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## Free Speech, the Search for Truth, and the Problem of Collective Knowledge

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# **Roy R. Ray Lecture Series**



# FREE SPEECH, THE SEARCH FOR TRUTH, AND THE PROBLEM OF COLLECTIVE KNOWLEDGE

Frederick Schauer\*

## I. INTRODUCTION

**A**MONG the more enduring visions of the goal of the First Amendment's speech and press clauses,<sup>1</sup> and of the very principle of freedom of speech more broadly, is the idea that a regime of freedom of speech will enable the society within which such a principle is taken seriously to identify more true propositions, to reject more false propositions, and thus to facilitate the advance of knowledge within that society. The idea is sometimes discussed under the heading of the "search for truth,"<sup>2</sup> and even more often as the "marketplace of ideas,"<sup>3</sup> but the basic concept of freedom of speech as enabling a society to increase its level of knowledge, to facilitate its identification of truth, and to expose error has a wide and persistent currency. Indeed, in one of the Supreme Court's most recent important free speech cases, *United States v. Alvarez*,<sup>4</sup> Justice Kennedy's majority opinion repeated much of the conven-

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\* David and Mary Harrison Distinguished Professor of Law, University of Virginia. This Article is the written version of the Roy R. Ray Lecture delivered at the Dedman School of Law, Southern Methodist University, on April 12, 2017. I am grateful to the SMU faculty and students for the invitation and for their comments and questions, and to the support of the family of the late Professor Ellen Solender in the preparation of the final Article. An earlier version of this Article was presented at the University of Sydney Law School in November, 2016, and this version is better for the audience comments on that occasion.

1. U.S. Const. amend. I.

2. See, e.g., *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 503–04 (1984); Rebecca L. Brown, *The Harm Principle and Free Speech*, 89 S. CAL. L. REV. 953, 1005 (2016); Erica Goldberg, *Free Speech Consequentialism*, 116 COLUM. L. REV. 687, 701 (2016); Leslie Kendrick, *First Amendment Expansionism*, 56 WM. & MARY L. REV. 1199, 1217 (2015).

3. See, e.g., *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2234 (2015) (Breyer, J., concurring); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988); Christoph Bezemek, *The Epistemic Neutrality of the "Marketplace of Ideas": Milton, Mill, Brandeis and Holmes on Falsehood and Freedom of Speech*, 14 FIRST AMEND. L. REV. 159 (2015); Jared Schroeder, *Shifting the Metaphor: Examining Discursive Influences on the Supreme Court's Use of the Marketplace Metaphor in Twenty-First Century Free Expression Cases*, 21 COMM. L. & POL'Y 383 (2016); Alexander Tsesis, *Balancing Free Speech*, 96 B.U. L. REV. 1, 8–11 (2016).

4. 567 U.S. 709 (2012) (holding that the Stolen Valor Act, 18 U.S.C. § 704 (2016), constituted unconstitutional content discrimination as applied to a candidate for political office who had falsely claimed, among other false statements, to have been awarded the Congressional Medal of Honor).

tional marketplace of ideas wisdom,<sup>5</sup> punctuated by his observation that “[t]ruth needs neither handcuffs nor a badge for its vindication.”<sup>6</sup> And earlier the Court had signaled a similar theme, announcing in *Gertz v. Robert Welch, Inc.*<sup>7</sup> that “[h]owever pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.”<sup>8</sup>

The search for truth/marketplace of ideas justification for a distinct principle of freedom of speech has for decades been subject to harsh criticism,<sup>9</sup> but, as Justice Kennedy’s opinion in *Alvarez* shows, the justification persists, both in judicial opinions<sup>10</sup> and in the academic commentary.<sup>11</sup> Yet one of the aspects of this particular free speech justification that appears largely to have been ignored is the question of just *whose* knowledge is relevant, and, thus, what it is for a society to know something, or to have discovered truth (or exposed falsity), in a setting in which the society is comprised of multiple members, each with his, her, or its own knowledge. If I believe (correctly) that astrology is bunk but you believe (falsely) that astrology is the key to the universe, what can we say, if anything, about what you and I know—what *we* know, collectively—and about whether we have discovered truth? And the problem is apparent not only in the truncated two person scenario just hypothesized, but also, and more realistically, for the far larger aggregations of individuals and entities that we call societies, cultures, or even countries.

My goal in this Article is thus to consider the implications of the problem of collective knowledge for thinking about free speech, for examining the search for truth as a justification for a free speech regime, and for contemplating the image of the marketplace of ideas. In settings in which some people know things that others do not, or in which some people believe things to be true that others are just as convinced are false, or in which First Amendment-protected utterances will produce changes of belief in multiple and inconsistent ways, do even the soundest versions of

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5. *Id.* at 727–28.

6. *Id.* at 729. For commentary on and analysis of *Alvarez*, see SEANA VALENTINE SHIFFRIN, *SPEECH MATTERS: ON LYING, MORALITY, AND THE LAW* 120–29 (2014); Alan K. Chen & Justin Marceau, *High Value Lies, Ugly Truths, and the First Amendment*, 68 VAND. L. REV. 1435 (2015); Paul Horwitz, *The First Amendment’s Epistemological Problem*, 87 WASH. L. REV. 445 (2012); Helen Norton, *Lies and the Constitution*, 2012 SUP. CT. REV. 161 (2012).

7. 418 U.S. 323 (1974).

8. *Id.* at 339–40.

9. See, e.g., Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821 (2008); Paul H. Brietzke, *How and Why the Marketplace of Ideas Fails*, 31 VAL. U. L. REV. 951 (1997); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1 (1984). And see also *infra* Section II.

10. See *supra* notes 2–3. See also *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014); *Virginia v. Hicks*, 539 U.S. 113, 119 (2003); *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 587 (1998); 44 *Liquormart v. Rhode Island*, 517 U.S. 484, 496 (1996); *CBS v. Democratic Nat’l Comm.*, 412 U.S. 94, 99 (1973) (Brennan, J., dissenting); *Lamont v. Postmaster Gen.*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring).

11. See *supra* notes 2–3, 9. See also Toni M. Massaro & Helen Norton, *Siri-ously? Free Speech Rights and Artificial Intelligence*, 110 NW. U. L. REV. 1169, 1178 (2016); Howard M. Wasserman, *Holmes and Brennan*, 67 ALA. L. REV. 797, 798 (2016).

the marketplace of ideas theory encounter previously unrecognized problems? My aim here is principally to identify and expose the issue, leaving definitive conclusions, concrete implications, and normative prescriptions to other people or other times.

## II. LOCATING THE SEARCH FOR TRUTH ON THE FREE SPEECH MAP

Almost a half century ago, Thomas Emerson offered a catalog of foundations for what he called “The System of Freedom of Expression,”<sup>12</sup> and Emerson’s catalog remains a useful guide to free speech theory, even as subsequent contributions have both added to<sup>13</sup> and subdivided his list. Putting aside the grab bag of pragmatic justifications that Emerson described as “the dynamics of the limitation,”<sup>14</sup> three clusters of foundational goals served for Emerson to ground both the idea of freedom of expression generally and the First Amendment more specifically. One of these clusters was what Emerson described as individual self-fulfillment,<sup>15</sup> and since Emerson’s time a vast array of theories has sought to explain the importance of freedom of speech in terms of embodying or fostering what others have variously described as self-realization,<sup>16</sup> self-

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12. THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 6–20 (1970). Emerson’s book builds on his earlier Thomas I. Emerson, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* (1966), which in turn is a revision of Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 *YALE L.J.* 877 (1963).

13. See, e.g., LEE C. BOLLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* (1986) (tolerance); STEVEN H. SHIFFRIN, *DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA* (1999) (dissent); STEVEN H. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* (1990) (same); Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California*, 29 *WM. & MARY L. REV.* 653 (1988) (civic and intellectual courage); Vincent Blasi, *Free Speech and Good Character*, 46 *UCLA L. REV.* 1567 (1999) (same); Vincent Blasi, *Free Speech and Good Character: From Milton to Brandeis to the Present*, in *ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA* 62 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002) (same); Paul Horwitz, *Citizenship and Speech*, 43 *MCGILL L. J.* 445 (1998) (reviewing OWEN M. FISS, *THE IRONY OF FREE SPEECH* (1996)) (same).

14. EMERSON, *supra* note 12, at 9–11. Many of the concerns that Emerson includes within his “dynamics of the limitation” idea are those that are sometimes discussed under “distrust of government” justifications for the First Amendment. See, e.g., Abner S. Greene, *The Concept of the Speech Platform: Walker v. Texas Division*, 68 *ALA. L. REV.* 337, 380 (2016); Gia B. Lee, *First Amendment Enforcement in Government Institutions and Programs*, 56 *UCLA L. REV.* 1691, 1777 (2009); Barry P. McDonald, *Speech and Distrust: Rethinking the Content Approach to Protecting the Freedom of Expression*, 81 *NOTRE DAME L. REV.* 1347 (2006); Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 *HARV. L. REV.* 84, 111 (1998).

15. EMERSON, *supra* note 12, at 6.

16. See Marc O. DeGirolami, *Virtue, Freedom, and the First Amendment*, 91 *NOTRE DAME L. REV.* 1465, 1473 (2016); Martin H. Redish, *The Value of Free Speech*, 130 *U. PA. L. REV.* 591 (1982); Mark Tushnet, *New York Times v. Sullivan Around the World*, 66 *ALA. L. REV.* 337, 342 n.36 (2014).

expression,<sup>17</sup> liberty,<sup>18</sup> dignity,<sup>19</sup> individuality,<sup>20</sup> or autonomy.<sup>21</sup>

Other theorists, sometimes rejecting the autonomy/liberty foundations<sup>22</sup> for freedom of speech and sometimes seeking only to supplement them, have attempted to locate the idea of freedom of speech in an account of democracy, arguing in one way or another that a regime of free speech either facilitates democracy or is, definitionally,<sup>23</sup> a component of democratic governance.<sup>24</sup> Sometimes this value is located in the view that

17. See *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964); *United States v. Alvarez*, 638 F.3d 666, 674 (9th Cir. 2011) (Kozinski, J., concurring in denial of rehearing en banc); Sonja R. West, *The “Press,” Then & Now*, 77 OHIO ST. L.J. 49, 53–54 (2016).

18. See C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* (1989); C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1977); C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1 (1976); Jan Narveson, *Freedom of Speech and Expression: A Libertarian View*, in *FREE EXPRESSION: ESSAYS IN LAW AND PHILOSOPHY* 59 (W.J. Waluchow ed. 1994); David A.J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45 (1974).

19. See Guy E. Carmi, *Dignity versus Liberty: The Two Western Cultures of Free Speech*, 26 B.U. INT’L L.J. 277 (2008); Guy E. Carmi, *Dignity—The Enemy from Within: A Theoretical and Comparative Analysis of Human Dignity as a Free Speech Justification*, 9 U. PA. J. CONST. L. 957 (2007); Adrienne Stone, *Defamation of Public Figures: North American Contrasts*, 50 N.Y.L. SCH. L. REV. 9, 24 (2005).

20. See RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 9–10 (1992); Richard Moon, *The Supreme Court of Canada on the Structure of Freedom of Expression Adjudication*, 45 U. TORONTO L.J. 419, 419 (1995).

21. See, e.g., C. Edwin Baker, *Autonomy and Free Speech*, 27 CONST. COMM. 251 (2011); Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875 (1994); Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 233 (1992); Seana Valentin Shiffrin, *A Thinker-Based Approach to Freedom of Speech*, 27 CONST. COMM. 283 (2011); Seana Valentine Shiffrin, *Reply to Critics*, 27 CONST. COMM. 417 (2011); David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334 (1991). Among the leading proponents of an autonomy-based justification, particularly one premised on listener autonomy, has been Thomas Scanlon, T.M. Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204 (1972), but Scanlon now (properly, in my view) doubts that arguments from autonomy can distinguish free speech anti-paternalism from anti-paternalism more generally. See T.M. Scanlon, *Comment on Baker’s Autonomy and Free Speech*, 27 CONST. COMM. 319, 322 n.11 (2011).

22. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971). See also Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299 (1978); Frank Morrow, *Speech, Expression, and the Constitution*, 85 ETHICS 235 (1975).

23. One might, that is, define democracy independent of the question of free speech—as being about majority rule, for example—but then posit that freedom of speech, instrumentally, will either make democracy more effective, or more likely to be accepted, or more resistant to anti-democratic pressures. Or one might, instead, simply take freedom of speech as a component of the definition of democracy, such that a society with less freedom of speech is, for that reason, less democratic. Although the issue is orthogonal to the principal theme of this Article, the contrast between instrumental and definitional understandings of the relationship between freedom of speech and democracy does suggest a connection between democratic justifications for freedom of speech and the academic literature contrasting intrinsic with instrumental accounts of democracy itself. See CHARLES BEITZ, *POLITICAL EQUALITY: AN ESSAY IN DEMOCRATIC THEORY* (1989); THOMAS CHRISTIANO, *THE RULE OF MANY* (1996); WILLIAM NELSON, *ON JUSTIFYING DEMOCRACY* (1980).

24. See, most prominently, ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* (1960); ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948). For applications of Meiklejohn’s ideas, see Harry Kalven, Jr., *The New York Times Case: A Note on “The*

decisions in a democracy must be made by the people and not their representatives,<sup>25</sup> and at other times the emphasis is on the importance in a democracy of constraining—checking—the power of government,<sup>26</sup> but the basic idea is that freedom of speech serves functions in a democracy that are both dependent upon and derivative of the basic idea of government as subservient to and responsible to the population at large.

Alongside these justifications, and in important respects more long-standing, is the idea that freedom of speech serves as an effective mechanism for locating truth, for identifying and expunging falsity, and for increasing the stock of human knowledge.<sup>27</sup> Under one conception of this idea, a conception most directly located in Oliver Wendell Holmes's enduring claim that "the best test of truth is the power of the thought to get itself accepted in the competition of the market,"<sup>28</sup> the competition of propositions in the marketplace of ideas is *truth-defining*, in the sense that truth is to be understood or defined as that which in fact survives in the marketplace of ideas. Just as strong free market proponents understand "value" as a market-defined idea, such that that which succeeds in the market is for that reason valuable, so too might Holmes be understood as

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*Central Meaning of the First Amendment*," 1964 SUP. CT. REV. 191; William Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965). For variations on the basic theme of freedom of speech as grounded in a conception of democracy, see ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* (1995); CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1993); Ashutosh Bhagwat, *The Democratic First Amendment*, 110 NW. U. L. REV. 1097 (2016); Ashutosh Bhagwat, *Details: Specific Facts and the First Amendment*, 86 S. CAL. L. REV. 1, 33-35 (2012); Robert C. Post, *Participatory Democracy as a Theory of Free Speech: A Reply*, 97 VA. L. REV. 617 (2011); Martin H. Redish & Abby Marie Mollen, *Understanding Post's and Meiklejohn's Mistakes: The Central Role of Adversary Democracy in the Theory of Free Expression*, 103 NW. U. L. REV. 1303 (2009); James Weinstein, *Free Speech and Political Legitimacy: A Response to Ed Baker*, 27 CONST. COMM. 361 (2011); James Weinstein, *Extreme Speech, Public Order, and Democracy: Lessons from the Masses*, in *EXTREME SPEECH AND DEMOCRACY* 23 (Ivan Hare & James Weinstein eds. 2009). A useful critique is C. Edwin Baker, *Is Democracy a Sound Basis for a Free Speech Principle?* 97 VA. L. REV. 515 (2011).

25. See MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT*, *supra* note 24; ROBERT C. POST, *CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION* (2014); Post, *Participatory Democracy as a Theory of Free Speech: A Reply*, *supra* note 24. Post, as well as Weinstein (*supra* note 25), stress the importance of democracy to the citizen-participant rather than to the collective decision, which makes their account differ from Meiklejohn's and others, but exploring these differences is not germane to the focus of this Article.

26. See Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521 (1977). See also Michael Schudson, *Why Democracies Need an Unlovable Press*, in *FREEDOM OF THE PRESS: THE FIRST AMENDMENT IN ACTION* 73 (Timothy E. Cook ed. 2005). The checking value might also be valuable in non-democratic societies, as long as excess concentration of power is deemed to be dangerous even apart from the way in which it would interfere with popular sovereignty.

27. FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 15-34 (1982); Brian C. Murchison, *Speech and the Truth-Seeking Value*, 39 COLUM. J.L. & ARTS 55 (2015).

28. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). An important historical account is THOMAS HEALY, *THE GREAT DISSENT: HOW OLIVER WENDELL HOLMES CHANGED HIS MIND—AND CHANGED THE HISTORY OF FREE SPEECH IN AMERICA* (2013). See also SHELDON NOVICK, *HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES* 331 (1989).



making a similar claim about truth, such that the ideas that survive in the marketplace of ideas are, for that reason, those that we choose to designate as “true.” But although such a conception of truth might be consistent with Holmes’s own partly (and sometimes) skeptical and partly (and sometimes) pragmatic philosophical commitments,<sup>29</sup> and might be plausible as simply a way of expressing the idea that matters of *political* (and policy) truth in a democracy ought to be decided by the people,<sup>30</sup> that conception is implausible in the context of factual, scientific, and other ideas—including many moral ones—in which there is a conception of truth that is independent of what the marketplace of ideas at any particular time may happen to accept.<sup>31</sup> The earth was round even when almost all people thought it flat, the propositions of phrenology<sup>32</sup> and astrology had no more scientific empirical grounding when and where people have taken them to be true than they do now, and the moral wrongness of Nazi ideology is neither historically nor culturally contingent.<sup>33</sup> Insofar as the claims about the marketplace of ideas are understood as globally truth-defining, those claims are either extremely narrow in application, being limited to truths of a certain kind, or else they are largely false, or, perhaps, they are both.<sup>34</sup>

Considerably more plausible, therefore, is an understanding of the “argument from truth”<sup>35</sup> that understands freedom of speech not as truth-defining but as *truth-locating*. That is, if we adopt for some, many, or most propositions the view that their truth (or falsity) is a property existing independent of and logically antecedent to the process or mechanism that might be employed to identify those truths, then the argument is now that freedom of speech is the best method of locating those independently-defined truths or is at least a method for doing so that it is superior to any

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29. See generally ALBERT W. ALSCHULER, *LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES* (2000); ALLEN MENDENHALL, *OLIVER WENDELL HOLMES, JR., PRAGMATISM, AND THE JURISPRUDENCE OF AGON: AESTHETIC DISSENT AND THE COMMON LAW* (2017); Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787 (1989); Patrick J. Kelley, *Was Holmes a Pragmatist? Reflections on a New Twist to an Old Argument*, 14 S. ILL. U. L.J. 427 (1990); Yosai Rogat, *The Judge as Spectator*, 31 U. CHI. L. REV. 213 (1964); Catharine P. Wells, *Legal Innovation Within the Wider Intellectual Tradition: The Pragmatism of Oliver Wendell Holmes, Jr.*, 82 NW. U. L. REV. 541 (1988).

30. See Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1 (2004). See also Frederick Schauer, *Facts and the First Amendment*, 57 UCLA L. REV. 897, 910 (2010).

31. See Steven D. Smith, *Skepticism, Tolerance, and Truth in the Theory of Free Expression*, 60 S. CAL. L. REV. 649, 665–83 (1987).

32. On phrenology, the now completely discredited so-called science of assessing a person’s personality by the shape of his or her skull, see R.J. Cooter, *Phrenology: The Provocation of Progress*, 14 HIST. SCI. 211 (1976).

33. “[T]he theory of the truth of the marketplace, determined ultimately by a count of noses—this total relativism—cannot be the theory of our Constitution.” ALEXANDER BICKEL, *THE MORALITY OF CONSENT* 77 (1975).

34. See Schauer, *supra* note 27, at 20–22; Daniel E. Ho & Frederick Schauer, *Testing the Marketplace of Ideas*, 90 N.Y.U. L. REV. 1160, 1166–67 (2015).

35. Schauer, *supra* note 27, at 15–34.

or most other available alternative methods.<sup>36</sup> This idea of freedom of speech as truth-locating is the basic concept expressed long ago by John Milton when he asked, rhetorically, in the *Areopagitica*, “Who ever knew Truth put to the worst, in a free and open encounter?,”<sup>37</sup> and it is the foundation for many of the arguments in chapter 2 of John Stuart Mill’s *On Liberty*,<sup>38</sup> in Karl Popper’s *The Open Society and Its Enemies*,<sup>39</sup> and in numerous other contributions to free speech theory<sup>40</sup> and constitutional doctrine.<sup>41</sup> Freedom of speech under this argument does not define truth but is thought to provide a comparatively reliable social mechanism for identifying error, for locating truth, and thus, in the aggregate, for advancing social knowledge.<sup>42</sup>

Understood in this way, as a claim about the comparative (compared to, say, expert or authoritative selection) reliability of a particular institutional design in advancing knowledge, the argument from truth is revealed as substantially empirical, its philosophical provenance notwithstanding.<sup>43</sup> Whether this or that method for identification of independently defined truth will locate more truths, or expose more falsehoods, when compared to some other method having the same goal is not nearly as much a philosophical (or legal) question as it is a testable, empirical one.<sup>44</sup> And as a testable, empirical proposition, it turns out that there are good reasons to doubt the soundness of the empirical claim.<sup>45</sup>

36. See, e.g., Michael J. Perry, *Freedom of Expression: An Essay on Theory and Doctrine*, 78 NW. U. L. REV. 1137, 1138–61 (1983).

37. JOHN MILTON, *AREOPAGITICA* 126 (J.C. Suffolk ed., University Tutorial Press, 1968) (1644). See Vincent Blasi, *The Elliot Lecture: Milton’s Areopagitica and the Modern First Amendment*, in IDEAS OF THE FIRST AMENDMENT 47 (Vincent Blasi ed., 2d ed. 2012).

38. JOHN STUART MILL, *ON LIBERTY* (David Spitz ed., Norton 1975) (1859).

39. KARL POPPER, *THE OPEN SOCIETY AND ITS ENEMIES* (5th ed. 1966).

40. E.g., Carl A. Auerbach, *The Communist Control Act of 1954: A Proposed Legal-Political Theory of Free Speech*, 23 U. CHI. L. REV. 173 (1956); William P. Marshall, *In Defense of the Search for Truth as a First Amendment Justification*, 30 GA. L. REV. 1 (1995); Eugene Volokh, *In Defense of the Marketplace of Ideas/Search for Truth as a Theory of Free Speech Protection*, 97 VA. L. REV. 595 (2011).

41. The idea surfaces prominently in, for example, *Davenport v. Wash. Educ. Ass’n*, 551 U.S. 177, 179 (2007); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969); *Lamont v. Postmaster Gen.*, 381 U.S. 301, 308 (1965).

42. See also Benjamin S. DuVal, *Free Communication of Ideas and the Quest for Truth: Toward a Teleological Approach to First Amendment Adjudication*, 41 GEO. WASH. L. REV. 161 (1972).

43. One can imagine a genuinely controlled experiment designed to focus on evaluating different decision procedures for identifying truth, but to the best of my knowledge no such experiments have in fact been conducted.

44. And perhaps we have Mill and his philosophical talents to blame for the fact that the questions he raised remain understood as far more philosophical than empirical.

45. See LARRY ALEXANDER, *IS THERE A RIGHT TO FREEDOM OF EXPRESSION* 128–30 (2005). As Alexander discusses, many environments—academic inquiry and publication, for example—often act on the assumption that the pursuit of truth is best pursued in highly regulated and structured discursive environments. See also Alvin I. Goldman, *Epistemic Paternalism: Communication Control in Law and Society*, 88 J. PHIL. 113 (1991); Alvin I. Goldman & James C. Cox, *Speech, Truth, and the Free Market for Ideas*, 2 LEGAL THEORY 1 (1996); Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, in *ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA* 153, 163–64 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002). And on the effects of potential market failure in the

More specifically, if we understand the question as one about which properties of a proposition will cause it to be accepted by some individual or group, there is scant empirical support for the view that the truth of a proposition has a greater causal effect on acceptance than, say, the charisma or authority or status of the speaker, the frequency with which the proposition is expressed,<sup>46</sup> the way (including technology) in which the proposition is expressed, the prior beliefs and prejudices of the hearer, the pragmatic (or psychological or emotional) value to the hearer of the proposition being true, and much more.<sup>47</sup> If the venerable claim for the marketplace of ideas is thus understood as a comparative claim about the value of that method compared to others for locating truth and thus increasing social knowledge, there are good reasons to be considerably more skeptical about the claim than standard free speech theory and ubiquitous civil libertarian (and judicial<sup>48</sup>) rhetoric seems typically to appreciate.

### III. THE PROBLEM OF COLLECTIVE KNOWLEDGE

Although there are many good reasons to be skeptical of the marketplace of ideas/search for truth family of justifications for the First Amendment and for a principle of freedom of speech more broadly,<sup>49</sup> there are also good reasons to be skeptical of the skepticism. Human cognition and human rationality have their pathologies, but so too do expert processes, and perhaps especially governmental processes.<sup>50</sup> If the empirical claim of the marketplace of ideas account is understood, as it should be, as a comparative one, the question is not whether the marketplace of ideas is good at locating truth and advancing human knowledge, but, rather, whether it is better at doing so than a committee of experts, an agency of

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marketplace of ideas, see Tamara R. Piety, *Market Failure in the Marketplace of Ideas: Commercial Speech and the Problem That Won't Go Away*, 41 LOY. L.A. L. REV. 181 (2007).

46. Or, especially in the age of the Internet, the frequency with which a proposition is repeated or transmitted.

47. Much of the social science research, largely from social psychology, bearing on this issue is summarized and cited in Ho & Schauer, *supra* note 35, at 1168–72. And for the partly empirical and partly theoretical perspective from economics, see, for example, Richard A. Posner, *Free Speech in an Economic Perspective*, 20 SUFFOLK U. L. REV. 1 (1986). See also Blasi, *supra* note 30, at 4–13; Albert Breton & Ronald Wintrobe, *Freedom of Speech vs. Efficient Regulation in Markets for Ideas*, 17 J. ECON. BEHAV. & ORG. 217 (1992).

48. See *supra* notes 3–4 and accompanying text.

49. And perhaps especially in the context of verifiable factual propositions. See Schauer, *supra* note 30; Mark Tushnet, “*Telling Me Lies*”: *The Constitutionality of Regulating False Statements of Fact*, Harvard Law School Public Law & Legal Theory Working Paper No. 11-02 (2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1737930](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1737930).

50. I say “perhaps” because the claim is a tricky one. Although there are reasons to distrust experts, reasons to distrust aggregations of experts, and reasons to distrust government, it is not so clear that aggregations of government experts, such as those who inhabit regulatory agencies such as the Food and Drug Administration and the National Traffic Safety Board, are to be more distrusted because of their governmental status than are otherwise similar collections of similar experts outside of the public sector.

bureaucrats, or a hierarchy of powerful (and often self-interested<sup>51</sup>) public officials. Here, the directly applicable social science research, other than the anecdotal, is largely non-existent,<sup>52</sup> and as such there is not very much that can be said definitively about the marketplace claim if properly understood as a comparative one. As current controversies about climate change (and, to a lesser extent, the alleged harms of immunization and genetically modified foods) indicate, even many factual and scientific issues are so caught up in contested politics that it is difficult to place very much confidence in the most obvious alternatives to an open marketplace of ideas.<sup>53</sup>

As a result of these uncertainties and complications, in this Article I simply assume that there is at least some soundness in the comparative empirical claims that lie behind standard marketplace of ideas theory. That is, I will assume that there is some reason, in some contexts and on some subjects, to believe that something resembling an unrestricted clash of facts, ideas, and opinions will at times be more likely to tend toward the identification of truth, independently defined, than will some number of other approaches, institutions, and methods, especially those associated with government or other powerful and self-interested truth-determiners. But even with this assumption in place, problems and issues remain, one of which is my focus here. Specifically, even if we assume that the goal is the advancement of knowledge, and even if we assume that one lone individual can know something at Time Two that she did not know at Time One, what is it for a collection of individuals to know something at Time Two that the collection did not know at Time One? To put the same question more directly, what is it for a collection of individuals to know something?<sup>54</sup> These are difficult questions, but their diffi-

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51. And if, as is so often claimed, governmental officials are infected with a pervasive self-interest, then we should not quickly dismiss the possibility of the same for groups of experts.

52. As an example, however, it is worth noting that the pathology of overconfidence in judgments is as great, and perhaps greater, for experts than it is for non-experts. *See, e.g.*, Markus Glaser, Thomas Langer, & Martin Weber, *True Overconfidence of Professionals and Lay People: Individual Differences Within and Between Tasks*, BEHAV. DECISION MAKING (2011); Leilani Greening & Carla C. Chandler, *Why It Can't Happen to Me: The Base Rate Matters, but Overestimating Skill Leads to Underestimating Risk*, 27 J. APPLIED SOC. PSYCH. 760 (1997). *See*, more generally, but supporting the same point, Ethan Zell & Zlatan Krizan, *Do People Have Insight Into Their Abilities? A Metasynthesis*, 9 PERSP. ON PSYCH. SCI. 111 (2014). Much earlier, John Stuart Mill had speculated about the same phenomenon: "Absolute princes, or others who are accustomed to unlimited deference, usually feel this complete confidence in their own opinions on nearly all subjects." Mill, *supra* note 38, at 19.

53. On the kinds of political, psychological, and sociological distortions that might lead to at least some degree of distrust of organized expertise and organized science, *see* SHEILA JASANOFF, *SCIENCE AT THE BAR: LAW, SCIENCE, AND TECHNOLOGY IN AMERICA* (1997).

54. I will note but not discuss the potentially relevant scholarship on the subject of whether there can be a collective legislative intent. *See, e.g.*, Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547 (1983); Richard H. Fallon, Jr., *Constitutionally Forbidden Legislative Intent*, 130 HARV. L. REV. 523, 542–44 (2016); John F. Manning, *Inside Congress's Mind*, 115 COLUM. L. REV. 1911 (2015). In some respects the problems are similar in the sense that the complexities that bedevil attempts to say that *this* is the intention of a multi-member body (such as Congress, or a multi-member court) are related

culty does not make them any less important. Without knowing how a group can know something, we cannot know how a group can know something that it did not know previously. And without knowing how a group can know more (or less) than it did previously, we cannot know how to assess to growth of human knowledge, which is, after all, the ultimate goal of any version of the search for truth/marketplace of ideas account.

The question I address here, the question of group knowledge, has, it turns out, been the subject of considerable recent philosophical interest, even if not in the specific context of freedom of speech. Traditionally, that branch of philosophy understood as epistemology—the philosophical understanding of knowledge—has focused on single individuals. In asking questions such as what it is to know something, whether one knows something that is in fact true if one does not have justifications for that true belief, whether one knows something if one has a justified belief in something that turns out to be untrue, whether one knows something if one has a justified belief in something that turns out not to be true, and so on, traditional epistemology has, historically, focused almost entirely on the single individual.<sup>55</sup>

More recently, however, epistemology has expanded its focus. Following on the influential “social epistemology” of Alvin Goldman,<sup>56</sup> an increasing number of philosophers have turned to fascinating and important questions of “group belief,”<sup>57</sup> or, more broadly, collective knowledge.<sup>58</sup> But although this scholarship represents an important breakthrough in the study of epistemology and addresses numerous questions as significant as they are deep and novel, the focus, as with traditional individualist epistemology, has largely been on what it is for a group to be justified in some belief, or what it is for a group to believe something, and not very much on the actual existence of true beliefs for a group, independent of whether the beliefs are justified, and independent of whether the beliefs actually count as beliefs in some deeper philosophical sense.

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to the difficulties surrounding efforts to attribute a determination of truth or belief to a multi-member population. But in other respects, the problems are different because the legislative intent problem stems from the alleged necessity and alleged difficulty of identifying a single intention, but those problems are not the ones that arise when we are trying to think about the advance of knowledge or the identification of truth by a multi-member population.

55. See, e.g., RODERICK M. CHISHOLM, *THEORY OF KNOWLEDGE* (2d ed. 1977); D.W. HAMLYN, *THEORY OF KNOWLEDGE* (1970).

56. ALVIN I. GOLDMAN, *KNOWLEDGE IN A SOCIAL WORLD* (1999).

57. See Jennifer Lackey, *What is Justified Group Belief?* 125 *PHIL. REV.* 341 (2016).

58. See, e.g., *THE EPISTEMIC LIVES OF GROUPS: ESSAYS IN THE EPISTEMOLOGY OF COLLECTIVES* (Michael S. Brady & Miranda Fricker eds., 2016); *ESSAYS IN COLLECTIVE EPISTEMOLOGY* (Jennifer Lackey ed., 2014); *COLLECTIVE EPISTEMOLOGY* (Hans Bernhard Schmid, Daniel Sirtes, & Marcel Weber eds., 2011); Margaret Gilbert, *Collective Epistemology*, 1 *EPISTEME* 95 (2004); Frederick S. Schmitt, *The Justification of Group Belief, in* *SOCIALIZING EPISTEMOLOGY: THE SOCIAL DIMENSIONS OF KNOWLEDGE* 257 (1994); Symposium, *Collective Knowledge and Collective Knowers*, 21 *SOCIAL EPISTEMOLOGY* 209 (2007); Raimo Tuomela, *Group Knowledge Analyzed*, 1 *EPISTEME* 109 (2004).

All this is not to denigrate this profoundly interesting and deeply important area of relatively recent philosophical scholarship. It is, however, to suggest that the philosophical scholarship on the question of collective belief may not address directly the kinds of questions that are most relevant to the legal and political questions surrounding the concept and operation of the marketplace of ideas and to the view that the search for truth is a substantial justification for the principle of freedom of speech as it exists in most open and democratic developed nations. For that purpose, although prompted by the philosophical literature, we need to examine the issue from a slightly different direction. And thus it may be useful to formulate a simple and stylized example.

Suppose, therefore, that there is a society (or group of any kind) consisting of 100 people. And suppose that at some time—Time One—twenty of those people believe *P*, and that this belief is true. In other words, *P* is true. And then suppose further that for the same group at the same time ten people believe, falsely, that *P* is not true. They mistakenly believe not-*P*. And finally, suppose that the remaining seventy members of this population have no beliefs at all—no beliefs one way or another—in the question of *P*.

Now that we have described the baseline or initial array of beliefs about the question of *P*, assume that there is then some degree of speech about *P*. And after this public (or group-wide, or group-accessible) speech about *P* takes place, assume we then try to describe the beliefs of the group about *P*. Now, after some degree of speech about *P*—at Time Two—it turns out that in the same society (or, for that matter, in another society<sup>59</sup>), forty people now correctly believe *P*, thirty people now falsely believe not-*P*, and another thirty still have no beliefs at all on the subject of *P*.<sup>60</sup>

The question presented by this stylized example should now be obvious. Is this society epistemologically better off at Time Two than at Time One because more people have the correct belief in *P* at Time Two than had it at Time One? Or is the society epistemologically worse off at Time Two than at Time One because more people have the false belief—not-*P*—at Time Two than had it at Time One? My point, which I will explore in greater detail presently, is simply that on this information alone we cannot answer these questions.

The same issue and the same problems arise if we are thinking not about the array of beliefs on a single topic or proposition, but instead about beliefs on multiple topics or multiple propositions. So now assume

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59. My concern here is with the issue of comparison, and thus, analytically, it makes no difference whether we are comparing one society at different times or instead comparing two different societies.

60. I have previously used this example in a footnote to an article on a different topic, and the present Article can be considered as an expansion of what was previously no more than this one footnote. Frederick Schauer, *Social Epistemology, Holocaust Denial, and the Post-Millian Calculus*, in *THE CONTENT AND CONTEXT OF HATE SPEECH: RETHINKING REGULATION AND RESPONSES* 129, 136 n.23 (Michael Herz & Peter Molnar eds., 2012).

that at Time One this society, or some other society, has some number— $X$ —beliefs, and that some smaller number of those beliefs— $N$ —are true. And assume as well that the same society also has some number— $n$ —of false beliefs at Time One.  $X$  is the total number of beliefs in the society, and  $X$  is the sum of the society's true beliefs— $N$ —and false beliefs— $n$ . But now, what if at Time Two the society has  $X + Y$  beliefs, consisting of  $N + N'$  true beliefs but also  $n + n'$  false beliefs. Similarly, therefore, is the society better off for having more true beliefs at Time Two than it had at Time One, or is it worse off for having more false beliefs at Time Two than it had at Time One? Is a society with more true beliefs epistemologically better off with more true beliefs, or is it better off with fewer false beliefs, and what is the trade-off if more true beliefs, as in the example, are accompanied by more false beliefs?<sup>61</sup>

My main point here is to suggest that without knowing more about the nature of  $P$  (in the first example), about the relationship between  $P$  and the spread of belief in  $P$  and not- $P$ , and the about consequences of believing  $P$  and of believing not- $P$ , we simply cannot answer these questions. And so too with the second scenario, dealing with the question of aggregate beliefs about multiple subjects or multiple propositions. And I want to suggest further that the answers to these questions go to the heart of the search for truth/marketplace of ideas justifications for freedom of speech in ways that have not traditionally been recognized, but which are, as I explore in the following section, in need of further analysis and examination.

#### IV. COLLECTIVE KNOWLEDGE AND THE SPREAD OF BELIEF

The particular problem of collective knowledge as an epistemological problem has been almost completely absent from the search-for-truth literature on freedom of speech, but that literature, and especially the profoundly influential arguments of John Stuart Mill, nevertheless appears to have assumed a series of answers to the questions posed in the previous section. That is, Mill and others seem implicitly to have assumed that any society with more beliefs in the truth, or with beliefs in more truths, is better, certainly epistemologically and perhaps in total, than a society with fewer beliefs in truth, or with beliefs in fewer truths.<sup>62</sup>

61. An assumption here is that discussion of some proposition has the potential of increasing not only true beliefs about that proposition but false beliefs as well. This is implicit not only in all that psychology has told us about the psychology of belief formation, as set out in the various sources cited in Ho & Schauer, *supra* note 35, but also in common sense experience. If the number of people *hearing* that Barack Obama was born in Hawaii increases, presumably the number of people *believing* that he was born in Hawaii will increase as well. But if for all of the reasons discussed above some people may on some topics be resistant to true propositions, *see supra* text accompanying notes 30–43, the restatement of that which is true may also have the unintended side effect of increasing the number of people who believe in a false proposition.

62. If Mill is genuinely a thoroughgoing utilitarian, and especially an act-utilitarian, then the utility of gaining more knowledge must enter into a more complex calculus includ-

Lurking behind these assumptions appears to be a series of further assumptions about the acceptance of truth and about the consequences of falsity. To take my first stylized example above, the one in which people have different views about the truth or falsity of a single proposition, one way of concluding that a society with more people believing a true proposition is better off than a society with fewer people believing it, without regard to the number of people mistakenly believing in the negation, is to challenge the example by saying that the conditions that would increase the frequency of belief in (true) *P* from Time One to Time Two are conditions that simply could not increase the frequency of false (not-*P*) beliefs for any segment of a population exposed to the same stimuli as those that increased the frequency of true belief. If one believes that the truth of a proposition is the dominant factor in explaining why people believe a proposition, then there is no possibility that exposing people to the truth of a proposition would increase the number of people who believed to the contrary. And this of course is just a cumbersome and abstract way of saying what Milton said almost four hundred years ago,<sup>63</sup> and what some number of other theorists, judges, citizens, and activists in what broadly might be considered the Rationalist or Enlightenment traditions<sup>64</sup> have been saying ever since. If truth has some intrinsic power enabling it to prevail against untrue beliefs, or if human beings have some intrinsic capacity of reason that enables them to identify true propositions and reject false ones when actual evidence and arguments are presented to them, then there is little possibility that the circulation of true propositions, es-

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ing many other utility-enhancing and utility-detracting elements. If Mill is instead understood as a proto-rule-utilitarian, see J.O. Urmson, *The Interpretation of the Moral Philosophy of J.S. Mill*, 3 PHIL. Q. 33 (1953), then perhaps one of the rules would be a rule to maximize truth, not as an end in itself, but a rule which, if followed on all occasions, would maximize utility. But if Mill, some of his other writings notwithstanding (JOHN STUART MILL, UTILITARIANISM (1861)), is not genuinely a utilitarian at all, then he may be understood as valuing truth, liberty, and individuality (or one or two of those three) as ends in themselves and not as merely instrumental to utility-maximization. The issue of whether Mill was genuinely a utilitarian, or whether the Mill of *On Liberty* was genuinely a utilitarian, has interested scholars for generation. See generally MAURICE COWLING, MILL AND LIBERALISM (1963); JOHN GRAY, MILL ON LIBERTY (1983); ALAN RYAN, JOHN STUART MILL (1970); C.L. TEN, MILL ON LIBERTY (1980); Vincent Blasi, *Shouting "Fire!" in a Theater and Vilifying Corn Dealers*, 39 CAP. U. L. REV. 535 (2011). Apart from questions about Mill's deepest philosophical commitments and utilitarian bona fides, however, *On Liberty* seems to presuppose the enormously important value of truth. But even apart from the question whether that claim is based on truth as ultimate or instead as being merely instrumental, the claim is hardly, as much of our law about the invasion of privacy makes clear, self-evidently correct. See Frederick Schauer, *Reflections on the Value of Truth*, 41 CASE W. RES. L. REV. 699 (1991). See also Raphael Cohen-Almagor, *Why Tolerate? Reflections on the Millian Truth Principle*, 25 PHILOSOPHIA 131, 146–47 (1997).

63. See *supra* note 37 and accompanying text.

64. Among virtually countless accounts and analyses of the Enlightenment as a historical period and as a revolution based on "principles of human reason," see ERNST CASIRER, *THE PHILOSOPHY OF THE ENLIGHTENMENT* (Fritz C.A. Koelnn & James Pettegrove trans., 1955) (1932); LOUIS DUPRE, *THE ENLIGHTENMENT AND THE INTELLECTUAL FOUNDATIONS OF MODERN CULTURE* (2004); William Bristow, *Enlightenment*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Aug. 20, 2010) <https://seop.illc.uva.nl/entries/enlightenment/> [<https://perma.cc/AKN5-TWGN>].



pecially if supported by evidence and arguments, will increase the prevalence of belief in untrue propositions dealing with the same subject.

The problem, however, is that there is scant reason, as a matter of empirical psychological and sociological fact, to believe that these assumptions are sound for all or even most populations. Although the large amount of recent publicity given to so-called fake news has highlighted the question,<sup>65</sup> the fake news issue is in some sense distracting. Although modern technology, including but not limited to the Internet and realistic-looking computer simulations, has made it easier to create and circulate flat-out falsehoods that are nevertheless widely accepted as true, the phenomenon now re-labeled as “fake news” is hardly recent. Many people in recent years (and still) believe that Barack Obama was born in Kenya, despite definitive evidence to the contrary,<sup>66</sup> and so too with the false beliefs that President George W. Bush knew in advance of the September 11 attacks,<sup>67</sup> that the Holocaust did not occur,<sup>68</sup> that AIDS is the product of a government conspiracy,<sup>69</sup> and that the predictions of astrology are reliable.<sup>70</sup> Indeed, when P.T. Barnum is (erroneously) said to have observed more than a century ago that “there’s a sucker born every minute,”<sup>71</sup> he simply encapsulated a phenomenon of gullibility that is as widespread as it is old.<sup>72</sup>

65. See, e.g., James Carson, *What Is Fake News? Its Origins and How It Grew in 2016*, THE TELEGRAPH (Mar. 16, 2007), [www.telegraph.co.uk/technology/0/fake-news-origins-grew-2016/](http://www.telegraph.co.uk/technology/0/fake-news-origins-grew-2016/) [https://perma.cc/5B6Z-BN79]; Michael C. Dorf & Sidney Tarrow, *Stings and Scams: “Fake News,” the First Amendment, and the New Activist Journalism*, Cornell Legal Studies Research Paper 17-02, available at <https://ssrn.com/abstract=2906444>; Sapna Maheshwari, *How Fake News Goes Viral: A Case Study*, N.Y. TIMES (Nov. 20, 2016), [https://www.nytimes.com/2016/11/20/business/media/how-fake-news-spreads.html?\\_r=0](https://www.nytimes.com/2016/11/20/business/media/how-fake-news-spreads.html?_r=0) [https://perma.cc/4FFW-LS2X].

66. See Jeff Zeleny, *Persistent ‘Birthers’ Fringe Disorients Strategists*, N.Y. TIMES (Aug. 4, 2009), <http://www.nytimes.com/2009/08/05/us/politics/05zeleny.html> [https://perma.cc/V89S-PRWS]; Lymari Morales, *Obama’s Birth Certificate Convinces Some, but not All, Skeptics*, GALLUP (May 13, 2011), [www.gallup.com/poll/147530/Obama-Birth-Certificate-Convinces-Not-Skeptics.aspx](http://www.gallup.com/poll/147530/Obama-Birth-Certificate-Convinces-Not-Skeptics.aspx) [https://perma.cc/A64V-QKA2].

67. See Mark Jacobson, *The Ground Zero Grassy Knoll: A New Generation of Conspiracy Theorists Is at Work on a Secret History of New York’s Most Terrible Day*, N.Y. MAGAZINE, (Mar. 27, 2006) at 28; PUBLIC POLICY POLLING, *Obama’s Approval Steady* (Sept. 23, 2009), [http://www.publicpolicypolling.com/pdf/2009/PPP\\_Release\\_National\\_9231210.pdf](http://www.publicpolicypolling.com/pdf/2009/PPP_Release_National_9231210.pdf) [https://perma.cc/4ATE-8ZQV].

68. See Emma Green, *The World Is Full of Holocaust Deniers*, THE ATLANTIC (May 14, 2014), <https://www.theatlantic.com/international/archive/2014/05/the-world-is-full-of-holocaust-deniers/370870/> [https://perma.cc/LVE5-JXNS].

69. See CENTER FOR MEDIA AND DEMOCRACY, *Aids Conspiracy*, SOURCE WATCH (Jan. 23, 2006), [www.sourcewatch.org/index.php/AIDS\\_conspiracy](http://www.sourcewatch.org/index.php/AIDS_conspiracy) [https://perma.cc/CT9N-294T].

70. Linda Lyons, *Paranormal Beliefs Come (Super)Naturally to Some*, GALLUP (Nov. 1, 2005), <http://www.gallup.com/poll/19558/paranormal-beliefs-come-supernaturally-some.aspx> [https://perma.cc/H975-R24D].

71. The phrase is accurate, but it was uttered not by Barnum but by one of his competitors. See NICHOLAS DiFONZO, *THE WATERCOOLER EFFECT* 124 (2008).

72. Indeed, gullibility may be but one corner of the larger phenomenon of *motivated reasoning*, the widespread tendency of people to see the world and reason about it in light of, and distorted by, the facts and outcomes they would, for fact-independent reasons prefer. See Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCH. BULL. 489 (1990); Keith E. Stanovich & Richard F. West, *On the Failure of Cognitive Ability to Predict My-*

More recently, controversies about climate change,<sup>73</sup> the safety of genetically modified foods,<sup>74</sup> and the alleged danger of immunization,<sup>75</sup> among many others, have raised closely related issues. Although here the questions are less about single falsifiable (and false) facts than about science and about the weight or consensus<sup>76</sup> of scientific opinion, once again the nature of the controversies casts doubt on the rationalist Enlightenment belief—as embodied in the perspectives of Milton, Mill, and their successors—that truth has some intrinsic power or that humans have some innate ability to identify truth and reject falsity. What we now know, the rationalists and the Enlightenment unfortunately to the contrary, is that various attributes of a proposition other than its truth or falsity often play a major role in determining whether that proposition will be accepted or rejected.<sup>77</sup>

This longstanding and well-documented resilience of falsity in the face of fact and reason has important implications for the question of collective knowledge. Most obviously, it suggests that the statement of a proposition may under some circumstances increase, as the numbers in my hypothetical examples above suggest, both the number (and proportion)

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*side and One-Sided Thinking Biases*, 14 THINKING AND REASONING 129 (2008); Keith E. Stanovich & Richard F. West, *Natural Myside Bias Is Independent of Cognitive Ability*, 13 THINKING & REASONING 225 (2007); Keith E. Stanovich, Ricard F. West, & Maggie E. Toplak, *Myside Bias, Rational Thinking, and Intelligence*, 22 CURRENT DIRECTIONS IN PSYCH. SCI. 259 (2013). A prominent legal application is Dan M. Kahan, *The Supreme Court 2010 Term—Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 126 HARV. L. REV. 1 (2011). But although Kahan and others (see, e.g., Peter H. Ditto, David A. Pizzaro, & David Tannenbaum, *Motivated Moral Reasoning*, 50 PSYCH. LEARNING & MOTIVATION 307 (2009)) focus on moral or policy reasoning, it is important, as the foregoing scholarship demonstrates, not to forget, especially in the context of the issues discussed here, that motivated reasoning pervades and infects reasoning about verifiable fact as well as about less verifiable questions of philosophy, morality, and public policy. On this last phenomenon, see Stephan Lewandowsky & Klaus Oberauer, *Motivated Rejection of Science*, 25 CURRENT DIRECTION IN PSYCH. SCI. 217 (2016).

73. A useful and balanced, even if slightly dated, overview of some of the better and more prominent books on more or less all sides of the issue is Andrew C. Revkin, *Challenges to Both Left and Right on Global Warming*, N.Y. TIMES (Nov. 13, 2007), [www.nytimes.com/2007/11/13/science/earth/13book.html](http://www.nytimes.com/2007/11/13/science/earth/13book.html) [<https://perma.cc/KXR8-8E5W>].

74. See Katherine Zeratsky, *Genetically Modified Foods—Why the Controversy?* MAYO CLINIC NEWSLETTER (May 20, 2016), <http://www.mayoclinic.org/healthy-lifestyle/nutrition-and-healthy-eating/expert-blog/genetically-modified-foods/bgp-20164720> [<https://perma.cc/FX36-GXJ5>]. See also Sydney E. Scott, Yoel Inbar, & Paul Rozin, *Evidence for Absolute Moral Opposition to Genetically Modified Food in the United States*, 11 PERSP. ON PSYCH. SCI. 315 (2016).

75. See *History of Anti-vaccination Movements*, COLLEGE OF PHYSICIANS OF PHILADELPHIA, [www.historyofvaccines.org/content/articles/history-anti-vaccination-movements](http://www.historyofvaccines.org/content/articles/history-anti-vaccination-movements) [<https://perma.cc/FU4M-J4TN>].

76. The very idea of a consensus, of course, raises issues about the proportion of some group necessary to describe the group's views as a consensus, as well as whether all members of the group count equally (or at all) in the question whether a consensus exists.

77. See Daniel T. Gilbert, Douglas S. Krull, & Patrick S. Malone, *Unbelieving the Unbelievable: Some Problems in the Rejection of False Information*, 59 J. PERSONALITY & SOCIAL PSYCH. 601 (1990); Matthew E. Jacovina, Scott R. Hinze, & David N. Rapp, *Fool Me Twice: The Consequences of Reading (and Rereading) Inaccurate Information*, 28 APPLIED COGNITIVE PSYCH. 558 (2014); David N. Rapp, *The Consequences of Reading Inaccurate Information*, 25 CURRENT DIRECTIONS IN PSYCH. SCI. 281 (2016).

of people who believe something that is in fact true and the number (and proportion) of people who believe in the truth of something that is in fact false. Obviously, if all members of some population have views about the truth or falsity of some proposition, then an increase in those who believe it true will decrease the number of those who believe it false. But in a world in which the unaware or the undecided often represent an appreciable percentage of many populations on many issues, it is both theoretically and practically possible that discussion of (and freedom of speech about) some proposition will increase both the number of those with the true belief and the number with a false belief.

Although the recipients of messages may on occasion neither say nor do anything as a result of receiving a message, it is reasonable to assume that a recipient of a message will sometimes or often, as a result of receiving the message, say (or, of course, write, text, or whatever) something to someone else, and the someone else will then, once removed from the original message, either believe what she is told or disbelieve what she is told, where again the extent of belief or disbelief will not be entirely a function of the message received. And so on for some, presumably, considerable number of further iterations, each of which may well produce further believers and disbelievers, some of whom will be correct and some of whom will be mistaken.

All of the above is directed to shoring up the assumptions that support the stylized examples in the previous section. When a speaker utters a proposition that has a truth-value, some number of initial and subsequent hearers will, as a result of the initial utterance, have some reaction to the proposition uttered, and that reaction will, in some way, affect the beliefs of the hearers about the truth of the proposition. For some hearers, the utterance of the proposition will, as standard free speech theory supposes, cause them to reject their previously held false beliefs in favor of true beliefs. But for some others, the utterance of the proposition may well cause them to reject previously held true beliefs in favor of false ones.<sup>78</sup> For still others—the ones who previously had no beliefs on the topic of the proposition—the utterance will cause some of them to have

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78. If I may be forgiven for re-using a previously-published example, consider the scenario of Henry Fonda's character—Davis—in the classic 1957 film *12 Angry Men*. See Schauer, *supra* note 60, at 137 n.28. As is well known, the Fonda character, one of twelve jurors deliberating in a criminal case, eventually persuades his eleven fellow jurors to reject their previous false belief in the defendant's guilt for a (presumably, or so the film want us to believe) true belief in the defendant's possible innocence. But in engaging in his verbal persuasion (speech), Fonda had at his disposal not only the seeming truth of what he was saying, but also Fonda's good looks, charm, persistence, rhetorical talents, passion, and snappy white suit. But now consider a different scenario, in which the good looks, the charm, the persistence, the passion, the rhetorical talent, and the suit are the same, but in which the defendant was in fact guilty. The question is whether the same truth-independent attributes of Fonda's utterances might have persuaded eleven jurors to exchange a true belief for a false one in the same way that in the film a false belief was exchanged for a true one. The film being fiction, of course we cannot answer the question, but the mental experiment is nevertheless designed to focus attention on the possibility that in some or many circumstances the truth-independent attributes of a speech act might cause some recipient of that speech act to reach a conclusion—have a belief—contrary to the actual truth.

true beliefs where previously they had no beliefs, but for some of those who previously had no beliefs, the utterance will cause them to have false beliefs where previously they had no beliefs. Moreover, all four of these possibilities—true beliefs to false beliefs, false beliefs to true beliefs, no beliefs to true beliefs, and no beliefs to false beliefs—will exist when the proposition uttered is true, and also when it is false. A strong irrationalist might say that the truth of the proposition has no causal effect on the likelihood of its adoption, but I make no such claim here. Rather, I claim only and more cautiously that all of these possibilities will exist for both true and false propositions, and that that is so even if, as the rationalist would insist, some of the possibilities are more likely for true propositions than for false ones.

Thus, if we are thinking about the array of beliefs within a population—the issue of collective belief, or collective knowledge—the basic claim here is that the utterance of any proposition is likely to change the array of individuals holding both true and false beliefs, and what we know from serious psychology<sup>79</sup> and a vast amount of anecdotal evidence is that there is no reason to suppose that the change will be exclusively in the direction of more true belief. Even if, as the rationalist supposes, the weight of the change is in the direction of truth, as long as this is not the case for every individual on every proposition the point of the examples in the previous section still holds, and the problem then turns to that of determining the consequences of this complex shift in beliefs for some collectivity.

## V. A CALCULUS OF CONSEQUENCES

None of the above conclusions and complications about collective knowledge and the complexities of group belief would make much of a difference if it were the case that belief was inert.<sup>80</sup> If there are no or few consequences apart from belief for its own sake whether people have true beliefs or false ones, then any shift in a population's array of true and false beliefs would be of little interest or importance. If I change my belief in the superiority of chocolate ice cream over vanilla to the opposite, virtually nothing about the world will be affected.<sup>81</sup> But of course there is no reason to accept this premise for most beliefs about most subjects. People who believe that Alvarez actually was awarded the Medal of Honor even if he was not may well be more likely to vote for him than otherwise,<sup>82</sup> and if enough of them do so then the likelihood that a

79. See *supra* notes 34, 72.

80. On the relationship between belief and action, and for the implications of that relationship for thinking about freedom of thought and freedom of speech, see Frederick Schauer, *On the Distinction Between Speech and Action*, 65 EMORY L.J. 427 (2015).

81. I set aside the possibility that changes in preferences for ice cream flavors would have marketing and production implications, especially if the suppliers and manufacturing methods are different for chocolate than for vanilla.

82. See *United States v. Alvarez*, 567 U.S. 709 (2012). There is no evidence that Congress was motivated by such concerns in enacting the Stolen Vair Act. Much more likely, as

fabricator will hold office increases, a consequence we can assume, all other things being equal,<sup>83</sup> is for the worse.

Many contemporary debates reinforce the same point. If people believe that climate change is either non-existent or not substantially the product of human acts, and if those beliefs are false, then policies that would lessen the degree of human-created climate change are less likely to be adopted, and the consequences of climate change increased.<sup>84</sup> If people believe that immunization is harmful, and if that belief is false, then some number of children will contract diseases they would otherwise not have contracted.<sup>85</sup> If people believe that genetically modified foods are unsafe, and if the truth is to the contrary,<sup>86</sup> then there may be less development of healthy or lower-cost genetically modified foods than would otherwise be the case. If people believe that a substance made from apricot pits can cure cancer,<sup>87</sup> or that garlic rubs can cure AIDS,<sup>88</sup> they may well forego medically established treatments and suffer accordingly. If people believe that the Holocaust did not occur or has been substantially exaggerated, the believers may be more inclined towards anti-Semitic acts than otherwise,<sup>89</sup> and if people falsely believe (or believed) that Barack Obama was not eligible to be President because of his foreign birth, they might be less inclined to engage in some number of obedient or prosocial acts than otherwise, to the detriment of the common good.

In some sense the examples in the previous paragraph should not have been necessary. It seems hardly controversial that false beliefs can have bad consequences.<sup>90</sup> But if we combine this seemingly obvious proposi-

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the title of the law indicates, was simply a desire not to tarnish the dignity of the honor (or the honoree) and not to dilute the value of the honor by empowering suggestions about whether the honor was actually earned.

83. The qualification is important. The proclivity (or not) to lie is but one attribute of a holder of public office, and I make no claim here that it is the only desirable attribute, or that other desirable attributes might on some occasions or for some office-holders outweigh the undesirable attribute of a proclivity to fabrication.

84. *See supra* note 73.

85. *See supra* note 75.

86. *See supra* note 74.

87. *See* Arnold Relman, *Closing the Books on Laetrile*, 306 N.E.J. MED. 236 (1982). It is worth noting that Laetrile, which had no verified benefits but many verified dangers, continued to be unlawfully distributed presumably in response to consumer demand, almost a quarter of a century after its medical benefits were definitively established as non-existent. *See* Slingluff v. State Medical Board of Ohio, 2006-Ohio-3556.

88. *See* South Africa's Health Minister Advocates Treating AIDS with Lemon, Beetroot and Garlic, DAILYMAIL.COM (Aug. 20, 2006), <http://www.dailymail.co.uk/news/article-401485/South-Africas-health-minister-advocates-treating-AIDS-lemon-beetroot-garlic.html> [<https://perma.cc/ZR8V-H5XT>].

89. *See generally* GENOCIDE DENIALS AND THE LAW (Ludovic Hennebel & Thomas Hochmann eds., 2011).

90. For some time free speech theory and discourse was dominated by the view that speech was largely harmless, or was, as a category, less harmful than non-speech conduct, and was thus protected, in part, for that reason. *See* Sarah Sorial, *Sedition and the Advocacy of Violence: Free Speech and Counter-Terrorism* 18 CURRENT ISSUES CRIM. JUST. 431(2012) (discussing but not endorsing the "lesser harm" hypothesis). Alternatively, more sophisticated commentators acknowledged the harm that speech might produce, but ar-

tion with the argument in the previous section, things become more complex. More specifically, it appears that uttering propositions with truth value to a population will, in many instances, produce more individuals within that population who hold beliefs on some topic or proposition than was the case prior to the utterance, more individuals who hold true beliefs within that population than was the case prior to the utterance, but also more individuals who hold false beliefs within that population than was the case prior to the utterance.<sup>91</sup> The stylized example above of a population of 100 which went from twenty people holding true beliefs to forty, from seventy with no beliefs down to thirty, and with thirty people holding false beliefs up from ten, was designed to add hypothetical numbers to the dynamic that was just described.

Obviously, the numbers I have selected are not only hypothetical but also arbitrary, and equally obviously, the actual numbers will vary with the nature of the proposition,<sup>92</sup> the nature of the prior beliefs of the members of the population, the frequency and method of utterance, and much else, as discussed above. But as long as there remains the possibility of at least some increase in the number of people holding false beliefs as a result of the utterance of some proposition, and as long as the holding of false beliefs can have negative consequences, it is now clear that the utterance of a proposition will not necessarily be for the better, and that is so even if the utterance produces an increase in the number of members of the population holding true beliefs after the utterance. And thus, even if Mill's rationalistic suppositions are sound, his conclusions are sound only under the assumption that a society in which more people hold true beliefs than hold false beliefs is for the better, independent of the consequences of the false beliefs. But we can now see that there is little reason to accept this assumption.

The conclusion from the foregoing analysis is twofold. First, it is impossible to make a determination about the consequences of a factual utter-

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gued that it was harm of a certain indirect or otherwise more complex form, thus immunizing even most harmful speech from control. See C. Edwin Baker, *Harm, Liberty, and Free Speech*, 70 S. CAL. L. REV. 979 (1997). But although more recent scholarship has been more willing to recognize the harm that speech may cause, see CATHARINE MACKINNON, *ONLY WORDS* (1993); Susan Brison, *Speech and Other Acts*, 10 LEGAL THEORY 261 (2004); Susan J. Brison, *Speech, Harm, and the Mind-Body Problem in First Amendment Jurisprudence*, 4 LEGAL THEORY 39 (1998); Frederick Schauer, *Harm(s) and the First Amendment*, 2011 SUP. CT. REV. 81 (2011); Frederick Schauer, *The Phenomenology of Speech and Harm*, 103 ETHICS 635 (1993), that scholarship has focused, often in so-called hate speech contexts, on the harms of epithets, insults, and advocacy, and only rarely on the harms of falsity as such. One way of understanding this Article is as the beginnings of an attempt to remedy what appears to be a gap in the existing literature in this regard.

91. See *supra* note 74.

92. In *Va. State Board of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 763 n.24 (1976) (hereinafter *Virginia Pharmacy*), the Supreme Court noted the "common sense differences" between commercial and non-commercial propositions. The Court likely misidentified those differences in *Virginia Pharmacy*, erroneously believing that market forces would give commercial speech greater hardness than ideological speech, but the Court was still correct in its assumption that the dynamics of speech would vary with the nature of the proposition.

ance without knowing both the array of true and false beliefs that the utterance of some proposition will produce; and, second, that even knowing the array of produced true and false beliefs will be insufficient to determine whether the utterance is for the better or for the worse without also knowing the consequences flowing from the false beliefs.<sup>93</sup>

It is important to recognize, however, that even knowledge of the expected harm and expected benefits<sup>94</sup> of some utterance will not answer the free speech question. The essence of free speech (and First Amendment) protection is categorical,<sup>95</sup> in the sense that the question is not whether this or that utterance will produce more good than harm, or more harm than good. Rather, it is whether some rule that protects (or does not protect) some category of utterances will, when applied to all of the utterances within the category, be for the better.<sup>96</sup>

## VI. CONCLUSION

My goal in this Article has not been to even attempt to specify which First Amendment rule or rules should be adopted, whether about collective knowledge or about anything else. That is especially so given that the analysis here takes place entirely within a set of search for truth/marketplace of ideas justifications for freedom of speech, a set of justifications that has not fared well when subject to close analytical and empirical scrutiny,<sup>97</sup> however popular it may be with the Supreme Court, with other courts, and in civil liberties advocacy and rhetoric. Moreover, even to the extent that the search for truth survives as a legitimate justification for freedom of speech and freedom of inquiry, either generally or in more discrete settings, it most often appears alongside other justifications, rather than standing entirely alone.<sup>98</sup>

For all of these problems, however, the search for truth has demonstrated a remarkable resilience for both the courts and the commentators in thinking about the purposes that a principle of freedom of speech is designed to serve, and the goals that the First Amendment is plausibly understood to further. And as long as the search for truth persists in the constitutional doctrine and the scholarly commentary,<sup>99</sup> it is important to understand just what it means for a society to search for truth and what it

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93. Indeed, the optimal analysis should be informed by data not only on the consequences of false beliefs, which may occasionally be for the better, but also on the consequences of true beliefs, which may occasionally be for the worse.

94. I use "expected harm" and "expected benefits" in the statistician's sense of the magnitude of the consequences multiplied by the probability of their occurrence.

95. "Categorical," referring to categories, and not "categorical," which suggests absoluteness.

96. See Frederick Schauer, *The Second-Best First Amendment*, 31 WM. & MARY L. REV. 1 (1989).

97. See *supra* notes 41–43 and accompanying text.

98. On First Amendment doctrine as possibly (probably?) emerging not from any single foundational justification but instead from a combination of multiple justifications, see Kent Greenawalt, *Speech and Crime*, 1980 AM. B. FOUND. RES. J. 645 (1980).

99. See *supra* notes 2–5.

is for a society to have found it. But if we are thinking about the search for truth as a societal and not an individual goal,<sup>100</sup> then we cannot avoid examining more closely than the traditional thinking about freedom of speech, Mill included, has examined the question of how a society can find truth in the aggregate, what it is for a society to know something, and why determining what a society knows may not be as simple as adding up what each of the constituent members of that society know as individuals.

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100. *But see* Blasi, *supra* note 62, understanding Mill as aiming far more toward the development of individual intellectual character than at social knowledge.