The First Amendment in the Modern Age Panel

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JANUARY 12, 2012

Dean Kellye Testy:

Well good evening everyone. I want to get us started. I’m Kellye Testy, the Dean of the University of Washington School of Law. And it is my great pleasure to welcome you tonight to the First Amendment in the Modern Age Panel and I thank you for coming and welcome you to Gates Hall.

I’m really thrilled to have this group with us tonight. My colleague Professor Clark Lombardi is going to more formally introduce our panelists in a minute. But I want to just quickly say welcome, hello to Dean Robert Post from Yale. Sitting to his right, Professor Stephen Vladeck from American University, the Washington College of Law. And also to Mr. Bruce Johnson who is a partner at Davis, Wright and Tremaine. We are wonderfully grateful to each of these gentlemen for being with us today and I really thank you for your participation. I also want to take a minute to just make a very special thanks to our Washington Law Review students for sponsoring this event. Our students do a tremendous job on the Law Review and I don’t get opportunity enough to thank them for the hard work they do in holding up high academic standards and doing a great job with that publication. And so a special thank you and hello to all of our Law Review students today. I’m really happy to see you and appreciate you doing this work and I want to give a special thank you to the editor in chief Katherine Kirkland O’brien for her leadership on this event.

I want to thank Professor Lombardi for serving as moderator. I’ll introduce him in a moment. And I also want to give a special shout-out and thanks to our colleague Professor Ron Collins who is the Harold S. Shefelman Distinguished Scholar her at UW Law School and was the architect, so to speak, of this event and provided a lot of guidance and support to our students through it.

We are delighted to have an opportunity tonight to discuss Dean Post’s new book. It’s called Democracy, Expertise, and Academic Freedom. That work makes an innovative and essential contribution to our national discourse on the first amendment and we are very honored to host an exchange on its thesis tonight. The themes on this panel are ones that we will develop further in the May ’12 issue of the Washington Law Review. And that will feature essays by each of the panelists this evening and other leading scholars that will engage the themes that are raised in Dean Post’s book.

So without further ado, let me turn this program over to its moderator Professor Clark Lombardi. He is well known here to all of you and indeed throughout the nation and the world as a top scholar in Islamic law and also in constitutional law. We are thrilled to have him on our faculty, a tremendous teacher and scholar. He has degrees from Princeton.
undergraduate and MA, JD, and PhD from Columbia University. Professor Lombardi, thank you for moderating and I will turn it over to you.

Clark Lombardi:

Well thank you very much Kellye. It really is an honor for me to be here, both to be able to sit at the table with scholars whose work I admired and to hear what they have to say and engage with. I would like to extend thanks on behalf of the community to you Dean Testy, to the event staff which has done a wonderful job putting this together, to Ron Collins who helped us conceptualize and bring this panel together and to the Washington Law Review which did a wonderful job, all of the staff, so thank you very much.

As you’ve heard, we are going to be discussing in this symposium the arguments laid out by Dean Post in a new book called Democracy, Expertise and Academic Freedom: First Amendment Jurisprudence for the Modern State. And obviously, this is an extremely important and timely topic as it’s often debated in American politics today what exactly we need to have a robust democracy. There are all sorts of things we could talk about when we talk about the challenges of modernity or post-modernity to democracy and how free speech law can help us create a more robust democracy. Dean Post has put forward a very interesting and provocative and potentially extremely important argument. And we’re going to hear him explain to us some of the salient points of it and then we’ll have two commentators.

Let me quickly introduce Dean Post for those of you who are not already familiar with his work. I hope that is very few of you because it’s an extraordinary body of work. I first got to engage fully with Dean Post’s work when I was in my third year of law school and I took a seminar in first amendment with Professor Vlasey at Columbia Law School. It was a quite interesting seminar and our major assignment was to take one article and write a fifteen to twenty page critique on it. And I was assigned to critique in fifteen to twenty pages Dean Post’s article “Subsidized Speech”. And it was only then, I who had infinite capacity to be bumptious and argumentative and critical and nasty, realized how extremely hard it is to write fifteen pages on something for which you can find very little to criticize. And my own experience and respect for the work of Dean Post has obviously been seconded and thirded, and fourthed, and fifthed and on down as a look at his CV will reveal to anybody. He received his AB and PhD in the history of American civilization from Harvard University and his JD from Yale Law School. And he has set himself out as a leading scholar in the areas of constitutional law broadly speaking, but particularly in first amendment law, legal history and the equal protection. He has published countless articles and books including the aforementioned “Subsidized Speech” but most recently this extremely provocative work, Democracy, Expertise, and Academic Freedom. Appropriate for someone writing about academic freedom and the importance of ensuring that voters and citizens, broadly speaking have access to expert knowledge, Dean Post is a member of several organizations devoted to the promotion of expert knowledge. He’s a member of the American Philosophical Society and The American Law Institute and a fellow of the American Academy of Arts and Sciences.

And commenting on his book broadly speaking and of course on the comments that he makes will be two experts in first amendment. The first commentator is Professor Stephen Vladeck who is professor of law and the Associate Dean for scholarship at American University. He received his BA in history and math summa cum laude from Amherst and his JD from Yale Law School. His scholarship focuses on federal jurisdiction, constitutional
law, national security law, and most salient for this discussion about the first amendment, he has testified to Congress about first amendment jurisprudence and written widely about first amendment jurisprudence in the context of the war on terror. He’s coeditor of Aspen’s leading national security law casebook and has also drafted reports for institutions such as the Constitution Project and the First Amendment Center.

The second commentator is Bruce Johnson who is a veteran litigator and partner at Davis, Wright and Tremaine. He holds his AB from Harvard and a BA and MA from the University of Cambridge and a JD from Yale Law School. Mr. Johnson is an expert in advising clients on first amendment issues, especially commercial speech, commercial transactions, and consumer rights, all issues that are discussed in Dean Post’s book. And he has submitted numerous amicus briefs to the US Supreme Court on first amendment issues including one on the case of Snyder versus Phelps.

So I can’t imagine a more interesting interlocutor for us to talk about the ideas that we should be thinking about or two more interesting commentators to help us on our way. And we’ll have time for questions after they finish. So without further ado, I give you Dean Post.

Dean Post:

Thank you Clark for that lovely introduction and thank you Dean Testy and thank you Ron Collins, and thank you members of the Law Review. It’s wonderful for me to be here. I’m just staggered by the physical beauty but also by the loveliness of the students that I’ve encountered and by the graciousness of the faculty here and it’s really a privilege for me to be here. Thank you so very much all of you.

So let me talk for a few minutes about this book and then we’ll open it up for comments. This book began during the last administration when I began to get very worried about a kind of disrespect that the government had for knowledge. Whether there was global warming or not, whether abortion caused breast cancer, we seemed to be in this position where the government would assert something and then it would say, ‘it’s my opinion.’ I have an opinion there’s global warming, you have an opinion there isn’t, and then we teach the controversy. Everything seemed to be reducing to what’s your opinion, what’s my opinion as if we didn’t know anything anymore. And the question I had was: why is that a problem, isn’t the central point of the first amendment, the marketplace of ideas, we have a first amendment in order to open up a marketplace of ideas so that we can create new knowledge. That’s a central rational for the first amendment it has been since the great dissent by Holmes in 1919 and the Abrams case. We trusted the marketplace of ideas to create our knowledge. And I’d just like you to think about that rational for a few more moments. I’d like you to think about places in our society where we actually create knowledge. I mean, what we rely upon as knowledge is actually created.

So, say you’re the editor of a scientific journal, “Nature”, do you use the marketplace of knowledge? Do you say everyone can come and publish? If you are an academic department, say a physics department, and you want to advance physics, do you use the marketplace of ideas, you say anything goes? No you don’t, it’s the opposite. In any place that we actually see knowledge created in our modern society, we actually have two phases of things. On the one hand, we encourage critique. When Kant said, ‘what is
enlightenment,’ he said, ‘dare to think for yourself’. And of course we can’t create new knowledge until we critique the old knowledge. So one phase in the actual creation of knowledge has to be the freedom to be critical. But a second phase in every place where knowledge is actually created, from professional journals, to disciplinary societies, to universities, think of any place which actually knows anything, we have another phase which is the application of disciplinary standards where we say, this is good work. This is bad work. This work makes sense. This work is sloppy. This work is disciplined. This is undisciplined. We make these distinctions. And it’s upon such distinctions and the application of such standards that our whole notion of disciplinary depends. And just to put this in very simple terms, the whole first amendments is constructed upon doctrines like, this is Justice Powell speaking in the Gertz opinion, ‘There is no such thing as a false idea for purposes of the first amendment,’ no content discrimination, remember that, no view point discrimination. Well if there’s no such thing as a false idea, there can’t be any such thing as a true idea. And if there’s no such thing as a true idea, you can’t have knowledge. So what’s going on there?

It seems like the whole point of the first amendment is to create to the freedom to have opinions. And in point of fact, this is a long argument and I don’t have time to make it, but if you think how to understand the essentials of what the first amendment is about, it’s about the freedom to create public opinion. So why do I say that? Well sometimes if you come just to the words of the first amendment, you say the first amendment is protecting speech versus not speech. So on this account, the whole first amendment is erected on a contrast between speech on the one hand and action on the other hand. But the minute you think for two seconds about that distinction, you get into trouble. So how do you distinguish speech from action? The typical way you do that is you say speech is what conveys an idea. So in the Spence test the court says it’s speech if you’re trying to convey a particular idea, a specific idea, there’s a pretty good chance it’ll be communicated. So that’s your notion of speech and it comes under the first amendment. But that can’t be right. I mean think of the people who flew into the buildings on 9/11. They were trying to communicate a particular idea and they succeeded in communicating it, but there would be no first amendment defense to the charges against them were they’d have survived and had been tried. I can turn any crime into a first amendment case by that but we don’t do that. Or think conversely of contracts or disclosures by corporations. Every contract is in words, I’m speaking, but the regulation of contracts isn’t a first amendment problem. The regulation of product warnings which is in speech is not a first amendment problem. The regulation of professional malpractice and speech is not a first amendment problem. So it is not the case that the first amendment is triggered by every act of speech. Nor is it the case that the first amendment is triggered only by speech. There’s instances where we can regulate things and have a first amendment problem even though there’s no speech involved. A good example would be: suppose that Congress decided to ban newsprint in order to save trees. You bet there’d be a first amendment problem and speech isn’t involved in any particular way.

We need a different account of the first amendment than this very crude distinction between speech and action. Roughly, the way we do that is we say, what counts as speech for purposes of the first amendment depends upon why we have a first amendment in the first place. And there’s three great reasons for doing this. One is the marketplace of ideas and I’ve suggested to you already I don’t think that’s a very compelling rational. A second is individual autonomy and there are many reasons why that’s not a compelling rational for the first amendment. The most salient being that if the first amendment were to protect speech acts where your personal autonomy, yourself expression, your self-fulfillment were most at stake, first amendment coverage would be key to whether or how your autonomy
was at stake. But it turns out it’s not. So to pick a simple example, I can defame you. If you’re a public figure, the first amendment is triggered. If what I’m saying is a matter of public concern, the first amendment is triggered. But if you’re a private person and the matter is about private concern, even though my autonomy is equally at stake, the first amendment is not triggered. Or if I’m a public employee and I’m making a statement about a matter of public concern, first amendment is triggered. But my autonomy can be equally at stake and it’s not about a matter of public concern, first amendment coverage is not triggered. So first amendment coverage is triggered about things having to do with the public: public concern, public figure. Why is that? The answer I give in this book is that it turns out that the rational that I give in this book is that it turns out that the rational for explaining the first amendment which is most consistent with the pattern of our actual doctrine, and this is important because when we think about the first amendment, we’re not at liberty to postulate anything. We have to explain what commitments we have as a nation historically and those are best recorded in the history of our decision so we engage in something like a reflected equilibrium. We try to explain them, then we critique them in light of what we discover and then we refine what think our purposes are and so forth and so on. So if we look at what best describes the pattern of our doctrine, it is that we protect speech which is public speech. And what we mean by public is it’s part of the process of public opinion formation. Why would we protect the freedom of people to engage in speech that affects the content of public opinion? And the answer is we protect speech in order to safeguard our democracy.

The first theorists who thought about this though, well if we protect speech in order to protect democracy-theorists like Robert George or Alexander Meiklejohn, we have to protect that speech which is about governmental decision making. But that’s actually incorrect. If we have a democracy, a democracy is the form of government in which the state is responsive to the people. But exactly how is the state responsive to the people? Elections are one example, but it’s a very crude index of how the state is responsive. Much more important and continuous and ongoing is the fact that the state is responsive to public opinion, what people are actually thinking. And one guarantee of the democratic responsiveness of our democracy is that the first amendment guarantees each of us the right to affect public opinion as we see fit and it forms a kind of government in which the government is responsive to public opinion. And that describes some features of our first amendment doctrine which are really quite interesting.

So just to pick a simple example: I’m your doctor and I give you terrible advice about something and it turns out my advice in words damages you. You sue me for my words. I don’t have a first amendment defense. I can’t say geez that was just my opinion. Or it was an experiment as all life is an experiment, that’s Justice Holmes in the Abrams opinion. We don’t do that. We hold the doctor to the standards of professional knowledge. So, I’m giving this advice to you as my patient, no first amendment coverage there at all.

I am now on the Oprah Winfrey show and I give the same advice. The example I use in the book. There’s this in which there’s was actually a history, it’s kind of an example. You know the silver fillings in your mouth, they’re called dental amalgams it’s the mixture of silver and mercury. Those people who are older remember watching the dentist put the mercury and the silver together rand form the powder. There are many dentists who believe that the mercury leaches out of your fillings and causes various health problems like MS or Lou Gehrig’s disease and so they advised their patients to take the silver fillings out. And as of ten years ago, I’m giving you ten year old medical advice do not rely on this, every health study that we had showed that the mercury did not leach out. So when a dentist told
their patient to take out their silver fillings, they were telling the patient to take a great risk, to undergo a big expense for no medical benefit. And dentists who did that would lose their license and they’d be subject to malpractice suits. But the same dentist goes on the Oprah Winfrey show and says to the general public, you know, mercury leaches out of your amalgams, you ought to take out your amalgams. And some person in the audience says, gee that’s a dentist talking on Oprah Winfrey, he must be an authority, I’m going to rely, gets the fillings out, has a problem sues the dentist, sues the dentist, then it’s protected by the first amendment; same words, different context. What’s the difference? If I’m talking on the Oprah Winfrey, I’m talking to the public. I’m part of public opinion formation. If I’m talking to my patient, I’m practicing medicine and the patient is entitled to rely on my advice.

Now this boundary between speaking in ways that forms part of public opinion and speaking in ways that are other things like making a contract or practicing medicine, or practicing law or giving product warnings or commercial speech correspond to very great differences in first amendment doctrine. The most important thing I want to say here is that when we protect people’s ability to participate in public discourse, we’re protecting their ability to make the government responsive to them. So when you do a speech act in public discourse, your autonomy, your ability to do what you want to do is very important. And for that reason, I can’t compel to speak at all. I can’t say you have to be more factual, you have to have more facts. I can’t screen your content. Most of the ordinary rules of first amendment that we associate with first amendment doctrine apply here.

Now the interesting thing about what I’ve just told you is that the first amendment is a machine for the protection of public opinion, but that’s opinion and the question I started this book with is knowledge which is not opinion. It’s not an opinion whether abortion causes breast cancer or whether there’s global warming. We either know that or we don’t know that. Should there be first amendment protections for the production of knowledge? Now that will have an entirely different structure than opinion formation because knowledge is different than opinion. So first of all do we find in the first amendment any examples where we see first amendment protections for knowledge distribution? And the answer turns out to be, yes. There are not many examples, but they are intuitively robust.

So one example has been these laws where in various Midwestern states like Dakota and Nebraska, they’ve been trying to suppress abortion. They can’t suppress abortion because of Roe, so what they do is they require doctors to tell patients false things about abortion. So there’s a law saying you have to tell the patient that they have a statistically significant of severe psychological trauma even though we know that’s false. So the law compels the doctor to say something false to the patient, struck down under the first amendment, not Supreme Court, but district court.

Or in this recent opinion in this recent bankruptcy act, where the congress passed a law which said a lawyer cannot advise a client that they can incur debt in contemplation of bankruptcy. Now often you do want to incur debt in contemplation of bankruptcy. Say, for example, you want to consolidate your debts into one low paying loan. Or you want to incur debt to have a car so you can earn money after you go bankrupt. It’s perfectly good, it’s perfectly, it’s often the best advice. But congress distrusting the avid consumption of the American citizen said their lawyers cannot tell them the truth, meaning legal knowledge about their rights under the bankruptcy act and it was struck down by every court that viewed it that way. When it reached the Supreme Court, it evaded the issue by reinterpreting the statute. But notice these opinions which I’m giving you are opinions in
which courts either strike down laws compelling the distribution of false knowledge or prohibiting the distribution of true knowledge. And these are very intuitively robust findings.

But knowledge here is a very peculiar commodity because how do we know for example whether it’s true that you can inter debt in contemplation of bankruptcy, that it’s legal to do that? Or how do we know whether or not you have a statistically significant risk of severe psychological trauma if you have an abortion? How do we know whether that’s true or not? Well we know for example in the abortion case, we know that’s true by asking medical health people, by asking doctors. And we know whether you have a legal right to incur debt in contemplation of bankruptcy by asking lawyers. So we’ve just said something really interesting and really paradoxical. Which is, when the state tries to regulate knowledge distribution, we know whether it’s compelling the distribution of false knowledge or prohibiting the distribution of true knowledge only by reference to the knowledge practices of the very profession Congress is seeking to regulate. That’s a really interesting finding because what it says is that there is a constitutional value for us in the practices by which we create knowledge: medical knowledge, legal knowledge, and so forth and so on. That is a really interesting finding because it puts the protection not in whether it’s true or not true that you can regulate abortion in the following ways, but what actually the knowledge practices of the medical profession is. And that suggests that underlying the first amendment if we care about this value of knowledge, there has to be a constitutional sociology of knowledge somewhere.

So, there are laws in the various states prohibiting astrological advice, not in the newspaper, because that’s public opinion formation, but if I sell you my advice as an astrologer, various states say that’s fraud on you because astrology isn’t true. Well how do we know that astrology isn’t true? I guarantee you that if that goes to a federal court they won’t do it by calling expert astrologers to know whether it’s true or not. They’ll know it by calling astronomers or some field that they consider to be reliable. This is very much; you’ll see that the structure of this is like Daubert. You think of Daubert as a rule of federal evidence and when you can introduce federal expert testimony, but actually what I’m suggesting to you is this has constitutional roots, deep constitutional roots in the very idea that we want the constitution to protect the distribution and creation of knowledge.

So I’ve talked to you a little bit about distribution of knowledge. Let me talk about the creation of knowledge. Where do we create knowledge as a society? The place where knowledge is created, and when I say knowledge is created, what I mean is the standards by which we determine whether something is knowledge where that happens is universities. Universities train people in disciplinary methods. Universities are the sites by which disciplines like physics and chemistry and archaeology are created, sustained, nourished, replenished, understood and so universities have a very distinct function for this purpose. The Supreme Court has said since the 1950s that academic freedom is extremely important to the first amendment but has never told us why. And it has always associated in cases like Kashan the idea of academic freedom with the marketplace of ideas. But if academic freedom is about the production of knowledge, it’s the opposite of the marketplace of ideas.

If an astronomer in my department writes an editorial in The New York Times that the moon is made of green cheese, he does not get tenure. I make content discriminations. Even though I can’t punish him for publishing in The New York Times, the state can’t. The university makes content judgments all the time on the quality and competence of work. And that means that the doctrinal structure for the protection of knowledge situations
namely that you have to apply the disciplinary standards to determine whether something is true or not. Actually the importance is the distribution of knowledge to the hearer, not the participation of the speaker. So for example in malpractice situations, we can require doctors to talk, we can require lawyers to talk, we can require academics to talk, but I can’t require someone to talk in public discourse. Why? Because the constitutional value is not in the speaking but in the hearing. And if I require you to say something more, I’m actually amplifying the constitutional value, I’m increasing the distribution of knowledge.

And all of this applies within the universities. And if you think about this as a way of understanding academic freedom you can solve a lot of puzzles that presently afflict the doctrines of constitutional academic freedom in the university. I don’t have time to go into them, but I’ll just go into one. A lot of people worry does the right of academic freedom attach to the university or does it attach to the professor? And if you follow my argument, the conclusion would be it attaches to neither one. It attaches to the disciplinary which universities are there to foster. So if the institution of the university acts in a way that violates disciplinary standards by say giving into donors, or if professors violate disciplinary standards because they are not very good or whatever, neither one of them can claim the mantle of academic freedom. The academic freedom is there to protect the standards by which we create knowledge in the first place. And that’s the constitutional point of universities as unique institutions in the society. So I’m done thank you.

Stephen Vladeck

Let me just say thank you to Kellye Testy, to Katherine and the Law Review folks, to Ron Collins and especially to Robert. This is a real treat for me for a number of reasons not the least of which being the friends I have on the faculty and the love I have for Seattle.

I’m going to come at this from a bit of a specific perspective which is to say I’m going to devote my remarks to how Robert’s book and how what he just discussed might actually cache out vis a vis the press. Because I think one of the most interesting and recurring questions when it comes to understanding and giving content to the first amendment is why the press has this special or sometimes not so special role in the first amendment and how we think about giving a meaning to that role.

Let me just sort of start at the very beginning. So you probably all know that the first amendment has separate protection for the press. It’s freedom of speech or of the press. And yet, the Supreme Court has steadfastly refused over time to ever recognize special protections specifically imbued within the press clause as distinct from the speech clause. Even though, we can think of lots of famous Supreme court cases involving the press, almost always those cases turn on the speech clause of the first amendment not the press clause for lots of different reasons not the least of which being the court’s understandable uncertainty about how to decide who is and who is not the press. And indeed what is and what is not the press.

Now in 1974, in the speech that he gave at Yale Law School, Justice Stewart suggested that so far as the constitution goes, the autonomous press may publish what it knows and may seek to learn what it can. I think that’s a very elegant way of thinking about it, but the devil’s in the details. How does the press come to know what it knows and what are the means by which it learns what, in Justice Stewart’s mind, it can? That is to say, when we say the press can learn something, do we mean that practically, do we mean it legally, how do we sort of think that through?
So what about the press’s right to know and to learn? Does the first amendment protect the right of reporters for example; to have access to classified information, to publish in certain circumstances classified information? Does the first amendment protect the right of the press to have a special privilege from revealing the identity of confidential sources? This is of course the issue in Bransberg and later cases.

What I want to sort of suggest is I think Robert’s book gives us a fascinating through which to resituate this conversation. Because one way to look at it is that perhaps journalism is a vocation for which to quote from the book, ‘disciplinary practices that create expert knowledge are themselves invested with constitutional status’. That is to say perhaps one way to think of the quandary of how the first amendment might apply to the media is to think of journalism as a vocation like law, like medicine, like astronomy where we might actually want to invest these disciplinary practices with special constitutional status, certainly, that would allow us to draw distinctions between the normal routine acts of professional news gatherers and the potential less routine and more problematic acts of individuals who have no professional standards, who don’t have any special training who are merely amateur bloggers, twitterers, tweeters, et cetera and so on.

But I guess the question is though, even if that’s right, mightn’t there be a downside? And what I want to sort of spend the rest of my remarks hashing out is how this might actually not be such a wonderful, positive development and whether that has broader implications for thinking through Robert’s thesis going forward.

So first, I think the most important point is the one body who I think is unquestionably empowered by a world in which Robert’s view of democratic competence requires us to invest particular disciplinary practices with constitutional status is the courts. Because presumably it is the courts who will be doing the investing. That is to say it is the courts and not the discipline itself that decide which practices count, which disciplines count, et cetera. It wouldn’t make sense otherwise. Journalists shouldn’t necessarily be able to decide for themselves what the Constitution says about their own disciplinary practices. So when it comes to, for example, the reporter’s privilege, it would be up to a court to decide, well how much of this really is part of the disciplinary practice of journalism? How much is their meaningful, professional standards that can be turned into a judicial and manageable test in these cases and so on and so forth? What is truth in the context of journalism? And who decides what is expertise and who decides? So that’s the first concern.

The second concern I think is more amorphous but perhaps in the long term more interesting. Mightn’t there be cross-cutting or counter-valent arguments about expertise? That is to say what happens when you have two different expertises running into each other? How do you cache out first amendment protection in that context? How do you apply the first amendment in a manner that would protect the institutional expertise of the press at the expense of laypeople which could mean the press versus amateur bloggers, et cetera, but then doesn’t necessarily protect the press from the government? That is to say why couldn’t the government then turn around and say well there are certain things where we’re the experts? When it comes to disciplinary knowledge, we know more than you the press knows. You the press are amateurs when it comes to deciding whether disclosure of particular national security secrets will harm our interests, we’re the professionals, trust us. So if you’re going to invest disciplinary knowledge with special constitutional protection, the downside is when that’s not your disciplinary knowledge perhaps you’re going to actually lose whatever special constitutional arguments you might previously have. The way to think about it in terms of what Justice Stewart said in Yale Law School might be this: that
autonomy in this context cuts both ways. First amendment values shouldn’t be balanced
toward the press in a manner that might compromise its independence just as much as we
might think the first amendment values shouldn’t be balanced against the press in a manner
that compromises its independence. This is perhaps, ironically the real problem when we
think about the first amendment and the press perhaps the best the best way to protect the
press is to not treat them differently for first amendment purposes. That is to say perhaps the
best way to ensure that the press is able to serve role that at least we think the founders
meant it ot play was to not say here’s why you’re special and to sort of leave them alone. Or
as Floyd Abrams put it, ‘A press that continually applies to courts for vindication of the
right to gather information cannot credibly be the same press that tells the same courts that
what it prints and why it prints it are not matters for judicial consideration.’ So once you
have the press turning to the courts in the first instance, you might lose the moral suasion of
the argument that the press should be left alone in other instances.

This is a lot of sort of legal mumbo jumbo. Let me put this into practical terms. Let’s talk
about Wikileaks. I assume we have some background familiarity with Julian Assange and
his travails. So Wikileaks: the short version is that Wikileaks has disclosed through various
websites an inordinate amount of information that is classified at least in most cases because
it pertains to the national security of the United States. There’s a federal statute, the
Espionage of 1917, that makes what Wikileaks, I guess I have to say is accused of doing
probably a criminal offense. That is to say 18USC section 793e says that it is a crime for
individuals who are not entitled to have classified information, well the statute says
information relating to the national defense but I hope you’ll forgive me for short-handing it
here, that individuals who are not entitled to possess classified information cannot
retransmit it, cannot disseminate it, cannot even willfully retain it so long as they know that
the information may harm the national defense of the United States. So arguably Wikileaks
has violated the statute. Would Wikileaks have a first amendment defense? It’s the act of
publishing classified information as a speech act because this is matters of public concern,
because in some cases the information should not have been classified in the first place, et
cetera. Now part of why the Wikileaks question is so fraught is because one has a hard time
articulating the distinction between the Wikileaks and The New York Times. Wikileaks
discloses its information; The New York Times discloses its information on websites.
WikiLeaks reproduces cables from our diplomats to the state department. The New York
Times reproduces cables from our diplomats to the state department. The question is what is
the first amendment principle that allows us to distinguish, if we want to, maybe we don’t
want to, between Wikileaks and The New York Times? Better still what is the first
amendment principle that allows it to distinguish between The New York Times and you
when you download The New York Times article onto your computer because you are at
that point willfully retaining information related to the national defense? Now one answer
and the answer that has largely prevailed thus far is we don’t know. And indeed this is why
I think the mainstream media has been rather quiet on the potential liability and first
amendment implications of the Wikileaks affair. But another possibility is to take Robert’s
thesis and run with it. It is to suggest that unlike Wikileaks, The New York Times is a
professional journalism organization. That they are involved I the professional business of
news gathering and news reporting and that there are disciplinary practices which they not
only follow but which they’ve been careful in the Wikileaks case that they have been
following that would allow us to say they are responsible, they are entitled to first
amendment protections and so on and so forth. One could imagine that as an incredibly
attractive and appealing idea. But if journalism is a protected discipline, then perhaps you
would also open the door for the government to say so is secrecy. That is to say so is the
production of classified information. Knowing whether information is classified requires
expertise and journalists don’t have that, we do. That is to say The New York Times may be the astronomer to Julian Assange’s astrologer but when it comes to national security, the government may be the astronomer and The New York Times could be the astrologer. That's the concern.

In closing, because I’m running out of time let me just say this is not the first time this idea has come up. Robert was just reminding me today that Alex Bickel famously called this constitutional disorder. But more importantly, Bickel actually suggested that disorder wasn’t such a bad thing. So in his book The Morality of Consent this is what he said, he said, ‘government may guard mightily against serious but more ordinary leaks and yet must suffer them if they occur. Members of Congress as well as the press may publish materials that the government wishes to and is entitled to keep privately. It is a disorderly surely, but if we ordered it we would have to sacrifice one of two contending values: privacy or public discourse which are ultimately irreconcilable. If we should let the government sensor as well as withhold that would be too much dangerous power and too much privacy. If we should allow the government neither to sensor nor to withhold that would provide for too little privacy of decision making and too much power in the press and in Congress.’

I don’t know if the answer is that that’s why we don’t just let journalism be a discipline that falls within the democratic competence model. But even if we brush journalism aside I think that’s the real question that Robert’s thoughtful and decisive prompts us to ask. If the idea here is to bring order to disorder are we so sure that we don’t prefer disorder in the first instance? Thank you.

Bruce Johnson:

As a practicing lawyer who is heavily involved in free speech matters and free press matters at the level of, to use Bob Post’s words, ‘democratic legitimation’ and, to use my words law suits my responses both to Dean Post and Professor Vladeck are probably more pragmatic than academic, but I would like to make four basic points in response to the speakers.

I would like to congratulate Dean Post on bringing back the values of the reality based community which we have missed for many years. And I think articulate a sociology of knowledge which may keep that reality based community in operation even under future administrations which may take the same attitude that we saw several years ago on that very subject.

The first point I want to make about Dean Post’s book is that it’s interesting to me that the sunum bonum of free speech, the summit, for him is academic freedom. And in doing so, Dean Post necessarily focuses on the rights or responsibilities of institutions, Dean Post says that, ‘academic freedom protects the disinterested scholarship established by institutions of higher education and thus his theory of democratic competence depends on the institutional significance of universities.’ Indeed, modern universities, he says in his book, ‘are unique institutions because they facilitate the application and improvement of professional scholarly standards to advance knowledge for the public good.’ There’s an irony here for me because the modern American college and university at least since the Harvard Charter of 1650 is nothing more than a corporate entity. That charter, by the way, in 1650, was issued not by parliament but by the Massachusetts Bay Company which was itself a corporation created in England. So basically we created colonies which became states which were originally corporations and then they then created institutions that were colleges and universities. The other thing to bear in mind about universities and corporations is that
the leading case establishing vested rights of corporate entities is Dartmouth College versus Woodward in 1819 when Chief Justice Marshall basically affirmed the right of the people who held the charter for Dartmouth from interference by the democratic institutions of the state of New Hampshire.

Now I’m sure that Dean Post is probably unsympathetic to Citizens United versus FEC where the US Supreme Court famously held that corporations have free speech rights too. But it remains interesting to me that his sociology depends in large part on a corporate entity or these corporate entities exercising institutional responsibilities with regard to first amendment speech. He may respond, I suspect, by saying these protections are actually conferred on the faculty as an association of scholars and not on the corporate entity as such but that’s simply a different form of association from the corporate form and I don’t think that distinction necessarily creates a substantive difference in the law.

Second, I question how the courts will discern the differences between Dean Post’s ideal associations of scholars dedicated to the disinterested pursuit of knowledge and those examples that exist in real life. It may be one thing at the University of Washington or at Yale University but it may be very different at Jerry Falwell’s Liberty University. There may be different sorts of academic standards there and the question is how do we defer to the standards established by Liberty University as well as the standards established presumably by the disinterested academic faculty that complies with professional norms? And the question is is the same test applicable that we see with disciplines, i.e., is this astrology or is it law or medicine? And I think that it will be very important to see how courts deal with that type of question because those are two very different types of institutions. The Liberty University a university really dedicated to sectarian knowledge and the larger university that I think Dean Post talks about as the ideal situation. And we have to recognize of course that even in the normal universities, if we want to call them that, that these may not be responsive to professional discipline. There may be lots of funding, as a matter of fact; there is lots of funding by people with a lot of money who may not necessarily be interested in advancing knowledge. We see for example, and I’m quoting Matt Yglesias in his Think Progress blog back in May of 2001, ‘Charles Koch a very wealthy right-wing billionaire has recently decided to fund the economics department at Florida State University on the condition that his operatives would have a free hand in selecting professors and approving publications.’ Also Mr. Yglesias noted, ‘Koch virtually owns much of George Mason University, another public university through grants and direct control over think tanks within the school.’ And he goes on and describes the various controls that this particular donor has over those types of institutions. ‘And the other types of conditional agreements have been made,’ he said, ‘with Clemson and the University of West Virginia.’ So to the extent that university faculties are infected with billionaire funding form whatever direction who may be supporting junk science and junk economics and the like, they may be poor candidates for becoming platonic guardians in this type of situation.

Third, and this is interesting as a media lawyer because I’m really responding to Professor Vladeck without having even known that he would get into the subject. I’m struck by the decline over the years in any independent recognition of the press clause. Dean Post was probably present for the speech as was I for the speech made by Justice Stewart in 1974 entitled “Oar of the Press” where Justice Stewart argued that the press should be an independent monitor of government providing its own checks and balances. Indeed it was only a few years later in 1977 that the second circuit recognized this institutional rule with the so-called neutral reported rule in Edwards versus National Audubon Society. I can tell
you the neutral reported rule seems to have disappeared in recent years and it’s almost generational when you talk to a lawyer who handles press and media issues, when they bring up the subject of neutral reportage, it’s as though they’re talking about one of their grandfather’s favorite keepsakes. And it may be that the neutral reportage rule has gone virtually extinct. The ideal of, as Professor Vladeck points out, The New York Times that is objective, fact based journalists as the exemplar of the institutional press has really been replaced in fact, by a marketplace of ideas; a cacophony from Fox News to talk radio, to bloggers to twitterers, to tweeters, or whatever they are, in a sense it’s possible that journalism has effectively ceased to be a profession as Dean Post defines it, although one may ask if it ever was given that James Calendar, who wrote basically nasty articles on behalf of Thomas Jefferson and then when Jefferson didn’t pay him, wrote the same articles against Jefferson. It may be that that may be the more typical institutional role for the American press over the last 225 years than a journalism and fact-based understanding of reality. In fact along those same lines, within the last few days there’s been a discussion in The New York Times. The public editor has advanced the unusual notion that the news portion of The New York Times: an article, should actually, in the article itself point out when a politician makes a lie. For some reason this is considered a major question as to whether the news reporters should actually go out and point out that fact. Whereas the public editor pointed out, ‘it’s clear this is done almost every day in the opinion pages of The New York Times.’

What is this generational change for journalism? I think it was illustrated here in the Northwest by a very recent decision in federal district court in Portland, the Obsidian Finance versus Cox case. That case involved a blogger who seemed intent on creating websites attacking a local Portland lawyer and she was sued. She successfully argued that everyone expected given the standards of the blogosphere, that her blog postings were utterly devoid of factual content. As a result the judge dismissed the bulk of the case basically saying this is all rhetorically or if you have it, opinion. Then with the bulk of the plaintiff’s case stripped away, she sought to claim the benefits of the Oregon Shield Law as a defense to the remaining portion of the case which went to trial a few weeks ago. But the US District Court ruled in effect that cyber-stalking was not journalism.

As a press lawyer I’m somewhat sad that reporters and lawyers should be treated as, in effect, little more than astrologers, but I think we are heading towards a marketplace of ideas at least from the direction of journalism.

A final point, I’ve written an essay, a law review article, on this particular subject but Dean Post’s book focuses on public discourse and the fact that matters of public concern should be entitled to the most significant first amendment protection available. My article discusses the fact that over the last several years, Washington State has not been as effective as it could be in protecting matters of public concern and the promotion of democratic legitimation. Within the last year, the State Legislature has passed an anti-slap law RCW 4.24.525 which provides for a special immunity focusing on statements that are made on matters of public concern. So I look forward to this state providing ample protections for public discourse consistent with what Dean Post is advocating.

Clark Lombardi:

With that in mind I think the first thing we should do is see whether Dean Post has any responses to some of the comments that were made and then we’ll open up the floor to further questions.
Dean Post:

Thank you both for those wonderful comments, that’s my main reaction. In the book, I didn’t have time really to explicate it, I talk about two different constitutional purposes for the first amendment. One is democratic legitimation which focuses on speakers and participation of the speaker in the formation of public opinion and the other is democratic competence which is the cognitive empowerment to know something. And it’s really interesting to focus as both the commentators did on the relationship of the press to democratic competence as a value. I would say that the constitutional image of the press in the United States has always been extremely blurry. On the one hand the press a separate institution that has its own constitutional entitlements, it speaks for us. On the other hand, the press amplifies us; it’s like a republican party. On the third, it’s just a commercial speaker; it speaks on its own. And you can see opinions vary from one image to another and the minute you see the first metaphor of the press in an opinion you know where it’s going to come out on these values. And I do think as both the speakers pointed out, there is a huge problem in the press today the American press doesn’t know whether its primary value is objectivity or neutrality. If it’s neutrality, it reports the controversy and lets it lie. If it’s objectivity, if someone says something that’s outrageous, it actually points it out because it’s objective. The values of professionalism on the press’s side are quite indeterminate. The larger issue that this raises is how you disseminate the information and knowledge base is necessary to be democratically competent. And it does raise, if you push it, on the one hand the question of whether for example, whether FOIA, Freedom of Information Act is constitutionally required? Or on the other hand, whether the press has a specific role in doing this. So if we look at FOIA, the court has been resolute to say there’s no constitutional entitlement to Freedom of Information Act. On the other hand, every time you see it discussed it’s discussed on constitutional terms that you need access to information in order to have a democracy. Internationally speaking, the Inter-American Commission has created a right to access to information, so has the European Court of Human Rights. But we can view this as a variant of popular constitutionalism, namely there’s a constitutional right, but it’s not up to courts to do it, it has to be legislatively determined. A lot of interesting inquiry we can look at with respect to that. With respect to the press, this is very much the fundamental issue that you both raised; when we protect the press do we protect them as a speaker, which is say democratic legitimation. So you have a partisan, is Jefferson speaking through the newspaper? Or do we respect them because of the right of hearers to hear information in which case we can police their accuracy so they’re neutral? That’s very much like Michael Schudson used to write about at the beginning of the twentieth century, the press began to become professionalized and editors used to say get the facts instead of get the story. And there was a difference and the press started imagining itself as this neutral arbiter in professionalism and that would be compatible in protecting in terms of the hearers of the press. But we also have this other function of the press which is as a speaker, itself and how to distinguish between those is really the fundamental challenge that you raise.

Clark Lombardi:

Do you have any responses to the response?

Stephen Vladeck:

I’ll just say I think that’s exactly right but in an interest of not spending the entire discussion focusing on the press it begs the larger question of how we measure expertise. Just to put
this in context. There’s a remarkable footnote in an opinion Justice Suitor wrote shortly before he left the bench, well the court, anyway, I think it was Exxon versus Baker where one of the issues in the litigation had been a series of reports that had been funded by Exxon. They had been relied upon as sort of proof of the exact claim INAUDIBLE (56:22) was advancing and Justice Suitor drops this footnote, it’s a remarkable footnote it basically says we are cited that appear to establish all this data because these reports were funded by Exxon we will not rely upon them here. It’s sort of an independent evaluation of why that particular expertise was, in that context, not trustworthy. And we can all hope that there are lots of Justice Suitors out there in the world, but I guess the question is, how do we codify Justice Suitor?

Robert Post

I think in light of that, the example you raised with the Kope brothers funding on condition that is contrary to every fundamental principle of academic freedom would be. A university which accepts a grant allowing a lay donor to dictate the point of view or the qualifications has forfeited the right, in my view, to be a university and to enjoy academic and it’s quite shocking.

Bruce Johnson:

And one of the things I think that’s illustrated by Professor Vladeck’s point is the fact that I think the press clause to some extent operates against allowing courts to recognize a discipline of journalism. For whatever reason I believe they tend to back away, they can recognize other disciplines very easily but to actually involve a court in making decisions as to what is or is not journalistic is very troubling, I think it’s because of the press clause. In that Obsidian Finance case from last month or thereabouts, the court actually went out of its way to determine what a journalist was and I can tell you a number of the media lawyers in the business were shocked that a court was trying to make a determination as to of what a true and valid journalist would be and make a decision based on it. So I think you’re going to have a problem trying to sort of squeeze the institutional press into this disciplinary concept by virtue of that very diffidence.

Robert Post:

So you know you have the same problem with newsworthiness. Courts say what is newsworthy? It’s published in a newspaper. You have that same circularity. A third way is of course the Vince Blaze way. You were mentioning Vince Blasi, who views the press as a particular kind of institutional actor that has a specific constitutional function which is different either than being professional or of being something else. And it does correspond to some decisions, actually, the Minneapolis Star and Tribune decision in which the State of Minnesota had a tax that applied only to press. It had a use value tax that applied only to ink and paper used the press. And the court said you can’t single out the press. Why? Because the press has a specific function to perform in democracy and that looked a lot like the checking function that Vince Blasi. On the other hand you get the converse of those decisions where the press is seeking special privileges, say reporters or special access to information, the court has been very reluctant. On the one hand there are decisions which single out the press but it’s when the press is itself singled out.

Clark Lombardi:
Well that’s wonderful, I think we have twenty minutes to open up the floor to questions from the floor, if people would like to pose them. We have microphones on either side of the room. Please introduce yourself when you do so.

**Audience 1:**

Hi my name is Don Horowitz. I’ve spent some time in the last few years thinking a lot about the internet a lot. It’s interesting to me to hear the synonym used for the press ‘media’. Is the press really the press or is it a medium through which we get information and or knowledge? And I think the question of information and knowledge they’re not synonymous.

I ask this question because, well for a number of reasons, but about two weeks ago, Vinton Cerf who is one of the principle inventors of the internet had an article in The New York Times in which he said that the right to access the internet was not a fundamental human right and was not even a civil right because it was a medium through which you got what you have a basic right to which is information or to express yourself. And he made a distinction which I’m not sure you folks are necessarily going to agree with especially when I heard Dean Post say a ban on newsprint would raise some constitutional questions, first amendment has to do with public knowledge, and a number of other things. So I’d be interested in your views as to whether as the internet is developing or other kind of media that become very important over time has the same kind of rights for the public?

**Robert Post:**

So the court has very often said that, raised the question do we think about media for the communication of ideas and the protection attaches not only to the particular communication, not to a particular painting by Kandinsky which could communicate something, god knows what. But the fact that it’s a painting tells you that it’s protected, so a medium for the communication of ideas and often that phrase is taken, that’s in Burstein and many other opinions that is taken with the idea, it’s like a pipe through which the ideas flow. But I think that’s actually an inaccurate image. So take an example, you know the famous sculpture and it was by Duchamp. It’s a urinal. So you have the urinal in the men’s, this is in the famous arsenal exhibit in the United States. So you have a urinal it’s in the men’s bathroom, no first amendment protection, you can do anything you want to it. You take that same urinal, you put it in a museum and suddenly it’s a protected idea. It has no different idea than before which is telling you that it’s the medium itself that’s creating the idea. So think of John Cage, you go to a concert and it’s silent, nothing done. That’s telling you something because it’s playing against the conventions which makes something a medium. So the medium is protected because it’s ascetic conventions about how you communicate. And the reason why events in a medium are presumptively protected is because public opinion is created in a public sphere. A public sphere is what Charles Taylor has called a ‘form of modern imaginary’, it’s created in the seventeenth century through markets and coffee houses and stuff. Public opinion is product of public sphere and public sphere is the product of things like newspaper and various media by which we communicate to strangers. And the communication of strangers both communicates ideas in the sense of carrying like an idea through a pipe, or water through a pipe, but also the fact that we have these conventions that relate each to the other is itself of public value. And we can manipulate that even though you can’t specify what the idea in particular is.

**Audience 2:**
INAUDIBLE (1:03) I’m Kans and welcome to the Pacific Northwest. There is something incredibly heroic about Robert’s book and it is simple and let me be straightforward and that is the attempt to align the first amendment with truth. And these days at least ever since 1919 and Justice Holmes that has been a Sisyphean task and I certainly applaud you for that. In many respects Robert, truth is on the run. There is the commercialization of knowledge and I think Bruce Johnson and Steve Vladeck have spoken to that, when you talk about cases like Virginia Pharmacy that had the information model. But the fact is the reality of today’s marketplace is image advertising. It’s completely devoid, it doesn’t appeal to the mind. It appeals to desires. We have a case before the Supreme Court right now which one of our students, Jeff Barnum has just written about in our Law Review and I’ve recommended it to you, the United States versus Alvarez and there is a first amendment claim, believe it or not ladies and gentlemen, that false speech, factually false: I won a medal. That’s something verifiable either you did or you didn’t. There’s a case before the Supreme Court where it’s argued and I suspect that it may well prevail. Davis, Wright, Tremaine has filed a brief on behalf of the Reporter’s committee supporting the first amendment claim. And then finally we have Garcetti case which you talk about in your book in which public employees if they criticize, at least in their official capacity, the government they can be disciplined and there is a specter of applying that to the university. So any one of these areas it just seems that truth as we know it is on the run. In fact, if anything, the first amendment is moving toward opinion and away from truth. And I’d just like to have some of your ideas about any aspect of these three points: the commercialization of knowledge, the defense of false speech, and the application, as if Garcetti weren’t bad enough for those of us in the first amendment community to the university.

Robert Post:

Those are wonderful questions. And I agree with you that truth is on the run, that’s one reason that I wrote the book. I think your work on desires and the paratroopers is wonderful, it’s right. So much of modern speech is non-cognitive and one has to have a theory of freedom of speech that embraces the non-cognitive or you haven’t done anything in the modern world, which is one reason why we think of democratic legitimation as founded in the personal autonomy of the speaker which is to say the way the speaker is using language… I was just teaching a first amendment class this morning which was a delight on Cohen. Cohen versus California has a theory of language in which each truth of each sentence is unique and cannot be translated into any other because it is not ultimately cognitive. It has the force of emotion. It has the force of its idiosyncratic use of language and tradition and whatever it invokes. Language is thick. And I think that’s right because what’s ultimately at stake is my ability to say this, whatever this is in the unique way I say it. So if one has to think about the protection of truth, one has to think of it outside of public discourse because within public discourse there are very good reasons we do not give truth giving powers to the state as you said to the courts because then we become subject to the courts. I think one reason why other cultures are so comfortable allowing public discourse to being regulated is because they have great deference to public officials and bureaucratic decision making. If you look at Europe which is governed out of Brussels and you think can you imagine having a non-democratic bureaucracy like Brussels in this country? We’d see black helicopters over every tall building in this country. There’s no way it would happen in this country, but it happens in other cultures because they regard the government with more trust than we do. Our dependence on freedom of speech, our exceptionalism in this regard depends on our lack of trust of courts of the state. That is to say to determine truth from falsity. That’s one reason we’re very careful about giving courts that power, but we do
never the less have things like knowledge. You rely on them every time you go to a lawyer or a doctor or depend upon a warning for a product or depend upon a disclosure from a corporation if you’re going to invest. So there are places outside of public discourse where we are dependent, where we do rely on the truth value of the communications we receive and we can’t give that up or we’re really at the mercy of caveat emptor and the first amendment is turned into Lockner. There are certain people on the court like Thomas who I think want to go in that direction, I think it’s a problem. I think it’s a big problem.

Bruce Johnson:

One of the valuable things about Dean Post’s book is its reliance on what I would call private entities, civil society, practicing lawyers, faculties of medicine, institutions that are not governmental in order to make determinations of knowledge. Because we do find it troubling when the government decides it’s going to make the decision as to what is or is not to be truthful. But what we’ve created, I think, in our society and what the first amendment ought to recognize as a principle goal is permitting as Dean Post says, ‘permitting these disciplines to achieve what they need to achieve in order to protect and foster knowledge.’ It’s no secret that in the Soviet Union lawyers were heavily regulated. Academics were heavily regulated. Even scientists and the case Dean Post cites in his book the Lysankoism controversy, even scientists were prohibited from practicing their own activities consistent with their disciplines. So to preserve a free society, you need to be able to preserve these sectors of civil society which will discipline themselves and arrive at knowledge independent of governmental entities.

Robert Post:

This is also, I think, responsive to your point about commercialization. If we think about professionalism, professionalism classically, Talka Parsons, as defined as opposed to the market. So we don’t let Xerox say what’s true about physics but we do let a university say it. And it’s true, universities can be bought out. To the extent that they’re bought out they cease to be universities, they become McDonald U’s. But if they are a university, there is some distinction between those who support them and the value which they purport to hold which is the disinterested, meaning not commercialized view of knowledge. And all of academic freedom began in the United States as a claim against the purchase of knowledge. So the classic case being Leland Stanford’s widow said, ‘no economist on my university’ meaning Stanford can support the silver standard. So she fires Edward Ross who believes in the silver standard and she writes David Star Jordan who’s the president of Stanford, this person shouldn’t be on my faculty so he gets fired. Because it’s money buying the knowledge and academic freedom is that the money doesn’t get to buy the knowledge even though it’s buying the university.

Stephen Vladeck:

Just one quick thought. It seems to me that if we all agree that truth is a critical issue here but that in the public discourse truth can’t always be the ideal because of the reasons that we’ve been discussing, someone or at least something has to be in some sense the arbitrator of truth. Ron mentioned the Reporter’s Committee amicus brief in Alvarez which makes a compelling case for why that institution shouldn’t be the government. That there are reasons why the government should not be the institution that is the arbitrator of truth in this context. But if it’s not going to be the government, who is it going to be? I think that’s the hard question because the only way that you can have truth without investing it with
constitutional status that would then lead to suppression is some independent proxy to be its arbitrator. I think the answer has to be the public is ultimately the arbitrator of truth. And then the question becomes how does the public arbitrate truth? And that’s why I think we’re all obsessed with the press because the role of the press in this context is arming the public with information, some of it truthful, not all of it, some of it laced with opinion not all of it, that allows the public to decide for itself what is and what is not true.

So just really quickly let me put this in practical terms. Think of where we would be if we never knew about the torture memos or if we never knew about black sites, if we never knew about the warrantless wiretapping program, if we didn’t know that the Obama administration’s office of legal counsel had written a memo explaining why it was legal to conduct a target killing of Anwar Alalaki. Those are only things we know because the press violated existing criminal laws prohibited in the disclosure of classified information and only because someone else violated those laws and their employment contracts by leaking that information to the press. And so I think the real question and I think the reason why I suspect both Bruce and I gravitated toward the press part of this is because I think the tension we’re touching on is exactly this, is arming the power to decide for itself.

Robert Post:

One way to think about and put it on the table, if you both would consider, imagine separating the press into two different kinds of institutions. On the one hand there’s the press that’s like the Republican Party newspaper, it’s a press which is amplifying your voice or my voice a participate in public discourse. And the press which purports to be like Schutsen describes the press, ‘disinterested, professional’ and there could be legal signals about which standard you’re going to be subjected and rights and privileges could follow from that. I mean you could imagine that for example.

Stephen Vladeck:

Well and non-profit versus for profit press corporations.

Robert Post:

Yeah, exactly.

Ron Collins:

We have time for one more question. And it’s going to be yours.

Audience 3:

My name is Dan Ritter. I went to the law school here. At the risk of being identified with Pontius Pilate one might ask here what is truth. I mean, obviously there’s a great deal of diversity of opinion now perhaps more than ever, maybe always there has been. If you rely on professional standards of lawyers, doctors, academics, civil servants, politicians, you have the problem of bias, both conscious and unconscious. We have the problem of the contribution of public choice economics demonstrating in many areas how people have axe to grind whether they always recognize it or not. And certainly, the government has to decide what is truth in certain areas, such as whether the doctor can give bad advice to the
patient. But maybe in the area of first amendment which the government punishing people for saying maybe the marketplace of ideas is the best test after all. The reply is well the marketplace of ideas doesn’t always produce truth, often does not. But as far as the government is concerned, that is still no reason to give them power to punish people for violating someone’s notion of truth in these public speaking opinion molding spheres.

Robert Post:

Right that seems to be an excellent statement of the problem. On the one hand we want the government to punish the doctor who gives false information to the patient, so that doctor is not within the sphere of the marketplace of ideas. On the other hand, we don’t want the government to punish, say, The New York Times when it makes an editorial which the state believes is a crappy editorial so we know we have these two different alternatives and now the question is how do we sort? Which sort of speech goes in which box and which speech goes in the other? We need a criterion of sorting for which speech acts we will require the speaker to stand by the truth of their statement and which we will not because we don’t want the government interfering. What I suggest in the book is that within public discourse, within the sphere of public opinion formation, we want the state to be left out because we want the state to be responsive to public opinion rather than to make public opinion. Whereas the doctor disclosing information or your Honda, whatever manual you get from the manufacturer giving you truthful information about what to do in case there’s a seatbelt malfunction, that we don’t view as public opinion information. We view that as consumer safety. So we make these categorical distinctions but now the question is on what foundation?

Ron Collins:

We actually probably have time for one more question. Professor Stover, do you have a…

Audience 4:

I don’t need to introduce myself to the panel. I have to say that ever since Robert was my note editor for my Yale Law Journal piece he’s been educating me and he does continue to do that today and through his book. So thank you very much for that continued education that you’ve given me Robert.

My question goes to an aspect of your book that hasn’t really been discussed at all today except only when you briefly alluded to alternative theories of first amendment value. But not much has been said about that. In the context of your argument on democratic competence you do reference but suspend with rather summarily the theories of autonomy such as that given by Ed Baker or self-realization given by Martin Reddick and it seems to me that both of those theories or the key to any alternative first amendment value based on autonomy is the idea that general we have a libertarian protection of most speech unless in the balance the government can show that there is serious harm. And as it dawned on me as I was reading your book, that the description that you’ve given, the distinction that you’ve given between the knowledge that the government can require in the context of doctor/patient or lawyer/client privilege versus the knowledge that the government cannot regulate in the context of an Oprah TV show could be explained arguably, just as well by the harm principle that motivates these other theories of first amendment value. So I’d like you to respond to that. Can we not reach much the same result under either Reddick’s or Baker’s theories of first amendment value recognizing that in certain contexts there is much
greater likelihood of harm and of an inability to access counter-speech than in other contexts.

Robert Post:

Yeah that’s a wonderful question and I wish I could answer it more crisply than I can, but I think the general point I would make about it is this, Montain when he writes about human beings he says, ‘what makes us human is we speak’. So everything that we do is through speech. So everything that we do reflects our autonomy and speech. And if I had an autonomy theory, it would be triggered every time I said anything, meaning to communicate and that’s everything. And that just does not correspond to actually the way in which the first amendment works in any plausible way. In fact from the autonomy point of view the paradigmatic case would be my talking to an intimate about things that really matter to me. And the paradigmatic case of what can be regulated is my talking to an intimate about what really matters to me. I can be shielded from liability for defamation if I talk about a matter of public concern or about a matter of public opinion, a public figure or about a public official. But if I’m talking to my daughter about something of huge importance to the two of us, her boyfriend, say and I say something terrible about him no first amendment coverage whatever. So it just doesn’t correspond either to the intensity of my autonomy interest in speaking nor to the harm. You could debate it was more harm in publicly communicating it because it’s to more people. And yet, if I communicate it to many people rather than just a few, I’m privileged because I’m communicating it to the public, it seems to be a matter of public. So it’s very hard to get any ordinary theory of how autonomy is going to work to line up. And the way I would think about it is this, if I’m caring about autonomy, there’s nothing specific about speech in that question. I’m caring about me as an autonomous, self-determining human being. And what we say is warrant for limiting my autonomy is democratic legitimacy. If I have a democratic state, it can regulate me, the legislature can do it. When we’re asking about the first amendment, what we’re asking is something additional restriction that we put on democratic law making. There’s something in addition to my autonomy. What would that be? The answer I give is it’s something is prerequisite for the democratic legitimation itself and that’s why we take it out of the usual circuit of democratic legitimation. There’s something very odd, I want to say, about calling the first amendment, as the Supreme Court has many times, ‘the guardian of our democracy’, because the first amendment is what strikes down the products of our democratic lawmaking. It’s counter-majoritarian, the first amendment, yet we call it the guardian of democracy. So it has to be turning on some prerequisite that makes the democratic lawmaking process, itself democratic which is what the theory goes to. And autonomy wouldn’t be that.

Ron Collins:

Well in a symposium celebrating expertise, I think we should all be very grateful to have so much expert speech on the subject. We do have a reception that will be in the Perkins-Coie room I believe, and I hope many of us will join us to thank Professor Post and the two commenters in private, but right now I hope we can do so in public. It was really very…

Applause