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## DEMOCRATIC COMPETENCE, CONSTITUTIONAL DISORDER, AND THE FREEDOM OF THE PRESS

Stephen I. Vladeck\*

*Abstract:* In *Democracy, Expertise, and Academic Freedom: A First Amendment Jurisprudence for the Modern State*, Robert Post offers a powerful argument for why the First Amendment should protect the manner in which professional disciplines produce expert speech. This symposium Essay responds to Post's book by focusing on the potential interaction between Post's theory of "democratic competence" and the freedom of the press. Using the WikiLeaks affair as a foil, this Essay concludes that a "democratic competence" approach might provide a more coherent theoretical underpinning for according constitutional protection to *newsgathering* (as distinct from publication), and might thereby help to answer the unanswerable question about what the First Amendment's Press Clause actually protects. By the same logic, though, it might also provide for greater restraint on the media insofar as it constitutionalizes conventional arguments about the need to honor the government's expertise when protecting national security secrets against public dissemination. Thus, the question Post really raises is whether such a deeper but narrower First Amendment is one to which we should aspire.

We have then, at least in my opinion, the worst of both worlds. On the one hand the laws stand idle and are not enforced at least in part because their meaning is so obscure, and on the other hand it is likely that the very obscurity of these laws serves to deter perfectly legitimate expression and debate by persons who must be as unsure of their liabilities as I am unsure of their obligations.<sup>1</sup>

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[G]overnment 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

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1. *Espionage Laws and Leaks: Hearings Before the Subcomm. on Legislation of the Permanent H. Select Comm. on Intelligence*, 96th Cong. 14 (1979) (statement of Anthony A. Lapham, Gen. Counsel, CIA).

government wishes to, and is entitled to, keep private. It is a disorderly situation surely. But if we ordered it we would have to sacrifice one of two contending values—privacy or public discourse—which are ultimately irreconcilable.<sup>2</sup>

When the international organization WikiLeaks systematically disclosed to the public massive volumes of classified U.S. government information—including scores of sensitive diplomatic cables<sup>3</sup>—by posting them to its eponymous website, it presented a conundrum for those attempting to expound a comprehensive (and coherent) theory of the First Amendment.<sup>4</sup> To understand the parameters of the problem, consider 18 U.S.C. § 793(e), part of the Espionage Act of 1917.<sup>5</sup> Section 793(e) makes it a crime for anyone “having unauthorized possession of . . . information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation,” to “willfully communicate[] . . . the same to any person not entitled to receive it,” or to “willfully retain[] the same and fail[] to deliver it to the officer or employee of the United States entitled to receive it.”<sup>6</sup> Assume for the sake of argument that the U.S. government could make out a prima facie case that Julian Assange, WikiLeaks’ enigmatic founder and editor-in-chief, violated § 793(e) by posting to public websites thousands of classified U.S. government diplomatic cables and reports (at least some of which presumably “relat[e] to the national defense”).<sup>7</sup> Would the First Amendment ever provide Assange with a defense?<sup>8</sup> I have suggested

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2. ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 80 (1975).

3. For an overview of the WikiLeaks affair, see THE NEW YORK TIMES, *OPEN SECRETS: WIKILEAKS, WAR, AND AMERICAN DIPLOMACY* (Alexander Star ed., 2011).

4. See Peter Grier, *WikiLeaks: Would First Amendment Protect Julian Assange?*, CHRISTIAN SCI. MONITOR (Dec. 3, 2010), <http://www.csmonitor.com/USA/2010/1203/WikiLeaks-Would-First-Amendment-protect-Julian-Assange>.

5. Act of June 15, 1917, ch. 30, 40 Stat. 217 (codified as amended in scattered sections of 18, 22 & 50 U.S.C.).

6. 18 U.S.C. § 793(e) (2006).

7. Perhaps because of First Amendment concerns, at least one district court has read an additional scienter requirement into § 793(e). See *United States v. Rosen*, 445 F. Supp. 2d 602, 645 (E.D. Va. 2006). I assume here that, to the extent *Rosen* is followed, the government could satisfy such a heightened burden in Assange’s case. Obviously, there would be no need to reach the First Amendment question if the statute itself did not apply.

8. Some have argued that the First Amendment ought not to protect Assange because he is a non-citizen whose allegedly unlawful conduct took place outside the territorial United States. See, e.g., Andrew C. McCarthy, *How to Get Julian Assange*, N.Y. DAILY NEWS (Dec. 12, 2010), <http://www.nydailynews.com/opinion/julian-assange-u-s-aggressive-prosecution-charge-wikileaks-villain-article-1.474728>. Whether or not someone in Assange’s situation could affirmatively invoke

elsewhere that the answer under extant precedent is quite possibly “no.”<sup>9</sup>

Now, change the hypothetical: What if the government separately sought to prosecute the *New York Times*, which published a number of articles quoting directly from some of the classified documents that WikiLeaks made public, and also posted some of the cables themselves?<sup>10</sup> Assuming that, per its text, § 793(e) applies to downstream redistribution,<sup>11</sup> would the *Times* have a First Amendment defense to such charges?<sup>12</sup> And what about individuals who downloaded some of the WikiLeaks documents onto their computers, or who downloaded the *Times* articles quoting from those documents, and “willfully retain[ed] the same”? Would *they* have a First Amendment defense? In general, if one believes that the answer to the First Amendment question in each of these three scenarios isn’t the same, what is the First Amendment principle that supplies the necessary basis for distinguishing among them?

At first blush, it may not be obvious how these questions relate to academic freedom, or to Robert Post’s discussion thereof in *Democracy, Expertise, and Academic Freedom: A First Amendment Jurisprudence for the Modern State*.<sup>13</sup> Indeed, other than one tantalizing allusion,<sup>14</sup>

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the First Amendment as a civil plaintiff, allowing him to raise it as a defense to a criminal prosecution by the U.S. government in an Article III federal court seems a far less debatable proposition.

9. See Stephen I. Vladeck, *Inchoate Liability and the Espionage Act: The Statutory Framework and the Freedom of the Press*, 1 HARV. L. & POL’Y REV. 219, 232–34 (2007).

10. See, e.g., Scott Shane, *WikiLeaks Leaves Names of Diplomatic Sources in Cables*, N.Y. TIMES, Aug. 29, 2011, at A4; Scott Shane & Andrew W. Lehren, *Leaked Cables Offer Raw Look at U.S. Diplomacy*, N.Y. TIMES, Nov. 29, 2010, at A1.

11. There is no textual reason why § 793(e) *wouldn’t* apply to any and all retransmissions of the same information, even once that information is already otherwise available in the public domain. Nevertheless, there has only been one attempted prosecution of a third party under § 793(e), and that attempt collapsed. See *Rosen*, 445 F. Supp. 2d 602; *Feds Drop Charges in AIPAC Spy Case*, CBSNEWS (May 1, 2009), [http://www.cbsnews.com/2100-250\\_162-4982793.html](http://www.cbsnews.com/2100-250_162-4982793.html).

12. In the *Pentagon Papers* case, Justice White expressly suggested that the *Times* and *Washington Post* could have been prosecuted under § 793(e) after publishing the Pentagon Papers. See *New York Times Co. v. United States*, 403 U.S. 713, 737–40 (1971) (White, J., concurring).

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

14. Consider the following passage:

First Amendment coverage presumptively extends to media for the communication of ideas, like newspapers, magazines, the Internet, or cinema, which are the primary vehicles for the circulation of the texts that define and sustain the public sphere. *In the absence of strong countervailing reasons*, whatever is said within such media is covered by the First Amendment.

*Id.* at 20 (emphasis added) (footnote omitted). Obviously, one wonders what Post has in mind as examples of “strong countervailing reasons.” The monograph provides no further illumination.

nowhere does Post's monograph grapple at all with the question of whether (or when) the government's interest in protecting national security secrets would justify infringement on otherwise constitutionally protected speech *qua* publication.<sup>15</sup> Instead, Post's book focuses on the complex relationship between two First Amendment values: democratic legitimation, which he defines as the commitment "to the egalitarian premise that every person is entitled to communicate his own opinion,"<sup>16</sup> and democratic competence—"the cognitive empowerment of persons within public discourse, which in part depends on their access to disciplinary knowledge."<sup>17</sup> Democratic competence, Post explains, is necessary for democratic legitimation, even though it is inconsistent with it to the extent that democratic competence requires certain speech to "be subject to a disciplinary authority that distinguishes good ideas from bad ones."<sup>18</sup> As he elaborates, "[t]he value of democratic competence is undermined whenever the state acts to interrupt the communication of disciplinary knowledge that might inform the creation of public opinion."<sup>19</sup> As such, the First Amendment itself must privilege—and protect from governmental interference—the means by which the relevant discipline creates expert knowledge in order properly to protect the integrity (the "competence") of public discourse.<sup>20</sup>

Post's central ("radical and counterintuitive"<sup>21</sup>) conclusion, that "democratic competence can be constitutionally protected only if the disciplinary practices that create expert knowledge are themselves invested with constitutional status,"<sup>22</sup> is provocative and insightful. It also has implications far afield of academic freedom, for it suggests a way of fundamentally reconceptualizing not just the underlying purpose of the First Amendment, but a host of distinctions in First Amendment jurisprudence that have typically defied easy theoretical grounding.<sup>23</sup>

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15. Nor does Post's prior work (including his student note, which criticized Congress's failure to define the term "national security" in FOIA, *see* Note, *National Security and the Amended Freedom of Information Act*, 85 *YALE L.J.* 401 (1976)) shed light on his views as to the circumstances in which government can suppress (or retroactively punish) publication of sensitive information without running afoul of the First Amendment.

16. POST, *supra* note 13, at xiii.

17. *Id.* at 34.

18. *Id.*

19. *Id.* at 61.

20. *See id.* at 95–99.

21. *Id.* at 96.

22. *Id.*

23. In addition to academic freedom, Post devotes a fair amount of discussion in the book (and in his earlier work) to making sense of the Court's approach to "commercial" speech. *See, e.g., id.* at

Indeed, it is probably no understatement to suggest that it will take years to fully flesh out the implications of Post's thesis in areas besides and beyond academic freedom.

At least where national security and the press are concerned, though, the implications of Post's thesis are both immediate and potentially dramatic. Thus, using the WikiLeaks affair as a foil, this Essay situates Post's "democratic competence" theory within the larger—and ever-on-going—debate over the extent to which the First Amendment protects the freedom of the press, especially in situations where the government may have a compelling interest in keeping particular information secret.<sup>24</sup> There are at least two potential consequences that would result from applying Post's theory in this context: *First*, as Part I explains, "democratic competence" could well provide the missing theoretical justification for reinvigorating the First Amendment's Press Clause<sup>25</sup>—a provision that the U.S. Supreme Court, for various reasons, has consistently declined to invest with substantive content independent of its immediate lexical predecessor, the First Amendment's Speech Clause.<sup>26</sup> To the extent that journalism as a discipline would qualify for the special protections attendant to Post's democratic competence approach,<sup>27</sup> his book may finally provide the hook on which courts and commentators can hang a constitutional distinction between Julian Assange and the *New York Times*, as opposed to merely an emotional one.<sup>28</sup>

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34–46; Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1 (2000). But see Martin H. Redish & Abby Marie Mollen, *Understanding Post's and Meiklejohn's Mistakes: The Central Role of Adversary Democracy in the Theory of Free Expression*, 103 NW. U. L. REV. 1303, 1334–36 (2009) (describing and critiquing application of Post's theory to commercial speech).

24. See, e.g., Geoffrey R. Stone, *Government Secrecy vs. Freedom of the Press*, 1 HARV. L. & POL'Y REV. 185 (2007) (summarizing the theoretical, doctrinal, and prudential considerations that factor into properly framing the balance between governmental secrecy and freedom of the press).

25. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . .").

26. See generally David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429 (2002); Margaret A. Blanchard, *The Institutional Press and Its First Amendment Privileges*, 1978 SUP. CT. REV. 225; Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025 (2011).

27. This result would depend, in Post's view, on the creation of a "constitutional sociology of knowledge" pursuant to which standardized conditions for expertise are "created and certified." POST, *supra* note 13, at 58. The example Post uses is if Congress were to require accountants to use "predetermined federal formulae for the calculation of profit." As Post explains, First Amendment coverage "would be triggered if the mandated federal formulae either prevented accountants from distributing knowledge or required accountants to distribute falsehoods." *Id.*

28. For examples of the latter, see Floyd Abrams, Op-Ed., *Why WikiLeaks Is Unlike the Pentagon Papers*, WALL ST. J., Dec. 29, 2010, at A13, and Bill Keller, *The Boy Who Kicked the Hornet's*

*Second*, and cutting somewhat in the opposite direction for reasons elaborated upon in Part II, “democratic competence” might also have a downside with regard to freedom of the press, at least where national security secrets are concerned. After all, if one can fairly describe Post’s book as arguing that there are contexts in which the Constitution should privilege “disciplinary knowledge” over amateur opinion, it is not difficult to imagine government arguments that *government officials*, rather than journalists, possess the relevant disciplinary knowledge when it comes to disseminating national security secrets.<sup>29</sup> Journalists, after all, are only (highly skilled) amateurs in terms of assessing the nature of threats to U.S. national security. Consequently, just as Post’s theory would embolden the discipline of journalism, so too might it entrench the discipline of governmental secrecy, in which the relevant experts may all argue *against* publishing, among other things, the torture memos,<sup>30</sup> the warrantless wiretapping program,<sup>31</sup> black sites,<sup>32</sup> and so on. Post might respond that this conceptualization does not apply when it comes to using disciplinary expertise to keep information *out* of public discourse, but it is not immediately obvious why democratic competence is only a one-way ratchet. Put another way, in areas where suitable indicia of expertise were available, might not Post’s approach provide just as convincing arguments for *withholding* information from public discourse?<sup>33</sup>

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*Nest*, N.Y. TIMES, Jan. 30, 2011, § MM (Magazine) at 32.

29. Indeed, this argument is a variation on the more general argument against *judicial* interference in national security policy, i.e., that the executive branch possesses the relevant expertise when it comes to deciding which information can and cannot be publicly disclosed. See ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* (2007). *But see* Alice Ristroph, *Professors Strangelove*, 11 GREEN BAG 2D 245 (2008) (reviewing POSNER & VERMEULE, *supra*).

30. See Dana Priest & R. Jeffrey Smith, *Memo Offered Justification for Use of Torture: Justice Dept. Gave Advice in 2002*, WASH. POST, June 8, 2004, at A1, available at <http://www.washingtonpost.com/wp-dyn/articles/A23373-2004Jun7.html> (summarizing memos produced by the Justice Department’s Office of Legal Counsel that appeared to condone the torture of non-citizens in U.S. custody).

31. See James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1 (discussing classified program of potentially unlawful domestic wiretapping).

32. See Dana Priest, *CIA Holds Terror Suspects in Secret Prisons: Debate Is Growing Within Agency About Legality and Morality of Overseas System Set Up After 9/11*, WASH. POST, Nov. 2, 2005, at A1 (disclosing CIA practice of sending suspected terrorists to secret prisons in foreign countries based on classified documents leaked to reporter by government sources).

33. See, e.g., Redish & Mollen, *supra* note 23, at 1339 (“[T]he democratic competence model seemingly assumes that government can identify ‘false’ speech and properly suppress it. Allowing the government to regulate speech in this manner deprives individuals of the very information that might reasonably cause them to question orthodox ideas of truth and to challenge those in authority

More generally, as this Essay concludes, the WikiLeaks example reveals the dilemma that democratic competence would truly pose for the First Amendment. Democratic competence may expand the scope of First Amendment protection, but it might also empower the government (and perhaps other disciplinary practices) with stronger countervailing arguments justifying the suppression of speech in cases in which the First Amendment would otherwise apply, or privileging other classes of speech over those classes Post has in mind. If that's true, the question becomes whether we really should aspire to such a deeper but potentially narrower First Amendment.

#### I. "DEMOCRATIC COMPETENCE" WOULD REINVIGORATE THE PRESS CLAUSE AS AN INDEPENDENT CONSTITUTIONAL CONSTRAINT

Despite the familiar admonition that "it cannot be presumed that any clause in the constitution is intended to be without effect,"<sup>34</sup> the U.S. Supreme Court has never identified substantive rights protected by the First Amendment's Press Clause independent of those guaranteed by the previous clause's protection of the "freedom of speech."<sup>35</sup> As Justice Kennedy explained in *Citizens United*<sup>36</sup>:

We have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers. With the advent of the Internet and the decline of print and broadcast media, moreover, the line between the media and others who wish to comment on political and social issues becomes far more blurred.<sup>37</sup>

To be sure, the Court's reluctance may in part be based on textual uncertainty, given the debate over whether the "press" the First Amendment meant to protect is an industry, a technology, or something else entirely.<sup>38</sup> But even for those who believe that the Framers meant to protect the press in whatever form as a *means* for publicly disseminating

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who hold such ideas.").

34. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803).

35. See sources cited *supra* note 26.

36. *Citizens United v. FEC*, 558 U.S. \_\_\_, 130 S. Ct. 876 (2010).

37. *Id.* at 905–06 (citations omitted) (internal quotation marks omitted).

38. Compare, e.g., Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology?: From the Framing to Today*, 160 U. PENN. L. REV. 459 (2012) (arguing that, based on historical sources, the Press Clause is better understood as protecting the press as a technology), with Randall P. Bezanson, *Whither Freedom of the Press?*, 97 IOWA L. REV. (forthcoming 2012) (criticizing Volokh's analysis).

matters of public concern, it remains difficult to discern just *who* the Constitution intends to protect in the provision of that service.<sup>39</sup> This task is particularly challenging since, as Justice Kennedy observed, technological innovations have increasingly blurred any possible distinction between professional and amateur newsgatherers.<sup>40</sup> Of course, the celebrated First Amendment advocate Floyd Abrams may be correct that, “[i]n the great preponderance of cases, a court has little difficulty knowing a journalist when it sees one.”<sup>41</sup> But, as is true with so many doctrines, it is the marginal cases that matter—and that invariably make bad law. To that end, this Part begins by offering an overview of the competing viewpoints with regard to the constitutional status of the press before turning to Post’s “democratic competence” theory and how its application to journalism might solve some of the open questions in this area.

#### A. *The U.S. Supreme Court and the Press*

Although there are numerous academic overviews of the U.S. Supreme Court’s jurisprudence in cases implicating the press, perhaps Justice Potter Stewart, in a famous 1974 speech he delivered at Yale Law School, provided the most concise capsule summary.<sup>42</sup> Stewart’s view was that the Press Clause is a structural provision designed to protect the “institutional autonomy” of the press, and that the Court’s jurisprudence has largely struck the right balance in promoting and preserving that autonomy:

So far as the Constitution goes, the autonomous press may publish what it knows, and may seek to learn what it can.

But this autonomy cuts both ways. The press is free to do battle against secrecy and deception in government. But the press cannot expect from the Constitution any guarantee that it will succeed. There is no constitutional right to have access to particular government information, or to require openness from

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39. See, e.g., West, *supra* note 26, at 1029.

40. I don’t mean to suggest that the line-drawing problem is of recent vintage. On the contrary, the difficulty of separating the “press” from the lay public has been inherent since the First Amendment was ratified. See Anderson, *supra* note 26, at 446–51. At a minimum, though, it seems clear that technological advances have made it that much *cheaper* for private citizens to engage in mass public communication, and have thereby eliminated the *economic* barriers to entry that might previously have served as a practical limit on the public at large.

41. Floyd Abrams, *The Press Is Different: Reflections on Justice Stewart and the Autonomous Press*, 7 HOFSTRA L. REV. 563, 580 (1979).

42. See Potter Stewart, “*Or of the Press*,” 26 HASTINGS L.J. 631 (1975).

the bureaucracy. The public's interest in knowing about its government is protected by the guarantee of a Free Press, but the protection is indirect.<sup>43</sup>

Thus, although largely through the Free *Speech* Clause (or through unspecific allusions to the First Amendment in general), the Court has applied the most rigid scrutiny to decisions regarding newsworthiness; divided rather pointedly on the question of punishment subsequent to publication; and generally left undisturbed state and federal laws interfering with acts of newsgathering.<sup>44</sup> Accordingly, the Court has struck down state laws (1) requiring a newspaper to provide equal space to a candidate whose character the paper had assailed;<sup>45</sup> (2) banning newspapers from publishing accounts of confessions or admissions made by criminal defendants to law enforcement or other non-media third parties;<sup>46</sup> and (3) punishing third parties for "divulging or publishing truthful information regarding confidential proceedings" of a state judicial inquiry and review commission.<sup>47</sup> At the same time, the Court has refused to formally recognize a "reporter's privilege" shielding journalists from complying with state or federal grand jury subpoenas, even while recognizing that "without some protection for seeking out the news, freedom of the press could be eviscerated."<sup>48</sup> As Justice White's opinion in *Branzburg* concluded:

It would be frivolous to assert—and no one does in these cases—that the First Amendment, in the interest of securing news or otherwise, confers a license on either the reporter or his news sources to violate valid criminal laws. Although stealing documents or private wiretapping could provide newsworthy information, neither reporter nor source is immune from conviction for such conduct, whatever the impact on the flow of news.<sup>49</sup>

The Court's most recent foray into this field manifests precisely this distinction. *Bartnicki v. Vopper*<sup>50</sup> upheld a radio station's "repeated

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43. *Id.* at 636.

44. Abrams, *supra* note 41, at 587 (footnotes omitted).

45. Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974).

46. Neb. Press Ass'n v. Stuart, 427 U.S. 539 (1976).

47. Landmark Commc'ns, Inc. v. Virginia, 435 U.S. 829, 837 (1978).

48. Branzburg v. Hayes, 408 U.S. 665, 681 (1972).

49. *Id.* at 691; *see also* Toledo Newspaper Co. v. United States, 247 U.S. 402, 419–20 (1918) ("It suffices to say that however complete is the right of the press to state public things and discuss them, that right as every other right enjoyed in human society is subject to the restraints which separate right from wrongdoing.")

50. 532 U.S. 514 (2001).

intentional disclosure of an illegally intercepted cellular telephone conversation about a public issue. The persons who made the disclosures did not participate in the interception, but they did know—or at least had reason to know—that the interception was unlawful.<sup>51</sup> Writing for a 6–3 majority, Justice John Paul Stevens relied on three critical facts: that the radio station itself had played no direct role in the unlawful recording of the conversation at issue; that there was no allegation that the radio station broke the law in *obtaining* the recording; and that the content of the recording was a matter of public concern.<sup>52</sup> Citing *Branzburg*, he emphasized that “[o]ur holding, of course, does not apply to punishing parties for obtaining the relevant information *unlawfully*.”<sup>53</sup> And Justice Stephen Breyer’s concurring opinion, joined by Justice O’Connor, suggested that these factors by themselves might still not have been enough absent the affected speakers’ lack of a “legitimate interest in maintaining the privacy of the particular conversation.”<sup>54</sup>

In short, then, *Bartnicki* reaffirms Justice Stewart’s view of the relationship between the First Amendment and the press: the Court is particularly sensitive about dictating the content of published information, including through post-publication prosecution. At the same time, it shows little inclination to afford any special protection to the antecedent acts of newsgathering—without which such reporting would not be possible.

Thus, even as numerous scholars have attempted to articulate criteria to determine who *constitutes* the press, few—if any—of those discussions have focused on the related but distinct quandary raised by the autonomy concept enmeshed within the U.S. Supreme Court’s jurisprudence: “The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act.”<sup>55</sup>

### B. “Democratic Competence” and the Freedom of the Press

The animating premise of Robert Post’s new book, as noted above, is that First Amendment jurisprudence should recognize the significance of “democratic competence” in addition to (and perhaps in some cases at the expense of) “democratic legitimation.”<sup>56</sup> In other words, not all

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51. *Id.* at 517–18.

52. *See id.* at 527–35.

53. *Id.* at 532 n.19 (emphasis added) (citing *Branzburg*, 408 U.S. at 691).

54. *Id.* at 539 (Breyer, J., concurring) (emphasis removed).

55. Stewart, *supra* note 42, at 636.

56. *See* POST, *supra* note 13, at 96.

speech is equal. This conclusion is deeply embedded within the Court's jurisprudence with regard to misleading or defamatory speech, but largely missing from discussions of scientific opinion, academic freedom, or other closely related topics.<sup>57</sup> In an age where every controversial issue is often framed as just another debate with two sides, Post's book attempts to provide a constitutional roadmap for privileging speech *qua* opinion that is the unique result of professional expertise.<sup>58</sup> This could be accomplished, Post posits, by extending First Amendment coverage to governmental regulation of "disciplinary speech"<sup>59</sup>—anything from laws compelling doctors to provide certain information to pregnant women contemplating abortion to laws barring lawyers from encouraging their clients to incur debt "in contemplation of bankruptcy."<sup>60</sup> Post concedes that under his approach, some disciplines will be more susceptible to governmental interference than others.<sup>61</sup> In particular, "[t]he more divided the community of disciplinary expertise, the greater the leeway for political control."<sup>62</sup> But where the community of disciplinary expertise stands together, the First Amendment, in Post's view, should provide a potent and ubiquitous counterbalance to governmental attempts to suppress that expert opinion, or in the alternative to require "equal time" for contrary views.<sup>63</sup>

What this means in practice, Post explains, is that "democratic competence can be constitutionally protected only if the disciplinary practices that create expert knowledge are themselves invested with constitutional status."<sup>64</sup> That is to say, the First Amendment should not *only* protect the opinion that professional expertise produces; it should also protect the *means* that that profession uses to arrive at the opinion.<sup>65</sup> Although Post does not offer an exhaustive list of which professions should or should not be included, he specifically notes that "[t]he practices of astrology and palmistry would not qualify, but those of chemistry, law, and medicine probably would."<sup>66</sup> More generally, the First Amendment should cover practices "regarded as contributing to the

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57. *See, e.g., id.* at 41–44.

58. *See id.* at 96.

59. *Id.* at 44.

60. *See id.* at 48–52.

61. *See id.* at 97.

62. *Id.* at 97.

63. *See id.* at 97–98.

64. *Id.* at 96.

65. *See id.* at 96–97.

66. *Id.* at 96.

value of democratic competence” and, where necessary, shield such practices from all but the most compelling governmental intrusions.<sup>67</sup>

So conceived, it is relatively easy to envision journalism as one of the disciplines whose practices should receive First Amendment coverage within Post’s framework. After all, journalism makes a substantial contribution to the value of democratic competence; in many respects, there may be *no* field that more directly advances “the cognitive empowerment of persons within public discourse.”<sup>68</sup>

More subtly, journalism also fits within the jurisprudential pattern that Post’s book laments. That is to say, journalism is another example wherein the U.S. Supreme Court at various points appreciates the constitutional significance of the *product* resulting from disciplinary expertise, but shows little inclination to show special favor for the means pursuant to which the discipline arrived at those ends. And, as Post suspects is true more generally, the particular concern with regard to journalism may be a fear of privileging elites at the expense of valuable but amateur opinion.<sup>69</sup> All the while, such an approach may well privilege those who determine who the elites actually *are* for First Amendment purposes.<sup>70</sup>

Finally, journalism appears to be a qualifying discipline because it bears all the hallmarks of the other disciplines Post would be inclined to include: First, there are professional standards and ethical norms of conduct to which journalists generally aspire.<sup>71</sup> A professional accrediting organization (the Accrediting Council on Education in Journalism and Mass Communications) supervises undergraduate and graduate programs.<sup>72</sup> Additionally, whether or not courts have *already* identified such standards,<sup>73</sup> it is *possible*, however controversially, to

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67. *See id.*

68. *See id.* at 33–37.

69. *See, e.g., id.* at 56–60 (explaining how courts would decide whether—and when—to protect the “circulation of expert knowledge”).

70. *See, e.g., id.* at xi–xiii.

71. *See Code of Ethics, SOCIETY OF PROFESSIONAL JOURNALISTS* (1996), <http://www.spj.org/pdf/ethicscode.pdf>.

72. *See ACEJMC Accredited Programs 2011–2012, ACCREDITING COUNCIL ON EDUC. JOURNALISM & MASS COMMUNICATIONS* (MAY 15, 2012), <http://www2.ku.edu/~acejmc/STUDENT/PROGLIST.SHTML>.

73. *See* Brian C. Murchison et al., *Sullivan’s Paradox: The Emergence of Judicial Standards of Journalism*, 73 N.C. L. REV. 7 (1994) (articulating a series of norms that have emerged in libel law in cases applying the “actual malice” test from *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), including norms regarding appropriate amounts of research and independent source verification; use of language, especially in articles about criminal activity, that implies conclusions unsupported by available facts; and so on).

identify judicially manageable norms of journalism that would allow courts to differentiate between those who qualify as practitioners in the field and those who do not.<sup>74</sup>

C. *Implications: From Branzburg to WikiLeaks*

Indeed, the more interesting question appears to be not *whether* journalism would fit within Post's paradigm, but what, exactly, that might entail. There are two immediate possibilities:

*First*, the case for a constitutionally grounded "reporter's privilege" might become far stronger under a democratic competence approach insofar as *newsgathering* might become a disciplinary practice invested with its own constitutional protections. After all, part of the Court's concern in *Branzburg* was whether reporters should be treated no differently from average citizens in terms of the "normal duty of appearing and furnishing information relevant to the grand jury's task."<sup>75</sup> If the professional discipline of newsgathering were invested with First Amendment coverage, *that* would provide a potentially compelling distinction between the reporter and the citizen. In that case, the reporter could at least claim that protecting the confidentiality of a source was a necessary concomitant to gathering news. To be sure, courts would have to scrutinize such a claim with care, but Post's approach differentiates between First Amendment *coverage* and First Amendment *protection*—only the former follows from an approach grounded in democratic competence.<sup>76</sup> What First Amendment standards actually govern such disciplinary practices is a question of First Amendment *protection* that could only be answered in time.

Still, it seems safe to speculate that such an approach would not produce an absolute reporter's privilege; rather, it would yield a qualified privilege along the lines of Justice Powell's *Branzburg* concurrence—a case-by-case analysis in which the reporter is able to protect the anonymity of a source in all but the most compelling circumstances.<sup>77</sup> Of course, a number of courts have already recognized such a privilege through creatively counting the votes in *Branzburg*.<sup>78</sup>

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74. See West, *supra* note 26.

75. *Branzburg v. Hayes*, 408 U.S. 665, 691 (1972).

76. POST, *supra* note 13, at 96.

77. See *Branzburg*, 408 U.S. at 709–10 (Powell, J., concurring).

78. See, e.g., *Chevron Corp. v. Berlinger*, 629 F.3d 297, 306–07 (2d Cir. 2011); *Price v. Time, Inc.*, 416 F.3d 1327, 1343 (11th Cir. 2005) (citing *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 725 (5th Cir. 1980)); *Lee v. Dep't of Justice*, 413 F.3d 53, 59–60 (D.C. Cir. 2005).

Post's democratic competence approach would provide the missing (or, at least, undertheorized) constitutional underpinnings for such a maneuver—and for Powell's underlying argument.

*Second*, recognizing journalism as a professional discipline with constitutionally protected means of generating disciplinary knowledge would also provide the constitutional underpinnings for distinguishing between those who are practitioners of the discipline and those who are not. Indeed, it is axiomatic under Post's approach that courts would inevitably generate a "constitutional sociology of knowledge"<sup>79</sup>—a functional approach that would accord protected status to the means by which professional journalism is produced. Thus, anyone who followed those professional practices—whether professional journalists *or* amateurs—would presumably be entitled to invoke whatever special privileges follow from recognizing journalism as such a discipline. At the same time, those who do not comply with such practices could not in turn resort to special constitutional protection for their activities or the fruits thereof.

By this logic, it follows that the staff of the *New York Times* would qualify for special protections, whereas Julian Assange and his colleagues at WikiLeaks arguably would have a harder (but hardly impossible) time claiming such protections.<sup>80</sup> Explaining how the *Times* handled the WikiLeaks material, Managing Editor Bill Keller wrote that "[y]our obligation, as an independent news organization, is to verify the material, to supply context, to exercise responsible judgment about what to publish and what not to publish and to make sense of it."<sup>81</sup> In this respect, at least, Post's democratic competence framework appears only to expand the scope of the First Amendment. After all, even if only a subset of the public is entitled to claim special protections for the disciplinary practices that result in professional journalism, that goes only to the Court's historic reluctance to accord protection to newsgathering. Nothing about such a result at least immediately suggests that the Court might simultaneously be inclined to scale back the protections it has historically accorded to the content (and act) of publication.

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79. POST, *supra* note 13, at 96.

80. See, e.g., Keller, *supra* note 28 (noting the differences between the approach taken by reporters at the *New York Times* and that followed by WikiLeaks, including WikiLeaks' initial public disclosure of thousands of documents without any "harm minimization").

81. *Id.*

## II. DEMOCRATIC COMPETENCE WOULD ALSO POTENTIALLY EMPOWER EXPERTISE-DRIVEN ARGUMENTS FOR PRESERVING NATIONAL SECURITY SECRETS

Another arena in which the democratic competence approach might also further empower the press is with respect to publishing sensitive governmental—or even private—information. After all, if professional journalism standards of *newsgathering* are met, Post’s methodology suggests that the First Amendment would to some degree shield professional journalists’ decisions to gather—and then publish—information that might otherwise be properly kept out of the public domain. Consider Bill Keller’s analysis of the *Times*’ WikiLeaks coverage:

We have written a series of articles based on what we have learned about various aspects of American foreign policy from this trove of secret cables. We have drawn on our past reporting and the experience of our correspondents to supply context and to cast doubt where information in the cables is questionable. . . . We have edited out any information that could identify confidential sources—including informants, dissidents, academics and human rights activists—or otherwise compromise national security.<sup>82</sup>

In other words, the *Times*’ decision to publish the cables reflected its *professional* journalistic judgment, and not just a knee-jerk reaction to having a big story thrust into its lap.<sup>83</sup> Similar arguments were made when the *Times* and the *Washington Post* broke the torture memos, the warrantless wiretapping program, the existence of black site detention facilities, and so on.<sup>84</sup> The media organizations that decide to publish classified national security information tend to invoke two different justifications for their conduct: *First*, they argue that the disclosed material is newsworthy insofar as it touches on matters of public concern. *Second*, and related, they argue that much of the classified material should not have been classified, either because it does not in fact relate to national security or because the underlying program to

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82. Bill Keller, *Answers to Readers’ Questions About State’s Secrets*, N.Y. TIMES (Nov. 29, 2010), <http://www.nytimes.com/2010/11/29/world/29askthetimes.html>; *see also id.* (“The government, of course, has the right—under law, and as a matter of common sense—to keep some information secret. When the government fails to do so, as it did in this case owing to a security breach that has reportedly been corrected, then we have to decide what to do with the fallout.”).

83. *See, e.g.*, Keller, *supra* note 28.

84. *See* sources cited *supra* notes 30–32.

which the material relates is illegal.<sup>85</sup> For support, these arguments often emphasize that, under the terms of the relevant Executive Order, national security information should not be classified to “conceal violations of law, inefficiency, or administrative error,” or “prevent embarrassment to a person, organization, or agency.”<sup>86</sup> What this strand of reasoning misses, though, is that information that is *otherwise* properly classified (pursuant to any one of seven broadly defined categories in the most recent Executive Order)<sup>87</sup> is not subject to declassification merely *because* it conceals violations of law, inefficiency, or administrative error. Instead, the Executive Order imposes a *de facto* intent requirement; so long as the *intent* of classification is not to conceal illegality, the classification is not improper under § 1.7(a) even if the subject of the classified material is unlawful governmental conduct.<sup>88</sup>

This distinction is important because, to the extent that a journalist’s decision to disclose sensitive national security information may reflect *two* judgments, it is important to highlight the extent to which only one of those judgments is arguably at the core of the journalist’s “disciplinary expertise.” That is, while the decision that particular classified material is newsworthy is fairly seen as one in which a journalist’s professional judgment should figure prominently, it is far more difficult to make the same argument about a decision that particular information would jeopardize national security if disclosed to the public. To the contrary, the government routinely argues (and courts routinely agree) that the relevant expertise in this field belongs largely, if not exclusively, to the Executive Branch.<sup>89</sup> As Justice Blackmun wrote

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85. See generally Note, *Media Incentives and National Security Secrets*, 122 HARV. L. REV. 2228 (2009).

86. Exec. Order No. 13,526, § 1.7(a), 75 FED. REG. 707, 710 (Dec. 29, 2009).

87. *Id.* § 1.4, 75 FED. REG. at 709 (mandating that classified information pertain to “(a) military plans, weapons systems, or operations; (b) foreign government information; (c) intelligence activities (including covert action), intelligence sources or methods, or cryptology; (d) foreign relations or foreign activities of the United States, including confidential sources; (e) scientific, technological, or economic matters relating to the national security; (f) United States Government programs for safeguarding nuclear materials or facilities; (g) vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to the national security; or (h) the development, production, or use of weapons of mass destruction”).

88. This conclusion follows from the text of the Executive Order, which only forbids classification if it was “in order to” serve one of the four prohibited goals. See *id.* § 1.7(a), 75 FED. REG. at 709.

89. See, e.g., *McGehee v. Casey*, 718 F.2d 1137, 1148 (D.C. Cir. 1983) (acknowledging and deferring to “the CIA’s technical expertise and practical familiarity with the ramifications of sensitive information”).

for the Court in *Department of the Navy v. Egan*,<sup>90</sup>

Predictive judgment of this kind must be made by those with the necessary expertise in protecting classified information. For “reasons . . . too obvious to call for enlarged discussion,” the protection of classified information must be committed to the broad discretion of the agency responsible, and this must include broad discretion to determine who may have access to it. Certainly, it is not reasonably possible for an outside nonexpert body to review the substance of such a judgment and to decide whether the agency should have been able to make the necessary affirmative prediction with confidence. Nor can such a body determine what constitutes an acceptable margin of error in assessing the potential risk.<sup>91</sup>

This point should not be overstated. Nevertheless, it seems likely that, faced with conflicting claims to “disciplinary expertise”—the reporter’s claim that particular information is newsworthy and the government’s claim that the same information would endanger national security if publicly disclosed—courts will inevitably place a heavy thumb on the scale in favor of the government. As Chief Justice Roberts suggested two years ago, “when it comes to collecting evidence and drawing factual inferences in [cases implicating national security and foreign policy concerns], the lack of competence on the part of the courts is marked, and respect for the Government’s conclusions is appropriate.”<sup>92</sup> Of course, as such reasoning indicates, this argument is central even under existing frameworks for conceptualizing the relationship between the First Amendment and national security. But to whatever extent a democratic competence approach would extend the scope of First Amendment coverage to the disciplinary practices by which we construct expert knowledge, there is no reason why the argument would not work equally well in reverse. Indeed, cases where the media seeks to disclose national security secrets and the government refuses based on claims of unique institutional “expertise” could cut *against* First Amendment-grounded defenses.

If this outcome, too, is normatively desirable, it might follow that

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90. 484 U.S. 518 (1988).

91. *Id.* at 529 (alteration in original) (citation omitted) (quoting *CIA v. Sims*, 471 U.S. 159, 170 (1985)).

92. *Holder v. Humanitarian Law Project*, 561 U.S. \_\_\_, 130 S. Ct. 2705, 2727 (2010) (citation omitted) (internal quotation marks omitted); *see also id.* (“One reason for that respect is that national security and foreign policy concerns arise in connection with efforts to confront evolving threats in an area where information can be difficult to obtain and the impact of certain conduct difficult to assess.”).

democratic competence would then put the *right* question before the courts, i.e., whether the professional expertise of journalists with regard to newsworthiness should outweigh the government's proffered expertise in assessing the risk of disclosing sensitive national security information to the public. But if the true contribution of democratic competence is to turn this—and all relatively analogous—questions into judicially enforced balancing tests, democratic competence will not only require constructing a “constitutional sociology of knowledge,”<sup>93</sup> to borrow Post's phraseology; it will also require a hierarchical understanding of how to privilege one such sociology over another in cases in which they conflict.

Moreover, the more courts become obsessed (as they surely will) with questions of whether to favor one kind of expertise over another in sorting out the First Amendment considerations, the more likely it is that they will lose track of the reason for engaging in the endeavor in the first place—“the cognitive empowerment of persons within public discourse.”<sup>94</sup> If disciplinary expertise is truly the linchpin of democratic competence, it is difficult to see why a (properly formed) expert belief that information should *not* be provided to persons within public discourse is worthy of any less constitutional enshrinement than a belief that such information *should* be. Otherwise, democratic competence would risk internal inconsistency, for it would suggest that disciplinary knowledge is only relevant to the extent it *contributes* material to public discourse, rather than to the extent that it enriches the role “experts” play in *shaping* public discourse.

A separate but distinct objection might be that we should resist the idea that government expertise is the sole consideration when it comes to matters of national security. One need look no further for this criticism than Professor Alice Ristroph's satire of the use of the “ticking bomb” hypothetical in debates over torture. After introducing the hypothetical, Ristroph deconstructs the expertise-laden assumptions on which it relies:

The rhetorical strategy is to secure an admission that torture is sometimes morally justifiable. From there, it's just a matter of working out the operational details, which . . . is of course a task for experts rather than ordinary civilians or—heaven forbid—lawyers. Who will select the targets for torture? (Security experts within the executive or military.) What methods will be used? (Those determined by the experts to be effective.) How do

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93. POST, *supra* note 13, at 96.

94. *Id.* at 34.

we know that the experts identify the right targets, those who actually have critical information? (They're experts, stupid. They'll use their expertise.)<sup>95</sup>

Yet again, though, this argument underscores a broader critique of democratic competence: If the goal is enriching public discourse, should disciplinary expertise really be the *sine qua non* of First Amendment protection? Is there not something to be said for the role of truly amateur contributions to public discourse, especially in circumstances in which the “experts” may be beholden to outmoded (and outdated) ways of thinking about the underlying concepts, and might otherwise be inclined to crowd amateurs out of the conversation?

Ultimately, the example of national security secrets seems at once to illuminate both the promise and peril of democratic competence: certain speech that has not historically received special First Amendment treatment *would* receive it, but only when a particular subset of parties (as determined by the courts) engages in it. For better or worse, the result seems to be that the First Amendment would thereby become deeper in its scope, but narrower in its application.

#### CONCLUSION: THE VIRTUE OF CONSTITUTIONAL DISORDER?

This Essay opened with two roughly contemporaneous quotes cutting (at least superficially) in fairly different directions. Testifying before Congress in 1979, CIA General Counsel Tony Lapham bemoaned the lack of clarity concerning the Espionage Act—the uncertain scope of which continues to plague contemporary conversations over the extent to which leakers (and those who report on leaks) should face criminal liability for disclosing sensitive national security information.<sup>96</sup> In contrast, Professor Alex Bickel, writing in *The Morality of Consent* in 1975, extolled the virtue of constitutional “*disorder*,” on the theory that, as between two equally unsustainable alternatives in the long-run (the government has both *or* neither the power to withhold *and* censor), a theoretically indefensible compromise position was the best way practically to balance two ultimately irreconcilable values—“privacy and public discourse.”<sup>97</sup>

The juxtaposition of the quotes was deliberate, but they are not entirely inconsistent. There is a world of difference between statutory disorder and constitutional disorder. Yes, our federal statutes should

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95. Ristroph, *supra* note 29, at 251–52.

96. *Supra* text accompanying note 1.

97. *Supra* text accompanying note 2.

more clearly distinguish between true spies, leakers, and those who disseminate the products of those leaks, even if we think either or both of the latter should face criminal sanctions for unauthorized disclosures of national security information. Statutory ambiguity in this field at once both chills speech and unduly hampers government, since actors on both sides of the equation can never be sure whether the conduct at issue is in fact within the legislative sanction.

But the more we seek to articulate constitutional rules for distinguishing between these categories, the more that the recipients of special protection in that constitutional scheme become dependent upon protecting their special constitutional *status*. Such a result would also almost certainly come at the expense of whatever other values contribute to their role in illuminating public discourse. As Floyd Abrams warned, “A press that continually applies to the courts for vindication of its right to gather information cannot credibly be the same press that tells the same courts that what the press prints and why it prints it are not matters that courts may even consider.”<sup>98</sup>

At a higher level of abstraction, Abrams’ view is a variation on Justice Stewart’s theme that “autonomy cuts both ways.”<sup>99</sup> That is to say, the danger in giving *any* category of speech special First Amendment protection is that it necessarily diminishes the speaker’s autonomy, since there is *something* about the speech that qualifies it for special solicitude within the ambit of Post’s First Amendment vision. And were the speech lacking that particular characteristic, it would be left on the outside. The real question therefore becomes whether courts should construe the First Amendment so that it supports “*the cognitive empowerment of persons within public discourse*,”<sup>100</sup> or whether courts should understand the First Amendment as protecting the *autonomy* of those institutions—like the press—that play particularly central roles in contributing to that cognitive empowerment. Even if all agree that democratic competence should play a critical role in our thinking about the First Amendment, there may be numerous institutions for which we should be more careful to safeguard their autonomy than their internal disciplinary practices.

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98. Abrams, *supra* note 41, at 591.

99. See *supra* text accompanying note 43.

100. POST, *supra* note 13, at 34 (emphasis added).