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## Understanding the First Amendment

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## UNDERSTANDING THE FIRST AMENDMENT

Robert Post\*

It is a rare privilege to be read and engaged by such thoughtful and insightful commentators as the *Washington Law Review* has assembled. It is exhilarating to participate in a conversation of this range and intensity. I am very grateful to the *Washington Law Review*, Ronald K.L. Collins and David Skover, and the University of Washington School of Law, for making this symposium possible.

As I read the contributions to this symposium, I am put in mind of Oliver Wendell Holmes' famous injunction that "[w]e must think things not words, or at least we must constantly translate our words into the facts for which they stand, if we are to keep to the real and the true."<sup>1</sup> Although lawyers love words and language, "the real justification of a rule of law," Holmes argued, "is that it helps to bring about a social end which we desire."<sup>2</sup> Holmes' advice was to pay close attention to whether our legal words in fact function to serve our social ends.

Nowhere is the disjunction between words and ends more apparent than in First Amendment jurisprudence. We suffer from First Amendment hypertrophy. Doctrine proliferates endlessly and meaninglessly. Around every corner is yet another confusing First Amendment "test." We barely ever stop to ask what social ends are actually served by this barrage of inconsistent and abstract doctrine. We rarely take time to "translate our [First Amendment] words into the facts for which they stand."

The illuminating contribution of Bruce E.H. Johnson and Sarah K. Duran<sup>3</sup> seems fortunately almost immune from this affliction. Strategic

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1. Oliver Wendell Holmes, Jr., *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 460 (1899). Holmes' words came in an address delivered before the New York State Bar Association on January 17, 1899.

2. *Id.*

3. Bruce E.H. Johnson & Sarah K. Duran, *A View from the First Amendment Trenches*:

Lawsuits Against Public Participation (SLAPPs) are theoretically interesting precisely because they illustrate the disjunction between legal words and social ends. Plaintiffs bring SLAPP suits to enforce rights created by substantive legal doctrine. Substantive legal doctrine, especially when subject to constitutional standards that determine whether particular speech acts should receive First Amendment immunity, ought accurately to reflect our values. At first blush, therefore, SLAPP suits ought not to be problematic; defendants should prevail whenever constitutional standards provide that their speech deserves constitutional protection.

This way of thinking, however, does not pay sufficient attention to how legal standards actually function. It fails to appreciate the transaction costs associated with litigation enforcing substantive doctrine. Defending even an unmeritorious suit can be costly and time-consuming, and this expense will likely discourage otherwise protected participation in public discussion. The anti-SLAPP statutes Johnson and Duran discuss are designed to address and nullify such transaction costs. They not only shift attorneys' fees, but they also create pathways for the "prompt and inexpensive" resolution of SLAPP suits.<sup>4</sup> Johnson and Duran invite us to theorize the actual behavioral effects of enforcing substantive First Amendment standards; they direct our attention to the reality that underlies doctrine.

The idea that substantive First Amendment rules should take account of the transaction costs of litigating First Amendment rights is a deep insight. It ultimately derives from the legal realism inspired by Holmes. Johnson and Duran are concerned with how the costs of enforcing First Amendment doctrine affect actual participation in public discourse. The first decision of the U.S. Supreme Court systematically to reason in this way was *New York Times Co. v. Sullivan*,<sup>5</sup> which fashioned the "actual malice" rule precisely to nullify the transaction costs of libel litigation.<sup>6</sup> It designed the actual malice rule to anticipate and nullify the "chilling

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*Washington State's New Protections for Public Discourse and Democracy*, 87 WASH. L. REV. 495 (2012).

4. *Id.* at 497.

5. 376 U.S. 254 (1964).

6. *Id.* at 279. Under the "actual malice" standard, a public official must prove with "convincing clarity" that a statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not" before recovering for defamation. *Id.* at 279–80, 285–86. The case represented a revolution in legal thinking. Robert C. Post, *Justice William J. Brennan and the Warren Court*, 8 CONST. COMMENT. 11, 22–23 (1991). Whether the actual malice rule was ultimately successful is a debatable question. See RANDALL P. BEZANSON ET AL., *LIBEL LAW AND THE PRESS: MYTH AND REALITY* 200–04 (1987).

effect” of ordinary and otherwise constitutionally defensible substantive rules of defamation liability. The anti-SLAPP statutes so helpfully analyzed by Johnson and Duran are legislative interventions created to accomplish precisely the same result.<sup>7</sup>

Anti-SLAPP statutes anticipate and nullify the chilling effects produced by First Amendment litigation. Johnson and Duran discuss various forms of anti-SLAPP statutes that differently specify the precise scope of public participation that ought to be protected from the transaction costs of First Amendment litigation.<sup>8</sup> It is clear that we can intelligibly evaluate the differences among these anti-SLAPP statutes only if we first specify the precise “social ends” that we wish to use First Amendment doctrine to attain.

This may sound like an obvious framework for analysis, but it is all too frequently ignored in First Amendment scholarship. The social ends that underlie First Amendment doctrine are deeply obscure. Misled by the seeming simplicity and generality of First Amendment doctrine, we imagine that the goal of First Amendment doctrine is to protect speech itself. But in fact nothing could be further from the truth.<sup>9</sup>

The difficulty is apparent in the concise and lucid contribution by Judge Thomas Ambro and Paul Safier.<sup>10</sup> Ambro and Safier correctly observe that the First Amendment does not apply in the absence of state action, and they rightly affirm that the First Amendment must thus be interpreted in light “of the dangers uniquely associated with government interference in the development and expression of ideas.”<sup>11</sup> But they interpret these dangers in light of what they regard as “the pervasive First Amendment norm of content neutrality,”<sup>12</sup> and they deduce from this norm that we ought to preclude government from “pick[ing] winners” within “‘expert’ disputes.”<sup>13</sup> They speculate that this conclusion is justified by the limited institutional competence of courts. How, they ask, can “ill-informed judges” possibly make “pronouncements from seemingly *ex cathedra* seats of judgment”?<sup>14</sup>

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7. See Johnson & Duran, *supra* note 3, at 501 (“[T]he threat of costly SLAPPs can effectively deter the exercise of free expression.”).

8. *Id.* at 501–06.

9. ROBERT C. POST, *DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* 1–25 (2012).

10. Thomas L. Ambro & Paul J. Safier, *The First Amendment, the Courts, and “Picking Winners,”* 87 WASH. L. REV. 397 (2012).

11. *Id.* at 400.

12. *Id.*

13. *Id.* at 401, 402, 408.

14. *Id.* at 404.

Ambro and Safier's argument is built on the premise that "the pervasive First Amendment norm of content neutrality" corresponds to what Holmes calls "the real and the true."<sup>15</sup> But this premise is false. It turns out that the rule against content discrimination is applied in only limited circumstances. The rule applies to speech within public discourse but not to speech outside of public discourse. Government routinely regulates commercial speech based upon its content; we know that commercial speech enjoys no First Amendment protection if it is false or misleading.<sup>16</sup> Government also routinely regulates the speech of professionals like doctors based upon its content. Bad advice risks sanctions for medical malpractice.<sup>17</sup> There are countless such examples.<sup>18</sup>

Judge Ambro has himself written an excellent opinion in *Natale v. Camden County Correctional Facility*<sup>19</sup> in which he accurately observes that "[i]n the typical malpractice case, the duty of care, or 'the standard of practice to which the defendant-practitioner failed to adhere[,] must be established by expert testimony.'"<sup>20</sup> But this observation implies that courts must determine the competence of medical advice based upon their evaluation of expert testimony. When expert testimony conflicts, courts must pick a "winner" in order to ascertain liability.

I mention this prosaic example to illustrate how easily we are misled by abstract First Amendment doctrine. The "pervasive norm" of content neutrality does not apply to the typical malpractice case, in which courts are routinely regarded as capable of "picking winners" within "expert disputes." In fact, courts evaluate expert opinion virtually every time they determine whether to admit expert testimony challenged under Rule 702 of the Federal Rules of Evidence.<sup>21</sup> Because there is no universally

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15. See Holmes, *supra* note 1, at 460.

16. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 563–64 (1980) ("[T]here can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it.").

17. Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939, 949–52 (2007).

18. See Paul Horwitz, *The First Amendment's Epistemological Problem*, 87 WASH. L. REV. 451–52 (2012) ("Outside what Schauer calls the 'boundaries' of conventional First Amendment coverage, in such areas as securities fraud, the government evaluates (and punishes) statements on the basis of their truth or falsity." (citing Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765 (2004))).

19. 318 F.3d 575 (3d Cir. 2003).

20. *Id.* at 579 (quoting *Sanzari v. Rosenfeld*, 167 A.2d 625, 628 (N.J. 1961)).

21. See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592–95, 597 (1993).

applicable First Amendment norm against content discrimination, courts are not generally regarded as incompetent to adjudicate expert controversies.<sup>22</sup>

This suggests that we do not discourage courts from second-guessing expert opinion in public discourse because we regard courts as institutionally incapable of doing so. We instead discourage courts from second-guessing expert opinion in public discourse because we do not wish them to do so. And no doubt we reach this conclusion because we do not want government to control the content of public discourse.

The most fundamental question of First Amendment doctrine is why we disable courts from regulating speech within public discourse, although we pervasively empower courts to regulate speech outside of public discourse. The thesis of my book is that this doctrinal structure expresses our constitutional commitment to achieving the “social end” of democratic legitimation. A democratic state must be responsive to public opinion, which is why “[a] democracy without public opinion is a contradiction in terms.”<sup>23</sup> A necessary condition for democratic legitimacy is therefore that persons be free to participate in the formation of public opinion.<sup>24</sup>

The norm against content discrimination is applied within public discourse because we do not want the state to form the very public opinion to which it should be democratically responsive. Seen from this angle, the explanation of the “pervasive” norm of content discrimination depends precisely upon the *limited* scope of its application. The norm applies within public discourse, but not outside it. Attending to the actual ways in which we regulate speech, rather than to the ways in which abstract First Amendment doctrine proclaims that we regulate speech, is thus essential to understanding the social ends that constitutional doctrine in fact seeks to achieve.

In his fascinating and comprehensive contribution, Paul Horwitz is determined not to be fooled by the bromides of First Amendment

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22. This conclusion is not inconsistent with the thought that there may be specific contexts in which judicial deference to expert opinion is warranted. In the specific context of disputes involving academic freedom, for example, I quite agree with Ambro and Safier that it might sometimes be difficult for courts to take “constitutional sides in academic debates involving knowledge gleaned from scientific inquiry.” See Ambro & Safier, *supra* note 10, at 407. Nevertheless, like Ambro and Safier (as well as like Professor Judith Areen), I also believe that there is no ground for judicial deference when “professional judgment” is not exercised. *Id.* at 406–07; POST, *supra* note 9, at 79.

23. HANS KELSEN, GENERAL THEORY OF LAW AND STATE 287–88 (Anders Wedberg trans., 1945).

24. POST, *supra* note 9, at 9–10, 22–23.

doctrine.<sup>25</sup> He refuses to be misled by the abstract and patently refutable generalizations that courts advance in the name of the First Amendment. Instead Horwitz rightly inquires into the “social end” that the First Amendment law should be construed to help bring about. It is apparent that he holds great affection for the claim that “a search for truth” is “a central goal of the First Amendment.”<sup>26</sup> Yet Horwitz seems puzzled when his research reveals that First Amendment doctrine is indeterminate and indecisive on the elemental question of whether false statements of fact come within the umbrella of First Amendment coverage.<sup>27</sup>

One might expect that the fascinating results of his research would drive Horwitz to conclude either that achieving truth is not presently a central organizing purpose of First Amendment doctrine or that we should reorganize First Amendment doctrine so that it can most effectively ascertain truth. Curiously, however, Horwitz does not seem attracted to either option. He instead advances a melancholy narrative of declension.

As Horwitz tells the tale, there has been a serious “decline of truth-seeking arguments for freedom of speech.”<sup>28</sup> He strongly implies that because “First Amendment law will inevitably be concerned with epistemically freighted concepts such as truth, falsity, accuracy, and reliability,”<sup>29</sup> these arguments must be accorded pride of place in First Amendment doctrine.<sup>30</sup> He seems depressed by the fact that in recent years “free speech theory itself has increasingly retreated” from truth-seeking justifications, and has “focused instead on other justifications, such as democratic self-government or individual autonomy.”<sup>31</sup>

Whatever else can be said about Horwitz’s complex position, the declension narrative is unconvincing. Although in past centuries many have argued that freedom of critical inquiry is necessary for the advancement of knowledge,<sup>32</sup> American judicial decisions applying the

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25. See Horwitz, *supra* note 18.

26. *Id.* at 472–73.

27. *Id.* at 467–70.

28. *Id.* at 489.

29. *Id.* at 487–88.

30. Although it seems quite true that First Amendment doctrine must inevitably deal with such epistemological questions, the same could be said of every area of law. Having to deal with epistemological questions is a far cry from being *about* such questions. It does not follow from the prominent presence of such questions that the First Amendment is primarily about truth seeking.

31. *Id.* at 489.

32. For a very brief overview, see MATTHEW W. FINKIN & ROBERT C. POST, FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM 11–27 (2009).

First Amendment have almost always been about political speech.<sup>33</sup> Indeed, they have typically explained themselves in terms that echo Chief Justice Hughes' pioneering 1931 opinion in *Stromberg v. California*<sup>34</sup>: "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system."<sup>35</sup>

If First Amendment doctrine has from the beginning been organized to "bring about [the] social end" of democratic legitimation rather than of truth,<sup>36</sup> the doctrinal uncertainties nicely exposed by Horwitz should come as no surprise. "Epistemic" issues of truth or falsity are merely ancillary to the primary point of First Amendment jurisprudence, which is to protect the free formation of public opinion. Horwitz can of course argue that First Amendment doctrine should be reorganized to achieve the primary goal of advancing knowledge, but he does not seem inclined to take that path.

Instead his inquiry gravitates toward such mid-level questions as whether "false statements per se are a 'special case' that demand an exception from the general coverage of the First Amendment."<sup>37</sup> This kind of question takes the abstract and general nature of First Amendment doctrine at face value, and it therefore risks reproducing exactly the pathology of First Amendment doctrine that Horwitz seems determined to avoid. First Amendment principles can coherently be formulated only if they are organized to achieve clear social values. If the First Amendment's primary purpose is to protect democratic legitimation, general questions about the abstract constitutional status of "false statements per se" can have no very cogent answer. Sometimes falsity will be tolerated to further the mission of democratic legitimation, sometimes it will not.

With regard to the criminal libel of a public official, for example, the U.S. Supreme Court once proclaimed:

[E]ven where the utterance is false, the great principles of the Constitution which secure freedom of expression in this area preclude attaching adverse consequences to any except the

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33. See *Cohen v. California*, 403 U.S. 15 (1971); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Thornhill v. Alabama*, 310 U.S. 88 (1940).

34. 283 U.S. 359 (1931).

35. *Id.* at 369.

36. See POST, *supra* note 9, at 1–25.

37. Horwitz, *supra* note 18, at 461.



knowing or reckless falsehood. Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred.<sup>38</sup>

The Court has repeatedly interpreted the First Amendment to protect mere falsity so that “uninhibited” participation in public discourse can be constitutionally encouraged. Outside public discourse, by contrast, the Court regularly interprets the First Amendment to penalize mere falsity, as is illustrated by constitutional standards applied to commercial speech or professional medical advice.<sup>39</sup>

This strongly suggests that First Amendment doctrine is not in fact organized around epistemic concerns. Of course, *ceteris paribus*, falsity matters. But First Amendment doctrine deliberately subordinates epistemological concerns to the requirements of democratic legitimation. To ask an abstract question about the status of false statements is to pose an inquiry that runs against the purpose of existing First Amendment doctrine. Horwitz seems so entranced by epistemic values that with one exception he fails to recognize how fundamentally First Amendment doctrine would have to be reorganized in order to be fully responsive to his concerns.

The exception involves Horwitz’s articulate defense of an “institutionalist” First Amendment.<sup>40</sup> Horwitz advocates extending First Amendment protection to “*infrastructural* institutions that form a fundamental part of a larger public sphere.”<sup>41</sup> Examples would apparently include universities, the press, libraries, churches, and voluntary associations, which together Horwitz regards as constituting

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38. *Garrison v. Louisiana*, 379 U.S. 64, 73 (1964). In what is undoubtedly the high water mark of the Millian emphasis on the epistemological value of error that Horwitz so nicely discusses, the Court continued, “even if [a speaker] did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth.” *Id.* at 73. As Horwitz correctly observes, the Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), subsequently repudiated the proposition that the publication of false statements honestly believed to be true can contribute to “the ascertainment of truth,” thus leaving as the sole justification for the protection of falsity within public discourse the political importance of uninhibited participation in public discourse. See Horwitz, *supra* note 18, at 469–70. The Court explained in *Garrison*, quoting *New York Times*:

For speech concerning public affairs is more than self-expression; it is the essence of self-government. The First and Fourteenth Amendments embody our “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”

*Garrison*, 379 U.S. at 74–75 (quoting *N.Y. Times*, 376 U.S. at 270).

39. See *supra* notes 16–18 and accompanying text.

40. Horwitz, *supra* note 18, at 480–86.

41. *Id.* at 481 (emphasis in original).

“a kind of ‘sovereign sphere.’”<sup>42</sup> As far as I can make out, Horwitz believes that such institutions should be constitutionally shielded from political regulation because they contribute “in unique ways to the production of knowledge and deserve[] protection or autonomy.”<sup>43</sup>

Horwitz’s argument on this point is so casual that it is difficult to follow. Does he seriously believe that voluntary associations and churches produce *knowledge*?<sup>44</sup> And although I quite agree that institutions like universities do produce knowledge, how should their contribution to knowledge be weighed against other equally important constitutional values, like democratic self-governance? Does Horwitz believe that conflicts among constitutional values do not occur? Or does he believe that in the context of such conflicts the significance of knowledge is so predominant that it is a waste of time to engage in the “considerable and somewhat gymnastic effort” to determine how inconsistent constitutional values may be reconciled?<sup>45</sup> I fail to see how we could possibly determine the precise degree of “autonomy” to which infrastructural institutions should be “*constitutionally* entitled” without answering such questions.<sup>46</sup> The hardheaded legal realism that Horwitz so conspicuously embraces would seem to *require* that we focus on such inquiries.

Stephen I. Vladeck, like Horwitz, believes that the press is a unique and significant infrastructural institution.<sup>47</sup> In contrast to Horwitz, however, Vladeck is exquisitely aware that specifying constitutional protections for the press will require mediating among conflicting constitutional values. In his fine and careful contribution, Vladeck nicely demonstrates how attributing constitutional autonomy to the press will have *both* costs and benefits.<sup>48</sup>

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42. *Id.* at 481 & n.235, 482.

43. *Id.* at 485. It is not clear to me why Horwitz regards “the production of knowledge” as any less “abstract” than conceptual categories like democratic legitimation or democratic competence. *Id.* at 479, 481. It is true that the production of knowledge is not ultimately a political category and that Horwitz appears to object to prioritizing political self-determination as a constitutional value. *Id.* at 478–80. Perhaps Horwitz believes that the social stability required for deploying knowledge does not require a secure foundation in legitimate self-governance. *See id.* at 486. There may be societies in the world where knowledge creates its own legitimation and stability, but I doubt that the United States is among them.

44. Alternatively, if churches and private associations do not produce knowledge, what social goods do they produce, and why should these goods receive exigent constitutional protection?

45. *Id.* at 479.

46. *Id.* at 482 (emphasis in original).

47. Stephen I. Vladeck, *Democratic Competence, Constitutional Disorder, and the Freedom of the Press*, 87 WASH. L. REV. 529 (2012).

48. *Id.* at 548 (“But the more we seek to articulate constitutional rules for distinguishing between

The press is a deeply ambiguous institution. Seen from one perspective, the press is a platform for amplifying the voice of engaged citizens. Since the early days of the Republic, the press has functioned as a mouthpiece for partisan politics; different newspapers have spoken for different points of view or for different political parties.<sup>49</sup> Seen from another perspective, however, the press is a unique institution quite distinct from the ordinary citizen. For the past century, elite newspapers have imagined themselves as independent, disinterested, and professional organizations whose mission is to educate the public about newsworthy matters.<sup>50</sup> This ideal, born during the progressive era, has begun to take institutional root. As Vladeck summarizes the point:

[T]here are professional standards and ethical norms of conduct to which journalists generally aspire. A professional accrediting organization (the Accrediting Council on Education in Journalism and Mass Communications) supervises undergraduate and graduate programs. Additionally, whether or not courts have *already* identified such standards, it is *possible . . .* to identify judicially manageable standards of journalism that would allow courts to differentiate between those who qualify as practitioners in the field and those who do not.<sup>51</sup>

In our own time, the independent and disinterested institution of the press is torn between the distinct and potentially conflicting values of “neutrality” and “objectivity.”<sup>52</sup>

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these categories, the more that the recipients of special protection in that constitutional scheme become dependent upon protecting their special constitutional *status*. Such a result would also almost certainly come at the expense of whatever other values contribute to their role in illuminating public discourse.” (emphasis in original)).

49. This view of the press may underlie the Court’s recent observation in *Citizens United v. FEC*, 558 U.S. \_\_\_, 130 S. Ct. 876 (2010): “We have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers.” *Id.* at 905 (citing *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 691 (1990) (Scalia, J., dissenting)). If the press is simply a means of amplifying what ordinary speakers have to say, it should not possess privileges beyond those of the First Amendment speakers whose voices it broadcasts.

50. See MICHAEL SCHUDSON, *DISCOVERING THE NEWS: A SOCIAL HISTORY OF AMERICAN NEWSPAPERS 160–94* (1978). Horwitz refers to this relatively recent image of the press when he observes that “Press practices are rich with disciplinary standards and well-developed self-regulatory norms and practices.” Horwitz, *supra* note 18, at 484).

51. Vladeck, *supra* note 47, at 540–41 (emphasis in original) (citations omitted).

52. A “neutral” press understands its mission as reporting on public controversies, but it avoids taking part in such controversies. A neutral press will convey to the public that a controversy exists between creationists and biologists over the topic of evolution, but it will not intervene to evaluate competing positions in the controversy. A neutral press therefore incentivizes persons to manufacture “controversies” that threaten public opinion with confusion. This can plainly be seen in

In my book, I observe that there are good reasons why the disciplinary norms of professions like medicine or law should sometimes be accorded independent constitutional status.<sup>53</sup> I suggest that the First Amendment should be interpreted so as to foster this status because it will advance the constitutional value of “democratic competence.”<sup>54</sup> Vladeck sensibly asks whether First Amendment doctrine ought also to be interpreted to configure the press as serving the value of democratic competence. After all, Vladeck argues, this might express proper respect for the necessary role played by the press in educating the public about matters of public concern; it might also justify special legal immunities, like reporters’ privileges, that seem necessary for the press to fulfill its educational mission.<sup>55</sup>

In evaluating Vladeck’s suggestion, we should note at the outset that the institutional autonomy of the press can be constitutionally justified without appealing to the value of democratic competence. Vince Blasi long ago persuasively argued that the First Amendment should be interpreted to serve a “checking value,” which imagines the press as a unique set of institutions that inhabit a structurally antagonistic relationship to government.<sup>56</sup> We wish to protect the press because we wish to encourage the press to “check” the possibility of government abuse. As a matter of theory and history, Blasi’s hypothesis has much support.<sup>57</sup> Vladeck’s discussion of national security demonstrates how protections for the press are most important in circumstances when the

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the advantage that the tobacco industry took of the obligations of a neutral press to report only the existence of a “controversy” over whether smoking was harmful. In contrast to a “neutral” press, an “objective” press will not only report the existence of public controversies, it will *also* evaluate the significance of these controversies by communicating presently existing knowledge. Whereas a “neutral” press will report to the public that there is a controversy over global warming, an “objective” press will also frame that controversy by reporting the consensus of scientific opinion. For an illustration of the difference, see Thomas E. Mann & Norman J. Ornstein, *Admit It: The Republicans Are Worse*, WASH. POST, April 29, 2012, at B1.

53. POST, *supra* note 9, at 45–46.

54. *Id.* at 27–60. Democratic competence refers to “the cognitive empowerment of persons within public discourse, which in part depends on their access to disciplinary knowledge. Cognitive empowerment is necessary both for intelligent self-governance and for the value of democratic legitimation.” *Id.* at 34.

55. Vladeck, *supra* note 47, at 541–42.

56. See Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521. The checking value plainly underlies decisions like *Minneapolis Star & Tribune Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 583–85 (1983), which configure the press as distinct from other speakers and as generically in conflict with the government.

57. See David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455 (1983). Under Blasi’s theory, of course, the “press” would be constitutionally defined as those institutions that we regard as advancing the checking value.

press and the government occupy adversarial positions.<sup>58</sup>

The concept of structural conflict is quite foreign to the value of democratic competence. Modeling the constitutional status of the press on the kind of disciplinary authority enjoyed by medicine or law would authorize government interventions designed to uphold press authority, just as government presently intervenes to uphold the authority of doctors and lawyers.<sup>59</sup> Such interventions would be quite problematic if, as Blasi convincingly argues, we wish to fashion First Amendment principles that will institutionalize *tension* between the press and the state.

Vladeck's essay asks us to clarify why we might accord special constitutional status to the press. Should constitutional rules imagine the press as amplifying the voice of ordinary citizens, or as providing the public with a disinterested and professional form of knowledge, or as "checking" government overreaching and abuse? Holmes' sound advice is that we cannot determine the substance of our constitutional doctrine until we are first clear about the "social ends" we wish to achieve.

It is possible that we are ambivalent about our social ends. We may yearn both for a professionally competent press and yet admire a press that is freewheeling and partisan and that, as Vladeck puts it, exemplifies "truly amateur contributions to public discourse."<sup>60</sup> We may simultaneously prize press institutions that valiantly oppose the government. When our constitutional values conflict in this way, it would seem deeply unwise to fashion our constitutional doctrine to give exclusive dominion to one or another point of view. The ambiguity of contemporary doctrine reflects the ambiguity of our own values, and Vladeck seems to me prudent to leave these questions unresolved.

If constitutional law cannot guarantee that expert knowledge be disseminated to the public through the press, how does constitutional law imagine that expert knowledge will be communicated to public opinion? That is the question Joseph Blocher pursues in a shrewd and canny contribution.<sup>61</sup> Blocher suggests that if our constitutional principles do not permit government to underwrite an authoritative

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58. Vladeck, *supra* note 47, at 543–47.

59. As Joseph Blocher perceptively observes, using the value of democratic competence to define the constitutional value of the press would "mean that the state could police journalists in much the same way as it polices commercial or professional speech—to ensure that they are fulfilling the functions that entitle them to protection in the first place." Joseph Blocher, *Public Discourse, Expert Knowledge, and the Press*, 87 WASH. L. REV. 409, 442 (2012).

60. Vladeck, *supra* note 47, at 547.

61. Blocher, *supra* note 59.

expert to speak to the public, we may well ask “whether and to what degree expert knowledge actually does inform democratic decisionmaking.”<sup>62</sup>

Blocher’s question is well taken, and it does not seem to me to have a definitive constitutional answer. We know that the state does underwrite expertise *outside* of public discourse; that is the lesson of malpractice suits and state proscriptions of misleading commercial speech. But we seem reluctant to allow the state analogously to underwrite expertise within public discourse. This is because we do not wish the state to control the content of public opinion. We would feel queasy if the state were to intervene authoritatively to settle the conflicting pronouncements of the dueling experts that routinely fill our news media. Does this imply, as Blocher seems to suggest, that expertise can exist within public discourse only if the state underwrites it?<sup>63</sup>

Through its educational responsibilities, through its bully pulpit and enormous resources, the state can encourage a proper respect for expert knowledge within the public sphere. But whether such knowledge receives the weight it deserves within public discourse is not ultimately a question of constitutional law, at least not so long as democratic legitimation remains our foundational constitutional commitment. I myself believe that democratic legitimation must remain lexically prior to democratic competence because any action of the state, including any action designed to underwrite expertise, must necessarily presuppose that the political interventions of the state are legitimate. Such legitimacy necessarily depends upon democratic legitimation. This implies that if public opinion recklessly abandons authoritative knowledge in an uncontrolled quest for ideological wish fulfillment, the Constitution alone will not save us.<sup>64</sup>

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62. *Id.* at 437.

63. Blocher writes that “there must be *some* method of accountability, legal or otherwise, for claims of expertise in public discourse.” *Id.* at 434. But of course there is always political accountability for speech within public discourse. Why is that not enough? Why “must” there also be legal accountability, when any such accountability will necessarily compromise democratic legitimation? No doubt democratic competence would be better served if the state could impose legal accountability for expert pronouncements within public discourse. But the cost of such accountability would be intolerably high. Blocher’s yearning for constitutional clarity seems also to underlie his strange assumption that attributing First Amendment value to particular speech acts implies “complete protection” or is simply a vain act. *Id.* at 424–25. Because constitutional values often conflict, constitutional protection is frequently bounded and limited.

64. Blocher writes that “it seems hard to maintain the division between expert knowledge ‘in’ public discourse and expert knowledge ‘before’ public discourse. If the point of knowledge is to inform public discourse, at some point it must enter into it.” *Id.* at 435. He is right to raise this worry. Although Blocher correctly grasps the constitutional “point” of expert knowledge, he seems

For constitutional purposes, public opinion forms within the uncoerced domain of public discourse. In my book I define public discourse in terms of the communicative processes required for the free formation of public opinion prerequisite for democratic legitimation:

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. . . . Following the usage of the Court, I shall use the term “public discourse” to refer to the forms of communication constitutionally deemed necessary for formation of public opinion.<sup>65</sup>

Public discourse is the set of speech acts whose insulation from state control is necessary to justify our ongoing belief that we inhabit a democracy in which government is responsive to the people. What we think of as “ordinary” First Amendment rules, like the “pervasive” norm of content neutrality to which Ambro and Safier appeal, typically apply to state regulations of public discourse. The basic thought is that the state ought to answer to public opinion rather than control the content of public opinion.

Blocher fears that this definition of public discourse is “circular.”<sup>66</sup> I confess that I do not understand his objection. “Public discourse” is a label that we apply to those speech acts that we deem, for constitutional and normative reasons, necessary for the free formation of public opinion. The boundaries of public discourse are thus set by substantive normative judgments. Whether to categorize any particular speech act as inside or outside of public discourse no doubt requires difficult and complex judgments and trade-offs.<sup>67</sup> Sometimes such judgments are made retail, and sometimes wholesale. I have no doubt that the boundaries of public discourse will prove perennially controversial. But

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to imagine a world in which the Constitution can guarantee that expert knowledge actually fulfills its “point.” That aspiration seems to me quite beyond the realm of constitutional law. The Constitution encourages conditions under which expert knowledge might be able to fulfill its “point,” but the Constitution cannot compel public opinion, at least not so long as we remain a democracy.

65. POST, *supra* note 9, at 15.

66. Blocher, *supra* note 59, at 414. I should note that in my view the boundaries of public discourse are contextually defined, which means that they are determined by form and content. Blocher seems to imagine that I think otherwise, *id.* at 418–21, but I make this explicit in Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601 (1990).

67. For a full discussion, see POST, *supra* note 9.

there is nothing at all circular about the question of whether particular speech acts should be accorded the constitutional protections we afford to public discourse.

In the end we will define the boundaries of public discourse in ways that express our commitments to the value of democratic legitimation. These commitments invariably conflict with other complementary and inconsistent constitutional goals and values. Such constitutional conflicts and uncertainties are inevitable. There is no avoiding them. There is only the endless effort to think things, not words.