KNOWING WHAT WE TALK ABOUT: EXPERTISE, DEMOCRACY, AND THE FIRST AMENDMENT

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(Based on the 2008 Julius Rosenthal Foundation lectures delivered at Northwestern University School of Law)
INTRODUCTION

As I type these words, I gaze out at my backyard, and I know that there is a large oak in the northwest corner of my lawn. My knowledge of this oak rests on the fact that I can both see the tree and have reason to trust my senses. But my knowledge of this oak should be contrasted to my knowledge that cigarettes cause cancer. I can not acquire the latter form of knowledge merely by trusting my senses.

I have instead learned about the carcinogenic properties of cigarettes by studying the judgment of those whom I have reason to trust. We call such persons “experts.” How did these experts come to know that cigarettes are carcinogenic? Certainly not in the same way that I came to know about my oak tree. They instead deployed the full and elaborate apparatus of modern public health epidemiological and statistical science. This science consists of disciplinary knowledge practices that can be acquired only through training and instruction. The practices create a form of knowledge that is constantly expanding through speculation, observation, analysis, and experiment. In this book I shall refer to this kind of knowledge as “expert” or “disciplinary” knowledge. Any modern society needs expert knowledge in order to survive and prosper.

In this book I shall analyze the relationship between the First Amendment and the practices that create and sustain disciplinary knowledge. The bald words of the First Amendment provide that “Congress shall make no law . . . abridging the freedom of speech.” We have traditionally interpreted these words to mean that the Constitution protects a “marketplace of ideas”1 that we believe produces knowledge. This account of the First Amendment was first articulated by Justice Holmes in his justly famous dissent

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in *Abrams v. United States*, arguing the origin of all judicial efforts to theorize the First Amendment. Holmes explained:

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.

The United States Supreme Court has since and frequently proclaimed that that “it is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.” That the point of First Amendment doctrine is to “advance knowledge and the search for truth by fostering a free marketplace of ideas and an ‘uninhibited, robust, wide-open debate on public issues,’” has become more or less of a constitutional commonplace. Indeed, “the most influential argument supporting the constitutional commitment to freedom of speech is the contention that speech is valuable because it leads to the discovery of truth.”

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2 250 U.S. 616 (1919).


4 *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).


The very concept of a “marketplace of ideas” has long been subject to devastating objections based upon its various imperfections, inefficiencies, and internal contradictions. But in this book I shall focus on the marketplace of ideas from a slightly different angle. I shall inquire into the relationship between the marketplace of ideas and the production of expert knowledge. I shall argue that such knowledge can be produced only if the norms and practices of a discipline are observed. And a discipline, as the *Oxford English Dictionary* reminds us, refers to “the training of scholars or subordinates to proper and orderly action by instructing and exercising them.”

The marketplace of ideas expresses the egalitarian principle that persons cannot be regulated based upon the content of their ideas. We have interpreted the First Amendment to mean that every person has an equal right to speak as he or she thinks right. The state is therefore constitutionally prohibited from disciplining our communication on the basis of an official view about what is proper or correct. The First Amendment limits on copyright, 55 Vand. L. Rev. 891, 897 (2002) (The “marketplace of ideas theory is fundamentally unsound both normatively and descriptively.”); Fredrick Schauer, Free Speech: A Philosophical Enquiry 15-34 (1982); David A. Strauss, Persuasion, Autonomy, and Freedom of Expression, 91 Colum. L. Rev. 334, 348-50 (1991); Stanley Ingber, The Marketplace of Ideas: A Legitimizing Myth, 1984 Duke L.J. 1. In the light of these notorious objections, Vince Blasi has offered a fundamental re-interpretation of the value expressed in Holmes’ metaphor of the marketplace of ideas:

As Holmes understood the notion, the marketplace of ideas does not offer the prospect of a just distribution of the opportunity to persuade. It does not offer the prospect of wisdom through mass deliberation, nor that of meaningful political participation for all interested citizens. What the marketplace of ideas does offer is a much needed counterweight, both conceptual and rhetorical, to illiberal attitudes about authority and change on which the censorial mentality thrives. It honors certain character traits-inquisitiveness, capacity to admit error and to learn from experience, ingenuity, willingness to experiment, resilience-that matter in civic adaptation no less than economic. It devalues deference and discredits certitude, and in the process holds various forms of incumbent authority accountable to standards of performance. It offers a reason to interpret the First Amendment to protect some gestures of opposition and resistance that have nothing to do with dialogue or dialectic.


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Amendment stands for the proposition that we are not the students of the state. We are adults who are constitutionally empowered to speak for ourselves.

If expert knowledge depends upon the preservation of disciplines, and if disciplines require maintenance of “proper and orderly action,” the very independence the First Amendment jealously safeguards is in tension with the production of expert knowledge. If wish to know whether cigarettes are carcinogenic or whether high tariffs produce market inefficiencies or whether plutonium 230 has a half life of about 24,000 years, we cannot intelligently speak for ourselves. We cannot know such matters by reference to our own immediate sensual knowledge. We must instead rely on the results of the disciplinary practices that define atomic physics or economics or medicine.11 Anyone who has ever submitted a paper to a top-flight professional journal would immediately recognize that these disciplinary practices exclude as much speech as they facilitate. If a marketplace of ideas model were to be imposed upon Nature or the American Economic Review or The Lancet, we would very rapidly lose track of whatever expertise we possess about the nature of the world.12

11 See, e.g., Richard Lewontin, Billions and Billions of Demons, NEW YORK REVIEW OF BOOKS, 44:1 (January 9, 1997) (“Given the immense extent, inherent complexity, and counterintuitive nature of scientific knowledge, it is impossible for anyone, including non-specialist scientists, to retrace the intellectual paths that lead to scientific conclusions about nature. In the end we must trust the experts and they, in turn, exploit their authority as experts and their rhetorical skills to secure our attention and our belief in things that we do not really understand.”).

12 “The institutional structure of scholarly journals serves to reinforce disciplinary hierarchies: at the lowest level, the evaluator, reader, or reviewer is implicitly considered to be qualified to make judgments about a contribution at a level above that of the contributor himself. From there the hierarchy extends to the editorship, and the selection processes for filling the intervening positions evidently reinforce the hierarchizing and orthodoxy of the discipline in question.” Wolfram W. Swoboda, Disciplines and Interdisciplinarity: A Historical Perspective, in INTERDISCIPLINARITY IN HIGHER EDUCATION (Joseph J. Kockelmans ed. 1979), at 78-99. See Ellen Messer-Davidow, Book Review, SIGNS, 17:3 (Spring 1992), 676-688, at 679: “Gatekeepers, by virtue of their position as evaluators (editors of journals, referees of manuscripts, reviewers of grant proposals), decide which work will be presented in public forums and which will languish in obscurity. Upon cumulative decisions of this kind depend the professional and
Contemporary technical expertise is created by practices that demand *both* critical freedom to inquire *and* affirmative disciplinary virtues of methodological care, virtues which the philosopher Charles Peirce once called “the method of science” as distinct from the “method of authority.” The maintenance of these virtues quite contradicts the egalitarian tolerance that defines the marketplace of ideas paradigm of the First Amendment. Because the practices that produce expert knowledge regulate the autonomy of individual speakers to communicate, because they transpire in venues quite distant from the sites where democratic public opinion is forged, they seem estranged from most contemporary theories of the First Amendment. My object in this book is to inquire what, if anything, can be said about this constitutional hiatus.

I shall stage this inquiry in three chapters. In Chapter One, I shall present what I regard as the most convincing account of the normative foundations of our First Amendment. This account centers on the value of what I call “democratic legitimation,” which explains why the First Amendment is committed to the egalitarian premise that every person is entitled to communicate his own opinion. In Chapter Two, I discuss the tension between this entitlement and indicia of reliability that define expert knowledge. I shall argue that there is indeed a First Amendment principle capable of sustaining the disciplinary practices that produce expert knowledge and that this principle depends upon the constitutional value I call “democratic competence.” Understanding the relationship between democratic legitimation and democratic competence is difficult and challenging,
because democratic legitimation both requires democratic competence and is in many ways incompatible with it. In Chapter Three, I address the consequences of democratic competence for the production of disciplinary knowledge within universities. I discuss the constitutional foundations of academic freedom, which have been badly misunderstood by many contemporary commentators and court decisions. Finally, in the fourth and final Chapter, I underscore the larger theoretical implications of the vision of constitutionalism that I espouse.
CHAPTER ONE:

DEMOCRATIC LEGITIMATION AND THE FIRST AMENDMENT

In this book I consider the First Amendment as a source of judicially-enforced rights. The First Amendment serves this function by establishing distinctive doctrinal tests and standards that courts use to evaluate the constitutionality of government regulations. Following Frederick Schauer, I shall distinguish between First Amendment “coverage” and First Amendment “protection.” The former refers to the question of the kinds of government regulation courts should subject to the special scrutiny exemplified by the distinctive doctrinal tests of the First Amendment; the latter refers to the question of what these tests should allow and what they should forbid. An essential task of First Amendment theory is to explain the scope of First Amendment coverage. We need to know the circumstances in which courts are authorized to deploy the distinctive doctrinal tests and principles of the First Amendment.

The text of the First Amendment refers to “freedom of speech.” This has suggested to some, like Justice Souter, “that speech as such is subject to some level of protection unless it falls within a category, such as obscenity, placing it beyond the Amendment's scope.” To extend First Amendment coverage to “speech as such”

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15 Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457, 478 (1997) (Souter, J., dissenting) (Emphasis added). See, e.g., Barry P. McDonald, Government Regulation or Other “Abridgments” of Scientific Research: The Proper Scope of Judicial Review Under the First Amendment, 54 EMORY L.J. 979, 1009 (2005) (“[A]ll speech receives First Amendment protection unless it falls with certain narrow categories of expression that 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’--such as incitement of imminent illegal conduct, intentional libel, obscenity, child pornography, fighting words, and true threats.”). Throughout the history of First Amendment theory, this view has been known as the “two-level theory” of First Amendment coverage. See Nat Stern, The Doubtful Validity of Victim-Specific Libel Laws, 52 VILL. L. REV. 533, 534-35 (2005); Tom Hentoff, Speech, Harm, and Self-Government: Understanding the Ambit
requires an account of what we mean by “speech.” Normally this account is created by distinguishing “speech” from “action.” Thus the pioneering First Amendment theorist Thomas Emerson sought to explain the scope of First Amendment coverage by reference to “a fundamental distinction” between “‘expression’ and ‘action,’” a distinction that he believed would have to make-up “a crucial ingredient” of any First Amendment theory.16

Of course we all can recognize paradigmatic examples of speech and action. Addressing the assembled crowd in Hyde Park is speech; throwing a brick through my neighbor’s window is action. But if we try to generalize these paradigmatic examples into systematic principles that distinguish speech from action, we at once run into notorious difficulties. Emerson, for example, sought to define speech as the “communication of ideas.”17 His approach was subsequently adopted by the Supreme Court in Spence v. Washington, which held that First Amendment coverage would be triggered whenever “an intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it.”18

Unfortunately this approach runs into immediate and intractable contradictions. Even if I throw a brick through my neighbor’s window in order to communicate the particularized message that I do not like his religion and that he ought immediately to vacate the premises, and even if the likelihood is great that this message will be

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17 Id. at 8.
understood by my neighbors, no one would think to extend First Amendment coverage to my subsequent prosecution for vandalism.\textsuperscript{19} It is child’s play to multiply such examples. Just think of the all the messages deliberately and successfully conveyed by acts of terrorism.

Moreover First Amendment coverage does \textit{not} extend to large patches of perfectly ordinary state legislation, like the Uniform Commercial Code or the imposition of tort liability for the negligent failure to warn, even though such legislation precisely seeks to control the successful communication of particularized messages in language. “We are men,” Montaigne writes, “and we have relations with one another only by speech.”\textsuperscript{20} To define First Amendment coverage by reference to communication in language would constitutionalize virtually all our “relations with one another,” and that could hardly be desirable.

To make matters even more complicated, First Amendment coverage has properly been held to extend to a communication that forms part of a “significant medium for the communication of ideas”\textsuperscript{21} even if the communication does not succeed in conveying a particularized message.\textsuperscript{22} The Court, per Justice Souter, recognized in the context of a St. Patricks Day parade that if the \textit{Spence} requirement of “a narrow, succinctly articulable message” were taken as precondition for First Amendment coverage, constitutional

\textsuperscript{19} “[O]ne cannot burn down someone’s house to make a political point and then seek refuge in the First Amendment.” Virginia v. Black, 538 U.S. 343, 394 (2003) (Thomas, J., dissenting).


\textsuperscript{21} Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952).

doctrine “would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schöenberg, or Jabberwocky verse of Lewis Carroll.”

These examples suffice to demonstrate that it is not possible constitutionally to distinguish speech from action on the ground that the former communicates ideas or uses language. The implications of this conclusion are quite significant, for it suggests that speech can not be distinguished from action because of some common property that “speech” possesses but that “action” does not. It follows that the scope of First Amendment coverage cannot be determined merely by observing properties in the world; it does not depend upon the distribution of any natural thing like “ideas” or “speech as such.”

Time and again Emerson’s efforts to define the scope of First Amendment coverage were frustrated by this fact. But because he was a great First Amendment theorist, one can discern in Emerson’s work the seeds of a very different approach to the problem we are considering. Almost casually Emerson notes that the scope of First Amendment coverage may have to be ascertained in light of “the fundamental purposes

23 Id. at 569. For a full discussion, see Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249 (1995).

24 Hence Wittgenstein’s famous pronouncement: “Words are deeds.” LUDWIG WITTGENSTEIN, CULTURE AND VALUE ¶ 46e (P. Winch trans., 1980).

25 Consider, for example, Emerson’s discussion of espionage:

Perhaps a word should be added concerning the classification of espionage as “action.” It is true that espionage usually involves the communication of information, and this by itself would normally be considered “expression.” But espionage does take place in a context of action; the espionage apparatus is engaged primarily in conduct that dwarfs any element of expression.

EMERSON, *supra* note 16, at 58. The passage amounts to a concession First Amendment coverage cannot be defined in terms of the communication of ideas.
of the system [of freedom of expression] and the dynamics of its operation." This approach would constitute the polar opposite of Spence and the concept of "speech as such." It would not determine the reach of First Amendment doctrine by observing properties of the world—by asking whether regulated behavior communicates ideas—but instead by articulating the purposes of the First Amendment and by developing First Amendment doctrine in ways that serve these purposes. Forms of conduct that realize distinctively First Amendment values would be classified as "speech" for purposes of the Constitution.

We can now begin to appreciate why the question of First Amendment coverage is so profound. The actual contours of First Amendment doctrine can not be explained merely by facts in the world; they must instead reflect the law's efforts to achieve constitutional values. This suggests that we can learn the purposes we have constructed First Amendment doctrine to achieve by tracing the contours of actual First Amendment coverage.27

I.

The text of the First Amendment is mute about its purposes. These must be constructed. Judicial efforts to determine the objectives of the First Amendment are less than a century old. Modern First Amendment doctrine first appears in the great Holmes opinions of 1919;28 it does not begin to develop until the 1930s. On the Court and among

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26 Id. at 18. Edwin Baker offers a similar interpretation of Emerson in BAKER, supra note 9, at 70-73.

27 No doubt the scope of First Amendment coverage will change as these purposes change.

28 See Robert Post, Reconciling Theory and Doctrine in First Amendment Jurisprudence, 88 CALIF. L. REV. 2355 (2000). For a discussion of the First Amendment in its forgotten years before 1919, see DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS (1997). In 1833 the eminent commentator Joseph Story opined "that the language of this amendment imports no more, than that every man shall have a right to
commentators there have been great and vigorous debates about what the purposes of the First Amendment ought to be.

All Americans are of course entitled freely to advocate whatever theory of the First Amendment they find most convincing. But if we are to speak responsibly about the purposes of the judicially-enforced First Amendment to which the nation has historically demonstrated its commitment, we have no choice but to reference the actual shape of entrenched First Amendment jurisprudence. We need not passively receive this inheritance. We ought instead to aspire to what John Rawls has termed “considered judgment in reflective equilibrium.”29 This implies the effort to give our nation’s actual jurisprudential commitments, as expressed in its historically decided cases, their most powerful, defensible and persuasive formulation, and then to critically re-evaluate received doctrine in light of this formulation. Reflective equilibrium requires a critical engagement with our own past. Constitutional law depends upon such engagement because “how we are able to constitute ourselves is profoundly tied to how we are already constituted by our own distinctive history.”30

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That this amendment was intended to secure to every citizen an absolute right to speak, or write, or print, whatever he might please, without any responsibility, public or private . . . is a supposition too wild to be indulged by any rational man. This would be to allow to every citizen a right to destroy, at his pleasure, the reputation, the peace, the property, and even the personal safety of every other citizen.

*Id.* at 731-32. Story acknowledged, however, that his views were controverted. *Id.* at 738-44.


Over the past decades, and speaking roughly, three major purposes for the First Amendment have been proposed. The first, embodied in the marketplace of ideas theory, is cognitive; the purpose of First Amendment protections for speech is said to be “advancing knowledge and discovering truth.” The second is ethical; the purpose of the First Amendment is said to be “assuring individual self-fulfillment” so that every person can realize their “character and potentialities as a human being.” And the third is political; the purpose of the First Amendment is said to be facilitating the communicative processes necessary for successful democratic self-governance.

Without question the marketplace of ideas theory captures something essential to growth of knowledge. Kant famously grounded enlightenment in the spirit of “Sapere aude!” the “resolution and courage to use one’s own understanding without the guidance of another.” The marketplace of ideas theory stresses that knowledge cannot grow, and truth cannot advance, unless the law allows us to venture our own ideas and reasons. Yet when we speak of “advancing knowledge and discovering truth,” at least in the context of expert knowledge, we refer to something more than mere hypothesis and speculation.

“Standard analysis” in philosophy holds that “knowledge” is “belief that is both true and justified.” Philosophers have puzzled forever about how true and justified

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31 EMERSON, supra note 16, at 6. Because Emerson sought to build his First Amendment theory on the distinction between speech and action, he was eclectic and comprehensive in the “values and functions” that he thought the First Amendment would serve. Id.

32 Id.

33 This theory is most prominently associated with ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE (1965).

34 Kant, Immanuel. An Answer to the Question, What is Enlightening?, in ESSAYS AND TREATISES ON MORAL, POLITICAL, AND VARIOUS PHILOSOPHICAL SUBJECTS (London 1798-99), at p. 3.

belief should be identified, so that “no clear account of knowledge emerges as an
established, widely accepted philosophical finding.”\textsuperscript{36} It does not seem helpful for
constitutional lawyers to venture into this epistemological thicket. It would seem rather
more useful to affirm, with Allan Gibbard, that “the concept of knowing serves to guide
us in relying on some kinds of judgment and not on others.”\textsuperscript{37} Concluding that a person
“knows, then, amounts to planning to rely on his judgment.”\textsuperscript{38} The question is thus the
relationship between the marketplace of ideas and our ability to plan to rely on the
judgment of others.

There are some who suggest that “human knowledge” should be conceived as
simply an endless aggregation of “dispersed information.”\textsuperscript{39} The challenge is to
efficiently and comprehensively assemble relevant data. In this way “Biology, chemistry,
physics, economics, psychology, linguistics, history, and many other fields are easily
seen as large wikis, in which existing entries, reflecting the stock of knowledge, are
‘edited’ all the time.”\textsuperscript{40} Those who favor this approach point to the remarkable success of
open source software or prediction markets in “pooling information” to answer questions
like whether “the economy of Saudi Arabia [will] prosper in next year.”\textsuperscript{41} The assumption

\textsuperscript{36} ALLAN GIBBARD, THINKING HOW TO LIVE 226 (2003).

\textsuperscript{37} Id. at 227.

\textsuperscript{38} Id.

\textsuperscript{39} CASS R. SUNSTEIN, INFOTOPIA: HOW MANY MINDS PRODUCE KNOWLEDGE 9 16 (2006). See JAMES
SUROWIECKI, THE WISDOM OF CROWDS: WHY THE MANY ARE SMARTER THAN THE FEW AND HOW

\textsuperscript{40} SUNSTEIN, supra note 39, at 217.

\textsuperscript{41} SUNSTEIN, supra note 39, at 15-16.
seems to be that the world will speak for herself so long as we are able to amass the universe of pertinent information.

It would seem implausible, however, if not downright perverse, to seek to determine the half-life of plutonium 230 merely by creating a prediction market, or to use Wikipedia to ascertain whether cigarettes are carcinogenic.\textsuperscript{42} In such matters what counts as relevant information is itself the result of sophisticated disciplinary expertise. We construct such information by actively intervening in the world through research, theory, and experiment. Note that \textit{Wikipedia} itself strictly prohibits the publication of “original research or original thought,”\textsuperscript{43} thus distinguishing between readily available information and information produced by the application of disciplinary standards. \textit{Wikipedia} makes the same (unelucidated) distinction when it provides that “the threshold for inclusion in Wikipedia is \textbf{verifiability, not truth}—that is, whether readers are able to check that material added to Wikipedia has already been published by a reliable source, not whether we think it is true.”\textsuperscript{44} And \textit{Wikipedia} guidelines specifically provide that “Academic and peer-reviewed publications are usually the most reliable sources when available.”\textsuperscript{45}

Such publications are produced within practices where \textit{Sapere aude} is only half the story.\textsuperscript{46} Scholarship requires not only a commitment to vigorous debate and critical

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\item \textsuperscript{42} For a good discussion, see Christopher P. Guzelian, \textit{Scientific Speech}, 93 \textit{Iowa L. Rev.} 881, 892 n.41 (2008).
\item \textsuperscript{43} See \url{http://en.wikipedia.org/wiki/Wikipedia_No_original_research}.
\item \textsuperscript{44} See \url{http://en.wikipedia.org/wiki/Wikipedia_Verifiability}.
\item \textsuperscript{45} See \url{http://en.wikipedia.org/wiki/Wikipedia_Reliable_sources} (“Material that has been vetted by the scholarly community is regarded as reliable; this means published in reputable peer-reviewed sources and/or by well-regarded academic presses.”).
\item \textsuperscript{46} See \textit{Bernard Williams, Truth & Truthfulness: An Essay in Genealogy} 213-219 (2002).
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freedom, but also and equally a commitment to enforcing standards of judgment and
critical rigor.47 We rely on expert “knowledge” precisely because it has been vetted and
reviewed by those whose judgment we have reason to trust. All living disciplines are
institutional systems for the production of such “knowledge.”

This is explicitly the perspective adopted by federal courts when they determine
whether to admit expert testimony about “scientific, technical, or other specialized
knowledge” under Federal Rule of Evidence 702.48 Such testimony is accepted only if it
meets “exact standards of reliability,”49 which means that an expert’s claim to
knowledge must be validated by an “assessment of whether the reasoning or
methodology underlying the testimony is scientifically valid,”50 an assessment that in part
depends upon “whether the theory or technique has been subjected to peer review and
publication.”51

47 Perhaps Charles Sanders Peirce said it best:

Some persons fancy that bias and counter-bias are favorable to the extraction of truth—that hot and
partisan debate is the way to investigate. This is the theory of our atrocious legal procedure. But
Logic puts its heel upon this suggestion. It irrefragibly demonstrates that knowledge can only be
furthered by the real desire for it, and that the methods of obstinacy, of authority, and every mode
of trying to reach a foregone conclusion, are absolutely of no value. These things are proved. The
reader is at liberty to think so or not as long as the proof is not set forth, or as long as he refrains
from examining it. Just so, he can preserve, if he likes, his freedom of opinion in regard to the
propositions of geometry; only, in that case, if he takes a fancy to read Euclid, he will do well to
skip whatever he finds with A, B, C, etc., for, if he reads attentively that disagreeable matter, the
freedom of his opinion about geometry may unhappily be lost forever.

CHARLES SANDERS PEIRCE, 2 COLLECTED PAPERS (Charles Hartshorne, Paul Weiss, and Arthur Burks eds.
Cambridge, MA: Harvard University Press, 1931-58), at 635.

48 Rule 702 provides: “If scientific, technical, or other specialized knowledge will assist the trier of fact to
understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill,
experience, training, or education, may testify thereto in the form of an opinion or otherwise.”


51 Id. at 593. In Kumho tire Co. v. Carmichael, 526 U.S. 137 (1999), the Court held that this standard
applied to all expert testimony based upon technical knowledge, not just to “scientific” knowledge. Id. at
The continuous discipline of peer judgment, which virtually defines expert knowledge, is quite incompatible with deep and fundamental First Amendment doctrines that apply "the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content"\(^{52}\) and that impose a "requirement of viewpoint neutrality"\(^{53}\) on regulations of speech. If content and viewpoint neutrality is "the cornerstone of the Supreme Court’s first Amendment jurisprudence,"\(^{54}\) the foundation of peer judgment is the capacity to evaluate the merit of opinions so as to distinguish the meritorious from the specious. This is exactly what normal First Amendment doctrine prohibits. “If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”\(^{55}\)

To put the matter simply, if “the First Amendment recognizes no such thing as a ‘false’ idea,”\(^{56}\) then it cannot sustain, or even tolerate, the disciplinary practices necessary to produce expert knowledge. The creation of expert knowledge requires practices that seek to separate true ideas from false ones. A scientific journal bound by First

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Amendment doctrine, and thus disabled from making necessary editorial judgments about the justification and truth of submissions, could not long survive.\textsuperscript{57} Alexander Meiklejohn was quite correct to observe that deep within First Amendment doctrine there is an “equality of status in the field of ideas.”\textsuperscript{58} This egalitarian commitment is in sharp tension with the cognitive aspiration to knowledge, which in the end must always rely on \textit{discrimination}, in the traditional sense of judgment and evaluation.

It is not intelligible to believe that all \textit{ideas} are equal. Americans repudiate “discrimination,” however, because they imagine that \textit{persons}, rather than \textit{ideas}, should be equal. Americans are committed to the equality of persons. The deep egalitarian dimension of the First Amendment resonates far more with this ethical value than with any cognitive ideal. The primary ethical value that has been ascribed to the First Amendment is that of autonomy or individual self-fulfillment, which expresses the

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\item Explaining the falsity of the proposition that “more total truth possession will be achieved if speech is regulated only by free-market mechanisms rather than by other forms of regulation,” the social epistemologist Alvin Goldman has observed:

    Domains of opinions where speech is totally unregulated, or is at most regulated by the market, are arguably the domains where maximum error and falsity are to be found. We have in mind domains in which rumor, gossip, old-wives’ tales, and superstition flourish, where astrology and the occult are purveyed and apparently believed. . . . Formal education is highly regulated: Teachers are selected for their training and comparative expertise, and not everyone is allowed to teach I the classroom. Nor is such regulation simply a matter of the market; public education, at any rate, seems to be a nonmarket enterprise. . . .

    Next, consider certain forums for scientific and scholarly speech that are highly regulated, and which, nonetheless, are responsible for what many people take to be the greatest amount of knowledge. Scientific, professional, and academic journals are widely thought (certainly by scientists and academics) to be the best forums available for discovering and learning truths, yet these communications systems are highly regulated. Editors and referees impose stringent criteria for the publication of submitted manuscripts. Attempts to “speak” in these forums are often rigidly controlled. People lacking the methodologies and technical skills demanded by these journals have no chance of getting their thoughts aired therein, and even well-trained practitioners encounter difficulties. But regulated journals of this sort are widely thought to be effective in promoting truth.


\item MEIKLEJOHN, \textit{supra} note 33, at 27.
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principle that all persons ought to be accorded the equal dignity to fulfill their individual potential.

I should note at the outset that there is no particular connection between speech and this ethical idea of equal autonomy, because autonomy can be manifested and instantiated through any form of behavior, not merely through communication. There is no doubt that a libertarian commitment to autonomy has deep roots in American constitutionalism and that it has detectably influenced the content of First Amendment doctrine. But the fundamental constitutional commitments of the nation, as reflected in the actual scope of First Amendment coverage, do not suggest that the protection of autonomy can be deemed a basic purpose of the judicially-enforced First Amendment.

If the protection of autonomy were a fundamental goal of the First Amendment, all expression equally connected to the achievement of individual self-fulfillment would be accorded equal First Amendment value. But this is emphatically not the case. Much speech that may be of great importance to the autonomy of individual speakers receives no First Amendment coverage at all. Consider, for example, speech that may be of great importance to a speaker but that is defamatory of another.

Well entrenched First Amendment doctrine holds that if such speech defames a public official or public figure, or if it involves a matter of public concern, the Constitution precludes the application of common law rules that impose liability without fault and that presume damages. The theory is that the strict regulation of such speech


would be inconsistent with the nation’s “profound national commitment” to a robust public debate that will assure the “unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”61 If defamatory speech is about a matter “of purely private concern,”62 by contrast, “states are free to retain common law principles.”63 First Amendment coverage thus does not extend to private defamatory speech, no matter how important such speech may be to the self-fulfillment of the speaker. First Amendment coverage is extended only when state regulation might adversely affect the value of democratic self-governance.

The same principle of First Amendment coverage applies when the state seeks to sanction the speech of its employees. First Amendment coverage materializes only when employee speech is about a matter “of public concern,” because only such speech is “entitled to special protection.”64 First Amendment doctrine attributes no constitutional significance to the question of how important speech may be to the autonomy or self-fulfillment of an employee.65 First Amendment coverage is triggered only when a government employee begins “to speak as a citizen addressing matters of public concern.”66 More or less the same standard of First Amendment coverage applies to the

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tort of intentional infliction of emotional distress\textsuperscript{67} and to state efforts to sanction speech in order to protect privacy.\textsuperscript{68}

This pervasive and entrenched pattern of First Amendment coverage would make little sense if the protection of autonomy were a fundamental constitutional purpose. Consider a simple case. Many dentists passionately believe that dental amalgams, which are a mixture of silver and mercury used to fill cavities in teeth, are dangerous to the health of their patients because the mercury can leach out and be absorbed by the body.\textsuperscript{69} Because the American Dental Association and state dental boards consider amalgams safe and appropriate, they have punished dentists for advising their patients to remove their amalgam fillings, because they believe that such advice exposes patients to unnecessary risk and expense. This professional discipline regulates the professional speech of dentists, and it does so without First Amendment coverage. Dentists can not assert a First Amendment defense to this discipline, just as they can not assert a First Amendment defense to suits for medical malpractice based upon bad advice. It makes no difference how important it may be to the autonomy of an individual dentist to communicate what he believes to be the truth about dental amalgams to his patients; it makes no difference how passionately any particular dentist may wish to safeguard the health of his patients.

First Amendment coverage does materialize, however, if a dentist wishes to take her case about dental amalgams to “the general public” by publishing a book or by

\textsuperscript{67} Hustler Magazine v. Falwell, 485 U.S. 46 (1988).


participating in a television interview. If the dentist is subsequently sued for “negligent misrepresentation” by members of her audience who relied upon her advice and removed their dental amalgams, the dentist may be constitutionally immunized from liability.70

The autonomy interests of a dentist are the same whether she speaks to the general public in a book or to specific patients in her office, but First Amendment coverage extends to the former but not the latter. This difference can not be explained by the constitutional value of autonomy. It can be explained only on the hypothesis that speech to the general public is of particular First Amendment importance.

The distinction between public speech and non-public speech is embedded deeply within the fabric of First Amendment doctrine, and it can not be clarified by autonomy theories of the First Amendment. More generally, we can observe that communication and conduct that is essential to individual self-definition pervade human society, and for this reason the value of autonomy can become salient at almost any time and in almost any context. This suggests that autonomy theories of the First Amendment will have difficulty generating coherent patterns of First Amendment coverage. Whenever we detect such a pattern, therefore, and especially when the pattern we detect does not seem in any way sensitive to the concerns of individual autonomy, we must conclude that we are in the presence of a First Amendment purpose that does not express the constitutional value of individual autonomy.

First Amendment coverage does in fact display systematic patterns that are both indifferent to individual autonomy and consistent with the view that the fundamental purpose of the First Amendment is political, rather than ethical. The Court has time and

again explained its own First Amendment jurisprudence in terms of “securing of an
informed and educated public opinion with respect to a matter which is of public
care.”71

The freedom of speech and of the press guaranteed by the Constitution embraces
at the least the liberty to discuss publicly and truthfully all matters of public
concern without previous restraint or fear of subsequent punishment. . . .
Freedom of discussion, if it would fulfill its historic function in this nation, must
embrace all issues about which information is needed or appropriate to enable the
members of society to cope with the exigencies of their period.72

The persistent attention in First Amendment doctrine to whether communication
involves public officials, or public figures, or matters of public concern, or is directed to
the general public, derives from the conviction that, as Learned Hand put it, “public
opinion . . . is the final source of government in a democratic state.”73 “Public opinion,”
said James Madison, “is the real sovereign in every free” government.74 The function of
the First Amendment is to safeguard the communicative processes by which public
opinion is formed, so as to ensure the integrity of “the great process by which public
opinion passes over into public will, which is legislation.”75 Agreement on this point is
almost universal. Even a thinker like Carl Schmitt defines democracy as “the rule of
public opinion, ‘government by public opinion.’”76 It is for this reason that we

72 Id. at 101-102.
73 Masses Publishing Co. v. Patten, 244 F. 535, 540 (S.D.N.Y.), rev’d, 246 F. 24 (2d Cir. 1917).
PAPERS OF JAMES MADISON 170, 170 (Robert A. Rutland et al. eds., 1977).
75 FRANCIS LIEBER, ON CIVIL LIBERTY AND SELF-GOVERNMENT 131 (1859).
76 CARL SCHMITT, CONSTITUTIONAL THEORY 275 (Jeffrey Seitzer trans. 2008). Not only does Schmitt
assert that “there is no democracy without public opinion,” id., but he also writes that “‘People’ is a
concept that becomes present only in the public sphere. The people appear only in the public, and they first
denominate the antimajoritarian First Amendment the “guardian of our democracy.”77 Even though the very object of the First Amendment is to restrict what laws a majority may enact, its purpose is to protect the free formation of public opinion that is the *sine qua non* of democracy.

The contours of First Amendment coverage, the constitutional distinction between speech and action, is therefore to be determined in the first instance by a normative inquiry into the forms of conduct we deem necessary for the free formation of public opinion. Sometimes this conduct occurs through language, and sometimes, as with picketing78 and flag burning,79 it does not. First Amendment coverage is “not confined to verbal expression” but “embrace[s] appropriate types of action which certainly include the right in a peaceable and orderly manner to protest by silent and reproachful presence, in a place where the protestant has every right to be.”80 Conversely, vast stretches of ordinary verbal expression, as for example between dentists and their patients, between corporations and their shareholders, between commercial partners, is not considered necessary for the formation of public opinion and is consequently excluded from First Amendment coverage.81 Following the usage of the Court, I shall use the term “public

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discourse” to refer to the forms of communication constitutionally deemed necessary for formation of public opinion.  

Early theorists of the connection between the First Amendment and democracy understood the essence of democracy to be the principle of majoritarianism, as expressed through the mechanism of elections. They therefore believed that First Amendment coverage should extend only to speech that informed voters about matters pertinent to electoral politics. Robert Bork, for example, famously argued that

The category of protected speech should consist of speech concerned with governmental behavior, policy or personnel . . . . Explicitly political speech is speech about how we are governed, and the category includes a wide range of evaluation, criticism, electioneering and propaganda. It does not cover scientific, education, commercial or literary expressions as such. A novel may have impact upon attitudes that affect politics, but it would not for that reason receive judicial protection . . . . The line drawn must . . . lie between the explicitly political and all else.

Thinking through the implications of this perspective, Alexander Meiklejohn concluded that because the constitutional value of speech lay in informing voters how to exercise the franchise, “What is essential is not that everyone shall speak, but that everything worth saying shall be said.” Meiklejohn and Bork therefore believed that First Amendment coverage should not extend to the autonomy interests of speakers, but

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83 MEIKLEJOHN, supra note 33; Robert Bork, Neutral Principles and Some First Amendment Problems, 47 IND. L. J. 1 (1971).

84 Bork, supra note 83, at 27-28.

85 MEIKLEJOHN, supra note 33, at 26.
only to the rights of voters to receive information. Some very great modern scholars of
the First Amendment have continued to pursue this framework of analysis. 86

These conclusions do not correspond well to entrenched principles of First
Amendment coverage, which serve not only “to ensure that the individual citizen can
effectively participate in and contribute to our republican system of self-government,”87
but also to encompass all forms of artistic and literary productions that have nothing to do
with explicitly political advocacy. “[I]n the area of freedom of speech and press the
courts must always remain sensitive to any infringement on genuinely serious literary,
artistic, political, or scientific expression.”88

These disparities between entrenched First Amendment doctrine and the
conclusions of early democracy theorists were caused by the fact that the latter possessed
a very inadequate understanding of the nature of democracy. They imagined that the
basic principle of American democracy was majoritarianism, as expressed through
elections. But majoritarianism and elections are merely mechanisms for making
decisions. American democracy does not rest upon decision-making techniques, but
instead upon the ideal of self government, the notion that those who are subject to law
should also experience themselves as the authors of law. Constitutional democracy in the
United States seeks to instantiate this ideal by rendering government decisions responsive
to public opinion and by guaranteeing to all the possibility of influencing public opinion.

86 See, e.g., OWEN FISS, LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER
(1996). For a discussion, see Robert Post, Equality and Autonomy in First Amendment Jurisprudence, 95

Alabama, 310 U.S. 88, 95 (1940)).

This formulation suggests that judicial First Amendment protections for speech are necessary, although not sufficient, for ensuring democratic legitimacy. If persons are prevented from participating in the formation of public opinion, to the end of rendering public opinion responsive to their own point of view, they are not likely to regard themselves as potentially the authors of those government decisions that affect them. But it does not follow that they will in fact regard their government as democratically legitimate even if government decisions are indeed responsive to public opinion and even if they are guaranteed the right to participate in the formation of public opinion. This may be true for many reasons. Persons may lack resources sufficiently to participate in the formation of public opinion, or they may have views that are systematically and persistently repudiated by the majority, and so on. Nevertheless, if persons are prevented even from the possibility of seeking to influence the content of public opinion, there is little hope of democratic legitimation in a modern culturally heterogeneous state. That is why freedom of speech is generally the first and most pressing demand in any state experiencing a transition to democracy.

89 Of course if all citizens in a state spontaneously agree on government decisions because of some pre-existing cultural homogeneity, democratic legitimacy might be possible without freedom of speech. Rousseau seems to have imagined something like this state of affairs, since advocated that the general will be formed without public discussion. Jean-Jacques Rousseau, The Social Contract 73 (Trans. Maurice Cranston 1968). Carl Schmitt also seems to have regarded “the constitutionally unalienated people, in their ethnic and national sameness, as the ‘true’ foundation of democracy. Democracy is the rule of the people’s will, whose essence is collective authenticity; this quality cannot be achieved by mere aggregation of private individual wills; the attribute of elections in liberal democracies. . . . This concept of democratic representation clearly reveals the close connection between democracy and authoritarian rule—an affinity which led Schmitt to the (at a first glance paradoxical) contention that a true dictatorship can only be founded on a democratic basis.” Ulrich K. Preuss, Constitutional Powermaking for the New Polity: Some Deliberations on the Relations Between Constituent Power and the Constitution, 14 Cardozo L. Rev. 639,650-51 (1993). Democracy does contain this danger of collapse into totalitarianism so long as it does not rest on the premise of cultural heterogeneity.
II.

It follows from this analysis that First Amendment coverage should extend to all efforts to influence public opinion. We know that public opinion is formed within what sociologists call the “public sphere,” and we know that historically “the public sphere in the political realm evolved from the public sphere in the world of letters.”\(^{90}\) Following the development of affordable and widely dispersed printed material, like books and newspapers, the public sphere became an arena in which strangers could communicate systematically and regularly with each other. This is the precondition for the very idea of a “public opinion.”

The development of the public sphere was a fundamental “mutation” in the development of the modern “social imaginary.”\(^{91}\) It enabled “members of society” for the first time to envision themselves as engaging each other “through a variety of media: print and electronic as well as face-to-face encounters, wherein they discuss matters of common interest and thus are able to form a common mind about these.”\(^{92}\) The concept of a “public” emerges from “the circulation of texts among strangers who become, by

\(^{90}\) JÜRGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE 30-31 (Thomas Burger, trans., 1991). The common law privilege of fair comment about matters of public concern, for example, ultimately traces back to an 1808 decision involving the harsh criticism of three travel books. Although the criticism was otherwise defamatory, the judge charged the jury that:

> Every man who publishes a book commits himself to the judgment of the public, and anyone may comment upon his performance. . . . [W]hatever their merits, others have a right to pass their judgment upon them -- to censure them if they be censurable, and to turn them into ridicule if they be ridiculous.


\(^{92}\) Id.
virtue of their reflexively circulating discourse, a social entity.”93 The public sphere can sustain democratic legitimation only insofar as it is beyond the grasp of comprehensive state managerial control. “If it were not possible to think of the public as organized independently of the state . . . , the public could not be sovereign with respect to the state. . . . The peculiar character of a public is that it is a space of discourse organized by discourse. It is self-creating and self-organized; and herein lies its power, as well as its elusive strangeness. . . . Speaking, writing, and thinking involve us—actively and immediately—in a public, and thus in the being of the sovereign.”94

Democracy requires that government action be tethered to public opinion. Because public opinion can direct government action in an endless variety of directions, it is impossible to classify in advance which aspects of public opinion are “political” and which are not. A novel like The Jungle might inspire the reform of government inspection procedures for food; a movie like Missing might encourage a reexamination of foreign policy; the sad tale of Brittany Spears might instigate a re-examination of public health policies toward the mentally disturbed, and so on. It is for this reason that First Amendment coverage presumptively extends to all communications that form public opinion. Most especially, the First Amendment coverage extends to media for the communication of ideas, like newspapers, magazines, the internet, or cinema, which are the primary vehicles for the circulation of the texts that define and sustain the public


94 Id. at 68-69. “[A] public can only produce a sense of belonging and activity it is self-organized through discourse rather than through an external framework. This is why a distortion or blockage in access to a public can be so grave, leading people to feel powerless and frustrated. Externally organized frameworks of activity, such as voting, are and are perceived to be poor substitutes.” Id. at 70.
sphere.\textsuperscript{95} In the absence of strong countervailing reasons, whatever is said within such media is presumptively covered by the First Amendment.

Because we think of public opinion as “sovereign” in a democracy, we tend to imagine public opinion as agential, as deciding questions like war or price regulation or universal health insurance.\textsuperscript{96} This tendency is reinforced by the irrepressible desire of political scientists and pollsters to measure the “content” of public opinion, to inform us whether the median voter approves or disapproves of financial bailouts or Guantanamo detentions or estate taxes. For First Amendment purposes, however, public opinion is not conceived in this agential way. The Constitution instead regards public opinion as continuously evolving within the public sphere. Democracy does not require that government be subordinated to any particular temporary manifestation of this public opinion. It requires rather that the public sphere remain open to continual revision.

Democratic nations deploy a variety of mechanisms to subordinate governmental decision-making to public opinion. Elections are the most obvious and pervasive such

\textsuperscript{95} For a discussion, see Robert Post, \textit{supra} note 23.

\textsuperscript{96} One of the most striking features of publics, in the modern public sphere, is that they can in some contexts acquire agency. . . . Publics act historically. They are said to rise up, to speak, to reject false promises, to demand answers, to change sovereigns, to support troops, to give mandates for change, to be satisfied, to scrutinize public conduct, to take role models, to deride counterfeits. It is difficult to imagine the modern world without the ability to attribute agency to publics, though doing so is an extraordinary fiction. It requires us, for example to understand the ongoing circulatory time of public discourse as though it were discussion leading up to a decision.

The attribution of agency to publics works in most cases because of the direct transposition from private reading acts to the sovereignty of opinion. All of the verbs for public agency are verbs for private reading, transposed upward to the aggregate of readers. Readers may scrutinize, ask, reject, opin, decide, judge, and so on. Publics can do exactly these things. And nothing else. Publics—unlike mobs or crowds—are incapable of any activity that can not be expressed through such a verb. Activities of reading that do not fit the ideology of reading as silent, private, replicable decoding—curling up, mumbling, fantasizing, gesticulating, ventriloquizing, writing marginalia, and so on—also find no counterparts in public agency.

\textit{WARNER, supra} note 93 at 123.
mechanism. There are many ways to construct elections, but even the best designed
election can at most reflect the content of public opinion at a particular moment in time.
The larger perspective of the First Amendment is not so blinkered; it regards public
opinion as always in motion. From the constitutional point of view, therefore, public
opinion does not possess the internal consistency or integrity that is characteristic of
agents who must decide and act. It is instead transactional and subjectless, and the object
of the First Amendment is to protect the open processes by which public opinion is
perpetually formed and reformed. We can even say that the First Amendment seeks to
safeguard the integrity of the public sphere itself.

Like any form of government, a democracy must make decisions, even
irretrievable ones, and it must act on these decisions with consistency and integrity. But
democracy is unique because it embeds state decisions within communicative processes
that continuously reconsider and reevaluate them. Even as a democratic state carries out
the decisions of its government, therefore, it must remain ultimately accountable to
potentially kaleidoscopic communicative processes. Habermas is thus rigorously
accurate to conclude that in a democracy “sovereignty is found” in “subjectless forms of
communication that regulate the flow of discursive opinion- and will-formation,” so that
“popular sovereignty withdraws into democratic procedures and the demanding
communicative presuppositions of their implementation.”

Within public discourse, the First Amendment protects the autonomy of speakers,
not merely the rights of audiences. If persons within public discourse are prevented from
choosing what to communicate or not to communicate, the value of democratic

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97 JÜGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW
legitimation will not be served. Persons will not experience participation in public discourse as means to make government responsive to their own personal views. That is why the First Amendment has been interpreted to prohibit the state from compelling persons to speak within public discourse, even to the extent of disclosing true and material facts. “There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees ‘freedom of speech,’ a term necessarily comprising the decision of both what to say and what not to say.”

“Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech,” but “[t]he First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it.”

At root, First Amendment prohibitions against viewpoint and content discrimination express the essential postulate that all persons within public discourse should be equally free to say or not say what they choose. This equality reflects the premise that in a democracy every subject of law possess an equal right to seek to shape the content of public opinion and so to influence government action. Those bound by law are entitled to the imaginative possibility that public opinion will be responsive to their views; this possibility underwrites their capacity to experience the state as democratically legitimate.

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99 Id. at 795.

100 Id. at 790-91.
Government regulations of speech are very different outside the sphere of public discourse. Government routinely requires persons to speak,\textsuperscript{101} whether it compels manufacturers to label their products or doctors to report patients with AIDS or motorists to report accidents. It routinely engages in content and viewpoint discrimination, sanctioning speech based upon its substance, whether through the law of professional malpractice or commercial misrepresentation or securities regulation. Whereas within public discourse the political imperatives of democracy require that persons be regarded as equal and as autonomous,\textsuperscript{102} outside public discourse the law commonly regards persons as dependent, vulnerable and hence unequal.\textsuperscript{103} Clients are legally entitled to rely on the advice of their lawyers; consumers on the representations of manufacturers; shareholders on the information of corporations. That is why law holds lawyers accountable for malpractice, manufacturers for the failure to warn, and corporations for misrepresentation. Within public discourse, by contrast, the First Amendment ascribes autonomy equally to speakers and to their audience, so that the rule of \textit{caveat emptor} applies. A member of the general public who foolishly removes his silver fillings upon reading a dentist’s book is held responsible for his own bad decision.\textsuperscript{104}


\textsuperscript{102} For a discussion, see Robert Post, \textit{Democracy and Equality,} 603\textsuperscript{ The Annals of the American Academy of Political and Social Science} 24 (2006).

\textsuperscript{103} See Robert Post, \textit{Community and the First Amendment,} 29\textsuperscript{ Ariz. St. L. J.} 473 (1997).

\textsuperscript{104} See supra note 70. Compare Winter v. G.P. Putnam's Sons, 938 F.2d 1033 (9th Cir. 1991), in which the First Amendment was held to immunize from liability the publisher of the \textit{The Encyclopedia of Mushrooms} from suit by those who alleged that their health was gravely damaged by eating poisonous mushrooms in reliance on the information provided by the \textit{Encyclopedia}. 
This contrast is quite stark, and it is the single most salient existing pattern of entrenched First Amendment doctrine. The contrast suggests one further reason why interpreting the First Amendment to serve the value of autonomy would be undesirable. There are times when we wish law to ascribe to persons the virtue of autonomy, and there are times when we wish law to ascribe to persons the vulnerability of dependence. In actual social life, of course, persons are always both autonomous and dependent. The question is how we wish the law ascriptively to regard them.\textsuperscript{105} If the First Amendment were to require the state to regard all communication through the lens of autonomy, it would disable law from making this important distinction.

The point is especially important when government seeks to enforce dimensions of communicative respect that define the dignity and self-worth of persons.\textsuperscript{106} I refer here to the law of libel, privacy, outrageous infliction of emotional distress, hate speech, and so on. The enforcement of such laws is essential for healthy human development, and yet the ascribed assumption of autonomy precludes such enforcement within the sphere of public discourse. Racist speech can be punished in secondary schools and in the workplace, but not in \textit{The New York Times}. Within public discourse, the First Amendment requires law to respect the autonomy of speakers rather than the targets of speech; outside public discourse, the First Amendment permits the state to regulate the autonomy of speakers in order to protect the dignity of the targets of speech. I do not


think that an autonomy view of the First Amendment can explain or accept this distinction.

A democratic interpretation of the First Amendment, by contrast, possesses the capacity to adjust the boundary between public discourse and non-public discourse in ways that allow the law to designate when autonomy should and should not be legally ascribed. It can formulate judicially-enforced rights so as to incorporate the sociological insight that some such boundary is necessary if a society is to entrench the civility norms necessary for social cohesion and identity. Almost all democratic accounts of the First Amendment seek to differentiate a political domain of public opinion creation from non-political domains of civil society. This distinction would be merely arbitrary if the First Amendment were understood as ascribing the value of autonomy to the speech of all persons.

If the central thrust of the First Amendment is democratic legitimation, and if this value precludes content discrimination, we can begin to appreciate the full depth of the puzzle with which I began this Chapter. It would at first glance appear that wherever First Amendment doctrine applies, it suppresses legal support for the disciplinary practices necessary for endowing beliefs with the reliability that defines disciplinary knowledge. “To call a field a ‘discipline,’” after all, “is to suggest that . . . its authority does not derive from the writings of an individual or a school, but rather from generally accepted methods and truths.”

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these methods and truths. Yet First Amendment doctrine serves the value of democratic legitimation by preventing government from imposing any such methods and truths within public discourse. What then is the relationship between the First Amendment and the production and dissemination of expert knowledge? It is to that question that I shall turn in Chapter Two.
CHAPTER TWO

DEMOCRATIC COMPETENCE AND THE FIRST AMENDMENT

The First Amendment guarantees the free formation of public opinion. But public opinion is, in the end, merely opinion. Hegel recognized this early on:

The formal subjective freedom of individuals consists in their having and expressing their own private judgments, opinions, and recommendations on affairs of state. This freedom is collectively manifested as what is called ‘public opinion’, in which what is absolutely universal, the substantive and the true, is linked with its opposite, the purely particular and private opinions of the Many.109

It is precisely because public opinion reflects the subjective perspective of individuals that the First Amendment prohibits the state from denying persons access to public discourse. The goal of democratic legitimation is a primary purpose of the First Amendment, and possibility of democratic legitimation lies in the hope that persons who are permitted the opportunity to make public opinion responsive to their own subjective, personal views might come to regard themselves as the potential authors of the laws that bind them.

But if public opinion is merely opinion, then it lacks the indicia of reliability that makes for knowledge. As Hegel immediately saw, public opinion “in itself . . . has no criterion of discrimination, nor has it the ability to extract the substantive element it contains and raise it to precise knowledge. Thus to be independent of public opinion is the first formal condition of achieving anything great or rational whether in life or in science.”110

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109 GEORG WILHELM FRIEDRICH HEGEL, HEGEL’S PHILOSOPHY OF RIGHT ¶ 316 (p. 204) (T.M. Knox trans. 1952).

110 Id. at ¶ 318 (p. 205).
reliable knowledge was so great that John Stuart Mill could recognize that “[t]he modern regime of public opinion is, in an unorganized form, what the Chinese educational and political systems are in an organized; and unless individuality shall be able successfully to assert itself against this yoke, Europe, notwithstanding its noble antecedents and its professed Christianity, will tend to become another China.”\textsuperscript{111} Mill felt the need for protection “against the tyranny of the prevailing opinion and feeling, against the tendency of society to impose, by other means than civil penalties, its own ideas and practices as rules of conduct on those who dissent from them.”\textsuperscript{112}

The fundamental First Amendment doctrine of content neutrality is meant to force the state to allow persons to participate in the formation of public opinion, no matter what they intend to say. The doctrine advances the goal of democratic legitimation by ensuring that public opinion will remain open to the subjective apprehension of all, even of the idiosyncratic and eccentric. Fools and savants are equally entitled to address the public.

What we characterize as expert knowledge, by contrast, is not to be determined by a popular head count. Technical beliefs do not become reliable merely because they are widely shared. As Thomas Kuhn has observed, “One of the strongest, if still unwritten, rules of scientific life is the prohibition of appeals to heads of state or to the populace at large in matters scientific.”\textsuperscript{113} We regard scientific beliefs as reliable because they are

\begin{footnotesize}
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\item \textsuperscript{111} \textsc{John Stuart Mill, On Liberty} 118, 119, 129-30 (The Lawbook Exch., Ltd. 2002) (1859).
\item \textsuperscript{112} \textit{Id.} at ??????.
\item \textsuperscript{113} \textsc{Thomas Kuhn, The Structure of Scientific Revolutions} 168 (2d ed. 1970). Consider in this regard the editorial that \textit{Scientific American} published on April Fool’s day 2005, \textit{Okay We Give Up}:
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There’s no easy way to admit this. For years, helpful letter writers told us to stick to science. They pointed out that science and politics don’t mix. They said we should be more
subject to disciplinary standards of verifiability, reproducibility, falsifiability, and so on.\textsuperscript{114} The First Amendment prohibits the state from enforcing these standards within public discourse. If these standards are to be enforced, therefore, it must be within some venue apart from public discourse, in which the egalitarian principle of democratic legitimation is subordinated to the purpose of producing reliable knowledge. From the perspective of such a venue, First Amendment doctrine seems deliberately designed to maintain public opinion as \textit{opinion} by prohibiting the practices that produce the reliability associated with disciplinary knowledge.

An important qualification to this conclusion concerns factual truth. “Freedom of opinion,” Hannah Arendt writes, “is a farce unless factual information is guaranteed and balanced in our presentation of such issues as creationism, missile defense and global warming. We resisted their advice and pretended not to be stung by the accusations that the magazine should be renamed Unscientific American, or Scientific Unamerican, or even Unscientific Unamerican. But spring is in the air, and all of nature is turning over a new leaf, so there’s no better time to say: you were right, and we were wrong.

In retrospect, this magazine’s coverage of so-called evolution has been hideously one-sided. For decades, we published articles in every issue that endorsed the ideas of Charles Darwin and his cronies. . . .

Good journalism values balance above all else. We owe it to our readers to present everybody’s ideas equally and not to ignore or discredit theories simply because they lack scientifically credible arguments or facts. Nor should we succumb to the easy mistake of thinking that scientists understand their fields better than, say, U.S. senators or best-selling novelists do. Indeed, if politicians or special-interest groups say things that seem untrue or misleading, our duty as journalists is to quote them without comment or contradiction. To do otherwise would be elitist and therefore wrong. . . .

Get ready for a new \textit{Scientific American}. No more discussions of how science should inform policy. If the government commits blindly to building an anti-ICBM defense system that can’t work as promised, that will waste tens of billions of taxpayers’ dollars and imperil national security, you won’t hear about it from us. If studies suggest that the administration’s antipollution measures would actually increase the dangerous particulates that people breathe during the next two decades, that’s not our concern. No more discussions of how policies affect science either—so what if the budget for the National Science Foundation is slashed? This magazine will be dedicated purely to science, fair and balanced science, and not just the science that scientists say is science. And it will start on April Fools’ Day.


\textsuperscript{114} See Craig Calhoun, \textit{The Promise of Public Sociology}, 56 BRITISH J. OF SOCIOLOGY 355, 356-57 (2005) (“Partial autonomy is the condition for transcending the mere play of opinions and clash of powers. A scientific field that did not achieve some capacity for autonomous judgment, that was merely heteronomously controlled by others would not merely lack authority, but lack credibility.”).
the facts themselves are not in dispute. . . . [F]actual truth informs political thought.”

Entrenched First Amendment doctrine affirms that “there is no constitutional value in false statements of fact.”

Thus even as courts hold that “under the First Amendment there is no such thing as a false idea,” they also permit the state to sanction the publication of false facts, even within public discourse.

Government control over factual truth is in tension with the value of democratic legitimation. Citizens who seek to participate in public discourse, and who are penalized because they disagree with official versions of factual truth, are excluded from the possibility of influencing public opinion.

Although we might postulate a world in

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115 H. ARENDT, BETWEEN PAST AND FUTURE 238 (1968).


117 Gertz, 418 U.S. at 339.

118 No one has analyzed this tension more deeply than Hannah Arendt, who writes that “from the viewpoint of politics, truth has a despotic character,” because truth demands acknowledgment regardless of popular debate, whereas “debate constitutes the very essence of political life.”

The modes of thought and communication that deal with truth, if seen from the political perspective, are necessarily domineering; they don’t take into account other people’s opinions, and taking these into account is the hallmark of all strictly political thinking.

Political thinking is representative. I form an opinion by considering a given issue from different viewpoints, by making present to my mind the standpoints of those who are absent; that is, I represent them. . . . The more people’s standpoints I have present in my mind while I am pondering a given issue, and the better I can imagine how I would feel and think if I were in their place, the stronger will be my capacity for representative thinking and the more valid my final conclusions, my opinion.

ARENDT, supra note 115 at 241. “Truth,” Arendt writes, “carries within itself an element of coercion.” Id. at 239.

[H]istorically the conflict between truth and politics arise out of two diametrically opposed ways of life—the life of the philosopher . . . and the way of life of the citizen. To the citizens’ ever-changing opinions about human affairs, which themselves were in a state of constant flux, the philosopher opposed the truth about those things which in their nature were everlasting and from which, therefore, principles could be derived to stabilize human affairs. Hence the opposite to truth was mere opinion, which was equated with illusion, and it was this degrading of opinion that gave the conflict its political poignancy; for opinion, and not truth, belongs among the indispensable prerequisites of all power. “All governments rest on opinion,” James Madison said, and not even the most autocratic ruler or tyrant could ever rise to power, let alone keep it, with the support of those who are like-minded. By the same token, every claim in the sphere of human affairs to an absolute truth, whose validity needs no support from the side of opinion, strikes at the
which reasonable persons do not disagree about factual truth, we all know that as a practical matter this is not the case. Intense and consequential disputes about factual questions abound. Insofar as the state intervenes definitively to settle these disputes, it alienates persons from participation in public discourse.

First Amendment jurisprudence tends to negotiate this tension through doctrines like that of “actual malice”119 or “fault,”120 which prohibit the state from punishing citizens for mere factual error. These doctrines prevent the state from punishing citizens participating in public discourse simply because they have made a factual mistake. The state can punish such citizens only if it also shows that they have communicated with some guilty state of mind, like the deliberate intent to mislead or negligence. Doctrines requiring this special form of mens rea are designed to create a “breathing space” that immunizes participants in public discourse from the fear that they might be punished for innocent factual error.121

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root of all politics and all governments.

Id. at 232-33. Arendt allows us to see that First Amendment protections guarantee the specifically political character of public opinion. To the extent that law enforces claims of truth, it suppresses “political thinking” by excluding from political participation those who embrace a different truth than the state.


121 See, e.g., New York Times, 376 U.S. at 271:

That erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the “breathing space” that they “need * * * to survive,” was also recognized by the Court of Appeals for the District of Columbia Circuit in Sweeney v. Patterson, 128 F.2d 457, 458 (1942), cert. denied, 317 U.S. 678. Judge Edgerton spoke for a unanimous court which affirmed the dismissal of a Congressman's libel suit based upon a newspaper article charging him with anti-Semitism in opposing a judicial appointment. He said:

Cases which impose liability for erroneous reports of the political conduct of officials reflect the obsolete doctrine that the governed must not criticize their governors. * * * The interest of the public here outweighs the interest of appellant or any other individual. The protection of the public requires not merely discussion, but information. Political
In matters of expert knowledge, courts use additional techniques to maintain the openness of public discourse. Entrenched First Amendment doctrine holds that although in public discourse the state may penalize false assertions of fact, it may not sanction false assertions of opinion. Courts construe this distinction in a manner that errs “on the side of nonactionability.”122 Statements “that describe present or past conditions capable of being known through sense impressions”123 are classified as factual, whereas statements in which a speaker “is expressing a subjective view, an interpretation, a theory, conjecture, or surmise”124 tend to be classified as protected opinion.

Because courts view “scientific truth is elusive” and believe that “scientific controversies must be settled by the methods of science rather than by the methods of litigation,”125 they characteristically regarded expert judgments as nonactionable ideas. “More papers, more discussion, better data, and more satisfactory models—not larger awards of damages—mark the path toward superior understanding of the world around conduct and views which some respectable people approve, and others condemn, are constantly imputed to Congressmen. Errors of fact, particularly in regard to a man's mental states and processes, are inevitable. * * * Whatever is added to the field of libel is taken from the field of free debate.

The basic insight is that the “First Amendment requires that we protect some falsehood in order to protect speech that matters.” Gertz, 418 U.S. at 341.


Courts self-consciously “foster a public forum for the robust debate that identifies scientific truths.” The upshot is that within public discourse courts are reluctant to use law to enforce the disciplinary standards that define expert knowledge. Even about matters that are squarely within the competence of recognized disciplines, there are no preconditions or qualifications for participation in the formation of public opinion.

“In the world of opinion,” Michael Walzer writes, “truth is indeed another opinion.” The value of democratic legitimation leads First Amendment doctrine to construct public discourse as a world of public opinion because it prevents the state from maintaining the standards of reliability that we expect from expert knowledge. The

126 Id. “Judges,” it is said, “are not well equipped to resolve academic controversies.” Dilworth v. Dudley, 75 F.3d 307, 310 (7th Cir. 1996). See Oxycal Laboratories, Inc. v. Jeffers, 909 F.Supp. 719, 724 (S.D. Cal. 1995) (“The Court cannot inquire into the validity of . . . scientific theories, nor should it.”).


Scientists continuously call into question and test hypotheses and theories; this questioning advances knowledge. . . . If advancement in medical scientific knowledge is essential to society, ”inquiries into these problems, speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible." . . .

In making the threshold determination of whether a medical science article is reasonably capable of defamatory meaning in light of surrounding circumstances, we believe a court should weigh the need to protect intellectual reputation against society's great need to permit an unfettered discussion of medical science hypotheses. Certainly statements are not immune from the control of defamation law merely because they appear in medical science articles. However, in the area of medical science research, criticism of the creative research ideas of other medical scientists should not be restrained by fear of a defamation claim in the event the criticism itself also ultimately fails for lack of merit. We believe calling the medical science research article here defamatory would serve to unduly restrict the free flow of ideas essential to medical science discourse.


creation of reliable disciplinary knowledge must accordingly be relegated to institutions that are not controlled by the constitutional value of democratic legitimation.

This division of labor has been theorized by Allen Buchanan, who argues for the necessity of “key liberal institutions” capable of authorizing “a comparatively large role for merit in the social identification of reliable sources of belief (epistemic authorities), where ‘merit’ means the possession of objective qualifications rationally related to the functions of particular social roles and positions.” Buchanan notes that “among the most important social institutions for the production of true beliefs are (1) the social division of labor and (2) the social identification of experts that is, epistemic authorities, individuals or groups to whom others defer as reliable sources of true beliefs.” The “unrestrained epistemic egalitarianism” imposed by the First Amendment on public discourse is incompatible with “the division of epistemic labor” necessary for the production of expert knowledge.

There are good reasons to support liberal institutions of the kind described by Buchanan. No less a democrat than John Dewey has recognized that “opinions and beliefs concerning the public presuppose effective and organized inquiry” and that “genuine public policy cannot be generated unless it be informed by knowledge, and this knowledge does not exist except when there is systematic, thorough, and well-equipped

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130 *Id.* at 103.

131 *Id.* at 118.
search and record.” Expert knowledge is prerequisite for intelligent self-governance. Recall in this context the grim regime of Trofim D. Lysenko, who prohibited Soviet biologists from investigating genetics on the ground that Marxism required all forms of behavior to be explained by environmental influences. Lysenko’s efforts to impose political control over the epistemological structure of Soviet science inflicted longstanding damage on the development of Soviet biology. On the other side of the spectrum, we have in recent years witnessed an assault on expert knowledge by members of the Bush Administration acting in the belief that their conservative political mandate authorized them to reject the “judicious study of discernible reality” and instead ideologically to create “our own reality.”

132 JOHN DEWEY, THE PUBLIC AND ITS PROBLEMS 177-79 (1927). “Unless there are methods . . . what passes as public opinion will be ‘opinion’ in its derogatory sense rather than truly public, no matter how widespread the opinion is.” Id. at 177.

133 See E.W. Caspari & R.E. Marshak, The Rise and Fall of Lysenko, 149 SCI. 275, 275 (1965) (noting that “[n]ot only does the decline in the fortunes of Lysenko reflect the continuing improvement in the scientific climate in the U.S.S.R. . . . , but his career is an object lesson on the harm which results from an attempt to impose an external dogmatism on science”); see also S.M. Gershenson, The Grim Heritage of Lysenkoism: Four Personal Accounts: IV. Difficult Years in Soviet Genetics, 65 Q. REV. BIOLOGY 447, 447 (1990); Howard Simons, Russian Genetics and Chickens, 73 SCI. NEWSL. 298, 298 (1958).

134 Ron Suskind, Without a Doubt, NEW YORK TIMES MAGAZINE, October 17, 2004, at 51 (quoting one senior adviser to Bush to the effect that “When we act, we create our own reality. And while you’re studying that reality—judiciously, as you will—we’ll act again, creating other new realities, which you can study too . . . We’re history’s actors . . . and you, all of you, will be left to just study what we do.”). On the potentially dire consequences of acting in this way, see, e.g., Juliet Eilperin, Climate Findings Were Distorted, Probe Finds; Appointees in NASA Press Office Blamed, THE WASHINGTON POST, June 3, 2008, at A-02 (“An investigation by the NASA inspector general found that political appointees in the space agency’s public affairs office worked to control and distort public accounts of its researchers’ findings about climate change for at least two years”); John Johnson Jr., Bush Appointee Steps Down after Post at NASA, THE LOS ANGELES TIMES, FEBRUARY 9, 2006, at A-16 (NASA public affairs official George C. Deutsch accused of exerting political pressure on agency scientists, “ordering that the word ‘theory’ be added after every mention of the big bang, which proposes that the universe began with a gigantic explosion. . . . Deutsch wrote that the big bang was ‘not proven fact; it is opinion.’”); Lawrence K. Altman, Panel Finds No Connection Between Cancer and Abortion, THE NEW YORK TIMES, March 7, 2003, at A-22 (“A scientific panel appointed by the director of the National Cancer Institute has concluded that there is no evidence that having an abortion increases the risk of breast cancer later in life, a suggestion raised earlier on the agency's Web site. Critics have contended that the Bush administration revised its fact sheets on the connection between induced abortions and breast cancer to satisfy conservative constituents, a charge that administration officials have rejected.”).
Reliable expert knowledge is necessary not only for intelligent self-governance, but also for the very value of democratic legitimation. As the eminent French political theorist Claude Lefort has argued, democratic states are distinguishable from totalitarian regimes because in the latter “a condensation takes place between the sphere of power, the sphere of law and the sphere of knowledge. Knowledge of the ultimate goals of society and of the norms which regulate social practices becomes the property of power, and at the same time power itself claims to be the organ of discourse which articulates the real as such.”\textsuperscript{135} A state that controls our knowledge controls our minds.\textsuperscript{136} A state that can freely govern the production of disciplinary knowledge can set the terms of its own legitimacy. It can undermine the capacity of citizens to form autonomous and critical opinions. It can make a mockery of the obligation of a democratic government to be responsive to the views of its citizens.

There are thus good reasons to ensure that the production of disciplinary knowledge remain at least partially independent from state control. It is one thing to identify a social need, however, and it is quite another to identify a set of constitutional principles that serve to address that need. My question in this Chapter is whether we can discern distinct First Amendment doctrines designed to protect the social practices that produce and distribute disciplinary knowledge. These principles would serve a constitutional value that I shall call “democratic competence.” Democratic competence refers to the cognitive empowerment of persons within public discourse, which in part

\textsuperscript{135} CLAUDE LEFORT, DEMOCRACY AND POLITICAL THEORY 15 (David Macey Trans. 1988).

\textsuperscript{136} The insight is a common one. See, e.g., George Orwell, 3 The Collected Essays, Journalism, and Letters of George Orwell: As I Please, 1943-1945 (Sonia Orwell and Ian Angus eds. 2000), at 87-89 (“The really frightening thing about totalitarianism is not that it commits ‘atrocities’ but that it attacks the concept of objective truth; it claims to control the past as well as the future.”).
depends on their access to disciplinary knowledge. Cognitive empowerment is necessary both for intelligent self-governance and for the value of democratic legitimation.

To theorize the value of democratic competence is to face the appearance of a 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 itself. Democratic competence is thus both incompatible with democratic legitimation and required by it. This is an awkward conclusion that requires us to think hard about how democratic competence can be reconciled with democratic legitimation.

It is plain that within public discourse the value of democratic legitimation enjoys a lexical priority. Democratic identity is forged within public discourse, and nothing is more fundamental for democracy. But there are many forms of communication that lie outside public discourse and that are not governed by its constitutional requirements. Judicial doctrine that serves the distinct value of democratic competence is likely to be most identifiable in these spheres of non-public discourse. In this Chapter I explore whether in such spheres we can recognize judicial decisions that require the state to respect, and perhaps even to maintain, the value of democratic competence.

One relevant line of precedent concerns contemporary commercial speech doctrine, which vigorously protects the dissemination of factual information outside of public discourse. Oddly enough, commercial speech doctrine is best explained as resting on the constitutional value of democratic competence. There are also a series of lower court decisions that serve this same value by protecting the distribution of disciplinary
knowledge outside of public discourse. These decisions are rare and fragmentary, but they are nevertheless intuitively robust. They yield the unexpected conclusion that our First Amendment has been interpreted to protect the authoritative disciplinary practices by which expert knowledge is produced from unchecked political control.

I.

Democracy subordinates government to public opinion. It follows that an educated and informed public opinion will more intelligently and effectively supervise the government. Bentham noticed early on that “[i]n an assembly elected by the people, and renewed from time to time, publicity is absolutely necessary to enable the electors to act from knowledge.” 137 The entire theory of the First Amendment espoused by Meiklejohn developed from this basic point. He argued that freedom of speech was necessary in order to ensure “the voting of wise decisions. . . . The welfare of the community requires that those who decide issues shall understand them. . . . Just so far as, at any point, the citizens who are to decide an issue are denied acquaintance with information or opinion, or doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning for the general good. It is that mutilation of the thinking process of the community against which the First Amendment of the Constitution is directed.”138

This approach to the First Amendment does not take as its primary purpose the establishment of democratic legitimacy, but rather the facilitation of democratic


138 MEIKLEJOHN, supra note 33, at 26-27. Compare John Dewey: “There can be no public without full publicity in respect to all consequences which concern it. Whatever obstructs and restricts publicity, limits and distorts thinking on social affairs.” DEWEY, supra note 132, at 167,
competence. It understands the function of communication to be the education of the electorate, and hence, as Meiklejohn clearly saw, takes as its “point of ultimate interest . . . not the words of the speakers, but the minds of the hearers.” Meiklejohn was explicit that the First Amendment “does not require that, on every occasion, every citizen shall take part in public debate. Nor can it even give assurance that everyone shall have opportunity to do so. . . . What is essential is not that everyone shall speak, but that everything worth saying shall be said.”

We know that Meiklejohn’s approach does not describe First Amendment as it applies to public discourse, because entrenched First Amendment doctrine does indeed guarantee the right of every citizen to take part in public debate. To exclude any person from public debate is to deny that person of the possibility of using speech to make public opinion responsive to his views and hence of striving for the possibility of democratic legitimation. Within public discourse the value of democratic legitimation trumps that of democratic competence.

It does not follow, however, that democratic competence drops out of the picture altogether. In those rare cases when the right of a speaker to communicate and the right of an audience to receive information are not perfectly symmetrical, the Court has not hesitated to defend the independent right of an audience to receive information willingly.

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139 Id. at 26.

140 Id.

141 There are exceptional cases when a speaker is deemed, in the eyes of the First Amendment, to be merely “a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.” Red Lion Broad. Co. v. FCC, 395 U.S. 367, 389 (1969). In such circumstances the First Amendment has been interpreted to permit the regulation of speakers’ rights along explicitly Meiklejohnian lines. For a full discussion, see Robert Post, Subsidized Speech, 106 Yale L. J. 151 (1996).
communicated.\textsuperscript{142} And there have even been cases in which the Court has held that “the right to attend criminal trials is implicit in the guarantees of the First Amendment,” because “the explicit, guaranteed rights to speak and to publish concerning what takes place at a trial would lose much meaning if access to observe the trial could . . . be foreclosed arbitrarily.”\textsuperscript{143}

Outside of the context of court proceedings that have been traditionally open to the public, however, the Court has been exceedingly reluctant to interpret the First Amendment to require government disclosure of information to enhance democratic competence. It has regarded the job of deciding which government information to disclose and which to withhold as “clearly a legislative task which the Constitution has left to the political processes.”\textsuperscript{144}

There is no discernible basis for a constitutional duty to disclose, or for standards governing disclosure of or access to information. Because the Constitution affords no guidelines, absent statutory standards, hundreds of judges would, under the Court of Appeals' approach, be at large to fashion ad hoc standards, in individual cases, according to their own ideas of what seems “desirable” or expedient . . . .

“There is no constitutional right to have access to particular government information, or to require openness from the bureaucracy . . . . The public's interest in knowing about its government is protected by the guarantee of a Free Press, but the protection is indirect. The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act.”\textsuperscript{145}

\textsuperscript{142}See, e.g., Lamont v. Postmaster General of the U.S., 381 U.S. 301 (1965); Kleindienst v. Mandel, 408 U.S. 753, 762 (1972).


\textsuperscript{144} Houchins v. KQED, 438 U.S. 1, 12 (1978).

This allocation of authority to fulfill a potential constitutional value is best interpreted as expressing a deep-seated—although analytically obscure\textsuperscript{146}—distinction between affirmative and negative rights.\textsuperscript{147} American courts are far more comfortable with decisions that prevent government from regulating individuals than they are with decisions that require government to act at the behest of individuals. If we are to find robust evidence of judicial enforcement of the value of democratic competence, therefore, it will most likely concern negative rights that prohibit the government from preventing individuals from disseminating information or knowledge, even when the communicative acts involved in this dissemination do not occur within public discourse.

There is in fact well developed judicial doctrine to this effect. I am referring to commercial speech doctrine. In 1970s the United States Supreme Court repudiated its longstanding conclusion that “the Constitution imposes no . . . restraint on government” regulation of “purely commercial advertising.”\textsuperscript{148} Commercial advertising had been unprotected because it was outside public discourse. Everyone understood that seeking to sell toothpaste was a different kind of communicative action than attempting to influence the content of public opinion. But in 1976 the Court held that First Amendment coverage should extend to commercial advertising because:

\begin{footnotesize}
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\item There seems to be general agreement that democratic competence is a constitutional value. Thus the Court has referred to the Freedom of Information Act (“FOIA”), which enables persons to learn about official government records, as “a structural necessity in a real democracy.” Nat’l Archives & Records Admin. V. Favish, 541 U.S. 157, 172 (2004). In one of his first acts as President, Obama reaffirmed his commitment to FOIA because “democracy requires accountability, and accountability requires transparency. . . . In our democracy, the Freedom of Information Act, which encourages accountability through transparency, is the most prominent expression of a profound national commitment to ensuring an open Government.” See http://www.whitehouse.gov/the_press_office/FreedomofInformationAct/.
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Advertising . . . is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. . . . And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decision-making in a democracy, we could not say that the free flow of information does not serve that goal.\(^{149}\)

The passage seems to offer two distinct reasons for extending First Amendment coverage to commercial advertising. The first is that advertising is necessary for the efficient functioning of commercial markets. This account invests market efficiency with independent constitutional value; it claims that advertising ought to receive constitutional protection because market efficiency is a constitutional objective.

This reasoning is entirely unconvincing. The First Amendment serves the value of democratic legitimation by protecting the communicative processes through which the public decides whether to pursue the goal of market efficiency or whether to subordinate that goal to other objectives like redistribution or paternalism. To attribute independent constitutional value to market efficiency is to restrict legislative choices in the name, as Oliver Wendell Holmes famously said in his dissent in *Lochner*, of the particular socio-economic vision advanced in “Mr. Herbert Spencer’s *Social Statics*.”\(^{150}\) Any such interpretation of the First Amendment would contradict the fundamental value of democratic legitimation.

\(^{149}\) *Virginia State Board of Pharmacy*, 425 U.S. at 765.

The second reason advanced by the Court for extending First Amendment coverage to commercial advertising suffers from no similar fatal liability. The Court states that commercial advertising should be covered by the First Amendment because it is relevant to “public decision-making in a democracy.” Advertising conveys information pertinent “to the formation of intelligent opinions as to how” the American economy should be regulated. “Advertising, though entirely commercial, may often carry information of import to significant issues of the day,”\textsuperscript{151} and for this reason merits constitutional protection in order to safeguard “the essential role that the free flow of information plays in a democratic society.”\textsuperscript{152}

To assert that First Amendment coverage should extend to commercial advertising because it conveys factual knowledge that cognitively empowers public opinion is to affirm that speech can be protected because it serves the value of democratic competence. It is not surprising, therefore, that the shape of commercial speech doctrine follows roughly Meiklejohnian lines, as indeed does the First Amendment doctrine applied to state regulations seeking to control the circulation of non-advertising commercial information outside of public discourse.\textsuperscript{153} The Court has explained that


\textsuperscript{153} See, e.g Innovative Database Systems v. Morales, 990 F.2d 217 (5th Cir. 1993); United Reporting Publishing Corp. v. California Highway Patrol, 146 F.3d 1133, 1137 (9th Cir. 1998), rev’d on other grounds, 528 U.S. 32 (1999); Individual Reference Services Group, Inc. v. FTC, 145 F.Supp.2d 6, 41 (D.D.C. 2001), aff’d, Trans Union LLC v. F.T.C., 295 F.3d 42, (D.C. Cir. 2002); cf. IMS Health Inc., v. Ayotte, --- F.3d --- (1st Cir. 2008); Pharm. Care Mgmt. Ass’n v. Rowe, 429 F.3d 294, 309 (1st Cir. 2005); New York State Rest. Ass’n v. New York City Bd. Of Health, 2008 U.S. Dist. LEXIS 31451; Robert Post,
“[t]he First Amendment's concern for commercial speech is based on the informational function of advertising,”\textsuperscript{154} and therefore that “the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides.”\textsuperscript{155} “A commercial advertisement is constitutionally protected not so much because it pertains to the seller's business as because it furthers the societal interest in the ‘free flow of commercial information.’”\textsuperscript{156}

Important doctrinal consequences follow from these constitutional premises. Because the constitutional value of commercial speech lies in the information that it carries, the state can engage in content discrimination to regulate and suppress the circulation of “misleading” information.\textsuperscript{157} The contrast to permissible regulations of public discourse is stark.\textsuperscript{158} It would be forbidden content discrimination for the state to


\textsuperscript{157} “In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.” Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980).


The Government may regulate commercial speech in ways that it may not regulate other speech. Specifically, the government may regulate commercial speech to ensure that it is not false, deceptive or misleading.

Commercial speech that is found to be false or misleading is afforded no First Amendment Protection at all. This is because a listener “has little interest in receiving false, misleading, or deceptive commercial information.” However, if speech is found to be non-commercial speech, even falsehoods contained in the speech will be given protection. The
suppress “misleading” speech within public discourse. Such suppression would be inconsistent with the equal right of every speaker to participate in the formation of public opinion. But “‘the First Amendment . . . does not prohibit the State from insuring that the stream of commercial information flow[s] cleanly as well as freely.’” Government regularly scrutinizes the content of commercial speech\(^\text{160}\) so as to insure that such speech serves the value of democratic competence by conveying reliable, rather than misleading, information.

Commercial speakers are commonly compelled to speak in ways that enhance the information they circulate.\(^\text{161}\) To augment the efficiency and transparency of markets, the state routinely requires commercial speakers to divulge information about the products they sell. If applied to public discourse, such compulsion would transgress the subjective experience of speakers who seek to shape public opinion to reflect to their own personal perspectives about matters they regard as important. For this reason the First Amendment prohibits the state from compelling political commentators to be accurate

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Supreme Court has made clear that Constitutional protection does not turn upon “the truth ... of the ideas and beliefs which are offered.”...

The erroneous statement is inevitable in free debate, and ... it must be protected if the freedoms of expression are to have the “breathing space” that they “need ... to survive.”

*New York Times Co. v. Sullivan,* 376 U.S. 254, 271-72 (1964) (citations omitted). Therefore, if false or misleading speech is non-commercial it is afforded full First Amendment protection, and if it is commercial, it falls entirely outside the protection of the First Amendment, and would be subject to prior restraints. . . .


\(^\text{160}\) There is “a vast regulatory apparatus in both the federal government and the states . . . to control . . . potentially misleading or deceptive speech.” Kathleen M. Sullivan, *Cheap Spirits, Cigarettes, and Free Speech: The Implications of 44 Liquormart,* 1996 SUP. CT. REV. 123, 153.

\(^\text{161}\) Post, *Compelled Commercial Speech, supra* note 152, at 584-85. In the context of public discourse, the Court has specifically held that compelled disclosure of facts should be subject to strict scrutiny. *See* Riley v. Nat’l Fed’n of the Blind, 487 U.S. 781 (1988).
and balanced. The First Amendment serves the value of democratic legitimacy by preventing the state from compelling speakers in public discourse to disclose neutral factual information the state may regard as relevant, because such compulsion would alienate speakers from their own communication. But because commercial speech is not protected in order to promote the value of democratic legitimation, but instead to serve the constitutional value of democratic competence, compelled disclosures of commercial speech are constitutionally permissible. They augment the flow of accurate information to the public and so advance the relevant underlying constitutional value.

We can learn important lessons from commercial speech doctrine. It demonstrates that entrenched First Amendment doctrine does indeed focus on the flow of information to the public sphere so as to enhance the quality of public decision-making. Such doctrine is oriented to the rights of an audience to receive information rather than to the rights of speakers to communicate. The doctrine thus displays properties that are inconsistent with the First Amendment rules that govern public discourse. Commercial speech doctrine authorizes the state to engage in content discrimination to suppress


163 Thus the Court has held that that state cannot even force participants in public discourse to disclose their identity; it has affirmed a constitutional right to publish anonymously. See McIntyre v. Ohio Elections Com’n., 514 U.S. 334 (1995).

164 In United States v. United Foods, Inc., 533 U.S. 405 (2001), the Court held that the state was constitutionally prohibited from compelling commercial speakers to communicate messages of opinion and endorsement, as distinct from neutral factual information. Because the commercial context of these messages was outside public discourse, United Foods necessary rests on the recognition of an autonomy interest in speakers that does not derive from democratic legitimation. The recognition of such an interest is most unusual in the Court’s jurisprudence, and it was not well thought-through in United Foods. See Post, Compelled Commercial Speech, supra note 152. The Court has been confused and inconsistent in determining the kind of legal protection that this kind of autonomy interest should receive. See United States v. United Foods, Inc., 533 U.S. 405, 410 (2001); Glickman v. Wileman Brothers & Elliott, 521 U.S. 457, 491-92 (1997) (Souter, J., dissenting); Johanns v. Livestock Marketing Ass’n, 125 S. Ct. 2055, 2074 n.10 (2005) (Souter, J., dissenting).
misleading information, and it empowers the state to compel the disclosure of
information. The structure of commercial speech doctrine is in these respects antithetical
to First Amendment protections for democratic legitimation.

II.

Commercial speech doctrine concerns the circulation of information, which is to
say the dissemination of facts. It is triggered by the communication of this information
outside of public discourse. Because the doctrine is designed to protect the value of
democratic competence, it permits government to regulate speech in ways that are
forbidden to the state within the context of public discourse. Commercial speech doctrine
is based upon the premise that a better informed public opinion will produce more
competent democratic decision-making.

Constitutional protections for democratic competence in the context of expert
knowledge involve issues that are not raised in the context of the simple circulation of
information. It must be determined, for example, whether democratic competence
requires protections for the production of expert knowledge as well as for its distribution.
In Chapter 3 I shall consider how the doctrine of academic freedom has developed in
order to create constitutional safeguards for the creation of new disciplinary knowledge.
In the remainder of this chapter, I shall consider the question of how existing First
Amendment doctrine might protect the circulation of expert knowledge outside of public
discourse.

Of course if an expert chooses to participate in public discourse by speaking about
matters within her expertise, her speech receives the full protections of the First
Amendment. Expert knowledge is typically classified as fully protected opinion, which
is why the speech of the dentist I described in Chapter One who addressed the general public about the dangers of dental amalgams was properly immunized by the First Amendment. Constitutional protections for expert speech within public discourse preclude the state from holding such speech to ordinary standards of disciplinary competence. Biologists can with impunity write editorials in the *New York Times* that are such poor science that they would constitute grounds for denying tenure within a university. This means that members of the general public can rely on expert pronouncements within public discourse only at their peril.\(^{165}\) The value of democratic legitimation, which governs First Amendment doctrine within public discourse, protects the interests of speakers in participating rather than the interests of an audience in relying on the truth of speech. Knowledge, as we have said, consists of those forms of speech on which persons can reasonably plan to rely.

Within public discourse, therefore, the First Amendment precludes the state from enforcing the disciplinary methods that make disciplinary knowledge reliable. Readers of the *New York Times* must trust than expert editorialists are properly applying the methods that define their disciplinary expertise; they cannot depend upon the law to make it so. Claims of expertise within public discourse are in the end subject to political rather than legal accountability. In the public sphere the “traditional authority” that might otherwise attach to “expertise” is thus softened and rendered more open to “dialogic engagement.”\(^{166}\) Some, like Anthony Giddens, regard this as a cause for celebration.


\(^{166}\) ANTHONY GIDDENS, BEYOND LEFT AND RIGHT: THE FUTURE OF RADICAL POLITICS 128 (1994).
Matters are quite otherwise outside of the domain of public discourse, where law typically mandates the competence of experts. Doctors, dentists, lawyers or architects who offer unskilled advice to their clients face legal regulation, most commonly in the form of malpractice litigation. In such contexts law stands as a surety for the disciplinary truth of expert pronouncements. It guarantees that clients can plan to rely on expert professional judgment.

First Amendment coverage does not typically extend to malpractice litigation. A doctor who offers bad advice to a patient cannot defend a consequent tort suit on the ground that his opinion was an experiment, as all life is an experiment. A lawyer who serves up an incompetent legal opinion cannot defend a subsequent malpractice suit on the grounds of his individual autonomy or of the marketplace of ideas. The law will simply ask whether the opinion did or did not meet relevant professional standards of competence. If a patient relies to her detriment on the advice of a dentist who commits what the American Dental Association considers malpractice and advises the removal of silver fillings, the First Amendment will not serve as a defense.

This poses something of a puzzle. If First Amendment coverage extends to the circulation of commercial information outside of public discourse, why does it not also extend to the circulation of expert knowledge? One distinction that might immediately strike us is that commercial speech tends to be addressed to the general public in advertisements that are placed in newspapers or radio or other media that are widely distributed. The information contained in commercial speech thus tends to have an obvious impact on public opinion. The advice offered by an expert professional, by
contrast, is typically given only to a single person. It is not broadcast to the public
sphere, and so its potential effect on public opinion is far less apparent.

This distinction does seem to me decisive, because there is no reason why public
opinion might not be formed one conversation at a time. If a person learns through the
advice of their dentist that dental amalgams are dangerous, they might wish to support
legislation regulating the availability of such treatments. There are certainly groups who
are presently advocating for such reform.\textsuperscript{167} So long as knowledge is potentially relevant
to the formation public opinion, I do not see in principle why it should constitutionally
matter whether it is distributed to one person or to a thousand.

The difference between the commercial speech and expert knowledge seems to
me a matter of quality rather than quantity. Commercial speech doctrine covers
commercial advertisements are typically addressed to an audience that is mature,
independent, and free to accept or reject their blandishments. The doctrine presupposes
an equality between an advertiser and its audience.\textsuperscript{168} This equality is specifically and
emphatically absent in the case of professional clientele. In law and in social practice
professional clients are entitled to rely on the truth and accuracy of a professional
judgment because they are presumed to be dependent upon that judgment and unable
themselves to judge its quality. Malpractice law gives teeth to this entitlement.

\textsuperscript{167} See, e.g., Consumers for Dental Choice, “Working to Abolish Mercury Dental Fillings,” available at
http://www.toxicteeth.org/about_Us.cfm; Mercury Policy Project, available at
http://www.mercurypolicy.org/.

\textsuperscript{168} Indeed the Court has refused to apply the protections of commercial speech where the conditions of such
equality are lacking. See, e.g., Edenfield v. Fane, 507 U.S. 761, 774-75 (1993); Shapero v. Ky. Bar Ass'n,
This entitlement, however, suggests that First Amendment coverage might arise in contexts that are distinct from malpractice. There are times when legislation compels expert professionals to communicate false judgment to their clients,\textsuperscript{169} or, conversely, when legislation prohibits expert professionals from communicating to their clients relevant knowledge. The very dependence of clients on the competence of professional advice suggests that clients expect to be apprised of relevant knowledge. This expectation is reciprocal. Expert professionals can not properly do their work unless they can freely communicate pertinent knowledge. If court seek to protect the value of democratic competence in the communication of expert knowledge, as they do in the communication of commercial information, we should expect to see First Amendment coverage triggered when governments seek by legislation to interrupt the mutually desired and anticipated exchange of expert knowledge.\textsuperscript{170}

This is indeed the case. Consider § 536(a)(4) of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”),\textsuperscript{171} which provides that

(a) A debt relief agency shall not . . .

\textsuperscript{169} As is the case in a recent South Dakota statute that seeks to discourage abortions by requiring doctors falsely to inform their patients about the likelihood of post abortion syndrome. The statute is discussed in detail in Post, \textit{supra} note 69.

\textsuperscript{170} \textit{See, e.g.}, Conant v. Walters, 309 F.3d 629 (9th Cir. 2002), in which the Ninth Circuit reached just this conclusion in the context of the federal government seeking to prevent doctors from “recommending” (as distinct from “prescribing”) medical marijuana. The court believed that First Amendment scrutiny was triggered because “An integral component of the practice of medicine is the communication between a doctor and a patient. Physicians must be able to speak frankly and openly to patients.” \textit{Id.} at 636. Even though federal law prohibited the prescription and use of marijuana, a patient might “upon receiving the recommendation could petition the government to change the law.” \textit{Id.} at 634.

(4) advise an assisted person or prospective assisted person to incur more debt in contemplation of such person filing a case under this title or to pay an attorney or bankruptcy petition preparer fee or charge for services performed as part of preparing for or representing a debtor in a case under this title.

Some courts, concerned to avoid “grave constitutional questions,” have interpreted the term “debt relief agency” not to apply to bankruptcy lawyers.\(^\text{172}\) But several other courts have concluded that attorneys are under the plain terms of the statute indeed subject to the prohibition of BAPCPA.\(^\text{173}\) If the statute does apply to attorneys, it prevents them from communicating truthful and accurate knowledge about the best course of legal action available to their clients.

The state has a reason for prohibiting the communication of this knowledge. The statute seeks to discourage “prospective bankrupts from accumulating debt in a particular fashion, thus deterring debtors from ‘gaming’ the means test by improperly enlarging pre-existing debt, thereby diluting the assets of the bankruptcy estate otherwise available to creditors.”\(^\text{174}\) But despite the statute’s rationale there may be perfectly rational and honorable reasons for incurring debt in contemplation of bankruptcy. For example, a “legitimate incursion . . . of debt could be the refinance of a mortgage that allows a debtor to pay off the mortgage and other debts, such as credit card debt, in a chapter 13 where

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\(^{174}\) Milavetz, 355 B.R. at 765; 541 F.3d at 793-94. “Moreover, it may be in the client’s best interest to incur additional debt to purchase a reliable automobile before filing for bankruptcy, so that the debtor will have dependable transportation to travel to and from work, which will likely be necessary to maintain the debtor’s payments in bankruptcy. Incurring these types of additional secured debt, which would often survive or could be reaffirmed by the debtor, may be in the debtor’s best interest without harming the creditors.” Id. at 794.
failure to refinance may only allow the debtor sufficient funds to pay off one or the other but not both.”175 BAPCPA thus “prohibits attorneys, in certain instances, from giving the best and most complete advice to their clients.”176

Because the strength of Congress’s reasons for prohibiting the exchange of truthful information between attorneys and clients is weak when applied to cases in which accurate legal advice serves legal and honorable purposes, every court to have considered the question has found § 526(a)(4) unconstitutional under the First Amendment.177 What is more striking for our purposes is that virtually every court, whether or not it has struck down § 526(a)(4), has concluded that First Amendment coverage extends to a statute that prohibits an attorney from disclosing true knowledge to a client in the privacy of a consultation room. This fact should be somewhat surprising in light of the fact that ordinary malpractice suits routinely sanction attorney speech (and non-speech) without any First Amendment coverage whatsoever.178

175 Olsen, 350 B.R. at 916.


177 Milavetz, 541 F.3d at 793; Olsen, 350 B.R. at 916; Zelotes, 363 B.R. at 665-67; Connecticut Bar Ass’n, 394 B.R. at 284. The only possible exception might be Hersh, 2008 WL 5255905 (5th Cir. Dec. 18, 2008), which agreed that “if interpreted literally” BAPCPA “may apply to speech that is protected by the First Amendment.” Id. at *8. The Fifth Circuit chose to apply “the doctrine of constitutional avoidance” to construe the statute to prevent only a debt relief agency’s advice to a debtor to incur debt in contemplation of bankruptcy when doing so would be an abuse of the bankruptcy system,” id. at *9, which the court interpreted as prohibiting attorney advice to commit “a fraudulent act.” Id. See id. at *11. The Court explicitly held that as so interpreted BAPCPA “has no application to good faith advice to engage in conduct that is consistent with a debtor’s interest and does not abuse or improperly manipulate the bankruptcy system.” Id. at *13.


[Appellants' conduct allegedly consisted of: (1) a failure to serve timely discovery responses . . . ; (2) a failure to comply with a court order to serve responses without objections; and (3) a failure to comply with a second court order. Thus, it appears that the alleged attorney malpractice did not consist of any act in furtherance of anyone's right of petition or free speech, but appellants' negligent failure to do so on behalf of their clients. . . . Appellants have failed to demonstrate that
Apparently BAPCPA triggers constitutional intuitions that differ from those aroused by ordinary malpractice suits. Stripped to its essentials, BAPCPA seeks to prohibit the communication of truthful knowledge in the context of a professional-client relationship. It is the job of attorneys to advise clients about how best to navigate the legal options available to them. It is the expectation of clients that they will receive this advice. Nothing in the Constitution would prevent the federal government from prohibiting persons from incurring debt in contemplation of bankruptcy, in which case it would be unobjectionable that attorneys be penalized for counseling illegal action. But BAPCPA does not make this action illegal. As matters stand, therefore, § 526(a)(4) blocks lawyers from communicating knowledge about possible legal decisions, knowledge that clients properly expect to receive. Precisely the vulnerability and dependence of clients makes this prohibition all the more damaging, since it interrupts a circulation of knowledge that all affected parties expect to transpire.

There are a number of legal commentators who now embrace what is called an “institutional approach to the First Amendment.” 179 The basic idea is that the First Amendment ought to protect the “defined social relationships” that make up existing institutions, such as the profession of law. 180 Applied literally, this approach suggests such conduct amounts to constitutionally protected speech or petition, and we reject their attempt to turn garden-variety attorney malpractice into a constitutional right.


that the First Amendment should immunize from political regulation all extant professional practices. I regard this conclusion as implausible. It is often necessary or desirable to exert political control over professional practices, and it would difficult to justify a constitutional doctrine that would turn all efforts to regulate professional practices into constitutional questions. And in fact some political efforts to regulate professional practices, like BAPCPA, seem to trigger First Amendment coverage, but other efforts, like malpractice litigation, do not.

If all state regulations of professional speech were to trigger constitutional scrutiny, regulations that survive constitutional review would presumably do so because the strength of the government interests the regulations serve would outweigh their potentially negative effects on pertinent First Amendment values. This balance cannot be assessed without specifying the First Amendment values at issue. It follows that the regulation of professional speech always raises constitutional questions that can not be reduced to existing professional practices. In the case of BAPCPA, for example, it is not enough to say that the statute prevents attorneys from speaking as they would otherwise customarily speak. If we are to assess the statute’s constitutionality, we must specify the precise ways in which BAPCPA potentially compromises specific First Amendment values.

This value cannot inhere in the autonomy of attorneys, since attorney speech is pervasively regulated without First Amendment coverage. Indeed, an attorney who failed to advise her client about a potentially legal and useful enlargement of debt in
contemplation of bankruptcy might well be liable in malpractice, and she would not be able to invoke the First Amendment in defending against such a suit. Nor can the constitutional value at stake in BAPCPA inhere in the marketplace of ideas, for attorneys are held strictly to account for the truth and accuracy of their opinions. And it is plainly not the case that the constitutional value potentially compromised by BAPCPA is that it regulates attorney speech “as such,” for attorney speech is commonly regulated without triggering First Amendment coverage.

I can see no alternative but to conclude that BAPCPA triggers First Amendment coverage because its purpose and effect is to block the communication of knowledge that might ultimately inform public opinion and thereby enhance the competency of democratic decision-making. As with commercial speech, it does not matter that this knowledge is communicated outside public discourse. The constitutionality of BAPCPA must be assessed by weighing its effect on the First Amendment value of democratic competence against whatever countervailing interests the statute may serve in seeking to regulate attorney communications. The ultimate determination of constitutionality will depend upon such factors as the extent to which the flow of expert knowledge to the

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181 See Hughes v. Malone, 247 S.E.2d 107, 111 (Ga. Ct. App. 1978) (holding that “[a]lthough an attorney is not an insurer of the results sought to be obtained by such representation, when, after undertaking to accomplish a specific result, he then wilfully or negligently fails to apply commonly known and accepted legal principles and procedures through ignorance of basic, well-established and unambiguous principles of law or through a failure to act reasonably to protect his client's interests, then he has breached his duty toward the client”); see also Dixon Ticonderoga Co. v. Estate of O'Connor, 248 F.3d 151, 172 (3d Cir. 2001) (finding a “duty [on the part of an attorney] to take any steps necessary for the proper handling of the matter, to communicate about the matter with [the client], and to advise [the client] about the legal and strategic issues involved in the representation”). The Third Circuit also found a “specific duty to research, monitor, and advise his or her clients about [key legal issues].” Id. Indeed, attorneys are required to make a good faith effort to research unfamiliar legal issues, so as to provide their clients with accurate legal advice. See Clary v. Lite Machines Corp., 850 N.E.2d 423, 423 (Ind. Ct. App. 2006) (noting that “all of the states... that have addressed the issue of legal research (or lack thereof) as malpractice have found that an attorney's duty to his client encompasses knowledge of the law and an obligation to perform diligent research and provide informed judgments”); Prudential Insurance Co v. Dewey, Ballantine, Bushby, Palmer and Wood, 80 N.Y.2d 377 (N.Y. 1992) (attorneys liable for a false opinion letter).
public sphere has been impaired, the significance of the state’s interests in enacting BAPCPA, the capacity of the state to advance these interests without impairing the value of democratic competence, and so forth.

This analysis explains why malpractice litigation does not trigger First Amendment coverage. Malpractice litigation regulates professional speech in order to maintain pertinent professional criteria of knowledge. The question in a malpractice suit is whether a professional has met professional standards in the communication of knowledge. Malpractice litigation is thus a vehicle through which law incorporates and enforces disciplinary standards.\footnote{See, e.g., Bailey v. Tucker, 621 A.2d 108, 115 (Pa. 1993) (finding that “an attorney who agrees for a fee to represent a client is by implication agreeing to provide that client with professional services consistent with those expected of the profession at large”); Gorski v. Smith, 812 A.2d 683, 700 (Pa. Super. Ct. 2002) (noting that “[t]he rule is well established that an attorney is liable to his client for negligence in rendering professional services . . . [and] that liability will be imposed for want of such skill, prudence and diligence as lawyers of ordinary skill and capacity commonly possess and exercise”); Young v. Bridwell, 437 P.2d 686, 690 (Utah 1968) (holding that an attorney is “required to possess the ordinary legal knowledge and skill common to members of his profession . . . [or] the ordinary standards of professional competence”).} Just as the regulation of “misleading” commercial speech is exempt from First Amendment review,\footnote{See note 157 supra.} so the regulation of professional malpractice is beyond First Amendment coverage.\footnote{Whether commercial speech is misleading is itself a First Amendment question, whereas whether professional speech constitutes malpractice is not a First Amendment question. This is an important difference that is not theorized in contemporary doctrine. One explanation might be that courts feel confident in determining the truth or falsity of commercial information, but they feel rather less confident in determining the trustworthiness of professional advice and judgment. They are therefore inclined to constitutionalize the latter question only in the most extreme situations, such as those created by statutes like BAPCPA.}

Legislation like BAPCPA, in contrast to malpractice litigation, seeks politically to override relevant professional standards of knowledge. Legislation like BAPCPA can compromise the constitutional value of democratic competence when it requires professional experts to communicate knowledge that is professionally regarded as false,
or when it prohibits professional experts from communicating knowledge that is professionally regarded as true. In such circumstances First Amendment coverage is triggered because the value of democratic competence is at risk. Democratic competence is not at risk in ordinary malpractice litigation, because such litigation seeks to uphold disciplinary standards in the communication of expert knowledge.

III.

If First Amendment coverage is triggered by statutes that force professionals to communicate untruths to their clients or that prevent professionals from communicating relevant disciplinary knowledge, the scope of First Amendment coverage will depend upon judicial assessment of the relevant state of expert knowledge. This has subtle but highly significant constitutional implications.

Consider a dentist who wishes to advise her patients to remove their dental amalgams and who is prohibited from doing so by local regulation. Imagine that the dentist charges that the regulation violates the First Amendment. The question of whether this regulation blocks the transmission of knowledge and hence triggers First Amendment coverage depends upon whether dental amalgams actually endanger the health of patients. The only way that a court can answer this question is by reference to the disciplinary knowledge of medical experts. It follows that First Amendment coverage of this regulation will depend upon the application of the very disciplinary practices that the regulation seeks to control. A court will determine whether the regulation ought to

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meet First Amendment standards by applying the authoritative methods and truths of medical science.

This suggests that in the context of disciplinary knowledge courts can protect the value of democratic competence only if they incorporate and apply the disciplinary methods and truths by which expert knowledge is defined. This is the kernel of truth at the core of the new institutional approach to the First Amendment. Disciplinary practices of this kind are neither democratic nor egalitarian. They are not to be determined by popular vote. Although courts cannot use these disciplinary practices to regulate public discourse, they can and must use them to assess the constitutionality of legislative efforts to regulate the circulation of expert knowledge outside of public discourse. In the context of BAPCPA, for example, courts subjected the statute to First Amendment scrutiny because they believed that the statute prevented lawyers from informing clients that they had the right to incur debt in contemplation of bankruptcy, and they believed that clients had this right by applying the disciplinary practices that establish legal knowledge.

The implications of this analysis are startling. The constitutionality of state attempts to regulate the communication of expert knowledge must depend upon judicial application of the very disciplinary practices that define expert knowledge. In the context of disciplinary knowledge, therefore, judicial efforts to protect democratic competence will require courts to ascribe independent constitutional value to the disciplinary practices by which expert knowledge is created. Political efforts to control such practices will trigger First Amendment scrutiny.
Consider what would happen if a state were to pass legislation prohibiting astrologers from offering fee-for-service advice to clients. The state would defend its legislation on the ground that such advice was consumer fraud. Ordinary consumer

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186 See, e.g., Williams v. Jenkins, 83 S.E.2d 614, 615 (Ga. 1954) (upholding a conviction under “a city ordinance which, in substance, provides that it shall be unlawful to practice within the city the calling or profession of fortune-teller or astrologer.”).

187 See, e.g., In re Bartha, 134 Cal. Rptr. 39 (Ct. App. 1976), in which a court upheld a Los Angeles ordinance providing:

No person shall advertise by sign, circular, handbill or in any newspaper, periodical or magazine, or other publication or publications, or by any other means, to tell fortunes, to find or restore lost or stolen property, to locate oil wells, gold or silver or other ore or metal or natural product; to restore lost love or friendship or affection, to unite or procure lovers, husbands, wives, lost relatives or friends, for or without pay, by means of occult or psychic powers, faculties or forces, clairvoyance, psychology, psychometry, spirits, mediumship, seership, prophecy, astrology, palmistry, necromancy, or other craft, science, cards, talismans, charms, potions, magnetism or magnetized articles or substances, oriental mysteries or magic of any kind or nature, or numerology, or to engage in or carry on any business the advertisement of which is prohibited by this section.

Id. at 40. The defendant in the case argued that the statute violated rights to freedom of expression, because it would “prohibit legitimate businesses, such as weather forecasting.” Id. at 43. The Court rejected the argument on the ground that “It is within the police power of the municipality and province of the legislative body to determine that the business of fortunetelling is inherently deceptive and that its regulation or prohibition is required in order to protect the gullible, superstitious, and unwary.” Id.

In David v. Ohio, 160 N.E. 473 (Ohio 1928), the Ohio Supreme Court upheld a statute providing that “whoever, not having been legally licensed so to do, represents himself to be an astrologer, fortuneteller, clairvoyant or palmister, shall be fined not less than twenty-five dollars nor more than one hundred dollars or imprisoned in jail not less than thirty days nor more than three months, or both.” Id. at 474. The Court offered a history of legislative efforts to regulate fortune-telling and astrology on the grounds “that fortune-telling and similar crafts are fraudulent practices, and therefore not within the protection afforded to a lawful business.” Id. at 475.

Compare to these cases the decision of the federal district court in Rushman v. Milwaukee, 959 F.Supp. 1040 (E.D. Wisc. 1997), in which, at the behest of an astrologer, the court invoked the First Amendment to strike down a Milwaukee ordinance outlawing “astrology, fortune telling, and numerous other pseudo-sciences.” Id. at 1041. The court stated:

The line between beliefs (or opinions) and facts is blurry at best. What seems like a provable fact to one person is only an opinion to another; paleontologists like Stephen J. Gould think that evolution is a scientific fact, while creationists think it is only a false belief. Throughout history, many societies have decided that the government should arbitrate truth and falsehood, fact and opinion; their record is not comforting. Doubting the government's talent for or benefit from declaring what is true and what is not, the United States took a different approach; the First Amendment forbids the government from arbitrating truth and fiction. A person is free to write and sell books declaring the earth is flat or that one race is superior to another.

Although the First Amendment prohibits arbitrating fact and opinion, it allows the government to regulate economic transactions. Therefore, the government can outlaw fraud-false statements made to convince a person to buy an item or invest money. . . .
fraud is prohibited without triggering First Amendment coverage because anti-fraud legislation is understood to suppress falsehood rather than truth. Judicial efforts to protect democratic competence require First Amendment scrutiny only when the circulation of actual knowledge is interrupted.

Although astrology and fortune telling may be rejected by science, naive and outdated, they are beliefs; the marketplace of ideas—not the United States, not Wisconsin, and not the City of Milwaukee—decides their value. Banning those practices is not commercial regulation but censorship. If the City is attacking those who use pseudo-sciences to defraud others, the ordinance is overly broad. The City must focus on the fraud, not the subject-matter of the speech.

_id._ at 1041-42. As the court’s reference to the publication of flat-earth books makes clear, the district court understood the ordinance to prohibit the practice of astrology in public discourse, rather than merely to prohibit fraud between commercial actors. The Court’s opinion illustrates how First Amendment doctrine ensures that public discourse remain a realm of opinion rather than knowledge.


189 Consider _Turner v. Kansas City_, 191 S.W.2d 612 (Mo. 1946), in which the Court upheld the constitutionality of a city ordinance that provided:

> It shall be unlawful for any person for pay to tell or pretend to tell fortunes or reveal or attempt to reveal future events in the life of another or by means of occult or psychic powers, faculties or forces, clairvoyance, psychology, psychometry, spirit-mediumship, prophecy, astrology, palmistry, necromance, cards, talismans, charms, potions, magnetism or magnetized articles or substances, oriental mysteries or magic of any kind or nature, to undertake or pretend to find or restore lost or stolen money or property, to undertake or pretend to locate oil wells, gold or silver or other ore or metal or natural product, to undertake or pretend to restore lost love, friendship or affection, to undertake or pretend to unite, or reunite or to find lovers, husbands, wives, lost relatives or friends.

The plaintiff in the case conducted “a business ‘commonly known as fortune telling’ for pay,” _id._ at 860, and had sued to invalidate the ordinance. She argued that prohibiting “any person to ‘reveal or attempt to reveal future events in the life of another’” was “unreasonable” because it would “prevent engineers advising contractors how to achieve given construction results; a physician advising a patient how to improve his health; a lawyer applying the law to facts related by his client; a scientist advising a manufacturer how to produce a synthetic product; a banker advising a customer he will extend credit; an inventor predicting he will enable people to overcome space at unheard of heights and speeds, and a radio genius predicting he will carry the human voice from city to city, state to state, and nation to nation.” _Id._ at 617. The Court would have none of it:

> Plaintiff is not engaged in any of the endeavors last above specified. Usually a litigant champions his own rights; not the rights of others. The ordinance, read as a whole, evidences a purpose to protect against deception and fraud through the suppression of the acts therein enumerated. In so far as the matters mentioned by plaintiff are the result of legitimate business endeavors, they are without the pale of the ordinance provisions. Plaintiff's position twists the language and warps the manifest purpose of the ordinance. It is without merit. . . . It will be soon enough to rule individual instances under the ordinance as they occur and are presented.
If we ask how a court might determine whether astrological advice communicates falsehood or knowledge, we must identify the body of expertise to which a court would appeal in order to answer this question. It is all but certain that a court would not decide whether astrological advice communicates knowledge by consulting the disciplinary standards of astrology, in the way that courts considering the constitutionality BAPCPA consulted the disciplinary standards of the legal profession. A court would instead consult what it regards as reliable forms of scientific expertise.\(^\text{190}\)

In our society the professional practices of law produce the kind of knowledge that advances the value of democratic competence, but the professional practices of astrology do not produce such knowledge. It is reasonable to plan to rely on legal advice, but it is foolish to plan to rely on astrological opinion. That is why the scope of First Amendment coverage depends upon the application of the disciplinary practices of law, but not upon the disciplinary practices of astrology. Courts will defend the constitutional value of democratic competence only when they believe that legislation potentially compromises the transmission of actual knowledge.

Judicial protections for democratic competence thus inevitably entangle constitutional adjudication in the sociological construction of knowledge. In this regard

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\(^{190}\) See, e.g., New Jersey v. Kennilworth, 54 A. 244 (N.J. 1903) (upholding a 1799 statute providing that "all persons who shall use or pretend to use or have skill in physiognomy, palmistry or like crafty science, * * * shall be deemed and adjudged to be disorderly persons," with the proviso that "[i]f ever there shall be discovered any rational evidence that palmistry is a real science, its use for honest purposes will pass beyond the range of this statute; but, in the present case, the use of palmistry was plainly within the prohibition."); Griffith v. Dep’t of Motor Vehicles, 598 P.2d 1377, 1382-83 (Wash. Ct. App. 1979) (upholding a ban on “drugless healers” performing “natural childbirths” by comparing the adequate training obtained by obstetricians to the inadequate training obtained by “drugless healers” and declaring the ban a “legitimate regulatory expression where the legislature seeks to prevent the inadequately trained and uneducated from practicing in areas in which competency is lacking”).
the case of astrology is relatively simple. But consider a more complex example.
Suppose a state were to prohibit persons from offering fee-for-service advice about
homeopathic medicine. Whether the discipline of homeopathic medicine produces
knowledge is a highly controverted question. In deciding whether or not to apply First
Amendment standards to the prohibition, therefore, a court would have to determine
whether the discipline of homeopathic medicine itself produces constitutionally valuable
knowledge. If a court decides that the discipline of homeopathic medicine does produce
such knowledge, First Amendment coverage would be triggered. But if a court decides
that the discipline of homeopathic medicine does not produce constitutionally valuable
knowledge, it would have to ask whether the ban was justified by applying the expertise
of “established” scientific disciplines. That expertise might lead a court to conclude that
homeopathic medicine was indeed fraudulent, so that a ban was justified, or it might
lead a court to conclude that homeopathic medicine was so effective that the ban could
not be constitutionally justified. In neither case would a court have incorporated the
disciplinary practices of homeopathic medicine into its constitutional reasoning.

191 Homeopathic medicine remains controversial within the mainstream medical community. In reviewing
the literature on the overall effectiveness of homeopathic medicine, the American Medical Association
(AMA) concluded, “While most homeopathic remedies are not known to have harmed anyone (probably
because of the extreme dilutions involved), the efficacy of most homeopathic remedies has not been
available at http://www.idi.mdh.se/kurser/ct3340/ht07/assignment-2-extra-

192 Consider in this regard In re Guess, 393 S.E.2d 833 (N.C. 1990), in which the Supreme Court of North
Carolina upheld the revocation of a doctor’s license to practice medicine for “unprofessional conduct”
because he had practiced homeopathic medicine. The court held that whether “new and beneficial medical
practices” would be permitted must be determined “by ‘acceptable and prevailing’ methods of medical
research, experimentation, testing, and approval.” Id. at 839. By contrast the dissent proclaimed that “this
is not a case of a quack beguiling the public with snake oil and drums, but a dedicated physician seeking to
find new ways to relieve human suffering.” Id. at 841 (Frye, J., dissenting).
Other difficult constitutional questions will no doubt arise. Consider, for example, what a court might do if the federal government were to enact legislation requiring accountants to report profit and loss to their clients by using only predetermined federal formulae for the determination of profit. Such legislation would subject the professional advice of accountants to political criteria. First Amendment coverage would be triggered if the mandated federal formulae either prevented accountants from distributing knowledge or required accountants to distribute false judgments. How would a court determine whether either was the case?

If a court regarded the practices of accountants as constitutive of financial knowledge, it might take the mere overriding of the disciplinary practices of professional accountants to trigger a serious First Amendment question, just like courts considering the constitutionality of BAPCPA took the mere overriding of the legal knowledge of lawyers to raise a prima facie First Amendment question. But a different question would be presented if courts instead understood accountants to communicate representations of knowledge the validity of which were to be determined by the practices of another discipline, say that of economics. In that case a court seeking to

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194 See, e.g., V. E. Odmark, Some Aspects of the Evolution of Accounting Functions, 29 THE ACCOUNTING REVIEW 634, 634-38 (No. 4) (Oct., 1954) (“As the interpreter of business results, the accountant must utilize all methods and techniques available to him in discharging his obligations to management and to society. A corporate investor must be furnished with information which will permit him to form an opinion as to the profitability of operations of the enterprise. ‘Fool’s’ profits resulting from monetary as well as losses from monetary deflation must be clearly indicated.”).

195 R.K. MAUTZ & HUSSEIN A. A SHARAF, THE PHILOSOPHY OF AUDITING 14 (1961) ("Accounting includes the collection, classification, summarization, and communication of financial data; it involves the measurement and communication of business events and conditions as they affect and represent a given enterprise or other entity. The task of accounting is to reduce a tremendous mass of detailed information to manageable and understandable portions.").
determine whether the proposed federal formulae should trigger First Amendment scrutiny would rely heavily on the knowledge practices of economists. These practices would have acquired independent constitutional value over and against attempted political control.

We can summarize this analysis by noting that there are indeed strong suggestions in First Amendment doctrine that courts are willing to protect the value of democratic competence. We can detect the influence of democratic competence whenever courts protect the circulation of information outside of public discourse in the context of commercial speech, or whenever they protect the circulation of expert knowledge outside of public discourse in contexts like BAPCPA. When courts protect the circulation of expert knowledge, they also extend constitutional recognition to the disciplinary truths and methods that create such knowledge. In effect this immunizes such truths and methods from unrestricted political manipulation, which ensures that they will remain a source of knowledge that is independent from unchecked state control.

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196 Our discussion of these contexts suggests that there may be no generic constitutional account of what others have called “professional speech,” which is to say “speech . . . uttered in the course of professional practice,” as distinct from “speech . . . uttered by a professional.” Halberstam, supra note 180, at 843. Professional speech will trigger First Amendment coverage to the extent that it threatens to compromise First Amendment values. Sometimes, as in malpractice actions, state regulation of professional speech will not trigger First Amendment coverage at all, and sometimes, as in the case of BAPCPA, such coverage will be triggered by the value of democratic competence. In other cases constitutional review may be provoked by constitutional values different from democratic competence. If a state were to bar clergy from informing parishioners that transubstantiation occurs during holy communion, for example, we would regard the threat to the free formation of religious belief to be of such great significance as to trigger constitutional review under the Free Exercise and Establishment Clauses. This is true even though we would consider the question of transubstantiation to involve matters of opinion rather than of knowledge. And sometimes constitutional coverage might be triggered because state regulation adversely affects institutions that have their own constitutional value. For example in Legal Services Corp. v. Velazquez, 531 U.S. 533 (2001), the Court struck down federal legislation that effectively prevented legal services attorneys from arguing to courts that “either a state or federal statute by its terms or in its application is violative of the United States Constitution.” Id. at 537. The Court held that the legislation “prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power” and hence “threatens severe impairment of the judicial function.” Id. at 545-46. The shape and form of constitutional protections extended to professional speech will depend upon the precise constitutional values at stake.
The resulting doctrinal structure safeguards the independence of the key liberal institutions that produce expert knowledge. Yet this structure does not compromise democratic legitimation by imposing disciplinary methods and truths onto public discourse. It sustains democratic legitimation by maintaining a separation between “the sphere of knowledge” and “the sphere of power.” It prevents the state from obliterating independent sources of expert knowledge. By ascribing constitutional significance to the independent disciplinary practices that define expert knowledge, it empowers democratic citizens to demand accountability from their government. Whether any particular disciplinary practice will acquire constitutional significance of this kind depends upon the constitutional sociology of knowledge.
CHAPTER THREE:

ACADEMIC FREEDOM AND
THE PRODUCTION OF DISCIPLINARY KNOWLEDGE

The value of democratic competence is undermined whenever the state acts to interrupt the communication of disciplinary knowledge that might inform the creation of public opinion. BAPCPA is legislation of this kind. The question I shall address in this chapter is whether we existing First Amendment doctrine seeks to safeguard the value of democratic competence by extending First Amendment coverage also to state actions that inhibit the production of expert knowledge.

There is an obvious candidate for such doctrine. First Amendment jurisprudence has protected academic freedom for over fifty years. Academic freedom safeguards the creation of disciplinary knowledge within universities. The Supreme Court has proclaimed that academic freedom is a “special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.”197 At present, however, the doctrine of academic freedom stands in a state of shocking disarray and incoherence. One eminent commentator has remarked that “there has been no adequate analysis of what academic freedom the Constitution protects or of why it protects it. Lacking definition or guiding principle, the doctrine floats in the law, picking up decisions as a hull does barnacles.”198

The problem is in part that the Court has failed to understand the connection between academic freedom and the value of democratic competence. It has instead


sought to protect academic freedom in order to safeguard the marketplace of ideas. It has announced that “The classroom is peculiarly the ‘marketplace of ideas.’ The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, (rather) than through any kind of authoritative selection.”199

If the purpose of constitutional protections for academic freedom are best understood as designed to serve the value of democratic competence, the ideal of the marketplace of ideas can only produce confusion. Universities are archetypal institutions for the creation of disciplinary knowledge, and such knowledge is produced by discriminating between good and bad ideas. It follows that academic freedom can not usefully be conceptualized as protecting a marketplace of ideas. In this chapter I shall argue that constitutional safeguards for academic freedom are best understood in light of the value of democratic competence and that this value can helpfully illuminate many of the conundrums that presently afflict judicial efforts to apply the First Amendment doctrine of academic freedom.

I.

Today we are likely to find unexceptionable, perhaps even banal, Karl Jasper’s claim that “the university is the corporate realization of man’s basic determination to know. Its most immediate aim is to discover what there is to be known and what

199 Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967). See Rosenberger v. Rectors and Visitors of the University of Virginia, 515 U.S. 819, 831 (1995); Healy v. James, 408 U.S. 169, 180 (1972); Dambrot v. Cent. Mich. Univ., 55 F.3d 1177, 1188 (6th Cir. 1995) (“[t]he purpose of the free-speech clause ... is to protect the market in ideas, broadly understood as the public expression of ideas, narratives, concepts, imagery, opinions-scientific, political, or aesthetic-to an audience whom the speaker seeks to inform, edify, or entertain.”); Thomas Gibbs Gee, ‘Enemies or Allies? ’ In Defense of Judges, 66 TEX. L. REV. 1617, 1617 (1988) (referring to “academic freedom and to the all but indistinguishable first amendment right of free speech.”).
becomes of us through knowledge.”\textsuperscript{200} Most every modern university includes in its mission statement the purpose of striving “to create knowledge.”\textsuperscript{201} The modern university is defined in terms of “the preservation, advancement, and dissemination of knowledge.”\textsuperscript{202} Universities are institutions that paradigmatically develop and apply the disciplinary practices that define modern forms of expert knowledge.

This concept of the university did not always exist in the United States. During the major part of the 19\textsuperscript{th} century, the objective of most American colleges was to instruct young men in received truths, both spiritual and material. It is only when American scholars became infected with the German ideal of \textit{Wissenschaft}, with the idea of systematizing and expanding knowledge, that American universities began to transform their mission. It is a moment of great historical significance when Daniel Coit Gilman could in 1885 address the assembled officers, students and friends of the John Hopkins University to assert, with confidence and at length, that the “functions” of the university “may be stated as the acquisition, conservation, refinement and distribution of knowledge. . . . It is the business of a university to advance knowledge.”\textsuperscript{203}

\begin{itemize}
\item \textsuperscript{203} D.C. GILMAN, THE BENEFITS WHICH SOCIETY DERIVES FROM UNIVERSITIES: AN ADDRESS 16 (1885).
\end{itemize}
The concept of academic freedom emerged in the United States at roughly the same time, and in response to, this transformation of the purpose of higher education.\textsuperscript{204} Writing during this moment of transition, John Dewey could with characteristic lucidity observe the emerging relationship between the new concept of the university and the new idea of academic freedom:

In discussing the questions summed up in the phrase academic freedom, it is necessary to make a distinction between the university proper and those teaching bodies, called by whatever name, whose primary business is to inculcate a fixed set of ideas and facts. The former aims to discover and communicate truth and to make its recipients better judges of truth and more effective in applying it to the affairs of life. The latter have as their aim the perpetuation of a certain way of looking at things current among a given body of persons. Their purpose is to disciple rather than to discipline. . . . The problem of freedom of inquiry and instruction clearly assumes different forms in these two types of institutions.\textsuperscript{205}

The basic idea of academic freedom is simple and unanswerable: knowledge cannot be advanced unless existing claims to knowledge can with freedom be criticized and analyzed.\textsuperscript{206} Arthur Lovejoy elegantly summarized the point in 1930, noting that the university’s

\textsuperscript{204} Arthur Twining Hadley, the President of Yale, noted in 1903 that “In Germany the increase of academic freedom is to a surprisingly large measure the result of public interest in modern science and public demand for competent and trained technical experts.” Arthur Twining Hadley, \textit{Academic Freedom in Theory and Practice}, 91 \textit{Atlantic Monthly} 334, 341 (1903).

\textsuperscript{205} John Dewey, \textit{Academic Freedom}, 23 \textit{Educational Rev.} 1, 1 (1902). “The university function is the truth-function. At one time it may be more concerned with the tradition or transmission of truth, and at another time with its discovery. Both functions are necessary, and neither can ever be entirely absent.” \textit{Id.} at 3. For an example of how academic freedom would appear under the more traditional concept of education, see Kay v. Board of Higher Education of City of New York, 18 N.Y.S. 2d 821, 829 (N.Y. Sup. Ct 1940) (Upholding dismissal of Bertrand Russell from the College of the City New York on the grounds that “this court . . . will not tolerate academic freedom being used as a cloak to promote the popularization in the minds of adolescents of acts forbidden by the penal Law. . . . Academic freedom does not mean academic license. It is the freedom to do good and not to teach evil. . . . Academic freedom cannot teach that . . . adultery is attractive and good for the community. There are norms and criteria of truth which have been recognized by the founding fathers.”).

\textsuperscript{206} This is not the only justification for academic freedom, for universities have other purposes besides the advancement of knowledge. They also have the pedagogical purpose of inculcating in their students a mature independence of mind. Academic freedom is also necessary to serve this purpose. See Robert Post,
function of seeking new truths will sometimes mean . . . the undermining of widely or generally accepted beliefs. It is rendered impossible if the work of the investigator is shackled by the requirement that his conclusions shall never seriously deviate either from generally accepted beliefs or from those accepted by the persons, private or official, through whom society provides the means for the maintenance of universities. . . . Academic freedom is, then, a prerequisite condition to the proper prosecution, in an organized and adequately endowed manner, of scientific inquiry . . . .

The first and arguably greatest articulation of the logic and structure of academic freedom in America was the 1915 Declaration of Principles on Academic Freedom and Academic Tenure, published by the newly formed American Association of University Professors (AAUP). The concept of academic freedom advanced in the Declaration was later incorporated in the canonical 1940 Statement of Principles on Academic Freedom and Tenure, which has been endorsed by over 180 educational organizations and which has become “the general norm of academic practice in the United States.”

The 1915 Declaration defined academic freedom as consisting of three components:

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209 AAUP Documents, supra note 208, at 3-11.

210 William W. Van Alstyne, Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review, 53 Law & Cont. Prob. 79, 79 (Summer 1990). See Browzin v. Catholic Univ. of Am., 527 F.2d 843, 848 & n. 8 (D.C. Cir. 1975) (“[The 1940 Statement] represent[s] widely shared norms within the academic community, having achieved acceptance by organizations which represent teachers as well as organizations which represent college administrators and governing boards.”).
Academic freedom . . . comprises three elements: freedom of inquiry and research; freedom of teaching within the university or college; and freedom of extramural utterance and action.\(^{211}\)

Twenty-five years later these same three components of academic freedom were reaffirmed in the 1940 Statement.\(^{212}\) In this Chapter I shall analyze the constitutional dimensions of the first of these three components, which the 1940 Statement characterizes as freedom of research and publication.\(^{213}\) Insofar as the constitutional value of democratic competence concerns the creation and dissemination of disciplinary knowledge, it is about this first component of academic freedom.

It is apparent that the 1915 Declaration does not analogize academic freedom of research and publication to the marketplace of ideas. The Declaration does indeed argue that because a purpose of higher education is “to promote inquiry and advance the sum of

\(^{211}\) 1915 Declaration, supra note 208, at 292.

\(^{212}\) 1940 Statement, supra note 208, at 3-4:

Academic Freedom

1. Teachers are entitled to full freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties; but research for pecuniary return should be based upon an understanding with the authorities of the institution.

2. Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject.[ Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment.

3. College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.

\(^{213}\) See supra note 212.
human knowledge,” universities must award faculty with “complete and unlimited freedom to pursue inquiry and publish its results. Such freedom is the breath in the nostrils of all scientific activity.” But although the Declaration asserts that “the university teacher’s independence of thought and utterance” is required by the basic purpose of a university, the Declaration also takes pains to distinguish this independence of thought from a marketplace of ideas in which all ideas must be tolerated.

The Declaration explicitly repudiates the position “that academic freedom implies that individual teachers should be exempt from all restraints as to the matter or manner of their utterances, either within or without the university.” Academic freedom implies that the “liberty of the scholar within the university to set forth his conclusions, be they what they may, is conditioned by their being conclusions gained by a scholar’s method and held in a scholar’s spirit; that is to say, they must be the fruits of competent and patient and sincere inquiry.” The Declaration conceives academic freedom as the freedom to pursue the “scholar’s profession” according to the standards of that profession. It is only in this way that scholars can fulfill the university’s mission of creating new knowledge.

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214 Declaration, supra note 208, at 295.
215 Id.
216 Id. at 294.
217 Id. at 300.
219 Declaration, supra note 208, at 298.
In contrast to the marketplace of ideas, therefore, academic freedom protects scholarly speech only when it complies with “professional norms.”

It is for this reason that universities are free to evaluate scholarly speech based upon its content—to reward or to sanction scholarly speech based upon its professional quality.

Universities make these judgments whenever they hire professors, promote them, tenure them, or award them grants. Although the First Amendment would prohibit government from sanctioning the *New York Times* if it were inclined to editorialize that the moon is made of blue cheese, no astronomy department could survive if it were unable to deny tenure to a young scholar who was similarly convinced. Academic freedom thus depends upon a double recognition: that knowledge cannot be advanced “in the absence of free inquiry” and that “the right question to ask about a teacher is whether he is competent.”

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221 David M. Rabban, *Does Academic Freedom Limit Faculty Autonomy?* 66 Texas L. Rev. 1405, 1408-09 (1988). Lovejoy accurately caught the tension between individual freedom and professional obligations when he defined academic freedom as

> the freedom of the teacher or research worker in higher institutions of learning to investigate and discuss the problems of his science and to express his conclusions, whether through publication or in the instruction of students, without interference from political or ecclesiastical authority, or from the administrative officials of the institution in which he is employed, unless his methods are found by qualified bodies of his own profession to be clearly incompetent or contrary to professional ethics.


> Consider, for example, the ideal of academic freedom. The rights and duties of teachers and students are neither absolute nor self-justifying. They derive from our understanding of what teaching, learning, and scholarship require. . . . [The rights of academic freedom] are framed and limited by norms of scholarly achievement, professional ethics, and academic government.

222 "Academic freedom is not a doctrine to insulate a teacher from evaluation by the institution that employs him.” Carley v. Arizona Board of Regents, 737 P.2d 1099, 1103 (Aria. App. 1987).

Competence is defined by reference to scholarly or disciplinary standards. These standards can not be determined by reference to public opinion. “The definition of competence does not shift with every wind of prejudice, religious, political, racial, or economic.” In this sense academic freedom has always been conceived as a barrier to “the pressure in a democracy of a concentrated multitudinous public opinion. The great majority of the people in a given community may hold passionately to some dogma in religion, some economic doctrine, or some political or social opinion or practice, and may resent strongly the expression by a public teacher of religious, economic, political, or social views unlike those held by the majority.” Academic freedom insulates scholars

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224 Nicholas Murray Butler, the President of Columbia University who notoriously fired Columbia professors who opposed American entry into World War I, see Post, supra note 206, demonstrated his ignorance of the essence of academic freedom when he asserted that “a university teacher owes a decent respect to the opinions of mankind. Men who feel that their personal convictions require them to treat the mature opinion of the civilized world without respect or with active contempt may well be given an opportunity to do so from private station and without the added influence and prestige of a university’s name.” Nicholas Murray Butler, Academic Freedom, 47 EDUCATIONAL REV. 291, 292 (1914). For Butler, “the crux of the whole matter” was that those who enjoyed “academic freedom” were required to do so “as gentlemen.” Id. at 294. In Science the philosopher J.E. Creighton cut to the heart of the matter by quoting at length from an 1897 address of Cornell President Schurman: “If it is asserted that the business of the college or university is to teach that which the average man may believe, or that which is acceptable to the university, or that which the board of trustees may assert as truth, the answer must always be that such a course contravenes the principle on which the university was founded, and however true it may be that the majority must rule in the body politic, the motto of the university must be, one man with God’s truth is a majority.” Quoted in J.E. Creighton, Academic Freedom 37 SCIENCE 450, 450 (1921). Schurman went on to argue that this is because “the end of a university is truth and the promotion of truth. . . . We need for the advance of civilization the striking out of new ideas or the application of old ideas to new fields. Where are such ideas to be urged, if the business of the university is to teach what is acceptable to the community? All science would be impossible on this theory.” Id.

225 Hutchins, supra note 223, at 73. Kant saw this very clearly:

It is absolutely essential that the learned community at the university also contain a faculty that is independent of the government’s command with regard to its teachings; one that . . . is free to evaluate everything, and concerns itself with the interests of he sciences, that is, with truth: one in which reason is authorized to speak out publicly. For without a faculty of this kind, the truth would not come to light (and this would be to the government’s own detriment); but reason is by its nature free and admits of no command to hold something as true (no imperative “Believe” but only a free “I believe.”


226 Charles W. Eliot, Academic Freedom, 26 SCIENCE 1, 1 (July 5, 1907).
from the political pressure of public opinion so that they can pursue the disciplinary practices by which expert knowledge is created and certified.227 Academic freedom, as the Declaration precisely notes, upholds “not the absolute freedom of utterance of the individual scholar, but the absolute freedom of thought, of inquiry, of discussion and of teaching, of the academic profession.”228

This concept of academic freedom initially developed as a professional norm for the governance of institutions of higher education. It was not recognized in constitutional law during the first half of the 20th Century. In 1937, for example, a legal commentator could note that “academic freedom is not . . . a constitutional privilege, or even a legal term defined by a history of judicial usage and separately listed in the digests and Words and Phrases.”229 Academic freedom did not emerge as a constitutional concept until the

227 Hence the observation of the 1915 Declaration:

This brings us to the most serious difficulty of the problem; namely, the dangers connected with the existence in a democracy of an overwhelming and concentrated public opinion. The tendency of modern democracy is for men to think alive, to feel alike, and to speak alike. Any departure from the conventional standards is apt to be regarded with suspicion. Public opinion is at once the chief safeguard of a democracy, and the chief menace to the real liberty of an individual. It almost seems as if the danger of despotism cannot be wholly averted under any form of government. In a political autocracy there is no effective public opinion, and all are subject to tyranny of the ruler; in a democracy there is political freedom, but there is likely to be a tyranny of public opinion.

An inviolable refuge from such tyranny should be found in the university. It should be an intellectual experiment station, where new ideas may germinate and where their fruit, though still distasteful to the community as a whole, may be allowed to ripen until finally, perchance, it may become part of the accepted intellectual food of the nation or of the world.

Declaration, supra note 208, at 297.

228 Declaration, supra note 208, at 294. Hence the conclusion of Thomas Haskell: “Historically speaking, the heart and soul of academic freedom lie not in free speech but in professional autonomy and collegial self-governance. Academic freedom came into being as a defense of the disciplinary community (or, more exactly, the university conceived as an ensemble of such communities).” Thomas L. Haskell, Justifying the Rights of Academic Freedom in the Era of “Power/Knowledge,” in Louis Menand, ed., The Future of Academic Freedom 54 (Chicago: University of Chicago Press 1996).

1950s and McCarthyite efforts to remove subversives from the Nation’s universities.\textsuperscript{230} It is not until 1967 that we learned that academic freedom is a “special concern of the First Amendment.”\textsuperscript{231} The question I shall explore in this Chapter is exactly why academic freedom should be of concern to the First Amendment and how that concern ought doctrinally to be expressed.\textsuperscript{232}

\textbf{II.}

To speak of academic freedom as a First Amendment right is to presuppose that academic freedom serves a specifically constitutional value. Universities and the faculty who populate them are the primary sites in modern American society in which disciplinary knowledge is created and diffused in order to serve the public good. The creation and diffusion of disciplinary knowledge serve the First Amendment value of democratic competence. It is exactly this value that the Court invoked when it initially began to speak of academic freedom as a constitutional principle.

The first major Supreme Court decision to invoke the concept of academic freedom was \textit{Sweezy v. New Hampshire}.\textsuperscript{233} The case concerned a New Hampshire “loyalty program” designed “to eliminate ‘subversive persons’ among government personnel.”\textsuperscript{234} The state Attorney General sought to interrogate Paul Sweezy, a well-liked professor at the University of New Hampshire. The Supreme Court held that the state’s loyalty program violated the First Amendment.


\textsuperscript{231} Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967).

\textsuperscript{232} As Mark Yudof observed in 1987, “In my judgment, a persuasive constitutional argument for academic freedom as professorial autonomy has yet to emerge from the cases and scholarly works.” Mark G. Yudof, \textit{Three Faces of Academic Freedom}, 32 \textit{Loyola L. Rev.} 831, 838 (1987).

\textsuperscript{233} 354 U.S. 234 (1957).

\textsuperscript{234} 354 U.S. 234, 236 (1957).
known Marxist economist who had been a visiting lecturer at the University of New Hampshire. Sweezy answered all the Attorney General’s questions with the exception of inquiries regarding two subjects: “his lectures at the University of New Hampshire, and his knowledge of the Progressive Party and its adherents.”235 Sweezy’s support of Henry Wallace’s Progressive party involved his participation in public discourse, and no theory of academic freedom was necessary in order to understand that the Attorney General’s investigation had impinged “upon such highly sensitive areas as . . . freedom of political association.”236

But Sweezy’s classroom lectures on “the theory of dialectical materialism” or the inevitability of “Socialism” were quite another matter.237 These lectures formed no part of public discourse, because Sweezy’s relationship to the students in his classroom constituted a professional relationship, analogous to the relationship between a lawyer and her clients. Sweezy could properly be held accountable for the professional competence of his lectures.238 If the Attorney General’s attempted interrogation of Sweezy’s lectures triggered First Amendment coverage, it was not because Sweezy had the First Amendment right to influence public opinion as he saw fit. The classroom is not a location in which the value of democratic legitimation is at stake.

The plurality opinion of Chief Justice Warren was therefore forced to develop a distinct justification for extending First Amendment coverage to Sweezy’s lectures:

235 Id. at 248.

236 Id. at 245.

237 Id. at 244.

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.239

The passage is blurry, invoking both freedom of teaching and freedom of research. It is upon the latter that I wish to focus. In this regard Warren emphasizes the need for American “democracy” to avoid the stagnation that would occur were it to fail to make “new discoveries.” It conceives “scholarship” as a medium for these discoveries, especially “in the social sciences,” and it concludes that democratic competence in this regard must be protected by awarding teachers the freedom “to inquire, to study and to evaluate, to gain new maturity and understanding.”

In his influential concurring opinion, Justice Frankfurter was even more explicit:

Progress in the natural sciences is not remotely confined to findings made in the laboratory. Insights into the mysteries of nature are born of hypothesis and

239 Id. at 250. In the preceding paragraph Warren had carefully distinguished two distinct constitutional justifications for the two distinct subjects of the Attorney General’s investigation: “We believe that there unquestionably was an invasion of petitioner’s liberties in the areas of academic freedom and political expression--areas in which government should be extremely reticent to tread.” Id. In the subsequent paragraph, Warren developed the distinct theme of political liberty to engage in public discourse:

Equally manifest as a fundamental principle of a democratic society is political freedom of the individual. Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association. This right was enshrined in the First Amendment of the Bill of Rights. Exercise of these basic freedoms in America has traditionally been through the media of political associations. Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents. All political ideas cannot and should not be channeled into the programs of our two major parties. History has amply proved the virtue of political activity by minority, dissident groups, who innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted. Mere unorthodoxy or dissent from the prevailing mores is not to be condemned. The absence of such voices would be a symptom of grave illness in our society.

Id. at 250-51.
speculation. The more so is this true in the pursuit of understanding in the groping endeavors of what are called the social sciences, the concern of which is man and society. The problems that are the respective preoccupations of anthropology, economics, law, psychology, sociology and related areas of scholarship are merely departmentalized dealing, by way of manageable division of analysis, with interpenetrating aspects of holistic perplexities. For society's good--if understanding be an essential need of society--inquiries into these problems, speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible. Political power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and the people's well-being, except for reasons that are exigent and obviously compelling.240

Frankfurter quoted extensively from the statement of a conference of senior South African scholars in defense of open universities:

“A university is characterized by the spirit of free inquiry, its ideal being the ideal of Socrates--‘to follow the argument where it leads.’ This implies the right to examine, question, modify or reject traditional ideas and beliefs. Dogma and hypothesis are incompatible, and the concept of an immutable doctrine is repugnant to the spirit of a university. . . .

“Freedom to reason and freedom for disputation on the basis of observation and experiment are the necessary conditions for the advancement of scientific knowledge. A sense of freedom is also necessary for creative work in the arts which, equally with scientific research, is the concern of the university.

“* * *  It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail ‘the four essential freedoms' of a university-to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”241

240 Id. at 261-62 (Frankfurter, J., concurring).

241 Id. at 262-63 (Frankfurter, J., concurring). In his concurring opinion in Wieman v. Updegraff, 344 U.S. 183 (1952), which struck down a state statute requiring state employees to execute a loyalty oath, Frankfurter had already constructed the spine of his argument that such a requirement ought to be especially unconstitutional as applied to professors:

The functions of educational institutions in our national life and the conditions under which alone they can adequately perform them are at the basis of these limitations upon State and national power. These functions and the essential conditions for their effective discharge have been well described by a leading educator:

‘Now, a university is a place that is established and will function for the benefit of society, provided it is a center of independent thought. It is a center of independent thought and criticism that is created in the interest of the progress of society, and the one reason that we know that every totalitarian government must fail is that no totalitarian government is prepared to face the consequences of creating free universities. . . .

‘A university, then, is a kind of continuing Socratic conversation on the highest level for the very best people you can think of, you can bring together, about the most
In these passages the justification for extending First Amendment coverage to academic freedom is that universities, and the scholars who populate them, produce “understanding,” and understanding is “an essential need of society.” Disciplinary knowledge can be acquired only through “hypothesis and speculation.” The value of democratic competence is thus at the root of the constitutionalization of academic freedom of research and inquiry. As we saw in Chapter 2, expert knowledge is a constitutional value in a democracy that depends upon public opinion.

It is important to note, however, that the argument for democratic competence plays out differently in the context of academic freedom than in the framework of professional speech. There are at least two salient distinctions. First, doctors and lawyers do not possess academic freedom; instead the law of malpractice rigorously requires them to transmit existing pertinent expert knowledge to patients and clients. Although we may demand competence from professional scholars, academic freedom is deliberately designed to provide ample room for experimentation and speculation that may “seriously deviate either from generally accepted beliefs or from those accepted by the persons, private or official, through whom society provides the means for the maintenance of universities.”

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important questions, and the thing that you must do to the uttermost possible limits is to guarantee those men the freedom to think and to express themselves. . . .
Statement of Robert M. Hutchins, Associate Director of the Ford Foundation, November 25, 1952, in Hearings before the House Select Committee to Investigate Tax-exempt Foundations and Comparable Organizations, pursuant to H.Res. 561, 82d Cong., 2d Sess.

_id._ at 196-98 (Frankfurter, J., concurring).

242 _Lovejoy, supra_ note 207.
This difference is explained by the fact that whereas we demand that doctors and lawyers uphold existing standards of knowledge, we expect scholars to create new knowledge. Universities cannot expand knowledge if faculty merely reproduce already existing knowledge. There is thus a tension built into the core of academic freedom between, on the one hand, expanding the frontiers of existing knowledge, and, on the other hand, competently exemplifying existing disciplinary standards. This tension, which has no analogue in the context of professional speech, is persistent and without resolution. Institutionally the tension is practically mediated by the distinction between untenured faculty, who are closely scrutinized for competence, and tenured faculty, who are awarded a generous presumption of competence to facilitate the academic freedom necessary for creating new knowledge.

Second, academic freedom refers not only to the freedom of faculty, but also to the specific the institution of the university. There is no real analogy to this concrete institutional focus in the context of professional speech. In his Sweezy concurrence, for example, Frankfurter speaks of “the four essential freedoms’ of a university-to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.” Frankfurter’s remarks have greatly influenced subsequent cases like Regents of the University of California v. Bakke and Grutter v. Bollinger, which have tended to identify academic freedom with the institutional autonomy of universities.

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243 For a discussion, see Post, supra note 206, at 74-79.


Although new disciplinary knowledge can be generated at innumerable social sites, the constitutional emphasis on universities expresses the idea that academic freedom does not protect research as such, but rather the disinterested scholarship established by institutions of higher education. Private corporations may invest in the creation of new expert knowledge, but they do not do so for the public good, as do universities. Disciplines may be practiced in private corporate settings, but they are defined, nourished, replenished and sustained within universities. “Disciplines” that flourish outside of universities, like astrology, are unlikely to be accepted as reliable.

Recognizing the interdependence of reliable disciplinary knowledge and institutions of higher education, the Court in *Sweezy* invested universities with unique constitutional value. This institutional focus was so intense that the Court regarded it as irrelevant that Paul Sweezy himself, although an economist of note and reputation, was not a tenured member of any university faculty, but merely a guest lecturer in a classroom. What mattered was that Sweezy was participating in the transmission of knowledge appropriate to a university setting.

The sharp focus on the institutional significance of universities can at times seem to contradict the conclusion that individual professors might possess academic freedom. Consider what might have happened if Sweezy had been on the faculty of the University of New Hampshire and if he had been disciplined by the university administration in order to assuage political pressure coming from university alums. If Sweezy were to sue for a violation of academic freedom, and if the University of New Hampshire were to

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defend on the ground of its own institutional autonomy—the university’s own academic freedom to supervise its faculty—a latent tension between individual and institutional academic freedom would seem to become manifest.

Courts and commentators have noticed this potential conflict between individual and institutional concepts of academic freedom, and they have spilled a great deal of ink over the question of which form of academic freedom ought to be adopted by courts. But the tension between individual and institutional academic freedom can be

247 Regents of University of Michigan v. Ewing, 474 U.S. 214, 226 n.12 (1985) (Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, see Keyishian v. Board of Regents, 385 U.S., at 603; Sweezy v. New Hampshire, 354 U.S. 234, 250, (1957) (opinion of WARREN, C.J.), but also, and somewhat inconsistently, on autonomous decisionmaking by the academy itself, see University of California Regents v. Bakke, 438 U.S. 265, 312, (1978) (opinion of POWELL, J.); Sweezy v. New Hampshire, 354 U.S., at 263 (FRANKFURTER, J., concurring in result); Dow Chemical Co. v. Allen, 672 F.2d 1262, 1275 (7th Cir. 1982) (“Case law considering the standard to be applied where the issue is academic freedom of the university to be free of governmental interference, as opposed to academic freedom of the individual teacher to be free of restraints from the university administration, is surprisingly sparse.”); Piarowski v. Illinois Community College District 525, 759 F.2d 625, 629 (7th Cir. 1985) (“though many decisions describe ‘academic freedom’ as an aspect of the freedom of speech that is protected against governmental abridgment by the First Amendment, . . . the term is equivocal. It is used to denote both the freedom of the academy to pursue its ends without interference from the government (the sense in which it used, for example, in Justice Powell's opinion in Regents of the University of California v. Bakke, 438 U.S. 265, 312 (1978), or in our recent decision in EEOC v. University of Notre Dame Du Lac, 715 F.2d 331, 335-36 (7th Cir.1983)), and the freedom of the individual teacher (or in some versions—indeed in most cases—the student) to pursue his ends without interference from the academy; and these two freedoms are in conflict, as in this case.”); Keen v. Benson, 970 F.2d 252, 257 (7th Cir. 1992) (“as this case reveals, the assertion of academic freedom of a professor can conflict with the academic freedom of the university to make decisions affecting that professor”); Cooper v. Ross, 472 F. Supp 802,813 (D.C. Ark. 1979) (“The present case is particularly difficult because it involves a fundamental tension between the academic freedom of the individual teacher to be free of restraints from the university administration, and the academic freedom of the university to be free of government, including judicial, interference.”).

reconciled if we appreciate that the function of First Amendment doctrine is to protect First Amendment values. The First Amendment value at issue in academic freedom of research and publication\footnote{I do not here consider the dimensions of academic freedom that concern freedom to teach or freedom of extramural speech.} is democratic competence. This value encompasses \textit{both} the ongoing health of universities as institutions that promote the growth of knowledge \textit{and} the capacity of individual scholars to inquire and to disseminate the results of their inquiry.

Universities promote the growth of new knowledge when they facilitate the capacity of scholars to apply and improve the professional scholarly standards that define knowledge in particular disciplines. That is why despite their formal legal control over university governance, American university administrators nevertheless typically and properly defer heavily to the peer judgments of faculty when making decisions about how to govern university affairs. If administrators were instead defer to “the prevailing opinions and sentiments of the community in which they dwell,” and thus override professional standards in the name of “thismultitudinous tyrannical opinion,”\footnote{Eliot, \textit{supra} note 226, at 1-2.} universities as institutions would cease to serve the constitutional value of democratic competence. They would become, in the words of the 1915 Declaration, “essentially proprietary institutions” which do not “accept the principles of freedom of inquiry, of opinion, and of teaching; . . . [T]heir purpose [would not be] to advance knowledge by the unrestricted research and unfettered discussion of impartial investigators, but rather to subsidize the promotion of opinions held by the persons, usually not of the scholar’s
calling, who provide the funds for their maintenance.”

It is “manifestly important,” the Declaration asserts, that such institutions “not be permitted to sail under false colors.”

From a constitutional point of view, therefore, academic freedom has nothing to do with the autonomy of institutions that happen to include the name “university” in their titles. It applies instead only to institutions that actually use professional scholarly standards to advance knowledge for the public good. Academic freedom does not entail deference to university administrators “who have expertise in education.”

It instead entails deference to the professional scholarly standards by which knowledge is created.

We can see this if we imagine that Paul Sweezy had been a tenured professor at the University of New Hampshire and had been sanctioned by his peers in the economics department because they regarded his economic views to be professionally incompetent. Because peer evaluation is always a necessary precondition for academic freedom, Sweezy could have sued for redress only on the ground that the sanction imposed by his peers was incompetent when measured by the professional standards of the discipline of economics. Sweezy would in effect have had to ask a court to determine that his peers had committed a kind of professional malpractice because they had failed properly to apply the prevailing standards of the economics community.

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251 Declaration, supra note 208, at 293.

252 Id.

253 As Kant observes, “The university would have a certain autonomy (since only scholars can pass judgment on scholars as such).” KANT, supra note 225, at 23.

We have already noted, however, that there is an important difference between the requirements of academic freedom and the malpractice standards imposed upon the learned professions. We expect doctors and lawyers competently to perform to prevailing standards; the health and welfare of persons depends upon it. But the whole purpose of academic freedom is to encourage experimentation, hypothesis and speculation. The distinction between competent and incompetent economics scholarship is thus a great deal more murky than the distinction between competent and incompetent medicine or legal advice. It is for this reason plausible for courts to have concluded that “When judges are asked to review the substance of a genuinely academic decision . . . they should show great respect for the faculty’s professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.”255

The justification for deference is that courts are not well equipped to second-guess the exercise of the professional scholarly standards that advance the constitutional value of democratic competence in the context of university scholarship. Courts are properly concerned that “judges should not be ersatz deans and educators.”256 Nothing in this concept of academic freedom, however, justifies deference when universities make executive decisions that do not purport to reflect professional standards. Nothing in the concept of academic freedom would require deference to the decision of university


256 Bishop v. Aronov, 92 F.2d 1066, 1075 (11th Cir. 1991).
administrators, who possess neither the capacity nor the pretense of exercising professional judgment, to sanction a professor because of political pressure.

This suggests that the supposed tension between the institutional and individual accounts of academic freedom is based upon a misunderstanding. The constitutional value of academic freedom depends upon the exercise of professional standards, which inhere neither in institutions as such, nor in individual professors as such. The right question for courts to ask about academic freedom is how to fashion doctrine that best protects the “freedom of thought, of inquiry . . . of the academic profession.” This can be complicated question, because administrative decisions often purport to express professional standards. It is important, however, not confuse the question of when deference is appropriate with the question of whether academic freedom inheres in institutions or in individuals.

III.

Without doubt the most controversial recent decision involving academic freedom has been *Urofsky v. Gilmore*, decided en banc by the Fourth Circuit in 2000. The case concerned a challenge to a Virginia statute providing that state employees, including university professors, could not “access, download, print or store an information infrastructure files or servers having sexually explicit content,” unless such access was

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257 *Declaration*, supra note 208, at 294.

258 For a discussion of when judicial deference may or may not be appropriate when reviewing institutional decisionmaking, see Robert Post, *Between Management and Governance: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713 (1987).

259 216 F.3d 401 (4th Cir. 2000).
approved in writing by an “agency head.”\footnote{Id. at 404.} Gilmore realized that the statute, because it restricted the research of faculty, was inconsistent with academic freedom conceived as “a professional norm,”\footnote{Id. at 411.} but it concluded that “The Supreme Court, to the extent it has constitutionalized a right of academic freedom at all, appears to have recognized only an institutional right of self-governance in academic affairs” rather than “a First Amendment right of academic freedom that belongs to the professor as an individual.”\footnote{Id. at 412. “The Court has focused its discussions of academic freedom solely on issues of institutional autonomy.” Id. at 415.} Gilmore did not seem to realize that if indeed the Supreme Court had articulated a constitutional right of academic freedom that attached to universities, the only possible constitutional value at stake was that of democratic competence, which must apply equally to the need for individual professors to pursue their professional research free from government interference.\footnote{The Court also failed to realize that the Virginia statute was in fact a regulation of the university itself. See Byrne, supra note 248, at 112. Gilmore should be compared to Henley v. Wise, 303 F.Supp. 62, 66 (D.C. Ind. 1969), which struck down an Indiana statute criminalizing the possession of obscene material without intent to sell, lend or give away, in part because the statute “intruded” into “the right of scholars to do research and advance the state of man’s knowledge.”}

*Gilmore* was explicit that “because the Act does not infringe the constitutional rights of public employees in general, it also does not violate the rights of professors.”\footnote{Gilmore, 216 F.3d at 415.}

*Gilmore* analyzed the constitutional rights of public employees in terms of Supreme Court precedents like *Pickering v. Board of Education*,\footnote{319 U.S. 563 (1968).} *Connick v. Myers*,\footnote{461 U.S. 138 (1983).} and
These decisions hold that First Amendment coverage does not extend to sanctions for the speech of state employees unless such speech involves “a matter of public concern.”268 *Gilmore* is unusual because it frankly acknowledges that the “public concern” test of the *Pickering-Connick-Churchill* line of cases refers to general First Amendment rights that have nothing especially to do with academic freedom. But courts generally have not recognized this, and they have used the “public concern” test to assess whether state regulations infringe academic freedom.269 This represents a rather deep misunderstanding of the nature of academic freedom of research and publication.

The *Pickering-Connick-Churchill* line of cases rests on the premise that in a democracy the implementation of government decisions frequently requires the creation of organizations. If a democratic state wishes to create a social security system, it must establish a social security administration; if it wishes to provide a welfare system, it must establish a social service bureaucracy. Such organizations are purposive; they exist to achieve the ends for which they are created. Within such organizations, therefore, the

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268 *Connick*, 461 U.S. at 146-47.

state must manage its employees, including their speech, in ways designed to fulfill organizational objectives. That is why the speech of soldiers can be regulated as is necessary to secure the national defense or the speech of lawyers within a courtroom can be regulated as is necessary to secure justice.270 “The state has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with the regulation of the speech of the citizenry in general.”271

When an employee speaks about a matter of “public concern,” however, she participates in public discourse “as a citizen.”272 In such instances the state must “balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”273 The instrumental

270 The logic of this and the following paragraph is developed in detail in Post, supra note 258.

271 Pickering, 391 U.S. at 568.

272 Connick, 461 U.S. at 142.

273 Id. Immanuel Kant early on identified this tension. In An Answer to the Question: “What is Enlightenment?” he observes:

The public use of man’s reason must always be free . . . . the private use of reason may quite often be very narrowly restricted . . . . [B]y the public use of one’s own reason I mean that use which anyone may make of it as a man of learning addressing the entire reading public. What term the private use of reason is that which a person may make of it in a particular civil post or office with which he is entrusted.

Now in some affairs which affect the interests of the commonwealth, we require a certain mechanism whereby some members of the commonwealth must behave purely passively, so that they may, by an artificial common agreement, be employed by the government for public ends . . . . It is, of course, impermissible to argue in such cases; obedience is imperative. But in so far as this or that individual who acts as part of the machine also considers himself as a member of a complete commonwealth or even of cosmopolitan society, and thence as a man of learning who may through his writings address a public in the truest sense of the word, he may indeed argue without harming the affairs in which he is employed for some of the time in a passive capacity. Thus it would be very harmful if an officer receiving an order from his superiors were to quibble openly, while on duty, about the appropriateness or usefulness of the order in question. He must simply obey. But he cannot reasonably be banned from making observations as a man of learning on the errors in the military service, and from submitting these to his public for judgement.

logic of an organization must somehow be reconciled with the egalitarian structure of public discourse. The *Pickering-Connick-Churchill* line of cases is about how this reconciliation should be effected.

The structure of faculty speech within public universities is subject to an exactly analogous analysis. The speech of faculty within state universities can be regulated as is necessary to achieve the purposes of higher education. But such faculty may also wish to participate in public discourse as citizens. It is precisely this tension that the Court in *Sweezy* addressed when it spoke about the impropriety of the New Hampshire Attorney-General questioning Paul Sweezy about his involvement in the Progressive Party. The Court concluded that Paul Sweezy’s participation in the progressive party had nothing to do with his employment as a professor, so that his political association could not be grounds for penalizing him in his capacity as a state employee.

Courts that use the “public concern” test to measure the scope of academic freedom fail to recognize that the Court in *Sweezy* conceived the constitutional question of academic freedom to arise from *Sweezy’s* classroom lectures, not from his participation in the Progressive Party. *Sweezy* conceptualized the interrogation of Sweezy’s party politics as a violation of the “political freedom of the individual.”

The precise question of Sweezy’s academic freedom, by contrast, arose only when the Attorney-General sought to chill Sweezy’s classroom lectures. In these lectures Sweezy did not play the role of a citizen; he was not participating in public discourse. He was an

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275 *Sweezy*, 354 U.S. at 250. For a discussion see *supra* notes 233-239.
expert communicating knowledge to his students and thereby to the public. It was his function as a university employee to communicate this knowledge. The state Attorney General’s interrogation threatened to suppress both Sweezy’s communication of expert knowledge to the public and Sweezy’s ability to function effectively in a state organization.

Academic freedom of research and publication concerns the special function of university faculty to expand the frontiers of disciplinary knowledge. Academic freedom triggers First Amendment coverage not because of the value of democratic legitimation, but because of the value of democratic competence. Because the criterion of “public concern” is about reconciling the value of democratic legitimation with the value of organizational effectiveness, it has nothing to do with triggering First Amendment coverage in matters of academic freedom. First Amendment coverage should be extended whenever the freedom of the scholarly profession to engage in research and publication is potentially compromised. That freedom is necessary both to the effective functioning of state universities and to the realization of the constitutional value of democratic competence.

If the “public concern” test of the Pickering-Connick-Churchill line of cases is relevant to anything, it is to the third component of academic freedom, which is what the 1915 Declaration called “freedom of extramural utterance and action.” This aspect of professional academic freedom refers to the freedom to “speak or write as citizens” rather than as experts. An example of freedom extramural expression might an

276 See supra notes 211-212.

277 1940 Statement, quoted in note 212 supra.
astronomer who wishes to write in public about NAFTA,278 or a computer scientist who wishes to speak out about the war in Iraq.279 When faculty engage in such speech, they attempt to influence public opinion so as to make it responsive to their views. They do not speak as experts conveying knowledge, but as citizens seeking to participate in public debate.

Experts have for years debated whether freedom of extramural speech should be considered an aspect of professional academic freedom, because freedom of extramural speech is by hypothesis unrelated to the special training and expertise of faculty.280 From

278 See, in this regard, the remarks of Harvard President Abbott Lawrence Lowell:

[T]he right of a professor to express his views without restraint on matters lying outside the sphere of his professorship is not a question of academic freedom in its true sense, but of the personal liberty of the citizen. It has nothing to do with liberty of research and instruction in the subject for which the professor occupies the chair that makes him a member of the university. The fact that a man fills a chair of astronomy, for example, confers on him no special knowledge of, and no peculiar right to speak upon, the protective tariff. His right to speak about a subject on which he is not an authority is simply the right of any other man, and the question is simply whether the university or college by employing him as a professor acquires a right to restrict his freedom as a citizen

Quoted in HENRY AARON YEOMANS, ABBOTT LAWRENCE LOWELL, 1856-1943 at 310 (Cambridge, Harvard University Press 1948).

279 An example would be the case of Sami Al-Arian, a computer science professor, was disciplined for statements concerning terrorism in the middle east after September 11, 2001. See Joe Humphrey, Professors Condemn Al-Arian’s Firing, TAMPA TRIBUNE, June 15, 2003, p. 1. For the AAUP investigative report on the Al-Arian case, see ACADEME Vol. 89, No. 3, p. 59 (2003).


The phrase “academic freedom,” in the context “the academic freedom of a faculty member of an institution of higher learning” refers to a set of vocational liberties: to teach, to investigate, to do research, and to publish on any subject as a matter of professional interest, without vocational jeopardy or threat of other sanction, save only upon adequate demonstration of an inexcusable breach of professional ethics in the exercise of any of them. Specifically, that which sets academic freedom apart as a distinct freedom is its vocational claim of special and limited accountability in respect to all academically related pursuits of the teacher-scholar; an accountability not to any institutional or societal standard of economic benefit, acceptable interest, right thinking, or socially constructive theory, but solely to a fiduciary standard of professional integrity. To condition the employment or personal freedom of the teacher-scholar upon the institutional or society approval of his academic investigations or utterances, or to quality either
a constitutional point of view, however, freedom of extramural expression raises the same question of democratic legitimation as that which occurs whenever any government employee seeks to participate in public discourse. The “public concern” test of the *Pickering-Connick-Churchill* line of cases is an effort to identify and resolve this question. This is quite a different question than academic freedom of research and publication, which turns on the constitutional value of democratic competence, rather than that of democratic legitimation.

The logic of *Sweezy* points unmistakably to the conclusion that that the regulation of faculty research and publication should trigger First Amendment coverage whether or not faculty speech involves matters of public concern. The general collapse of constitutional academic freedom doctrine into the “public concern” test of the *Pickering-Connick-Churchill* line of cases misses this essential point. It fails to recognize the independent constitutional value of democratic competence. It fails also to recognize that academic freedom is the only way effectively to achieve the constitutional mission of state organizations charged with the institutional purpose of expanding knowledge.\(^{281}\)

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\(^{281}\) See Rebecca Gose Lynch, *Pawns of the State or Priests of Democracy: Analyzing Professors’ Academic Freedom Rights Within the State’s Managerial Realm*, 91 CALIF. L. REV. 1061 (2003). Because sanctions against university administrators in their administrative capacities may not involve the constitutional value of democratic competence, the deployment of the “public concern” test in such circumstances is far more defensible than its use to assess the academic freedom of tenured faculty in their
IV.

If the “public concern” test of the Pickering-Connick-Churchill line of cases is frequently invoked by lower courts attempting to wrestle with thorny questions of constitutional academic freedom, so also is another decision of the Supreme Court--Hazelwood School Dist. v. Kuhlmeier. In Hazelwood the Court held that a secondary school was authorized to restrict or compel speech as necessary in order to fulfill its chosen curriculum. In the context of higher education, Hazelwood is typically invoked when a professor claims that a university has interfered with his freedom in the classroom. A good example in Bishop v. Aronov, in which a university professor was instructed to refrain from interjecting his religious beliefs or preferences during instructional time periods.

Citing Kuhlmeier, the court in Aronov held that “As a place of schooling with a teaching mission, we consider the University's authority to reasonably control the content of its curriculum, particularly that content imparted during class time. Tangential to the authority over its curriculum, there lies some authority over the conduct of teachers in and out of the classroom that significantly bears on the curriculum or that gives the appearance of endorsement by the university.” Aronov felt driven to the conclusion

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work as scholars. See, e.g., Schrier v. University of Colorado, 427 F.3d 1253 (10th Cir. 2005); Jeffries v. Harlseton, 52 F.3d 9 (2nd Cir. 1995).


283 926 F.2d 1066 (11th Cir. 1991).

284 Id. at 1074.
that “Though we are mindful of the invaluable role academic freedom plays in our public schools, particularly at the post-secondary level, we do not find support to conclude that academic freedom is an independent First Amendment right.”

Most apparently at issue in Aronov was the component of academic freedom that the 1915 Declaration identifies as freedom of teaching. Freedom of teaching is an exceedingly complex and ill-defined topic, for it must be reconciled not only with the capacity of faculty departments and universities to design and implement curricular requirements, but also with the academic freedom of students. If there is an argument for constitutionalizing freedom of teaching, it must be of the kind sketched by Frankfurter in his famous concurrence in Wieman v. Updegraff:

That our democracy ultimately rests on public opinion is a platitude of speech but not a commonplace in action. Public opinion is the ultimate reliance of our society only if it be disciplined and responsible. It can be disciplined and responsible only if habits of open-mindedness and of critical inquiry are acquired in the formative years of our citizens. The process of education has naturally been the basis of hope for the perdurance of our democracy on the part of all our great leaders, from Thomas Jefferson onwards.

To regard teachers in our entire educational system, from the primary grades to the university as the priests of our democracy is therefore not to indulge in hyperbole. It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion. Teachers must fulfill their function by precept and practice, by the very atmosphere which they generate; they must be exemplars of open-mindedness and free inquiry. They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them. They must have the freedom of responsible inquiry, by thought and action, into the meaning of social and economic ideas, into the checkered history of social and economic dogma. They must be free to sift evanescent doctrine, qualified by time and circumstance, from that restless,

285 Id. at 1075.

286 See supra notes 211-212.

287 For a discussion of this tension, see Piggee v. Carl Sandburg College, 464 F.3d 667, 670-71 (7th Cir. 2006).
enduring process of extending the bounds of understanding and wisdom, to assure
which the freedoms of thought, of speech, of inquiry, of worship are guaranteed
by the Constitution of the United States against infraction by national or State
government.288

In this passage, Frankfurter advances the argument that democracy can succeed only if
persons are educated to become competent democratic citizens. The forms of pedagogy
necessary for what we may call “democratic education”289 should thus be invested with
constitutional value.290

I do not in this Chapter address the thorny subject of freedom of teaching. I shall
instead focus on classroom regulations that affect academic freedom of research and
publication. This freedom includes the right to disseminate the results of research to lay
persons, including and most especially to students in the classroom. Freedom of research
and publication is implicated in the classroom not merely because classrooms are a
primary medium for the transmission of scholarly expertise to the public, but also
because classrooms are the only medium through which the next generation of scholars
can be produced.

In Sweezy the New Hampshire Attorney General sought to inhibit Sweezy’s
efforts to report in classroom the results of his independent scholarly research into the
nature of socialism and economic materialism. Academic freedom of research and

288 Wieman v. Updegraff, 344 U.S. 183, 196-98 (1952) (Frankfurter, J., concurring).
289 AMY GUTMANN, DEMOCRATIC EDUCATION (1987).
290 Court decisions have sometimes analyzed student rights in primary and secondary schools on the
assumption that the constitutional purpose of public education is to produce democratically competent
students, and they have sometimes analyzed such rights on the assumption that constitutional purpose of
public education is to reproduce existing cultural values. Compare Tinker v. Des Moines School District,
see Robert Post, Racist Speech, Democracy, and the First Amendment, 32 WM. & MY. L. REV. 267, 317-25
publication must include, at a minimum, the freedom to communicate the results of research to students when it is pedagogically relevant to do so. Freedom of research does not in this sense seem to have been at issue in Aronov, because in that case the professor was teaching a class in “exercise physiology” and the classroom remarks for which he was disciplined concerned how “God came to earth in the form of Jesus Christ and he has something to tell us about life which is crucial to success and happiness.”291 It is difficult to construe these remarks as a report of scholarly expertise. At most they were an effort to motivate and engage students in the classroom. Such an effort would exemplify freedom of teaching rather than freedom of research and publication.

In Sweezy, by contrast, the State of New Hampshire sought to inhibit a professor from reporting to his students pedagogically relevant conclusions of her research on the ground that these conclusions were irrelevant to the truth of the issues under consideration in the classroom. If we assume the professional competence of Paul Sweezy, which seems never to have been questioned, the State of New Hampshire in effect desired to set itself up as the arbiter of the economic truth of these issues. It was seeking politically to override professional scholarly investigation. The case would have been no different if the administrators of the University of New Hampshire, instead of the State Attorney General, had sought to dictate determine relevant economic truth and to limit Paul Sweezy’s classroom lectures on that basis.292 In the classroom a faculty

291 Aronov, 926 F.2d at 1068.

292 I am not now considering cases in which university administrators seek to limit the ability of faculty to report the conclusions of their research to students on the ground that expressing such conclusions would undermine the pedagogical mission of the university. In contrast to Sweezy, universities in such cases do not pre-judge the truth of questions under classroom consideration; they instead assert a conflict between the heuristic mission of the university and its scholarly mission. Such conflicts might sometimes be said to arise in the context of racist or sexist speech, where it has been argued that reports of scholarly conclusions would undermine the ability of students to learn. In such circumstances the academic freedom of faculty to
member can not be reduced to the mouthpiece of non-professional, non-scholarly judgments of relevant knowledge. A university that seeks confine faculty in this way would become, in the words of the *1915 Declaration*, an “essentially proprietary” institution\(^{293}\) dedicated to the promulgation of particular views rather than to sustaining the ongoing scholarly discipline by which knowledge is identified and expanded.

As Dewey observed at the outset of the last century, the purpose of such a university would be to perpetuate “a certain way of looking at things current among a given body of persons. . . . to disciple rather than to discipline.”\(^{294}\) A university not dedicated to the disciplinary identification, discovery, and diffusion of new knowledge would not trigger the value of democratic competence, and so it would not merit First Amendment coverage. Such a “university” might deserve judicial deference in the same way that any state administrative entity might deserve judicial deference, but it would not implicate the distinct constitutional value of democratic competence.

Two years ago the Court rendered a decision that potentially takes a long step toward entrenching a constitutional vision of universities that disciple rather than discipline. In *Garcetti v. Ceballos*\(^{295}\) the Court held “that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications

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\(^{293}\) See *supra* note 251.

\(^{294}\) Dewey, *supra* note 205.

from employer discipline.”296 In the secondary school context, *Garcetti* has already been interpreted to deny all academic freedom in the classroom because a “school system does not ‘regulate’ teachers' speech as much as it *hires* that speech. Expression is a teacher's stock in trade, the commodity she sells to her employer in exchange for a salary.”297 Were this same conclusion to be applied in the context of higher education, universities would be transformed into essentially proprietary institutions.298 Aware that its holding would have this implication for academic freedom of research, *Garcetti* itself notes that “There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence,” and it concludes that “We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.”299

It is precisely to avoid the logic implicit in *Garcetti* that the drafters of the 1915 *Declaration* insisted that faculty “are the appointees, but not in any proper sense the employees,” of universities.300

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296 *Id.* at 421.

297 Mayer v Monroe County Community School Corp., 474 F.3d 477, 479 (7th Cir. 2007). Yudof observes that “Unless an abridgement of speech lies in every exercise of governmental authority to speak through individuals—and how else might abstract entities called governments speak?—it is difficult to countenance the view that government control of its own professional speakers violates the historically developed concepts of freedom of expression.” Yudof, *supra* note 232, at 839.

298 In that regard, see Renken v. Gregory, 541 F.3d 769 (7th Cir. 2008), in which the Seventh Circuit, a leader in interpreting and applying *Garcetti*, held in the context of the speech of a professor at a public university that “In order for a public employee to raise a successful First Amendment claim, he must have spoken in his capacity as a private citizen and not as an employee.” *Id.* at 773.

299 *Garcetti*, 547 U.S. at 425.

300 *Declaration, supra* note 208, at 295.
[O]nce appointed, the scholar has professional functions to perform in which the appointing authorities have neither competency nor moral right to intervene. The responsibility of the university teacher is primarily to the public itself, and to his judgment of his own profession; and, while, with respect to certain external conditions of his vocation, he accepts a responsibility to the authorities of the institution in which he serves, in the essentials of his professional activity his duty is to the wider public to which the institution itself is morally amenable. So far as the university teacher’s independence of thought and utterance is concerned—though not in other regards—the relationship of professor to trustees may be compared to that between judges of the federal courts and the executive who appoints them. University teachers should be understood to be, with respect to the conclusions reached and expressed by them, no more subject to the control of the trustees, than are the judges subject to the control of the president, with respect to their decisions; while of course, for the same reason, trustees are no more to be held responsible for, or to be presumed to agree with, the opinions or utterances of professors, than the president can be assumed to approve of the legal reasonings of the courts.301

Translated into contemporary constitutional terms, the argument of the *Declaration* is that faculty serve the “public” insofar as they serve the public function of identifying and discovering knowledge. It is this function that triggers the constitutional value of democratic competence. Were faculty to be merely the employees of a university, as *Garcetti* conceptualizes employees, they would be responsible in their “official duties” for promulgating the opinions of the governors of the university. They could then no longer serve the function of identifying and advancing knowledge, because in modern society the creation of knowledge is inseparably connected to the application of professional, disciplinary standards. Without the function of advancing knowledge, the value of democratic competence would no longer be served by universities as institutions.

Were that consequence to obtain, our nation would have lost an invaluable resource, one that has propelled us to the forefront of the world stage. In today’s information age, intellectual stagnation implies economic and military death. Much depends, therefore, on the extent to which the Court appreciates the full weight that rides on the casual reservation that it advanced in *Garcetti.*