, the right of academic institutions to devote themselves exclusively to particular schools of thought.

We suggest that Professor Judith Areen advocates a better approach.⁵⁹ She argues that where a faculty member challenges a termination or demotion based on “academic” speech, the university’s decision should be presumed to be made on legitimate grounds if supported by the faculty or by a faculty committee.⁶⁰ If so, the aggrieved scholar can prevail only by showing that “the decision was ‘such a substantial departure from accepted academic norms as to demonstrate that the faculty did not exercise its professional judgment.’”⁶¹ As Professor Areen notes, such an approach would allow courts to “avoid infringing the academic freedom of academic institutions.”⁶² In that way, courts can protect academic freedom in a manner that does not require them to

56. 694 F. Supp. 2d 817 (S.D. Ohio 2010).

57. *Id.* at 834–35, 843–44.

58. *Id.* at 844 (emphasis added).

59. Areen, *supra* note 48.

60. *Id.* at 995.

61. *Id.* (quoting *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985)).

62. *Id.*

wade into ongoing academic debates.

CONCLUSION

Dean Post has written a valuable book supporting well the need for democratic competency as a First Amendment value. The concerns we express do not displace the core of that measure insofar as it deals with matters of knowledge attained through scientific inquiry.

Nonetheless, whatever may be true about how expert knowledge is produced, we are uncomfortable with any suggestion that courts should jump into the briar patch and “determine *which* disciplinary practices implicate the value [of democratic competence] and which do not.”⁶³ That is a bridge far too far. Such an approach raises the specter of the elite deciding behind closed doors what ideas win and those that lose. As stated succinctly by Judge Damon Keith, “[d]emocracies die behind closed doors.”⁶⁴

We have related concerns about the role Dean Post assigns courts in protecting academic freedom as a First Amendment value. While we are sympathetic to his attempt to rescue academic freedom from the more general public-employee free speech cases, judicial doctrines in this area must minimize any intrusion by courts on the development and enforcement of academic standards by universities.

63. POST, *supra* note 1, at 96 (emphasis added).

64. *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002).