View metadata, citation and similar papers at core.ac.uk
brought to you by CORE
provided by Duke Law Scholarship Repository

VOLUME 133 DECEMBER 2019 NUMBER 2

HARVARD LAW REVIEW

© 2019 by The Harvard Law Review Association

ARTICLES

FREE SPEECH AND JUSTIFIED TRUE BELIEF

Joseph Blocher

CONTENTS

Introduction 440
I. The Epistemic First Amendment 447
A. *The Standard Account: The Marketplace of Ideas Maximizes Truth* 448
B. *The Standard Critiques* 451
1. *Internal: Speech Does Not Maximize Truth* 451
2. *External: Truth Is Not the Central Value of Free Speech* 455
C. *The Road to Larissa* 459
II. The Constitutional Value and Definition of Knowledge 464
A. *Knowledge as a First Amendment Value* 465
1. *Knowledge as a Means to the Intrinsic Good of Truth* 465
2. *Knowledge as a Guide to Action* 470
3. *Truth, Knowledge, and Character* 472
4. *Truth and the Role of the State* 473
B. *Mapping a Knowledge-Based First Amendment: What Justifications Count?* 476
1. *Justifications Internal to the Thinker* 477
2. *External Justifications for Knowledge* 482
C. *When and How Knowledge Matters: A Comment on Professional Speech and* NIFLA v. Becerra 486
Conclusion 496

FREE SPEECH AND JUSTIFIED TRUE BELIEF

Joseph Blocher[*]

Law often prioritizes justified true beliefs. Evidence, even if probative and correct, must have a proper foundation. Expert witness testimony must be the product of reliable principles and methods. Prosecutors are not permitted to trick juries into convicting a defendant, even if that defendant is truly guilty. Judges' reasons, and not just the correctness of their holdings, are the engines of precedent.

Lawyers are, in short, familiar with the notion that one must be right for the right reasons. And yet the standard epistemic theory of the First Amendment — that the marketplace of ideas is the "best test of truth" — has generally focused on truth alone, as if all true beliefs must be treated equally. This thin account leaves the epistemic theory vulnerable to withering criticism, especially in a "post-truth" era.

This Article suggests that the epistemic theory of the First Amendment might be reframed around a different value: not truth alone, but knowledge, roughly defined as justified true belief. Philosophers from Plato until the present day have explored what makes knowledge distinct and distinctly valuable; echoes of those efforts can be heard in First Amendment theory and doctrine as well. A knowledge-based account need not limit the protections of free speech to justified true belief, any more than the marketplace model covers only truth, and may even help resolve thorny First Amendment issues like those involving professional speech and institutional deference. The goal of this Article is to provide a richer epistemic account of the First Amendment at a time when it is sorely needed.

INTRODUCTION

A century ago, Justice Holmes's dissent in *Abrams v. United States*[1] helped lay the foundations of U.S. free speech law and theory. Though he was hardly writing on a blank slate, Justice Holmes captured something powerful when he wrote that "the best test of truth is the power of the thought to get itself accepted in the competition of the market, and . . . truth is the only ground upon which [people's] wishes safely can be carried out."[2] This marketplace of ideas model was "virtually canonized" for generations[3] and has shaped First Amendment

* Lanty L. Smith '67 Professor of Law, Duke Law School. Many thanks to Rebecca Aviel, Vince Blasi, Alan Chen, Claudia Haupt, Paul Horwitz, Sam Kamin, Andy Koppelman, Govind Persad, Fred Schauer, Alex Tsesis, and the faculty of University of Denver Sturm College of Law for helpful comments, and to Izaak Earnhardt for excellent research assistance.

[1] 250 U.S. 616 (1919).

[2] *Id.* at 630 (Holmes, J., dissenting).

[3] William P. Marshall, *In Defense of the Search for Truth as a First Amendment Justification*, 30 GA. L. REV. 1, 1 (1995) ("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."); *see also* Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 130 (1989) ("The most familiar argument for freedom of speech is that speech promotes the discovery of truth.").

doctrine in significant ways.[4] But it was and is, to repurpose Justice Holmes's own words, "an experiment, as all life is an experiment."[5]

Many people seem ready to conclude that the experiment has failed. Developments in psychology, economics, history, sociology, and other scholarly fields have drawn attention to the host of problems — cognitive limitations, motivated reasoning, racism, sexism, resource inequalities, and the like — that make it impossible for the marketplace of ideas to reliably deliver on its promise of identifying "truth."[6] *Abrams*'s own legacy provides an example, since the influence of the case undoubtedly owes a great deal to the power and beauty of Justice Holmes's prose, rather than the "truth" of the ideas it expresses.[7]

Such critiques are, for the most part, internal to the epistemic theory: they accept truth as the end goal of the First Amendment but doubt the ability of unregulated speech to deliver it. Another set consists of external challenges — those suggesting that the First Amendment's lodestar is not truth, but democracy, personal autonomy, or some other value.[8]

But scholarly debates are not the most serious threat to the marketplace model. A robust system of free speech depends fundamentally on widely shared social, political, and cultural commitments,[9] and it would be putting it mildly to say that there is widespread anxiety about truth and the ability of speech — especially but not exclusively online speech — to counter falsehoods and lies. Every day, headlines deliver discouraging answers to John Milton's rhetorical question, "Let [Truth] and falsehood grapple; who ever knew Truth put to the worse in a free and open encounter?"[10] The undoubted prevalence of free and

---

[4] *See* Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 825 n.7 (2008) (collecting cases invoking the marketplace model).

[5] *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

[6] *See infra* section I.B.1, pp. 451–55.

[7] *Cf.* Richard A. Posner, *Introduction*, *in* THE ESSENTIAL HOLMES xvii (Richard A. Posner ed., 1992) (arguing that some of Justice Holmes's opinions "owe their distinction to their rhetorical skill rather than to the qualities of their reasoning").

[8] *See infra* section I.B.2, pp. 455–59; *see also* Frederick Schauer, *Facts and the First Amendment*, 57 UCLA L. REV. 897, 909–10 (2010) (noting that "the free speech literature appears increasingly to have detached itself from the empirical and instrumental epistemic arguments" largely in favor of those based on democracy and autonomy).

[9] If a citation is necessary, one could do worse than Judge Learned Hand: "Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court even can do much to help it." LEARNED HAND, THE SPIRIT OF LIBERTY (1944), *reprinted in* THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND 189, 190 (Irving Dilliard ed., 1952); John M. Harlan, *The Bill of Rights and the Constitution: An Excerpt from an Address*, 64 COLUM. L. REV. 1175, 1176 (1964) (quoting same).

[10] JOHN MILTON, AREOPAGITICA: A SPEECH FOR THE LIBERTY OF UNLICENSED PRINTING 45 (H.B. Cotterill ed., MacMillan & Co. 1961) (1644); *see also* Vincent Blasi, *A Reader's Guide to John Milton's* Areopagitica*, the Foundational Essay of the First Amendment Tradition*, 2017 SUP. CT. REV. 273, 310.

accessible *true* information — one promise of the information age — seems to have done little to stem the tide.[11]

Against this tide, a retreat from the epistemic theory of the First Amendment, or perhaps from free speech altogether, might seem attractive or even necessary. After all, if it is to model its own purported virtues, the marketplace theory must recognize that it, too, can go the way of other "fighting faiths."[12] If we are living in a "post-truth" era,[13] then perhaps we need a post-truth First Amendment.

And yet such a capitulation could worsen the crisis. The epistemological problem of the "post-truth" era is not simply that some people no longer value truth, but that so many believe falsehoods. When people act on outlandish but truly held beliefs they often demonstrate a strong — even perversely courageous — commitment to what they believe to be factual truths.[14]

One therefore cannot combat the phenomenon simply by insisting on the value of truth. Nor is it possible to fully sidestep the problem by making democracy, autonomy, or some other value the central goal of the First Amendment. Those theories, too, frequently depend in part on the epistemic function of free speech. A well-functioning democracy relies on expert knowledge.[15] Lies and misinformation can interfere with personal autonomy.[16]

---

[11] *See generally* YOCHAI BENKLER ET AL., NETWORK PROPAGANDA: MANIPULATION, DISINFORMATION, AND RADICALIZATION IN AMERICAN POLITICS *passim* (2018).

[12] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Justice Holmes himself suggested as much: "If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way." Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

[13] Amy B. Wang, *"Post-Truth" Named 2016 Word of the Year by Oxford Dictionaries*, WASH. POST (Nov. 16, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/11/16/post-truth-named-2016-word-of-the-year-by-oxford-dictionaries/ [https://perma.cc/WV5N-ECAZ] ("It's official: Truth is dead. Facts are passe.").

[14] This is not universally true, of course — some are simply trolling, manipulating, or otherwise engaged in expression that is indifferent to truth. Neither the marketplace model nor my knowledge-based alternative is well suited to address situations where truth itself is irrelevant. From the perspective of an epistemic theory, and at risk of slight overstatement, "these men are nihilists. There's nothing to be afraid of." THE BIG LEBOWSKI (PolyGram Filmed Entertainment & Working Title Films 1998).

[15] ROBERT C. POST, DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE, at ix (2012) ("Any modern society needs expert knowledge in order to survive and prosper."); *see also* TOM NICHOLS, THE DEATH OF EXPERTISE: THE CAMPAIGN AGAINST ESTABLISHED KNOWLEDGE AND WHY IT MATTERS 216 (2017) ("[T]he collapse of the relationship between experts and citizens is a dysfunction of democracy itself.").

[16] *See, e.g.*, STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE 116–17 (1990); David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 354 (1991) ("Lying creates a kind of mental slavery that is an offense against the victim's humanity for many of the reasons that physical slavery is."); Jonathan D. Varat, *Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship*, 53

The challenge, therefore, is to conceptualize the First Amendment in a way that recognizes the power of the critiques but also safeguards the necessary epistemic values of free speech, above and beyond an unrealistic faith that free speech will deliver "truth." And because freedom of speech is an actual (albeit normative) practice,[17] and not just a matter of theory, any account of free speech values should be built using the materials of that practice, including but not limited to legal doctrine.[18] Those materials should not be expected to point squarely in favor of a single, overarching free speech principle,[19] but they can still clarify our existing commitments and help shape new ones.

The search for free speech principles has also regularly drawn on insights from other disciplines — from the marketplace of ideas as a whole. Indeed, the basic insight of the marketplace metaphor itself had earlier been articulated by Milton, Mill, and others, and its announcement in *Abrams* owes more to economics, political philosophy, and history than to precedent.[20] And because the value of free speech is partly an epistemological question,[21] it is worth considering that for generations of epistemologists, the most common lodestar is not truth — the central concern of the Holmesian approach to free speech[22] — but

UCLA L. REV. 1107, 1113 (2006) (noting argument that manipulative lies "are incompatible with the respect for human autonomy underlying the First Amendment"); *see also* IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 48 (Lewis White Beck trans., The Bobbs-Merrill Co. 1959) (1785) (arguing that lies violate human autonomy by treating people as means rather than ends).

[17] It might be more accurate to say "set of practices," given the many distinct activities that reside under the header: freedoms of the press, artistic creation, scientific research, political debate, and so on. *See* FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 14 (1982).

[18] *See* POST, *supra* note 15, at 5 ("To determine the purposes of the First Amendment, therefore, we must consult the actual shape of entrenched First Amendment jurisprudence."); Robert Post, Replies, *Participatory Democracy as a Theory of Free Speech: A Reply*, 97 VA. L. REV. 617, 618 (2011) ("Because law typically acquires authority from the commitments and principles of those whom it seeks to govern, I have sought to identify this fundamental purpose by inquiring into our historical commitments and principles." (citing Robert C. Post & Neil S. Siegel, *Theorizing the Law/Politics Distinction: Neutral Principles, Affirmative Action, and the Enduring Legacy of Paul Mishkin*, 95 CALIF. L. REV. 1473, 1474 (2007))).

[19] *See, e.g.*, Robert Post, Essay, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1271 (1995) ("There is in fact no general free speech principle . . . ."); Steven Shiffrin, *Dissent, Democratic Participation, and First Amendment Methodology*, 97 VA. L. REV. 559, 559 (2011) ("Too many values interact in too many complicated ways to expect that a single, or small set of values, would emerge as the transcendent master value in resolving freedom of speech questions. Because of this, an eclectic approach is both the most descriptive and the best normative methodology with which to approach free speech issues." (footnote omitted)).

[20] *See infra* notes 45–52 and accompanying text.

[21] *Cf.* Paul Horwitz, *The First Amendment's Epistemological Problem*, 87 U. WASH. L. REV. 445, 447 (2012) ("[T]he First Amendment faces what I call an epistemological problem: specifically, the problem of figuring out just how knowledge fits within the First Amendment.").

[22] Even to call it "Holmesian" is to raise questions, for Justice Holmes's own view of truth was complex and debatable. *See* Alexander Tsesis, *Free Speech Constitutionalism*, 2015 U. ILL. L. REV. 1015, 1039, 1056–57; *infra* note 135 and accompanying text.

knowledge.[23] And although there are deep divisions and ongoing debates about the definition and value of knowledge (these are the basic questions of epistemology, after all[24]), philosophers since Plato have often taken as their starting point a tripartite definition of knowledge as *justified true belief* (JTB),[25] and this Article will use the labels interchangeably.

Although JTB has been subject to searching examinations and criticisms far beyond the scope of this Article,[26] it remains central in the epistemological debates. The second and third parts of the tripartite definition are, generally speaking, less controversial than the first: One cannot "know" something that is false,[27] or that one does not believe. But, and somewhat more controversially, even a true belief will not constitute knowledge if it is not properly justified. A lucky guess that is borne out, for example, or an accurate belief generated by lying or manipulation, is not "knowledge."

Broadening the First Amendment's frame to focus on justifications of belief, and not just on truth alone, provides a richer epistemic defense of the goal of free speech — not just as a means of identifying particular factual or political truths, but as a means of strengthening our mechanisms of belief.[28] Standard accounts focus on the maximization of truth but give no particular attention to the justifications for true belief — the individual habits of mind[29] and social practices[30] that support the acquisition and belief of truths. This keeps cognition at the

---

[23] Matthias Steup, *Epistemology*, STAN. ENCYCLOPEDIA OF PHIL. (Dec. 14, 2005), https://plato.stanford.edu/entries/epistemology [https://perma.cc/4W4T-8BUZ] ("[E]pistemology is the study of knowledge and justified belief.").

[24] Douglas N. Husak & Craig A. Callender, *Willful Ignorance, Knowledge, and the "Equal Culpability" Thesis: A Study of the Deeper Significance of the Principle of Legality*, 1994 WIS. L. REV. 29, 44 ("[There are] enormous theoretical difficulties in understanding and applying the concept of knowledge. Epistemologists have sought to elucidate the concept of knowledge and have found this project no small task.").

[25] *See* RODERICK M. CHISHOLM, THE FOUNDATIONS OF KNOWING 43 (1982); Stewart Cohen, *Justification and Truth*, 46 PHIL. STUD. 279 (1984) (discussing schools of thought relating to justification and truth). For more classic sources, see ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS 172–78 (1981); PLATO, THEAETETUS 201b–201d, at 80 (M.J. Levett trans., 1992). *See generally* BERTRAND RUSSELL, HUMAN KNOWLEDGE: ITS SCOPE AND LIMITS *passim* (1948).

[26] To take the most obvious example, Edmund Gettier effectively proved that JTB alone cannot provide a satisfactory account of knowledge. *See* Edmund L. Gettier, *Is Justified True Belief Knowledge?*, 23 ANALYSIS 121 (1963).

[27] Whether someone can "know" something that is not false, but which has no standard propositional truth value, is a harder question. *See, e.g.*, Martha C. Nussbaum, *Love's Knowledge*, *in* LOVE'S KNOWLEDGE: ESSAYS ON PHILOSOPHY AND LITERATURE 261, 262 (1990) ("Knowledge of the heart must come from the heart . . . .").

[28] *See, e.g.*, Ashley Messenger, Essay, *The Epistemic and Moral Dimensions of Fake News and the First Amendment*, 16 FIRST AMEND. L. REV. 328, 337 (2017) ("If 'knowledge' is 'true, justified belief,' then one who wishes to have knowledge must care about whether that belief is justified.").

[29] *See infra* section II.B.1, pp. 477–82

[30] *See infra* section II.B.2, pp. 482–86.

center of the First Amendment, while accepting the thrust of the internal critiques (which are focused on truth, not justifications) and incorporating some elements of the external critiques (including the relevance of social practices).[31]

A knowledge-based approach to free speech can also do better than the marketplace model in directly addressing the broader epistemological crisis in free speech. People have access to more information — more truth propositions — than ever before, and may continue to believe passionately in the importance of truth. There are, of course, bitter disagreements about whether certain ideas are true. But the more fundamental disagreement and doubt is about which sources, practices, and institutions provide reliable or otherwise desirable information.[32] This is a debate about valid *justifications*, not about whether particular beliefs are true, or for that matter whether truth is important.

In order to be successful, a knowledge-based approach must not only address these challenges; it must also account for existing practices and legal rules. Fortunately, what works in theory in this case also works in practice. Many legal rules (and, in some respects, the basic rules of legal argumentation) are predicated on a commitment to establishing proper justifications.[33] If a prosecutor lies to secure the conviction of a guilty criminal, he or she will have created a true belief in the minds of the jury — but that belief will not be *justified*, and might not be permitted to stand.[34]

Of course, the rules of the courtroom do not apply *mutatis mutandis* to public discourse,[35] so one must ask whether the First Amendment

---

[31] *See infra* section I.C, pp. 459–64.

[32] *American Views: Trust, Media, and Democracy*, KNIGHT FOUND. (Jan. 16, 2018), https://knightfoundation.org/reports/american-views-trust-media-and-democracy [https://perma.cc/TL7E-JNW8] ("[M]ost Americans believe it is now harder to be well-informed and to determine which news is accurate. They increasingly perceive the media as biased and struggle to identify objective news sources. They believe the media continue to have a critical role in our democracy but are not very positive about how the media are fulfilling that role.").

[33] *See* JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW 100–01 (Roland Gray comp., The MacMillan Co. 1921); Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 633 (1995) (noting that, in "[t]he conventional picture of legal decisionmaking, . . . giving reasons is both the norm and the ideal"). Admittedly, faced with the challenge of legal realism, even defenders of the concept of *ratio decidendi* and precedential reasoning were forced to confront the limits of the method. *See* Arthur L. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161, 182–83 (1930) (criticizing prevailing wisdom as to which part of a case's reasoning is actually precedential).

[34] *See* Berger v. United States, 295 U.S. 78, 88–89 (1935). The same is basically true of the exclusionary rule. Mapp v. Ohio, 367 U.S. 643, 654–55 (1961). For further discussion of this principle, see Augustine, *To Consentius: Against Lying* (H. Browne trans.), *in* 3 A SELECT LIBRARY OF THE NICENE AND POST-NICENE FATHERS OF THE CHRISTIAN CHURCH 481–500 (Philip Schaff ed., 1887), which argues categorically against lying, even if it is to "unearth [heretics] out of their hiding places," *id.* at 481.

[35] For an exploration of their relationship, see Lisa Kern Griffin, *Honesty Without Truth: Lies, Accuracy, and the Criminal Justice Process*, 104 CORNELL L. REV. ONLINE 22, 23–25 (2018).

can prioritize certain justifications for belief without violating core doctrinal and theoretical commitments. Perhaps most importantly, there is a crucial difference between treating justifications as *necessary* and treating them as aspirational. The JTB approach defended here is of the latter variety: it makes knowledge the goal of the First Amendment, not a prerequisite for constitutional coverage, just as the marketplace model has truth as a lodestar but covers falsehoods as well. The point in either case (or, for that matter, under other theories like those prioritizing democracy) is to focus on the goals of free speech, not to conflate that end with a particular means.

This is not a purely normative, theoretical mission — it is intertwined with current doctrinal and scholarly controversies regarding professional and expert speech, institutionalism, and a general focus on social practices in First Amendment doctrine.[36] From an epistemic perspective, these debates look different through the JTB lens. There might, for example, be a significant difference between a doctor and a palm reader describing the outcome of a surgery, even if they say the same thing and therefore have identical truth values. By privileging justifications for true belief, the JTB lens could better account for the constitutional status of professional speech and knowledge communities like universities, and for the attention given to the mental states — for example, internal justifications — of speakers and listeners.

Part I investigates the strengths and weaknesses of the standard epistemic theory of free speech — the marketplace model — and the ways in which a thicker epistemology might preserve its core while incorporating many of the insights of alternative theories rooted in democracy and individual autonomy. Part II attempts to situate the concept of "knowledge" in the First Amendment, first by providing an account of its constitutional value and then by considering various ways in which courts could identify and protect proper justifications for beliefs without running afoul of other First Amendment principles. It uses the Supreme Court's recent decision in *National Institute of Family & Life Advocates (NIFLA) v. Becerra*[37] to illustrate how the knowledge-based approach might have done a better job than the marketplace model in evaluating the constitutional status of professional speech.

It is important at the outset to clarify the scope of the argument. Making justified true belief the central epistemic value of the First Amendment could potentially help solve these and other problems of doctrine and theory, but it would not necessarily involve a radical revision, nor would it be applicable in all free speech scenarios. Like the theory it seeks to amend — the marketplace of ideas — the JTB

---

[36] *See infra* section II.B.2, pp. 482–86.

[37] 138 S. Ct. 2361 (2018).

approach is most relevant in situations where the epistemic values of free speech are in play, and that is not always the case. Art, political opinion, and other important forms of free speech — or, for that matter, epistemic claims made in public discourse[38] — may be protected for reasons not grounded in their "truth."

The goal of this Article is not to solve the First Amendment's epistemic crisis, but to suggest a new way to think about it. The Article's ultimate end is to convince readers that epistemic approaches to the First Amendment should — subject to constraints — treat justified true belief, rather than truth alone, as the lodestar of free speech values. Doing so would help address some of the deficiencies in the marketplace of ideas model, while providing a richer account of the First Amendment's epistemic goals.

I. THE EPISTEMIC FIRST AMENDMENT

The central First Amendment debate is normative, foundational, and unresolved: what is the constitutional value of free speech? The volume of scholarly attention devoted to the question is almost incalculable, and though the question is to some degree insoluble, at its best the discussion has been rich and productive[39] — a model of the "marketplace of ideas" at work.

Inquiries into the First Amendment's purpose are not solely the realm of scholars and high theorists. Doctrinal questions like whether, why, and to what extent the First Amendment protects artistic expression, commercial speech, or professional speech are hard to answer based purely on constitutional text, history, or sometimes even precedent. They depend, in important ways, on normative suppositions about the value of free speech.[40]

Free speech theories are often distinguished based on whether they prioritize democracy, individual autonomy, or the marketplace of

---

[38] *See* POST, *supra* note 15, at 29–31, 43–47.

[39] *See* Steven H. Shiffrin, *Freedom of Speech and Two Types of Autonomy*, 27 CONST. COMMENT. 337, 337 (2011) ("[S]ocial reality is too complex to hope or expect that First Amendment theory could be reduced to a single value or small set of values. Nonetheless, extraordinarily fruitful scholarship can be produced by those who try. Such scholarship can show just how far we can get by resort to monistic approaches (as well as their limits)." (footnote omitted)).

[40] *See generally* MARK V. TUSHNET, ALAN K. CHEN & JOSEPH BLOCHER, FREE SPEECH BEYOND WORDS: THE SURPRISING REACH OF THE FIRST AMENDMENT 15–148 (2017) (canvassing doctrinal, social, and theoretical explanations for the protection of instrumental music, nonrepresentational art, and nonsense); C. Edwin Baker, *The First Amendment and Commercial Speech*, 84 IND. L.J. 981, 985–86 (2009) (arguing that affording commercial speech protection is inconsistent with the notion that constitutional protection of speech is intended to ensure government respect for individual freedom and autonomy); Claudia E. Haupt, *Professional Speech*, 125 YALE L.J. 1238, 1241–42 (2016) (arguing that professions should be regarded as "knowledge communities," a designation that informs the justifications for and limits of speech freedom and regulation).

ideas.[41] It is not my goal here to fully canvass those theories or choose among them; I tend to share the view that there are multiple free speech values.[42] (It follows, and is worth emphasizing, that this Article does not purport to present a single all-encompassing First Amendment theory.) But recognizing the inevitability of coexistence and compromise is perfectly consistent with efforts to sharpen and refine each of the theories in response to criticism. Democracy-promoting theories, for example, have been significantly enriched by efforts to explore not just the value of "political speech" in a narrow sense,[43] but the broader values of political equality, participation, and legitimation.[44] The goal of this Article is to provide a similarly enriching account of the First Amendment in which the epistemic value of speech remains central.

A. *The Standard Account: The Marketplace of Ideas Maximizes Truth*

First Amendment theory is sometimes said to have started with Justice Holmes's paean to truth and free speech in his *Abrams* dissent.[45] The central passage of that opinion, which many scholars and lawyers probably know by heart, is among the most powerful and influential ever penned by a Justice:

> [W]hen 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.[46]

---

[41] Alexander Tsesis, *Balancing Free Speech*, 96 B.U. L. REV. 1, 6–16 (2016) (identifying "the most influential schools of free speech theory," *id.* at 8, as the acquisition of truth, political speech, and self-expression). In his masterwork, Thomas Emerson provided a slightly different list, specifically by dividing the "democracy" rationale into two. *See* THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6–7 (1970) (including self-fulfillment, discovering truth, providing for decisional participation, and balancing political adaptability and stability).

[42] *See supra* p. 443.

[43] *See* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 29 (1971) (arguing that the First Amendment covers only "criticisms of public officials and policies, proposals for the adoption or repeal of legislation or constitutional provisions and speech addressed to the conduct of any governmental unit in the country").

[44] *See* POST, *supra* note 15, at 27–60; James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491, 497–500 (2011).

[45] *See, e.g.*, Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, *in* ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 153, 153 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002) (noting that Justice Holmes "virtually invented both First Amendment theory and First Amendment doctrine. He advanced the theory of the marketplace of ideas, and he demonstrated how doctrine would have to evolve to implement this new theory"); Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256, 1278 n.97 (2005) (noting the view that "the First Amendment started in 1919" when *Abrams* was penned).

[46] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

What Justice Holmes meant by this "theory" remains the subject of debate,[47] but most take it to be an argument that open competition in ideas is the best way to guarantee that "the truth will out."[48] That, at least, is the version of the theory that tends to crop up in Supreme Court opinions.[49]

Justice Holmes was not alone in this view. The "power of the thought" he had "accepted" had been more or less identified in *Areopagitica* by John Milton, who asked, "Let [Truth] and falsehood grapple; who ever knew Truth put to the worse in a free and open encounter?"[50] Two centuries later, in Chapter 2 of *On Liberty*, John Stuart Mill provided a more complete and full-throated defense of the principle, noting that "it is as certain that many opinions, now general, will be rejected by future ages, as it is that many, once general, are rejected by the present."[51]

As Professor Vincent Blasi has observed, Justice Holmes's original move, and perhaps his boldest claim, was that the theory he described was in fact "the theory of our Constitution."[52] One can, however, find plenty of support in American law and politics for the notion that the competition of ideas will lead to truth. Defending the idea of religious freedom, Thomas Jefferson wrote:

> [T]ruth is great and will prevail, if left to herself; . . . she is the proper and sufficient antagonist to error, and has nothing to fear from the conflict unless by human interposition disarmed of her natural weapons, free argument and debate; errors ceasing to be dangerous when it is permitted freely to contradict them.[53]

---

[47] Professor Vincent Blasi, for example, reads Justice Holmes's commitment to free speech as being more about individual character and social participation than about the pursuit, let alone acquisition, of any objective "truth." *See infra* section II.A.3, pp. 472–73. Others, including Professor Frederick Schauer, argue that it is important to distinguish between claims about defining the truth and claims about locating it. *See, e.g.*, Frederick Schauer, *Free Speech, the Search for Truth, and the Problem of Collective Knowledge*, 70 SMU L. REV. 231, 236–37 (2017).

[48] WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE act 2, sc. 2.

[49] *See* Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 2 n.2; *see also, e.g.*, Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("Those who won our independence . . . believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine . . . .").

[50] MILTON, *supra* note 10, at 45; *see also* Int'l Bhd. of Elec. Workers, Local 501 v. NLRB, 181 F.2d 34, 40 (2d Cir. 1950) ("[T]ruth will be most likely to emerge, if no limitations are imposed upon utterances . . . ."), *aff'd*, 341 U.S. 694 (1951); Walter Bagehot, *The Metaphysical Basis of Toleration*, *in* 3 LITERARY STUDIES 204, 208 (Richard Hold Hutton ed., London, Longmans, Green, and Co. 1895) ("[I]n discussion truth has an advantage.").

[51] JOHN STUART MILL, ON LIBERTY 22 (Stefan Collini ed., Cambridge Univ. Press 1989) (1859).

[52] *See* Vincent Blasi, *Reading Holmes Through the Lens of Schauer: The* Abrams *Dissent*, 72 NOTRE DAME L. REV. 1343, 1351–54 (1997).

[53] 2 Thomas Jefferson, *A Bill for Establishing Religious Freedom*, *reprinted in* THE PAPERS OF THOMAS JEFFERSON 545, 546 (Julian P. Boyd ed., 1950). The connection between truth-

Professor Zechariah Chafee put the point similarly in *Freedom of Speech*, published just a year after *Abrams*:

> The true meaning of freedom of speech seems to be this. One of the most important purposes of society and government is the discovery and spread of truth on subjects of general concern. This is possible only through absolutely unlimited discussion, for . . . once force is thrown into the argument, it becomes a matter of chance whether it is thrown on the false side or the true, and truth loses all its natural advantage in the contest.[54]

One could go on multiplying examples.

Whether or not the marketplace was in fact the theory of our Constitution in 1919, *Abrams* helped make it so going forward. Indeed, Justice Holmes's opinion has been called "the most powerful dissent in American history."[55] Eight years after *Abrams*, Justice Brandeis extended Justice Holmes's dissent (which Justice Brandeis had joined) in his own concurring opinion in *Whitney v. California*[56]: "[F]reedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth."[57] In the case of bad ideas or falsehoods, "the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression."[58] In the decades since, the Supreme Court has repeatedly reaffirmed that the "purpose of the First Amendment [is] to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail."[59]

Most discussion and citation of *Abrams* has focused on what Justice Holmes meant about the "competition of the market" and whether it is indeed the "best test" of truth. But that elides a more fundamental question: What did he mean by "truth"? It seems that Justice Holmes did not intend to limit himself to narrowly objective truths. As discussed in more detail below, he was skeptical that such truths exist.[60] Instead, he defined truth as a kind of "can't help":

> [W]hen I say that a thing is true I only mean that I can't help believing it — but I have no grounds for assuming that my can't helps are cosmic can't helps — and some reasons for thinking otherwise. I therefore define the

---

seeking in free speech and free exercise has been explored in depth by Professor William Marshall, among others. William P. Marshall, *Truth and the Religion Clauses*, 43 DEPAUL L. REV. 243 (1994).

[54] ZECHARIAH CHAFEE, JR., FREEDOM OF SPEECH 34 (1920).

[55] Andrew Cohen, *The Most Powerful Dissent in American History*, THE ATLANTIC (Aug. 10, 2013), https://www.theatlantic.com/national/archive/2013/08/the-most-powerful-dissent-in-american-history/278503/ [https://perma.cc/C5ER-LL2H]; *see also* THOMAS HEALY, THE GREAT DISSENT: HOW OLIVER WENDELL HOLMES CHANGED HIS MIND — AND CHANGED THE HISTORY OF FREE SPEECH IN AMERICA (2013); RICHARD POLENBERG, FIGHTING FAITHS: THE ABRAMS CASE, THE SUPREME COURT, AND FREE SPEECH (1987).

[56] 274 U.S. 357 (1927).

[57] *Id.* at 375 (Brandeis, J., concurring).

[58] *Id.* at 377.

[59] Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969).

[60] *See infra* note 182.

> truth as the system of my intellectual limitations — there being a tacit reference to what I bet is or will be the prevailing can't help of the majority of that part of the world that I count.[61]

What is striking about this passage is the degree to which it focuses not on accuracy but on *grounds* for belief — on justifications, in other words. In that sense, it broadens the frame in precisely the same way as a knowledge-based account of the First Amendment. This understanding has been overshadowed by the competition-of-truths metaphor, but a return to it might represent a better understanding of Justice Holmes.

As Professor Bill Marshall puts it, "the oft-repeated metaphor that the First Amendment fosters a marketplace of ideas that allows truth to ultimately prevail over falsity has been virtually canonized."[62] But, in keeping with its commitment to protecting actual blasphemy,[63] First Amendment theory subjects even its saints to criticism.

B. The Standard Critiques

All standard versions of the marketplace theory share two basic premises: that truth is worth pursuing, and that the free exchange of ideas is the best method of pursuit. It follows that the First Amendment should generally be suspicious of speech restrictions, even well-intentioned ones, as they will tend to frustrate the identification of truth. These two premises — one establishing an end (truth), the other a means (free trade in ideas) — have, in turn, been heavily criticized.

1. Internal: Speech Does Not Maximize Truth. — Perhaps the most common critique of the marketplace model is that it provides a poor means to achieve its own stated goal of discovering truth. These critiques are internal to the epistemic approach in that they all accept the value of truth, and may even prize it especially highly. Their concern is instrumental: that the marketplace of ideas cannot, in theory or in practice, achieve that value.

Some versions of this critique emphasize the ways in which "real" markets and the marketplace of ideas are so fundamentally different from one another that the "competition" *Abrams* celebrates is disconnected from the end it supposedly serves. The concepts of consumption and price, for example, are foundational in economics but have no clear analogue in free speech.[64]

---

[61] Letter from Oliver Wendell Holmes, Assoc. Justice, U.S. Supreme Court, to Harold Joseph Laski, Professor, London Sch. of Econ. (Jan. 11, 1929), *in* 2 HOLMES-LASKI LETTERS 248 (Mark D. Howe ed., 1963) (cited in Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1, 11 n.36).

[62] Marshall, *supra* note 3, at 1.

[63] *See* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 505 (1952).

[64] ALVIN I. GOLDMAN, KNOWLEDGE IN A SOCIAL WORLD 203–04 (1999).

Such objections can partially be met by revising the economic model underlying the marketplace of ideas.[65] But remapping the economic theory of the marketplace of ideas does not avoid — and in fact can exacerbate — other objections. For decades, scholars have pointed to ways in which the "myth" of the well-functioning marketplace of ideas papers over basic elements of human nature, psychology, and social organization.[66] Like other markets, the marketplace of ideas is subject to massive resource inequalities,[67] racial and other biases,[68] and irrational behavior.[69] The ascendance of behavioral economics and increased reliance on cognitive psychology in law[70] have helped document the ways in which individual and collective biases interfere with the ability to sort and process truth.[71] Some legal scholars have begun to investigate the question empirically, and their findings — like those of scholars in other disciplines — seem to confirm that more speech does not always necessarily lead to more truth.[72]

---

[65] *See, e.g.*, Blocher, *supra* note 4, at 822 (attempting to incorporate lessons from institutional economics).

[66] *See, e.g.*, C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 974 (1978) ("The assumptions on which the classic marketplace of ideas theory rests are almost universally rejected today. Because of this failure of assumptions, the hope that the marketplace leads to truth, or even to the best or most desirable decision, becomes implausible."); Frederick Schauer, *Social Epistemology, Holocaust Denial, and the Post-Millian Calculus*, *in* THE CONTENT AND CONTEXT OF HATE SPEECH 129, 138 (Michael Herz & Peter Molnar eds., 2012) (noting that allowing expression of false ideas may "increase the number of people who hold false beliefs").

[67] *See, e.g.*, Baker, *supra* note 66, at 965–66 (pointing to unequal presentation of viewpoints in mass media); Kathleen M. Sullivan, *Discrimination, Distribution and Free Speech*, 37 ARIZ. L. REV. 439, 445 (1995) (writing that, although "[i]deas are not as scarce as resources are, . . . there may be scarcity in the available means for their dissemination").

[68] *See, e.g.*, Shelly Chaiken, *Communicator Physical Attractiveness and Persuasion*, 37 J. PERSONALITY & SOC. PSYCHOL. 1387, 1394 (1979) ("The present research indicates that physical attractiveness can significantly enhance communicator persuasiveness."); Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343, 385–86 (1991) (arguing that racist speech distorts discourse by disempowering minority rebuttal, "a result at odds, certainly, with marketplace theories of the first amendment").

[69] *See, e.g.*, Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124, 1131 (1974) (observing that otherwise useful and rational decisionmaking heuristics lead to "systematic and predictable errors").

[70] *See generally* Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1473–74 (1998); Christine Jolls, *Behavioral Law and Economics* 2 (Nat'l Bureau of Econ. Research, Working Paper No. 12879, 2007), https://www.nber.org/papers/w12879.pdf [https://perma.cc/2KJF-6KPY].

[71] Derek E. Bambauer, *Shopping Badly: Cognitive Biases, Communications, and the Fallacy of the Marketplace of Ideas*, 77 U. COLO. L. REV. 649, 673–96 (2006) (describing perceptual biases that complicate the acquisition and processing of information).

[72] Schauer noted the existence of this empirical question twenty years ago, and — working with an empirical scholar — has recently tested it. Daniel E. Ho & Frederick Schauer, *Testing the Marketplace of Ideas*, 90 N.Y.U. L. REV. 1160, 1160 (2015) (noting that there is "at best mixed support for the [marketplace] metaphor's veracity," and reporting empirical study of "buffer zones" at polling places and abortion clinics); Frederick Schauer, *Discourse and Its Discontents*, 72 NOTRE DAME L. REV. 1309, 1333 (1997) ("A great deal of free speech theory and a great deal of discourse

One particularly noteworthy intervention in this regard has come from feminist jurisprudence. Feminist critiques of free speech in the context of pornography are well-known and controversial.[73] The challenges those critiques pose to the marketplace of ideas might be less well known.[74] Feminist free speech scholars have done more than emphasize the shortcomings of the standard model — they have proposed alternative accounts that treat truth not simply as propositional, but as relational[75] and positional.[76] This characterization of knowledge creation as a social activity[77] is hard to square with the traditional marketplace model, given the latter's focus on propositional truth, but it is perfectly consistent with richer epistemological accounts that foreground the social practices justifying belief.[78]

In recent years, these long-simmering scholarly debates about the marketplace of ideas have been inflamed both inside and outside the academy by the perceived increase in public falsehoods, lies, and "fake news." Efforts to combat falsehoods with counterspeech, as the marketplace model mandates in all but the most limited of circumstances,[79] do not inspire much confidence. Many believe that President Donald Trump rose to political power not just despite but partially because of his penchant for lying and falsely accusing others of doing the same.[80] Although many civil libertarians have rushed to the ramparts,[81] some

theory is marked by an admirable epistemological optimism, but whether that epistemological optimism is well-founded is in the final analysis an empirical question, as to which the resources of contemporary social science research might help to locate an answer.").

[73] *See, e.g.*, ANDREA DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN (1981); CATHARINE A. MACKINNON, ONLY WORDS (1993).

[74] For a helpful overview, see generally Susan H. Williams, Essay, *Feminist Jurisprudence and Free Speech Theory*, 68 TUL. L. REV. 1563 (1994).

[75] *See, e.g.*, Susan H. Williams, *Democracy, Freedom of Speech, and Feminist Theory: A Response to Post and Weinstein*, 97 VA. L. REV. 603, 606 (2011) ("The feminist alternatives generally involve relational models of truth, as opposed to the traditional, Cartesian model.").

[76] *See, e.g.*, Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 832 (1990) ("Positionality rejects both the objectivism of whole, fixed, impartial truth and the relativism of different-but-equal truths. It posits instead that being 'correct' in law is a function of being situated in particular, partial perspectives upon which the individual is obligated to attempt to improve.").

[77] *See* Williams, *supra* note 74, at 1568.

[78] *See infra* note 239 and accompanying text (describing social epistemology and institutional approaches to the First Amendment, which similarly focus on truth-seeking as a social rather than individual enterprise).

[79] *See* Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring) ("To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one.").

[80] *See, e.g.*, Jeremy Adam Smith, *How the Science of "Blue Lies" May Explain Trump's Support*, SCI. AM.: GUEST BLOG (Mar. 24, 2017), https://blogs.scientificamerican.com/guest-blog/how-the-science-of-blue-lies-may-explain-trumps-support/ [https://perma.cc/Q9WS-88DP].

[81] *See, e.g.*, Joel Lovell, *Can the A.C.L.U. Become the N.R.A. for the Left?*, N.Y. TIMES MAG. (July 2, 2018), https://nyti.ms/2lOCs2m [https://perma.cc/UR6E-6SG6] ("Since Trump took office, the A.C.L.U. has taken 170 'Trump-related legal actions.'").

voices, particularly on the left, have condemned freedom of speech for having enabled and perhaps even facilitated a crisis.[82]

One answer is that the arc of public discourse is long, but that it eventually bends toward truth. Indeed, Justice Holmes's own conception of the move to truth was likely more evolutionary than revelatory — not that individuals would frequently change their minds in response to new ideas, but that, collectively, public discourse would shift in favor of truth.[83]

This account of the marketplace has the benefit of being more descriptively plausible, at the cost of being — almost in equal measure — less normatively attractive. For one thing, it allows a great deal of harm to be inflicted (likely against already marginalized groups) while speech markets work themselves pure. Some current critiques of free speech focus on the magnitude and unfairness of these costs.[84]

Advocates of the marketplace model have little choice but to concede many of these points. It is undeniable that participants in the marketplace of ideas — like those in the "real" marketplace — are subject to a host of biases, irrationalities, and cognitive failings that prevent them from sorting truth from falsehood efficiently and effectively. To the degree that the argument in favor of free speech is based on that instrumental value, it is an imperfect tool at best.

And yet the fallback position is still available: imperfect, perhaps, but superior. Defenders of the marketplace, whether in goods and services or ideas, can and do argue that whatever its failings, free trade is *better* than government action at delivering the ultimate goods desired, whether they be economic efficiency or truth.[85] This argument, based

---

[82] *See, e.g.*, Sarah Jones, *How Donald Trump Poisons Free Speech*, NEW REPUBLIC (Aug. 23, 2017), https://newrepublic.com/article/144471/donald-trump-poisons-free-speech [https://perma.cc/FQ9S-8F2M] ("This is all compelling proof that [free speech] absolutists may have to re-examine their arguments. Above all, Trump's presidency supports the notion that no law, even when it is enshrined in the Constitution, can alone justify an absolute position on free speech."). Contemporary critiques of free speech protections for Trump and other members of the nationalist far-right find antecedents in the works of 1930s theorists like Karl Loewenstein. *See, e.g.*, Robert A. Khan, *Why Do Europeans Ban Hate Speech? A Debate Between Karl Loewenstein and Robert Post*, 41 HOFSTRA L. REV. 545 (2013); *cf.* Karl Loewenstein, *Militant Democracy and Fundamental Rights, I*, 31 AM. POL. SCI. REV. 417, 423–24 (1937).

[83] *See* Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1, 26 ("[T]he theory of evolution might help to explain why a robust freedom of speech can be extremely valuable even when most individuals remain stubbornly impervious to demonstrably valid refutations of their beliefs. . . . As the population changes with the infusion of new persons with different ideas, the pattern of beliefs within the community changes, even if no single individual ever embraces a new idea or discards an old one.").

[84] *See, e.g.*, JEREMY WALDRON, THE HARM IN HATE SPEECH 5 (2012); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2326–41 (1989)*; see also* sources cited *supra* note 73 (feminist critiques).

[85] *See* SCHAUER, *supra* note 17, at 34 ("The reason for preferring the marketplace of ideas to the selection of truth by government may be less the proven ability of the former than it is the often evidenced inability of the latter.").

on comparative advantage, permits the truth-seeking First Amendment to weather a great many internal critiques while still retaining its privileged position in free speech law and theory.[86] The external critiques present a different type of challenge.

2. *External: Truth Is Not the Central Value of Free Speech.* — The critiques described above, though powerful and sometimes designed to dethrone the marketplace model, are "internal" to the epistemic theory. They accept (or at least can accept) that truth is a fundamental goal, while denying that unregulated speech is the right way to achieve it. A more fundamental line of critique suggests that the theory not only has malfunctioning means, but also the wrong end.[87]

Some of these "external" critiques begin by interrogating the notion of truth itself and questioning whether it actually has real value unless yoked to some other concept like power, or (more narrowly) whether its value must give way to others like dignity.[88] But most people readily accept that truth either has intrinsic value[89] or is so closely related to other values (like the informed action to which *Abrams* alludes[90]) that a theory attempting to maximize it is on the right track.

A related line of argument is that truth is neither objective[91] nor attainable,[92] and that the marketplace therefore has no value. Even accepting the minor premise, however, the major premise does not necessarily follow. As Professor Kent Greenawalt puts it, "the truth-discovery argument can survive a substantial dose of skepticism about objective truth."[93] Indeed, as described in more detail below, Justice Holmes himself seemed to share that skepticism, and yet — like the pragmatists with whom he is often associated — he believed that one can and should pursue the truth while (and by) continually subjecting

---

[86] *See, e.g.*, Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2375 (2018) (quoting Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

[87] Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 317 n.70 (1978) (noting that the Constitution does not structurally support the idea that the goal of the First Amendment is the quest for truth).

[88] *Cf.* Frederick Schauer, *Reflections on the Value of Truth*, 41 CASE W. RES. L. REV. 699, 713–24 (1991) (questioning the value of truth when it conflicts with other values).

[89] *See infra* section II.A.1, pp. 465–70.

[90] *See infra* section II.A.2, pp. 470–72. Recall that, just after invoking the "competition of the market," Justice Holmes declared that "truth is the only ground upon which [people's] wishes safely can be carried out." *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

[91] Ingber, *supra* note 49, at 25 ("[T]he assumption of the existence of objective truth is crucial to classic marketplace theory, [but] almost no one believes in objective truth today."); *see also* Baker, *supra* note 66, at 974–81 ("The assumptions on which the classic marketplace of ideas theory rests are almost universally rejected today. . . . First, truth is not objective.").

[92] Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 617 (1982) ("[I]f we can never attain the truth, why bother to continue the fruitless search?").

[93] Greenawalt, *supra* note 3, at 132.

received wisdom to testing.[94] The search for truth itself can be valuable;[95] one can get closer to truth without entirely reaching it.[96]

Rather than making a frontal assault on truth and the pursuit thereof, other scholars have argued that truth is simply not the central value of the First Amendment. The entire realm of free speech theory is far too broad to canvass, let alone explore in any detail. It is sensible and common, however, to divide the other leading theories into two classes: those that prioritize democracy, and those that focus on personal autonomy.[97] In general, the political-democracy accounts often associated with Professor Alexander Meiklejohn prioritize the importance of free speech to a well-functioning democracy.[98] Such speech often involves false or non-falsifiable statements of preference and opinion. Autonomy-based theories focus more on the self-realization and liberty of the individual speaker, not on whether speech advances the collective search for propositional truths.[99] This is of course a necessary over-simplification, but the point of the discussion here is not to give those theories their due, but only to show how they diverge from the truth-seeking account.

But even if one accepts that there is a lexical priority to free speech theory,[100] and that democracy or autonomy must come ahead of truth,

---

[94] *See generally* Blasi, *supra* note 83 (discussing Justice Holmes's relationships with pragmatist philosophers).

[95] *See* Marshall, *supra* note 3, at 4 ("[T]he attack misfires when it suggests that the First Amendment value inherent in the search for truth exists only in its purported goal — the actual finding of truth. The value that is to be realized is not in the possible attainment of truth, but rather, in the existential value of the search itself.").

[96] *See* Greenawalt, *supra* note 3, at 132. The negative implication of *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), is useful here — after all, the Supreme Court there denied constitutional coverage to "certain well-defined and narrowly limited classes of speech" that "are no essential part of any exposition of ideas, and are of such slight 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." *Id.* at 571–72 (emphasis added).

[97] *See supra* note 41 and sources cited therein.

[98] *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 88–98 (1948) (arguing, contra Justice Holmes, that the purpose of the First Amendment is to protect self-government); *see also* CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 22–23 (1993) (arguing that Madisonian ideas of democracy, rather than free market principles, should shape First Amendment theory); Weinstein, *supra* note 44, at 491 ("[C]ontemporary American free speech doctrine is best explained as assuring the opportunity for individuals to participate in the speech by which we govern ourselves.").

[99] *See, e.g.*, SHIFFRIN, *supra* note 16, at 43 ("The first amendment may value participation and freedom more than truth."); C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1, 6–7 (1976) (arguing that the First Amendment protects a speaker's self-realization); Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 216 (1972). Scanlon later abandoned this view. T.M. Scanlon, *Why Not Base Free Speech on Autonomy or Democracy?*, 97 VA. L. REV. 541, 546 (2011).

[100] *See* Post, *supra* note 19, at 1272–73.

the epistemic value of free speech remains important.[101] Autonomy theorists do not necessarily need to rely on truth, though they need not and generally do not discount its value. After all, in order to *effectively* exercise autonomous choice, achieve self-realization, or engage in self-expression, people typically count on reliable information.[102] Conversely, being subjected to lies or falsehoods has long been recognized — by Kant, most notably[103] — as a threat to personhood.

For democracy theories, the importance of reliable information — even "truth" — is more obvious. A well-functioning democracy, after all, relies not just on people's freedom to express their political opinions and instincts, but on the availability of expertise and knowledge. The most prominent and powerful recent explanation of this relationship appears in the work of Professor Robert Post, who argues that while the animating value of the First Amendment is "democratic legitimation," which is rooted in the equality of speakers and ideas without regard to truth or falsity,[104] it also relies on the companion value of "democratic competence," meaning the "cognitive empowerment of persons within public discourse, which in part depends on their access to disciplinary knowledge."[105]

The point is simply that democracy- and autonomy-based theories can be understood in ways that preserve the importance and value of truth. But why should they have to accommodate themselves to truth, rather than the other way around? Can an epistemic approach to free speech account for the values of democracy and autonomy?

Perhaps the most obvious move is to include "political truths" among those that the marketplace is best suited to identify. After all, the Framers described certain contestable political theories as being "truths" that were "self-evident."[106] If that is the case — indeed, if those truths are among the *most* important truths that the marketplace can identify

[101] I believe that the converse is probably less true, at least for the simple marketplace model, which can and perhaps does treat truth as intrinsically valuable and therefore does not need to draw strength from democracy or autonomy approaches. The knowledge-based approach draws much more heavily on — or at least is more compatible with — the other theories.

[102] *See* David S. Han, *Autobiographical Lies and the First Amendment's Protection of Self-Defining Speech*, 87 N.Y.U. L. REV. 70, 90–103 (2012) (focusing on ways in which lies might advance the autonomy interests of a lying speaker). For a similar argument focused on listeners, see Alan K. Chen, Free Speech, Rational Deliberation, and Some Truths About Lies 4 (unpublished draft) (on file with the Harvard Law School Library), for an argument that some forms of fake news and other speech "might be understood to facilitate a type of listener self-realization that [Professor Alan Chen] call[s] 'expressive experiential autonomy.'"

[103] Varat, *supra* note 16, at 1113 ("Some commentators have borrowed from Immanuel Kant to urge that manipulative lies, at least, are incompatible with the respect for human autonomy underlying the First Amendment."); *see also* SHIFFRIN, *supra* note 16, at 117–19.

[104] Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 482, 484–85 (2011).

[105] POST, *supra* note 15, at 34.

[106] *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

— then the truth-seeking and democracy-based approaches seem largely to collapse into one another.[107]

But this co-opting solution is not entirely satisfying. Few people think of the goals, let alone outputs, of politics as "truths" in the same way as the "ideas" that battle for acceptance in the marketplace. Though political debates are hopefully grounded in fact, and free speech may be able to help in that regard,[108] no amount of market-style competition is likely to establish the "truth" of whether abortion or guns should be further regulated, or whether the United States should withdraw troops from Afghanistan, or whether the Senate should have confirmed Judge Merrick Garland. Those resonate as normative issues that, while crucially important, do not have truth value in the standard sense.[109]

To some degree, this is simply a semantic debate, and there is no point in trying to resolve it here. What matters for the current discussion is not conceptual precision (or accuracy, depending on whether one thinks there is a truth of the matter to be established), but the considerable cost that it would impose on the marketplace theory to expand the definition of truth in this way. For most people, the attraction of the marketplace model is precisely its ability to develop and identify *verifiable* truths. If one expands the goals and functioning of the market to encompass political beliefs and the like, then it starts to look a lot like the market exists simply to label as "truth" whatever commands the majority's support. That is a way to *define* truth, not to identify or, as Justice Holmes said, "test" it.[110]

In sum, then, the marketplace model is in trouble. In part, it faces rebellion from within, as scholars and others have justifiably pointed

---

[107] The collapse need not be complete: it is possible that the real goal of a democratic theory might be participation or legitimation or some value other than the advancement of any particular "truths." Whether this entails conflation of the two theories is debatable. *See* Schauer, *supra* note 88, at 704–05 (arguing that it does).

[108] Greenawalt, *supra* note 3, at 132 ("[D]iscourse certainly can test the coherence of value claims, and can elucidate and clarify the values of a culture and of individuals.").

[109] I include the qualifying clause because I do not want to fully sideline the view that normative statements — unlike, for example, commands — can have truth value. As a matter of doctrinal hydraulics, however, forces tend to push in the other direction, "systematically transmut[ing] claims of expert knowledge into assertions of opinion," at least in public discourse. POST, *supra* note 15, at 44.

For example, the Supreme Court has confirmed that, in order to be actionable, "statement[s] on matters of public concern must be provable as false." Milkovich v. Lorain Journal Co., 497 U.S. 1, 19 (1990). Accordingly, full constitutional protection must be extended to subjective assertions that do not articulate an objectively verifiable event. *See id.* at 20–22. Doubt is resolved in favor of treating something like an opinion rather than a fact. *See* Moldea v. N.Y. Times Co., 22 F.3d 310, 317 (D.C. Cir. 1994) (holding that, where "it is highly debatable whether [a] statement is sufficiently verifiable to be actionable in defamation," or "[w]here the question of truth or falsity is a close one, a court should err on the side of nonactionability" (internal citation and quotation marks omitted)).

[110] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

out its inability to deliver the value — truth — that it is supposedly designed to maximize. Additionally, it is under siege from outside, as competitor theories rooted in autonomy and democracy start to claim more and more of the territory.

Perhaps most seriously, however, it faces neglect.[111] This is doom in scholarly circles, where the worst castle is one that nobody wants to storm. But it also represents a missed opportunity and challenge for the larger debate about free speech. Rarely has the relationship between speech and truth been subject to a more searching public examination than right now. And even those who defend free speech seem to do so on nonepistemic grounds.

What connects many of the critiques and responses is a sense that the marketplace model is simply not worth an enthusiastic defense. It might be grudgingly invoked, but only alongside an enumeration of its faults. The concept of "truth" seems flat, unless leavened with the inclusion of normative beliefs or an understanding that truth is relative and socially determined — two moves that essentially answer the critiques by adopting them, thereby apparently giving up what made the marketplace model attractive in the first place. Is it possible instead to provide a thicker and more successful epistemological account of the First Amendment?

This Article claims that it is. Epistemic defenses of speech can be salvaged from the rubble of the traditional marketplace of ideas. This does not mean giving up entirely on the ability or desirability of speech as a mechanism of improving human understanding. It does, however, mean recognizing that, in certain contexts and subject to certain constraints, the goal of free speech is not the maximization of truths in the abstract, but rather the development of knowledge. Recreating First Amendment theory and doctrine around justified true belief, rather than truth alone, provides a more satisfying account of free speech and the practices that sustain it. To understand why and how, it may help to take a brief detour.

C. The Road to Larissa

In one of the most famous of the Socratic dialogues, Plato's *Meno*, Socrates discusses with Meno the nature of virtue and its relationship to knowledge. Socrates gets Meno to agree that a person can lead the way to the city of Larissa, "or anywhere else you like," whether he knows the way or instead simply happens to have a right opinion about

---

[111] Greenawalt, *supra* note 3, at 130 ("During most of the twentieth century, consequentialist arguments [including truth-seeking] have dominated the discussion of freedom of speech, although the last two decades have seen a resurgence of nonconsequentialist arguments cast in terms of basic human rights and dignity.").

it.[112] It would therefore seem that, so long as a man "has the right opinion about that of which the other has knowledge, he will not be a worse guide than the one who knows, as he has a true opinion, though not knowledge."[113] Meno then asks, reasonably enough, "why knowledge is prized far more highly than right opinion, and why they are different."[114] Meno thus articulates both the crucial normative question — why is knowledge more valuable than true belief? — and the definitional one — how is knowledge different from true belief?

The remainder of this Article will attempt to unpack both of those questions in the context of the constitutional commitment to freedom of speech. That context is important, for the goal here is not to advance or even describe the past two-and-a-half millennia of epistemology. If the inquiry is to be useful to the *legal* question of free speech, it must be mediated through the First Amendment — the doctrines, practices, and theories that together constitute the American system of free speech. Part II attempts that task in some detail.

At the outset, however, it is important to establish why and how the attempt is worthwhile. The world hardly lacks for First Amendment theories, after all, and there is a very real risk that bringing more epistemology into the First Amendment will further muddle two already complicated fields. The goal of this short section is simply to provide a prima facie case that the concept of knowledge is sufficiently valuable and distinct to merit the trip to Larissa.

The place to begin is with the first part of Meno's question: What makes knowledge "prized far more highly than right opinion"?[115] Socrates's primary answer is that knowledge is "tied down" in a way that mere right opinion (that is, true belief) is not.[116] He invokes the sculptures of Daedalus, which were said to be mobile: To "acquire an untied work of Daedalus is not worth much, like acquiring a runaway slave, for it does not remain, but it is worth much if tied down."[117] He concluded by analogy:

> [T]rue opinions, as long as they remain, are a fine thing and all they do is good, but they are not willing to remain long, and they escape from a man's mind, so that they are not worth much until one ties them down by (giving) an account of the reason why.[118]

---

[112] PLATO, MENO 97a (G.M.A. Grube trans.), *in* PLATO: COMPLETE WORKS 870, 895 (John M. Cooper & D.S. Hutchinson eds., 1997).

[113] *Id.* at 97b, at 895.

[114] *Id.* at 97d, at 895.

[115] *Id.* Throughout this article, I follow Meno's lead in asking the normative question before the definitional one, though one could imagine asking them in either order — after all, the value of "knowledge" surely depends on what one means by the term.

[116] *Id.* at 97d, at 895.

[117] *Id.* at 97d–98a, at 895.

[118] *Id.*

Socrates's account thus provides one potential value proposition for knowledge: the former is a surer and stabler guide to action than truth alone. That argument is fully consistent with — indeed echoes — First Amendment law and theory, at least to the extent that it connects belief and action. Recall that the second and third of Justice Holmes's propositions in *Abrams* (following the "competition of the market") were that "truth is the only ground upon which . . . wishes safely can be carried out" and that this is "the theory of our Constitution."[119]

The following Part considers this possibility in detail, along with others that might ground the value of knowledge in its instrumental relationship to the truth, its relevance to personal character, or its value in checking state power. My goal here is simply to show that reorienting the epistemic account of the First Amendment so as to focus on *knowledge* rather than *truth* is worthwhile. In doing so, I depart a bit from the existing literature. As noted above, the standard defense to most attacks on the marketplace conception is to fall back on the comparative argument. But that is both too much and too little of a concession. What is needed is a fundamental reconsideration of the epistemic *ends* of free speech, not just a contingent defense of its advantage as a means.

This is less an admission of defeat than an evolution in response to justified criticism. After all, the marketplace theory itself is not immune to the "competition" that it celebrates. Democracy- and autonomy-based theorists have regularly fine-tuned their theories' central goals, and the epistemic First Amendment must similarly develop and grow if it is to keep pace.

In that respect, it is worth noting that one common theme in the evolution of free speech theories has been not only to focus on the ultimate goods of democracy and autonomy, but also to emphasize the foundations of those values. For democracy theorists, this often means protecting not only political speech or democratic outcomes, but also the mechanisms by which those outcomes are reached and justified — what Post calls "democratic legitimation."[120] Some strains of autonomy theory make similar moves by focusing on internal processes of thinking.[121] What these accounts have in common is that they embed speech in some other central value (democracy or autonomy) as both a means

---

[119] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[120] *See* POST, *supra* note 15, at 18. Post defines this term as the notion that "First Amendment coverage should extend to all efforts deemed normatively necessary for influencing public opinion." *Id.* Even Meiklejohn casts his theory as defending the community's "thinking process" from being "mutilat[ed]" by the government. ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 27 (1960) (emphasis omitted).

[121] *See, e.g.*, Seana Valentine Shiffrin, *A Thinker-Based Approach to Freedom of Speech*, 27 CONST. COMMENT. 283, 298 (2011).

and an end. It matters *how* we reach our democratic decisions, and it matters *how* we achieve or express our autonomy.

The truth-seeking First Amendment generally lacks an analogous account — an argument for why truth reached through free speech is not only more likely but also more valuable than truth reached in some other fashion. This gap leaves the marketplace model especially vulnerable to the empirical challenges described above. Some scholars have responded by emphasizing the value of the search for truth[122] or what the competition of ideas means for character and culture.[123]

Those defenses, in turn, share a common and valuable theme: an emphasis on *ways* of reaching (or at least seeking) the truth. Like the democracy and autonomy variations discussed above, they focus on the journey, rather than the destination. But that move seems harder for truth-focused theories than for the alternatives. After all, democracy and autonomy are practices, whereas the common understanding of truth — even within First Amendment theories — is that it is an end. How, then, can we account for the distinctive importance of reaching truth in the right way?

This brings us back to Meno's second question about knowledge and true belief — "why they are different."[124] In *Meno*, Socrates says that in order to constitute knowledge, right opinions must be "tied down."[125] Plato clarifies this concept in *Theaetetus* with the tripartite definition that remains the starting point of epistemological discussion — knowledge with "an account," or *justified true belief* (JTB).[126] The truth condition is relatively uncontroversial; one cannot know something that is false. The belief condition (that one must believe something in order to know it) presents some complications, since one can imagine situations in which a person correctly and with justification answers a question without confidently believing herself to be correct.[127]

The vast majority of scholarship and debate, however, has been about the justification condition: whether a justification is sufficient or even necessary for knowledge, and — assuming a positive answer to one of the first two questions — how to identify the kinds of justifications that count. There are many ways to map that debate. Below, I follow others by dividing the debate into "internal" accounts (those focusing on

[122] *See* Marshall, *supra* note 3, at 4.

[123] *See* Blasi, *supra* note 83, at 26.

[124] PLATO, *supra* note 112, at 97d, at 895.

[125] *Id.* at 97e, at 895.

[126] *See* PLATO, THEAETETUS 202c (M.J. Levett & Myles Burnyeat trans.), *in* PLATO: COMPLETE WORKS, *supra* note 112, at 157, 224 ("Now when a man gets a true judgment about something without an account, his soul is in a state of truth as regards that thing, but he does not know it; for someone who cannot give and take an account of a thing is ignorant about it. But when he has also got an account of it, he is capable of all this and is made perfect in knowledge.").

[127] *See, e.g.*, Colin Radford, *Knowledge — By Examples*, 27 ANALYSIS 1, 2–4 (1966).

the reasoning of the individual) and "external" accounts (those requiring justifications that might not be available to the individual).[128]

My goal is to suggest that the debate over proper justifications has value for free speech theory, not to choose a side about which justifications (individual intellectual responsibility, disciplinarity, etc.) are to be preferred. The range of justifications sufficient to transform a true belief into knowledge is potentially quite broad. One particularly demanding view is the Cartesian one: a belief is justified if and only if one has an unshakable conviction about it.[129] This view comes close to collapsing truth and justification into one another. An alternative approach, commonly known as reliabilism, counts as justified those true beliefs that emerge from cognitive processes that themselves tend to produce truth.[130] Reliance on perceptions, good reasoning, and professional training might all satisfy that condition, whereas wishful thinking, motivated reasoning, and fabulism might not. Some philosophers argue to the contrary that epistemic justification is not reliant on objective truth frequency, and must instead be regarded as a "normative notion"[131] — a true belief is justified so long as it reflects the available evidence, however imperfect. There are innumerable variations on the theme.[132] What connects them — and animates this Article — is the notion that justifications matter.

Of course, as with any foundational philosophical definition, the JTB approach is not perfect. Indeed, it is demonstrably incomplete, as Professor Edmund Gettier showed with his proof that some justified true beliefs (such as those resting on coincidence) are not knowledge.[133] But it remains the default definition of knowledge, and a pretty good one at that.[134]

---

[128] *See, e.g.*, Husak & Callender, *supra* note 24, at 46; Steup, *supra* note 23, § 2.3.

[129] *See* Lex Newman, *Descartes' Epistemology*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Spring 2019 ed.), https://plato.stanford.edu/archives/spr2019/entries/descartes-epistemology [https://perma.cc/Y2CY-MS54].

[130] *See, e.g.*, Alvin I. Goldman, *What Is Justified Belief?*, *in* JUSTIFICATION AND KNOWLEDGE 1, 20 (George S. Pappas ed., 1979) (presenting this view as an alternative to Descartes's view); *see also* Cohen, *supra* note 25, at 280 (same).

[131] Cohen, *supra* note 25, at 282, 285.

[132] For a helpful overview, see Jonathan Jenkins Ichikawa & Matthias Steup, *The Analysis of Knowledge*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Summer 2018 ed.), https://plato.stanford.edu/archives/sum2018/entries/knowledge-analysis [https://perma.cc/5N6J-JBL2].

[133] *See* Gettier, *supra* note 26; *see also* Brian Leiter, *Positivism, Formalism, Realism*, 99 COLUM. L. REV. 1138, 1160 n.71 (1999) (book review) ("I think everyone agrees that Gettier 'proved' that the analysis of 'knowledge' as 'justified true belief' does not work." (citation omitted)).

[134] *See, e.g.*, John Turri, *Is Knowledge Justified True Belief?*, 184 SYNTHESE 247, 258 (2012) ("There's a reason why so many smart people found JTB so attractive for so long. Once we're convinced that JTB is false, the next most plausible explanation for the attraction is that JTB is *close* to being true. And if my analysis here is correct, then JTB hit very close to the mark indeed.").

Focusing on justifications for truth means looking beyond the "competition" between ideas and taking into account their foundations: a consideration of the basis for our ideas, and not just their accuracy. Bringing this conception of knowledge into the First Amendment means adjusting many existing frameworks, including the marketplace model. But doing so might actually help preserve the epistemic and cognitive values underlying the marketplace approach.

The road to Larissa, then, does not necessarily pass directly through the marketplace, but neither does it depart entirely from the standard materials of First Amendment law and theory. The remainder of this Article will attempt to situate knowledge, and especially justification, as a distinctly constitutional value. But as a starting point for that journey, it may be helpful to remember that Justice Holmes himself seemed to conceptualize truth as focusing not just on the destination — Larissa, as it were — but also on the voyage itself. As he put it: "[a]ll I mean by truth is the road I can't help travelling."[135]

II. THE CONSTITUTIONAL VALUE AND DEFINITION OF KNOWLEDGE

The first Part of this Article had three main goals: to distill the fundamental arguments in favor of the marketplace of ideas approach to free speech, to acknowledge the strength and depth of the internal and external objections to it, and to make a prima facie case that knowledge has some appeal as an epistemic free speech value.

These points set up two tasks for the second Part: first, to defend knowledge as a First Amendment value by establishing what is distinctively and constitutionally important about it, and second, to define it by identifying what kinds of justification are constitutionally relevant. Epistemologists could take these questions in either order, but in constructing a legal account of knowledge it makes sense to begin with the first.

To some degree, the focus on justifications should come naturally to lawyers. In law, justifications are often as essential as accuracy, whether in determining the culpability of a willfully ignorant defendant,[136] assessing the qualifications of an expert witness,[137] or limiting the use of accurate and persuasive evidence that was unconstitutionally

---

[135] Letter from Oliver Wendell Holmes, Assoc. Justice, U.S. Supreme Court, to Georgina Pollock (Oct. 27, 1901), *in* 1 HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK 1874–1932, at 100 (Mark DeWolfe Howe ed., 1941) (cited in Blasi, *supra* note 83, at 11 n.36); *see also* Letter from Oliver Wendell Holmes, Assoc. Justice, U.S. Supreme Court, to Frederick Pollock (June 17, 1908), *in* 1 HOLMES-POLLOCK LETTERS, *supra*, at 139 ("[A]ll I mean by truth is what I can't help thinking . . . .") (cited in Blasi, *supra* note 83, at 11 n.36).

[136] *See* Husak & Callender, *supra* note 24, at 41–53.

[137] FED. R. EVID. 702 (permitting a person to testify as an expert witness if, inter alia, "the testimony is the product of reliable principles and methods").

obtained.[138] In all of those situations, true belief is not in question, and yet the law may require proper justification as well. Showing that justifications are relevant to law is only the beginning, however. It remains to be shown that they matter to the First Amendment in particular.

A. Knowledge as a First Amendment Value

In constructing a distinctively constitutional account of the value of knowledge, it makes sense to start with existing First Amendment theories and materials. The discussion in Part I has already begun this project by showing how a focus on justified true belief, rather than truth alone, can help address some weaknesses of the marketplace approach, while capitalizing on the strengths of competing theories rooted in democracy or personal autonomy.[139] The task now is to make the connections more specific and concrete.

1. Knowledge as a Means to the Intrinsic Good of Truth. — Knowledge is already partly embedded in the truth goal that has been central to First Amendment jurisprudence. And the current crisis in faith about truth as an end of First Amendment protection and theory looks less problematic when we shift focus from truth to justified true belief.

Invocations of *Abrams* tend to focus on the marketplace mechanism for establishing and identifying truth, rather than on what Justice Holmes suggests about why truth matters. This traditional approach invites the kinds of instrumental critiques discussed above, while failing to fully justify the epistemic goal. A close reading of the passage, however, suggests not only a mechanism but also an underlying value:

> [W]hen 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.[140]

What is the "ultimate good" to which Justice Holmes refers? One possibility — the one that most readers probably assume — is truth itself. Perhaps, like equality or liberty or some other potential sovereign

---

[138] Weeks v. United States, 232 U.S. 383, 392 (1914) ("The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.").

[139] *See supra* section I.C, pp. 459–64.

[140] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (emphasis added).

virtues,[141] truth is a virtue that society is obligated to pursue for its own sake.[142] At some basic level, this seems uncontroversial, as there is broad agreement that the advancement of truth is a value,[143] even if not the central value, of the First Amendment.[144]

One argument for knowledge as a First Amendment value, then, could be that it is instrumentally valuable for maximizing truth. People committed to proper justifications for true belief might be better motivated or better able to identify truth — in fact, for some epistemologists, this point is basically definitional.[145] As Plato put it: "[S]omeone who loves learning must above all strive for every kind of truth from childhood on."[146] Plato might not have meant knowledge in the JTB sense (the quote comes from *Republic* rather than *Meno* or *Theaetetus*), but the point is widely accepted, if not easy to empirically verify, that falsity prospers where knowledge practices do not.[147] It seems plausible, then, that pursuing the proper justifications (scholarly discipline, etc.) tends to lead to truth. After all, sometimes the best or even only way to reach an end like being healthy is by cultivating particular means like healthy eating.

On that note, it is worth emphasizing that, even on the most bare-bones account of the marketplace model, what really matters are not true propositions but true beliefs. The fact or breadth of belief might be irrelevant to whether a proposition is true,[148] but it is immensely important to the normative evaluation of free speech as a social practice.

---

[141] *See generally* RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY (2000) (arguing that equal respect and treatment of citizens are the central virtues of democratic sovereignty).

[142] *See* Marshall, *supra* note 3, at 27 ("It is not an overstatement to note that the concern with truth has dominated the Western intellectual tradition.").

[143] Shannon M. Roesler, *Evaluating Corporate Speech About Science*, 106 GEO. L.J. 447, 464–71 (2018) ("[T]he notion that truth has intrinsic epistemic value is widely accepted." *Id.* at 465.); Schauer, *supra* note 8, at 902 ("[I]t seems relatively uncontroversial to assert that, in general, truth is, *ceteris paribus*, better than falsity, that knowledge is, *ceteris paribus*, better than ignorance, and that a society with more true belief is, *ceteris paribus*, better than one with less belief in the truth or than one with more beliefs that are actually false."); Schauer, *supra* note 88, at 704 ("The proposition that truth is necessarily and always valuable has been implicit in centuries of free speech theory.").

[144] *See supra* section I.B.2, pp. 455–459.

[145] *See infra* notes 251–253 and accompanying text (discussing reliabilism and related approaches).

[146] PLATO, REPUBLIC bk. IV, 485d (G.M.A. Grube & C.D.C. Reeve trans.), *in* PLATO: COMPLETE WORKS, *supra* note 112, at 971, 1109.

[147] *See* Alvin I. Goldman & James C. Cox, *Speech, Truth, and the Free Market for Ideas*, 2 LEGAL THEORY 1, 12 (1996) (arguing that "domains where maximum error and falsity are to be found . . . are precisely the ones relatively unserviced by formal education").

[148] Of course, even this statement is not true if one defines truth as majority belief, as a thin reading of Justice Holmes might suggest. But it seems unlikely that this definition is the First Amendment's conception of truth. *Cf.* Whitney v. California, 274 U.S. 357, 374 (1927) (Brandeis, J., concurring) ("[A] State is, ordinarily, denied the power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequence.").

Put another way: What is the value of a truth that no one believes? The whole point of the connection between truth and free speech is to increase the identification, understanding, and belief of those truths.[149]

Recognizing the difference between truths and true beliefs is important, in part because it helps illustrate the point that one does not necessarily maximize true beliefs — or even truths — by flooding the market with true statements. The availability and accessibility of truths are not enough for them to "get . . . accepted in the competition of the market,"[150] if consumers in that market are not willing or able to accept them. Indeed, Justice Holmes himself recognized as much: "One thinks that an error exposed is dead, but exposure amounts to nothing when people want to believe."[151]

Consider (it shouldn't be hard) a world in which more truths are available than ever before, but are often washed away on waves of falsehood. With unimaginable amounts of information at our literal fingertips (and arguably within our "extended" minds[152]) there is nonetheless a pervasive sense of disquiet that we, as individuals and as a collective, are facing something like an epistemic crisis. The sheer volume of information may overwhelm our ability to categorize, process, sort, and remember. The proliferation of falsehoods makes it hard to trust *any* idea, which in turn saps people's ability and willpower to engage in the kinds of debate that might put truth and falsehood to the test. The ability to find information that confirms our initial judgments makes it harder to engage with challenging ideas, and all too easy to simply deepen our social or cognitive biases.[153] The degradation of our attention spans makes it hard to engage in deep thinking or learning.[154] And so on.

---

[149] Schauer, *supra* note 88, at 707 ("[T]he argument from truth is essentially an argument from knowledge. The value asserted by the argument from truth is the value of having people believe things that are in fact true. Truth, after all, is a property of a proposition and has little to do with human action or belief.").

[150] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[151] Letter from Oliver Wendell Holmes, Assoc. Justice, U.S. Supreme Court, to Frederick Pollock (Aug. 30, 1914), *in* 1 HOLMES-POLLOCK LETTERS, *supra* note 135, at 219 (cited in Blasi, *supra* note 83, at 26 n.95).

[152] The question of knowledge and extended minds as they relate to the First Amendment is itself an interesting and important one. *See, e.g.*, Betsy Sparrow et al., *Google Effects on Memory: Cognitive Consequences of Having Information at Our Fingertips*, 333 SCIENCE 776, 778 (2011) (observing that study participants are more likely to recall "where" on a computer a piece of information is stored than "what" it is).

[153] *See* Tversky & Kahneman, *supra* note 69, at 1127–28 (discussing the tendency of people to utilize availability heuristics, which are facilitated by the easy availability of information).

[154] *See generally* TIM WU, THE ATTENTION MERCHANTS (2016) (claiming that the modern attention span is decreasing steadily in the wake of overstimulation by mass media and information penetration). *But see* Simon Maybin, *Busting the Attention Span Myth*, BBC NEWS (Mar. 10, 2017), https://www.bbc.com/news/health-38896790 [https://perma.cc/6GSK-NMMV] (arguing that there is no conclusive proof that attention spans are declining).

But it is hard to cast these as problems within the traditional marketplace model, which tends to treat the proliferation of ideas as, if not an unqualified-albeit-instrumental good, at the very least a necessary evil. There can indeed be situations in which the search for ideas is self-defeating, but for the most part — as with economic markets — a broader and deeper market is likely to be more efficient and effective.

On the JTB account, however, the sheer volume of information is not an unalloyed good. What matters is the maximization of knowledge, which includes not only the volume of truths but also the quantity and quality of justifications — bases for believing those truths. Strengthening shared commitments to *justifications* of true belief, moreover, can help overcome some (albeit not all[155]) of those cognitive biases and thereby facilitate the spread of truth itself.

Mechanisms of knowledge might also improve the *proportion* of beliefs that are truthful. There is, after all, a difference between simply maximizing the total amount of truths available and finding the most desirable equilibrium between true and false beliefs. As Professors Alvin Goldman and James Cox put it:

> Each agent's quantity of truth possession might be represented by his or her ratio of true beliefs to true-beliefs-plus-false-beliefs, or perhaps the ratio of true beliefs to true-beliefs-plus-false-beliefs-plus-no-opinions. . . . [T]he social ratio would be the total number of true beliefs (or believings) by members of society divided by the total number of true beliefs, false beliefs, and no opinions.[156]

This is an important distinction that is sometimes elided in the debate about the marketplace model, where the battle tends to be about whether the free exchange of ideas maximizes truth or falsehood, as if those are the only two options and the size of the overall set of beliefs is fixed. In actuality, there is no necessary "cap" on the number of beliefs, and so the proportion between true and false beliefs is itself potentially as important as the total amount of true beliefs. A person (or society) with ten true beliefs and one hundred false ones might be far worse off than one with nine true beliefs and no false ones.

A great deal of current First Amendment scholarship focuses on the phenomenon of "fake news."[157] As with countless other free speech controversies in the past (Nazis in Skokie and the like), one gets the sense

---

[155] Racism and other prejudicial beliefs are not purely cognitive problems, and so cannot be entirely fixed by more or better thinking. *See, e.g.*, Stuart Hall, *Signification, Representation, Ideology: Althusser and the Post-Structuralist Debates*, 2 CRITICAL STUD. MASS COMM. 91, 108–13 (1985) (arguing that race as an ideological category is overdetermined by its relation to other contested economic, political, and cultural practices and structures).

[156] Goldman & Cox, *supra* note 147, at 5.

[157] Although it undoubtedly owes much to President Trump, the surge actually began before his presidency. *See* Horwitz, *supra* note 21, at 462 (noting, in 2012, that "[i]t is unsurprising that these

that scholars have little personal sympathy with the purveyors of fake news, but that those same scholars often conclude — sometimes but not always grudgingly[158] — that fake news is nonetheless generally protected by the First Amendment.[159] After all, the whole point of the epistemic model of free speech is that "the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression."[160]

Sometimes fake news and related phenomena are described as evidence of a "post-truth" era, or a society "in which truth seems to matter so little."[161] But the "post-truth" label can obscure something important about the people who believe fake news, lies, conspiracies, and other demonstrably false notions: they do not necessarily deny the value of truth.[162] Quite to the contrary, many believe themselves to be in possession of it, and that it has power, which is why President Trump goes to such great lengths to brand unwanted stories as "fake news."[163] One cannot combat the phenomenon, then, by simply insisting on the value of truth.

What is missing is not a belief in the importance of truth, but declining faith in — and increasing disagreement about — the disciplines, institutions, and practices of *knowledge*.[164] The underlying debate is about which sources and justifications for belief are valid: media, universities, churches, personal intuition, and so on. That discussion is not

---

sorts of epistemological questions have interested First Amendment scholars" and that "[w]hat is more surprising, perhaps, is the sudden intensity of this interest").

158 *See* sources cited *supra* note 102 (defending constitutional value of lying as a means of advancing speaker and listener autonomy).

159 *See* Clay Calvert & Austin Vining, *Filtering Fake News Through a Lens of Supreme Court Observations and Adages*, 16 FIRST AMEND. L. REV. 153, 156–58 (2018); Mark Verstraete & Derek E. Bambauer, *Ecosystem of Distrust*, 16 FIRST AMEND. L. REV. 129, 147–52 (2018) (sounding a "cautionary note on interventions," *id.* at 147).

160 Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

161 Schauer, *supra* note 8, at 919.

162 This view does not apply to everyone involved in the phenomenon of fake news. Trolls, saboteurs, and others might very well be committed to purposeful attacks on what they know to be truths. I will not address the constitutional status of such speech in any detail here, except to note that the First Amendment protects a great many lies, but also permits liability for certain falsehoods uttered with a culpable mental state. The "speech" of algorithms, bots, and other nonhumans also raises threshold questions not addressed here. For more comprehensive accounts of some of these issues, see Stuart Minor Benjamin, *Algorithms and Speech*, 161 U. PA. L. REV. 1445, 1447 (2013) (arguing that the outputs of "most algorithmic-based editing" are speech for the purposes of the First Amendment); Tim Wu, *Machine Speech*, 161 U. PA . L. REV. 1495, 1517–24 (2013) (arguing for the usefulness of a "functionality doctrine" in considering the application of First Amendment protection in an increasingly algorithmic world, *id.* at 1518).

163 *See, e.g.*, Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 20, 2018, 5:38 AM), https://twitter.com/realdonaldtrump/status/965943827931549696 [https://perma.cc/94XR-VCDV] ("I have been much tougher on Russia than Obama, just look at the facts. Total Fake News!").

164 *Cf.* John O. McGinnis, *A Politics of Knowledge*, NAT'L AFF., Winter 2012, at 58, 59 (contrasting an "outdated approach" in which "analysis of potential improvements was to come from the top, foisted upon the public by experts and bureaucrats" with a "technological acceleration that provides new mechanisms for creating social knowledge").

a debate about the value of truth, but about where it is to be found. What justifications can or should be privileged over others is a difficult but unavoidable question, addressed in part below.[165]

Moreover, some truths may be more significant than others.[166] The kinds of truths that one finds in the online marketplace of ideas, for example, might be precisely the kinds of accurate but trivial facts that contribute nothing to personal or social flourishing. By contrast, true beliefs acquired through the development of expertise could be the kinds that most people intuitively regard as more valuable.

Of course, this is a normative statement — inevitably so; the basic question is one of value, after all. And to fully defend it would require a more precise account of the kinds of knowledge that an individual or society might prize (scientific, medical, and so on). My point here is only the general one that knowledge, rather than truth, might better capture the epistemic values that most people really want from free speech: not only quantity, but also quality, of information.

2. Knowledge as a Guide to Action. — Similarly, knowledge fits into current First Amendment theory because it is a guide to action, a preoccupation of truth-based models starting with *Abrams* itself.

Although most people probably agree that truth has some intrinsic value — that, all else equal, more truth is generally better than less — true beliefs are also important because they serve as a guide to informed action.[167] People act on their beliefs, and when those beliefs are false they are likely to make worse decisions. When people come to believe that Democratic leaders are operating a child sex ring out of the basement of a D.C. pizza parlor,[168] or that vaccines cause autism,[169] and then act on those demonstrably incorrect beliefs, they often harm themselves and others in the process.

The importance of the relationship between truth and action was emphasized in *Abrams*. After stipulating the value of "competition" in identifying truth — the heart of the standard marketplace model —

---

[165] *See infra* section II.B, pp. 476-86.

[166] Goldman & Cox, *supra* note 147, at 6 ("[I]t seems implausible to weight all propositions equally. Believing a (true) law of physics or a (true) economic principle intuitively seems like a more significant cognitive accomplishment than believing a more humdrum truth.").

[167] *See* Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554, 557 (1991) ("The First Amendment is based on the belief that people will make better decisions if they are more fully informed."); *cf.* Paul A. David & Dominique Foray, *Economic Fundamentals of the Knowledge Society*, 1 POL'Y FUTURES EDUC. 20, 25 (2003) (defining knowledge as a quality that "empowers its possessors with the capacity for intellectual or physical action").

[168] *See* Amanda Robb, *Anatomy of a Fake News Scandal*, ROLLING STONE (Nov. 16, 2017, 3:07 PM), https://www.rollingstone.com/politics/news/pizzagate-anatomy-of-a-fake-news-scandal-w511904 [https://perma.cc/Z7VK-824K].

[169] *See* Peter J. Hotez, *How the Anti-Vaxxers Are Winning*, N.Y. TIMES (Feb. 8, 2017), https://nyti.ms/2k1LpSB [https://perma.cc/Q7SR-PLXN].

Justice Holmes went on to say that "truth is the only ground upon which . . . wishes safely can be carried out" and that this is a part of "the theory of our Constitution."[170] On this vision, truth might not be valuable intrinsically, but as a basis for action — individual, perhaps, but also collective. Justice Holmes would later reemphasize the tight connection between truth, belief, and action in *Gitlow v. New York*,[171] arguing that an idea "offers itself for belief and *if believed it is acted on* unless some other belief outweighs it or some failure of energy stifles the movement at its birth."[172]

Recall that Meno's question for Socrates was what makes knowledge more valuable than true belief alone. Socrates's answer was that knowledge is fastened or "tied down" in a way that makes it a more effective basis for action.[173] A person who *knows* the way to Larissa is more likely to make it there, since mere true belief is more brittle and can be shaken — it has no foundation of justification on which to rest.

If the purpose of true belief is to guide action, and knowledge does so better than true belief alone, then Socrates's answer to Meno is also the answer to our constitutional question: knowledge is to be preferred to truth alone because it is a better guide to action. A person or society[174] in possession of knowledge will stay the course — will reach Larissa — more dependably.

This conclusion is consistent with the fact that truth-based accounts of the First Amendment often point to the instrumental value of truth as a guide to action. A standard argument in favor of constitutional coverage for commercial speech, for example, is that it provides the kind of information that consumers need in order to make decisions.[175] The competition of the marketplace — which in the case of commercial speech is both metaphorical and real — will help ensure that the information is true. But when it comes to certain kinds of speech — those made in the context of a professional relationship, for example[176] — accuracy is not left to the market. As Professor Claudia Haupt notes: "T]he state may ensure that clients seeking professional advice are not harmed by 'false' ideas by way of imposing professional malpractice liability."[177] The link between information, understanding, and action in such contexts is such that law may legitimately intervene.

---

[170] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[171] 268 U.S. 652 (1925).

[172] *Id.* at 673 (Holmes, J., dissenting) (emphasis added).

[173] PLATO, MENO at 97e, *in* PLATO: COLLECTED WORKS, *supra* note 112, at 895.

[174] *See* Schauer, *supra* note 47, at 232 (exploring the distinction between individual and collective knowledge).

[175] For an early exploration, see Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 432–33 (1971).

[176] *See infra* section II.C, pp. 486–496.

[177] Haupt, *supra* note 40, at 1274.

Again, of course, there are normative questions and assumptions lurking. Designing First Amendment doctrine so as to privilege knowledge will incentivize and enable certain kinds of action over others — those that accord with whatever justifications the law recognizes.[178] To take just one example, Professor Paul Horwitz notes that, on one view: "[A]cademic freedom is prized primarily because its contribution to truth-seeking will yield discoveries or insights that . . . benefit society at large."[179]

There are serious questions about which practices and institutions deserve this kind of deference.[180] But at a general level, as with the argument that truth is generally better than falsehood, it seems relatively safe to say that truth-guided actions will generally be better than those guided by falsehood. And if knowledge does a better job than true belief alone at maintaining the link between truth and action, then there is good reason for a system of free speech to prize it.

3. Truth, Knowledge, and Character. — Focusing on justified true belief, rather than truth proper, explicitly foregrounds the emphasis — already present in First Amendment theory — on the process of truth-seeking. Indeed, one reading of Justice Holmes is that he was not concerned so much with the value of truth as a basis for action as he was with the competition of the market itself, and the kinds of values it demands and develops, such as determination, drive, and a constant searching for the transcendent (leavened with the knowledge that it may be unattainable).[181] On this view, the main benefits of the search for truth are the values that it inculcates, not the destination it reaches.

As noted above, the standard account of the marketplace of ideas is that it provides the best means of developing and identifying truths. But Justice Holmes himself was not confident that any single "truth" was waiting to be discovered. As Blasi explains:

> Holmes certainly was a pluralist. Throughout his adult life, in a variety of intellectual endeavors, he displayed an instinctive aversion to assertions of "absolute" truth. He wrote to John Wu: "I don't believe or know anything about absolute truth." He once described truth as "the majority vote of that nation that could lick all others."[182]

---

[178] *Cf.* Schauer, *supra* note 88, at 709 ("[T]he argument from truth as an argument for freedom of speech and freedom of the press is parasitic on a theory of value or a theory of the good as to which knowledge is instrumental.").

[179] Paul Horwitz, Grutter*'s First Amendment*, 46 B.C. L. REV. 461, 484 (2005); *see also* Keyishian v. Bd. of Regents of the Univ. of N.Y., 385 U.S. 589, 603 (1967) (holding that "academic freedom . . . is . . . a special concern of the First Amendment" because "[t]he Nation's future depends" on children being given "wide exposure to [a] robust exchange of ideas").

[180] *See infra* section II.B, pp. 476–86.

[181] Irene M. Ten Cate, *Speech, Truth, and Freedom: An Examination of John Stuart Mill's and Justice Oliver Wendell Holmes's Free Speech Defenses*, 22 YALE J.L. & HUMAN. 35, 66–67 (2010).

[182] *See* Blasi, *supra* note 83, at 14 (footnotes omitted).

One way to read this passage is as defining truth simply as whatever emerges from the marketplace of ideas. But that definition would make the relationship between truth and the marketplace more tautological than teleological. If truth just *is* what the marketplace produces, then it is hard to see how it functions as an independent value sufficient to justify reliance on the marketplace.

That result can be avoided if one understands Justice Holmes's goal not as defining particular objective and consistent truths, but as requiring continual testing and retesting of ideas and ideals — a marketplace, more than a market, as Blasi puts it.[183] Blasi argues that *Abrams* "contains the seeds of an understanding of the First Amendment that has more to do with checking, character, and culture than with the implausible vision of a self-correcting, knowledge-maximizing, judgment-optimizing, consent-generating, and participation-enabling social mechanism."[184] Bill Marshall makes a similar move in his influential defense of the marketplace model, arguing that the "value that is to be realized is not in the possible attainment of truth, but rather, in the existential value of the search itself."[185] Both of these arguments emphasize the *process* of truth-seeking, not just the value of true beliefs themselves.

The knowledge-based approach to the First Amendment similarly emphasizes not just the outcomes of free speech, but also the value of certain modes and habits of thinking. In practice, the two will sometimes overlap. Good justifications might be only those that reliably lead to truth. In any event, to the degree that *Abrams* is about habits of mind and character, rather than truths, it fits more comfortably with a focus on knowledge than on truth alone.

4. Truth and the Role of the State. — A knowledge-based account of the First Amendment also helps answer a puzzle that the truth-centric approach stops short of addressing: If truth is the goal of First Amendment protection, why not allow speech regulation in specific areas where the government almost certainly has a comparative advantage in assuring or identifying verifiable truths?

The answer to this question is not entirely satisfying from within the marketplace model. Justice Holmes's claim that the "best test" of truth is to get itself accepted in the marketplace of ideas is generally understood as an argument that the marketplace of ideas will be more *accurate*

---

[183] *Id.* at 13 ("Perhaps the imagery that we should take from Holmes's figure of speech is not that of a highly structured price-determining *market* such as a stock exchange, a mechanism designed to achieve plebiscitary and transactional precision, but rather a choice-proliferating market*place*, a site for spontaneous and promiscuous browsing, comparing, tasting, and wishing, a paean to peripatetic subjectivity amid abundance.").

[184] *Id.* at 2. Blasi somewhat discounts the First Amendment's "knowledge-maximizing" function, but I do not read him to be using "knowledge" in the way I am here.

[185] Marshall, *supra* note 3, at 4. *But see* Schauer, *supra* note 88, at 704–08 (arguing that the search for truth has no intrinsic value).

than the state — that it will sort truths from falsehoods with fewer false positives and false negatives.[186] This argument is an empirical one and is subject to all the concerns, weaknesses, and objections canvassed above.[187]

A knowledge-based First Amendment might be able to fill the gap. On this approach, the question is not the simple empirical issue of how many truths are available, but what *justifications* are available for believing them. Obviously, this entails identifying which justifications are appropriate and which are not — a project that Part II begins — but it is not hard to imagine that "because the government said so" would head the list of improper justifications.[188] It is unacceptable because the state cannot oversee truth-seeking without eroding other underlying First Amendment values. The concern is not whether the government can do a more accurate job in identifying truth (the standard marketplace argument), but whether its efforts to do so will trample on other important free speech principles.

Consider the constitutional limitations on the government's power to punish or prevent false speech.[189] For the most part (commercial speech is a bit of an exception[190]), the First Amendment prevents this kind of regulation.[191] But why? Justice Holmes's argument that the "best test of truth is the power of the thought to get itself accepted in the competition of the market" might be convincing in general, but surely not in cases where *undoubtedly* false statements are in play. Indeed, the Supreme Court itself has often said that "there is no constitutional value in false statements of fact,"[192] and that such statements "are particularly valueless" precisely because "they interfere with the truth-seeking function of the marketplace of ideas."[193]

And yet, when faced with a case involving a statute punishing a limited set of such undeniably false statements, the Court struck down the law on First Amendment grounds. In *United States v. Alvarez*,[194]

---

[186] *See supra* pp. 448–49.

[187] *See supra* section I.B, pp. 451–59.

[188] *Cf.* Steven G. Gey, *The First Amendment and the Dissemination of Socially Worthless Untruths*, 36 FLA. ST. U. L. REV. 1, 21 (2008) (arguing that government has no "legal authority to identify and enforce any particular version of right and wrong, or truth and untruth").

[189] Whitney v. California, 274 U.S. 357, 374 (1927) (Brandeis, J., concurring).

[190] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980) ("For commercial speech to [be constitutionally protected], it at least must concern lawful activity and not be misleading.").

[191] United States v. Alvarez, 567 U.S. 709, 723 (2012) (plurality opinion) (striking down the Stolen Valor Act, Pub. L. No. 109-437, 120 Stat. 3266 (2006), which criminalized false claims about having military medals).

[192] Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974); *see also, e.g.*, *Alvarez*, 567 U.S. at 746 (Alito, J., dissenting) (collecting cases); BE&K Constr. Co. v. NLRB, 536 U.S. 516, 531 (2002) ("[F]alse statements may be unprotected for their own sake . . . ."); Herbert v. Lando, 441 U.S. 153, 171 (1979) ("Spreading false information in and of itself carries no First Amendment credentials.").

[193] Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 52 (1988).

[194] 567 U.S. 709.

the petitioner had been convicted of violating the Stolen Valor Act,[195] which criminalized false claims of having received the Congressional Medal of Honor.[196] There was no doubt that the petitioner had lied and no real defense of his lie's value.[197] A majority of the Court even acknowledged that the falsity of speech had counted against its constitutional protection in some cases.[198] Ultimately, the Court's decision seemed to rest on its view that only a stronger historical tradition could justify the law.[199] Whatever one thinks of the Court's recent turn to historical categoricalism in First Amendment cases,[200] it must be said that it does not flow naturally or neatly from a commitment to the marketplace of ideas.

A knowledge-based approach could have provided a broader and more satisfying epistemic account. Focusing on the inappropriateness of the law as a tool (again, not because it is blunt, but because it is forbidden) helps make sense of the fact that the Supreme Court has consistently extended constitutional protection to false statements[201] despite insisting that they have no value.[202] One way to reconcile those seemingly conflicting principles is to understand the former as an instantiation of the rule that the government simply cannot prohibit falsehoods, even if it can identify them accurately and even if they have no value. True beliefs have less value if they are a result of government regulation. This is not inconsistent with *Alvarez*, to be clear — it is an alternative way of understanding the epistemic values at work.

In fact, it might provide a better account of some aspects of the decision, including the plurality's repeated invocation of the concept of "integrity." The Court insisted that "[t]he Government's interest in protecting the *integrity* of the Medal of Honor is beyond question."[203] But what does "integrity" mean in this context? The Court invoked the same concept in the course of noting that prohibitions on perjury similarly punish a particular kind of false speech, and have been upheld on a similar integrity-based rationale: "To uphold the integrity of our trial system, . . . the constitutionality of perjury statutes is unquestioned."[204]

---

[195] Pub. L. No. 109-437, 120 Stat. 3266 (2006).

[196] *Id.* at 713 (plurality opinion).

[197] *Id.* at 753 (Alito, J., dissenting) ("Neither of the two opinions endorsed by Justices in the majority claims that the false statements covered by the Stolen Valor Act possess either intrinsic or instrumental value.").

[198] *Id.* at 719 (plurality opinion) (noting that, under current doctrine, falsity is "not irrelevant"); *id.* at 732–33 (Breyer, J., concurring) (noting that "this Court has frequently said or implied that false factual statements enjoy little First Amendment protection").

[199] *Id.* at 717–18 (plurality opinion) (citing United States v. Stevens, 559 U.S. 460, 468 (2010)).

[200] For a critical assessment of *Stevens*'s historical categoricalism, see Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2212–32 (2015).

[201] *Alvarez*, 567 U.S. at 715 (plurality opinion); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) (allowing liability only for knowing or reckless falsehoods).

[202] *See supra* p. 474.

[203] *Alvarez*, 567 U.S. at 725 (plurality opinion) (emphasis added).

[204] United States v. Dunnigan, 507 U.S. 87, 97 (1993).

This is notable precisely because the protection of integrity is different from the pursuit of truth and is actionable even if it leads a jury to believe, accurately, that a particular defendant is guilty. The harm has to do with processes of belief — with justifications, in other words.

All of the examples described in the preceding four sections help show ways in which an account of free speech that focuses on justified true belief already exists in the doctrine — and in some cases better explains its complexities — than an account focused more simplistically on "truth."

B. Mapping a Knowledge-Based First Amendment: What Justifications Count?

The discussion up until this point has attempted to show that there is a difference between truth and knowledge, and that there are good reasons to take the latter seriously as an important and distinct First Amendment value. But what is, or should be, the First Amendment's theory of knowledge? What kinds of justifications are constitutionally relevant?

The answers to these questions must come from within law.[205] A constitutional theory of free speech that represented the cutting edge of epistemological thinking but failed to account for our actual First Amendment practice would be no constitutional theory at all. The goal of this section is to show how various aspects of free speech theory and doctrine can — and in some ways already do — account for knowledge as a constitutional value. My purpose here is only to show that justifications are important and that they might plausibly be identifiable,[206] not to resolve which justifications count. After all, epistemologists, whose entire field is devoted to these questions, and who — unlike legal scholars — are relatively unencumbered by precedent, have yet to settle on which justifications transform a belief into knowledge.[207] Some epistemologists define it to mean true belief alone,[208] or true belief that is "safe"[209] or "sensitive"[210] in an epistemological sense. One might

---

[205] *Cf.* Husak & Callender, *supra* note 24, at 48 ("The conception of justification typically employed by philosophers is idealized, and may be unsuitable for purposes of imposing criminal liability.").

[206] *See id.* at 45 ("The mental state of knowledge was hence identified with an agent correctly believing a proposition for which he possessed good evidence. Exactly what form good evidence would take was again controversial, but for present purposes an intuitive understanding of 'evidence' is more than sufficient.").

[207] Christian Turner, *The Burden of Knowledge*, 43 GA. L. REV. 297, 303–04 (2009) ("It is highly contested precisely what kind of truth and what kind of justifications, whether in the form of pure logical entailment or mere evidence, are needed to elevate a mere belief to the special, objective status of knowledge.").

[208] *See* Crispin Sartwell, *Knowledge Is Merely True Belief*, 28 AM. PHIL. Q. 157 (1991); Crispin Sartwell, *Why Knowledge Is Merely True Belief*, 89 J. PHIL. 167 (1992).

[209] *See, e.g.*, Ernest Sosa, *How to Defeat Opposition to Moore*, 13 PHIL. PERSP. 141, 142 (1999).

[210] *See, e.g.*, NOZICK, *supra* note 25, at 172–78; *see also* Kelly Becker & Tim Black, *The Resilience of Sensitivity*, *in* THE SENSITIVITY PRINCIPLE IN EPISTEMOLOGY 1, 1 (Kelly Becker & Tim Black eds., 2012).

likewise agree that knowledge is a central First Amendment value, and yet disagree about what constitutes knowledge (as philosophers themselves do). The same is true of other schools of First Amendment thought; many scholars agree that democracy is at the heart of the First Amendment, for example, but have different visions of what that means for the amendment's coverage.[211] Any type of justification-based approach falls within the ambit of a knowledge-based framework.

1. Justifications Internal to the Thinker. — One possible answer is that while the First Amendment values justifications, it cares only that individual thinkers do their best with the information available to them. Reckless, irresponsible, or malicious beliefs — even if true — would not be prioritized in the same way. That does not mean that they would be totally unprotected, any more than falsehoods and opinion must be denied constitutional coverage in a truth-based account. The point is only that the constitutional goal would be to encourage true beliefs that have been reached in the proper way. The justifications that count are those internal to the thinker.

This approach maps substantially onto what is sometimes called the "internal" approach in epistemology.[212] The basic point of that approach is that, in Professor Laurence BonJour's explanation:

> [O]ne's cognitive endeavors are epistemically justified only if and to the extent that they are aimed at this goal [that is, truth], which means very roughly that one accepts all and only those beliefs which one has good reason to think are true. To accept a belief in the absence of such a reason . . . is to neglect the pursuit of truth; such acceptance is, one might say, *epistemically irresponsible*. My contention here is that the idea of avoiding such irresponsibility, of being epistemically responsible in one's believings, is the core of the notion of epistemic justification.[213]

On this account, the justification is something that is cognitively available to the individual thinker. One might even go so far as to say that intellectual responsibility is its own reward. Professors Douglas Husak and Craig Callender point to John Locke, who wrote in *An Essay Concerning Human Understanding* that a person with justification "may

---

[211] *Compare* Bork, *supra* note 43, at 29 (arguing that the First Amendment covers only "criticisms of public officials and policies, proposals for the adoption or repeal of legislation or constitutional provisions and speech addressed to the conduct of any governmental unit in the country"), *with* Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 257 ("Literature and the arts must be protected by the First Amendment. They lead the way toward sensitive and informed appreciation and response to the values out of which the riches of the general welfare are created.").

[212] *See generally* LAURENCE BONJOUR, THE STRUCTURE OF EMPIRICAL KNOWLEDGE (1985); RODERICK M. CHISHOLM, THEORY OF KNOWLEDGE 76–77 (2d ed. 1989).

[213] BONJOUR, *supra* note 212, at 8 (cited in Husak & Callender, *supra* note 24, at 50 n.78).

have this satisfaction in doing his duty as a rational creature, that, though he should miss truth, he will not miss the reward of it."[214]

The fact that Locke — a major influence on the Framers[215] — seems congenial with this approach suggests that traces of it might be found within our free speech tradition. One can see the same theme in Milton's *Areopagitica*: "A man may be a heretic in the truth; and if he believe things only because his Pastor says so, or the Assembly so determines, without knowing other reason, though his belief be true, yet the very truth he holds becomes his heresy."[216]

And indeed some of the foundational critiques and defenses of the marketplace model seem rooted in the same basic notion. Meiklejohn's critique of Justice Holmes's marketplace conception emphasizes this exact point:

> [The marketplace metaphor has been a] fruitful source of intellectual irresponsibility and of the errors which irresponsibility brings. We Americans, when thinking in that vein, have taken the "competition of the market" principle to mean that as separate thinkers, we have no obligation to test our thinking, to make sure that it is worthy of a citizen who is one of "the rulers of the nation." That testing is to be done, we believe, not by us, but by "the competition of the market." Each one of us, therefore, feels free to think as he pleases, to believe whatever will serve his own private interests. . . . And to that disastrous end the beautiful words of Mr. Holmes have greatly contributed.[217]

The passage bears rereading as it echoes so much contemporary angst about information and truth. The "epistemic[] irresponsib[ility]" and "intellectual irresponsibility" that BonJour and Meiklejohn decry boil down to the same thing: a lack of internal justification for belief, such as doubting President Barack Obama's natural born citizenship as a way of expressing disapproval of him, or believing a particularly outlandish claim about President Donald Trump for the same reason. Such motivated reasoning represents a paradigmatic case of epistemic irresponsibility.[218]

Of course, serious challenges accompany the use of an internal-justification approach to knowledge as a constitutional lodestar. One initial concern is that motivated reasoning is so completely pervasive that any theory that denies its value will be unduly narrow in

---

[214] Husak & Callender, *supra* note 24, at 50 n.77 (quoting 2 JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 413 (Alexander C. Fraser ed., Dover Publ'ns. 1959) (1690)).

[215] Locke was the third-most-cited thinker of the Founding era, after Montesquieu and Blackstone. AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION 8 (2012) (citing DONALD S. LUTZ, A PREFACE TO AMERICAN POLITICAL THEORY 134–40 (1992)).

[216] MILTON, *supra* note 10, at 34.

[217] MEIKLEJOHN, *supra* note 120, at 73–74.

[218] I am grateful to Professor Govind Persad for illustrating this point.

scope.[219] But, again, one can locate intellectual responsibility as the central value of the First Amendment while accepting that it is not universal, and might even be rare. That does not mean limiting coverage to intellectually responsible speech any more than a truth-based account must deny coverage to falsehood.

The real challenge is not one of scope, but of method: Can the law define the constitutional value of speech based on the mental states of individual speakers? It can, and does. After all, the constitutionalization of defamation law has consisted in large part of an effort to identify the mental states — negligence, actual malice, and so on — that make a false statement actionable in various contexts.[220] These are precisely the kinds of questions one would ask within an internal-justification model. Whatever the practical and conceptual challenges, then, it is possible to imagine legal rules that would take into account a speaker's justifications for her beliefs.

In other ways — especially when accounting for the constitutional value of false but intellectually responsible (that is, justified) statements — the knowledge-based model might actually be more satisfying than the marketplace model in accounting for the current rules of defamation law. Truth (the lodestar of the marketplace model) undoubtedly matters in the constitutional status of defamation rules. It is (today, anyway[221]) regarded as a complete defense to a defamation claim.[222] But the question of truth is not all there is, because not all false statements are actionable. Depending on the context, the statement must be made with actual malice,[223] negligence, or some other actionable mental state.[224] These are *constitutional* limitations.[225] The question, then, is why the First Amendment — and, for present purposes, the marketplace model in particular — should care about the basis (or, perhaps, "justification") for a false statement.

---

[219] *See* Dan M. Kahan, *The Supreme Court, 2010 Term — Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 7–8 (2011) ("There is broad societal consensus in support of the liberal principles that animate constitutional rights. Citizens' perceptions of what outcomes these principles should yield in particular cases, however, are subject to motivated cognition . . . ." (footnote omitted)).

[220] *See infra* p. 479.

[221] Schauer, *supra* note 88, at 700 (noting that, in the context of a criminal libel action, "the common law recognized that there could be 'injurious truth'" (quoting NORMAN L. ROSENBERG, PROTECTING THE BEST MEN 119 (1986))).

[222] *Id.* at 699–700.

[223] *Cf.* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) (standard for cases involving public officials).

[224] Gertz v. Robert Welch, Inc., 418 U.S. 323, 348 (1974).

[225] *Id.* at 347 ("We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.").

Of course, the JTB account — with its focus on justifications — is not the only answer to that question. The addition of mental state requirements limits the scope of liability overall, thereby preserving more room for discourse, which might be seen as an unambiguous good from the perspective of free speech.[226] In particular, the post-*Sullivan* constitutionalization has often been defended as a structural protection of the press itself.[227] One might also say that the First Amendment must protect false statements of fact because, essentially, the law cannot accurately or effectively separate falsehoods from truth and there is too much risk that the latter would be swept in with the former, or valuable speech chilled.[228] The argument is basically one of precaution, with the protection of falsehoods regarded as a necessary evil.

There is much to be said for this argument. Epistemic humility is a major First Amendment value[229] and is consistent with a great deal of doctrine and theory. But there is also something unsatisfying about it. There are *some* categories of cases in which separating falsehood from truth is possible. Indeed, given that falsehood is an essential element of defamation, and truth is a complete defense, the doctrine already draws lines between truth and falsehood. The reason for protecting falsehoods therefore cannot rest entirely on an inability to separate them from truths.

What, then, is the positive case for protecting what we might call justified falsehoods — those unaccompanied by actual malice, negligence, or another culpable mental state? Professor Alan Chen argues that certain falsehoods can be valuable to autonomy and personal development.[230] Others, going all the way back to Mill, have argued from within the epistemic model that being exposed to falsehoods helps people identify and believe in truth.[231] Both of these arguments have much

---

[226] United States v. Alvarez, 567 U.S. 709, 719–20 (2012) (plurality opinion) ("The requirements of a knowing falsehood or reckless disregard for the truth as the condition for recovery in certain defamation cases exists to allow more speech, not less.").

[227] *See, e.g.*, Frederick Schauer, *The Dilemma of Ignorance:* PGA Tour, Inc. v. Casey Martin, 2001 SUP. CT. REV. 267, 286. These arguments, in turn, jibe well enough with the marketplace model, especially if one regards the press as a constitutionally relevant actor in that marketplace. *See* Joseph Blocher, *Public Discourse, Expert Knowledge, and the Press*, 87 WASH. L. REV. 409, 423–30 (2012).

[228] *Cf.* Schauer, *supra* note 88, at 703 ("[T]he entire framework of defamation law after *New York Times* is based on the strategic protection of falsity in order to maximize the dissemination of truth . . . .").

[229] Martin H. Redish & Gary Lippman, *Freedom of Expression and the Civic Republican Revival in Constitutional Theory: The Ominous Implications*, 79 CALIF. L. REV. 267, 281 (1991).

[230] *See* Chen, *supra* note 102, at 4.

[231] *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279 n.19 (1964) ("Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.'" (quoting JOHN STUART MILL, ON LIBERTY 15 (1859), *reprinted in* ON LIBERTY AND OTHER WRITINGS 1, 20 (Stefan Collini ed., 1989))); MILL, *supra*, at 51 (concluding that silencing speech "rob[s] the human

to recommend them, and the latter in particular is fully consistent with the marketplace model.

The knowledge-based approach can provide a different account: a false statement is deserving of constitutional coverage when it is based on a sufficient justification.[232] The law, in other words, can protect intellectual responsibility even when it leads to falsehood in a particular case. This is effectively a restatement of the defamation rules. And just as those rules are already tailored to different contexts, so too might we want and expect intellectual responsibility to be contextually tailored within the JTB model. Perhaps absence of malice would be the proper threshold in some scenarios, while negligence might be the rule in others.

Consider another of Justice Holmes's free speech aphorisms: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."[233] Scholars have tended to focus on why such speech might be excluded from First Amendment coverage — the most common explanation is that it leaves insufficient time and space for counter-speech.[234] But the fact that there *is no fire* is what makes the shout actionable in the first place. And that raises hard questions about falsehood and justification.

Imagine that Justice Holmes's theater-goer sees what appears to be smoke billowing into the theater. Unbeknownst to her, the smoke is all part of the performance — a special effect intended to coincide with an upcoming scene in which the hero saves a child from a burning building. The theater-goer, honestly believing with justification that the theater is on fire, falsely shouts "FIRE!," causing a stampede in which many people are injured. Those people sue. Can she be found liable?[235]

A judge faced with such a case would almost certainly focus on the theater-goer's mental state.[236] Though the shouter turned out to be incorrect (that is, untruthful), she was not intellectually irresponsible —

race" because even when an opinion is false, its contrast with the truth will more clearly illuminate the latter).

[232] My focus in this section is on internal justifications — that is, mental states — but one might take the same approach with external justifications as well.

[233] Schenck v. United States, 249 U.S. 47, 52 (1919).

[234] *See* Carlton F.W. Larson, *"Shouting 'Fire' in a Theater": The Life and Times of Constitutional Law's Most Enduring Analogy*, 24 WM. & MARY BILL RTS. J. 181, 183–85 (2015).

[235] Consider, too, a scenario with precisely the same facts except that there actually *is* a fire, but one whose smoke is not yet visible. The theater-goer shouts "FIRE!" and causes a stampede in which many people are injured. The statement is true, but not justified — Gettier's argument, combined with Justice Holmes's metaphor.

[236] The Supreme Court has long emphasized the necessity of a culpable mental state in assessing statutes which may criminalize speech. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam) (striking down Ohio's Criminal Syndicalism Act on the basis that it was not limited to proscribing advocacy "*directed to* inciting or producing imminent lawless action and . . . likely to incite or produce such action" (emphasis added)); Yates v. United States, 354 U.S. 298, 319–20 (1957) (focusing on the importance of intent in reiterating that the constitutionality of the Smith Act was

not negligent, malicious, or even careless. In other words, her internal justifications are sufficiently strong to provide a defense, notwithstanding the fact that her speech does not advance democracy or truth or any plausible First Amendment value besides her own autonomy.

One might object that this approach would expand the realm of protected speech too far — after all, a falsehood is not knowledge, even if it is justified. But a knowledge-based approach need not protect *only* knowledge, any more than a truth-based approach need protect *only* truth. In both cases, the point is to orient law and theory toward a particular end. And the knowledge-based approach, unlike one based solely on truth, makes justifications relevant, which in turn makes it easier to account for constitutional protection of the justified falsehood.

2. External Justifications for Knowledge. — Partly in response to the kinds of challenges discussed above, and also thanks to the fundamental problem posed by Gettier,[237] some theories of knowledge have stipulated justifications that go beyond internal thought processes. These "external" theories involve something more. An externalist "would say that what we want from justification is the kind of objective probability needed for knowledge, and only external conditions on justification imply this probability."[238] Often, but not always, these external approaches overlap with social epistemology, which "focuses on public and institutional practices that can foster the acquisition of knowledge or information."[239]

But in fact there seems to be considerable overlap between trends in epistemology — at least as they relate to external justifications — and First Amendment doctrine and scholarship. Many free speech scholars have begun to focus on the practices and institutions that produce truth and knowledge, instead of (or in addition to) evaluating the truth value of particular statements.[240] Applied to the issue of justification, this suggests that the question is whether a particular true belief has been acquired through the proper institutions and practices: professional training, higher education, open discussion, and so on.

---

dependent on it being "aimed at the advocacy and teaching of concrete action for the forcible overthrow of the Government, and not of principles divorced from action").

[237] Husak & Callender, *supra* note 24, at 46 ("Gettier is commonly taken to have refuted internalism, and to have demonstrated that genuine knowledge consists of true belief that is to some extent externally justified.").

[238] Steup, *supra* note 23, § 2.5.

[239] Goldman & Cox, *supra* note 147, at 2 ("*Individual* epistemology is concerned with purely private events and processes, such as perceptual experience or inference; *social* epistemology focuses on public and institutional practices that can foster the acquisition of knowledge or information."); *see also* GOLDMAN, *supra* note 64, at 4 ("An enormous portion of our truth seeking . . . is either directly or indirectly social.").

[240] *See* sources cited *infra* note 242.

Social epistemology is an attractive tool for the First Amendment's epistemological challenges. It allows one to remain generally agnostic about the truth value of particular statements, as Justice Holmes himself would have wanted,[241] without giving up on the notion that some statements are true and some are false. Moreover, social epistemology has much in common with First Amendment approaches that are themselves sociological, in the sense that they take account of — and privilege — certain institutions, practices, and disciplines. Especially for the past fifteen years or so, free speech scholars have argued that free speech law can and should "recognize those informational, investigative, and communicative domains whose more-or-less distinctive properties warrant special First Amendment treatment."[242]

Many of the scholars in this vein self-identify as institutionalists, and they advance a range of different arguments. For some, institutionalism is simply a matter of bringing doctrine into step with lived reality, or of providing the self-governance without which certain social practices and organizations simply cannot survive, or of furthering the goals of a robust democracy and limiting the power of a sometimes-overweening state.[243] For others, institutionalism is about finding a way to support the marketplace of ideas.[244] Still others have pursued similar aims in the name of pluralism.[245]

The search for valid justifications in a knowledge-based approach to the First Amendment might map onto these efforts to enumerate and justify special treatment of institutions, professions,[246] social practices,[247] and the like. This is not an easy task from an epistemological or legal perspective, let alone from a perspective that combines the two. The underlying challenge is how to identify the incentives and social practices that have a particular relationship to knowledge.

One possibility would be to begin with the marketplace model. Just as truth is supposed to prevail over falsehood "in a free and open encounter,"[248] so too might we expect desirable justifications to prevail over other justifications (or none at all). The decline of traditional news media would on this view be prima facie evidence of its unreliability as

---

[241] *See supra* notes 2–5 and accompanying text.

[242] Schauer, *supra* note 45, at 1278. *See generally* PAUL HORWITZ, FIRST AMENDMENT INSTITUTIONS (2012); Symposium, *Constitutional "Niches": The Role of Institutional Context in Constitutional Law*, 54 UCLA L. REV. 1463 (2007); Jack M. Balkin, *The Future of Free Expression in a Digital Age*, 36 PEPP. L. REV. 427, 432 (2009) ("A system of free speech depends . . . on an infrastructure of free expression . . . [which] includes the kinds of media and institutions for knowledge, creation, and dissemination that are available at any point in time.").

[243] *See generally* HORWITZ, *supra* note 242.

[244] *E.g.*, Blocher, *supra* note 4, at 855.

[245] *E.g.*, JOHN D. INAZU, CONFIDENT PLURALISM: SURVIVING AND THRIVING THROUGH DEEP DIFFERENCE (2016).

[246] *See* Haupt, *supra* note 40, at 1269.

[247] *See* Post, *supra* note 19, at 1278–79.

[248] MILTON, *supra* note 10, at 45.

a source of truth. Like the marketplace of ideas, the marketplace of justifications approach would basically relieve judges and others from having to make difficult and inevitably normative determinations.

But the marketplace logic seems even more problematic with regard to justifications than it does with regard to truth alone. For one thing, the nature of the relevant "competition" is somewhat obscure. Presumably, it would mean that if two people have the same true belief and come into competition with one another, then the one with a better justification would "prevail" over the other. Credentialed experts, for example, might receive deference above and beyond the truth value of the statements that they are making at any given time.

This is an empirical supposition, however, and it seems entirely plausible that a marketplace of justifications will end up favoring those that confirm existing biases or are cheaply acquired. From the perspective of an audience, truth acquired cheaply might be just as functionally useful — and therefore prized — as truth that rests on a proper foundation. As a result, speakers who can provide truths at low cost have an advantage over those who have earned their true beliefs through expensive and time-consuming processes like higher education or professional training.

In the end, it seems unlikely that a laissez-faire approach will result in identification of desirable (reliable, for example) external justifications. What might be preferable would be to establish a list of desirable characteristics and an institutional actor capable of applying them accurately and legitimately. Neither of these questions is easy, of course, but neither are they unanswerable. As Greenawalt notes: "If truth is a meaningful concept and people are capable of asserting many propositions of fact and value with confidence, they must have some basis for recognizing what social practices promote the discovery of truth."[249]

To identify those social practices, Greenawalt suggests a kind of comparative and historical approach — "to look at various societies and historical periods to see when the discovery of truth has prospered."[250] One might also look at practices and contexts within contemporary societies — comparing, for example, online message boards and university classrooms. Truths appear in each of those places, but they appear more reliably in the latter.

In fact, a version of this approach has long been defended in philosophical circles. The basic notion of *reliabilism* is essentially that certain practices reliably (even if imperfectly) lead to truth, and then can serve

---

[249] Greenawalt, *supra* note 3, at 133; *see also* POST, *supra* note 15, at 32 (citing Allen Buchanan, *Political Liberalism and Social Epistemology*, 32 PHIL. & PUB. AFF. 95, 103 (2004)) (emphasizing importance of "the social identification of experts, that is, epistemic authorities, individuals or groups to whom others defer as reliable sources of true beliefs").

[250] Greenawalt, *supra* note 3, at 133.

as valid external justifications for knowledge.[251] The question of predictive strength and reliability often comes up in discussions of science, where scientific knowledge is often evaluated based on probabilistic theories, not on a bright line around "truth."[252] Thomas Kuhn's theory is consistent with this basic idea — that science does not salt away certain hard truths but is constantly subject to observation and retesting, and the occasional revolution.[253] In the First Amendment context, this would mean that beliefs acquired through reliable practices have the proper justification to count as knowledge.

This of course does not mean that judges and legal scholars should outsource First Amendment cases to the arbitration of epistemologists. But law often employs tools from other disciplines to help answer concrete questions like whether a particular arrangement of businesses is anticompetitive,[254] or whether a burden on constitutionally protected activity is sufficiently tailored to achieve the government's goal.[255] Epistemological debates do not always lend themselves to precision or certainty (though there are some arguments that are accepted as proofs[256]), but they are no less precise or certain than constitutional law as a whole, and they may be more important to legal reasoning than is sometimes supposed.[257]

The basic questions of what makes knowledge valuable, and what makes it distinct from truth, are common to both enterprises, despite the additional twists and turns that constitutional analysis might mandate. There is no need for lawyers to pretend that the questions we face are unique and original when they are not. Philosophical enquiries can be

---

[251] Steup, *supra* note 23, §§ 2.3–.5.

[252] *See* Roesler, *supra* note 143, at 464–71 ("[P]robability theories share a common objective: they seek to test the relative strength of theories or hypotheses so that scientists can continually refine their theories. . . . Legal doctrine should be based on this basic understanding of the inherent nature of scientific knowledge rather than on inapplicable notions of absolute truth versus falsity." *Id.* at 471.). Professor Shannon Roesler points to Karl Popper, who "argued that the strength of a given hypothesis depends on how well corroborated it is, which in turn depends on how well the hypothesis has survived tests designed to disprove or falsify it and its boldness." *Id.* at 466.

[253] *See generally* THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1962).

[254] John E. Lopatka & William H. Page, *Economic Authority and the Limits of Expertise in Antitrust Cases*, 90 CORNELL L. REV. 617, 618–22 (2005) (noting that dependence on economics and economic experts has increased in recent antitrust litigation while also arguing that courts largely remain the gatekeepers for what sorts of economic authority and models are legitimate).

[255] *See, e.g.*, Craig v. Boren, 429 U.S. 190, 201–04 (1976) (statistical surveys); *see also* Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 195 (1997) ("In reviewing the constitutionality of a statute, courts must accord substantial deference to the predictive judgments of Congress." (internal quotation marks omitted) (quoting Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 665 (1994))).

[256] *See, e.g.*, *supra* p. 463.

[257] *See generally* Michael S. Pardo, *The Gettier Problem and Legal Proof*, 16 LEGAL THEORY 37, 38 (2010) (arguing that there is a deep connection between knowledge and legal proofs).

a useful guide,[258] and epistemology can help clarify and defend core concepts, even though — and perhaps because — lawyers and legal scholars tend to invoke the concept of knowledge more loosely than philosophers do.[259]

C. *When and How Knowledge Matters: A Comment on Professional Speech and* NIFLA v. Becerra

Having ranged through First Amendment theory and epistemological debates, it is time to return to caselaw. For even if the knowledge-based account is appealing as a matter of constitutional theory, epistemology, or information policy, to succeed as constitutional law it must be able to contribute to the adjudication of First Amendment disputes. And it can.

The constitutional treatment of professional speech is perhaps the most fruitful example. Haupt defines such speech as that which "communicates a knowledge community's insights from a professional to a client, within a professional-client relationship, for the purpose of giving professional advice."[260] Importantly, this is a contextual and somewhat narrow definition, not a prescription for giving heightened protection to any speech uttered by professionals or other "elites." And although with one notable exception (discussed below) the Supreme Court has yet to provide much guidance about the doctrinal status of professional speech,[261] many cases have implicitly treated it as a distinct category.[262] Some have done so by striking down laws that interfere with the transmission of professional knowledge.[263]

But treating professional speech differently does not always mean giving it *more* protection. Some courts have effectively exempted restrictions on professional speech from the strict scrutiny that usually applies to content-based restrictions.[264] Licensing restrictions and malpractice liability are permissible in the context of professional

---

[258] *See generally* Blasi, *supra* note 83, at 18, 25–28 (noting Justice Holmes's engagement with philosophers and thinkers outside the law, including Charles Darwin, John Stuart Mill, and pragmatists such as John Dewey, William James, and Charles Sanders Peirce).

[259] Michael J. Madison, *Notes on a Geography of Knowledge*, 77 FORDHAM L. REV. 2039, 2043 (2009) ("Law and policy speak of knowledge in broader, looser, and more general terms . . . .").

[260] Claudia E. Haupt, *The Limits of Professional Speech*, 125 YALE L.J.F. 185, 195 (2018); *see also* Haupt, *supra* note 40, at 1247.

[261] Paul Sherman, *Occupational Speech and the First Amendment*, 128 HARV. L. REV. F. 183, 183 (2018) ("[T]he Supreme Court has said little about the intersection of occupational licensing and the First Amendment.").

[262] Haupt, *supra* note 40, at 1240–41 (collecting cases).

[263] *See, e.g.*, Wollschlaeger v. Governor of Fla., 848 F.3d 1293, 1301 (11th Cir. 2017) (striking down recordkeeping, inquiry, and antiharassment provisions of the Florida Firearms Owners' Privacy Act, which limited physicians' ability to discuss firearms with patients).

[264] *See, e.g.*, King v. Governor of N.J., 767 F.3d 216, 232 (3d Cir. 2014); Pickup v. Brown, 740 F.3d 1208, 1231 (9th Cir. 2014); Moore-King v. County of Chesterfield, 708 F.3d 560, 568–70 (4th Cir. 2013).

speech[265] notwithstanding the restrictions they place on the marketplace of ideas. In effect, then, recognizing professional speech does not necessarily mean giving it "more"[266] or "less" protection; it means recognizing the professions' disciplinarity, which might sometimes be quite restrictive.

For purposes of the knowledge-based approach, what matters is that the standards and practices of the relevant knowledge communities — whether they be scientific,[267] academic,[268] medical,[269] journalistic,[270] or otherwise — provide the standards against which the speech that claims their mantle must be judged. In Post's words, "democratic competence can be judicially protected only if courts incorporate and apply the disciplinary methods by which expert knowledge is defined."[271] And that means that the doctrine must confront precisely the questions with which this Article has attempted to grapple: which justifications for belief matter, and in which contexts?

Unsurprisingly, the boundaries of professional speech remain contested.[272] It seems clear, though, that, in keeping with the JTB approach, they are defined in large part by epistemological method rather than by accuracy alone.[273] It is the disciplinarity underlying it — the justification, in other words — that gives such speech its status, and not simply its accuracy in any specific instance. If an expert is an expert only on the occasions when she is right, then there is nothing to the label. As Post puts it: "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

---

[265] *See* Kagan v. City of New Orleans, 753 F.3d 560 (5th Cir. 2014); Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939, 950–51.

[266] Sherman, *supra* note 261, at 183–84 (arguing that "occupational speech, including even expert advice, is entitled to far more protection than lower courts have given it, and is likely entitled to strict scrutiny").

[267] *See, e.g.*, KUHN, *supra* note 253, at 3 (emphasizing the need to study actual episodes in the history of science — and the professional communities in which they take place — to understand scientific rationality). *See generally* BRUNO LATOUR & STEVE WOOLGAR, LABORATORY LIFE: THE CONSTRUCTION OF SCIENTIFIC FACTS (2d ed. 1986) (examining the complex social, technological, and practical interactions that go into the creation of scientific knowledge).

[268] *See* Post, *supra* note 45, at 163 ("The social practices necessary for a marketplace of ideas to serve a truth-seeking function are perhaps most explicitly embodied in the culture of scholarship inculcated in universities and professional academic disciplines.").

[269] *See* Nadia N. Sawicki, *Character, Competence, and the Principles of Medical Discipline*, 13 J. HEALTH CARE L. & POL'Y 285, 296 (2010).

[270] Blocher, *supra* note 227, at 440–42.

[271] POST, *supra* note 15, at 54.

[272] Haupt, *supra* note 260, at 188 (arguing for a narrow definition).

[273] Haupt, *supra* note 40, at 1251 ("[M]embers of knowledge communities have shared notions of validity and a common way of knowing and reasoning (consider the old adage of 'thinking like a lawyer')." (footnote omitted)).

of such 'knowledge.'"[274] The identification of these disciplines will be contested, but that does not mean it is impossible. As Greenawalt notes, "any idea that people are wholly incapable of evaluating what sorts of social practices promote discovery of truth is untenable."[275]

The crucial issue therefore becomes a boundary question about when professional speech is at issue. Justifications, as a matter of law, are not always constitutionally relevant. In many settings, other constitutional principles — the equality of speakers and viewpoints, for example — trump the First Amendment's epistemological values.[276] As suggested above, resolving the boundary question requires a threshold consideration of the audience and context; professional speech doctrine does not apply to speech by a professional in public discourse.[277]

One sees this distinction in Justice White's influential concurrence in *Lowe v. SEC*,[278] which until recently was perhaps the most significant pronouncement by a Justice on the question of professional speech. Writing for himself, Chief Justice Burger, and Justice Rehnquist, Justice White concluded that "[o]ne who takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances is properly viewed as engaging in the practice of a profession"; any speech exercised in doing so is only "incidental" to that conduct.[279] By contrast, a speaker who does not "purport to be exercising judgment on behalf of any particular individual with whose circumstances he is directly acquainted" has a stronger First Amendment claim.[280] Justice White's distinction essentially maps the public-nonpublic distinction discussed above.

Questions about professional speech lay at the heart of the Supreme Court's decision in *National Institute of Family & Life Advocates v. Becerra*[281] (*NIFLA*). The case has been celebrated and criticized from a variety of different angles.[282] My purpose here is not to provide a

---

[274] POST, *supra* note 15, at 8.

[275] Greenawalt, *supra* note 3, at 133.

[276] *See* POST, *supra* note 15, at xiii.

[277] *See, e.g.*, Lowe v. SEC, 472 U.S. 181, 232 (1985) (White, J., concurring in the result).

[278] 472 U.S. 181; *id.* at 211 (White, J., concurring in the result); *see also* Thomas v. Collins, 323 U.S. 516, 544 (1945) (Jackson, J., concurring) (concluding that "a rough distinction always exists" between regulation of a vocation and of speech); Sherman, *supra* note 261, at 186–87 (noting and bemoaning the influence of Justice White's opinion on lower courts).

[279] *Lowe*, 472 U.S. at 232 (White, J., concurring in the result).

[280] *Id.*

[281] 138 S. Ct. 2361 (2018).

[282] *See, e.g.*, Robert McNamara & Paul Sherman, NIFLA v. Becerra*: A Seismic Decision Protecting Occupational Speech*, 2017–2018 CATO SUP. CT. REV. 197, 197–98 ("[I]t is no exaggeration to say that *NIFLA* cements the Roberts Court as the most libertarian in our nation's history on free-speech issues."); *The Supreme Court, 2017 Term — Leading Cases*, 132 HARV. L. REV. 277, 351 (2018) ("The Court fundamentally undermined its previous commercial speech doctrine, which allowed compelled disclosures in order to protect consumer interests, and advanced one side in the abortion debate by carving out a convoluted exception to its previous medical-disclosure cases.").

further broad assessment, but only to suggest that some aspects of the Court's reasoning might have been improved by a tighter focus on knowledge, instead of appeals to the traditional marketplace model.

At issue in *NIFLA* was a California law (the FACT Act[283]) that imposed disclosure requirements on what are sometimes called crisis pregnancy centers (CPCs), which might appear to be standard healthcare providers but in fact provide antiabortion counseling.[284] As the Court summarized, the Act required that "[l]icensed clinics must notify women that California provides free or low-cost services, including abortions, and give them a phone number to call. Unlicensed clinics must notify women that California has not licensed the clinics to provide medical services."[285] The Ninth Circuit upheld the restrictions.[286]

In a 5-4 decision, with Justice Thomas writing for the majority, the Supreme Court concluded that the California law was a content-based restriction and struck it down.[287] The Court declined to recognize (though explicitly did not foreclose[288]) a special doctrine for professional speech: "Speech is not unprotected merely because it is uttered by 'professionals.'"[289] Denying protection to professional speech, the majority suggested, would give the state "unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement."[290]

This part of the decision rests on a false dichotomy. Recognizing professional speech as a First Amendment category need not mean giving the state "unfettered power." It might, for example, mean giving the state power to recognize the professions' own disciplinary standards — not their "truths," but rather their methods of knowing. That might be difficult, and contestable, but it would not leave professional speech "unprotected." Nor would the doctrine extend to all speech "uttered by professionals." Even the most fervent supporters of professional speech doctrine do not suggest that it extends to all statements by professionals. Only in certain contexts is professional knowledge relevant — including, perhaps, the offices of licensed clinics.[291]

---

[283] CAL. HEALTH & SAFETY CODE §§ 123470–123473 (West 2016).

[284] *NIFLA*, 138 S. Ct. at 2368.

[285] *Id. See generally* HEALTH & SAFETY § 123472.

[286] Nat'l Inst. of Family & Life Advocates v. Harris, 839 F.3d 823, 829, 840 (9th Cir. 2016), *rev'd sub nom. NIFLA*, 138 S. Ct. 2361.

[287] *NIFLA*, 138 S. Ct. at 2371, 2378.

[288] *Id.* at 2375 ("[N]either California nor the Ninth Circuit has identified a persuasive reason for treating professional speech as a unique category that is exempt from ordinary First Amendment principles. We do not foreclose the possibility that some such reason exists.").

[289] *Id.* at 2371–72.

[290] *Id.* at 2375.

[291] *See* Post, *supra* note 265, at 947–48 (evaluating the distinction between a dentist engaged in public discourse and one speaking outside of public discourse and subject to sanction). How one defines these contexts is a hard question, and the briefing in *NIFLA* offered many alternatives. *See* McNamara & Sherman, *supra* note 282, at 212–13 (summarizing approaches suggested by the

For present purposes, however, what is more relevant is the Court's reliance on the marketplace metaphor:

> [W]hen the government polices the content of professional speech, it can fail to "preserve an uninhibited marketplace of ideas in which truth will ultimately prevail." Professionals might have a host of good-faith disagreements, both with each other and with the government, on many topics in their respective fields. Doctors and nurses might disagree about the ethics of assisted suicide or the benefits of medical marijuana; lawyers and marriage counselors might disagree about the prudence of prenuptial agreements or the wisdom of divorce; bankers and accountants might disagree about the amount of money that should be devoted to savings or the benefits of tax reform. "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market," and the people lose when the government is the one deciding which ideas should prevail.[292]

It is hard to imagine a more confident statement of the traditional epistemic model — indeed, the notion that the truth "will ultimately prevail" is even more certain than Justice Holmes's "best test of truth." *NIFLA* therefore sets up an unusually crisp contrast between the marketplace model and the JTB alternative described here. In significant ways, JTB proves more attractive.

NIFLA's marketplace model runs into problems from the start, many of which are the fundamental critiques that have plagued the model for so long.[293] For example, the regulated context — licensed professionals speaking to potential patients about medical services — involves precisely the kind of power imbalance that makes many skeptical of the marketplace model. And given the particular subject matter of abortion services, the notion that "truth will out" in the long run is especially unattractive, since a woman seeking an abortion has a limited (and in many places shrinking) time frame in which to obtain it.[294] As always, the fallback defense for the marketplace model might be that it is still better than government regulation. But that is not particularly convincing here, since the regulation itself — which applied only to conversations with patients — would not even reach the debates among professionals that the majority invoked. That particular marketplace of ideas could continue to function as before.

United States, Public Citizen, the Cato Institute, and the Institute for Justice); *cf.* Garcetti v. Ceballos, 547 U.S. 410, 417 (2006) (noting that First Amendment coverage is triggered "in certain circumstances" when a government employee "speak[s] as a citizen addressing matters of public concern").

[292] *NIFLA*, 138 S. Ct. at 2374–75 (second alteration in original) (citations omitted) (first quoting McCullen v. Coakley, 573 U.S. 464, 476 (2014); and then quoting Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

[293] *See supra* section I.B, pp. 451–59.

[294] *See An Overview of Abortion Laws*, GUTTMACHER INST. (Oct. 1, 2019), https://www.guttmacher.org/state-policy/explore/overview-abortion-laws [https://perma.cc/M3UP-PUG7].

Even beyond the practical impact on speakers, the kind of law challenged in *NIFLA* involves a claim — compelled speech — whose harm is easier to conceptualize in terms of JTB than in terms of "truth" alone. The marketplace of ideas is usually thought to *benefit* from the addition of new voices and ideas.[295] Of course, distortion and other concerns might be present, but, as the Court has previously noted, "disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech."[296] If the remedy for false speech is more speech, why shouldn't the same be true of compelled speech? A crisis pregnancy center might simply say: "We are required by law to tell you that the state of California provides low-cost abortion services. But we believe that taking advantage of them is tantamount to committing murder, and we want to help you avoid that." This would, after all, come close to what the Court suggested that California could do: engage in its own "public-information campaign" to educate women about crisis pregnancy centers.[297]

From the perspective of JTB, however, compelled speech presents an additional kind of epistemic harm: it interferes with the disciplinarity and social practices that contribute to true belief. Under, for example, a reliabilist approach to justification,[298] a particular practice's ability to reliably produce true beliefs would be harmed if it were coerced into endorsing other beliefs. If the medical profession reliably induces true beliefs in patients (that vaccines prevent certain diseases, for example), it may be particularly important that the messages coming from that profession be unedited by others. Conversely, as Justice Breyer has put it, when "speech is subject to independent regulation by canons of the profession[,] . . . [which] obligat[e speech,] . . . the government's own interest in forbidding that speech is diminished."[299] The creation of knowledge, in other words, depends on a kind of nongovernmental regulation, which in turn shields that knowledge from unnecessary governmental regulation.

As to the intramural professional debates, as an epistemological matter the invocation of the marketplace in *NIFLA* was especially unconvincing on the facts of the case. The marketplace is uniquely ill-suited to resolve "good-faith disagreements"[300] about the "wisdom of divorce" or the "ethics of assisted suicide."[301] Few people believe that there is epistemic "truth" on such matters. They are fundamentally normative

[295] *Cf. NIFLA*, 138 S. Ct. at 2388 (Breyer, J., dissenting) ("[The] marketplace is fostered, not hindered, by providing information to patients to enable them to make fully informed medical decisions in respect to their pregnancies.").

[296] Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 651 (1985).

[297] *NIFLA*, 138 S. Ct. at 2376.

[298] *See* sources cited *supra* note 130 and accompanying text.

[299] Garcetti v. Ceballos, 547 U.S. 410, 446 (2006) (Breyer, J., dissenting).

[300] *NIFLA*, 138 S. Ct. at 2374–75.

[301] *Id.* at 2375.

debates over which even a capacious reading of the marketplace model would likely have only limited sway.

Can and should such debates be informed by facts? Of course. And the JTB approach — and a doctrine of professional speech — can better account for how, as a matter of practice, law should and does treat some speakers differently in some contexts. Lawyers might disagree with one another about the wisdom of prenuptial agreements, but only they can give legal advice about them. Why does law recognize such a limit on speech? Because lawyers and doctors are recognized as having special expertise, which in particular contexts — a professional relationship, per Justice White — demands different treatment. That does not require that the profession reach unanimity on any of the contested issues listed in *NIFLA*, nor on others that have a more recognizable truth value. The fact that lawyers and doctors might respond differently to different scenarios does not mean that their disagreements are anything other than *professional*. They might disagree, and they might sometimes be wrong, but their professional training gives them the proper *justifications* for their beliefs. When they fall short of those professional standards, they lose the benefit of that justification and may be subject to special forms of liability, like malpractice, that would be unconstitutional if applied in other contexts.

The traditional marketplace model has a hard time accounting for these features of existing law. Longstanding doctrine recognizes that the special status of the professions may allow legitimate restrictions that elsewhere would be unconstitutional. For example, the Court has upheld "laws that require professionals to disclose factual, noncontroversial information in their 'commercial speech.'"[302] These laws are typically justified on epistemic grounds.[303] Most prominently, in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*,[304] the Court upheld a fee disclosure requirement, explaining that "[b]ecause the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides," the "constitutionally protected interest in *not* providing any particular factual information in . . . advertising is minimal."[305]

California argued that the FACT Act fell within this exception, since the disclosures were purely factual, and designed to counter what might

---

[302] *Id.* at 2372 (quoting Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 651 (1985)).

[303] *See, e.g.*, Semler v. Or. State Bd. of Dental Exam'rs, 294 U.S. 608, 611 (1935) (upholding state dentistry regulation that "afford[ed] protection against ignorance, incapacity and imposition"); Dent v. West Virginia, 129 U.S. 114, 122 (1889) (upholding medical licensing requirements that "tend to secure [a State's citizens] against the consequences of ignorance and incapacity[,] as well as of deception and fraud").

[304] 471 U.S. 626.

[305] *Id.* at 651.

otherwise be confusion.[306] But Justice Thomas's majority opinion rejected this antideception purpose,[307] and found that *Zauderer* was inapplicable — not because the specific information was anything but factual, but because, in part, state-sponsorship of abortion itself is controversial.[308] As Justice Breyer noted in dissent, however, "[a]bortion is a controversial topic and a source of normative debate, but the availability of state resources is not a normative statement or a fact of debatable truth."[309]

The hard question after *NIFLA* will be where facts end and "controversy" begins. This is a hard question to answer from within the marketplace framework, as it offers no obvious markers for when a "truth" has been "accepted," to adopt Justice Holmes's language in *Abrams*.[310] There must be some limits, or else the exception would swallow the exception — the Court might as well have overruled *Zauderer* outright. The question is who should get to draw those limits. One possibility, of course, would be the people acting through their elected representatives. But that would mean letting the government decide "which ideas should prevail": precisely what the marketplace of ideas forbids. *NIFLA* essentially tacks hard in the other direction, leaving it to judges to determine which matters are "controversial" and whether — as seems to be the case in *NIFLA* — that conclusion extends to all factual predicates of a normative debate.

The knowledge-based approach, by contrast, would suggest that the limitations could be drawn by the relevant knowledge community itself. If scientists agree on the value of vaccines, then the matter is not "controversial." If doctors do not agree on "the ethics of assisted suicide," then it *is* controversial — either because there is "good-faith disagreement" about truth, or (more likely) because it is a normative issue with no truth value. It will of course be hard to decide which knowledge community should speak to which issue, and what level of agreement is necessary, and so on. But current doctrine is essentially making these determinations already, in a far less transparent way. *NIFLA*'s declaration that certain matters are "controversial" is an example of this phenomenon of opaque assessment.

---

[306] The legislature had in fact found that some crisis pregnancy centers "employ 'intentionally deceptive advertising and counseling practices [that] often confuse, misinform, and even intimidate women from making fully-informed, time-sensitive decisions about critical health care.'" Nat'l Inst. of Family & Life Advocates v. Harris, 839 F.3d 823, 829 (9th Cir. 2016) (alteration in original) (quoting CAL. ASSEMB. COMM. ON HEALTH, AB 775, 2015–2016 Leg., Reg. Sess., at 3 (2015), *rev'd sub nom. NIFLA*, 138 S. Ct. 2361.

[307] *NIFLA*, 138 S. Ct. at 2377.

[308] *Id.* at 2372 (describing the law as requiring "these clinics to disclose information about *state*-sponsored services — including abortion, anything but an 'uncontroversial' topic").

[309] *Id.* at 2388 (Breyer, J., dissenting).

[310] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

To be clear, my goal here is not to offer a full-throated defense of professional speech doctrine. There may be very good reasons to reject it, as evidenced by the Court's reluctance to adopt a single doctrinal pronouncement,[311] or the ability of existing First Amendment tools to justify it.[312] *NIFLA* itself, for example, recognizes the possibility of restrictions on commercial advertising and professional *conduct* that nonetheless involves speech.[313] My more limited argument is that the marketplace model is not a convincing reason to reject professional speech doctrine, and that the JTB approach gives more support for recognizing it.

In short, if the goal of free speech is epistemic, then it makes sense to recognize the special role of the practices and institutions that justify our true beliefs. Doing so of course can raise serious concerns, however, perhaps the most obvious of which is the apparent elitism of this approach. Would it not mean giving special treatment to precisely the kinds of speakers (professionals, for example) who are already advantaged in the marketplace of ideas?

Not necessarily. First, my goal here is only to suggest that justifications matter, not to pick which ones matter. I happen to think that distinct treatment of professional speech makes sense, but the JTB approach can certainly accommodate disagreement on that. Others might argue that independent conclusions are more important than those reached through disciplinarity. That is a separate debate from whether justifications matter.

Moreover, to say that knowledge — or particular speakers — should receive special treatment is not to say that *privileged* treatment is appropriate. After all, a doctrine of professional speech would in many instances permit content-based restrictions that standard First Amendment doctrines would forbid. The key is that such restrictions — like the JTB approach as a whole — are keyed not just to particular speakers (which would amplify the elitism concern) but to particular contexts. Thus, while it may be impermissible for a state to fine citizens who claim the earth is flat, it is perfectly permissible for a state university to deny tenure to a geography professor who teaches as much, contrary to the standards of her discipline. If that same professor were, on her own time and as a private citizen, to propound such theories in public

---

[311] *NIFLA*, 138 S. Ct. at 2375.

[312] *See* Rodney A. Smolla, *Professional Speech and the First Amendment*, 119 W. VA. L. REV. 67, 74 (2016). I am less sanguine about the Court's suggestion that content-based restrictions can only be based on "persuasive evidence . . . of a long (if heretofore unrecognized) tradition to that effect." *NIFLA*, 138 S. Ct. at 2372 (internal quotation marks omitted) (quoting United States v. Alvarez, 567 U.S. 709, 722 (2012) (plurality opinion)). That rule itself appears to be a recent doctrinal innovation. *See* Lakier, *supra* note 200, *passim*.

[313] *See NIFLA*, 138 S. Ct. at 2372. It hardly needs to be said that adding more strain to the speech-conduct distinction carries complications of its own.

discourse, she would again be immune from sanction. The full context, and not just the speaker's identity, is what matters.

More generally, this particular complication emphasizes the ways in which the JTB approach can and must operate hand in hand with broader social practices — those that identify the appropriate disciplines, institutions, or other justifications for true beliefs. On that note, the "post-truth" challenge is not only about increased skepticism about "facts," but about a lack of trust in institutions more generally.[314] The theory relies on that trust, but cannot provide it. Identifying a core of disciplinary knowledge deserving of special First Amendment treatment is a difficult task, made even harder when professional and licensing organizations understand themselves as being engaged with broader issues of justice, fairness, and the like.[315] That is not to say that knowledge-based fields must stay in narrow lanes, only that the conflation of disciplinary knowledge and political positions makes it harder to provide an epistemic defense of the former. Of course, for those who believe that knowledge is politics (or vice versa), that will not be satisfying. The theory described here — or, for that matter, any epistemic account of the First Amendment — has little to offer them.

This leads to the second caveat, which is that the JTB approach — like the theory it is meant to amend, though perhaps even more so — would have a limited reach. Not all free speech controversies are amenable to a theory rooted in epistemic values. Restrictions on nonrepresentational art or instrumental music, for example, are hard to evaluate from a "marketplace" perspective. And while the JTB alternative might be an improvement (focusing as it does on practices, rather than truth value alone[316]), it is still an awkward fit for some contexts. In public political discourse, for example, it might be more important to adopt a pathological frame and prevent any line-drawing among speakers and speech (even false speech, as in the *Alvarez* case discussed above), while other contexts would permit and even demand exactly that.

There is nothing novel about this caveat. Already, the Supreme Court treats truth and falsity differently depending on the context in which a statement is uttered — a statement that is actionable in the professional context might not be if uttered in public discourse.[317] Of course, it is not easy to draw, let alone justify and maintain, the lines

---

[314] *See* Jim Norman, *Americans' Confidence in Institutions Stays Low*, GALLUP (June 13, 2016), https://news.gallup.com/poll/192581/americans-confidence-institutions-stays-low.aspx [https://perma.cc/TKQ7-7VGA] (noting low — and falling — trust in public schools, television news, and newspapers).

[315] Thanks to Professor Paul Horwitz for powerfully pushing this point.

[316] For a more extended argument that a practice-based approach is the best way to account for the constitutional status of nonrepresentational art, instrumental music, and nonsensical speech, see TUSHNET ET AL., *supra* note 40, at 7–9.

[317] POST, *supra* note 15, at 44.

between public and nonpublic discourse.[318] Professor Paul Horwitz rightly notes that the Court "has not told us clearly . . . why citizens can generally be relied on to distinguish between true and false statements made in the political realm and not in other areas, such as commercial speech or securities fraud."[319] And yet the Court regularly does carve up the constitutional space in precisely that way — and, most importantly for present purposes, it seems to do so especially often in cases where the *justifications* for facts are relevant.

CONCLUSION

In legal reasoning, it is not enough that a statement be true. From the very first day of law school, students learn that accurately stating the result of a case is insufficient. The reasoning matters just as much, if not more. Likewise, an expert witness cannot be recognized, nor a professional licensed, solely on the basis of his her or true statements — what matters is whether he or she has been right for the right reasons.

In First Amendment law and theory, the value of truth — and of the marketplace of ideas in achieving it — has been accepted as central to epistemic accounts of the value of free speech. That reliance has made the epistemic account vulnerable to a wide range of powerful critiques. Reframing the First Amendment around justified true belief, rather than truth alone, might help resolve the amendment's epistemological crisis and establish an epistemic value for free speech at a time when such an account is desperately needed.

A knowledge-based approach will not rescue us from a post-truth era.[320] But it can contribute to a richer and more productive discussion of what free speech is for.

---

[318] I believe that the line exists, though I have some concerns about how to treat the transmission of knowledge across those domains. *See* Blocher, *supra* note 227, at 416–18.

[319] Horwitz, *supra* note 21, at 457 (citing Brown v. Hartlage, 456 U.S. 45 (1982)). Soon after Horwitz's article, the Court decided *United States v. Alvarez*, striking down portions of the Stolen Valor Act and providing further confirmation of Horwitz's point. 567 U.S. 709, 723 (2012) (plurality opinion).

[320] *See* Schauer, *supra* note 8, at 919 ("Far more than First Amendment freedoms have created a society in which truth seems to matter so little, and far more than First Amendment freedoms will be necessary to do anything about it.").