14

Knowledge Institutions and Resisting 'Truth Decay'

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14.1 INTRODUCTION

Today is a time of retrogression in sustaining rights-protecting democracies, and of high levels of distrust in institutions.[1] Of particular concern are threats to the institutions, including universities and the press, that help provide the information base for successful democracies. Attacks on universities, and university faculties, are rising. In Poland over the last four years, a world-renowned constitutional law theorist, Wojciech Sadurski, has been subject to civil and criminal prosecutions for defamation of the governing party.[2] In Hungary, the Central European University (CEU) was ejected by the government, and had to partly relocate to Vienna,[3] and other attacks on academic freedom followed.[4] Faculty members in a number of countries have needed to relocate to other countries for their own safety.[5]

With thanks to Martha Minow, Ron Krotoszynski, Mark Tushnet and Bob Taylor for their generous and helpful comments and to Harvard Law students Jesse Lin and Sergey Smirnov for very able research assistance. On the term used in the title of this chapter, see Jennifer Kavanagh and Michael D. Rich, *Truth Decay* (Santa Monica, CA: RAND, 2018).

[1] See generally the 2022 Fall special issue of *Deadalus*, 'Institutions, Experts and the Loss of Trust'.

[2] Max Shanahan, 'USyd Professor Sadurski Acquitted of Criminal Defamation', *Honi Soit*, 26 September 2021 https://honisoit.com/2021/09/usyd-professor-sadurski-acquitted-of-criminal-defamation (reporting his acquittal in 2021 of the criminal defamation charge but noting plans of the party to appeal).

[3] CEU, at the time headed by Michael Ignatieff, was forced out in 2019; see https://thepienews.com/news/ceu-forced-to-move-to-vienna.

[4] See Lydia Gall, 'Hungary Continues Attacks on Academic Freedom: EU Should Attack to Ensure Autonomy of Universities', Human Rights Watch, 3 September 2020, www.hrw.org/news/2020/09/03/hungary-continues-attacks-academic-freedom.

[5] See Scholars at Risk, 2022 Annual Report, 7 (noting that Scholars at Risk arranged for 171 positions for at-risk scholars and that the organization received 1,770 applications for assistance). According to the New University in Exile Consortium, on 23 July 2023, Azerbaijan wrongfully arrested an internationally well-regarded economist who is also head of a dissident political party, and was holding him in cruel and health-threatening conditions.

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Governments attack what subjects can be taught – in Hungary bans on gender studies;[6] in Poland, a government minister issued a call to ban gender studies and 'LGBT ideology'.[7] Attacks on academics and universities, through government restrictions and public or private violence, are not limited to Poland and Hungary, but are of concern in Brazil, India, Turkey and a range of other countries.[8] Attacks on journalists are similarly rising.[9] These developments are deeply concerning. The proliferation of 'fake news', doctored photos and false claims on social media has

See 'Consortium Scholar, Dr. Gubad Ibadoghlu, Arrested and Detained in Azerbaijan', New University in Exile, 24 July 2023, https://newuniversityinexileconsortium.org/news/in-the-press/consortium-scholar-dr-gubad-ibadoghlu-arrested-and-detained-in-azerbaijan.

[6] Becky Prager, 'The Hungarian Gender Studies Ban, and Its Implication for Democratic Freedom', *Harvard Journal of Law & Gender (online)*, 2019, https://journals.law.harvard.edu/jlg/2019/01/the-hungarian-ban-on-gender-studies-and-its-implications-for-democratic-freedom; Lauren Kent and Samantha Tapfumaneyi, 'Hungary's PM Bans Gender Study at Colleges Saying "People Are Born either Male or Female"', CNN, 19 October 2018, www.cnn.com/2018/10/19/europe/hungary-bans-gender-study-at-colleges-trnd/index.html.

[7] See 'Minister Calls for Ban on "LGBT Ideology" and Gender Studies at Polish Universities and Schools', Notes from Poland, 10 September 2020, https://notesfrompoland.com/2020/09/10/minister-calls-for-ban-on-lgbt-ideology-and-gender-studies-at-polish-universities-and-schools; 'Poland: Rule of Law Erosion Harms Women, LGBT People', Human Rights Watch, 15 December 2022, www.hrw.org/news/2022/12/15/poland-rule-law-erosion-harms-women-lgbt-people (describing 'a government-supported Family Charter, calling for the exclusion of LGBT people from Polish society', and stating that '[m]ore than 90 regional and municipal authorities have now declared themselves "LGBT ideology free" or signed the charter').

[8] See, e.g., Jack Grove, 'Deans Fired at Turkish Universities', *Inside Higher Ed*, 4 February 2022, www.insidehighered.com/news/2022/02/04/firing-deans-raises-academic-freedom-concerns-turkey; Suzy Hansen, '"The Era of People Like You Is Over": How Turkey Purged Its Intellectuals', *New York Times Magazine*, 29 July 2019, www.nytimes.com/2019/07/24/magazine/the-era-of-people-like-you-is-over-how-turkey-purged-its-intellectuals.html; Report on Wojciech Sadurski, of Warsaw University, Poland, Scholars at Risk, 2019, www.scholarsatrisk.org/report/2019-01-20-university-of-warsaw; Emilio Peluso Neder Meyer and Thomas Bustamante, 'Academic Freedom under Attack in Brazil', Verfassungsblog, 19 May 2021, https://verfassungsblog.de/academic-freedom-under-attack-in-brazil; 'PB Mehta Row: Over 150 International Scholars Slam "Attack on Academic Freedom"', *The Week Magazine*, 20 March 2021, www.theweek.in/news/india/2021/03/20/pb-mehta-row-over-150-international-scholars-slam-attack-on-academic-freedom.html; Susi Meret, 'Attacks on Academic Freedom Escalate in France and Denmark', Open Democracy, 31 July 2021, www.opendemocracy.net/en/countering-radical-right/attacks-academic-freedom-escalate-france-and-denmark (describing French education minister's warnings of dangers of 'Islamo-leftism' in universities); Jesus Velasco, 'AMLO's Attacks on Mexico's Higher Education Institutions May Accelerate the Country's Scholarly Exodus to the US', LSE, 9 July 2020, https://blogs.lse.ac.uk/usappblog/2020/07/09/amlos-attacks-on-mexicos-higher-education-institutions-may-accelerate-the-countrys-scholarly-exodus-to-the-us. See generally, Academic Freedom Monitoring Project, Free to Think 2022, Scholars at Risk, www.scholarsatrisk.org/resources/free-to-think-2022 (reporting on '391 attacks on higher education communities' that year in 65 countries and territories in the world, including bomb attacks against historically black colleges and universities (HBCUs) in the United States; up from 332 attacks reported in 2021).

[9] 'Killings of Journalists up 50 per cent in 2022', UNESCO, 17 January 2023, https://news.un.org/en/story/2023/01/1132507.

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been widely documented.[10] Constitutional democracy cannot long be sustained in an 'age of lies', where truth and knowledge no longer matter.[11]

Turning from the world to the United States of America, the position of the USA in rankings of respect for political and civil liberties has suffered a marked decline.[12] Likewise, the USA has seen a decline in its ranking for academic freedoms.[13] Waning confidence in the value of a college education has been accompanied by a pronounced partisan skew in evaluating the value of higher education.[14] Suspicion

[10] See, e.g., Rob Dobi, 'Study: False News Spreads Faster than the Truth', MIT Management Sloan School, 8 March 2018, https://mitsloan.mit.edu/ideas-made-to-matter/study-false-news-spreads-faster-truth (summarizing study by Soroush Vosoughi, Deb Roy and Sinan Aral, 'The Spread of True and False News Online' (2018) 359 *Science* 1146) (research shows that lies spread faster than truth on Twitter); Elizabeth Dwoskin, 'Misinformation on Facebook Got Six Times More Clicks than Factual News during the 2020 Election, Study Says', *The Washington Post*, 4 September 2021, www.washingtonpost.com/technology/2021/09/03/facebook-misinformation-nyu-study (summarizing study by New York University and University of Grenoble).

[11] See Sophia Rosenfeld, *Democracy and Truth: A Short History* (Philadelphia: University of Pennsylvania Press, 2019) 137. Cf. Tom Nichols, *The Death of Expertise: The Campaign against Established Knowledge and Why It Matters* (Oxford: Oxford University Press, 2017) ('No longer do we hold these truths to be self-evident, we hold all truths to be self-evident, even the ones that aren't true').

[12] Compare, e.g., the global rankings of Freedom House, 2023, https://freedomhouse.org/countries/freedom-world/scores?sort=asc&order=Total%20Score%20and%20Status (showing the US score of 83 and ranking 58th among 210 countries and territories rated in overall scores for political rights and civil liberties) with the 2017 global rankings, https://freedomhouse.org/country/united-states/freedom-world/2017 (showing US score of 89) and https://freedomhouse.org/report/freedom-world/2017/scores?sort=asc&order=Total%20Score%20and%20Status (showing the USA ranked forty-third in the world, along with other countries scoring 89) and Freedom House global rankings (2013), www.freedomhouse.org/sites/default/files/FIW%202013%20Booklet.pdf (using a different methodology, showing the USA achieved the highest ranking possible (1 in political rights, and 1 in civil liberties), along with 47 other countries; V-Dem Democracy Report 2022, https://v-dem.net/media/publications/dr_2022.pdf, 46, table 2 (showing decline in US score on liberal democracy index over last ten years).

[13] See Katrin Kinzelbach et al., 'Academic Freedom Index 2023 Update', FAU Erlangen-Nürnberg and V-Dem Institute, https://academic-freedom-index.net/research/Academic_Freedom_Index_Update.pdf ('After a long period of relatively high academic freedom levels, four out of five indicators visibly declined in 2021', and noting both President Trump's 'statements critical of science and academia' and actions by a number of state governments; chart showing the USA in a group of countries in a tier of the top 40–50 percent of countries on its academic freedom index, with countries in the top 10 percent tier including, e.g., Estonia, Belgium, Germany, Israel, Italy, Finland, Spain and Nigeria); ibid. at 5 (showing in figure 4 that the USA has lost ground in protecting academic freedoms since 2012); see also Reporters Without Borders, https://rsf.org/en/country/united-states (noting a 'sharp rise' in violations of press freedoms in 2020 but some improvement since, with the USA ranking 45 out of 170 countries in the 2023 World Press Freedom Index; in the 2020 World Press Freedom Index, the US was ranked 32, https://rsf.org/en/ranking); Erin C. Caroll, 'Obstruction of Journalism' (2022) 99 *Denver Law Review* 407.

[14] See 'America's Hidden Common Ground on Public Higher Education: What's Wrong and How to Fix It', Report, Public Agenda, 2022, https://publicagenda.org/resource/americas-hidden-common-ground-on-public-higher-education-whats-wrong-and-how-to-fix-it; 'The Growing Partisan Divide in Views of Higher Education', Pew Research Center,

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of expertise, along with tolerance by significant parts of the public and by leading political figures for outright fabrications, have increased.[15] Bans on teaching Critical Race Theory were encouraged initially by an executive order in 2020 banning the teaching of 'divisive topics'.[16] Tracking language from this executive order, a number of states enacted bans, including Iowa's 2021 law banning institutions of higher education from promoting 'specific defined concepts' including 'race or sex scapegoating' and teaching that 'that the United States of America and the state of Iowa are fundamentally or systemically racist or sexist'.[17] Whether or not the federal courts ultimately will uphold this law, its enactment is plainly inconsistent with basic ideas of pursuing truth through academic freedoms.[18]

This chapter argues that constitutional democracies need 'knowledge institutions', in part because of the role they can play as intermediary organizations for the public in sorting out genuine claims of knowledge from false claims and in checking false claims by those with power. These 'knowledge institutions' should be recognized in comparative constitutional studies as essential elements of a constitutional infrastructure. Section 14.2 introduces a general claim about knowledge

19 August 2019, www.pewresearch.org/social-trends/2019/08/19/the-growing-partisan-divide-in-views-of-higher-education-2.

[15] See Rosenfeld, *Democracy and Truth* (n 11); Vittorio Bufacchi, 'What's the Difference between Lies and Post-Truth in Politics? A Philosopher Explains', The Conversation, 24 January 2020, https://theconversation.com/whats-the-difference-between-lies-and-post-truth-in-politics-a-philosopher-explains-130442; Lee McIntyre, *Post-Truth* (Cambridge, MA: MIT Press, 2018). See also, Atul Gawande, 'The Mistrust of Science', *The New Yorker*, 10 June 2016.

[16] Executive Order on Combatting Race and Sex Stereotyping, US, 22 September 2020 (applying to federal government and its grantees and banning teaching of 'divisive concepts', including, e.g., the concepts that '(2) the United States is fundamentally racist or sexist; (3) an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously; (4) an individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex; … (8) any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex').

[17] House File 802 (Iowa). 'Race or sex scapegoating' is defined in the law as 'assigning fault, blame, or bias to a race or sex, or to members of a race or sex because of their race or sex, or claiming that, consciously or unconsciously, and by virtue of persons' race or sex, members of any race are inherently racist or are inherently inclined to oppress others, or that members of a sex are inherently sexist or inclined to oppress others'.

[18] If a conclusion, a view, is based on sound research within the expertise of the professor, then its expression is consistent with the pursuit of knowledge even if competing views based on research exist; the development of 'justified true beliefs' can be a process of contestation. On the role and limits of consensus in science, see Mark Tushnet, 'Trust the Science but Do Your Research: A Comment on the Unfortunate Revival of the Progressive Case for the Administrative State' (2023) 98(2) *Indiana Law Journal* 335. On the impact of the 2020 Executive Order (n 16) in encouraging state enactments, see, 'CRT Forward: Tracking the Attack on Critical Race Studies', UCLA Law School, 2023, https://crtforward.law.ucla.edu/wp-content/uploads/2023/04/UCLA-Law_CRT-Report_Final.pdf (reflecting enactment of twenty-nine measures targeting institutions of higher learning, though many more target K-12 instruction); see also 'Educational Gag Orders: Legislative Restrictions on the Freedom to Read, Learn, and Teach', PEN America, https://pen.org/report/educational-gag-orders.

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institutions in constitutional democracies.[19] Section 14.3 raises a set of concerns about the implications of some recent US Supreme Court case law for the knowledge functions of public universities. It argues that these decisions reflect a fundamental failure to appreciate the role of these and other knowledge institutions in the infrastructure necessary for constitutional democracies to sustain themselves.

14.2 KNOWLEDGE INSTITUTIONS IN CONSTITUTIONAL DEMOCRACIES

Justice Felix Frankfurter once suggested that government-employed college 'teachers' are vital in developing public views that are 'disciplined and responsible', it being their 'special task to foster those habits of open-mindedness and of critical inquiry, which ... make possible an enlightened and effective public opinion'.[20] Knowledge institutions are central to these goals. This section will discuss some definitional questions about knowledge institutions, and explain the need to focus on those institutions in democracies..

14.2.1 *A Simple Definition*

Knowledge institutions are ongoing entities that have, as a central purpose, the dissemination, preservation or production of knowledge.[21] They aspire to some degree of objectivity, reliability or accuracy in evaluating claims and evidence, including the consideration of opposing evidence or views. In doing so they apply distinct disciplinary methodologies designed to enhance the search for better understandings of the world;[22] they seek to maintain an epistemic openness, consistent with commitments to knowledge based on evidence and disciplinary methodologies that, over time, may lead to changed or expanded understandings.[23] In order to aspire to objectivity in the pursuit of knowledge, *independence* in the application of disciplinary methods and openness to having one's beliefs dis-verified through those

[19] See generally, Vicki C. Jackson, 'Knowledge Institutions in Constitutional Democracy: Preliminary Reflections' (2021) 7 *Canadian Journal of Comparative and Contemporary Law* 156. Some of the ideas in this chapter were set forth in this earlier 2021 paper.

[20] *Wieman* v. *Updegraff*, 344 US 183, 196–97 (1952) (Frankfurter J, concurring); see also *Keyishian* v. *Board of Regents of the University of State of New York*, 385 US 589 (1967).

[21] See Jackson, 'Preliminary Reflections' (n 19), at 165–66.

[22] See Carolyn Evans and Adrienne Stone, *Open Minds: Academic Freedom and Freedom of Speech of Australia* Kindle ed. (Melbourne: La Trobe University Press, 2021) p. 85 ('disciplinary methods require researchers to support their theories with evidence and justification, expose them to systematic testing capable of invalidating them and submit them to peer review prior to publication as well as to subsequent criticism and contradiction').

[23] The search for knowledge according to independent disciplinary standards exists not only in the sciences but also in the social sciences and in the humanities; improved understandings of older literary texts, or of a philosophical problem, are a form of knowledge, tested by different methods than those of physics.

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methods are required. To be sure, what is accepted as true may vary over time; scientific findings may be based in part on assumptions that are matters of legitimate public debate;[24] but the processes of knowledge development allow for correction and improvement and, over the long run, real lives of real people have thereby improved.[25]

Knowledge institutions include ongoing entities that are public and private – universities, the free truth-seeking press,[26] courts and some government offices (such as the Census Bureau or other government offices charged with collecting and disseminating accurate, reliable data).[27] They are not a 'branch' of government but an essential part of the infrastructure of democratic constitutionalism. Knowledge institutions act as informational intermediaries for the public, helping to navigate among the many claims (some false, some true, some uncertain) now being disseminated.[28] A diverse group of knowledge institutions populated by diverse professionals is a valuable part of the knowledge infrastructure, providing different perspectives and cross-checks on developing understandings of knowledge.

14.2.2 *Knowledge*

The concept of knowledge is a contested one. There are important philosophical disagreements about the nature of epistemic claims; but there is fairly wide agreement on the proposition that knowledge should be understood to mean 'justified true beliefs', or that truth alone does not establish knowledge without something like some further grounds or account for why something is true.[29] Yet, I claim,

[24] See, e.g., Sandra Harding, *The Science Question in Feminism* (Ithaca, NY: Cornell University Press, 1986); Sheila Jasanoff, 'Perspective: Back from the Brink: Truth and Trust in the Public Sphere' (2017) 33(4) *Issues in Science and Technology* 25, at 28 (discussing the multi-participant process of establishing 'public truths').

[25] See, e.g., Gawande, 'The Mistrust of Science' (n 15).

[26] See Vicki C. Jackson, 'Knowledge Institutions in Constitutional Democracy: Reflections on the Press' (2022) 14 *Journal of Media Law* 275.

[27] Vicki C. Jackson, 'Knowledge at Risk: Democratic Constitutionalism and the Administrative State' (unpublished ms., September 2022).

[28] Cf. Brian Leiter, 'The Epistemology of the Internet and the Regulation of Speech in America' (2022) 20 *Georgetown Journal of Law & Public Policy* 903 (discussing the role of knowledge 'gatekeepers' including in academia); Robert Post, 'The Internet, Democracy and Misinformation' (Chapter 2 in this volume, arguing that the absence of professional 'gatekeepers who vouched for the authenticity and epistemological value of distributed information' poses a threat to democracy's public sphere).

[29] See generally, Jonathan Jenkins Ichikawa and Matthias Steup, 'The Analysis of Knowledge' in Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy*, Summer 2018, https://plato.stanford.edu/archives/sum2018/entries/knowledge-analysis. For helpful discussion by a legal academic, see Joseph Blocher, 'Free Speech and Justified True Belief' (2019) 133 *Harvard Law Review* 439, 459–64; see also Jackson, 'Preliminary Reflections' (n 19), at 163–64. For competing perspectives, see David Rabban, 'Can Academic Freedom Survive Postmodernism' (1998) 86 *California Law Review* 1377 (reviewing *The Future of Academic Freedom*, ed. by Louis Menand in 1996, discussing arguments for political rather than epistemological

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attempting to govern based on knowledge is likely to yield better outcomes than not doing so, even though 'knowledge' is in some respects socially constructed and subject to change as scientific paradigms shift or new evidence is discovered challenging orthodox beliefs.[30] 'Knowledge' here is understood not in absolute terms but rather, as referring to the best current understanding of descriptive and causal realities, reflecting justified current beliefs about what is true, based on reliable evidence.[31] To recognize this kind of role for 'knowledge' is to embrace the distinction between facts and opinions, to accept that there are understandings of the world about which, for practical purposes, there is a truth of the matter.[32] But it also embraces the idea that knowledge must remain open to being corrected or displaced by new, verifiable, knowledge claims.[33]

grounding of scholars' roles); Carlotta Pavese, 'Knowledge How' in Edward N. Zalta and Uri Nodelman (eds.), *The Stanford Encyclopedia of Philosophy*, Fall 2022, https://plato.stanford.edu/archives/fall2022/entries/knowledge-how (discussing 'anti-intellectualism' claims about 'knowledge how' to do things and whether a 'belief' is necessary to have 'how' knowledge).

[30] On epistemological debates about how knowledge changes, see, e.g., Thomas Kuhn, *The Structure of Scientific Revolutions* 3rd ed. (Chicago: University of Chicago Press, 1996) (emphasizing discovery of anomalies leading to new paradigms); Karin Knorr Cetins, *Epistemic Cultures: How the Sciences Make Knowledge* (Cambridge, MA: Harvard University Press, 1999) pp. 3–5, 8–11 (emphasizing how different disciplines use different tools); Robert K. Merton, 'The Normative Structure of Science' in Norman W. Storer (ed.), *The Sociology of Science: Theoretical and Empirical Investigations* (Chicago: University of Chicago Press, 1973) p. 270 (emphasizing the role of empirical confirmation of predictions and goals of disinterestedness and skepticism); Karl Popper, *The Logic of Scientific Discovery* 2nd ed. (London: Routledge, 2002) (emphasizing the role of falsifiability).

[31] See Ichikawa and Steup, 'The Analysis of Knowledge' (n 29) (knowledge as a belief that is true and justified); Jasanoff, 'Perspective' (n 24), at 28 ('in democratic societies, public truths are precious collective achievements, arrived at … through slow sifting of alternative interpretations based on careful observation and argument and painstaking deliberation among trustworthy experts'); 'In Defense of Knowledge and Higher Education', American Association of University Professors, 2019, www.aaup.org/report/defense-knowledge-and-higher-education (defining 'knowledge' as 'those understandings of the world upon which we rely because they are produced by the best methods at our disposal' and arguing that '[n]o state can organize effective government policy except on the basis of informed … investigation').

[32] See Vicki C. Jackson, 'Thayer, Holmes, Brandeis: Conceptions of Judicial Review, Factfinding, Proportionality' (2017) 130 *Harvard Law Review* 2348, at 2379–80; see also Edward J. Lowe, 'Fact' in Ted Honderich (ed.), *The Oxford Companion to Philosophy* (Oxford: Oxford University Press, 2005) p. 287; Henry P. Monaghan, 'Constitutional Fact Review' (1985) 85 *Columbia Law Review* 229, at 233. This view is in some tension with those of scholars like Richard Rorty, see Bjørn Ramberg and Susan Dieleman, 'Richard Rorty' in Edward N. Zalta and Uri Nodelman (eds.), *The Stanford Encyclopedia of Philosophy*, Fall 2023, https://plato.stanford.edu/archives/fall2023/entries/rorty/ (elaborating on Rorty's challenge to the idea that 'knowledge' corresponds to external realities).

[33] How one knows what 'truth' or 'knowledge' is, of course, presents a large question. On some issues (we could call them issues of fact) truth must bear a correspondence to a phenomenon in the world that is capable of intersubjective verification. Other kinds of knowledge may reflect more social or interpretive understandings. To constitute knowledge, these claims must be capable of being grounded in arguments or sources that others can look at or reflect upon. Institutions, applying their own disciplinary mechanisms oriented towards establishing truth,

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14.2.3 *Why Focus on Institutions?*

Many constitutional rights provisions – including those of expression, of association, and of the press – serve both democracy-enhancing and knowledge-producing functions, as argued by Alexander Meiklejohn and Justice Oliver Wendell Holmes.[34] Given the robust presence, in the USA and many other constitutional democracies, of judicially enforced protections for freedoms of speech, association and the press, why focus on institutions? Some excellent scholarly work has recently argued that the meaning of freedom of expression must be analyzed differently within different institutional contexts.[35] My own view is in great sympathy with these, but focuses on the institutions as objects of protection as well as the individual speech or speakers within the institutions.[36]

To be sure, individual freedoms are of great importance. They can and do promote the goal of developing and diffusing knowledge. But knowledge institutions – with their aspirations towards objectivity, their role as disciplinary gatekeepers to review the soundness of what is being taken as reliable information, and their epistemic openness to new evidence – offer some distinct advantages in the protection of rights and advancement of knowledge not served as well by a focus that looks solely to individual rights claimants.[37] This is so for several reasons. Institutions can

play a central role in enabling societies to determine when a truth about a matter is – or multiple truths are – established as knowledge. See notes 22 and 23.

[34] See Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* (New York: Harper & Brothers, 1948) pp. 105–7; *Abrams* v. *United States*, 250 US 616, 630 (1919), Holmes J, dissenting. The capacity of 'more speech' to help produce better knowledge has come under question, however, as new technologies on the Internet reduce the likelihood that false speech will be corrected where its viewers see it. See generally Tim Wu, 'Is the First Amendment Obsolete?' (2018) 117 *Michigan Law Review* 547.

[35] See Paul Horwitz, *First Amendment Institutions* (Cambridge, MA: Harvard University Press, 2013); Frederick Schauer, 'Towards an Institutional First Amendment' (2005) 89 *Minnesota Law Review* 1256, at 1250 and 1275; see also Joseph Blocher, 'Institutions in the Marketplace of Ideas' (2008) 57 *Duke Law Journal* 821.

[36] Various government interventions in college and university autonomy – even if not directly related to speech – may threaten their ability as institutions to sustain knowledge functions, just like government taxes on the use of paper and ink, see *Minneapolis Star & Tribune Co.* v. *Minnesota*, 460 US 575 (1983), may interfere with the constitutional freedoms of the press.

[37] On the importance of considering the institutions within which speech occurs, see, e.g., Horwitz, *First Amendment Institutions* (n 35); Schauer, 'Towards an Institutional First Amendment' (n 35), at 1260 (arguing for more recognition of differences among institutions in developing First Amendment doctrine); Frederick Schauer, 'Institutions as Legal and Constitutional Categories' (2007) 54 *UCLA Law Review* 1747, at 1753–54 (noting a 'pattern of treating First Amendment doctrine as institutionally blind', bemoaning 'how insignificant a role [institutions] appear to play in constitutional categorization'); Frederick Schauer, 'Principles, Institutions, and the First Amendment' (1998) 112 *Harvard Law Review* 84, at 86 ('the refusal to draw doctrinal distinctions among culturally distinct institutions is simply unworkable in the context of the vast and increasing domain of free speech claims').

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provide focal points for organized action by knowledge producers or disseminators.[38] Ongoing institutions can, moreover, also enhance and reinforce disciplinary cultures of independence and knowledge-seeking. The existence of institutions may offer legal protection for their members when their professional knowledge products lead to liability claims. Such institutions serve as much-needed intermediaries, helping to sort out genuine knowledge from the gushers of information that are now available to so many through social media. And knowledge institutions perform their truth-seeking/dissemination roles non-coercively, unlike regulatory arms of government that may seek to prohibit and punish speech. Although institutions may come under conflicting pressures, it is important that their role as knowledge producers and disseminators, and their independence in that role, be reinforced. An elaboration of these points follows.

14.2.3.1 On Focal Points for Collective Action

Adam Chilton and Mila Versteeg's research discloses an interesting relationship between the presence of written constitutional rights and actual levels of being able to exercise those rights. A positive relationship did not hold for all of the rights they investigated; the presence of rights to be free from torture, or to free speech, typically asserted by individuals, had no association with actual levels of respect for those rights. But for those rights held or exercised by *collective entities* – religious groups, trade unions or political parties – written protections were associated with greater levels of respect for those rights. Chilton and Versteeg suggest an explanation for the difference might be that the collective entities in which certain rights are exercised provide focal points for coordinated, collective action (such as organized protests) that may result in the protection of the rights, even without intervention of courts. That is, ongoing entities can facilitate coordination and collective action to protect those rights whose exercise is necessary to the core functions of the entity.[39] Particular universities and press institutions may provide a powerful focal point for the protection of academic and journalistic speech, research and investigation. Similarly, some government offices may provide powerful focal points for the preservation of the integrity of their own work, including knowledge production. Consider, for example, the collective efforts of Department of Justice officials to prevent the Attorney General from being persuaded by White House pressures to an erroneous legal interpretation as the basis for unlawful action,[40] or the concerted efforts by former members of the Department of Justice Office of Legal Counsel

[38] See Adam Chilton and Mila Versteeg, *How Constitutional Rights Matter* (Oxford: Oxford University Press, 2020). For a critique, see Madhav Khosla, 'Is a Science of Constitutionalism Possible' (2022) 135 *Harvard Law Review* 2110 (reviewing Chilton's and Versteeg's book).

[39] See Chilton and Versteeg, *How Constitutional Rights Matter* (n 38) p. 8.

[40] See Benjamin Wittes, 'James Comey's Damning Testimony', Brookings, 17 May 2007, www.brookings.edu/opinions/james-comeys-damning-testimony (describing how DOJ officials.

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(OLC) to uphold or re-envision the legal integrity and knowledge practices of that office in the face of apparent egregious departures.[41]

14.2.3.2 On Disciplinary Cultures

Institutions have institutional cultures, which include habits and norms about valid methods of producing and testing knowledge. Institutions help sustain and pass on these cultures, shared assumptions and codes of behaviors.[42] Institutions sustain their cultures in a variety of ways, including unconscious imitation, reward structures,[43] mission statements and codes of ethics.[44] Many opportunities exist to promote the

Comey, Goldsmith and Philbin coordinated action to prevent what they viewed as an illegal act being urged on the (then-hospitalized) Attorney General by the White House).

[41] See, e.g., Dawn Johnsen, 'Foreword' (to War, Terrorism, and Torture: Limits on Presidential Power in the 21st Century Symposium) (2006) 81 *Indiana Law Journal* 1139; Trevor Morrison, 'Stare Decisis in the Office of Legal Counsel' (2010) 110 *Columbia Law Review* 1448; Dawn Johnsen and Neil Kinkopf, 'How to Prevent Another "Torture Memo"', *The Wall Street Journal*, 21 January 2005 ('A group of 19 former OLC lawyers recently reviewed the practices that in the past have promoted high professional standards and prepared a set of 10 principles that, we believe, should continue to serve as the foundation for OLC's legal rulings').

[42] See generally, Edgar Schein, *Organizational Culture and Leadership* (Hoboken, NJ: Jossey-Bass, 1985) p. 9 (defining organizational culture as 'a pattern of basic assumptions – invented, discovered, or developed by a given group as it learns to cope with its problems of external adaptation and internal integration – that has worked well enough to be considered valid and, therefore, to be taught to new members as the correct way to perceive, think, and feel in relation to those problems'); Edgar Schein with Peter Schein, *Organizational Culture and Leadership* 5th ed. (Hoboken, NJ: Wiley, 2017) pp. 6–7 (defining 'the culture of a group as the accumulated shared learning of that group . . . to be taught to new members as the correct way to perceive, think, feel and behave in relation to those problems'); see also Don Hellriegel and John W. Slocum, *Organizational Behavior* (Cincinnati, OH: South-Western College, 2007) p. 418 (describing organizational culture as a 'collection of unspoken rules and traditions that play a part in determining the quality and nature of organizational life'); Davide Ravasi and Majken Schultz, 'Responding to Organizational Identity Threats: Exploring the Role of Organizational Culture' (2006) 49 *Academy of Management Journal* 433, at 437 (defining organizational culture as a set of assumptions that help 'defin[e] appropriate behavior for various situations'); cf. Barbara E. Armacost, 'Organizational Culture and Police Misconduct' (2004) 72 *George Washington Law Review* 453, at 521 and 546 (arguing that organizational culture is sustained and changed not only by leaders but also by the group as a whole, posing a challenge, for example, to efforts to change adverse cultures in policing units).

[43] Consider here the role of Pulitzer Prizes, awarded by Columbia University, and other awards in journalism. See 'About Us', https://journalism.columbia.edu/about; 'History of the Pulitzer Prize', www.pulitzer.org/page/history-pulitzer-prizes.

[44] On the professional culture of truth-seeking news media, see Jackson, 'Reflections on the Press' (n 26), at 284 (noting, for example, the recent creation at *The New York Times* of an office of 'Newsroom Cultures and Careers'). A professional culture of factual integrity is also asserted at the level of policy (and in fact is found) in many government offices. See, e.g., US Census Bureau, 'Scientific Integrity' (last revised 16 December 2021), www.census.gov/about/policies/quality/scientific_integrity.html (asserting its commitment, with other federal statistical agencies, to a 'common set of professional standards and operational practices designed to ensure the quality, integrity, and credibility of our statistical activities'); Emily Bazelon and Michael

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truth-seeking mission of universities and colleges and their faculties, including in hiring, promotion and tenure review; mission statements of universities, public and private, emphasize their role in knowledge production, preservation and transmission.[45] At a high level of generality, many in the sciences would agree with the National Academies of Science, Engineering and Medicine in the USA that 'the values of objectivity, honesty, openness, accountability, [and] fairness' are essential.[46] A more general statement, cognizant of the variation in some standards among disciplines, is found in Cambridge University's statement of good research practices, that 'the highest standards of integrity, honesty and professionalism in respect of their own actions in research and in their responses to the actions of others' is necessary, as is 'openness' about research and its availability.[47] Tenure standards of particular schools and departments cast further light on how particular schools talk about research quality.[48] Academic cultures are passed on in various ways – including, inter alia, through policy statements, tenure requirements, formal reviews, informal reviews, academic mentoring and professional associations in the various academic disciplines. So institutions matter because, in part by bringing together people with similar professional commitments over time, they can reinforce disciplinary cultures for the production of different kinds of knowledge.[49]

Wines, 'How the Census Bureau Stood Up to Trump', *New York Times Sunday Review*, 15 August 2021, p. 3; Michael Wines, 'Census Memo Cites "Unprecedented" Meddling by Trump Officials', *The New York Times*, 16 January 2022, p. 21; see also Stephen Skowronek, John A. Dearborn and Desmond King, *Phantoms of a Beleaguered Republic* (Oxford: Oxford University Press, 2021) p. 106 (discussing federal civil servant weather scientists resisting unscientific political interventions).

[45] See, e.g., University of Michigan's 'Mission Statement', https://president.umich.edu/about/mission (asserting a mission 'to serve the people of Michigan and the world through preeminence in creating, communicating, preserving and applying knowledge, art, and academic values'); Harvard College's 'Mission, Vision, & History', https://college.harvard.edu/about/mission-vision-history ("The mission of Harvard College is to educate the citizens and citizen-leaders for our society … with exposure to new ideas, new ways of understanding, and new ways of knowing').

[46] 'Fostering Integrity in Research', National Academies of Sciences, Engineering, and Medicine, 2017, https://nap.nationalacademies.org/read/21896/chapter/14, 9.

[47] 'Good Research Practice Guidelines', University of Cambridge, www.research-integrity.admin.cam.ac.uk/files/good_research_practice_guidelines_jan_2021.pdf.

[48] See, e.g., 'Standards for Tenure and Promotion' (2014), Georgetown University Law Center, www.law.georgetown.edu/wp-content/uploads/2018/05/A.-Tenure-Standards.pdf (describing tenurable qualities of legal scholarship as showing 'wide and critical command of the field of his or her study', stating that the 'highest indication of scholarship is the ability to make original contributions in one's field of knowledge', and '[e]xcellence in legal scholarship is characterized by clear and compelling argument that relies on relevant evidence or authority, by ideas or results that are both original and important, and by the author's attention to method').

[49] Although professionals or experts unaffiliated with any institution may apply disciplinary standards, institutions help define and uphold the disciplinary norms by which to assess the validity and reliability of truth claims. I thank Martha Minow, again, for pressing me on this point.

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14.2.3.3 Material Resources for Discipline-Conforming Knowledge Work

As discussed elsewhere, institutions matter because they are likely to have material capacities and incentives to protect the rights of their members, at least where their members are seeking to produce or identify knowledge in accordance with the relevant disciplinary norms.[50] Constitutional rights, of course, also provide protection, but that protection can be supported – or supplemented – by aspects of the institutional presence. This protection may take different forms. Institutions will, typically, have more money and access to legal expertise than any individual member. If a *New York Times* journalist or a Harvard scholar is sued or subject to investigation for their journalistic or academic work, their employers may be able to assist in their defense;[51] government employees are often able to have government support for their defense unless the employee's conduct 'does not reasonably appear to have been performed within the scope of his employment with the federal government … [or] is otherwise determined … not [to be] in the interest of the United States to provide'.[52] Of course, the interests of institutions and their employees may diverge,[53] but the presence of an institution whose goals generally overlap with those of its employees may provide added support against attacks on those employees for doing their jobs. If institutions fail to support employees in their knowledge production or disseminating capacities, the consequences for an epistemically sound system may be quite adverse.

14.2.3.4 Intermediaries and Massive Misinformation Flows

Another reason to give special attention to knowledge institutions as such arises from the profusion of communications sources that now exist in the world. This profusion of communications sources, including through social media, facilitate very quick and widespread diffusion of claims that may have little foundation or be completely

[50] See Jackson, 'Reflections on the Press' (n 26), at 284.

[51] Moreover, compliance with institutional norms of a knowledge institution may help insulate scholars or journalists from legal liability for their publications. See Horwitz, *First Amendment Institutions* (n 35), pp. 152–53 (noting that journalists' compliance with journalistic norms or customs can rebut claims of legal malice, an element required in the US for a public figure to win a defamation action).

[52] 28 CFR 50.15.

[53] Although there are possibilities for conflicts of interest between employing organizations and employees, in universities and news outlets there is some alignment in the dominant purposes of the institution and its professional staff. With respect to government institutions, the potential conflicts between government as employer and the professional knowledge workers it employs are perhaps greater. Scientific or statistical offices within government work within an overarching institution whose central purpose is to govern. Reconciling the need for independence and impartiality in the development of knowledge with the range of government purposes is a particular challenge, perhaps calling for more internal separation of powers.

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untrue.[54] Major sources of information flow on social media such as Facebook, YouTube or Twitter do not generally purport to screen what they disseminate for truthfulness;[55] their principal purposes do not include the creation or dissemination of knowledge, but rather the flow of communications. University communities and those of other intermediary institutions can often sort out true from false knowledge claims in a more authoritative way than any isolated individual acting on their own.

Knowledge institutions serve this function generally by applying appropriate disciplinary standards to determine what counts as 'knowledge', including the credentialing of experts and the identification of areas of epistemic uncertainty.[56] Moreover, a number of knowledge institutions (some independent non-governmental organizations, some universities) have in recent years supported scholarly work and established knowledge-disseminating projects specifically

[54] See Leiter, 'Epistemology' (n 28), at 918–19; cf. Luís Roberto Barroso, 'Populism, Authoritarianism, and Institutional Resistance' (2022) 57 *Texas International Law Journal* 259 (arguing that extremist, authoritarian movements seek to by-pass intermediary institutions, including the press and civil society, to gain power through direct social media appeals to supporters); Luís Roberto Barroso and Luna van Brussel Barroso, 'Democracy, Social Media, and Freedom of Expression: Hate, Lies, and the Search for the Possible Truth' (2023) 24 *Chicago Journal of International Law* 51 (discussing social media's effects on increased public participation and communication and at the same time increased 'disinformation campaigns, hate speech, slander, lies, and conspiracy theories used to advance antidemocratic goals').

[55] Wikipedia might be considered a knowledge institution insofar as its purpose is to disseminate knowledge; it is debatable whether it has a 'disciplinary method', other than relying on transparency, publicity, encouragement of supporting documentation and notation where it is in doubt.

[56] Many questions exist about whether particular institutions – for-profit universities, particular foundations or institutes – are 'knowledge institutions'. Sometimes an entity's mission statement will make clear that developing, preserving or disseminating knowledge is not central to its mission, even if it may be an incidental product. Sometimes an entity will claim to be oriented to knowledge production, but will be viewed by others as incapable of performing this role because commitment to an existing worldview prevents it from the kind of open-mindedness that knowledge institutions should have. A non-governmental organization (NGO), like the RAND Corporation – which describes itself as 'dedicated to furthering and promoting scientific, educational, and charitable purposes for the public welfare and security of the United States', blending 'scrupulous nonpartisanship with rigorous, fact-based analysis to tackle society's most pressing problems' – could be a knowledge institution to the extent it adheres to this self-description. 'A Brief History of RAND', RAND, www.rand.org/about/history.html. Other NGOs with more advocacy, or lobbying goals, might not be: an NGO such as the Tobacco Institute that used to exist in the USA, at least as described by Bath University Tobacco Tactics project, would probably not be. See https://tobaccotactics.org/article/tobacco-institute (describing an internal memo characterizing the institute's work in part as being about '[c]reating doubt about the health charge without actually denying it'). Many associations that play quite valuable (and constitutionally protected) democratic roles – including political parties or advocacy groups – may not be 'knowledge institutions' if one looks at what their central or primary purposes are, as well as whether they apply disciplinary process oriented towards identifying knowledge. In a work-in-progress (a book for Cambridge University Press), I plan to consider such questions.

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designed to understand, and to help check, the flow of misinformation online.[57] These projects directly seek to play an intermediary and knowledge-preserving role.

14.2.3.5 Knowledge Institutions as Less Coercive than Government Regulation

Knowledge institutions rely on less coercive measures in promoting knowledge than government regulation. Allowing the coercive powers of government to be used intrusively to regulate knowledge production, testing and dissemination poses acute risks to constitutional democracy. As current events have shown, some governments have invoked the COVID pandemic as a pretext to suppress and punish criticism of the incumbents by asserting coercive control over purportedly 'fake news'.[58] Although knowledge institutions may refuse to reward work that is deemed below par, or may impose employment-related sanctions, they do not have the coercive powers of government to prohibit speech or jail dissidents. Such milder forms of influence exercised by knowledge institutions offer a less threatening alternative to

[57] See, e.g., 'Research, Truth Decay, Fighting Disinformation', RAND, www.rand.org/research/projects/truth-decay/fighting-disinformation/search.html; 'Center for an Informed Public University of Washington', www.cip.uw.edu ('The Center for an Informed Public … is a multidisciplinary research center at the University of Washington … that has a mission to resist strategic misinformation, promote an informed society and strengthen democratic discourse'); 'Science of Science Communication Area of Study', Annenberg Public Policy Center, University of Pennsylvania, www.annenbergpublicpolicycenter.org/science-communication (designed to address 'gaps between expert knowledge of science and public perception'); Annenberg Public Policy Center with Factcheck: www.annenbergpublicpolicycenter.org/appc-in-new-collaboration-to-counter-misinformation-online; Pitt Disinformation Center at Pittsburg University, www.cyber.pitt.edu/disinformation ('creat[ing] a new, community-centered system for warning, understanding, and response to malign influence'); 'Knowledge Enterprise Center on Narrative, Disinformation and Strategic Influence', Arizona State University, https://globalsecurity.asu.edu/expertise/narrative-disinformation-and-strategic-influence (using research to 'support efforts to safeguard the United States, its allies, and democratic principles against malign influence campaigns'); 'Assembly: Disinformation', Berkman Klein Center, Harvard University, https://cyber.harvard.edu/research/assembly ('brings together participants from academia, industry, government, and civil society from across disciplines to explore and make progress on disinformation in the digital public sphere'); MIT Initiative on the Digital Economy, https://ide.mit.edu/research-group/misinformation-fake-news ('shed light on the basic science of how people decide what to believe and share, and leverage these insights to design anti-misinformation interventions').

[58] See Gabrielle Lim and Samantha Bradshaw, 'Chilling Legislation: Tracking the Impact of "Fake News" Laws on Press Freedom Internationally', Center for Media Assistance, 19 July 2023, www.cima.ned.org/publication/chilling-legislation ('[M]any misinformation, disinformation, and mal-information … laws chill press freedom, rather than enhance it'); 'Censorious Governments Are Abusing "Fake News" Laws', *The Economist*, 13 February 2021. In the USA, where there is aggressive First Amendment protection even for deliberately false statements in some contexts, increasingly state statutes have targeted false communications involving the Internet and social media. See Leslie Gielow Jacobs, 'Freedom of Speech and Regulation of Fake News' (2022) 70 (Issue Supplement_1) *American Journal of Comparative Law* i278, at i294.

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government efforts directly to sanction or suppress speech and the dissemination of knowledge.[59]

14.2.4 *Why Focus on Democracies?*[60]

All governments need knowledge in order to be able effectively to govern; even the most authoritarian of governments will need knowledge to maintain their own power.[61] But democracies are particularly dependent on knowledge institutions for their own legitimacy and effectiveness. *Democratic* constitutionalism requires at least to some degree the active involvement of knowledgeable citizens, even if only to participate in elections where public approval or displeasure with the performance of office holders can be expressed.[62] On more demanding understandings of democracy, elected representatives must deliberate seriously over issues of policy or, on some accounts, citizens must participate actively in influencing government bodies' agendas and policy outcomes.[63] Elections legitimize government insofar as they reflect the views of the voters who have access to information (about choices of candidates and policies) and access to voting without obstruction or coercion.[64]

[59] Cf. Mary Flug Handlin and Oscar Handlin, *The Dimensions of Liberty* (Cambridge, MA: Belknap, 1961), p. 111 ('The capacity to act through noncoercive means remained a critical element in American liberty. It preserved the latitude of choice available to the individual. By sustaining the conviction that desirable ends could be attained without calling upon the state, it helped set limits upon the use of political power without depriving society of services considered essential to its welfare').

[60] These paragraphs are largely drawn from Jackson, 'Preliminary Reflections' (n 19), at 199–201.

[61] See, e.g., Melissa M. Lee and Nan Zhang, 'Legibility and Informational Foundations of State Capacity' (2016) 79 *Journal of Politics* 118 (suggesting that all governments need knowledge and that, with better knowledge of local practices, views and persons, the state will have improved ability to assess and collect taxes and produce or encourage the production of goods); Stephen Holmes, *Passions and Constraint* (Chicago: University of Chicago Press, 1995) p. 119 (describing Jean Bodin's theory for why even monarchs benefit from some freedom of speech, enabling them to have access to vital information for maintaining their realm); cf. George Washington, 'First Address to Congress', 1790 ('Knowledge is in every country the surest basis of publick happiness. In one in which the measures of government receive their impression so immediately from the sense of the community, as in ours, it is proportionately essential').

[62] See, e.g., Joseph A. Schumpeter, *Capitalism, Socialism, and Democracy* (New York: Harper & Brothers, 1942) p. 250.

[63] See, e.g., Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge, MA: MIT Press, 1996) pp. 118–31; Hélène Landemore, *Open Democracy: Reinventing Popular Rule for the Twenty-first Century* (Princeton, NJ: Princeton University Press, 2020).

[64] Cf. Meiklejohn, *Free Speech* (n 34) pp. 45–46. Meiklejohn's argument for free speech on public issues rests on the assumption that free speech is the best way to provide a sound informational base for democratic decisions. His argument predates more recent technologies that, for many, have undermined some of the foundations for trusting wholly unimpeded speech.

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Thus legitimate elections depend on ample sources of information,[65] as well as unobstructed access to voting. On any version of a real democracy, knowledge relevant to evaluating issues and representatives must be available to voters.[66]

Second, *constitutional* democracies require knowledge institutions to sustain their constitutionalist character. A core idea of constitutionalism is that the rule of law applies to the government itself so as to constrain the government from arbitrary action.[67] Central elements of the rule of law require that the laws, and what they prohibit or authorize, be knowable, and that the enforcement of the law be characterized by some degree of consistency and reliability.[68] Thus, in order to secure the 'constitutionalist' aspect of constitutional democracy, knowledge of the law, about what it is, how it is being applied and how it can be improved, is necessary.

Third, knowledge is essential to the effective policy development and implementation that is necessary for government to respond to the needs and preferences of the public. Democratic constitutions must enable elected governments to work effectively in meeting the material needs of their societies, while at the same time protecting the individual rights that are central to human liberty and equality.[69] Constitutions not only impose constraints on governments but also empower

[65] To be sure, knowledge institutions may fail actually to pursue knowledge. See, e.g., 'Yellow Journalism', Public Broadcasting Service, www.pbs.org/crucible/frames/_journalism.html (describing how 'the Hearst newspapers, with no evidence, unequivocally blamed the Spanish' for the sinking of the Maine, encouraging the USA to intervene militarily in Cuba). Later studies reached divergent conclusions on whether the sinking was caused by an external bomb or by an internal coal bunker near a reserve magazine. See 'A Special Report: What Really Sank the Maine?', US Naval Institute, www.usni.org/magazines/naval-history-magazine/1998/april/special-report-what-really-sank-maine. This and other controversies emphasize the importance of pluralism in the existence and control of knowledge institutions.

[66] Knowledge institutions may play another role in fostering democracy: providing shelter for political dissidents, from their own countries or others, incubating the possibility of political challenge. See, e.g., Linda Colley, *The Gun, the Ship and the Pen: Warfare, Constitutions and the Making of the Modern World* (New York: Liveright, 2021) p. 230 (describing the British Museum as 'the temple of political exiles' in the nineteenth century).

[67] Cf. Charles McIlwain, *Constitutionalism: Ancient and Modern* 3rd ed. (Ithaca, NY: Cornell University Press, 1975) p. 21 (constitutionalism 'is a legal limitation on government; … the antithesis of arbitrary rule; its opposite is despotic government, the government of will instead of law'); see also András Sajó and Renáta Uitz, *The Constitution of Freedom: An Introduction to Legal Constitutionalism* (Oxford: Oxford University Press, 2019) p. 13.

[68] See generally Lon Fuller, *The Morality of Law* (New Haven, CT: Yale University Press, 1964); Jeremy Waldron, 'The Rule of Law' in Edward N. Zalta and Uri Nodelman (eds.), *The Stanford Encyclopedia of Philosophy* (Fall 2023 ed.), https://plato.stanford.edu/entries/rule-of-law (characterizing Fuller as arguing that rule of law principles require that laws be 'general, public, prospective, coherent, clear, stable, and practicable').

[69] See Vicki C. Jackson and Yasmin Dawood, 'Constitutionalism and Effective Government: Rights, Institutions, and Values' in Vicki C. Jackson and Yasmin Dawood (eds.), *Constitutionalism and a Right to Effective Government?* (Cambridge: Cambridge University Press, 2022).

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governments to act for the benefit of their people.[70] The democratic and constitutionalist pillars of constitutional democracy must be accompanied by a pillar of effective government.[71] Effective government requires competency in decision-making.[72]

Democratic elections mean less if elected officials are incompetent or lack access to knowledge that forms the basis for competent decisions. Incompetent government cannot effectively respond to and provide for the material needs of the people; constitutional democracies cannot long survive if their governments are not seen as effective in advancing the welfare of the people. Even the protection of individual rights rests on the ability of government to have an effective system that works to promote the protection of rights, including well-trained police, prosecutors, lawyers, judges and courts. Competency, in turn, rests on decision-makers having reliable knowledge of the world.

Constitutional democracies, then, rest on multiple pillars – of democracy and public consent, of respect for rule-of-law protections from arbitrary government conduct, of protection of individual rights and of competent, 'workable' governance.[73] To secure 'democratic', 'constitutionalist' and 'competency' forms of

[70] See N. W. Barber, *The Principles of Constitutionalism* (Oxford: Oxford University Press, 2018) p. 19; Sotirios A. Barber, 'Fallacies of Negative Constitutionalism' (2006) 75(2) *Fordham Law Review* 651; Sotirios A. Barber and James E. Fleming, *Constitutional Interpretation: The Basic Questions* (Oxford: Oxford University Press, 2007) ch. 4.

[71] See Jackson and Dawood, 'Constitutionalism' (n 69); see also Gillian E. Metzger, 'Foreword: 1930s Redux: The Administrative State under Siege' (2017) 131(1) *Harvard Law Review* 74 (noting the agreement of Brownlow and Landis, who had otherwise largely opposed positions on issues of presidential control in federal administrative law, that a democratic government had to have effective public administration). It is not coincidental that Landis and Brownlow were writing against the backdrop of fascism's rise in Europe.

[72] See Elizabeth Fisher and Sidney A. Shapiro, *Administrative Competence: Reimagining Administrative Law* (Cambridge: Cambridge University Press, 2020); Cass R. Sunstein, 'The Most Knowledgeable Branch' (2016) 164(7) *University of Pennsylvania Law Review* 1607; Robert C. Post, *Democracy, Expertise and Academic Freedom: A First Amendment Jurisprudence for the Modern State* (New Haven, CT: Yale University Press, 2012) (distinguishing legitimation by democracy and by competency, and arguing both are needed); cf. Bruce Ackerman, 'The New Separation of Powers' (2000) 113(3) *Harvard Law Review* 633, at 696–97 (discussing need for an 'integrity branch' and a 'regulatory branch' to provide competent and non-corrupt execution of the laws). For an argument that truth must be seen as central to democracy, see Michael Lynch, 'Truth as a Democratic Value' in Melissa Schwartzberg and Philip Kitcher (eds.), *Truth and Evidence* (New York: NYU Press, 2021) (arguing that protecting the means to pursue knowledge in democracy advances values of 'promoting deliberative decision-making procedures such as rational legislative processes and participatory politics' which rest on basic respect for each person and the existence of a 'common currency of reasons' for democratic contestation).

[73] See generally, Ackerman, 'The New Separation of Powers' (n 72), at 688–97; Post, *Democracy, Expertise and Academic Freedom* (n 72), p. 34; see also Sunstein, 'The Most Knowledgeable Branch' (n 72), at 1612; *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 US 579, 635 (1952) (Jackson J, concurring) ('While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a *workable* government') (emphasis added).

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legitimation, constitutional democracies require what Ginsburg and Huq call a 'shared epistemic' foundation.[74] A shared epistemic foundation is one that is rooted in verifiable knowledge about the world and a reasoned and open process for interpreting what that knowledge means for policymaking. To this end, democratic constitutionalism requires vibrant 'knowledge institutions', both within and outside of government, to help secure this shared epistemic foundation.

For the reasons discussed above, institutions devoted to knowledge production or dissemination deserve special attention in the field of constitutional studies; their role is a distinctive one in securing the freedoms and epistemological grounding necessary in constitutional democracies. Yet the role of knowledge institutions in constitutional democracy has gone underappreciated, both in US constitutional discourse and in comparative constitutional studies. Shoring up appreciation of and protections for knowledge institutions is thus urgently important.

14.3 BRIEF EXAMPLES: OF PUBLIC UNIVERSITIES AND GOVERNMENT OFFICES

Both government offices and universities, public and private, can be 'knowledge institutions'. Some government offices exist for the principal purpose of compiling and creating knowledge – about different sectors of the economy, about the population as a whole, about natural phenomena.[75] Many government offices also have other purposes to be pursued through the exercise of professionally informed knowledge, as in criminal prosecutors' offices, or in offices of health and safety regulation. In carrying out their knowledge-related functions, ongoing organizations in government, like academic departments, require commitments to the pursuit of truth or knowledge; the application of appropriate disciplinary standards designed to identify reliable knowledge claims; and the ability independently to apply those disciplinary criteria. In the sections that follow, I discuss case law that threatens that independence, in both government offices and public universities.

14.3.1 Garcetti *and Government Employees*

In *Garcetti* v. *Ceballos*,[76] the Court held that criminal prosecutors, and government employees generally, are not protected by the First Amendment from adverse employment action for statements made pursuant to the government employees' official duties – apparently even if the statements address matters of public concern,

[74] Aziz Huq and Tom Ginsburg, 'How to Lose a Constitutional Democracy' (2018) 65 *UCLA Law Review* 78, at 130–31.

[75] See Jackson, 'Knowledge at Risk' (n 27) (identifying several statutes imposing such duties).

[76] *Garcetti* v. *Ceballos*, 547 US 410 (2006).

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or of professional ethics and constitutional responsibility.[77] It explained that: 'Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.'[78] The implications for faculty at public universities aroused considerable concern,[79] although the Court reserved that question.[80]

Government offices no doubt have 'managerial' needs that warrant control over employee speech that would be unconstitutional if extended by the government as regulator to the citizenry as a whole.[81] But *Garcetti*'s prioritization of bureaucratic control over other public values of truth and legality remains a significant deterrent to expressions of professional disagreement within government offices, including those that are knowledge institutions, even when expressing those disagreements may be in the public interest. Government employees may develop specialized expert knowledge, making their observations and concerns of high value to the public as well as the government.[82] And government officials, like other employers, have incentives to avoid acknowledging or redressing their own mistakes,[83] a tendency that could be mitigated, or deterred, by recognizing that government employees doing 'knowledge' work for the government require, by virtue of the function of their office, greater protection for their speech in the course of official duties. In denying that a government employee has *any* First Amendment interest in

[77] See 'Leading Cases, Supreme Court 2005 Term, Public Employee Speech' (2006) 120 *Harvard Law Review* 273 (describing *Garcetti*'s factual allegations that the government prosecutor was professionally and constitutionally obligated to send a memo to his supervisor detailing concerns about an affidavit used to procure a search warrant and to disclose those concerns to defense counsel, he nonetheless suffered adverse employment action as a result). See also n. 89.

[78] *Garcetti* v. *Ceballos*, at 421–22. In other cases the Court has taken a categorical approach, treating 'government speech' as outside the concerns of the free speech clause of the First Amendment. See, e.g., *Pleasant Grove City* v. *Summum*, 555 US 460 (2009).

[79] See, e.g., Judith Areen, 'Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance' (2009) 97 *Georgetown Law Journal* 945.

[80] *Garcetti* v. *Ceballos*, at 423. The Court narrowed the sweep of *Garcetti* in *Lane* v. *Franks*, 573 US 228 (2014), with respect to sworn testimony by a government employee subpoenaed to testify about matters within his knowledge as a government employee. It distinguished *Garcetti* as resting on the fact that the speech in question – a memo written by the plaintiff to his supervisor – was within the scope of his official duties. Ibid. at 237–38.

[81] See generally Robert C. Post, *Constitutional Domains: Democracy, Community, Management* (Cambridge, MA: Harvard University Press, 1995).

[82] See Jackson, 'Knowledge at Risk' (n 27); see also Heidi Kitrosser, 'The Special Value of Public Employee Speech' (2015) *Supreme Court Review* 301; Helen Norton, *The Government's Speech and the Constitution* (Cambridge: Cambridge University Press, 2019) p. 11.

[83] In addition to counteracting existing incentives to avoid correcting errors, affording some protection to internal speech would recognize the special informational value such speech may have to government decisions, see Kitrosser, 'The Special Value' (n 82), a value that may be central to the protection of professional and constitutional responsibilities, and help deter future mistakes that could arise from dismissing internally raised concerns.

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speech made as part of their official duties as a government employee, *Garcetti* also undervalues the role of such speech in serving knowledge-related interests vital in a democracy, including checking or disclosing misinformation and breaches of constitutional requirements.

Although categorical rules have important advantages of clarity, and error avoidance,[84] when deployed to strip all constitutional protections from government employee speech in their official duties, that approach goes too far in cutting off potentially valuable information. At the same time, governments as employers have undoubted interests in being able to manage their workforce, including the ability to discipline employees for errors, incompetence or disruptive behavior at work.[85] And the constitutional system as a whole, and all of its members, have an interest in effective government that requires acknowledging the hierarchical authority in heads of offices to manage their staff.[86]

Those legitimate interests can be accommodated through doctrine that does less harm to the interests of the First Amendment and the public in the kind of information government employees can and should be able to provide,[87] while at the same time recognizing the knowledge-producing roles of government offices. Fred Schauer, among others, has criticized the Court for too rigid an application of legal categories that are insufficiently attentive to contextual differences between institutional settings.[88] As such work suggests, 'government speech' should not be deployed as a category to preclude careful attention to the competing values at stake in conflicts between managerial authority for work-related errors, on the one hand, and the professional judgment of professional employees exercised on behalf of public values, on the other.[89]

[84] See generally Frederick Schauer, 'Formalism' (1988) 97(4) *Yale Law Journal* 509; Kathleen Sullivan, 'Foreword: The Justices of Rules and Standards' (1992) 106(1) *Harvard Law Review* 22.

[85] See Robert C. Post, 'Subsidized Speech' (1996) 106(1) *Yale Law Journal* 151, at 164.

[86] See Post, *Constitutional Domains* (n 81) pp. 234–37 (on the role of hierarchy in organizations).

[87] See, e.g., Kitrosser, 'The Special Value' (n 82), at 303 and 333–36 (arguing for inquiry whether competency based claims for disciplining an employee were pretextual and distinguishing scripted and unscripted public employee jobs).

[88] See Schauer, 'Towards an Institutional First Amendment' (n 35); Schauer, 'Principles, Institutions and the First Amendment' (n 37), at 100–1.

[89] In *Garcetti*, a supervising deputy district attorney believed that an affidavit submitted in connection with a search warrant was misleading; he conveyed his views first, within his office, to his supervisor, and then to a court, in a hearing requested by defense counsel to suppress the evidence seized but in a redacted form as requested by his supervisor. See 'Leading Cases, Supreme Court 2005 Term' (n 77), at 274. The Court rejected the defense motion. Given the role of professional lawyers in prosecutors' offices, one would think that there was a powerful argument that the employee's behavior should not have been subject to sanction because of the value of expert knowledge in protecting the rights secured by constitutional criminal procedure rules.

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These arguments warrant significant modification of *Garcetti*, notwithstanding its concern for managerial prerogatives.[90] The US approach severs too completely the public employees' constitutional accountability to the public from its bureaucratically focused conception of the hierarchical responsibility of a public servant.[91] The question of government employee speech highlights one of the benefits of seeing knowledge institutions as a category in constitutionalism, because the benefits to be achieved by protecting the professionally informed, expert speech of some government workers overlap with the benefits to be derived from protecting academic and press freedoms, in ways that separate treatment may obscure.

14.3.2 *Universities as a Special Case?*

As noted, *Garcetti* did not rule on whether its holding – that government employees had no First Amendment protection for speech that was part of their official duties – would apply to professors at public universities. This unanswered question of *Garcetti* has assumed increasing importance, as attacks on basic elements of American academic freedom traditions mount while the Court has seemingly retreated from its prior support for the constitutional status of academic freedom in the context of student admissions. As Paul Horwitz argues, the law of free speech protection 'should be responsive to context, specifically including institutional context', and 'should be built from the perspective of important speech institutions, not imposed upon them'.[92] Academic freedom is central to sustaining constitutional democracy.[93] The central functions of universities as institutions – whether public or private – are to advance knowledge through research and teaching. Similar protections of academic freedoms should be accorded to those operating as public as well as those operating as private universities.

[90] For alternative approaches, see 'Guide on Article 10 of the European Convention on Human Rights: Freedom of Expression', European Court of Human Rights, 2021 (identifying six factors that bear on whether particular actions of whistleblowing or reporting irregularities by public officials are protected under Article 10), www.echr.coe.int/documents/guide_art_10_eng.pdf. Without necessarily adopting their specific criteria, I suggest that the European Court's work suggests that judicially developed criteria for balancing interests in managerial control against interests in truth are possible.

[91] For an incisive analysis of 'public knowledge producers' and the Court's First Amendment jurisprudence across a range of areas, see Heidi Kitrosser, 'Protecting Public Knowledge Producers' (Northwestern University Pritzker School of Law Public Law and Legal Theory Series, No. 22–36, 2022). On the adverse effects of the Court's declining protection of the free speech rights of government employees, especially in state and local governments, see Adam Shinar, 'Public Employee Speech and the Privatization of the First Amendment' (2013) 46 *Connecticut Law Review* 1.

[92] Horwitz, *First Amendment Institutions* (n 35) at 69.

[93] See generally Tom Ginsburg, 'Academic Freedom and Democratic Backsliding' (2022) 71(2) *Journal of Legal Education* 238.

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14.3.2.1 Student Admissions

In *Sweezy* v. *New Hampshire*,[94] Chief Justice Earl Warren's plurality opinion noted the 'essentiality of freedom in the community of American universities' as a 'self-evident' feature of the First Amendment, and cautioned against 'imposing any strait jacket upon the intellectual leaders in our colleges and universities'. In a concurrence, Justice Felix Frankfurter famously described the constitutional scope of academic freedom in explaining what freedoms of universities were necessary to maintaining a 'free society'.[95] Drawing from a statement by South African academics, his opinion stated that

> [i]t is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university – to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.[96]

Widely cited,[97] this statement of a US idea of academic freedom proved central to supporting decisions in subsequent cases upholding the use of race in university admissions to promote the diversity of the student body: Justice Lewis Powell's opinion in *Regents of University of California* v. *Bakke* quoted and relied on Justice Frankfurter's *Sweezy* discussion of academic freedom,[98] and this rationale was relied on as well in *Grutter* v. *Bollinger*.[99]

However, in *Students for Fair Admissions* v. *Harvard College*,[100] the Supreme Court in effect disavowed the reasoning in *Bakke* and *Grutter*, holding that consideration of race as such in university admissions violates the Equal Protection Clause; the Court invalidated the Harvard College plan (whose predecessor had been specifically approved by Justice Powell in *Bakke*). Contrary to the reasoning in prior

[94] *Sweezy* v. *New Hampshire*, 354 US 234, 250 (1957).

[95] Ibid. at 261–62 (Frankfurter J, concurring in the result, joined by Harlan J) (explaining 'the dependence of a free society on free universities [which] means the exclusion of governmental intervention in the intellectual life of a university').

[96] Ibid. at 263 (quoting and citing *The Open Universities in South Africa* (Johannesburg: Witwatersrand University Press, 1957) 10–12).

[97] See, e.g., *Board of Regents of University of Wisconsin System* v. *Southworth*, 529 US 217, 239 (2000) (Souter J, concurring in the judgment) (quoting Frankfurter's 'four essential freedoms' statement and concluding that 'protecting a university's discretion to shape its educational mission may prove to be an important consideration in First Amendment analysis of objections to student fees'); Post, *Democracy, Expertise and Academic Freedom* (n 72) p. 72; Peter Byrne, 'Academic Freedom: A Special Concern of the First Amendment' (1989) 99 *Yale Law Journal* 251, at 289–90.

[98] See *Regents of University of California* v. *Bakke*, 438 US 265, 312 (1978) (Powell J, delivering the judgment of the Court and concurring).

[99] *Grutter* v. *Bollinger*, 539 US 306, 329 (2003); *Grutter* was treated as no longer controlling in *Students for Fair Admissions* v. *Harvard College*, 143 S.Ct. 2141 (2023).

[100] Ibid. at 2166.

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cases, the Court treated the university's aims – including 'better educating its students through diversity' and 'producing new knowledge stemming from diverse outlooks' – as 'commendable goals, [but] not sufficiently coherent for purposes of strict scrutiny', 'worthy', but not enough to justify the use of race[101] – notwithstanding their acceptance in prior cases. The lack of respect for universities' academic decisions is manifest in the evident hostility with which strict scrutiny is applied (for example, the Court's claim that the educational benefits of student body diversity are not 'sufficiently coherent').

Students for Fair Admissions was a major case, with long majority, concurring and dissenting opinions. Of further concern, then, is that in this major case, in which universities defended an admissions program on academic freedom grounds,[102] not one opinion cites *Sweezy*. Why not? Should the majority in *Students for Fair Admissions* be understood as rejecting Frankfurter's formulation of academic freedom, at least as it applies to the admission of students? How concerned should one be about universities' capacities to remain independent 'knowledge institutions' if their academic freedom does not extend, generally, to selection of students? Even more concerning is the possibility that the Court's silence in *Students for Fair Admissions* implies skepticism that 'academic freedom' has any constitutional foundation whatsoever, for in that case, university faculty would be in the same position as government employees under *Garcetti*. *Garcetti*'s unanswered question about its application to public colleges and universities thus looms even larger in light of *Students for Fair Admissions*.

How central to universities is the ability to develop and apply selection criteria for choosing their students? One could perhaps argue – not very. One could argue that the core, or most central, reason to protect universities as knowledge institutions is

[101] See ibid. at 2166–67. Although this language accepts the university's judgment, it does so grudgingly and without calling these 'worthy' goals 'compelling'. In *Fisher* v. *University of Texas at Austin*, 570 US 297, 308 (2013), the Court, in ruling on the constitutionality of an affirmative action plan, recognized the importance of *Sweezy* and of academic freedom in student admissions. But the Court emphasized that race could be used in admissions only if its use survived 'strict scrutiny', and said that while, under *Grutter*, courts would defer to a university's conclusion that racial diversity was 'essential to its educational admission', the school still 'must prove that the means chosen by the University to attain diversity are narrowly tailored to that goal', and held that on that 'point, the University receives no deference'. Ibid. at 311. After remand and further findings in the lower courts, in *Fisher II*, 579 US 365, 381–82 (2016), the Supreme Court upheld the Texas approach, using the language of compelling interests. In *Students for Fair Admissions*, the Court gave no deference at all to the universities' decisions, including on the importance of racial diversity to educational goals, see ibid. at 2190 (Thomas J, concurring) (noting the Court's refusal to defer to the universities' own assessments of the educational benefits).

[102] See Harvard Respondent's brief in *Students for Fair Admissions*, at 30 (citing and quoting *Sweezy*); University of North Carolina Respondent's brief in *Students for Fair Admissions*, at 39 (quoting and citing *Sweezy*, and quoting and citing *Bakke* on the importance of safeguarding academic freedom). For a reference to 'academic freedom', but not to *Sweezy*, see *Students for Fair Admissions*, at 2234 (Sotomayor J, dissenting).

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for the production of knowledge that comes from faculty who are relatively untrammeled by the limits of conventional wisdom, and for teaching students both current knowledge and to open their minds to further learning as they go on in life. These core functions, it could further be argued, are not much influenced by the admission of those students – at least at the undergraduate level – who are primarily there to learn from their professors, rather than to assist professors in their research. Or one could argue that the reasons for active selection in the past, rather than, say, accepting as many students as the university had room for, had more to do with maintaining elite status or membership in a particular religion, considerations that are no longer persuasive in a more egalitarian society.

But is this really persuasive? In the context of modern colleges and universities – especially contemporary research universities – does the quality and diversity of one's students not affect the quality of faculty research? Do admissions decisions not reflect profoundly academic judgments about how to achieve a quality education? Such claims seem wholly implausible as applied to graduate students, who are often employed as teaching or research assistants to faculty members. But even undergraduate students may help faculty with their research. And classroom interactions with adult students of all ages, whose diverse experiences lead them to ask different kinds of questions that in turn lead faculty to see materials in new lights, have the potential to sharpen faculty minds and expand their horizons.[103] Thus, the autonomy of faculties over whom to admit seems closely related to core reasons for recognizing academic freedoms in universities and their faculties. Moreover, the qualities of mind and range of experiences that their classmate students have will affect the quality of student learning experience.[104] If research, teaching and learning are the core elements of universities as knowledge institutions, these favor considerable autonomy for universities in selecting their students. And if universities that have adopted affirmative action programs have made deliberate academic judgments about their educational mission (perhaps relying on academic studies to support their educational conclusions),[105] values of academic freedom are, at least arguably, seriously at risk when a court declares their program is invalid.

In this light, the absence of discussion of universities' academic freedoms in *Students for Fair Admissions* is troubling. True, the issue of racial justice/injustice under the equal protection clause dominated, under the standards of strict scrutiny established in *Grutter* and *Bakke*, and is of surpassing importance; constitutional

[103] How many faculty can say that they have not been inspired or provoked to new thoughts, reflected in later scholarship, by questions from their students?

[104] See William C. Kirby, *Empires of Ideas: Creating the Modern University from Germany to America to China* (Cambridge, MA: Belknap, 2022) p. 13.

[105] Cf., e.g., *Students for Fair Admissions*, at 2255–56 (Sotomayor J, dissenting) (noting that Harvard had consulted data to shape and decide whether to continue its program; arguing that data relied on by Justice Thomas was 'unreliable' and advanced an academically 'discredited' 'mismatch' thesis).

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interests in equality clearly support general rules prohibiting invidious discrimination against students based on race, sex or religion.[106] Moreover, it is not uncommon for public universities to experience external pressures or constraints to admit, for example, students from their own state,[107] and/or for financial reasons to admit other categories of students (including out-of-state) who can pay higher or full tuition fees.[108] But it was significant that these affirmative action programs reflected exercises of academic judgment, and the Court's decision interfered with those judgments and resulting programs. There are sound reasons to include the right to decide on selection criteria for students as part of a university's academic freedom. Had the protection of academic freedom been seen as of higher constitutional value, then a different balance might well have been struck between presumptive rules against considering race and the universities considered, non-invidious reasons for doing so as a method for building a more inclusive, more diverse student body.

14.3.2.2 Curriculum

The questions of what and how to teach are often said to be at the core, along with freedom of research, of the academic freedom of universities.[109] True, there is often some degree of shared control: it is not uncommon for governments to decide to support particular fields of study – such as medicine, veterinary medicine,

[106] See, e.g., Title VI, 42 U.S.C. § 2000d; Title IX, 20 U.S.C. §1681; *United States* v. *Virginia*, 518 US 515 (1996). Concerns for remedying past societal racial injustices might appear a powerful argument in favor of affirmative action plans, but the case law rejected this argument (except where a particular institution was officially determined to have engaged in unlawful discrimination). See *Bakke*, at 310 (Powell J, delivering the judgment of the Court and concurring); *City of Richmond* v. *Croson*, 488 U.S. 469, 496–97 (1989) (O'Connor J, announcing the judgment of the Court).

[107] See Jessica Callahan, 'Research Report: States with Automatic or Guaranteed College Admissions Policies', Connecticut General Assembly Office of Legislative Research, 3 March 2021, www.cga.ct.gov/2021/rpt/pdf/2021-R-0077.pdf (describing twelve universities with such externally imposed policies for guaranteed admissions); for more detail, see '50-State Comparison, State-Wide Admissions Policies, Does the State Have a Guaranteed Admissions Policy?', Education Commission of the States, May 2022, https://reports.ecs.org/comparisons/statewide-admissions-policies-2022-04.

[108] See, e.g., David Leonhardt, 'Econ 101', *New York Times Magazine*, 10 September 2023, 42, at 46 (noting that as government financial support for public universities has declined, incentives to admit students who pay full tuition have increased).

[109] See, e.g., 'How Academic Freedom Is Monitored', European Parliament, Panel for the Future of Science and Technology, March 2023, p. 6 (noting many different definitions of academic freedom and identifying at the common core the concepts of freedom of research and freedom of teaching); cf. ibid. at IV (providing a more detailed list of what is encompassed in the concept of academic freedom, noting that freedom to teach includes, within certain limits, freedom to choose students).

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mechanical arts or agriculture[110] – and to provide funds to be used towards that purpose,[111] and curriculum decisions are often made for universities based on a consensus among faculty and academic staff.[112] But as a matter of academic freedom, it must be up to academic faculty to determine the content of a course and how it should be taught.[113] In this way, the academic expertise of faculty is deployed to advance the field of knowledge that has attracted the government's interest; faculty are not required to speak or teach or write in ways that misrepresent their academically informed views. For governments to offer funds for the study of particular areas is not necessarily incompatible with leading understandings of academic freedom; for governments to require universities to offer specific courses of study may raise questions of academic freedom, perhaps depending on the degree

[110] In the USA, the federal Morrill Act, 2 July 1862, 12 Stat. 503, provided that monies it was enabling the states to obtain should support an endowment 'and maintenance of at least one college where the leading object shall be, without excluding other scientific and classical studies and including military tactics, to teach such branches of learning as are related to *agriculture and the mechanic arts*, in such manner as the legislatures of the States may respectively prescribe' (emphasis added).

[111] On controversy in the United Kingdom whether the government has gone too far in its new funding scheme for higher education in insisting on external, non-faculty direction of universities as to what fields of study to concentrate on, see Eric Barendt, *Academic Freedom and the Law: A Comparative Study* (Oxford: Hart, 2010) pp. 91–92. On threats by US state legislatures to penalize public universities over curricular decisions, see Adrienne Lu, 'State Lawmakers Frequently Try to Tell Public Colleges and Universities What To Do through the Power of the Budget', *Governing*, 24 April 2014, www.governing.com/news/headlines/how-state-lawmakers-control-state-universities.html.

[112] The idea that any constitutional protection of academic freedom beyond ordinary First Amendment freedoms is enjoyed only by universities as institutions (and not by faculty members), see, e.g., *Urofsky* v. *Gilmore*, 216 F3d 401, 411–15 (4th Cir. 2000), is not fully persuasive if universities are to function well as knowledge institutions. For example, while curricular development may be shared within the umbrella of academic freedoms, and research protections established at the university level, the nature and quality of the research and writing that ensues should be largely a matter of the individual faculty members' academic freedom. Whether that freedom should be protected entirely though autonomous within-university methods, such as peer review for tenure, is a different issue. Although some scholars would categorically protect the university's claims of academic freedom over those of individual scholars, academic freedom for universities need not exclude entirely constitutional protection for individuals where it can be shown that a particular institution's purportedly academic judgments are pretextual. Compare David Rabban, 'Functional Analysis of Individual and Institutional Academic Freedom' (1990) 53 *Law & Contemporary Problems* 227, at 283 (arguing that courts can review whether purported academic grounds are pretextual) with Byrne, 'Academic Freedom' (n 97), at 288 (arguing that courts should not review university decisions on academic grounds). And individual faculty members have other constitutional rights, including to be free from invidious discrimination, that can be externally enforced.

[113] See, e.g., 'Statement of Principles on Academic Freedom and Tenure', American Association of University Professors, 1940 ('Teachers are entitled to freedom in the classroom in discussing their subject'); the European Parliament's 'How Academic Freedom Is Monitored' (n 109) (distinguishing between faculty members' freedom to determine content and teaching methods of a course, on one hand, and the development of curriculum (in which faculty should play a role)); Evans and Stone, *Open Minds* (n 22) p. 145 (control over appointments, curriculum and teaching central to academic freedoms of universities).

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of faculty involvement in defining the curriculum;[114] but for governments to prohibit the study or teaching of particular topics or content plainly is wholly incompatible with the spirit of free inquiry in prevailing conceptions of academic freedom. Recent events in the USA and in other countries, including Poland and Hungary, challenge this basic aspect of academic freedom and of universities as knowledge institutions.

As noted earlier, the State of Iowa's House Bill 802 applies to public institutions of higher learning. Benignly, it states clearly that it does *not* prohibit teaching about the 'topics of sexism, slavery, racial oppression, racial segregation, or racial discrimination including topics related to the enactment and enforcement of laws resulting in sexism, racial oppression, segregation and discrimination'.[115] Yet it provides that any 'mandatory staff or student training' must not 'teach, advocate, act upon or promote specific defined concepts'. 'Specific defined concepts' include 'that the United States or State of Iowa are fundamentally or systematically racist or sexist'. The law also says that public employees are not 'prohibited from discussing such specific defined topics as part of a larger course of academic instruction'. So it would appear that faculty can *discuss* whether the USA or Iowa are fundamentally racist, but cannot *argue* – even if based on their academic expertise – that they are, at least if they are teaching something that could be regarded as 'mandatory student training' (whose application to, for example, a required history class is on its face unclear).[116]

[114] Compare Rabban, 'Functional Analysis' (n 112), at 278–29 and n 251 (noting Texas requirements that every state-supported university offer a course in government, and history, including that of Texas, and questioning whether the Court would view state control of higher education curriculum in the same light as its control of public school curriculum) with Byrne, 'Academic Freedom' (n 97), at 331 (suggesting that state compulsion of a particular liberal arts curriculum would surely be unconstitutional). Texas's requirements for American history and government at public universities are quite specific. See Texas Education Code, s. 51.301 (specifying that an 'American Way' course of specific content (though not viewpoint) be required of foreign students, and that at least six credits of coursework on government, including study of the USA and state constitutions, be generally required for graduation from universities receiving public funds). For a mandate that a 'core curriculum be developed by public boards with appropriate consultation with the Academic Senates', see California Education Code § 66720. Cf. Thomas I. Emerson, *The System of Freedom of Expression* (New York: Random House, 1970) p. 624 ('[T]he government can prescribe the [broad] character of the curriculum for a particular institution, provide what general areas are to be emphasized or omitted, even require the offering of certain courses', but not 'more immediate details of course content, methods of presentation … and similar matters … of academic competence').

[115] Iowa House Bill 802, s. 1.d.

[116] An even more aggressive intrusion on academic freedom in teaching is found in a 2022 Florida law, CS/HB 7, Ch. 2022-72. It prohibits 'training or instruction, that espouses, promotes, advances, [or] inculcates' support for affirmative action programs (that is, that someone 'by virtue of his or her race, color, national origin, or sex should … receive adverse treatment to achieve diversity, equity, or inclusion') and prohibits instruction 'that [a person] must feel guilt … [or] psychological distress for actions, in which he or she played no part, committed in the past by other members of the same race or sex'. Such prohibitions have the potential to cut deeply into faculty classroom speech and faculty-student exchange of ideas.

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The law is a clear violation of basic principles of academic freedom.[117] And if it were applied to private colleges and universities, it is reasonably clear that the law would be found to violate the First Amendment: it is a content- and viewpoint-based distinction, and it is difficult to imagine any argument that such a restriction would pass muster under the decided cases.[118] But the Iowa law applies only to public employees. As such, it raises the question reserved in *Garcetti* – whether the holding applies to faculty at public universities – which is now of critical importance.[119] Will *Students for Fair Admissions*' failure to endorse the constitutional concept of academic freedoms affect resolution of this question?

Allowing government to dictate what positions faculty can take in teaching university students, as the Iowa law appears to do, is incompatible with the independence necessary for a knowledge institution to function. It is a form of censorship with all of censorship's well-known potentials for harm; it prevents the free deployment of academic expertise for the benefit of student learners; and it can function as a form of government propaganda, anathema to a free society.[120] Seeing

[117] See notes 112 and 113.

[118] See, e.g., *R.A.V.* v. *City of St Paul*, 505 US 377 (1992) (holding that a statute prohibiting certain hateful speech was an unconstitutional viewpoint discrimination); *Brandenburg* v. *Ohio*, 395 US 444, 449 (1969) (holding that unless a speech urging violence constituted an incitement to imminent violence it could not constitutionally be punished); *Boos* v. *Barry*, 485 US 312 (1988) (holding that a law prohibiting signs outside an embassy critical of that embassy's government was unconstitutional because content-based restrictions on speech must be narrowly tailored to serve a compelling government interest and this law was not narrowly tailored).

[119] Although for some scholars criticism of university governance is central to the protection of academic freedom, see Evans and Stone, *Open Minds* (n 22) p. 17, a number of US lower courts have held, in reliance on *Garcetti*, that faculty members with official involvement in policymaking for their universities can be sanctioned for their speech about colleagues or university policy. See, e.g., *Porter* v. *Board of Trustees of Northern Carolina State University*, 72 F.4th 573 (4th Cir. 2023) (holding that a professor ridiculing his colleagues via email and challenging them in faculty meetings was not protected speech); *Renken* v. *Gregory*, 541 F.3d 769 (7th Cir. 2008) (holding that a professor's complaints about the university's use of grant funds was not protected speech); cf. Adrienne Stone, 'The Meaning of Academic Freedom: The Significance of *Ridd* v. *James Cook University*' (2021) 43(2) *Sydney Law Review* 241 (criticizing decision upholding dismissal of professor for breach of code requiring courtesy and decorum). But see *Demers* v. *Austin*, 746 F.3d 402 (9th Cir. 2014) (holding that a professor's proposed administrative reform plan was protected speech). For argument that *Garcetti* should not extend to public university faculty, see Areen, 'Government as Educator' (n 79) at 948–49; 'Case Note' (2014) 127 *Harvard Law Review* 1823 (case comment on 9th Cir. *Demers* decision). For an example of a European approach, see *Sorguç* v. *Turkey*, Application No. 17089/03, European Court of Human Rights, judgment of 23 June 2009 (finding a violation of European Convention speech rights where a professor was assessed damages for defaming a junior colleague in having made a general critique of faculty hiring practices at his institution, the Court emphasizing 'the importance of academic freedom, which comprises the academics' freedom to express freely their opinion about the institution or system in which they work'), http://hudoc.echr.coe.int/eng?i=001-93161.

[120] On the complications of government propaganda, see Hannah Arendt, 'Lying in Politics: Reflections on the Pentagon Papers', *New York Review of Books*, 18 November 1971; cf.

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universities (whether public or private) as knowledge institutions should make this clear.

As noted, careful attention must be given to the competing values at stake when the managerial authority of government as employer is countered by a claim that the professional judgment of professional employees be exercised on behalf of public values. In the academic setting, the balance tilts decisively in favor of providing autonomy for the professional judgments of academics, taken in academic contexts; it is the very function of faculty in these institutions to question, dissent and take sides – supported by evidence – on all kinds of subjects, notably including difficult issues. If *Garcetti*'s categorical exclusion of government employees from First Amendment protection when they are speaking within their official capacity survives (it should not), a categorical exception should be applied for academic staff in institutions of higher education. As the Court said in *Keyishian* v. *Board of Regents of the University of State of New York*, 'academic freedom … is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom'.[121] A 'pall of orthodoxy' is precisely what the Iowa law purports to prescribe – and the fact that it was proposed and enacted into law should raise deep concerns.

Freedom of research and freedom of teaching within areas of expertise, according to disciplinary standards of the field, is at the core of academic freedoms. As many scholars note, academic freedom is quite distinct from freedom of speech entitled to constitutional protection; academic freedoms require content-based distinctions to be drawn, and require viewpoints expressed in the classroom and in writing to be adequately supported in an academic way. As Adrienne Stone and Carolyn Evans put it: 'Freedom of speech is a political freedom that should be enjoyed by all people in democratic nations. Academic freedom has a more specific purpose. It protects the pursuit and dissemination of knowledge through free inquiry and ensures that university research and teaching is authoritative and unbiased.'[122] Academic freedoms are necessary in a constitutional democracy because without those freedoms, we stand on less certain ground about what is true knowledge; genuine inquiry requires space to test, explore and try out arguments for what may not yet be known to be true (and for what on further inquiry may not survive the disciplinary processes

Seanna Shiffrin, 'Unfit to Print: Government Speech and the First Amendment', 2022, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4201762 (arguing that some government speech violates the First Amendment); Helen Norton, 'Government Lies and the Press Clause' (2018) 89 *University of Colorado Law Review* 453 (government lies as impairing democratic function of press to hold government to account); Carolina Mala Corbin, 'The Unconstitutionality of Government Propaganda' (2020) 81 *Ohio State Law Journal* 815 (describing government propaganda as the 'deliberate dissemination of false claims on a matter of public interest').

[121] *Keyishian* v. *Board of Regents of the University of State of New York* at 603.

[122] Evans and Stone, *Open Minds* (n 22), p. 79.

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of justification and critique). The pursuit of knowledge is a good in itself and is also a good for society and for democracy, because of the valuable function the institution serves in developing and applying standards for the pursuit and verification of truth. Without independent knowledge institutions as important parts of our constitutional infrastructure, finally, the intermediary role in helping to sort out and check misinformation will go unfulfilled.[123]

[123] A book-in-progress (see n. 56) will seek to address both (i) how to identify knowledge institutions, some difficulties of which are suggested by *Big Mama Rag* v. *United States*, 631 F.2d 1030 (D.C. Cir. 1980) (discussing constitutionality of definition of an 'educational' organization for tax exemption purposes) and (ii) how to protect and improve knowledge institutions (considering the roles of courts, legislatures, public officials, media companies and civic groups, as well as knowledge institutions themselves).

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