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### The First Amendment's Epistemological Problem

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## THE FIRST AMENDMENT'S EPISTEMOLOGICAL PROBLEM

Paul Horwitz\*

### INTRODUCTION

A standard rule of thumb in journalism tells us that three of anything is a trend. Whatever the subject, high or low, no journalist will consider something a trend until he or she can find three examples. Once they are found, however, the newspapers and other outlets will fill with pieces gushing that “everybody’s doing it.”<sup>1</sup>

In the bit of trendspotting that follows—or, to lend it some dignity, in this analysis of an emerging theme in First Amendment scholarship—we have many more than three examples. Consider the titles of some recent papers by leading First Amendment scholars: *Facts and the First Amendment*,<sup>2</sup> *Details: Specific Facts and the First Amendment*,<sup>3</sup> and *‘Telling Me Lies’: The Constitutionality of Regulating False Statements of Fact*.<sup>4</sup> Consider, too, the U.S. Supreme Court’s grant of certiorari in the Stolen Valor Act case, *United States v. Alvarez*,<sup>5</sup> and the emerging scholarship on that case.<sup>6</sup> Consider other recent cases raising similar

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\*Gordon Rosen Professor, University of Alabama School of Law. I am grateful to Ashutosh Bhagwat, Michael Pardo, and Mark Tushnet for comments, Noah Jones and Michele Marron for research assistance, and the editors of the *Washington Law Review* for their perceptive questions and their patience. The author retains the copyright in this article and authorizes royalty-free reproduction for non-profit purposes, provided any such reproduction contains a customary legal citation to the Washington Law Review.

1. Daniel Radosh, *The Trendspotting Generation*, RADOSH.NET (Dec. 9, 2011), <http://www.radosh.net/writing/trends.html> (quoting the *Philadelphia Daily News*); see also *id.* (“The rule of threes is revered and so readily called upon that it trumps common sense: No matter how many mouths were involved, Mike Tyson, Christian Slater and Marv Albert do not indicate, in any meaningful sense, a trend in biting.”).

2. Frederick Schauer, *Facts and the First Amendment*, 57 UCLA L. REV. 897 (2010).

3. Ashutosh Bhagwat, *Details: Specific Facts and the First Amendment*, (UC Davis Legal Studies Research Paper No. 276, 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1935106](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1935106).

4. Mark Tushnet, *‘Telling Me Lies’: The Constitutionality of Regulating False Statements of Fact* (Harvard Public Law Working Paper No. 11-02, 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1737930](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1737930).

5. *United States v. Alvarez*, 617 F.3d 1198 (9th Cir. 2010), cert. granted, 132 S. Ct. 457 (2011).

6. See, e.g., Eugene Volokh, *Amicus Curiae Brief: Boundaries of the First Amendment’s ‘False Statements of Fact’ Exception*, 6 STAN. J. C.R. & C.L. 343 (2010); Josh M. Parker, Comment, *The*

issues.<sup>7</sup> Finally, consider the book that is the subject of this Symposium: Robert Post's *Democracy, Expertise, and Academic Freedom: A First Amendment Jurisprudence for the Modern State*.<sup>8</sup>

The puzzle all these writers are addressing is epistemological,<sup>9</sup> a question about the nature, legitimacy, and sources of knowledge.<sup>10</sup>

First Amendment jurisprudence routinely stresses the equality of

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*Stolen Valor Act as Constitutional: Bringing Coherence to First Amendment Analysis of False-Speech Restrictions*, 78 U. CHI. L. REV. 1503 (2011).

7. See, e.g., Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. \_\_\_, 130 S. Ct. 1324 (2010) (upholding a federal bankruptcy law that required law firms offering bankruptcy services to provide information about bankruptcy assistance and related services); Planned Parenthood Minn., N.D., S.D. v. Rounds, 530 F.3d 724 (8th Cir. 2008) (upholding in part, and reversing in part, an injunction against a South Dakota law that required physicians to tell patients seeking abortions that "the abortion will terminate the life of a whole, separate, unique, living human being").

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

9. See, e.g., ROBERT AUDI, *EPISTEMOLOGY: A CONTEMPORARY INTRODUCTION TO THE THEORY OF KNOWLEDGE* (Paul K. Moser ed., 2d ed. 2002); Matthias Steup, *Epistemology*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2005), available at <http://plato.stanford.edu/entries/epistemology/> ("[E]pistemology is the study of knowledge and justified belief.").

10. A slightly extended note on terms is called for here. I use some language more loosely here than I should, although the kinds of distinctions that concern epistemologists feature in remarkably few discussions within First Amendment scholarship. Although I distinguish between "true" and "false" speech, and refer generally to "knowledge," epistemology's primary concern is with *justified* true beliefs. For the most part, that is the concern of this Article. The focus on justification is most relevant in Part III, *infra*, which focuses on expert knowledge and its relationship to the First Amendment. For general discussion, see Steup, *supra* note 9. For discussions within or adjacent to First Amendment scholarship, see, for example, Michael J. Madison, *Notes on a Geography of Knowledge*, 77 *FORDHAM L. REV.* 2039 (2009); Mark Spottswood, *Falsity, Insincerity, and the Freedom of Expression*, 16 *WM. & MARY BILL RTS. J.* 1203 (2008); Nat Stern, *Defamation, Epistemology, and the Erosion (but Not Destruction) of the Opinion Privilege*, 57 *TENN. L. REV.* 595 (1990). For discussions of lawyers' tendency to describe knowledge imprecisely, possibly because law tends to focus on practical reason rather than on proper justifications for knowledge, see, for example, Peter F. Lake, *Posner's Pragmatist Jurisprudence*, 73 *NEB. L. REV.* 545, 579–80 (1994); *id.* at 580 n.154; Madison, *supra*, at 2043 ("Law and policy speak of knowledge in broader, looser, and more general terms [than philosophy] . . ."); Steven Walt, *Some Problems of Pragmatic Jurisprudence*, 70 *TEX. L. REV.* 317, 324–30 (1991).

I elide some further problems and distinctions that are important to epistemology but beyond the scope of this Article, including debates over the precise nature of knowledge and the so-called "Gettier problem." The Gettier problem points out that the presence of truth, belief, and justification may not be sufficient for "knowledge" where "the evidence that justifies a proposition bears only an accidental or coincidental relation with the truth of the proposition." Michael S. Pardo, *Testimony*, 82 *TUL. L. REV.* 119, 126–27 (2007); Edmund L. Gettier, *Is Justified True Belief Knowledge?*, 23 *ANALYSIS* 121 (1963). Kenneth Simons has argued that the Gettier problem has little general significance for law. See Kenneth W. Simons, *Rethinking Mental States*, 72 *B.U. L. REV.* 463, 541 n.267 (1992). *But see* Michael S. Pardo, *The Gettier Problem and Legal Proof*, 16 *LEG. THEORY* 37 (2010) (arguing that the Gettier problem, and the relationship between truth and justification generally, is more important to law than the literature generally supposes). I thank Michael Pardo for discussion on these issues, and absolve him of responsibility for what follows.

speakers,<sup>11</sup> refuses to allow government to regulate expression on the basis of its content,<sup>12</sup> and emphasizes that “there is no such thing as a false idea.”<sup>13</sup> But how does the First Amendment deal with *facts*? Even if Post is right that a central value of the First Amendment is the protection of “public discourse”<sup>14</sup> and the ideas and opinions it involves, public discourse still rests on a factual foundation.

Not all facts are equal. People are entitled to have different opinions about where Barack Obama was born and who his parents were. But those opinions presuppose that there is a fact of the matter. How do we know what is true? How, in particular, do *courts* ascertain what is true? And what does the First Amendment say about all this? If not all “facts” are equal in life, should they nonetheless be treated as equals in law?

In this Article, I treat the recent interest in these epistemological issues as an opportunity to explore an important aspect of Post’s project: the uneasy role of truth within First Amendment doctrine, and the relationship between courts and those institutions that we view generally as epistemically reliable sources of knowledge. My examination suggests that the First Amendment faces what I call an epistemological problem: specifically, the problem of figuring out just how knowledge fits within the First Amendment.

The growing attention to the epistemology problem among leading First Amendment scholars is significant enough to warrant examination. Although I offer some views of my own, my approach is primarily descriptive. We must see the epistemological problem clearly before we can do anything about it (*if* anything can be done, that is). That is the goal of this Article.

Part I presents some basic theoretical and doctrinal views concerning free speech and its relation to epistemological questions. I show that current theory and doctrine recognize, but do not resolve, a host of difficult questions about the relationship between truth, falsity, knowledge, and freedom of speech. I offer as an example the recent

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11. The classic source is Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. Chi. L. Rev. 20 (1975). For recent examinations, see, for example, Geoffrey R. Stone, *Kenneth Karst’s Equality as a Central Principle in the First Amendment*, 75 U. CHI. L. REV. 37 (2008); Daniel P. Tokaji, *First Amendment Equal Protection: On Discretion, Inequality, and Participation*, 101 MICH. L. REV. 2409 (2003).

12. See, e.g., *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95 (1972) (“[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”).

13. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974).

14. Robert Post, *Participatory Democracy as a Theory of Free Speech: A Reply*, 97 VA. L. REV. 617, 628–29 (2011).

litigation over the federal Stolen Valor Act, which was heard this Term in the U.S. Supreme Court. Part II analyzes the recent scholarship discussing these epistemological questions. Part III draws on Post's book and my own forthcoming book on what I call "First Amendment institutions."<sup>15</sup> I ask whether we can say more about what Post calls "the relationship between the marketplace of ideas and the production of expert knowledge."<sup>16</sup> In other words, are there ways that First Amendment law could better protect or encourage the production of useful facts? Part IV presents some conclusions about the relationship between knowledge, truth, and the First Amendment. The Conclusion seeks to move the conversation forward by speculating about the reasons for the recent surge in scholarly interest in this question.

## I. THE EPISTEMOLOGICAL PROBLEM IN FIRST AMENDMENT THEORY AND DOCTRINE

To understand the claim that there is an epistemological "problem" in the First Amendment, it is helpful to start with the basics. I focus on standard theories of freedom of expression and basic First Amendment doctrine. In both areas, we find conflicting attitudes concerning the relationship between free speech and qualities like knowledge, truth, fact, and opinion.

### A. *First Amendment Theory*

The free-speech theory that addresses epistemological questions most directly is the "truth-seeking" justification. Its most influential advocate is John Stuart Mill, whose *On Liberty* offers a largely truth-centered argument for freedom of speech.<sup>17</sup> Frederick Schauer calls Chapter Two of the book "the definitive expression of the (social) epistemic arguments for freedom of expression—the ways in which freedom of expression functions as an indispensable aid in the societal identification of truth (and exposure of falsity) and, thus, in the fostering of public knowledge."<sup>18</sup>

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15. See PAUL HORWITZ, *FIRST AMENDMENT INSTITUTIONS* (Harvard University Press, forthcoming 2012) (manuscript on file with author).

16. POST, *supra* note 8, at xi. In his Symposium contribution, Joseph Blocher raises much the same point, asking "how expert knowledge enters into public discourse, and how public discourse can accommodate it once it arrives there." Joseph Blocher, *Public Discourse, Expert Knowledge, and the Press*, 87 WASH. L. REV. 409, 413 (June 2012).

17. JOHN STUART MILL, *ON LIBERTY* (David Bromwich & George Kateb eds., 2003).

18. Frederick Schauer, *On the Relation Between Chapters One and Two of John Stuart Mill's On*

Mill draws on a venerable argument: that truth, if left to its own devices, would triumph in what we now call the “marketplace of ideas.”<sup>19</sup> Strikingly, however, Mill focuses on *false* speech, not true speech.<sup>20</sup> It seems obvious that true speech is worth defending, but less obvious that false speech should be protected. Yet Mill makes precisely that point.<sup>21</sup>

Mill makes three arguments.<sup>22</sup> First, an idea we assume to be false may actually be true.<sup>23</sup> Second, some ideas can contain elements of both truth and falsity, so that suppressing a falsehood also deprives us of what is true.<sup>24</sup> Finally, false speech has a value of its own: it can result in “the clearer perception and livelier impression of truth, produced by its collision with error.”<sup>25</sup>

Despite its centrality to the free speech tradition, Mill’s argument tells us less about the relationship between knowledge and the First Amendment than we might suppose, for two reasons. First, Mill assumes that the “typical impulse to suppress [speech] is based on the alleged falsity of the idea or articulation to be restricted.”<sup>26</sup> This move allows him to focus “entirely [on] the benefits and risks of restricting expression based upon its supposed falsity,”<sup>27</sup> but does not tell us how to determine whether speech is true or false.

Second, his examples of false speech involve matters of opinion, such as “open questions of morals,”<sup>28</sup> not more mundane facts. “Even in this

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Liberty, 39 CAP. U. L. REV. 571, 575–76 (2011).

19. See, e.g., *id.* at 587 n.61.

20. See, e.g., Spottswood, *supra* note 10, at 1215.

21. See MILL, *supra* note 17, at 121 (cautioning that some speech could be limited, regardless of its truth status, in cases in which the speech will do immediate harm—when “the circumstances in which [words] are expressed are such as to constitute their expression a positive instigation to some mischievous act”). A similar statement, with an added distinction between true and false speech, is Holmes’ famous line that the First Amendment does not protect one who “*falsely* shout[s] fire in a theatre and caus[es] a panic.” *Schenck v. United States*, 249 U.S. 47, 52 (1919) (emphasis added). See generally Vincent Blasi, *Shouting “Fire!” in a Theater and Vilifying Corn Dealers*, 39 CAP. U. L. REV. 535 (2011).

22. MILL, *supra* note 17, at 118. For useful discussion, see Schauer, *supra* note 18; Spottswood, *supra* note 10, at 1214–18.

23. MILL, *supra* note 17, at 118.

24. *Id.* at 112, 118.

25. *Id.* at 87.

26. Schauer, *supra* note 18, at 576; Spottswood, *supra* note 10, at 1215 (“Mill assumes during his argument that the only reason we might wish to suppress expression is because we believe it to be false.”); see also MILL, *supra* note 17, at 88 (“Those who desire to suppress [opinion], of course deny its truth.”).

27. Spottswood, *supra* note 10, at 1215.

28. MILL, *supra* note 17, at 86 n.\*.

most influential of the epistemic arguments for freedom of speech,” Frederick Schauer writes, “Mill was not to any appreciable extent addressing issues of demonstrable and verifiable fact.”<sup>29</sup>

This second problem might be self-limiting where free speech law is concerned. *On Liberty* is driven by Mill’s famous harm principle, under which speech and other actions should only be suppressed to prevent harm to others.<sup>30</sup> As a practical matter, given the finite time and resources of government regulators, the more mundane a factual statement is, the less likely it is to be suppressed. Government may wish to restrict speech advocating tyrannicide; and it may, consistent with the harm principle, wish to restrict false statements that could cause serious and immediate harm. But a false statement that the sky is red, or that Millard Fillmore was our fifth President, is unlikely to interest government censors, either for its own sake or for reasons of guarding against potential harm.

Still, Mill’s account leaves two important epistemological questions unanswered. First, what value should we assign to narrow factual statements? Second, how do we *know* whether those statements are true or false?

Other prominent justifications for freedom of speech are less focused on epistemological matters, but still give rise to similar questions. To take one example, the argument that free speech is necessary to support individual autonomy may say *something* about epistemic issues. Thus, David Strauss argues that First Amendment law can distinguish between manipulative lies and inadvertently false statements, because the former deliberately “interfere with a person’s control over her own reasoning processes.”<sup>31</sup> But truth and falsity are secondary considerations here.

We might say the same thing of justifications for free speech based on its importance to democratic self-government. One who values a free and informed citizenry engaging in public deliberation might also agree with the truth-seeking argument that unfettered political speech will result in more truth. Given the democratic justification’s focus on the political *process*, however, an advocate of free speech based on democratic self-government might just as easily conclude that “political

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29. Schauer, *supra* note 2, at 905; see also JAMES FITZJAMES STEPHEN, LIBERTY, EQUALITY, FRATERNITY 74–77 (Maurice Cowling et al. eds. 1967).

30. MILL, *supra* note 17, at 80. On the relationship between Chapter One of *On Liberty*, which sets out the harm principle, and Chapter Two, which discusses the value of protecting false ideas, see Schauer, *supra* note 18.

31. David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 354 (1991).

truth is what the people decide through democratic processes, without regard to whether what is politically true happens to be epistemically true.”<sup>32</sup>

Ultimately, neither rationale resolves the epistemological questions that lurk within the First Amendment. They do not tell us how to distinguish true from false statements, or how to deal with the “shades of grey between earnestly believing that what you say is true and being certain that it is false.”<sup>33</sup> They say little about who should make such determinations and how.

Two additional justifications for freedom of speech are worth mentioning, because they may lead to different approaches toward these epistemological questions. The first justifies the First Amendment primarily on the grounds of distrust of government.<sup>34</sup> According to this view, government cannot use its “legal authority to identify and enforce any particular version of right and wrong, or truth and untruth.”<sup>35</sup> An anti-paternalistic approach would lead to a general refusal to regulate false statements—not because we value falsity, but because we are reluctant to hand over to the state the authority to make such determinations.

The anti-paternalistic argument offers a valuable reminder that the question of institutional allocation—who gets to decide what is true or false—is as important as the value of true and false statements themselves. To those who say there is “no social value in the dissemination of falsehood, particularly knowing falsehood,”<sup>36</sup> Steven Gey responds that the harm of false speech is outweighed by the harm of empowering government to decide whether that speech is true or false.<sup>37</sup> As a practical matter, however, this argument is incomplete. Under current and well-settled law, government routinely makes such determinations. Outside what Schauer calls the “boundaries” of conventional First Amendment coverage,<sup>38</sup> in such areas as securities fraud, the government evaluates (and punishes) statements on the basis

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32. Schauer, *supra* note 2, at 910.

33. Spottswood, *supra* note 10, at 1224.

34. See Steven G. Gey, *The First Amendment and the Dissemination of Socially Worthless Untruths*, 36 FLA. ST. U. L. REV. 1, 16–20 (2008); see also Dale Carpenter, *The Antipaternalism Principle in the First Amendment*, 37 CREIGHTON L. REV. 579 (2004).

35. Gey, *supra* note 34, at 21.

36. Tushnet, *supra* note 4, at 25.

37. See Gey, *supra* note 34, at 22.

38. Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765 (2004).



of their truth or falsity.<sup>39</sup> Indeed, it does so even *within* the boundaries of conventional First Amendment coverage. It regulates false and misleading commercial speech,<sup>40</sup> and even defamatory political speech involving public officials if actual malice is involved.<sup>41</sup> An anti-paternalist argument that leaves this regulatory authority in place leaves much to be explained.

Finally, consider the civic courage argument.<sup>42</sup> This is the argument that speech—even false speech—can help develop the kind of civic character that is necessary for self-government.<sup>43</sup> Its exemplar is Justice Brandeis' view that “the final end of the state [is] to make men free to develop their faculties,” that courage is “the secret of liberty” and that “the greatest menace to freedom is an inert people.”<sup>44</sup> Absent grave and imminent danger, the remedy for false or dangerous speech “is more speech, not enforced silence.”<sup>45</sup>

I find the argument from civic courage powerful,<sup>46</sup> but it leaves important questions unanswered. Why is civic courage not a sufficient remedy in the many areas in which First Amendment law *permits* regulation, including false statements about public figures made with actual malice, or false or misleading commercial speech? As an empirical matter, moreover, how do we know that Brandeis was right? Is it really true that leaving false speech unregulated conduces to civic courage, or that the benefits of civic courage outweigh the dangers of false speech?

The foregoing discussion suggests two conclusions. First, epistemological questions are closely bound up with free speech and its justifications, whether directly or indirectly. Second, whatever their merits, the standard free speech justifications pose difficult questions

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39. See *id.* at 1778–79. For cases rejecting First Amendment challenges to securities fraud prosecutions, see, for example, *SEC v. Pirate Investor LLC*, 580 F.3d 233, 255 (4th Cir. 2009), and *SEC v. Wall St. Publ'g Inst., Inc.*, 851 F.2d 365, 373 (D.C. Cir. 1988).

40. See, e.g., *Cent. Hudson Gas & Elec. Co. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980).

41. See, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

42. See, e.g., LEE C. BOLLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* (1986); Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California*, 29 WM. & MARY L. REV. 653 (1988). This argument is, I think, distinct from the argument for the importance to public discourse of what Post calls “democratic legitimation.” I discuss that argument in Part III.

43. See, e.g., Blasi, *supra* note 21, at 541–42.

44. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

45. *Id.* at 377.

46. See generally Paul Horwitz, *Citizenship and Speech. A Review of Owen M. Fiss, The Irony of Free Speech and Liberalism Divided*, 43 MCGILL L.J. 445 (1998) (book review).

about the relationship between knowledge, truth, and free speech.

Finally, it is worth noting that the truth-seeking justification, and its accompanying marketplace of ideas metaphor, have become far less prevalent in contemporary free speech scholarship.<sup>47</sup> “[T]he free speech literature appears increasingly to have detached itself from the empirical and instrumental epistemic arguments” made by Mill and others, focusing instead on the other justifications canvassed here, such as arguments from democracy or autonomy.<sup>48</sup> I discuss below some of the reasons why that shift might have occurred.<sup>49</sup> For now, however, I take the shift mostly as a given rather than applauding or criticizing it. However, it *is* important. To the extent that these other justifications are less directly concerned with answering the First Amendment’s epistemological questions, they suggest that these questions are fated to remain unresolved.

### B. *First Amendment Doctrine*

The same questions are present in First Amendment jurisprudence. I focus here on just a few examples of the U.S. Supreme Court’s shifting views about the connection between truth, falsity, and free speech. Using academic freedom as a focus, I also examine the Court’s views about the relationship between the First Amendment, the acquisition of knowledge, and the institutions that help us acquire it.

Of course, the Court has also addressed these epistemological questions indirectly. Many laws, especially those concerning defamation and commercial speech,<sup>50</sup> contain permissible “restrictions on false, deceptive, and misleading communications.”<sup>51</sup> The Court has treated other laws involving potential falsity, such as perjury, fraud, and speech-related crime, as falling outside the boundaries of the First Amendment altogether.<sup>52</sup> The instances below involve more direct discussions of truth, falsity, and free speech.

#### 1. *Conflicting Dicta on Truth, Falsity, and Free Speech*

A prominent discussion of the potential value of false speech,

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47. Schauer, *supra* note 2, at 910.

48. *Id.* at 909–10.

49. *See, e.g.*, Conclusion, *infra*.

50. *See, e.g.*, Spottswood, *supra* note 10, at 1207–13; Gey, *supra* note 34, at 5–6.

51. Jonathan D. Varat, *Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship*, 53 UCLA L. REV. 1107, 1108 (2006).

52. *See generally* Schauer, *supra* note 38.

drawing directly on Mill, can be found in the Court's influential decision in *New York Times Co. v. Sullivan*.<sup>53</sup> Justice Brennan, quoting from *On Liberty*, wrote: "Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.'"<sup>54</sup>

This statement suggests that even false speech deserves constitutional protection. In a pattern that would repeat itself over the years, however, the Court soon retreated. In *Gertz v. Robert Welch, Inc.*,<sup>55</sup> the Court stated:

[T]here is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust, and wide-open" debate on public issues. They belong to that category of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."<sup>56</sup>

*Gertz* thus appears to reject the Court's Millian view in *Sullivan*. It denies the intrinsic value of false speech. It does recognize, however, that even if false statements are worthless, the difficulty of proving the truth or falsity of a statement may still require some protection for false speech. "The First Amendment requires that we protect some falsehood in order to protect speech *that matters*."<sup>57</sup>

The *Gertz* Court also opined: "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."<sup>58</sup> This statement illustrates the multilayered nature of the First Amendment's epistemological problem. On its face, it suggests that "ideas" are neither true nor false.<sup>59</sup> But its

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53. 376 U.S. 254 (1976).

54. *Id.* at 279 n.19 (citation omitted).

55. 418 U.S. 323 (1974).

56. *Gertz*, 418 U.S. at 340 (quoting *Sullivan*, 376 U.S. at 270, and *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

57. *Id.* at 341 (emphasis added).

58. *Id.* at 339–40.

59. Although this raises questions that would confront the Court in later cases—in particular, whether it is possible to distinguish "opinions" from "facts." See, e.g., *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 17–20 (1990).

reference to “judges and juries” also reminds us of a practical concern: that of proof. Given the courts’ epistemic limits, they must sometimes refrain from deciding whether a statement is “true” or “false.”

3. *Knowledge and the First Amendment: The Case of Academic Freedom*

Finally, consider academic freedom. A central concern of Post’s book, academic freedom is an area in which the Court has dealt with the connection between truth and the First Amendment at an institutional level. Courts treat the university as a central institutional player in the search for truth. In *Sweezy v. New Hampshire*,<sup>60</sup> Chief Justice Warren’s plurality opinion emphasized the truth-seeking justification for academic freedom, arguing that without protection for the scholarly production of “new discoveries” in the field of knowledge, “our civilization will stagnate and die.”<sup>61</sup>

It is worth noting that the *Sweezy* plurality does not focus on inculcating democratic values *within* the university, or insist that universities observe democratic norms. Rather, its focus is on the contributions that universities make *to* democracy by advancing the search for truth.<sup>62</sup> Academic freedom “is prized primarily because its contribution to truth-seeking will yield discoveries or insights that . . . benefit society at large.”<sup>63</sup>

In an example of the ways in which truth-seeking justifications for free speech have been “folded into . . . justification[s] sounding more in democratic theory” than epistemology,<sup>64</sup> the Court’s treatment of academic freedom has wandered away from the truth-seeking justification over time. Consider *Keyishian v. Board of Regents of the University of New York*.<sup>65</sup> Although that opinion compares the classroom to the “marketplace of ideas,” it does so for democratic and egalitarian purposes, not just epistemic ones.<sup>66</sup> “The Nation’s future depends upon leaders trained through wide exposure to [the] robust exchange of ideas which discovers truth ‘out of a multitude of tongues, (rather) than

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60. 354 U.S. 234 (1957).

61. *Id.* at 250.

62. *See, e.g.*, Paul Horwitz, Grutter’s *First Amendment*, 46 B.C. L. REV. 461, 483–84 (2005).

63. *Id.* at 484.

64. Schauer, *supra* note 2, at 910.

65. 385 U.S. 589 (1967).

66. *See* Horwitz, *supra* note 62, at 489.

through any kind of authoritative selection.”<sup>67</sup> The concern here is with the value of diverse speech *within* the classroom. Although *Keyishian* pays lip service to the competition for truth within the marketplace of ideas, it “is less interested in the results of that competition than it is in . . . the training and shaping of the nation’s citizens.”<sup>68</sup>

The cases involving affirmative action in higher education display a similar movement away from an emphasis on knowledge itself and toward an emphasis on other values, such as diversity and democratic legitimacy.<sup>69</sup> Thus, in *Grutter v. Bollinger*,<sup>70</sup> the Court wrote that “universities occupy a special niche in our constitutional tradition” and deserve judicial deference.<sup>71</sup> But its defense of universities’ “special niche” within the First Amendment was different than the one offered in *Sweezy*. The right of a university to select its own students had less to do with its entitlement to autonomy as a truth-seeking institution, and more to do with diversity’s *democratic* benefits. “Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized,” wrote Justice O’Connor.<sup>72</sup> It was especially important that *elite* academic institutions be racially diverse, given their role in cultivating “a set of leaders with legitimacy in the eyes of the citizenry.”<sup>73</sup>

This is a far cry from the truth-seeking justification offered for academic freedom in *Sweezy*. Indeed, it is not an epistemological justification at all. By the time *Grutter* was decided, academic freedom had been largely assimilated into the arguments for free speech based on democratic legitimacy and self-governance.<sup>74</sup> In this context, the relationship between diversity and truth-seeking was almost irrelevant.<sup>75</sup>

The First Amendment case law thus offers a couple of lessons. The

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67. *Keyishian*, 385 U.S. at 603 (citation omitted).

68. Horwitz, *supra* note 62, at 489.

69. *Cf.* POST, *supra* note 8, at 27–28, 34 (discussing “democratic legitimacy”).

70. 539 U.S. 306 (2003).

71. *Id.* at 328.

72. *Id.* at 332.

73. *Id.*

74. *See* Horwitz, *supra* note 62, at 500–01; *see also* Jack Greenberg, *Diversity, the University, and the World Outside*, 103 COLUM. L. REV. 1610, 1619 (2003) (“Justice O’Connor structures her argument so that preparation for the world beyond graduation has the constitutional protection of being a subset of academic freedom.”).

75. The U.S. Supreme Court recently granted certiorari in another case involving affirmative action in higher education, thus potentially putting all these issues back on the table. *See* *Fisher v. Univ. of Texas*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 1536 (U.S. Feb. 21, 2012, No. 11-345).

most important one is that the Court's discussion of the relationship between truth, knowledge, and the First Amendment has been inconsistent. The Court sometimes argues that the discovery of truth is a vital justification for the First Amendment. At other times, however, it subordinates that argument to other concerns, such as democratic legitimacy. It has difficulty dealing with basic concepts and propositions, including the distinctions (if any) between facts and opinions, true and false statements, and so on. Although it has reached sensible conclusions, such as that some fraudulent statements can be regulated, it has done so inconsistently and without adequate justification. It has not told us clearly, for example, why citizens can generally be relied on to distinguish between true and false statements made in the political realm<sup>76</sup> and not in other areas, such as commercial speech or securities fraud.

C. *The Stolen Valor Act: A Current Example of the First Amendment's Epistemological Problem*

These epistemological questions are at the forefront of a case the U.S. Supreme Court heard this Term, *United States v. Alvarez*.<sup>77</sup> *Alvarez* involves a prosecution under the Federal Stolen Valor Act, which makes it a crime to falsely represent that one has been awarded a military decoration or medal.<sup>78</sup> The defendant was an elected official who said at a public appearance: "I'm a retired marine of 25 years. I retired in the year 2001. Back in 1987, I was awarded the Congressional Medal of Honor. I got wounded many times by the same guy. I'm still around."<sup>79</sup> *Alvarez* was "still around," but nothing else in the statement was true.<sup>80</sup>

The Stolen Valor Act presents a snapshot of the epistemological questions the Court has left unaddressed, or answered inconsistently, in its First Amendment jurisprudence. The statute deals only with false statements of fact, not opinions or ideas. It is not restricted to *knowingly* false statements of fact;<sup>81</sup> even inadvertent misrepresentations are

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76. See, e.g., *Brown v. Hartlage*, 456 U.S. 45 (1982) (applying *Sullivan*'s actual malice standard to a case involving a law prohibiting false statements made by candidates for public office).

77. 617 F.3d 1198 (9th Cir. 2010), *cert. granted*, 132 S. Ct. 457 (2011). As of this writing, the decision is still pending.

78. 18 U.S.C. § 704 (2011).

79. *Alvarez*, 617 F.3d at 1200.

80. *Id.* at 1200–01.

81. Congress has since proposed to limit the statute's scope to misrepresentations made knowingly and with the intent to obtain something of more than *de minimis* value. See Stolen Valor Act of 2011, H.R. REP. NO. 112-1775, at 1 (2011); S. REP. NO. 112-1728, at 1 (2011).

covered.

The majority and dissenting opinions in the Ninth Circuit are instructive on the epistemological issues raised by the Stolen Valor Act. The key difference between them concerns the constitutional value of false speech. For the majority, the notion that “all false factual speech is unprotected” under the First Amendment is mistaken.<sup>82</sup> Its default rule is that “*all* speech” is protected from “government interference,” absent some compelling reason “other than the mere fact that [a statement] is a lie.”<sup>83</sup> The majority rejects the argument that the case is controlled by *Gertz*’s view that “the erroneous statement of fact is not worthy of constitutional protection,”<sup>84</sup> concluding that false statements can only be regulated when closely tied to a *specific* harm involving “low-value” speech.<sup>85</sup> Its rationale is largely one of distrust of government.<sup>86</sup> But it also reasons that the default assumption that all false speech is capable of regulation puts the burden of proof in the wrong place<sup>87</sup>—an essentially epistemological point. And it insists that “at least some knowingly false statements of fact,” including satire, fiction, and hyperbole, can have “affirmative constitutional value.”<sup>88</sup>

For Judge Bybee, who dissented, Alvarez’s knowingly false statement fell outside the boundaries of First Amendment protection altogether.<sup>89</sup> The only exception he was willing to entertain concerned cases in which “protecting a false statement is necessary ‘in order to protect speech *that matters*,’”<sup>90</sup> a category he treated fairly narrowly.<sup>91</sup> Bybee’s default rule

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82. *Alvarez*, 617 F.3d at 1205–06.

83. *Id.* at 1025 (emphasis in original).

84. *Id.* at 1202 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974)).

85. *See id.* at 1205 (“[W]e presumptively protect *all* speech against government interference, leaving it to the government to demonstrate, either through a well-crafted statute or case-specific application, the historical basis for or a compelling need to remove some speech from protection (in this case, for some reason other than the mere fact that it is a lie).”); *id.* at 1213 (“In sum, our review of pertinent case law convinces us that the historical and traditional categories of unprotected false factual speech have thus far included only *subsets* of false factual statements, carefully designed to target behavior that is most properly characterized as fraudulent, dangerous, or injurious conduct, and not as pure speech. We are aware of no authority holding that the government may, through a criminal law, prohibit speech *simply* because it is knowingly factually false.” (emphasis in original)).

86. *Id.* at 1205 (“[T]he right to speak and write whatever one chooses—including, to some degree, worthless, offensive, and demonstrable untruths—without cowering in fear of a powerful government is, in our view, an essential component of the protection afforded by the First Amendment.”).

87. *Id.* at 1204.

88. *Id.* at 1213.

89. *Id.* at 1220 (Bybee, J., dissenting).

90. *Id.* at 1221 (emphasis added) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341

was the exact opposite of the majority's: false statements are presumptively *unprotected* by the First Amendment.

Concurring in the denial of en banc review, Chief Judge Kozinski directly addressed the value of false speech, arguing that “white lies, exaggerations and deceptions . . . are an integral part of human intercourse.”<sup>92</sup> “[T]ruth is not the sine qua non of First Amendment protection,”<sup>93</sup> he argued. Autobiographical speech “is intimately bound up with a particularly important First Amendment purpose: human self-expression.”<sup>94</sup> If it is to avoid being reduced to “the monotonous reporting of strictly accurate facts about oneself,” autobiographical speech will inevitably include half-truths and outright falsehoods, all of which serve potentially valuable purposes: to “protect . . . privacy,” to “avoid recriminations,” to “prevent grief,” to “save face,” and so on.<sup>95</sup> Upholding the Stolen Valor Act would open the floodgates for the regulation of commonplace falsehoods that ought to be left to the “pull and tug of social intercourse.”<sup>96</sup>

How the Supreme Court resolves the *Alvarez* case will depend on a couple of doctrinal questions. The central question is where false statements fit within the distinction between high- and low-value speech.<sup>97</sup> That distinction was set out some seventy years ago in *Chaplinsky v. New Hampshire*,<sup>98</sup> which famously declared that “[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the

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(1974)).

91. See, e.g., *id.* at 1221 n.1, 1223 (“The Supreme Court has told us consistently that the general rule is that false statements of fact are unprotected, and has carved out certain limited exceptions to this principle in certain contexts.”). A similar approach was taken by Judge O’Scannlain in his dissent from the denial of en banc review in the Ninth Circuit. See *United States v. Alvarez*, 638 F.3d 666, 681 (9th Cir. 2011) (O’Scannlain, J., dissenting from the denial of rehearing en banc).

92. *Alvarez*, 638 F.3d at 673 (Kozinski, C.J., concurring in the denial of rehearing en banc).

93. *Id.*

94. *Id.* at 674; see also David S. Han, *Autobiographical Lies and the First Amendment’s Protection of Self-Defining Speech*, 87 N.Y.U. L. REV. 70 (2012).

95. *Alvarez*, 638 F.3d at 674–75 (Kozinski, C.J., concurring in the denial of rehearing en banc).

96. *Id.* at 675.

97. See, e.g., Larry Alexander, *Low Value Speech*, 83 NW. U. L. REV. 547 (1989); Arnold H. Loewy, *The Use, Nonuse, and Misuse of Low Value Speech*, 58 WASH. & LEE L. REV. 195 (2001); Jeffrey M. Shaman, *The Theory of Low-Value Speech*, 48 SMU L. REV. 297 (1995); Cass R. Sunstein, *Low Value Speech Revisited*, 83 NW. U. L. REV. 555 (1989). I assume in this discussion that the Court will join most of the lower courts in construing the Stolen Valor Act to require knowingly false statements of fact.

98. 315 U.S. 568 (1942).



profane, the libelous, and the insulting or ‘fighting’ words’ . . . .”<sup>99</sup> Those kinds of speech “are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”<sup>100</sup> Over time, the Court has brought some of those categories, such as libel, back within the First Amendment fold.<sup>101</sup> But the basic distinction remains.

Two Terms ago, in *United States v. Stevens*,<sup>102</sup> the Court revisited *Chaplinsky* when it reviewed a federal statute criminalizing depictions of animal cruelty.<sup>103</sup> The government argued this speech was of such low value that it was “categorically unprotected by the First Amendment.”<sup>104</sup>

From a reasonable observer’s perspective, the minimal value of this speech might seem obvious. But the Court refused to engage in an interest-balancing inquiry in order to determine which categories of speech fall into the low-value category, focusing instead on their “historic and traditional” nature.<sup>105</sup> The Court acknowledged that *Chaplinsky* seemed to suggest such a balancing inquiry, but denied that this formula should be applied to each new proposed category.<sup>106</sup> Similarly, last Term, in *Brown v. Entertainment Merchants Ass’n*,<sup>107</sup> the Court said it would require a “historical warrant” before recognizing new categories of low-value speech.<sup>108</sup> The government would have to provide “persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription.”<sup>109</sup> Thus, in *Alvarez*, the Court will have to decide whether false statements of fact are a new category or a very old one.

There is some warrant for the view that false statements of fact are “part of a long . . . tradition of proscription.”<sup>110</sup> Ultimately, however, I find it hard to square that argument with the Court’s recent decisions.

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99. *Id.* at 571–72 (citations omitted).

100. *Id.* at 572.

101. *See, e.g.*, Schauer, *supra* note 38, at 1776; Horwitz, *supra* note 15.

102. 559 U.S. \_\_\_, 130 S. Ct. 1577 (2010).

103. *Id.* at 1582–83 (2010) (describing the statute, 18 U.S.C. § 48 (2006)).

104. *Id.* at 1584.

105. *Id.* (quoting *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 127 (1991) (Kennedy, J., concurring)).

106. *Id.* at 1586 (rejecting any “freewheeling authority to declare new categories of speech outside the scope of the First Amendment”).

107. 564 U.S. \_\_\_, 131 S. Ct. 2729 (2011).

108. *Id.* at 2734.

109. *Id.*

110. *Id.*

The language in *Stevens* suggests that such a broad and free-floating category, absent a more specific context, is constitutionally problematic.<sup>111</sup> In its insistence on a historical warrant for new categories of low-value speech, the *Stevens* Court said it had only recognized such a category where it found a close connection to some specific and traditionally proscribable harm. It took as an example its decision in *New York v. Ferber*,<sup>112</sup> which upheld a statute criminalizing the advertising and sale of child pornography.<sup>113</sup> It described *Ferber* as having been grounded not on a “balance of competing interests’ alone,” but on the integral connection between the market for child pornography and its production, which has long been illegal.<sup>114</sup> Although the Court has recognized the low value of false statements in specific contexts, it is hard to conclude that false statements per se are a “special case” that demand an exception from the general coverage of the First Amendment.<sup>115</sup>

If the Court’s decisions in *Stevens* and *Brown* are read as meaning that low-value speech must generally be limited to historically recognized categories, and thus as a rejection of any case-by-case balancing of interests, then the epistemological elements of *Alvarez* will fade in importance, regardless of the outcome. The case will turn on historical inquiry, not on a direct evaluation of the value of false statements of fact.

Despite its emphasis on history, however, the Court has not rejected interest-balancing altogether. In order to determine whether false statements of fact fall within a traditional (albeit “heretofore unrecognized”) category of low-value speech, it will inevitably have to ask whether they share the fundamental characteristic of such categories: namely, that “the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required.”<sup>116</sup>

More broadly, *Stevens* represents a judgment about the First Amendment itself. The First Amendment, the Court observed, “reflects a judgment by the American people that the benefits of its restrictions on

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111. See, e.g., *Stevens*, 130 S. Ct. at 1585 (“The First Amendment’s guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits.”).

112. 458 U.S. 747 (1982).

113. See *id.* at 765.

114. *Stevens*, 130 S. Ct. at 1586 (quoting *Ferber*, 458 U.S. at 764).

115. *Id.*

116. *Id.* (quoting *Ferber*, 458 U.S. at 763–64).

the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it.”<sup>117</sup> This statement is essentially a form of cost-benefit analysis. It suggests that, in general, the benefits of preventing government from regulating speech—even false speech—outweigh the harms of that speech.

This may be a key article of the American faith, but it is also an empirical question—an “experiment,” as Justice Holmes described the First Amendment, to see whether “the best test of truth is the power of the thought to get itself accepted in the competition of the market.”<sup>118</sup> Despite their historical gloss, cases like *Stevens* ultimately rest on a view about the value of different kinds of speech, and the costs and benefits of regulating them.

In sum, *Alvarez* still brings us back to the epistemological questions with which we began this Part: How do we know what is true or false? How much does it matter? And how should our judgments on those questions affect First Amendment law?

## II. THE EPISTEMOLOGICAL PROBLEM REVISITED: CURRENT SCHOLARLY INTEREST IN TRUTH, FALSITY, AND THE FIRST AMENDMENT

It is unsurprising that these sorts of epistemological questions have interested First Amendment scholars. What is more surprising, perhaps, is the sudden intensity of this interest. In the last few years, a number of leading scholars have focused on various aspects of these questions: the constitutional status and social value of false statements of fact; the courts’ disparate treatment of false statements in different areas (such as dishonest campaign promises versus securities fraud); the constitutional value of true factual statements; and the relationship between First Amendment law and the institutions in which knowledge is produced and verified.

In this Part, I lay out some of the basic questions, and much more tentative answers, that recent scholarship on the First Amendment’s epistemological problem has provided. I focus in particular on the constitutional value of true and false statements.

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117. *Id.* at 1585.

118. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). See generally Alvin I. Goldman & James C. Cox, *Speech, Truth, and the Free Market for Ideas*, 2 LEG. THEORY 1 (1996); Frederick Schauer, *Is It Better to Be Safe than Sorry?: Free Speech and the Precautionary Principle*, 36 PEPP. L. REV. 301 (2009).

A. *The Constitutional Status of True Facts*

If one of the key purposes of the First Amendment is to advance the search for truth, one might assume that true factual statements deserve substantial protection. Milton's *Areopagitica*, a forerunner of Mill's *On Liberty* and a major influence on the development of freedom of speech, refers to the persecution of Galileo for challenging Church orthodoxy on astronomy.<sup>119</sup> Wouldn't it be odd to give greater protection to a completely mistaken attack on heliocentrism than to a simple statement of the fact that the Earth revolves around the sun?

In fact, as Schauer points out, "the relationship of the First Amendment to questions of hard fact" has received little sustained attention.<sup>120</sup> *On Liberty*, the "most epistemically focused of free speech arguments," dealt with ideas, not facts.<sup>121</sup> Even in a legal field in which truth might be expected to play a substantial role—defamation or seditious libel—it took some time for the truth of an allegedly defamatory statement to be accepted as a successful defense to that charge.<sup>122</sup> The courts' primary concern was not with accuracy as such, but with the potential of defamatory statements to harm the state or individual reputations.<sup>123</sup>

Although "issues of fact . . . have become an increasingly large part of First Amendment doctrine and writings" in the past half-century or so,<sup>124</sup> Ashutosh Bhagwat has observed that "[t]he question of what level of First Amendment protection should be accorded to true, factual speech" remains "largely unexplored."<sup>125</sup> To the extent that we may draw a general conclusion from the mass of cases addressing the legal status of "detailed, factual speech,"<sup>126</sup> the conclusion Bhagwat draws is surprising: across a range of areas, true facts have been accorded relatively little protection. To the extent that this speech has been protected, it has had more to do with the political nature of the speech than with its accuracy.<sup>127</sup>

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119. See Vincent Blasi, *John Milton's Areopagitica and the First Amendment*, 13 COMM. LAW. 1, 15 (1996); Burt Neuborne, *Speech, Technology, and the Emergence of a Tricameral Media: You Can't Tell the Players Without a Scorecard*, 17 HASTINGS COMM. & ENT. L.J. 17, 20 n.14 (1994).

120. Schauer, *supra* note 2, at 899.

121. *Id.* at 905.

122. See *id.* at 904, 907.

123. See *id.* at 903–04.

124. *Id.* at 907.

125. Bhagwat, *supra* note 3, at 3.

126. *Id.* at 6.

127. *Bartnicki v. Vopper*, 532 U.S. 514, 517–18 (2001) (shielding a radio station that broadcast

As Bhagwat shows, the courts have often refused to protect the dissemination of true but potentially harmful facts.<sup>128</sup> The publication of personal information about doctors who perform abortions, in a context in which that information constitutes a “true threat” to those physicians, can be enjoined.<sup>129</sup> A former CIA agent can be punished for revealing the names of undercover agents, resulting in harm to agents and intelligence operations.<sup>130</sup> Providing instructions on income tax evasion can lead to a criminal conviction.<sup>131</sup> The publication of details on how to manufacture hydrogen bombs can be enjoined, although much of the information was already in the public domain, because collecting the information in one place could assist foreign countries seeking to jump-start their own nuclear weapons programs.<sup>132</sup>

These cases have one thing in common. In each case, the truth of the published information was *central*, not incidental, to the loss of First Amendment protection. From a truth-seeking perspective, those are puzzling results.

There are two explanations for this; both raise epistemological questions. First, these true statements were closely related to serious harms. *Planned Parenthood*<sup>133</sup> and *Haig*<sup>134</sup> serve as examples. Publishing accurate information about abortion doctors, when other abortionists had already been killed and (in the court’s view) the web site could be understood to encourage further killings, presented both an immediate harm to the doctors—the threat of harassment, the need to change their addresses, and a chilling effect on their willingness to perform a legal procedure—and an imminent harm of violence.<sup>135</sup> In those circumstances there was no time to counteract those harms with “more speech.”<sup>136</sup>

Second, for reasons of both epistemology and institutional competence, courts might not want to draw a firm line between

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the details of an illegally intercepted conversation from civil liability, because the speech involved matters of public concern).

128. Bhagwat, *supra* note 3, at 7–38.

129. *Planned Parenthood v. Am. Coal. of Life Activists*, 290 F.3d 1058, 1062–63 (9th Cir. 2002) (en banc).

130. *Haig v. Agee*, 453 U.S. 280, 283–87, 309–10 (1981).

131. *United States v. Buttorff*, 572 F.2d 619, 621–22, 624 (8th Cir. 1978); Bhagwat, *supra* note 3, at 20.

132. *United States v. Progressive, Inc.*, 467 F. Supp. 990, 993–95 (W.D. Wis. 1979).

133. 290 F.3d 1058.

134. 453 U.S. 280.

135. *See, e.g., Planned Parenthood*, 290 F.3d at 1063, 1086.

136. *Whitney v. California*, 274 U.S. 357, 377 (Brandeis, J., concurring).

(protected) true speech and (unprotected) false speech. To say that true speech is protected while false speech is not implies that it is possible to draw such a line—and, just as important, that judges and juries are capable of drawing it. The accuracy or inaccuracy of some statements is so clear as to present little difficulty for anyone. Other statements, however, may exceed lay understanding. Judges and jurors may be incapable of assessing their truth or falsity, even if experts in the field could.<sup>137</sup> Of course, the law has ways of dealing with the proof of complex facts requiring expert evidence,<sup>138</sup> and appellate courts in First Amendment cases can independently review the factual basis of a determination by the lower court.<sup>139</sup> But those mechanisms raise epistemological questions of their own.<sup>140</sup> It may thus make more sense for judges to focus on whether a statement is harmful than on whether it is true or false.<sup>141</sup>

Even if we *can* identify uncontroversially true factual statements, we still face the question of how much value to accord them under the First Amendment. For Bhagwat, the answer is: not much.

Consistent with Schauer's observation that "the free speech literature appears increasingly to have detached itself from . . . empirical and instrumental epistemic arguments" in favor of other free speech justifications,<sup>142</sup> Bhagwat takes as his starting point the view that the purpose of the Speech Clause is "to facilitate political dialogue, and . . . enable the process of democratic self-governance"<sup>143</sup> This premise leads him to conclude that true statements of fact are entitled to less protection than ideas or opinions—even opinions, like "I believe Galileo was wrong," that are as close to wrong as a statement prefaced by the words "I believe that . . ." can come.<sup>144</sup>

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137. See Spottswood, *supra* note 10, at 1246.

138. See FED. R. EVID. 702; *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

139. See, e.g., *Bose Corp. v. Consumer's Union of U.S.*, 466 U.S. 485, 514 (1984) (requiring appellate judges in First Amendment cases to engage in searching review of important factual determinations in the district court).

140. See Barry P. McDonald, *Government Regulation or Other "Abridgements" of Scientific Research: The Proper Scope of Judicial Review Under the First Amendment*, 54 *Emory L.J.* 979, 1080 & n.404 (2005) (noting arguments "against First Amendment protection for scientific research on the basis that . . . science does not in fact yield knowledge that is epistemically superior with regard to the ascertainment of truth than other forms of knowledge," and citing sources).

141. Of course, the determination that speech is harmful itself involves probabilistic and empirical judgments; thus, even a focus on harm rather than truth cannot completely avoid the First Amendment's epistemological problems. See generally Schauer, *supra* note 118.

142. Schauer, *supra* note 2, at 909–10.

143. Bhagwat, *supra* note 3, at 40–41.

144. See, e.g., *id.* at 6–7, 77–79.

Bhagwat concedes that some factual details are “highly relevant to self-governance.”<sup>145</sup> But he emphasizes that “with respect to many, many specific facts, their relationship to any form of self-governance is tangential at best, and even when the relationship exists, it is often less direct than with respect to pure ideas.”<sup>146</sup> What mattered about the *Progressive’s* publication of details concerning the hydrogen bomb was not the facts themselves, but the debate over “the wisdom of laws seeking to suppress [that] information.”<sup>147</sup> Bhagwat recommends that we shift our focus away from the accuracy of particular factual details as such. Instead, “what is needed is a direct focus on self-governance. Factual details should receive protection [only] in proportion to their contribution to self-governance.”<sup>148</sup>

Schauer and Bhagwat’s articles show both that the constitutional value of true facts has been largely unexamined, and that there is a renewed interest in addressing this gap. Somewhat surprisingly, their analysis does not necessarily favor robust protection for true factual details. For Bhagwat, the truth of a statement is less important than whether it contributes to public discourse and whether it is harmful.<sup>149</sup> We might thus conclude that, even as “issues of fact . . . have become an increasingly large part of First Amendment doctrine and writings,”<sup>150</sup> judicial and scholarly analysis has moved *away* from epistemic considerations and toward other free speech justifications, such as democratic self-governance, that place less value in true facts themselves.

That is not necessarily a bad thing. Perhaps those justifications better reflect current First Amendment theory and doctrine. Or perhaps this shift in focus itself represents a form of epistemic humility: the more contested the truth is, the better reason there is for judges to focus on other concerns, like democratic self-governance.

But this approach does not completely avoid the existing epistemic questions, and may raise new ones. After all, if “[f]actual details should receive protection in proportion to their contribution to self-governance,”<sup>151</sup> or in proportion to the harm they cause, we must still decide how much those details contribute to self-governance, the risks of

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145. *Id.* at 44.

146. *Id.* at 48.

147. *Id.* at 49.

148. *Id.* at 66.

149. *See, e.g., id.* at 7.

150. Schauer, *supra* note 2, at 907.

151. Bhagwat, *supra* note 3, at 66.

harmful but true statements, and whether those risks are outweighed by the benefits of offering rigorous protection to true statements. Those are difficult questions, and the difficulty is compounded by the need to ask in the first place whether certain “facts” really are “true.”

*B. False Statements of Fact*

Regardless of how we treat *true* statements of fact, one might expect a strong consensus that the First Amendment need not protect *false* statements of fact. In support of this proposition, we have *Gertz*'s statement that “there is no constitutional value in false statements of fact,”<sup>152</sup> as well as a broad range of false statements that are uncontroversially capable of regulation under current law.<sup>153</sup> Even Mill concluded that “on a subject like mathematics . . . there is nothing at all to be said on the wrong side of the question.”<sup>154</sup>

Yet there is some tension here too. From a doctrinal standpoint, we can meet *Gertz*'s sweeping assertion with *Stevens*' equally broad conclusion that “[t]he First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs.”<sup>155</sup> That assertion does not speak to the value of false statements directly, but it does suggest that the First Amendment generally forecloses weighing the value of false speech at all. Against *Gertz*, too, we have the Court's footnote in *Sullivan*, adopting Mill's view that “[e]ven a false statement may . . . make a valuable contribution to public debate.”<sup>156</sup> Moreover, although many cases suggest that false speech can be restricted, another set of cases makes clear that “some knowingly false statements *are* protected.”<sup>157</sup>

A number of factors, involving varying epistemic considerations, appear to be at work in producing this tension. Thus, in *Sullivan*, the Court worried that a legal regime that permits liability for mere careless errors of fact in statements concerning public officials would deter true as well as false speech.<sup>158</sup> In other cases, such as those involving false or misleading commercial speech, the assumption is that regulation is permissible in part because the speaker is in an epistemically superior

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152. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974).

153. See, e.g., *Volokh*, *supra* note 6, at 349 (citing examples).

154. MILL, *supra* note 17, at 104.

155. *United States v. Stevens*, 559 U.S. \_\_\_, 130 S. Ct. 1577, 1585 (2010).

156. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279 n.19 (1964).

157. *Volokh*, *supra* note 6, at 351 (emphasis added); see *id.* at 350–51 (citing examples).

158. *Sullivan*, 376 U.S. at 279; see also *Volokh*, *supra* note 6, at 351.



position to evaluate the truth of its statements.<sup>159</sup> Thus, these opposing outcomes are arguably *both* epistemically justified. On the other hand, some of the reasons courts have protected false statements of fact have more to do with a broad distrust of government than with specifically epistemic considerations.<sup>160</sup>

Several scholars, including Schauer, Gey, Mark Tushnet, and Jonathan Varat, have recently focused on the First Amendment status of false statements of fact. Surprisingly, despite their differences on concrete issues such as the constitutionality of the Stolen Valor Act,<sup>161</sup> they basically agree that false statements lack epistemic and/or social value. I say “surprisingly” because, as we have seen, Mill, one of the most influential figures in the philosophical justification of free speech, argued that false speech has *some* genuine value, if only as a whetstone for the truth.<sup>162</sup>

Support for that argument seems to have eroded. Tushnet puts the point starkly. “When all is said and done,” he writes, “there really is no social value in the dissemination of falsehood, particularly knowing falsehood.”<sup>163</sup> We may protect false statements in order to guard against laws that would chill true speech, or to prevent ideologically motivated attempts to punish or suppress certain kinds of speech, but false statements have no inherent value.<sup>164</sup> Even Gey, who strongly defends the constitutional protection of some clearly false statements, *assumes* they are “socially worthless” and protects them only for anti-paternalistic reasons.<sup>165</sup>

Varat is perhaps the most willing to defend false statements on epistemic grounds, although somewhat indirectly. He makes two essentially instrumentalist arguments. The first, directed at falsehoods such as Holocaust denial, is the Brandeisian argument that the truth may be better served by publicly attacking lies than by suppressing them through legal channels. “Confronting the lie in the arena of public

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159. *See, e.g.,* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 771 n.24 (1976). Similarly, defenders of the constitutionality of the Stolen Valor Act argue that the speaker in those cases is in the best position to know whether she received a military decoration or not. *See, e.g.,* Volokh, *supra* note 6, at 352.

160. *New York Times Co. v. Sullivan* can be read as supporting either approach.

161. For example, Volokh and Varat, colleagues at UCLA, each filed amicus briefs on opposing sides in the *Alvarez* case.

162. *See, e.g.,* MILL, *supra* note 17, at 87 (suppressing falsity deprives us of “the clearer perception and livelier impression of truth, produced by its collision with error”).

163. Tushnet, *supra* note 4, at 25.

164. *See, e.g., id.* at 8–9, 18–20.

165. *See* Gey, *supra* note 34, at 17, 19.

discussion may increase the likelihood that the truth will be clearer and more long-lived, so that the truth is not forgotten," he writes.<sup>166</sup> "How many people are motivated more strongly to remember and solidify the true history of the Holocaust because they live in an unfortunate world with some who deny it?"<sup>167</sup> The other argument is even more instrumental: lies may sometimes help us "procure" the truth, as when journalists use deception to "acquir[e] otherwise unobtainable information" on matters of public concern.<sup>168</sup>

On the whole, though, although some of these scholars argue against the constitutionality of *particular* legal prohibitions on false statements, there is little debate over the epistemic or social value of those statements as such. That fact itself is worth noting, even if it does little to resolve particular cases. At a basic level, it tends to confirm Schauer's observation that the truth-seeking justifications that motivated Mill and many influential early First Amendment decisions are in relative decline.<sup>169</sup>

It also suggests something deeper about First Amendment law itself. These writers remain willing, for the most part, to protect even deliberately false speech in some contexts, *despite* their agreement on its lack of epistemic or social value.<sup>170</sup> This says something about how we construct First Amendment theory and doctrine. There is a kind of hydraulic dynamic at work here. As the truth-seeking justification for the protection of false statements has receded, other justifications for protecting them, such as those focused on democratic self-governance or distrust of government, have flowed in to take its place. Our theories have changed, but the consensus on which speech should be protected remains roughly the same. That suggests just how much work our

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166. Varat, *supra* note 51, at 1119.

167. *Id.*

168. *Id.* at 1122. As Varat notes, it is unlikely that the law would protect deliberate lies of this kind, although it would likely protect the subsequent publication of accurate information obtained in this manner. It should also be noted that these kinds of deceptions violate widely shared professional journalistic ethics. One can imagine less directly deceptive tactics that would pass legal and ethical muster, however. Imagine, for example, a reporter who finds herself sitting near two public officials negotiating some corrupt bargain, and who listens in without interrupting and identifying herself as a member of the press.

169. See Schauer, *supra* note 2, at 909–10.

170. Tushnet, for example, argues forcefully that lies have no social value, but provides many examples of cases in which arguments for their protection have considerable force. See, e.g., Tushnet, *supra* note 4, at 2–3 n.8 (excluding dramatic performances), 8–9 (noting that some lies may need to be protected to avoid the incidental deterrence of true speech), 17–18 (warning that the regulation of "ideologically inflected" falsehoods, such as that the Holocaust never occurred, could be used "as a lever to attack . . . wider ideological views").

intuitions and experience with respect to free speech are doing here, and just how secondary and subsidiary our specific theories and justifications may be.

### III. THE EPISTEMOLOGICAL PROBLEM EXPANDED: KNOWLEDGE, PUBLIC DISCOURSE, AND THE FIRST AMENDMENT

In this Part, I turn from these general epistemological questions to confront more directly one of the primary issues raised by Post's book: the relationship between the First Amendment and the production of knowledge. I argue that while Post offers some useful answers concerning this relationship, another approach—one that focuses on the infrastructural role within society of those institutions in which knowledge is generated, and gives them substantial autonomy to regulate themselves—might be preferable.

First, however, let us consider what our examination of the First Amendment's epistemological problem has taught us so far.

#### A. *The Epistemological Problem Recapitulated*

A few simple propositions summarize what we have learned about the relationship between truth, falsity, and the First Amendment. First, there is an increasing interest in non-epistemic justifications for freedom of expression. Democracy, self-governance, autonomy, and other justifications have all “ascended in importance” as primary justifications for our system of freedom of speech.<sup>171</sup> These approaches raise epistemic questions of their own. But their primary focus is not on truth, falsity, or justified belief as such.

Second, even *within* the realm of truth-seeking justifications for freedom of expression, there are fewer answers about the relationship between truth, falsity, and the First Amendment than one might expect. From Mill to the present, the focus of the truth-seeking argument has been on ideas or opinions, not facts. The paradigmatic example involves “ideologically inflected” claims,<sup>172</sup> such as claims about the existence or non-existence of the Holocaust. These claims are closely connected to debates over “highly contestable” normative propositions.<sup>173</sup> They present questions of “truth” that extend beyond simply proving or

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171. Schauer, *supra* note 118, at 309.

172. Tushnet, *supra* note 4, at 18.

173. Gey, *supra* note 34, at 8.

disproving a particular factual statement, and raise greater fears that government will use its authority in this area to weigh in impermissibly on normative questions.

The combined result is a First Amendment jurisprudence that is much less focused on facts themselves. There is no equality in the world of facts: it would be absurd to talk of the equal dignity of claims that the moon is made of rock and that it is made of cheese. But the slogans of the First Amendment, such as *Gertz's* statement that there is “no such thing as a false idea” under the First Amendment,<sup>174</sup> are highly egalitarian. More broadly, by forbidding discrimination among speakers and ideas, modern First Amendment doctrine emphasizes “the political equality that all citizens enjoy within a democracy.”<sup>175</sup> Every idea, no matter how misguided, and every speaker, no matter how ill-equipped, stands on equal footing. Truth and falsity have largely dropped out of the equation.

That observation raises interesting epistemological questions. As I suggested at the end of the last Part, however, it is not clear how much these questions matter in practice. Our intuition or practical reason may be doing more work than our theories.<sup>176</sup> In practice, even if we do not know *why* we are doing so, we rarely punish lies “simply because they are lies.”<sup>177</sup> We look for specific harms, and generally prohibit regulations that raise concerns over distrust of government, such as fear of ideologically motivated enforcement. As Schauer sums up the situation, “public noncommercial factual falsity will likely remain constitutionally protected for the foreseeable future.”<sup>178</sup>

Thus, the First Amendment's epistemological problem is *only* a “problem.” Although the free speech theories and doctrines we have canvassed raise a host of epistemological questions, a fairly predictable and vigorously protective system of freedom of speech endures. The First Amendment's epistemological problems do not appear to render the First Amendment unworkable as a matter of day-to-day practice.

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174. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974).

175. Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 484 (2011).

176. See, e.g., Daniel A. Farber & Philip P. Frickey, *Practical Reason and the First Amendment*, 34 UCLA L. REV. 1615, 1635–38 (1987); see also Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CALIF. L. REV. 2353, 2355 (2000) (noting that “those fluent in the law of free speech can predict with reasonable accuracy the outcomes of most constitutional cases” despite the morass of potentially contradictory rules, doctrines, and theories that populate First Amendment law).

177. Tushnet, *supra* note 4, at 2.

178. Schauer, *supra* note 2, at 915. Even if the Court upholds the constitutionality of the Stolen Valor Act, that does not mean it will subsequently uphold *any* law regulating *any* falsehood.

Incoherent, maybe, but not unworkable.

*B. A Different Epistemological Problem: The Role of Knowledge in the First Amendment*

The failure of First Amendment theory and doctrine to fully reckon with the role of facts, or “knowledge” more generally, within public discourse,<sup>179</sup> raises some significant issues that we have not yet examined. These issues lie at the heart of Post’s book.

Of particular importance is the risk that public discourse will end up with more falsity than truth, and that some of this falsity will be positively toxic. This concern animates Schauer’s recent lecture on facts and the First Amendment. There may be good reasons to protect false speech, but there are costs as well. We run the risk not only that public discourse will overflow with “plainly, demonstrably, and factually false” claims, but that people will *believe* them.<sup>180</sup> Millions of Americans profess beliefs—that President Obama is a Muslim, that AIDS was engineered by the American government, and so on—that are simply untrue.<sup>181</sup> Once let loose into the marketplace of ideas, they will find ready takers. These beliefs can become cascades, gaining adherents at dramatically increased rates<sup>182</sup> and distorting politics, public discussion, and public policy itself.

Schauer’s concern may be overstated. He worries about an “increasing acceptance of patent factual falsity,” and describes a modern society “in which truth seems to matter so little.”<sup>183</sup> On the whole, however, the American public is more intelligent,<sup>184</sup> better-educated,<sup>185</sup> and at least no worse-informed than in recent years.<sup>186</sup> Long before AI

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179. I deal with the definition of *public discourse* more fully below. Here, I use it as a simple term of convenience. I treat it as referring to public discussion generally, especially on matters of broad public concern.

180. Schauer, *supra* note 2, at 898.

181. *See id.* at 897–98.

182. *See generally* Cass R. Sunstein & Adrian Vermeule, *Conspiracy Theories* (Harvard Law Sch. Pub. Law & Legal Theory Research Paper Series, Working Paper No. 08-03, 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1084585](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1084585).

183. Schauer, *supra* note 2, at 919.

184. *See, e.g.*, JAMES R. FLYNN, WHAT IS INTELLIGENCE?: BEYOND THE FLYNN EFFECT 7–9 (2009) (documenting increases in IQ test scores over the course of the past century).

185. *See, e.g.*, Gage Raley, Note, *Yoder Revisited: Why the Landmark Amish Schooling Case Could—and Should—Be Overturned*, 97 VA. L. REV. 681, 695–96 & nn.80–81 (2011) (providing figures showing a substantial increase in education levels in the United States over the past 35 years).

186. *See Public Knowledge of Current Affairs Little Changed by News & Information*

Gore invented the Internet, Americans subscribed to a host of conspiracy theories and false beliefs. We would do well to be neither complacent nor panicked.

Still, the sheer mass of false factual statements that find adherents offers some cause for concern. It raises questions about the relationship between the First Amendment and the state of public knowledge and discourse. In particular, it should lead us to ask whether the search for truth has really been well-served by free speech doctrine. Schauer puts the point well: "The First Amendment may be embarrassed by the proliferation of public falsity, because presumably, from Milton to Madison to Mill to Holmes to the present, that is part of what the idea of free speech and its particular embodiment in the First Amendment was designed to prevent."<sup>187</sup>

So we are left with an important question: If a central goal of the First Amendment is to improve the quantity and quality of knowledge in our society, but First Amendment doctrine is mostly disabled from suppressing false facts and does not necessarily protect true ones, is there anything left in our doctrine that can help us enhance public discourse, by increasing our knowledge or reducing the number of falsehoods in circulation?

C. *Post's Answer: Democratic Competence and Expert Knowledge Practices*

One answer is supplied by Post's book *Democracy, Expertise, and Academic Freedom*. Post is concerned with the gap between First Amendment doctrine and knowledge, or knowledge policy, itself.<sup>188</sup> The question is especially pressing for Post because his approach to First Amendment theory privileges a particular understanding of public discourse, one grounded on what he calls "democratic legitimation": the equal status of citizens as "authors" of the laws, participating on equal terms in "the formation of public opinion."<sup>189</sup> He writes:

It is this equality that underwrites the First Amendment doctrine's refusal to distinguish between good and bad ideas,

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*Revolutions*, PEW RES. CENTER FOR PEOPLE & PRESS (Apr. 15, 2007), <http://www.people-press.org/2007/04/15/public-knowledge-of-current-affairs-little-changed-by-news-and-information-revolutions/> (summarizing report showing little decline in level of political knowledge between 1989 and 2007).

187. Schauer, *supra* note 2, at 918.

188. See POST, *supra* note 8, at ix-x (describing the book's subject as "the relationship between the First Amendment and the practices that create and sustain disciplinary knowledge").

189. Post, *supra* note 175, at 482-83.

true or false ideas, or harmful or beneficial ideas. The equality of status of ideas within public discourse follows directly from the equality of political status of citizens who attempt to make the government responsive to their views.<sup>190</sup>

As Post acknowledges, however, some speech *is* true, and some false. Some ideas are especially important to public discourse and society itself. This tension between the democratic equality of speakers, and the unequal status of different facts and realms of knowledge that are necessary for democracy to flourish, is nothing new. James Madison complained: “A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy.”<sup>191</sup> Thomas Dewey wrote that “genuine public policy cannot be generated unless it be informed by [expert] knowledge.”<sup>192</sup> And Hannah Arendt, noting that “factual truth informs political thought,” echoed Madison in observing that “[f]reedom of opinion is a farce unless factual information is guaranteed and the facts themselves are not in dispute.”<sup>193</sup>

For Post, this means we need to come up with another constitutional value besides “democratic legitimation.” He calls this “[d]emocratic *competence*”: the “cognitive empowerment of persons within public discourse, which in part depends on their access to disciplinary knowledge.”<sup>194</sup>

Because “cognitive empowerment is necessary . . . for democratic legitimation,”<sup>195</sup> we need separate constitutional principles capable of protecting each. The First Amendment protects democratic legitimation through egalitarian devices such as the rule that there is no such thing as a false idea. But we also need “distinct First Amendment doctrines designed to protect the social practices that produce and distribute disciplinary knowledge”<sup>196</sup>—practices in which facts are as important as opinions and all speakers are *not* equal.

Post purports to find traces of such doctrines across First Amendment law. Within the realm of public discourse, this involves a kind of

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190. *Id.* at 484–85.

191. Letter from James Madison to W.T. Barry (Aug. 4, 1822), reprinted in 9 THE WRITINGS OF JAMES MADISON 103 (Gaillard Hunt ed., 1910), quoted in POST, *supra* note 8, at 35.

192. JOHN DEWEY, THE PUBLIC AND ITS PROBLEMS 177–79 (1927), quoted in POST, *supra* note 8, at 32.

193. HANNAH ARENDT, BETWEEN PAST AND FUTURE 238 (1968), quoted in POST, *supra* note 8, at 29.

194. POST, *supra* note 8, at 34 (emphasis added).

195. *Id.*

196. *Id.* at 33.

alchemy, in which scientific debates are transmuted into differences of opinion that courts must abstain from judging.<sup>197</sup> Within commercial speech doctrine, he sees a complicated mix of factors that serve the informational value of advertising, which “conveys factual knowledge that cognitively empowers public opinion,”<sup>198</sup> while permitting government to regulate false and misleading statements that do not contribute to cognitive empowerment.<sup>199</sup>

More important still is Post’s effort to find evidence of constitutional protection for matters of democratic competence in “domains *outside* of public discourse.”<sup>200</sup> Take professional speech, an area in which the value of the speech is underwritten not by the equality of speakers, but by their expertise. We accord strong protection to professional speech because professionals operate from a base of specialized knowledge and training, and because they are subject to ongoing monitoring by the gatekeepers of their profession.

Whatever else we might say about the importance of professional speech to public discourse, it certainly does not observe the egalitarian norms of democratic legitimation. To the contrary, we respect professional advice precisely because we know that all opinions on professional matters are *not* equal, and rely on professionals to deliver competent advice according to professional standards. In this area, the law, through malpractice and its incorporation of professional standards, “stands as a surety for the disciplinary truth of expert pronouncements.”<sup>201</sup> Thus, “the very absence of First Amendment coverage from the context of malpractice litigation emphasizes the significance which law attributes to the circulation of accurate expert knowledge.”<sup>202</sup>

Although Post describes malpractice law as an instance of the “*absence* of First Amendment coverage,”<sup>203</sup> that is not the whole story. Malpractice requires a standard by which we determine whether professional speech has been competent or incompetent. That is an epistemic question, and the sources of judgment will come in the first instance from the professional disciplines themselves, through the

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197. *Id.* at 30–31; *see also id.* at 44 (“Within public discourse, traditional First Amendment doctrine systematically transmutes claims of expert knowledge into assertions of opinion.”).

198. *Id.* at 40–41.

199. *See id.* at 41.

200. *Id.* at 43 (emphasis added).

201. *Id.* at 45.

202. *Id.* at 47 (emphasis omitted).

203. *Id.* (emphasis added).



provision of expert evidence in court. For speech lying within the domain of democratic legitimation, judges have a suite of tools that are more or less judicially manageable and within their basic competence.<sup>204</sup> These are egalitarian standards: the rule of content neutrality, the notion that all opinions are equal, and so on. The standards that apply to democratically competent speech, on the other hand, are neither egalitarian nor especially judicially manageable. They must perforce be shaped in the first instance by the expert institutions themselves.<sup>205</sup> “It follows that the value of democratic competence can be judicially protected only if courts incorporate and apply the disciplinary methods by which expert knowledge is defined.”<sup>206</sup> In those areas, courts will “attribute *constitutional status* to the disciplinary practices by which expert knowledge is itself created.”<sup>207</sup>

Again, this raises a broader epistemological point. According to constitutional status to particular disciplinary practices<sup>208</sup> requires courts to come up with some boundaries—some basis for concluding that certain disciplinary practices fall within the realm of expert knowledge and contribute to democratic competence while others do not. “A constitutional sociology of knowledge is thus inevitable.”<sup>209</sup> In deciding which disciplinary practices should be treated as autonomous “expert” practices, courts are making judgments, involving a mixture of epistemic, sociological, and political considerations, about how we know certain things, who knows them best, and how they contribute to public discourse.

#### D. *The University as a Domain of Democratic Competence*

In theory, for courts to distinguish between particular expert or disciplinary practices raises “deep and intractable” epistemological questions about how they can do so.<sup>210</sup> At a more practical level, however, most of us can identify fairly well at least some of the “key liberal institutions that produce expert knowledge.”<sup>211</sup>

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204. See generally Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274 (2006).

205. See POST, *supra* note 8, at 31.

206. *Id.* at 54.

207. *Id.* at 55 (emphasis added).

208. See *id.* at 55–58 (noting that courts do not strongly protect *all* disciplinary practices).

209. *Id.* at 58.

210. *Id.*

211. *Id.* at 59.

An obvious candidate is the university, a primary subject of Post's book. The university, and the norms of academic freedom that animate it, have long been special concerns for Post.<sup>212</sup> This book represents a step forward in justifying the constitutional status of academic freedom while reconciling it with Post's broader interest in a democratic justification for the freedom of expression.

Making a point similar to the one we saw in Part II, Post observes that the U.S. Supreme Court's justification for academic freedom has shifted over time, moving from a focus on its contribution to truth-seeking to a more egalitarian and democratic justification, in which the university contributes to diversity and serves as a training ground for future democratic leaders.<sup>213</sup> This shift has "produce[d] confusion."<sup>214</sup> It equates speech within the university with democratic public discourse itself, rather than appreciating that academic speech contributes to public discourse precisely by observing *non*-democratic disciplinary standards.

Post argues that courts should resist the urge to justify academic freedom through egalitarian concepts such as the "marketplace of ideas." Rather, constitutional academic freedom must be understood in terms of the underlying "professional norms" of the academy.<sup>215</sup> First Amendment doctrine must protect the "key liberal institutions that produce expert knowledge"<sup>216</sup> within our society, but not by subjecting them to the general norms of public discourse.<sup>217</sup> It should recognize their special role as guarantors of democratic competence and allow them to regulate themselves according to their own disciplinary practices.

This is a useful step forward. It does not provide a direct answer to the question posed by Schauer: How can the First Amendment be said to

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212. See, e.g., MATTHEW W. FINKIN & ROBERT C. POST, *FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM* (2009); Robert Post, *The Structure of Academic Freedom*, in *ACADEMIC FREEDOM AFTER SEPTEMBER 11*, at 61 (Beshara Doumani ed., 2006).

213. See POST, *supra* note 8, at 62; *supra* notes 60–75 and accompanying text.

214. POST, *supra* note 8, at 62.

215. *Id.* at 67 (citations omitted) (internal quotation marks omitted).

216. *Id.* at 59.

217. Cf. Robert C. Post & Nancy L. Rosenblum, *Introduction*, in *CIVIL SOCIETY AND GOVERNMENT* 1, 13 (Nancy L. Rosenblum & Robert C. Post eds., 2002) (discussing the claims of advocates for a "logic of congruence" that "the internal lives of associations should mirror public norms of equality, nondiscrimination, due process, and so on" and arguing that this approach "potentially trespasses across the boundary that separates civil society from government"); NANCY L. ROSENBLUM, *MEMBERSHIP AND MORALS: THE PERSONAL USES OF PLURALISM IN AMERICA* 4, 36 (1998) (describing the logic of congruence and arguing against the insistence that individual institutions within civil society "mirror liberal democratic norms and practices"). I make a similar argument in Chapter 9 of HORWITZ, *supra* note 15.

enhance the search for truth or the soundness of public discourse when so many of its doctrines allow patently false facts to circulate in our society?<sup>218</sup> But it does provide an indirect answer. Given the egalitarian standards that prevail within the First Amendment's treatment of public discourse, we cannot eliminate falsity from this realm. But we *can* recognize and safeguard constitutional enclaves in which genuine knowledge, born of disciplinary expertise and policed by disciplinary standards, is generated.

*E. The Paradox and Problems of Expert Knowledge and "Public Discourse"*

Post's approach still leaves us with some tensions, however. He puts the point powerfully:

To theorize the value of democratic competence is to confront a seeming paradox. Democratic *legitimation* requires that the speech of all persons be treated with toleration and equality. Democratic *competence*, by contrast, requires that speech be subject to a disciplinary authority that distinguishes good ideas from bad ones. Yet democratic competence is necessary for democratic legitimation. Democratic competence is thus both incompatible with democratic legitimation and required by it.<sup>219</sup>

Post's response to this "seeming paradox" follows from his own view that democratic self-government is the primary end of the First Amendment. He writes that "[i]t is plain that within public discourse the value of democratic legitimation enjoys lexical priority," but suggests that we can still safeguard democratic competence by treating it as lying "*outside* public discourse."<sup>220</sup> This approach allows him to safeguard those realms in which expert knowledge is generated while still preserving a central role for "public discourse," understood in strongly democratic terms, within his general approach to free speech. It also, perhaps, allows him to avoid some of the barbs that have been aimed at his conception of public discourse itself, which his critics argue over-emphasizes political speech and fails to account for important aspects of current First Amendment doctrine.<sup>221</sup> In short, Post is able to resolve the seeming paradox he describes—but only through considerable and

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218. See *supra* notes 180–187 and accompanying text.

219. POST, *supra* note 8, at 34.

220. *Id.* (emphasis added).

221. See, e.g., Eugene Volokh, *The Trouble With "Public Discourse" as a Limitation on Free Speech Rights*, 97 VA. L. REV. 567 (2011).

somewhat gymnastic effort.

The problem, it seems to me, lies with Post's particular definition of and emphasis on "public discourse." Although I agree that public discourse, understood broadly as "the forms of communication . . . necessary for [the] formation of public opinion,"<sup>222</sup> is at or near the core of the First Amendment, I want to emphasize two points of difference with Post's approach.

First, although Post emphasizes the complex dialectical relationship between constitutional law and culture,<sup>223</sup> his treatment of public discourse still relies heavily on *legal* categories and doctrines, and on abstract concepts such as "democratic legitimation" and "democratic competence," rather than on more concrete cultural phenomena. I question whether this is the best approach. If we want to fully appreciate and improve "the relationship between the First Amendment and the practices that create and sustain . . . knowledge,"<sup>224</sup> we should focus more directly on those practices themselves. Instead of focusing on legal categories, or abstract concepts such as "democratic competence," we might focus more directly on the real-world institutions that play a key role in creating and transmitting knowledge.<sup>225</sup>

Second, although Post writes that public discourse encompasses more than just "majoritarianism and elections,"<sup>226</sup> there is still a decided emphasis on formal politics, and on the state itself, in his treatment of public discourse. He denies that his definition of public discourse is narrowly concerned with "political" speech, but justifies the breadth of public discourse on the basis that "public opinion can direct *government*

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222. POST, *supra* note 8, at 15.

223. See, e.g., Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 8 (2003); Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1280–81 (1995) ("First Amendment doctrine can recover its rightful role as an instrument for the clarification and guidance of judicial decisionmaking only if the Court refashions its jurisprudence . . . so as to generate a perspicuous understanding of the necessary material and normative dimensions of these forms of social order and of the relationship of speech to these values and dimensions.");

224. POST, *supra* note 8, at ix–x.

225. See, e.g., HORWITZ, *supra* note 15 (discussing the actual and potential role in First Amendment law and public discourse of "First Amendment institutions" such as libraries, universities, churches, and the press); Frederick Schauer, *Institutions as Legal and Constitutional Categories*, 54 UCLA L. REV. 1747 (2007) (arguing for the value of institutionally based analysis in constitutional law generally); Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256, 1265, 1278 (2005) (arguing that our First Amendment categories might be altered to "recognize those informational, investigative, and communicative domains whose more-or-less distinctive properties warrant special First Amendment treatment").

226. POST, *supra* note 8, at 17.

*action* in an endless variety of directions.”<sup>227</sup> He stresses that public opinion is “a far wider category than communications about potential government decision making” and includes “what a society generally believes and thinks.”<sup>228</sup> Yet his discussion returns frequently to the state itself—to the importance of holding “*governmental* decision making . . . accountable to public opinion.”<sup>229</sup> For Post, it seems, the subjects of public discourse are broad, but its ultimate end is narrow: it is the formation of legal authority and the making of legal decisions. He champions popular sovereignty, but views “government institutions” as the most important instantiation of that sovereignty.<sup>230</sup>

*F. An Institutional Approach to Knowledge and the First Amendment*

That is not the only way to envision public discourse, or the broader social structure of which it is both means and end. As a sociological and structural matter—and, I would add, as a normative matter<sup>231</sup>—we need not think of our social structure as originating or culminating in the state itself. Rather, we might think of our social structure, and particularly those aspects of it bearing on the First Amendment, as a broader “infrastructure” of which the state is only one part.<sup>232</sup> Universities, for example, do not just *serve* public discourse, and through it the democratic legitimacy of the state. They are *infrastructural* institutions that form a fundamental part of a larger public sphere. The state is clearly one of those infrastructural institutions too, and it may play a unique coordinating role within our social structure.<sup>233</sup> But it is still

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227. *Id.* at 19 (emphasis added).

228. Post, *supra* note 14, at 621.

229. Post, *supra* note 175, at 482 (emphasis added).

230. See Post, *supra* note 14, at 621.

231. See C. Edwin Baker, *Is Democracy a Sound Basis for a Free Speech Principle?*, 97 VA. L. REV. 515, 519–20 (2011) (exploring the normative and sociological aspects of Post’s approach); Post, *supra* note 175, at 485 (arguing that “[t]he boundary between public discourse and nonpublic discourse is . . . ultimately a normative one”).

232. See, e.g., HORWITZ, *supra* note 15; Jack M. Balkin, *The Future of Free Expression in a Digital Age*, 36 PEPP. L. REV. 427, 432 (2009) (arguing that “[a] system of free speech depends . . . on an infrastructure of free expression” that “includes the kinds of media and institutions for knowledge, creation, and dissemination that are available at any point in time”); Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 VILL. L. REV. 273, 274 (2008) (arguing that a variety of institutions, public and private, play a central infrastructural role “in clearing out and protecting the civil-society space within which the freedom of speech can be well exercised”).

233. Cf. Paul Q. Hirst, *Introduction* to THE PLURALIST THEORY OF THE STATE: SELECTED WRITINGS OF G.D.H. COLE, J.N. FIGGIS, AND H.J. LASKI 1, 17 (Paul Q. Hirst ed., 1989) (characterizing John Neville Figgis’ description of the state as a “society of societies, charged with

ultimately only a coequal institution.<sup>234</sup>

Nor are universities the only example. A variety of institutions, including the press, libraries, and others, play an infrastructural role, both in society in general and within public discourse, broadly understood.<sup>235</sup> They are no less necessary and important than the state itself. Over time, these institutions have developed a host of norms, practices, and traditions by which knowledge and other social goods are generated, scrutinized, and disseminated.<sup>236</sup> They are just as defined and constrained by function, discipline, and custom as the university.

If we proceed from this set of assumptions—that the relationship between the First Amendment and the production of knowledge requires different descriptive categories than those currently used by the courts, and that the state is just one part of a broader social structure that contains a variety of important infrastructural institutions—then we might approach the same project differently. Rather than focusing on broad legal categories like “content neutrality,” or conceptual categories like “democratic legitimation” or “democratic competence,” we might use a very different set of categories.

In particular, we could focus on specific real-world institutions themselves. Rather than ask whether particular speech counts as public discourse or not, and rather than thinking in terms of the “lexical priority” of democratic legitimation—understood in ways that privilege the state itself as the end of public discourse—over democratic competence,<sup>237</sup> we could ask a different set of questions. Is a particular institution a part of our social infrastructure, broadly understood? Does it constitute a sort of “sovereign sphere,” an institution or area of activity

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the task of making the continued existence and mutual interaction of such [other] associations possible through setting rules for their conduct”).

234. That the state might be treated as a coequal with these institutions does not mean there are no special reasons to be concerned with the state. Given the coercive power the state possesses, both as a matter of fact and because of its central coordinating role within the social structure, arguments for distrust of government may still hold, and First Amendment doctrine may justifiably continue to apply special rules to speech-suppressing state action. But we should do so for functional reasons, rather than treating the state’s coercive power as conclusive evidence that it takes primacy over or is superior to the other infrastructural institutions I discuss here. I am grateful to Ashutosh Bhagwat for pressing me on this point.

235. *See generally* HORWITZ, *supra* note 15 (describing universities, the press, libraries, voluntary associations, and churches as “First Amendment institutions,” and speculating about the possibility of other such institutions).

236. For illustrations of this point using the press as an example, see, for example, Blocher, *supra* note 16, and Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025 (2011).

237. POST, *supra* note 8, at 34.

that is a fundamental part of the equipment of civil society?<sup>238</sup> For purposes of the First Amendment, is the institution one that has long been recognized as playing an infrastructural role in contributing to public discourse, one supported both by history and by a substantial set of self-regulatory norms, practices, and traditions? If so, that institution may be regulated around the edges by the state, but should be acknowledged as a coequal part of the institutional structure of civil society.

Additionally, if the answer to these questions is yes, might there be some value in treating those institutions as *constitutionally* entitled to a substantial measure of autonomy? That is, having identified the institutions that play an infrastructural part in public discourse, broadly conceived, might we view them as being entitled to a good deal of freedom to regulate themselves, free of the usual, and often ill-fitting, rules and doctrines of the First Amendment? Rather than characterizing universities as engaged in “nonpublic discourse,” or focusing on the contribution that their “democratic competence” makes to the “democratic legitimation” of public discourse, might we simply recognize them as substantially autonomous “First Amendment institutions” *tout court*?

This is not the place to fully develop this approach or defend it against potential criticisms. There *are* potential problems with this approach.<sup>239</sup> But there are potential benefits too. I focus on three of them here.

First, this institutionally oriented approach helps to address and resolve the troubled relationship between the First Amendment and the production of knowledge. A number of institutions and activities—the press, libraries, universities, churches, and others—play a key role in the production of knowledge in our society. Moreover, they do so through a host of disciplinary and self-regulatory practices that do not fit easily

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238. See generally Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 HARV. C.R.-C.L. L. REV. 79 (2009). See also, e.g., Patrick M. Garry, *Assessing the Constitutional Autonomy of Such Non-State Institutions as the Press and Academia*, 2010 UTAH L. REV. 141; Mark DeWolfe Howe, *Foreword: Political Theory and the Nature of Liberty*, 67 HARV. L. REV. 91, 91 (1953); Franklin G. Snyder, *Sharing Sovereignty: Non-State Associations and the Limits of State Power*, 54 AM. U. L. REV. 365 (2004); Franklin G. Snyder, *Nomos, Narrative, and Adjudication: Toward a Jurisgenetic Theory of Law*, 40 WM. & MARY L. REV. 1623 (1999) (“The heart of the pluralistic thesis is the conviction that government must recognize that it is not the sole possessor of sovereignty, and that private groups within the community are entitled to lead their own free lives and exercise within the area of their competence an authority so effective as to justify labeling it a sovereign authority.”).

239. I address potential criticisms of First Amendment institutionalism in Chapter 10 of HORWITZ, *supra* note 15.

into existing First Amendment rules and categories. These institutions' practices are inconsistent with some of the fundamental precepts of First Amendment jurisprudence: that there is no such thing as a false idea, that all speakers are equal, and so on. Such practices—academic disciplinary; expertise in newsgathering and editing, and a host of ethical constraints in journalism; the professional practices of libraries; and others—ensure that knowledge is produced and protected in a careful and responsible manner. Even when individuals or entities within these institutions fail, as they sometimes will, a host of broader institutional practices serve to expose those errors to professional criticism. For reasons of epistemic authority and comparative institutional competence, the responsibility for overseeing these error-correcting mechanisms should lie primarily with the institutions themselves and secondarily with public criticism of those institutions, but only rarely with the courts.<sup>240</sup> In short, a focus on identifying and granting substantial autonomy to those institutions that play an infrastructural role in public discourse may do a better job of encouraging and protecting the expert production of knowledge than a mildly modified and somewhat abstract version of current First Amendment doctrine, such as Post's.

Second, by acknowledging the autonomy of these institutions, an institutional approach may ease some of the second-order epistemic questions that arise in the relationship between the *courts*, as interpreters of the First Amendment, and the production of knowledge. It may be asking too much of judges to let them decide whether particular speech is “public discourse” or “nonpublic discourse,” or to let them categorize particular forms of speech as falling within “democratic competence” or “democratic legitimacy.” A more categorical institutional approach, although it will pose some difficult definitional and boundary questions, may represent a more appropriate allocation of authority to those institutions that are most competent to decide these questions. A university or newspaper may be better qualified than a court to judge whether particular actions fall within the sphere of its own competence and constitute appropriate exercises of expertise and authority.

Finally, an institutional approach may do a better job of recognizing

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240. For more on the role of institutional self-criticism and public criticism—but not judicial review—in restraining First Amendment institutions, see Paul Horwitz, *Act III of the Ministerial Exception*, NW U. L. REV. COLLOQUY (2011), <http://www.law.northwestern.edu/lawreview/colloquy/2011/27/LRColl2011n27Horwitz.pdf>. For discussion of the boundaries and limits of First Amendment institutionalism, including limitations on institutionalism that leave room for judicial review, see HORWITZ, *supra* note 15.



the various ways in which expert knowledge is generated and disseminated to the wider public. By focusing on academic freedom, Post concentrates on one institution—the university—that produces what we think of as expert knowledge. But other, equally expert institutions create and disseminate knowledge as well.

Consider the press. Post zealously defends freedom of the press, but his account can be read as having more to do with democratic *legitimation* than democratic *competence*. He sees the press primarily as a vehicle for the dissemination of public *opinion*, and writes that the First Amendment presumptively protects “media for the communication of *ideas*, like newspapers, magazines, [or] the Internet, . . . which are the primary vehicles for the circulation of the texts that define and sustain the public sphere.”<sup>241</sup> As Joseph Blocher observes, however, this sells the press short.<sup>242</sup> Press practices are rich with disciplinary standards and well-developed self-regulatory norms and practices.<sup>243</sup> Nor does the press simply disseminate the knowledge or opinions of others. It *produces* knowledge, through a host of skills, practices, and resources that are not generally available to most citizens.<sup>244</sup> The role of the institutional press in the recent Wikileaks disclosures demonstrates this point, both in the information it helped bring to light and in the selectivity of editors and reporters in choosing which disclosures to publish.<sup>245</sup>

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241. POST, *supra* note 8, at 20 (emphasis added); *see also id.* at 44 (distinguishing between the disciplinary speech of a biologist within the university, and the speech of a biologist who writes an op-ed in *The New York Times*, which Post seems to treat as mere opinion falling within public discourse).

242. *See* Blocher, *supra* note 16, at 426–28.

243. For one of many examples, see *Code of Ethics*, SOC’Y PROF’L JOURNALISTS (1996), <http://www.spj.org/pdf/ethicscode.pdf>. For a general effort to catalogue basic principles of press ethics and professionalism, see Bill Kovach & Tom Rosenstiel, *THE ELEMENTS OF JOURNALISM* (2001).

244. This kind of statement is often met with skepticism by those who question the job done by the modern press, and argue that the rise of citizen journalism on the Internet shows that anyone could do as well as professional journalists. My view is that despite their failings, professional journalistic enterprises possess a variety of newsgathering techniques and self-regulatory practices not generally shared by the wider public. The question of Internet journalism complicates things, but not much. A good deal of Internet “journalism” still consists of commentary on reporting already done by the professional press. To the extent that there has been an increase in serious reporting on the part of Internet journalists, it has come mostly from those who have increasingly absorbed the professional skills and norms of the institutional press. For more on press professionalism and its worth, see HORWITZ, *supra* note 15, ch. 6; Paul Horwitz, “*Or of the [Blog]*,” 11 NEXUS 45 (2006) [hereinafter Horwitz, “*Or of the [Blog]*”]; Randall P. Bezanson, *Whither Freedom of the Press*, 97 IOWA L. REV. (forthcoming 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1982616](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1982616).

245. For an inside account, see Bill Keller, *The Boy Who Kicked the Hornet’s Nest*, N.Y. TIMES,

In short, an institutional approach to the First Amendment may do a better job of recognizing a *variety* of institutions, each of which contributes in unique ways to the production of knowledge and deserves protection or autonomy. This approach dissolves Post's distinction between democratic legitimacy and democratic competence. But it may give greater recognition to a host of "democratically competent" institutions and, in the long run, better improve the state of public knowledge.<sup>246</sup>

Post acknowledges the possibility of a more robustly institutional approach to the First Amendment. He sympathizes with the institutionalists' view that courts ought to "incorporate and apply the disciplinary methods by which expert knowledge is defined."<sup>247</sup> At bottom, however, he finds the institutional approach "implausible."<sup>248</sup> Given the fact that we regularly regulate professional speech, he writes, "[a] constitutional theory that immediately converts every effort to regulate professional practice into a constitutional question is surely suspect."<sup>249</sup>

But there is a difference between broad institutional autonomy and total regulatory immunity. The point of First Amendment institutionalism is not to grant absolute immunity to every action performed by a First Amendment institution. It is to make sure that the *shape* of First Amendment law is responsive to the nature and function of those institutions. A university might be entitled to substantial legal autonomy with respect to a properly made academic decision, no matter how mistaken that decision might seem to outsiders. But an institutionally-minded court could still insist before ceding its own

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Jan. 30, 2011 (Magazine), at 32. For a thoughtful discussion of the Wikileaks episode and the gradual convergence between mainstream media journalism and online journalism, see Yochai Benkler, *A Free Irresponsible Press: Wikileaks and the Battle over the Soul of the Networked Fourth Estate*, 46 HARV. C.R.-C.L. L. REV. 311 (2011).

246. As an additional point, as long as the press is treated under the rubric of democratic legitimacy rather than democratic competence, it is more likely to receive only a negative form of protection, in which it is free from discriminatory regulation but given little positive protection for fundamental practices such as newsgathering. Institutional protection for the press may thus result in more vigorous newsgathering, which will produce more "truth" and thus make a stronger contribution to public discourse. See, e.g., Horwitz, "Or of the [Blog]," *supra* note 244; West, *supra* note 236.

247. POST, *supra* note 8, at 54.

248. *Id.* at 51.

249. *Id.* Note that Post assumes that professional speech, such as that of lawyers and doctors, would fall within the scope of First Amendment institutionalism. That assumption is debatable, although in my forthcoming book I conclude that the case for institutional treatment of professional speech is reasonably strong. See HORWITZ, *supra* note 15, ch. 10.

authority that the university be acting within its scope *as a university*, and making an *academic* decision. A dean's decision to approve or veto a tenure vote is an academic decision that falls squarely within the infrastructural role of the university. It is directly related to the accumulation of knowledge through disciplinary standards that constitutes the university's unique contribution to our social order. Her arbitrary decision to shoot trespassers on sight is not, and does not call for institutional autonomy or judicial deference.

Of course these questions present their own difficulties. Although I doubt that the boundary questions raised by an institutional approach are more difficult than those raised by a court deciding whether some speech act falls within the category of democratic legitimacy or democratic competence, or even the familiar question whether a law is viewpoint-neutral, questions would certainly remain. That is not a sufficient reason to reject the institutional approach, however. Constitutional law *always* involves boundary questions. The point is that the institutional approach would draw its boundaries from actual social practices, and so might enhance, rather than obscure or complicate, the relationship between the First Amendment and the real-world practices by which knowledge is generated.

We need not resolve all these questions here. The aim of this Part has not been to solve the question of how the First Amendment should protect the production of knowledge; it has been to show that the question *exists*. As Post writes, the "relationship between the First Amendment and the practices that create and sustain . . . knowledge"<sup>250</sup> raises complex questions that are worthy of serious examination. It is sufficient simply to show that these questions are worthy of attention.

#### IV. LESSONS LEARNED

As I warned at the outset, I have offered few answers to the First Amendment's epistemological problem. It may be more important for now to ask the right questions than to supply an answer. Before we can hope to resolve the First Amendment's epistemological problem, we must see that there *is* a problem. We must see that despite centuries of theorizing and decades of jurisprudential development, we still face a large and important set of unanswered questions about the relationship between truth, falsity, freedom of speech, and the production and protection of knowledge.

Among the scholars examined in this Article, all of whom have made

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250. POST, *supra* note 8, at x.

recent contributions to the recognition and discussion of the epistemological problems raised by the First Amendment, there are still important differences. Some focus on true statements, and others on false or worthless statements.<sup>251</sup> Some focus not on truth or falsity as such, but on whether and how the First Amendment encourages the production of knowledge.<sup>252</sup> Some see the answer to that question as involving existing doctrinal categories, or broad concepts such as “democratic legitimacy” or “democratic competence.”<sup>253</sup> Others think the relationship between knowledge and the First Amendment can be improved by altering the categories we employ within the First Amendment altogether.<sup>254</sup>

What matters most, however, is that these scholars are all asking the same questions. They are all revisiting the usual assumptions that have governed in this area—that there is “no such thing as a false idea,” that all speakers enjoy equal status in the search for truth, and so on. They are asking similar questions about the epistemological basis and assumptions of the First Amendment: about the relationship between the First Amendment and truth, falsity, and the production of knowledge.

This sudden surge in interest in the epistemological problems underlying the First Amendment suggests a number of general conclusions and forward-looking questions. I offer them in a purely speculative spirit, in the hope that they will illuminate the ground we stand on and help us to advance.

First, it should be plain that the First Amendment, at the level of both theory and practice, is inextricably linked to a host of epistemological questions. The First Amendment deals with communication, after all, and most human communication consists of an attempt to obtain, understand, and express the truth.<sup>255</sup> Thus, First Amendment law will inevitably be concerned with epistemically freighted concepts such as truth, falsity, accuracy, and reliability.<sup>256</sup>

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251. Compare Bhagwat, *supra* note 3 (true statements), with Tushnet, *supra* note 4 (lies), and Gey, *supra* note 34 (worthless statements).

252. See, e.g., POST, *supra* note 8; Schauer, *supra* note 2.

253. See, e.g., POST, *supra* note 8.

254. I include myself here, see HORWITZ, *supra* note 15, although this is true of Schauer's work as well, see, e.g., Schauer, *supra* note 225.

255. See, e.g., ALVIN I. GOLDMAN, KNOWLEDGE IN A SOCIAL WORLD 3 (1999) (“Question asking is a universal feature of human communication and the prototype of a truth-seeking practice. The primary purpose of asking a question is to learn the answer, the true answer, from the respondent.”).

256. See, e.g., Michael J. Perry, *Freedom of Expression: An Essay on Theory and Doctrine*, 78 NW. U. L. REV. 1137, 1138–61 (1983) (arguing that all justifications for freedom of expression ultimately reduce to an “epistemic value” involving the need to protect useful “information and

Second, the discussion of these epistemological questions within First Amendment theory and doctrine will often be indirect. “[W]hat actually is speech or conduct is a complicated question as a matter of epistemology,” writes Edward Eberle. “But First Amendment law is not epistemology. Rather, free speech is a constitutional domain.”<sup>257</sup> First Amendment law itself will often operate at one remove from epistemological questions, focusing instead on doctrinal matters such as how to reconcile past precedents or craft judicially manageable rules. Where deep questions about the nature of truth and falsity are concerned, courts will rely on general statements and incompletely theorized agreements<sup>258</sup> and leave the theorizing to others.

There are good reasons for this, to be sure. Judges are not philosophers. But precisely *because* courts operate in this manner, the epistemological questions left in their wake are sometimes all the more glaring. In the course of an opinion, a court may toss in a line with profound tremendous epistemic import, such as that there is no such thing as a false idea. But such broad statements rarely resolve specific cases. Indeed, they only create further conflicts, as a court struggles to apply or distinguish that statement in a later case. So the questions remain, or multiply.

This, in a nutshell, is the First Amendment’s epistemological problem. Again, it is a *problem*, not a crisis. In general, free speech doctrine makes a good deal of sense. Occasionally, however, as with the *Alvarez* case, these broader epistemic questions return to the foreground. There may be no final resolution of the First Amendment’s epistemological problems. But the fact that so many scholars have recently focused on these questions is worth noticing in itself, making it important to gather and evaluate these treatments in one place. It makes more apparent the fundamental epistemic questions presented by the theory and doctrine of the First Amendment.

With respect to theory, the free speech justification that addresses these epistemological questions most directly, and thus might seem to have the best chance of providing useful answers to them, is the truth-

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ideas”).

257. Edward J. Eberle, *Cross Burning, Hate Speech, and Free Speech in America*, 36 ARIZ. ST. L.J. 953, 964 (2004).

258. See generally Stuart Minor Benjamin, *Transmitting, Editing, and Communicating: Determining What the “Freedom of Speech” Encompasses*, 60 DUKE L.J. 1673, 1678 (2011) (“The Supreme Court’s First Amendment jurisprudence is . . . one of the many areas characterized by incompletely theorized agreements.”); see also Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995).

seeking justification.<sup>259</sup> Closer examination, however, suggests that even this justification tells us surprisingly little about the relationship between the First Amendment and specific questions involving true or false facts.<sup>260</sup> Moreover, free speech theory itself has increasingly retreated from epistemic arguments and focused instead on other justifications, such as democratic self-government or individual autonomy.<sup>261</sup>

We might see this shift in focus as a product of modern skepticism “about the ability of truth to emerge and about the capacity of falsehood to be exposed.”<sup>262</sup> It might suggest that other factors, such as distrust of government, are more important than whether particular propositions are true or false.<sup>263</sup> Or perhaps the decline of truth-seeking arguments for freedom of speech, and the rise of other justifications, simply reflects a desire to avoid the intractable epistemological questions we have encountered here. Whatever the reason, it seems clear that no matter which theory of the First Amendment one turns to, there is no getting around the epistemological problems posed by the First Amendment.

Our discussion also suggests something about the relationship between the kinds of speech that are of central concern to the First Amendment and the kinds of knowledge institutions that we discussed in Part III: it reminds us of the *social* nature of the discourse and knowledge practices that are most highly prized by the First Amendment.<sup>264</sup> Much of the iconography of the First Amendment focuses on heroic dissenters, soapbox speakers, and other individualistic images. In reality, however, most important speech takes place in a deeply social context, and even individual speakers use language and ideas that are formed through social interaction.<sup>265</sup>

Moreover, many of the key sites in which knowledge is discovered and disseminated are not just social, but institutional.<sup>266</sup> Knowledge is formed and spread through particular institutions, characterized by

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259. See, e.g., Schauer, *supra* note 2, at 911 (“[O]f all of the justifications for a free speech principle, the epistemic arguments are the only ones that are even in the vicinity of addressing the question of factual falsity.”).

260. See *id.* at 907.

261. See *id.* at 910; see also Schauer, *supra* note 118, at 309.

262. Schauer, *supra* note 118, at 309.

263. See, e.g., Gey, *supra* note 34, at 16–22; Varat, *supra* note 51, at 1116–22.

264. See, e.g., GOLDMAN, *supra* note 255, at 4 (“An enormous portion of our truth seeking . . . is either directly or indirectly social.”).

265. See generally HORWITZ, *supra* note 15 (arguing that First Amendment tropes often focus on single individual speakers arrayed against the state, when most speech, including important individual speech, is actually formed in and through institutions).

266. See, e.g., GOLDMAN, *supra* note 255, at 163.

various forms of professional expertise and self-regulatory norms and practices. This is true of the press, universities, libraries, and other institutions that form the key infrastructural institutions of the First Amendment—and of public discourse itself. Thus, if we want to learn anything about the First Amendment’s epistemological problems, let alone resolve them, we must think about them largely in institutional terms. Particular institutions are key repeat players in the generation of knowledge. If we want to ensure that the First Amendment serves knowledge and its dissemination within public discourse, we need to pay close attention to those institutions and their “disciplinary practices.”<sup>267</sup>

#### CONCLUSION: WHY NOW?

I want to close this conversation with Post’s book, and with the other scholars whose work I have examined here, by inviting *more* conversation. I end this Article not with a summary, but with another question: Why have so many leading scholars suddenly focused on the same questions about the relationship between truth, falsity, and the First Amendment? What led them to roughly the same place at the same time?

Legal scholars are often led to examine the same question by a pending or recently decided case. The Stolen Valor Act case, *Alvarez*, is an obvious candidate here, as are the Court’s recent decisions in *Stevens* and *Brown*. But some of the recent scholarship addressing the First Amendment’s epistemological problems either predates these decisions or barely addresses them. A particularly important paper can spark scholarly interest, and Schauer’s article on facts and the First Amendment has clearly inspired others. Again, however, some of the recent scholarly treatments predate Schauer’s article.<sup>268</sup> It remains a puzzle why this issue erupted into the scholarly consciousness at the moment it did and to the degree it has.

But I mean “why now?” in a deeper sense as well. As we have seen, one common feature of a number of these articles, as well as Post’s important new book, is their recognition of the connection between the First Amendment and institutions. Much recent First Amendment scholarship is deeply concerned with the role of institutions within First Amendment doctrine.<sup>269</sup>

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267. POST, *supra* note 8, at 55.

268. See, e.g., Gey, *supra* note 34; Varat, *supra* note 51.

269. In addition to the sources already cited, see, for example, Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. 978 (2011); Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821 (2008); Josie Foehrenbach Brown, *Representative Tension: Student Religious Speech and the Public School’s Institutional Mission*, 38 J.L. & EDUC. 1 (2009); Anuj C. Desai, *The*

This seems an odd time to be turning to institutions. It is—or so we keep being told—an era of widespread distrust of public and private institutions.<sup>270</sup> Unlike earlier eras, such as the two decades following the Second World War, there is a lack of consensus about the trustworthiness of our institutions and their leaders, and a diminished willingness to defer to them.<sup>271</sup> The institutions, including universities, that we once associated with “expertise and social-scientific knowledge” have become associated instead with “arrogance and insularity.”<sup>272</sup> Faith in expertise itself has come under assault, as the popular debate over the science of global warming demonstrates.

Moreover, this is the Internet era, in which top-down knowledge is disdained and it is widely argued that truth can be more reliably discovered and shared through peer-to-peer processes involving amateur journalists,<sup>273</sup> amateur scholars—amateur everything. Of all the times to turn back to institutions, and to even *consider* granting greater degrees of constitutional protection or autonomy to those institutions, why now?

The possible answers to this question have a variety of potential implications for our understanding of both the First Amendment and our social order. It may show that our distrust of “government” in general vastly outweighs our distrust of individual institutions. It may suggest a degree of exhaustion with the rhapsodies of the Internet utopians and political populists, and a sense that institutions ought to weigh more heavily in the balance than they currently do. Perhaps it indicates that rather than distrust institutions as such, we have become more interested in institutional *pluralism*: in encouraging the spread of a host of institutions within a social sphere in which the role of the state itself is

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*Transformation of Statutes into Constitutional Law: How Early Post Office Policy Shaped Modern First Amendment Doctrine*, 58 HASTINGS L.J. 671 (2007); Roderick M. Hills, Jr., *The Constitutional Rights of Private Governments*, 78 N.Y.U. L. REV. 144 (2003); Lawrence Rosenthal, *The Emerging First Amendment Law of Managerial Prerogative*, 77 FORDHAM L. REV. 33 (2008); Michael R. Siebecker, *Building a “New Institutional” Approach to Corporate Speech*, 59 ALA. L. REV. 247 (2008); Michael R. Siebecker, *Corporate Speech, Securities Regulation, and an Institutional Approach to the First Amendment*, 48 WM. & MARY L. REV. 613 (2006); Russell H. Falconer, Note, *Institutional Rights, Individual Litigants: Standing to Sue Under the Press Clause*, 87 TEX. L. REV. 1223 (2009).

270. For a general discussion, see, for example, HUGH HECCLO, ON THINKING INSTITUTIONALLY (2008).

271. See, e.g., George Packer, *The New Liberalism*, 51 ARIZ. L. REV. 543, 552 (2009); Frank Pasquale, *Reclaiming Egalitarianism in the Political Theory of Campaign Finance Reform*, 2008 U. ILL. L. REV. 599, 611; John Fabian Witt, *Speedy Fred Taylor and the Ironies of Enterprise Liability*, 103 COLUM. L. REV. 1, 46 (2003).

272. John O. McGinnis, *A Politics of Knowledge*, NAT'L AFFAIRS, Winter 2012, at 59.

273. See, e.g., SCOTT GANT, WE'RE ALL JOURNALISTS NOW: THE TRANSFORMATION OF THE PRESS AND THE RESHAPING OF THE LAW IN THE INTERNET AGE (2007).



diminished. Even if we distrust particular institutions, we may believe that there is real value in allowing them to exist and experiment with minimal state interference.<sup>274</sup>

Or perhaps it simply means the pendulum is beginning to swing in the opposite direction. We have been through a period of disenchantment with experts, expertise, and institutions, during which First Amendment law took an increasingly top-down approach, treating institutions the same as everyone else.<sup>275</sup> Perhaps we are starting to remember that some institutions are less fungible, and more vital to our system of free speech and the production of knowledge, than we have assumed. Some institutions may require *institutional* protection if they are to serve their proper function within our public sphere.<sup>276</sup>

It is unlikely that the broader debate over the social and legal value of institutions, and their relationship to truth and knowledge, will end any time soon. Whether Post's reliance on those institutions that exemplify "democratic competence," or my own focus on "First Amendment institutions," will influence the courts in the long run will depend on the complex and porous relationship between constitutional law and public culture.<sup>277</sup> In the meantime, Post's book, and the other recent contributions surveyed in this Article, suggest that the First Amendment's epistemological problem and the role of particular institutions within public discourse demand further attention.

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274. See, e.g., John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 CALIF. L. REV. 485 (2002).

275. See, e.g., *Christian Legal Soc. v. Martinez*, 561 U.S. \_\_\_, 130 S. Ct. 2971 (2010) (applying public forum law to law school's treatment of student groups and refusing to recognize need for differential treatment of religious student group); *Citizens United v. FEC*, 558 U.S. \_\_\_, 130 S. Ct. 876 (2010) (refusing to distinguish between media corporations and other corporations); *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991) (rejecting a press challenge to a generally applicable law); *Emp't Div. v. Smith*, 494 U.S. 872 (1990) (holding that no Free Exercise Clause claim exists against a neutral, generally applicable law that only incidentally burdens religion).

276. Although it would be a mistake to read too much into it too soon, this is certainly one potential implication of the U.S. Supreme Court's recent decision upholding the ministerial exception, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. \_\_\_, 132 S. Ct. 694 (2012).

277. See POST, *supra* note 8, at 8–9.