THE NEXT GENERATION OF FREE EXPRESSION SCHOLARSHIP: A VERY SHORT MANIFESTO (IN MEMORY OF FRED SCHAUER)

Mark Tushnet*

INTRODUCTION

Consider the title and subtitle of Brian Leiter's superb essay: "Free Speech on the Internet: The Crisis of Epistemic Authority."[1] The title reflects what I think a great deal of free expression scholarship over the next decade will deal with: the

* William Nelson Cromwell Professor of Law, Emeritus, Harvard Law School. Thanks to Brian Leiter, Robert Post, L. Michael Seidman, Geoffrey Stone, and Rebecca Tushnet for comments on a draft of this Manifesto.

[1] Brian Leiter, *Free Speech on the Internet: The Crisis of Epistemic Authority*, 153 DAEDALUS 91, 91 (2024).

regulation of social media and artificial intelligence and other innovations, some now only nascent, in the information economy. The subtitle reflects what I think the most important free expression scholarship over the next decade should deal with: confronting the implications of serious challenges to the very ideas of information and truth themselves.[2]

This Manifesto begins with a discussion of the accomplishments of the prior generation of free expression scholarship.[3] The core of the Manifesto starts with a description of the idea of epistemic authority and draws upon Leiter's analysis to show its importance in free expression theory. It emphasizes, with Leiter, that epistemic authority is relational: between and among epistemic authorities, and between such authorities and "ordinary" citizens (that is, those who aren't near the core of an epistemic community that, as a collective, defines the community's core and boundaries).

That discussion is followed by a description of challenges to the idea of epistemic authority coming from *within* a number of epistemic communities: the natural sciences, journalism, and the university, including several disciplines. These internal challenges pose obvious questions for ordinary citizens: If insiders disagree, what are outsiders to do? Those questions are deepened by concerns taken up next: What social and political factors affect the ways in which epistemic communities are constituted in the first place and then allocate authority within the communities and determine who is within and who outside the community?[4]

The Manifesto's final Section briefly examines the normative implications of the preceding discussion. My personal normative takeaway is that the serious (that is, nonfrivolous) questions about epistemic authority and the accompanying sociopolitical analysis should lead to a normative modesty acknowledging that in almost

---

[2] To be clear, the word "serious" is doing a lot of work here. Many of the challenges to the ideas of information and truth are frivolous. Unfortunately, such unserious challenges seem to me to attract a great deal of attention. There's an unavoidable risk that a discussion of serious challenges will be undermined by guilt by association with the unserious ones.

[3] I am a member demographically of that generation but have contributed only marginally to free expression scholarship, mostly focusing on doctrinal questions at the fringes of major issues (nonrepresentational art, lies, spontaneous demonstrations). *See generally* Mark Tushnet, *Art and the First Amendment*, 35 COLUM. J.L. & ARTS 169 (2012); Mark Tushnet, *Epistemic Disagreement, Institutional Analysis, and the First Amendment Status of Lies*, 4 J. FREE SPEECH L. 651 (2024) [hereinafter Tushnet, *Epistemic Disagreement*] (note that this essay refers to an earlier version of Leiter's article); Mark Tushnet, *Spontaneous Demonstrations and the First Amendment*, 71 ALA. L. REV. 773 (2020). I suspect that my interest in the fringes may have alerted me to questions about epistemic authority, but I haven't written anything important about those questions. *But see generally* Tushnet, *Epistemic Disagreement*, *supra*; Mark Tushnet, *Trust the Science but Do Your Research: A Comment on the Unfortunate Revival of the Progressive Case for the Administrative State*, 98 IND. L.J. 335 (2023) [hereinafter Tushnet, *Trust the Science*].

[4] I note that Leiter's essay touches upon these questions but, understandably in light of its overall aims, doesn't deal with them in detail. Leiter, *supra* note 1.

all the interesting cases, whether there is *some* regulation of expression is likely to be a close question.[5]

I emphasize that this is a manifesto about the intellectual challenges posed for free expression law by the decline of the epistemic authority lodged in a number of major institutions, and not a manifesto about the kinds of regulation suitable for an environment in which epistemic authority is weak. I have no firm views about what sort of regulation of social media is justified by issues associated with epistemic authority, if any are—and so on through the list of possible regulations. I do try to provide examples of potential regulations that doctrine founded on the decline of epistemic authority might have to deal with, but I endorse none of those examples.

The bottom line, though, should be stated (perhaps overstated a bit to get the point across): The epistemic authority previously held by a number of important institutions is gone, and it's not coming back. Free expression theory has to get over it and figure out what to do next.[6]

I. THE PRIOR GENERATION'S ACCOMPLISHMENTS

When the prior generation arrived on the scene in the 1970s, free expression theory had been shaped by the legacies of John Stuart Mill, Oliver Wendell Holmes,

---

[5] Again, two qualifications that should be obvious: (1) The serious challenges to epistemic authority don't arise in connection with every question: Whether the earth revolves (in some specified sense) around the sun, whether two plus two equals four (in standard cases). Without making claims about the direction of the causal arrow, I simply note that serious efforts to regulate rarely arise in connection with these "indisputable" claims. (Without having done the research, I suspect that the frequently referenced legislative proposal specifying the value of π as three and one-seventh might be justified as an effort to develop a curriculum useful for ordinary elementary school students.) (2) That *some* regulations might be justified in light of questions about epistemic authority doesn't mean that *all* specific regulations are justified. Overbreadth, for example, seems to me likely to be a pervasive problem. The "close question" claim is aimed at challenges to regulatory proposals as unjustifiable because of fundamental principles of free expression and says nothing about more focused challenges to specific regulatory proposals.

[6] Here I allude to Scott McNealy's famous statement about the implications of modern information technology: "You have zero privacy anyway . . . . Get over it." Polly Sprenger, *Sun on Privacy: 'Get Over It,'* WIRED (Jan. 26, 1999, 12:00 PM), https://www.wired.com/1999/01/sun-on-privacy-get-over-it/ [https://perma.cc/MBW7-V44K]. For something like a manifesto motivated by observations similar to mine, *see generally* Robert C. Post, *The Internet, Democracy, and Misinformation*, *in* DISINFORMATION, MISINFORMATION, AND DEMOCRACY: LEGAL APPROACHES IN COMPARATIVE CONTEXT 37, 37–49 (Ronald J. Krotoszynski, Jr. et al. eds., 2025). That essay describes threats to democracy posed by (among other things) "the loss of epistemological authority," and expresses the hope that we can "develop strategies for [its] amelioration." *Id.* at 48–49. The thought underlying *this* Manifesto is that "amelioration" strategies are unlikely to be completely effective because the loss of epistemological authority has sources within the institutions claiming that authority, not solely in pathologies introduced by modern information technologies.

Louis Brandeis, and more proximately Justices Hugo Black, William O. Douglas, and Felix Frankfurter.[7] The working theory started with a paradigm acknowledging that regulation occurred when regulators, usually legislatures, reasonably believed that the speech they sought to regulate caused harm. With that paradigm in hand, free expression theory took the form of a rather unproductive—or so it seemed by the 1970s—dialogue over whether the First Amendment was an absolute, as Justice Black put it,[8] implying that all regulations of speech were subject to a difficult-to-overcome presumption of unconstitutionality, or whether the harms of regulation should be balanced against the risks that expression raised of harming other social interests. One feature of the absolutist position, which gradually became ascendent in the 1960s, was an unproductive distinction between speech, which in a shorthand couldn't be regulated, and conduct associated with speech, which could.

Lee Bollinger, Robert Post, Frederick Schauer, and Geoffrey Stone (listed alphabetically) were the dominant figures in transforming free speech theory in the 1970s and 1980s. After describing what I believe to be the two major accomplishments of that generation, I note one important issue it left unresolved and several issues that remain open for discussion within the general framework those scholars established.

A. Accomplishments: Doctrinal and Institutional

The distinction between content-based regulations and content-neutral ones is now commonplace in free expression analysis. Stone is largely responsible for this doctrinal clarification.[9] After dividing the regulated universe into two parts, we can see that (and why) what had seemed disparate issues—sometimes awkwardly grouped as "time, place, and manner" regulations—were governed by a single test (variously formulated) that was different and more tolerant of regulation than when applied to content-based regulations. And with the concept of content-based regulations in hand, we could see a distinction between the First Amendment's coverage and the protection it afforded covered speech.[10]

---

[7] *See History of Free Speech*, FIRE, https://www.thefire.org/history-free-speech [https://perma.cc/8NCV-998E] (last visited Apr. 17, 2025).

[8] Black's position is described in Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 246.

[9] Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 54–55 (1987).

[10] The content-based/content-neutral distinction clarified a large number of issues but didn't provide an all-purposes solution. What came to be known as special environments—schools, the military, prisons—posed a particular problem. In these environments applying the rules for content-based regulations worked well for some problems (disciplining students for protests about extra-university events, for example) and badly for others (tenure decisions). And what counted as a special environment wasn't well-explained. Post's distinction between managerial and general regulatory authority ("governance") went quite a way to solving these problems. Robert C. Post, *Between Governance and Management: The History*

A second major accomplishment was to introduce second-order considerations into the doctrinal structure of free expression. My view is that Schauer was primarily responsible for this accomplishment. A first-order analysis asks: Given the standard rationales for free expression, should this particular expression or class of expressions be covered and if so, protected? First-order analysis goes to the merits, so to speak. Second-order analysis asks questions about the form of regulation and the institutional arrangements for implementing regulation that follow from the choice of form.

Second-order analysis focuses on whether the values taken into consideration in first-order analysis are better served by rules or standards. The answer typically depends upon institutional arrangements. A high court can give clearer guidance to lower courts and legislatures through rules rather than standards, but at the cost of allowing some regulations that infringe on the values free expression seeks to advance and prohibiting some regulations that don't harm those values.[11] A high court can implement free expression values as it understands them perfectly by deploying a standard, but at the cost of licensing legislatures and lower courts to adopt and apply regulations that are inconsistent with the high court's understanding of free expression values and that (importantly) can't be effectively reviewed and corrected by the high court. Sometimes the inability to review results from the high court's limited decisional capacity, meaning that some decisions that the high court would treat as mistaken simply escape its attention, and sometimes it occurs because the mere existence of the regulations deters people from engaging in the prohibited speech, at least for a long enough time for the costs of regulation before invalidation to be substantial.

I believe that second-order analysis provides the best justification for many, perhaps most, of the Supreme Court's decisions that observers from both sides of the political spectrum separately find normatively troubling. Even if that belief is mistaken, though, the introduction of second-order analysis greatly clarifies issues that had puzzled prior generations of free expression scholars.

B. An Unresolved Issue: Private Power's Threat to Free Expression

As Vincent Blasi points out, John Stuart Mill worried about threats to free expression coming from private parties.[12] In the United States, the state action doctrine blocked the Supreme Court from systematically grappling with such threats. Contemporary concerns about the so-called cancel culture as well as concerns about the

---

and Theory of the Public Forum, 34 UCLA L. REV. 1713, 1717 (1987) [hereinafter Post, *Between Governance and Management*].

[11] This is an application of the well-known phenomenon that rules are always both over- and under-inclusive with respect to their purposes.

[12] Vincent Blasi, *Is John Stuart Mill's* On Liberty *Obsolete?*, 153 DAEDALUS 14, 16 (2024).

way in which expression transmitted on privately owned social media can cause harm have placed Mill's worries back on the table.[13]

The central problem here is to develop (and justify) free expression doctrine that permits modification of background property rules to limit the harm that expressive uses of the power enabled by private property can cause. We can find scattered hints of a sensible approach in some decided cases but no systematic treatment.[14]

Matal v. Tam could have been the vehicle for further development, specifically with respect to the permissibility of limiting property rights in the free expression setting.[15] A rock group whose members were Asian-Americans called itself "The Slants," appropriating a derogatory term for Asian-Americans to affirm their cultural identity.[16] The Slants sought to register their name as a trademark to bar others from selling band-related merch without permission.[17] The Trademark Office refused the registration, citing a statutory provision excluding from registration marks that disparaged persons or groups.[18] The Supreme Court held the provision an unconstitutional viewpoint-based regulation.[19]

The Trademark Office defended the provision on several grounds, one of which is directly relevant here. It cited cases in which the Supreme Court had upheld monetary subsidies and tax benefits distributed according to criteria that were content- and viewpoint-based.[20] Trademark registration was analogous: a statutory entitlement to a monetizable benefit. Justice Alito, writing for the Court, said almost without elaboration that cash subsidies and tax benefits were "nothing like" trademark registration.[21] He did hint at the larger question lurking in the government's position: he noted that the government "provides valuable non-monetary benefits" through a wide range of programs.[22] Though he didn't mention them, common-law property rights fit that description.

The proper response to that, though, is probably, "So what?" As I've noted, the First Amendment constrains common-law tort rules and *Shelley v. Kraemer* holds

---

[13] These worries are probably best located in that component of foundational free expression theory associated with expression's importance for democratic deliberation.

[14] *New York Times Co. v. Sullivan* and *Snyder v. Phelps* invalidated state tort rules as impermissibly content-based (and insufficiently justified). N.Y. Times Co. v. Sullivan, 376 U.S. 254, 264–65 (1964) (libel); Snyder v. Phelps, 562 U.S. 443, 460–61 (2011) (intentional infliction of emotional distress).

[15] *See* 582 U.S. 218, 241 (2017).

[16] *Id.* at 223.

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.* at 240 (citing Rust v. Sullivan, 500 U.S. 173 (1991); Nat'l Endowment for Arts v. Finley, 524 U.S. 569 (1998); Regan v. Taxation with Representation of Wash., 461 U.S. 540 (1983)).

[21] *Id.*

[22] *Id.* at 240–41.

that the Constitution—there the Equal Protection Clause—constrains common-law contract rules (or, if you like, the common-law property rules dealing with covenants with respect to land).[23] There seems to be no reason in principle to treat all common-law property rights any differently.

Shelley shows that coming up with the right constitutional rule might sometimes be more difficult than it was in *New York Times Co. v. Sullivan* and *Snyder v. Phelps*.[24] Figuring out what free expression rule should be applied to background rules of property law might be similarly difficult. *Moody v. NetChoice, LLC* pretty strongly suggests that saying, "They're not state actors so they should be free to use their property however they want, including by making regulatory decisions that a government couldn't make," isn't an adequate response to government efforts to constrain the ways in which holders of private power exercise it.[25] Exactly what regulations of private power used expressively are constitutionally permissible remains an open question within the framework constructed by the prior generation's scholars.

C. Continuing Issues Within the Prior Generation's Framework

The past generation's accomplishments established a framework for thinking about free expression issues. That framework, though, was always subject to some destabilizing pressures.

Doctrine can become unstable through innovative Supreme Court decisions. *Reed v. Town of Gilbert*, for example, offered a definition of content-based regulations that threatened to sweep into that category a wide range of regulations that almost certainly couldn't survive the stringent doctrinal test associated with it.[26] *Vidal v. Elster*, though perhaps an example of copyright/trademark exceptionalism,[27]

---

[23] 334 U.S. 1, 10 (1948).

[24] I am firmly of the heterodox view that the best reading of *Shelley* is that it held contracts containing racially restrictive covenants were unenforceable because they rested upon a common-law rule permitting restrictive covenants only if they didn't exclude too many people from purchasing the affected property and that rule had an unconstitutionally racially disparate impact. For my analysis, see generally Mark Tushnet, Shelley v. Kraemer *and Theories of Equality*, 33 N.Y. L. SCH. L. REV. 383 (1988). I have not yet seen an argument that effectively controverts mine. (The orthodox analysis of *Shelley* is that it deals with a common-law rule that is facially discriminatory on the basis of race, but that's just a mistaken understanding of the case.) The Court has rejected broad theories of disparate impact, which suggests that there's something odd about *Shelley*.

[25] *See generally* 603 U.S. 707 (2024). In *NetChoice*, the mechanism was statutory regulation but conceptually at least the mechanism could be common-law property rules, the most prominent of which would probably be rules regulating common carriers.

[26] *See* 576 U.S. 155, 159 (2015).

[27] *See generally* 602 U.S. 286 (2024). For a discussion of that exceptionalism, see generally Mark Lemley & Rebecca Tushnet, *First Amendment Neglect in Supreme Court Intellectual Property Cases*, 2023 SUP. CT. REV. 85 (2024).

might move in the direction of restabilizing the distinction between content-based and content-neutral regulations.[28]

A similar instability might now attend the rationale for excluding some subject matters from content-based First Amendment coverage. *United States v. Stevens* rejected a functional rationale—that the excluded subject matters made so small a contribution to advancing free expression values that the contribution was easily outweighed by the harms the expression caused—for a strictly historical one.[29] We may get some clarification of the current doctrinal structure if and when the Court considers "must carry" and similar requirements imposed upon contemporary social media and justified with reference to modified and updated common-law rules dealing with common carriers.[30]

The "rules versus standards" discussion can always be reopened as well. The reason is that the choice over time is never simply a rule versus a standard. The inevitable over- and under-inclusion of rules generates pressures to develop an exception to a specific rule that would reduce its over- or under-inclusiveness. And sometimes those pressures will prove impossible for judges to resist. The process repeats itself as pressures build to develop qualifications to the exceptions, and so on down the line. At some point a regime of rules, exceptions, and qualifications

---

[28] *Vidal*, 602 U.S. at 290 (upholding a trademark regulation barring registration of a mark using a person's name without her or his permission). *But see infra* note 30 (discussing the possibility that a "history and tradition" test of the sort invoked in *Elster* might produce a restabilization different from the one described in the text accompanying this note).

[29] *See* 559 U.S. 460, 470 (2010) (rejecting or reinterpreting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

[30] A different kind of doctrinal instability might support a quite different manifesto for the next generation. The Supreme Court has recently adopted an approach to some constitutional rights labeled "history and tradition." *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022) (substantive due process); United States v. Rahimi, 602 U.S. 680, 691 (2024) (Second Amendment). Some judges have advocated for using that approach for free expression issues. *See, e.g.*, Nat'l Republican Senatorial Comm. v. Fed. Election Comm'n, 117 F.4th 389, 399 (6th Cir. 2024) (Thapar, J., concurring). The "history and tradition" approach, as so far articulated, asks courts to look for analogues in the past to contemporary regulations. Regulations sufficiently analogous to those in the past—call them "target" analogues—are (or might be) constitutionally permissible whereas regulations that have no past analogues are (probably) unconstitutional. (I insert the parenthetical qualifications because the "history and tradition" approach is so new that we don't really know what "it" is.) There is, of course, a well-developed literature on analogies in law—the literature on common-law reasoning. Described at the most general level, the conclusion of that literature is that analogies are drawn or rejected depending upon whether the purposes served by the target analogues are served, are disserved, or are irrelevant to the purposes served by the thing you're trying to analogize. That's probably unsatisfactory for the "history and tradition" approach, whose rationale is that it minimizes the role of judicial assessment of purposes in coming up with a decision. *See id.* at 401. If the "history and tradition" approach is applied stably to free expression issues, the task for scholars will be to come up with a different, non-purpose-focused analysis of the analogizing process.

begins to look a lot like a regime of standards. I don't think that free expression scholarship or the more general "rules versus standards" scholarship has yet come up with a good way of handling this difficulty.

A related continuing issue comes from abroad. As I've noted, discussions of free speech theory in the 1950s and 1960s took the metaphor of balancing as their way of identifying a First Amendment standard. It was succeeded by the development of "tiers of scrutiny," which was a bit more rule-like (though not rule-like enough for some sitting Justices).[31] Outside the United States, constitutional courts have now in hand a proportionality test that replaces unstructured balancing with an even more rule-like approach.[32] Within the prevailing approach to free expression law a new question can be posed: Does a "rules, exceptions, qualifications" model better serve free expression values than a structured proportionality one, given the second-order considerations that counsel against unstructured balancing?

The preceding paragraphs deal with issues that arise in connection with constitutional doctrine rather than with free expression fundamentals. I don't have much to say about those fundamentals here, largely because I think that, with two exceptions, even by 1970 we had a decent grasp of them. Section I.B described the first exception, a failure to come up with a good account of the relation between private power and the democracy-promoting rationale for free expression.

The second exception is the rationale for free expression as a means of advancing, promoting, or otherwise recognizing personal autonomy. I accept the conventional characterization of this rationale as basically sounding in political philosophy. And because philosophy is an unending conversation, philosophers will regularly come up with new accounts of autonomy that will support new accounts of free expression law.[33] This is not so much to identify a continuing issue with the framework created by the past generation of free expression scholarship as it is to identify an issue that will continue within whatever framework we develop in the future.

D. A Brief Assessment of the Prior Generation's Accomplishments

Section I.C shows that the prior generation didn't solve all free expression problems, nor of course should we have expected it to. In my view, though, the identification of the distinction between content-based and content-neutral regulations was a major advance in understanding questions at the heart of the law of free expression. The introduction of second-order analysis similarly clarified a number

---

[31] *Cf. Rahimi*, 602 U.S. at 731 (2024) (Kavanaugh, J., concurring).

[32] See generally AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS (2012), for a comprehensive exposition.

[33] For recent examples, see generally MATTHEW H. KRAMER, FREEDOM OF EXPRESSION AS SELF-RESTRAINT (2021); SEANA VALENTINE SHIFFRIN, SPEECH MATTERS: ON LYING, MORALITY, AND THE LAW (2014).

of issues that first-order analysis handled badly. As of 2020, then, we simply knew a lot more about free expression theory than we did in 1970.

II. THE TASK FOR THE NEXT GENERATION OF SCHOLARSHIP: ANALYZING EPISTEMIC AUTHORITY

You've got to know stuff to do anything—work at a job, participate in politics, whatever. You can learn some stuff from personal experience but there's lots of stuff that you can't. You have to learn that stuff from someone else. That's where questions about epistemic authority arise: How can you know when to learn something from one person or source rather than another that offers different, even contradictory stuff? And, I reiterate, these questions are pervasive—and they obviously implicate expression, which is, in the present context, the way in which the stuff you need or want to know is transmitted to you from someone who might know the stuff.

Free expression law today was created for a world where established institutions sometimes served as transmitters of information—intermediaries, as they've come to be known—and sometimes had epistemic authority. Recent scholarship about social media focuses on the former, intermediary function: in the past the legacy media were gatekeepers limiting the ability of ordinary people to disseminate their views widely (and thereby limiting the harm that might occur) whereas today ordinary people can disseminate their views widely and thereby increase the risk that harm will occur. This scholarship asks whether or how existing free expression rules—for example, protecting anonymous dissemination of at least political speech—should be modified in light of the sharp reduction in the role of traditional intermediary institutions, now replaced by mysterious algorithmic intermediaries.

More interesting and important, I believe, is the reduction in these institutions' epistemic authority. A few decades ago, if you read a story in *The New York Times* or saw the CBS Evening News you could be pretty sure that the information it contained was accurate enough for you to use. That might still be true of *The New York Times* and CBS News, though the rise of adversary and personalized journalism, which I discuss briefly below, probably has reduced these institutions' epistemic authority: We now know enough to worry about whether the personal story that's the lede to some "mood of Middle America" piece is representative or whether the person identified as a political independent is actually a party loyalist. Taking science, journalism, and higher education as a whole, epistemic authority pretty clearly has diminished. The fact that the National Academy of Sciences has issued a report on a topic with implications for current political controversies no longer carries the weight that it did in the past. The same is true for news outlets and universities and their departments.[34]

[34] During the 2024 presidential campaign a large number of economists, who received the Nobel Prize in Economics, signed a statement critical of claims made by candidate

Some specific features of contemporary free expression law probably were shaped with the thought in mind that the institutions that certified facts did have epistemic authority.[35] More important than specific rules, though, is what I believe to be the underlying assumption of free expression law; that most of the time most of those in a position to say stuff to ordinary people have epistemic authority, so letting them say it will in general make society better off. That assumption probably no longer is accurate. Leiter refers to a contemporary crisis of epistemic authority. "We"—a term that I'm going to unpack—used to know who we could trust to tell us the stuff we needed or wanted to know: scientists, what are now known as the legacy media, credentialed authorities. We don't know who to trust any more. And, I suggest, that's not because of political polarization in which you have your facts and I have my alternative facts. Rather, I suggest, it's in part because the idea of authoritative knowledge has been undermined from within—that is, by people who have used epistemically justified modes of inquiry to "problematize" the claims to epistemic authority made by scientists, the legacy media, and academic specialists.

This Manifesto's claim is about the "in part" in the preceding sentence. Here are a couple of ways of summarizing the Manifesto:

> (1) Much of contemporary free expression law deals with regulations of what Mill called "opinion" rather than facts. And "opinion" swept in quite a bit. "[C]orn-dealers are starvers of the poor" was for Mill an opinion rather than, for example, a statement about the distributive effects of certain market arrangements.[36] As Schauer observed, much that Mill had to say didn't really help in thinking about regulations aimed at what regulators would describe as incontestably within the category of fact.[37] This Manifesto asserts that important questions over the

---

Donald Trump. Sixteen Nobel Economists Sign Letter About Risks to the U.S. Economy of a Second Trump Presidency (June 25, 2024), https://www.documentcloud.org/documents/24777566-nobel-letter-final/ [https://perma.cc/J5SZ-AA6K]. My strong sense is that fact had no effect in changing anyone's views. Maybe the fact that the prize's formal name is the Sveriges Riksbank [Royal Bank of Sweden] Prize in Economic Sciences in Memory of Alfred Nobel indicates that recipients shouldn't be regarded as having much epistemic authority! *See The Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel*, NOBEL PRIZE, https://www.nobelprize.org/prizes/economic-sciences/ [https://perma.cc/M6SM-2QZL] (last visited Apr. 17, 2025).

[35] See, for example, the discussion of libel law in *infra* Section II.C.

[36] JOHN STUART MILL, ON LIBERTY 121 (David Bromwich & George Kateb eds., 2003).

[37] Frederick Schauer, *Facts and the First Amendment*, 57 UCLA L. REV. 897, 904–05 (2010). Schauer also describes some of the features of the social world that produced cases invoking the First Amendment with respect to the regulation of facts. *Id.* at 907 n.56. Some Supreme Court opinions sidle up to the question of regulating factual assertions but rather quickly retreat from serious engagement. *See, e.g.*, Milkovich v. Lorain J. Co., 497 U.S. 1,

> next decade will require that the Court re-center its approach to free expression issues from opinions to facts; acknowledge that epistemic authority—the thing that certifies assertions as "facts"—has irreversibly declined; and, importantly, reconsider the assumption that content-based regulations (when focused on facts) are constitutionally permissible only when strongly justified.
>
> (2) More succinctly, the task for the next generation of free expression scholars is to figure out what the contours of a law of free expression should be in a world where valid claims to epistemic authority are much scaled back from what they were a few decades ago.

A. Basic Ideas Outlined

How do you know that someone or some institution has epistemic authority? The person asserts that something is true. You're not in a position to assess directly whether that assertion is correct. As a rough initial statement, we can say that you evaluate the assertion by looking at the person's credentials. If it's a statement about the risks posed by nuclear power, is the person a nuclear physicist, a structural engineer, or an osteopath? If it's an assertion about the risks posed by the MMR (measles, mumps, and rubella) vaccine, how many medical doctors agree with the assertion? How many epidemiologists? Are the assertions based upon studies that have been published in peer-reviewed journals or only upon self-published studies?

These questions show that credentialing is a social process—getting a degree in a specific field (or somehow demonstrating to people with such degrees that you've actually found something they've missed), going through the peer-review process, getting a job in a high or lower prestige institution (where the allocation of prestige is itself a social process).

Leiter points out that epistemic authority is relational in two senses.[38] First, there are members of an epistemic community: nuclear scientist A and nuclear scientist B. Within that community, A will be more authoritative than B with respect to some

---

21 (1990) (holding that a statement reasonably interpreted as implying that someone had committed perjury "can be [evaluated] on a core of objective evidence"). I don't know of a Supreme Court decision expressly rejecting First Amendment challenges to perjury law itself, but I assume that most analysts would say that that law, while content-based, satisfies the requirements of strict scrutiny. *Cf.* New York v. Ferber, 458 U.S. 747, 763–64 (1982) ("[I]t is not rare that a content-based classification of speech has been accepted because it may be appropriately generalized that within the confines of the given classification, the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required.").

[38] Leiter, *supra* note 1, at 93 ("Epistemic authority is always relative.").

issues. Second, there are outsiders to the epistemic community—the "we" I referred to above. We know that both A and B know more than we do about *any* question of nuclear physics. Suppose, though, that A and B disagree about some specific question that matters to us. How can outsiders assess the relative authoritativeness of their disparate views?

Specific epistemic communities are bounded. Some people are inside them, some outside. How are the boundaries of such communities determined? Or, more colloquially, how do you get credentials to enter the community? Who is a genuine scientist, who a crank? How do outsiders know when someone within an epistemic community—someone with a decent degree in nuclear physics, for example—has become a crank with respect to some issue ordinarily within the community's purview (for example, the relative risks posed by large-scale nuclear power plants and small "backyard" nuclear power generators)?[39]

Scholars have examined a fair number of epistemic communities, some in closer detail than others, and I will argue that they have converged on a general form of answer to these questions. The boundaries of epistemic communities are shaped in important part by social processes of exclusion and inclusion, and within the processes of inclusion there are social processes creating hierarchy. Further, though here the consensus if any is weaker, I argue that a fair amount of scholarship argues, to my mind persuasively, that those processes are tilted with respect to politics, economics, and general considerations of social order—tilted, ordinarily, in favor of the status quo.

One proposition in this Manifesto follows from the observation of tilt. A decent amount of expression, and quite a bit of free expression theory, focuses on *change*. The proposition is that declining epistemic authority based upon the analysis of how epistemic communities are constituted is a good thing because it enables change in areas of social life that have become congealed or impacted or inert or, simply, bad. Subsidiary to that claim is another: that one task for the next generation of scholarship will be to formulate appropriate doctrines that take the permanent reduction in epistemic authority into account.[40]

---

[39] For example, I personally wouldn't give any weight to the views of Kary Mullis on any issue other than something associated with the technology of polymerase chain reactions, for which he won a Nobel Prize in Chemistry. *Kary B. Mullis: Facts*, NOBEL PRIZE, https://www.nobelprize.org/prizes/chemistry/1993/mullis/facts/ [https://perma.cc/Q3YG-6W3Y] (last visited Apr. 17, 2025). He was a climate change and AIDS denialist. *See Kary B. Mullis: Interview*, NOBEL PRIZE, https://www.nobelprize.org/prizes/chemistry/1993/mullis/interview/ [https://perma.cc/7AKQ-3Q6Z] (last visited Apr. 17, 2025).

[40] The somewhat joking formulation in the title of my earlier foray into this area is a first stab at a quite informal doctrinal formulation: "Trust the Science but Do Your Research." Tushnet, *Trust the Science*, *supra* note 3. Somewhat more formally: regulations predicated on challenges to views dominant within an epistemic community should be permitted when those regulations are consistent with views prevalent though not dominant within that community. It should be obvious that one pressure point in this formulation is this: How can an

The remainder of this Part examines three epistemic communities to draw out the processes of social construction I've just mentioned: the so-called hard sciences, journalism, and higher education, first focusing on some specific disciplines and then turning to the university as a whole. My presentations are the barest of sketches, consistent with the "manifesto" form of this Article. The next generation of free expression scholars should, I think, flesh each one out in detail, drawing more fully upon existing scholarship from disciplines other than law to describe the social construction of epistemic authority and any social, political, and economic tilts the epistemic communities have. With such descriptions in hand the next generation will be able to generate some general propositions about epistemic authority and, I hope, work out doctrinal principles that respond appropriately to those propositions.

B. The Social Construction of the Natural Sciences

Leiter begins, as all sensible examinations of epistemic authority should, with the natural sciences, because the epistemic authority of many claims of natural science is the gold standard. We simply know a lot more about chemistry and physics than we do about history and economics.

The starting point for thinking about how assertions in the natural sciences have epistemic authority is that everything we know is in some sense provisional. We know that if we put a plate on a table, it's not going to fall through the table and crash on the floor. The reason we know that is that we have a well-established theory about how atoms make up solid objects with the characteristics that tables have. The *theory* is provisional, though.

The main line in twentieth-century philosophy of science began by explaining why theories were provisional: No matter how well-established a theory seemed to be it could be displaced by an experiment that falsified it. In the face of such an experiment scientists would reformulate the theory to explain everything the existing

---

outsider to the community know when the dissident views are prevalent *enough*? Determining that one dissident is a crank is easy, but what if there are five, ten, or twenty? Leiter, *supra* note 1, at 95 (referring to a single osteopath who stood against a position regarding COVID vaccines on which the "epistemic authorities [were] united"—a crank, in short). The Great Barrington Declaration, challenging prevailing views within the public health community about how to address COVID, was written by an Oxford University professor of epidemiology, a Stanford professor of medicine, and a Harvard professor of medicine. *See The Great Barrington Declaration*, GREAT BARRINGTON DECLARATION, https://gbdeclaration.org/ [https://perma.cc/5CAT-EHQZ] (last visited Apr. 17, 2025). Could regulation of expression—for example, requiring that statements favoring lockdowns be accompanied by a disclaimer—be justified by referring to the Great Barrington Declaration's opposition to lockdowns? Note that the question here is not whether the crank can be prevented from disseminating his views. I address that question briefly below, see *infra* Section II.G.

theory explained *and* the new result. Classical physics explained why the plate doesn't fall through the table but couldn't explain why photons sometimes seem to behave like little balls and sometimes like waves. Quantum physics explains the latter phenomenon and implies that the plate falling through the table is such a low probability event that we can go on having dinner parties as long as we want.

By the end of the twentieth century, though, that account of why theories were provisional had been displaced by one in which social processes featured prominently.[41] When you look at how natural scientists actually behave, the "crucial experiment" account just didn't fit the facts closely enough.[42] Some scientists immediately accept the results of the experiment and set about trying to revise the theory it placed into question; others take a more "wait and see" attitude. Sometimes the relevant scientific community simply ignores the anomalous result; sometimes the community raises nonfrivolous questions about the accuracy of the experimental apparatus or treats the result as a statistical fluke resulting from conditions external to the theory at issue; sometimes the community comes up with a new theory that simply tacked on the anomalous result as what came to be described in generic terms as a Ptolemaic epicycle.

Ultimately, though, the traditional story comes back. The community reformulates the theory as that story claimed and then declares correctly that we now know more than we did before. A scientific community can't simply come to agreement upon whatever it wants. The world as it really is places bounds on the community's conclusions. We know that we've made some progress when our accounts explain

---

[41] I feel compelled by the conventions of legal scholarship to cite here, *see generally* THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (4th ed. 2012), but will be otherwise quite parsimonious in my citation practice.

[42] MICHAEL D. GORDIN, PSEUDOSCIENCE: A VERY SHORT INTRODUCTION 6–7 (2023), gives a taste of the arguments:

> How do you determine that an observation actually constitutes a confirmation of a theory? . . . Suppose you did an experiment in your laboratory to test theory *X*, which predicts that under certain conditions your fact-o-meter should register a value of 32.8, and you got a result of 5.63. You have apparently falsified *X*. What do you do? Should you run to the journals and proclaim the death of *X*?
>
> Not so fast. How do you know that your experimental result was accurate? Maybe the reason you did not get the value of 32.8 is that your fact-o-meter malfunctioned, or perhaps you did not perform the experiment under precisely the right conditions. In short, it is rare to have a thumbs-up/thumbs-down result like in the 1919 eclipse expedition. (As a matter of fact, the results of that expedition were more equivocal than Eddington made them seem. It was several years before absolutely incontrovertible results in support of general relativity were obtained, largely by observatories in California.)

Id.

everything the prior ones did and then something more.[43] And scientific communities eventually do converge toward knowledge about the material world.

What goes into that "eventually"? A bunch of social processes. Diehard adherents to the prior theory actually die off. One or two particularly high-prestige community members, who are prestigious because they've already made major contributions to the field (for physics in the early twentieth century Albert Einstein and Niels Bohr), endorse the new theory. Adherents of the new theory train Ph.D. students who go to other institutions and spread the word.[44]

The field sometimes known as Social Studies of Science (SSS) and sometimes as Science and Technology Studies (STS) has developed to examine these social processes. The details of the processes don't matter for my purposes.[45] Three things do.

First, the processes take time to work. In the meantime, outsiders to the community—"we"—face policy questions in which scientific questions are embedded. During this period, we live in a world of ordinary disagreement about policy relevant facts, not a world in which epistemic authority has eroded, and contemporary free expression doctrine probably has the resources needed to deal with regulatory efforts in this world.

The second thing that matters is that at some point enough members of the community agree that the new story is correct. A scientific consensus "emerges"—or, better, is constructed. People who challenge the consensus, whether from within the community ("holdouts" or cranks) or from outside it, do raise questions about epistemic authority. How many is "enough," though? That too is determined by social processes. Consider an example that Leiter offers—reports by the National Academy of Sciences (NAS).[46] The epistemic skeptic asks, "How do you get to be a member

---

[43] Though I'm not a specialist whose views ought to have any authority, my sense is that this is why the most extravagant claims about the social construction of scientific facts are wrong. (Such claims are what I referred to earlier as "unserious." *See supra* note 2.)

[44] See generally NAOMI ORESKES, WHY TRUST SCIENCE? (Steven Macedo ed., 2019), for a good account of the state of play regarding science's epistemic authority in light of the SSS/STS critique.

[45] It's reasonably clear that sexism affects the processes of knowledge certification. Rosalind Franklin's omission from the award of the Nobel Prize in Physiology or Medicine for decoding DNA is usually attributed to sexism, as is the long delay in awarding that prize to Barbara McClintock for her work on "jumping genes." Reed Jones, *Sexism in Science: Was Rosalind Franklin Robbed of a Noble Prize?*, LMU NEWSROOM (Mar. 22, 2021), https://newsroom.lmu.edu/administrative/sexism-in-science-was-rosalind-franklin-robbed-of-a-nobel-prize [https://perma.cc/6A5T-QX2G]; *Barbara McClintock*, NOBEL PRIZE, https://www.nobelprize.org/womenwhochangedscience/stories/barbara-mcclintock [https://perma.cc/Q28V-CY3M] (last visited Apr. 17, 2025). These delays are examples of the "eventually" I discuss in the text; that McClintock received the Nobel Prize shows that reality does come knocking at some point.

[46] Leiter, *supra* note 1, at 93.

of the Academy?" Scientific achievement, of course, but not everyone who has made contributions to science gets in. "Important" or "substantial" contributions? Again, social processes shape the judgment of importance.

Another version of the same question is this: Who gets to be on the panels that actually write NAS reports? The following "story" is speculative and hypothetical but not wildly outrageous.[47] The NAS decided (or is asked) to prepare a report on some policy-relevant scientific question. The NAS board and its executive officers some up with a list of potential members. Suppose about two-thirds of the relevant community takes one version of the policy-relevant factual matters to be true. Ninety per cent of the list takes that view. The ensuing report might well say something along the lines, "Though some disagreement persists, the consensus of the scientific community is that the contested facts are thus-and-so."

Before turning to some doctrinal implications, I must emphasize that I'm not arguing that the fact that scientific consensus is reached through social processes fully accounts for the decline in the epistemic authority of the sciences with respect to policy-relevant matters. Industry groups and political parties sometimes find it in their interests to cast doubt on scientific claims.[48] They are facilitated in doing so by the existence of what the subtitle of an important work on this issue calls "a handful of scientists."[49] Until dissenters from the consensus can be dismissed as cranks, the social processes identified here are an enabling condition for interest-group and political exploitation: Industries with an interest in denying the human role in climate change were in a better position with some passages in reports by the NAS in hand than they would have been had they only cranks like Immanuel Velikovsky.[50] I should add, though, that similar social processes—that is, interest groups and political activists—assist in producing and supporting epistemic authority.

The process by which consensus emerges is inevitably viewpoint-based, in today's doctrinal terms. I know just enough about quantum physics to be able to

---

[47] One major work in SSS/STS deals with, among other things, the composition of expert panels by the Food and Drug Administration. SHEILA JASANOFF, THE FIFTH BRANCH: SCIENCE ADVISERS AS POLICYMAKERS 165–66 (1990).

[48] Thomas B. Edsall, *MAGA vs. Science Is No Contest*, N.Y. TIMES (Sept. 11, 2024), https://www.nytimes.com/2024/09/11/opinion/republicans-science-denial.html [https://perma.cc/4UP3-NV5D], provides an overview of the political analysis for the United States, with links to relevant scholarly articles. My view is that Edsall and the scholars he quotes understate the role of political leaders in devising programs that appeal to and enhance anti-science attitudes among their constituents.

[49] For the standard citation for this proposition, see generally NAOMI ORESKES & ERIC M. CONWAY, MERCHANTS OF DOUBT: HOW A HANDFUL OF SCIENTISTS OBSCURED THE TRUTH ON ISSUES FROM TOBACCO SMOKE TO GLOBAL WARMING (2010). Additionally, see generally RENÉE DIRESTA, INVISIBLE RULERS: THE PEOPLE WHO TURN LIES INTO REALITY (2024).

[50] On the NAS reports, see DIRESTA, *supra* note 49, at 148–51. On Velikovsky, who purveyed theories about recurrent close encounters between large astronomical objects and the Earth, see generally MICHAEL D. GORDIN, THE PSEUDOSCIENCE WARS: IMMANUEL VELIKOVSKY AND THE BIRTH OF THE MODERN FRINGE (2012).

formulate a hypothetical showing the viewpoint basis for building a consensus. The core ideas of quantum chromodynamics are well-established and understood, and many novice physicists in the field use those ideas in new experiments that generate new knowledge. In contrast, the theories attempting to explain the universe's dark matter and dark energy are highly contested. Let's assume, though, that one theory of dark matter begins to achieve dominance: forty per cent of physicists accept it, then fifty, then sixty. At this point a public university's physics department hires a physicist doing quantum physics. Two candidates emerge, both doing work of roughly equal quality in quantum chromodynamics. One agrees with the sixty per cent about dark matter: the other does not. The department hires the first *because* her views on dark matter conform to an emerging consensus—and thereby contributes to the development of consensus. The hiring decision is viewpoint based on a question about which there isn't yet a consensus.

That might make it constitutionally problematic under contemporary doctrine, though the university setting complicates the analysis. Another version of the hypothetical is a decision by public agencies to purchase or subsidize the publication of only physics books that endorse the not-yet consensus position on dark matter. Yet another would be a requirement that books that don't endorse that position have a sticker attached noting that the book's position on dark matter is not accepted by most physicists.[51]

Contemporary doctrine probably has the resources to deal with these hypotheticals (probably concluding that all are constitutionally permissible). Seeing scientific consensus as socially constructed, though, also brings out the possibility that contemporary doctrine's suspicion of viewpoint-based decisions is the wrong place to start. Where a better starting point would be, I think, might be an important task for the next generation.

Leiter refers to three areas of scientific consensus that are, in some sense, policy-relevant: climate change, evolution, and the efficacy of many vaccines.[52] Are there free expression issues associated with the erosion of epistemic authority manifested in skepticism about the scientific consensus on these issues?[53] As to climate

---

[51] *Cf.* Selman v. Cobb Cnty. Sch. Dist., 449 F.3d 1320, 1324 (11th Cir. 2006) (vacating for further findings a district court decision holding unconstitutional under the Non–Establishment Clause a school board requirement that the following sticker be placed on science textbooks: "This textbook contains material on evolution. Evolution is a theory, not a fact, regarding the origin of living things. This material should be approached with an open mind, studied carefully, and critically considered.").

[52] Leiter, *supra* note 1, at 92.

[53] As I was thinking about this Section of the Manifesto, I was repeatedly tempted to think about substantive policies based upon rejection of science's epistemic authority: policies about extraction of fossil fuels that reject scientific claims about the human role in climate change or bans on requiring prior vaccination as a condition for attending public schools. I resisted that temptation as best I could but think it best to note for readers that the concern in this Manifesto is with free expression and not substantive policy.

change: no one today appears to be seeking to ban completely the dissemination of climate-change skepticism or even to be seeking to require that disclaimers be attached to such skepticism. Perhaps, though, the issue of the role of property flagged in Section I.B might come into play in connection with "cancel culture" ideas about banning this material, or requiring disclaimers, on social media or in connection with appearances in forums sponsored by public agencies including public universities (and private universities who choose to hold themselves to constitutional standards).

As to evolution: clearly yes, in connection with curriculum choices in public schools—at least to the extent, limited though it might be, that evolution-skepticism can be divorced from religion clause concerns. Assume that public schools include some general scientific subject in their curriculum, and that the development of separate species is one such subject.[54] Do students have a First Amendment right to receive age-appropriate information dealing with that subject about which there is a scientific consensus? Only such information? Here the doctrinal resources inherited from the prior generation seem to me extremely thin—and highly controversial within the structure of that doctrine.[55]

And, as to vaccine skepticism: again, pretty clearly yes, in efforts by public health authorities to curb the dissemination of such skepticism again through bans or disclaimer requirements.

Free expression scholarship responding to the erosion of epistemic authority will have to deal with the implications of SSS/STS arguments about the social processes leading to the (provisional) acceptance of the claims of natural science. I suspect that one important pressure point will be the definition of the consensus sufficient to justify actions with free expression implications.

C. The Social Construction of Journalism

Leiter writes, "*The New York Times*, . . . despite certain obvious ideological biases (in favor of America, in favor of capitalism), has served as a fairly good mediator of epistemic authority with respect to many topics."[56] This Section deals with the "ideological biases" qualification in this sentence.

---

[54] This assumption is necessary to deal with Justice Black's concern in *Epperson v. Arkansas*, 393 U.S. 97, 111 (1968) (Black, J., concurring), that schools need not include biology in their curriculums, or the development of species in their biology curriculums. Clearly, though, the definition of a "general scientific subject" will be important here.

[55] For me, the key case is *Island Trees School District v. Pico*, 457 U.S. 853 (1982), dealing in my view inadequately with the question of when school board decisions to remove specific materials from school libraries are constitutionally impermissible.

[56] Leiter, *supra* note 1, at 94. Consistent with his focus on the natural sciences, the topics he lists are climate change, vaccines and autism, and creationism, and he mentions the National Academy of Sciences as a body that the newspaper treats as having epistemic authority. *Id.*

More than two decades ago I looked for scholarship on journalism that synthesized the role of social processes in constructing the authority claimed for what weren't yet known as the legacy media.[57] I was surprised to find little of use to me.[58] Recent work by Paul Horwitz, RonNell Andersen Jones, and Sonja West helps in limning the world in which the legacy media's epistemic authority has declined,[59] though I think their normative commitments to traditional notions of journalistic freedom obscure the contributions they could make to thinking about the rules for the world they describe.

The legacy media claim epistemic authority because they are, in their view, objective. We know from histories of the legacy media that newspapers weren't always objective in the modern sense. Many were expressly organs of political parties; others practiced "yellow journalism," presenting sensationalized factual accounts with little or no concern for their accuracy.

The legacy media became objective because canny entrepreneurs saw that there was money to be made by distancing their news pages from partisan politics. In politics, objectivity meant taking seriously the policy positions and arguments offered by the major parties (while treating the policy positions of minor parties as extreme, radical, or otherwise unserious). It meant seeking information and, importantly, opinions from both sides of political controversies (again, note the definition of the range of admissible disagreement). It meant giving presumptive credibility to official sources of information, and near absolute credibility to official U.S. sources of information about matters happening outside the United States in which the United States government had taken some interest.[60]

Notably, federal constitutional protection of journalism basically didn't exist before the rise of modern journalism. So, despite the persistence of yellow journalism—"miscreant purveyors of scandal," as the Court described them in *Near v. Minnesota*[61]—First Amendment law took shape when leading journalists presented

---

[57] I looked as part of my effort to think through questions of judicial authority ultimately published. *See generally* Mark Tushnet, *Judicial Leadership*, *in* DISPERSED DEMOCRATIC LEADERSHIP: ORIGINS, DYNAMICS, AND IMPLICATIONS 141 (John Kane et al. eds., 2009).

[58] The best, I thought, was work by Michael Schudson. *See generally* MICHAEL SCHUDSON, THE POWER OF NEWS (1995).

[59] *See generally* PAUL HORWITZ, FIRST AMENDMENT INSTITUTIONS (2013); RonNell Andersen Jones & Sonja R. West, *The Disappearing Freedom of the Press*, 79 WASH. & LEE L. REV. 1377 (2022); RonNell Andersen Jones & Sonja R. West, *The U.S. Supreme Court's Characterizations of the Press: An Empirical Study*, 100 N.C. L. REV. 375 (2021); RonNell Andersen Jones & Lisa Grow Sun, *Freedom of the Press in Post-Truthism America*, 98 WASH. U. L. REV. 419 (2020).

[60] Judith Miller's credulous reporting endorsing official claims about weapons of mass destruction in Iraq is a well-known case. *The New York Times* repudiated her reporting, without mentioning her name, in a long editorial note. *From the Editors;* The Times *and Iraq*, N.Y. TIMES (May 26, 2004), https://www.nytimes.com/2004/05/26/world/from-the-editors-the-times-and-iraq.html [https://perma.cc/4VS9-YLUQ].

[61] 283 U.S. 697, 720 (1931).

their profession as pursuing objectivity. That image was reinforced when radio and television came on the scene and were required to comply with "fairness" requirements.

Economic pressures led to changes in journalistic practice that affected the legacy media's epistemic authority. One such pressure has been the decline in advertising revenue because consumers now seek information online.[62] The legacy media do substantially less reporting than in the past about local political issues because they don't have the money to pay journalists with a local politics beat. Reporting for the legacy media might now be something like an entry-level job, with inexperienced writers seeking information and being susceptible to being misled by their sources. "Beat sweeteners" written by more experienced journalists, designed to put their sources in a good light to preserve continuing access to the sources, are now a well-known phenomenon.[63]

One response has been a change in the norms defining objectivity. Hearing from both sides has become "both sidesism," with objectivity today seeming to require that every story about misdeeds by one side include references to assertedly similar misdeeds by the other. Political reporting is dominated by horserace comparisons about who is ahead at every point, with comparisons of policy positions taking a subordinate place.[64] All these practices probably diminish ordinary readers' willingness to take what's published as authoritative.

Adversary journalism is a practice that comes close to abandoning the traditional ideal of objectivity.[65] Adversarial journalists have a mission—to "take down" their targets.[66] They are not immune from the temptation to shade the presentation of their information and in particular to treat as insubstantial the reasons their targets might

---

[62] For an analysis of information or "news deserts," see generally MARTHA MINOW, SAVING THE NEWS: WHY THE CONSTITUTION CALLS FOR GOVERNMENT ACTION TO PRESERVE FREEDOM OF SPEECH (2021).

[63] *See* Timothy Noah, *A Beat-Sweetener Sampler*, SLATE (Apr. 8, 2009, 2:27 PM), https://slate.com/news-and-politics/2009/04/a-beat-sweetener-sampler.html [https://perma.cc/AFR6-TZ5V].

[64] *See* J. Scott Matthews et al., *The Mediated Horserace: Campaign Polls and Poll Reporting*, 45 CANADIAN J. POL. SCI. 261, 261–63 (2012) ("The media's coverage of elections is dominated by 'horserace journalism': journalism that focuses on poll results . . . rather than . . . substantive treatment of election issues." (citation omitted)). Horserace reporting is enabled by the proliferation of polling. When the only polls were Gallup and a handful of others you simply couldn't write as many horserace stories, and by default and tradition, you'd deal with policy positions.

[65] For an overview, see *Adversarial Journalism*, WIKIPEDIA, https://en.wikipedia.org/wiki/Adversarial_journalism [https://perma.cc/8RLM-3WJT] (last visited Apr. 17, 2025).

[66] *See, e.g.*, Kate Duguid et al., *U.S. Media Veterans Back New Trading Firm with Financial News Arm*, FIN. TIMES (Oct. 23, 2023), https://www.ft.com/content/8550d1fe-569b-479c-b5b3-622716eda167 [https://perma.cc/A8GL-MAEV] (describing an effort by journalists providing information useful to short sellers in conjunction with an investment devoted to short selling).

have had for what they did. Personalistic journalism, in which authors insert themselves into the stories, clearly raises questions about the representativeness of the story being told.

Perhaps more important, legacy media's versions of objectivity might have substantive and even cognitive effects. Here, the best example comes initially from the statement made about local television news, "if it bleeds, it ledes." Stories about local crime come first. Substantively this might lead viewers to overestimate the prevalence of crime.

The cognitive effects might be even more important. Consider here the journalistic convention that stories about large-scale social and economic trends be introduced with a paragraph recounting what readers are supposed to take as a representative real-life case in which the trend manifested itself ("if it bleeds, it ledes"). The cognitive point here is that real-life stories (call them stories with direct emotional impact) are thought to be more effective in conveying information than "mere" statistics. Overstating a bit: this practice elevates emotional responses to the effects of policy developments over more deliberative ones.[67]

Journalists will of course respond that their experience shows that "if it bleeds, it ledes" is a good guideline for getting a reader's or viewer's attention. And that might be true. Yet, if so, it shows how objectivity is indeed a process of social construction. We don't know how readers would respond in a world where all trend stories started in the large and worked their way down to some specific examples.

Some free expression issues raised by the decline of journalism's epistemic authority are already clear. In the prior generation Lee Bollinger provocatively suggested that we might distinguish between (roughly) newspapers and radio and television journalism.[68] That proposal was not taken up then but has perhaps resurfaced or transformed into suggestions that the legacy media and the new media be subject to different regulatory regimes. So, for example, perhaps journalists employed by the legacy media should be entitled to claim the protections of journalist privilege statutes whereas true crime podcasters should not.[69] Perhaps libel law should be modified to take account of the decline of journalism's epistemic authority. We might preserve *New York Times v. Sullivan* for the legacy media but adopt a "responsible journalism" standard for new media—or apply a "responsible journalism" standard in every case.[70]

---

[67] Subordinate to this point is the possibility that using examples triggers "base rate neglect," that is, a failure to consider whether the example is actually representative.

[68] Lee C. Bollinger, Jr., *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 MICH. L. REV. 1, 1–4, 6 (1976).

[69] For a relevant discussion, see Howard Fineman, *Who Is a "Journalist"?*, 4 FIRST AMEND. L. REV. 1, 1–2 (2005). *See also infra* notes 111–12 and accompanying text (discussing Leiter's suggestion for reviving the Fairness Doctrine for legacy broadcast media but not the new social media).

[70] For the responsible journalism standard, see Defamation Act 2013, c. 26, §§ 1, 3–4

Again, the question this Manifesto raises is not whether these specific doctrinal suggestions are good ones but whether and how free expression doctrine should take into account the decline in the epistemic authority of the legacy media.

D. The Social Construction of Higher Education: Specific Disciplines and the University as a Whole

In 1963, Clark Kerr, then the president of the University of California, published a series of lectures under the title, "The Uses of the University."[71] A shorthand summary is that in Kerr's view modern universities produced socially useful knowledge. I consider here first the way in which universities produce knowledge—through their departments and disciplines—and then the way in which they assess whether the knowledge is socially useful.

1. Departments and Disciplines

Historians have a subfield, historiography, that expressly addresses the ways in which historical accounts fit into general social processes. A classic example is the historiography of race in the United States.[72] In the early twentieth century, described by one African American historian as "the nadir" for post-slavery race policy,[73] the so-called Phillips-Dunning School (after Ulrich B. Phillips, a Georgia-born historian at Yale University, and William Dunning, who taught at Columbia University) offered a pro-slavery, pro-Confederacy account of race relations.[74] Eugene Genovese then rehabilitated Phillips as race relations in the United States returned to its traditional complexity.[75] The civil rights movement in mid-century was accompanied by a new account treating (eventually controversially) African Americans as "white men with black skins."[76]

(Eng.) (simplifying the defense of responsible journalism created by *Reynolds v. Times Newspapers Ltd.* [1999] UKHL 45, [2001] 2 AC (HL) 127).

[71] See generally CLARK KERR, THE USES OF THE UNIVERSITY (1963), and several subsequent editions.

[72] Another example is the conflict over the proper understanding of the origins of Nazism in Germany, known as the *Historikerstreit*. *See generally* FOREVER IN THE SHADOW OF HITLER?: ORIGINAL DOCUMENTS OF THE HISTORIKERSTREIT, THE CONTROVERSY CONCERNING THE SINGULARITY OF THE HOLOCAUST (James Knowlton & Truett Cates trans., 1993).

[73] RAYFORD W. LOGAN, THE NEGRO IN AMERICAN LIFE AND THOUGHT: THE NADIR, 1877–1901, at 3–4 (1954).

[74] *See generally* ULRICH BONNELL PHILLIPS, LIFE AND LABOR IN THE OLD SOUTH (1929).

[75] *See generally* EUGENE D. GENOVESE, IN RED AND BLACK: MARXIAN EXPLORATIONS IN SOUTHERN AND AFRO-AMERICAN HISTORY (1971).

[76] KENNETH M. STAMPP, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH, at vii (1963).

Peter Novick's *That Noble Dream* provides a historiography of the idea of objectivity in historical studies.[77] In many ways, it's the equivalent for the discipline of history of SSS/STS. Novick structures his story around a persistent dialogue between historians who follow Leopold von Ranke in saying that history wants only to show what actually happened ("*wie es eigentlich gewesen*")—objectivists—and relativists who self-consciously see themselves as located in specific historical circumstances and as affected in their interpretations by those circumstances.[78] Relativists don't deny that there are some unassailable facts. They know that they shouldn't make stuff up,[79] except sometimes, as with experimental forms of narrative history in which imagined episodes are labeled as such.[80] But, the persistent debates between objectivists and relativists within the historical discipline means that outsiders can choose which narratives to accept, the 1619 Project or the 1776 Report for example. And that is a simple description of a world in which the discipline of history can't claim a lot of epistemic authority.

Scholars in other disciplines have critiqued claims that their disciplines produce knowledge as sound as that in the natural sciences.[81] These critiques sometimes explicitly refer to SSS/STS but more generally point in the direction of developing SSS/STS-like analyses of the social processes that shape what counts as knowledge in these disciplines. A notable example is the discussion of the difference between "fresh water" and "salt water" approaches to macroeconomics, which expressly links the differences to the specific departments (Chicago, MIT, Harvard, and others) in which adherents to each approach received their degrees.[82]

The so-called replication crisis in social psychology and close relatives is particularly interesting.[83] Social psychologists attract public attention when they report striking findings that seem to have implications for ordinary people's lives—how

---

[77] *See generally* PETER NOVICK, THAT NOBLE DREAM: THE "OBJECTIVITY QUESTION" AND THE AMERICAN HISTORICAL PROFESSION (1988).

[78] *Id.* at 3–4.

[79] The cautionary tale here is of Michael Bellesiles's. *See generally* James Lindgren, *Fall from Grace:* Arming America *and the Bellesiles Scandal*, 111 YALE L.J. 2195 (2002) (book review).

[80] *See, e.g.*, SAIDIYA HARTMAN, WAYWARD LIVES, BEAUTIFUL EXPERIMENTS: INTIMATE HISTORIES OF SOCIAL UPHEAVAL, at xvi–xxi (2019).

[81] *See, e.g.*, DEIRDRE N. MCCLOSKEY, THE RHETORIC OF ECONOMICS 3–6 (2d ed. 1998). *See generally* DONALD P. GREEN & IAN SHAPIRO, PATHOLOGIES OF RATIONAL CHOICE THEORY: A CRITIQUE OF APPLICATIONS IN POLITICAL SCIENCE (1994).

[82] *Saltwater and Freshwater Economics*, WIKIPEDIA, https://en.wikipedia.org/wiki/Saltwater_and_freshwater_economics [https://perma.cc/XM7P-TZ28] (last visited Apr. 17, 2025), provides a reasonably accurate description. The entry cites a review article by Gregory Mankiw stating, "An old adage holds that science progresses funeral by funeral," an almost express invocation of one feature in Kuhn's account. *Id.*; Gregory Mankiw, *The Macroeconomist as Scientist and Engineer*, 20 J. ECON. & PERSP. 29, 38 (2006).

[83] For an overview, see generally Scott E. Maxwell et al., *Is Psychology Suffering from a Replication Crisis?: What Does "Failure to Replicate" Really Mean?*, 70 AM. PSYCH. 487 (2015).

standing in a particular posture conveys a sense of power, for example. Attempts to reproduce these striking findings frequently fail. On one level the replication crisis offers a simple cautionary note: don't rush into changing your life or your organization's policies when you read a striking finding. The replication crisis, though, might diminish the epistemic authority of scholars in the affected fields not only with respect to their own striking findings but also with respect to their statements on other matters and even with respect to statements by people in the field who haven't made unreplicable findings.[84]

None of this is to say that disciplines never produce knowledge. Scholars know that they should correct an analysis that relied on a spreadsheet with serious coding errors even if the correction substantially qualifies their initial conclusion.[85] With these and other rules in place, disciplines do produce knowledge—just not as much and not as reliably as we used to think. That's why their epistemic authority has declined.

So far, I've discussed the extent to which disciplines produce knowledge. Kerr also thought that the disciplines within the university should produce socially valuable knowledge.[86] How do you measure the social utility of university-produced knowledge? One common measure is whether people currently holding power actually use it. So, for example, a review of international relations scholarship argues that scholars in the field should do "policy-relevant theoretical work" by producing "powerful theories that could help policy makers design effective solutions" to contemporary problems.[87] Two leading figures in the Law and Society Association worry about "the pull of the policy audience."[88]

That knowledge is socially valuable because it assists policymakers doesn't in itself cast doubt on a field's epistemic authority. But, as I discuss in a bit more detail in Section II.E, skewing the production of knowledge can lead outsiders to be skeptical when leaders in the field reject or simply neglect heterodox claims, which

---

[84] For an empirical study providing some limited support for this assertion, see generally Friederike Hendriks et al., *Replication Crisis = Trust Crisis? The Effect of Successful vs Failed Replications on Laypeople's Trust in Researchers and Research*, 29 PUB. UNDERSTANDING SCI. 270 (2020).

[85] *See* Paul Krugman, *The Excel Depression*, N.Y. TIMES (Apr. 18, 2013), https://www.nytimes.com/2013/04/19/opinion/krugman-the-excel-depression.html [https://perma.cc/374F-HWYS] (describing how coding errors led to a mistaken conclusion about the effects of the size of national debt on economic growth).

[86] KERR, *supra* note 71, at 12–16.

[87] Stephen M. Walt, *The Relationship Between Theory and Policy in International Relations*, 8 ANN. REV. POL. SCI. 23, 23 (2005). See generally Peter J. Katzenstein et al., International Organization *and the Study of World Politics*, 52 INT'L ORG. 645 (1998), for an article by three leading figures in the field that provides a historical narrative of the field's development. In its conclusion, the authors discuss "links between scholarship and policy" in approving terms. *Id.* at 684.

[88] Austin Sarat & Susan Silbey, *The Pull of the Policy Audience*, 10 LAW & POL'Y 97, 98 (1988). The authors advocate for "greater distance from the policy audience" than was prevalent in the field. *Id.* at 97.

is to say claims that aren't useful to contemporary policymakers. And that does undermine the field's epistemic authority.

2. The University as a Whole

Sixty years after Kerr gave his lectures his description remains largely accurate, and most of the changes since he wrote reinforce his emphasis on universities' efforts to produce socially useful knowledge. Universities have come to see their students as consumers whose existing demands must be satisfied (subject to some modest efforts to change those preferences). Those demands affect the construction of the university's lived environment and the curriculum's content, now more oriented toward ensuring that graduates are prepared for work. The job focus has meant that the STEM disciplines get more resources, and the more humanistic disciplines are put on fiscal diets. The expenses associated with STEM disciplines mean that donors have come to play a larger role, as has the government through its STEM-related research programs.

The institutional ties U.S. universities have built with universities elsewhere in the world are particularly interesting for my purposes. Universities justify the ties on financial and intellectual grounds. The justifications they offer are formally neutral with respect to the type of government in the other universities' nations and in particularly with respect to the degree to which governments control universities there ("institutions already doing significant scientific work, with the administrative capacity to manage a partnership"). The affiliated universities, though, aren't distributed evenly throughout the world.[89] The formally neutral criteria are applied in ways that have some substantive content. Doctrinal terms aren't relevant here, but they are suggestive with respect to epistemic authority. When outsiders observe that formally neutral criteria have some substantive impact the outsiders may well infer that something fishy is going on—and in particular may infer that the institution wants to have the substantive effect or at least isn't willing to do much about diminishing the effect ("these are people we can get along with"). In the present context that's a description of how a university's claim to epistemic authority, derived from its neutrality, is weakened.

3. Conclusion: Regulating Universities in a World Where Their Epistemic Authority Has Declined

Disciplinary divisions over what counts as knowledge and the social and cultural conditions that shape what counts as socially useful contribute to an erosion of

[89] I haven't done a current survey, but I believe that such a survey would reveal a fair amount of partnering with institutions in China, Singapore, the Arabian peninsula, and India, and rather little with institutions in Africa. That belief isn't quite confirmed by the essays therein, *see generally* Symposium, *Advances and Challenges in International Higher Education*, 153 DAEDALUS 1 (Wendy Fishman et al. eds., 2024), but it isn't undermined either.

universities' epistemic authority. That might affect the degree to which universities are afforded institutional academic freedom—that is, their ability to determine for themselves their intellectual and social missions. Could a legislature insist that a public or private university decline to accept funding from the People's Republic of China for a Confucius Institute, on the ground that the knowledge produced through such institutes was insufficiently reliable?[90]

The reduction in epistemic authority might also affect the academic freedom rules applicable to instructors. Suppose a university adopts a position of institutional neutrality derived from the Chicago Statement defining the university as neutral with respect to many extra-university events.[91] Pointing to the various involvements described earlier in this section, an instructor or the majority of a department calls the university hypocritical and issues a statement about some extra-university issue that would be inconsistent with the Chicago Statement were it issued in the university's name. Can a legislature bar the university from disciplining those who signed the statement? Require that it discipline them?

To reiterate, perhaps tiresomely, I'm taking no position on these questions. They arise because universities no longer have the degree of epistemic authority they formerly had. Robert Post and Paul Horwitz in the prior generation developed free expression theories that differentiated among the applicable rules based on the distinctive missions of different institutions. Among the institutions they discussed were universities.[92] If, as I've suggested, universities' missions no longer match the vision of universities that Post and Horwitz had, our thinking about them will require us to develop some free expression theory compatible with their new missions and the accompanying reduction in their epistemic authority.

E. Commonalities in the Social Construction of Epistemic Communities

We can see some common threads in the discussion of declining epistemic authority, at least with respect to policy-relevant issues, of the natural sciences, journalism, and universities. The main theme, of course, is that the institutions' epistemic authority rests upon foundations in social practices.

---

[90] According to a report by the Government Accountability Office, nearly all schools that had Confucius Institutes closed them in response to a statute that denied federal funding to schools with them. U.S. GOV'T ACCOUNTABILITY OFF., GAO-24-105981, CHINA: WITH NEARLY ALL U.S. CONFUCIUS INSTITUTES CLOSED, SOME SCHOOLS SOUGHT ALTERNATIVE LANGUAGE SUPPORT (Oct. 30, 2023).

[91] For a summary of the principles, see *Chicago Principles*, WIKIPEDIA, https://en.wikipedia.org/wiki/Chicago_principles [https://perma.cc/BV5N-WEFM] (last visited Apr. 17, 2025). For the full report, see REPORT OF THE COMMITTEE ON FREEDOM OF EXPRESSION, FIRE (2015), https://www.thefire.org/sites/default/files/2013/10/10171427/FOECommitteeReport3.pdf [https://perma.cc/LW74-C9MX] (last visited Apr. 17, 2025).

[92] *See, e.g.*, Robert Post, *Theorizing Student Expression: A Constitutional Account of Student Free Speech Rights*, 76 STAN. L. REV. 1643, 1657 (2024) [hereinafter Post, *Theorizing Student Expression*]; Post, *Between Governance and Management*, *supra* note 10, at 1748–49, 1799–800; HORWITZ, *supra* note 59, at 86, 107–08, 116, 237–38.

More concretely though in no special order: First, prestigious institutions and individuals serve as gatekeepers to knowledge domains. Here I'm not referring to common claims about how the legacy media used to open the gates for the dissemination of some material and keep them closed to other material. Rather, the point is that they act as gatekeepers to the domain of knowledge itself. They certify claims about vaccines' efficacy and risks as true or false. Prestige is allocated according to other social processes, including of course whether the prestigious individual or institution has already contributed to knowledge but also including criteria associated with credentialing. Katalin Karikó couldn't get a permanent tenure-line appointment when she and her collaborator Drew Weissman were working on what most researchers thought was the futile effort to stabilize RNA-based vaccines and her (non)-affiliation with prestigious institutions counted against treating their work as serious—until they succeeded and received a Nobel Prize in Medicine in 2023.[93]

Second, utility matters. We can't know whether something is true unless we know that it actually helps someone do something. Social processes help identify the "someones" and the "somethings" here. Compare claimed factual information that helps powerful economic actors in the United States get on with their work to claimed factual information that helps dissident groups organize against those economic actors. I'm confident (this is a manifesto, after all, and I'm entitled to insert my views into it) that the former will have greater epistemic authority—perhaps because it will be written up and broadcast in the legacy media in ways that the latter will not. And, notably, factual information that helps dissident groups organize against foreign governments with which the U.S. government is at odds will have greater epistemic authority as well.[94]

Finally, the social processes that create epistemic authority are tilted in favor of those already in power as Leiter's parenthetical reference to *The New York Times*'s "ideological biases (in favor of America, in favor of capitalism)" suggests.[95] The tilt can be overcome, of course—though the slope, so to speak, might be greater for some assertions that have epistemic authority than for others. It might be easier to get people to discuss the failures of the Centers for Disease Control to communicate

---

[93] Ben Binday, *"Not of Faculty Quality": How Penn Mistreated Nobel Prize-Winning Research Katalin Karikó*, DAILY PENNSYLVANIAN (Oct. 26, 2023, 2:53 AM), https://www.thedp.com/article/2023/10/penn-katalin-kariko-university-relationship-mistreatment [https://perma.cc/WY3T-PBJ8].

[94] The following example isn't perfect but at least gets us in the general area of concern. Zeynep Tufekci's work on social media's utility for dissident activists dealt with Turkish protests against Recep Tayyip Erdoğan, other non-U.S.-based protest movements, and the Occupy movement in the United States. *See generally* ZEYNEP TUFEKCI, TWITTER AND TEAR GAS: THE POWER AND FRAGILITY OF NETWORKED PROTEST (2017). I have a reasonably strong impression that her analysis of the use of social media by dissidents outside the United States has had greater "pick up" than her analysis of the Occupy movement.

[95] Leiter, *supra* note 1, at 94.

effectively the degree to which their recommendations about COVID were contingent and uncertain but the best available at the moment (the slope is gentle) than to discuss the possibility that COVID vaccines have a greater risk of long-term adverse consequences than public health authorities now admit (a steep slope).

The relation between the social processes that construct epistemic authority and the status quo might lead to some perhaps modest doctrinal payoffs. At the most general level, that relation suggests that we should elevate the role of dissent in shaping free expression doctrine because dissent often takes the form of challenging substantive policies justified by the decision-makers' epistemic authority.[96]

Weakened epistemic authority might have implications for the handful of doctrines that impose liability for falsity. I've already mentioned libel law. False advertising law might have to be reshaped if we come to understand the assertion that a statement is false to be an assertion that the statement is inconsistent with the consensus within a socially constructed epistemic community about what the statement asserts.[97] In cases where lies are said to have inflicted material or otherwise cognizable legal harm,[98] we might want to play up a requirement that the so-called liar actually believed that the statement was false or was knowingly indifferent to its truth or falsity.[99]

---

[96] Consider here the role that information from undisclosable sources and methods is said to play in shaping some aspects of foreign policy. Dissenters to such policies can point to the general weakening of epistemic authority as a reason for doubting the soundness of the substantive policies. For a sustained effort to make dissent central in free expression theory, see generally STEVEN H. SHIFFRIN, DISSENT, INJUSTICE, AND THE MEANING OF AMERICA (1999).

[97] Without having thought through all the details, my sense is that this is one place where re-centering on facts and reconsidering the rule of strong justification for content-based regulations would significantly clarify the explanation for liability-favoring results felt intuitively correct. Consider the following problem: the Food and Drug Administration will approve medications within its jurisdiction if manufacturers provide results from two "gold standard" double-blind tests of the medications' safety and effectiveness. Could false advertising liability be imposed on a manufacturer of a food supplement not within the FDA's jurisdiction for an advertisement that said, "scientific studies show," when the manufacturer has one double-blind study and one unblinded study? *Cf.* POM Wonderful, LLC v. FTC, 777 F.3d. 478, 483–84 (D.C. Cir. 2015) (involving a case where the FTC entered an order allowing POM Wonderful to advertise that its product helps treat or prevent disease if it had two gold-standard studies; the D.C. Circuit invoked First Amendment commercial speech doctrine to modify the order to allow such advertising if the manufacturer had one such study). The D.C. Circuit's analysis appears to turn on the fact that the initial FTC order was rigid and left no room for exceptions if, for example, the single gold-standard test was exceptionally powerful. *See id.* at 484. Rethinking First Amendment doctrine with questions about epistemic authority in mind might clarify or simplify the analysis of such cases.

[98] United States v. Alvarez, 567 U.S. 709, 717–19 (2012) (stating in dicta that liability can be imposed in such cases).

[99] Knowing indifference is central to Harry Frankfurt's influential definition of bullshit. HARRY G. FRANKFURT, ON BULLSHIT 24, 33–34, 51–52, 63–64 (2005).

I confess to a sense that these suggestions are rather weak tea.[100] I think as well, and in contrast, that there's probably a lot more that could be done were free expression theory to be subjected to a systematic and wide-ranging exploration of the role that strong and weak epistemic authority plays in that theory—the re-centering I've already mentioned. That at least is the thought that motivates this Manifesto.

F. The "Distrust Default"

One might object that everything I've said so far ignores the elephant in the room. Much free expression doctrine is motivated less by a direct effort to ensure that speech serves the values of free expression than by a deep distrust of the government's ability to determine accurately or without political bias when speech does or does not serve those values—the "distrust default."[101]

Note, though, that such a default has to be assessed in relation to the trustworthiness of the institutions the government seeks to regulate. Consider the following not-so-hypothetical scenario. At some time—let's call it the 1960s—people regarded universities and journalism as having reasonably high levels of epistemic authority. The "distrust default" captures the sense that the government has a significantly lower level of such authority. That justifies skepticism about the government's ability to make things epistemically better by regulating journalism and academic speech. Times change, though, and at a later time—perhaps today—people are significantly more distrustful of journalism and universities and only a bit more distrustful than they used to be of government. The epistemic gap between those institutions and the government has narrowed.

Under those circumstances the case for a generalized claim that governments are likely to be worse at making the marketplace of ideas work effectively than are private institutions is weakened. We would then try to look for areas in which the government's ability can take measures that improve the system of free expression's operation in light of the epistemic weaknesses prevalent in those domains. "Areas," I stress: the argument isn't that the government is always in a better position than those institutions, only that sometimes it is.[102] And, once again, that's what this

---

[100] It's as if the payoff to *The Communist Manifesto* was that cities should own and operate public transit systems. KARL MARX & FRIEDRICH ENGELS, THE COMMUNIST MANIFESTO (London, 1848), *reprinted in* THE COMMUNIST MANIFESTO 73, 91 (Jeffrey C. Isaac ed., 2012).

[101] The idea is familiar; I take the term from Enrique Armijo, though I note that he doesn't claim originality for the term. Enrique Armijo, *Counter-Lies: Disinformation in the Marketplace of Ideas*, IND. L.J. (forthcoming) (manuscript at 49–53), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4765004 [https://perma.cc/JMQ4-JPQP].

[102] That's why my argument wouldn't support the creation of the Orwellian Ministry of Truth that Justice Kennedy feared might be constitutionally permissible were the government to have the power to punish lies as such. *Alvarez*, 567 U.S. at 723. The Ministry of Truth is to be feared because its jurisdiction is unlimited.

Manifesto suggests is the task for the next generation of scholars: a more discrete examination of a world in which the gap between the epistemic authority of the government and other institutions has narrowed significantly.

G. A Note on the Community of First Amendment Scholars

I ended Part I saying that we knew more about free expression today than we did two generations ago. That's a knowledge claim about the community of free expression scholars and is subject to the same kinds of critique as all other knowledge claims. This isn't the place for a full SSS/STS-like analysis, but I think it worthwhile to make two points.

First, members of the community tend to "like" free expression. They tend to think the more expression the better or, more precisely, that rules limiting the dissemination of ideas should have pretty strong justifications.[103] They're uncomfortable with the inference to be drawn from Ronald Coase's analysis of the Federal Communications Commission: Speech is just a product and in a post–New Deal world should be regulable to the same extent that toothpaste and candy bars are.[104]

Second, the First Amendment community is composed almost entirely of academics, academic-adjacent writers, and legacy-media journalists. They tend to think that the institutions with which they are affiliated have earned the epistemic authority they had a few decades ago and tend to reject as ungrounded challenges to that authority. They worry about the social effects of any such decline and tend to hope that it can be restored, perhaps through vigorous reassertions of free expression rules developed when the institution's epistemic authority was at its height.

Third, liking the First Amendment means that members of the community tend to have reasonably strong normative "priors" when confronted with new problems. Post's work provides a good example. His view is that "[t]he value of speech is . . . the value of the social practice within which speech occurs."[105] He acknowledges that social practices change. The focus of his work tends to be on practices that have changed in what he regards as a bad way. When that happens, he argues, we shouldn't

---

[103] The "the more, the better" argument is made almost explicitly in Larry A. Alexander, *Trouble on Track Two: Incidental Regulations of Speech and Free Speech Theory*, 44 HASTINGS L.J. 921, 933 (1993).

[104] *See* R.H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1, 20 (1959).

[105] Robert C. Post, *The Unfortunate Consequences of a Misguided Free Speech Principle*, 153 DAEDALUS 135, 135 (2024) [hereinafter Post, *The Unfortunate Consequences*]; *see also* Post, *Theorizing Student Expression*, *supra* note 92, at 1652 (developing an account of the free expression rights of student in grades K–12 based upon a description of the mission of such schools, according to which courts should "determine, first, whether regulated student speech is within the scope of the managerial authority of the school, and second, whether restraints on student speech are required by the legitimate pedagogical purposes of the school").

change the way speech in the altered social practice is protected or regulated but should "repair" the practice.[106]

The argument of this Manifesto is that he might have things backwards. Put it this way: if the practice changes in a good way we'd want to alter the rules regulating speech in that domain. I have a sense that I'm more willing than others to treat as good the "decline" (here read "change") in epistemic authority of the natural sciences, journalism, academic departments, and universities as a whole. With that view we might be better off changing the way we think about speech in the new environment.

Members of the First Amendment community aren't opposed in principle to updating their priors—responding to changes in the social practices on which Post focuses—but it takes quite a bit to get them to do so. And social processes are what it takes. Leiter mentions the way in which Catharine MacKinnon's work had some, but rather limited, effects on free expression theory.[107] The reason for the effect is that her work was one of the vehicles by which the second wave of feminism entered the legal academy; the reason for the limits is the strength of the community's normative priors.[108]

Taken together these observations suggest to me that the community of First Amendment scholars will react to the decline of epistemic authority by attempting to restore that authority, thereby making rethinking the overall structure of free expression theory unnecessary. As I've said, I doubt that such a restoration is possible. Rethinking will be difficult. To use Thomas Kuhn's terms, it will require a paradigm shift.[109] I don't have a good handle on identifying the social processes that lead to paradigm shifts in the legal academy. I do think that quality of mind matters ("the merits," in some sense). So, it might take scholars with the qualities of mind of Bollinger, Post, Schauer, and Stone to carry out this Manifesto's call.[110]

---

[106] Post, *The Unfortunate Consequences*, *supra* note 105.

[107] Leiter, *supra* note 1, at 100.

[108] Two additional examples: (1) The work by Soraya Chemaly on cyberstalking and other harms caused by speech on social media. *See, e.g.*, Soraya Chemaly, *Demographics, Design and Free Speech: How Demographics Have Produced Social Media Optimized for Abuse and the Silencing of Marginalized Voices*, *in* FREE SPEECH IN THE DIGITAL AGE 150, 151 (Susan J. Brison & Katharine Gelber eds., 2019) (I note that Schauer and Post have chapters in this collection as well); *see also* DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE 13–14 (2014). (2) The more recent treatment of verbal acts as religion-based hostile environment harassment (or as regulable hate speech) in connection with protests about Israel's actions in Gaza, which shows how partisan political pressures can lead to updating.

[109] KUHN, *supra* note 41, at 1.

[110] I note that all four scholars also took on important administrative responsibilities in their institutions: four deans, two provosts, one president (of two institutions). They did so after they had made their major contributions to free expression theory but perhaps they brought to their scholarship whatever it was that made them good academic administrators—something like a breadth of view—even before they actually became administrators.

H. Conclusion: Some Problems Sketched

Let's assume that the erosion of epistemic authority is permanent and substantial. What sorts of free expression issues might we expect to arise? Some will undoubtedly deal with specific issues of the moment and can't be anticipated. The content of others, though, probably can be.

The set-up is this: We have some substantive regulations based upon facts that are sufficiently well-established to be taken as (provisionally) true, and other substantive regulations based upon facts as to which there is a consensus in the relevant community (the latter set of facts being better established than the former). There are people—call them the "deniers"—who reject the epistemic authority of the communities making the "good enough" or "consensus" assessments. Almost by definition the deniers are in a minority overall, but they might be a majority in some governing unit (a city or a school board) with jurisdiction over something tied to the substantive regulation. The general form of the free expression questions is: In either the "good enough" or "consensus" cases can the majority adopt free-expression compatible regulations that limit the ability of the deniers to disseminate their denialism? In either of those cases when the deniers have some regulatory authority can they adopt free-expression compatible regulations that make it more difficult for the majority to accomplish the goals of the substantive regulations? And, to extract the free-expression issue expressly, what regulations are compatible with free expression in a world where epistemic authority is significantly weaker in many policy-relevant domains than it was a few decades ago?

I think we can expect to see efforts to bolster and to undermine epistemic authority (sometimes both at once). Bolstering might occur through subsidies to entities that regulators believe to be particularly well-justified epistemically (reliable, as a shorthand) or bans on the distribution of material from entities they believe to be particularly badly justified (unreliable). In today's doctrinal terms we might ask whether "reliability" is a content-based criterion (my guess is that the answer is, yes).

Leiter suggests reviving the Fairness Doctrine for the legacy media as a means of bolstering.[111] His argument is that doing so would make unsustainable one-sided business models and, apparently, with both sides getting equal time, consumers will be able to assess policy-relevant scientific claims on the merits.[112] I have some quibbles and a deeper doubt. The quibbles: Limiting the benefits of the doctrine to

[111] Brian Leiter, *The Epistemology of the Internet and the Regulation of Speech in America*, 20 GEO. J.L. & PUB. POL'Y 903, 931–32 (2022) ("Broadcasters who devote time to controversial issues of public importance . . . ensure that representatives of the two major political parties in the United States have equal opportunity to present their views on these issues.").

[112] I infer the business-model argument from Leiter's statement, "This requirement would throw 'off the air' Sean Hannity and Rachel Maddow." *Id.* at 932.

the two major political parties wouldn't do much about contestable positions shared by the parties, a point suggested by Leiter himself who notes that the political "spectrum" is "narrow."[113] Limiting the revived doctrine to the legacy media couldn't do anything about epistemic undermining on the internet, which might well be today a more influential source of skepticism than the legacy media. The deeper doubt: Suppose the legacy media responded to a revived Fairness Doctrine with a "point-counterpoint" model in which representatives of both sides basically shout at each other.[114] My guess is that consumers would respond with an even deeper skepticism about the authority claimed by both sides.

Undermining might occur through requirements that material regulators believe to lack adequate epistemic justification be accompanied by disclosures or disclaimers (the content of which themselves might be subject to epistemic validation to the extent that it's possible).[115] Today we see such disclosures in connection with dietary supplements advertised as helping people deal with various ailments or perceived medical problems: "These statements have not been evaluated by the Food and Drug Administration. This product is not intended to diagnose, treat, cure or prevent any disease."[116] They are doctrinally justified today because they deal with commercial activity in a medical context, though they have come under some First Amendment pressure.[117]

Disclosures and disclaimers deal with material that an epistemic community treats as inadequately justified. In contrast, regulators might try to undermine the epistemic community itself because they believe that the community treats as inadequately justified information that is "actually" good enough to act on.[118] The easy examples don't implicate free expression (bans on vaccine requirements that are broadly supported in the public health community, for example). Removal of prize-winning books from library collections or required or recommended reading lists in schools and public universities do.[119] Contemporary law on this question is

---

[113] *Id.*

[114] The reference here is to a recurrent skit on "Saturday Night Live." For an example, see Saturday Night Live, *Weekend Update: Jane, You Ignorant Slut*, YOUTUBE (Aug. 7, 2017), https://www.youtube.com/watch?v=c91XUyg9iWM [https://perma.cc/7L65-ZL6P].

[115] This is a common feature of proposals to regulate the dissemination of false information through modern social media.

[116] 21 C.F.R. § 101.93(c)(1) (2016).

[117] For an overview, see Amy Kapczynski, *The Lochnerized First Amendment and the FDA: Toward a More Democratic Political Economy*, 118 COLUM. L. REV. F. 179, 183 (2018).

[118] *Cf.* Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 585 U.S. 755, 761–64, 778 (2018) (holding unconstitutional state requirements of specified factual disclosures by crisis pregnancy centers, including—for centers not licensed as medical facilities—that they were unlicensed).

[119] I use the term "prize-winning" to indicate that the works have wide approval within some epistemic community.

incredibly messy. Doctrine that allowed regulators to undermine epistemic authority would clarify it—as would doctrine that barred them from attempting to do so. That's not to say that any specific act of undermining epistemic authority itself or that the overall goal of undermining the epistemic authority of specific communities is a good idea. Yet, one lesson I draw from Sections II.B through II.D is that sometimes that kind of undermining is a good idea. Another is that it's going to happen, and scholars ought to be in a position to discuss its implications for these and similar undermining policies rather than simply assert that the people who write or choose the books have epistemic authority that outsiders must accede to.

The next generation of free expression scholarship will, I think, have to grapple with the question of whether today's doctrine does a good job of handling reasonable efforts to bolster or undermine epistemic authority. If they conclude that it doesn't, how might they shape doctrines allowing bolstering and undermining when appropriate?[120]

CONCLUSION: A TRULY PRAGMATIC TURN IN FREE EXPRESSION THEORY

Paul Feyerabend was a philosopher of science some of whose ideas—most notably, I think, his railing "against method," his advocacy of methodological pluralism, and his provocative phrase "anything goes"—influenced the development of SSS/STS.[121] I recall reading the following anecdote, though I can't now locate the source and so can't vouch for its details, much less its veracity: Feyerabend was delivering a paper at a conference in New York. One of his critics noted that Feyerabend had taken a plane from San Francisco to New York. But, the critic asked, if anything goes, why hadn't he ridden in on a broom? Feyerabend replied, "Because I don't know how, it would take a lot of time to learn, and I have better things to do with my time."

Embedded in that answer is a serious philosophical claim. Feyerabend took a plane because planes work even if brooms might work too, just not as effectively given his specific circumstances. The criterion he offered, that is, was pragmatic in a serious philosophical sense.

I think that the lesson to be drawn from the analysis of epistemic authority sketched in this Manifesto is likely to be that serious pragmatism is the way to go.[122] I think that the next generation of free expression scholars will have to get up to speed with a fairly deep engagement with John Dewey and the philosophical tradition in which he is located. And, from my reading of Dewey's comments about

---

[120] Leiter, *supra* note 1, at 99 (offering one doctrinal modification: "apply the familiar categories of 'low value' speech, *but without their temporal conditions*").

[121] *See Paul Feyerabend*, STAN. ENCYC. PHIL. (Aug. 24, 2020), https://plato.stanford.edu/entries/feyerabend/ [https://perma.cc/7XEA-E55Z].

[122] Not the drive-by sense of pragmatism casually invoked by many legal scholars.

free expression during World War I,[123] I suspect that one takeaway from that engagement will be a fair degree of skepticism about strong normative claims about general propositions about free expression as a constitutional right—whether those propositions favor the protection of speech in general or are comfortable with broad regulation of speech in general. I suspect that a truly pragmatic approach will lead one to see all the interesting cases—today, perhaps, the cancel culture and hostile environment harassment—as close ones.[124]

But all that is for the next generation. Maybe I'm wrong about even taking a pragmatic turn, or about what such a turn would lead to. I'm fairly confident, though, in asserting that major advances in understanding free expression will come from younger scholars with the qualities of mind manifested in the work of Bollinger, Post, Schauer, and Stone.[125]

---

[123] *See, e.g.*, John Dewey, *Conscription of Thought*, in 10 JOHN DEWEY: THE MIDDLE WORKS 1899–1924, at 276 (Jo Ann Boylston ed., 1980).

[124] I don't want to get into deeper waters here than I can manage, but I suspect that a truly pragmatic analysis would treat knowledge along the lines of "something that we're willing to act on," and that the doctrinal questions will revolve around regulations adopted when some of us think that others of us are willing to act on something that we ourselves wouldn't act on, and in doing so, those others will cause harm.

[125] I must conclude with the observation pressed upon me by Rebecca Tushnet that there's much to be written about the possible decline in the epistemic authority of courts with respect to facts (consider the effects of Innocence Project findings about mistaken convictions), mixed questions of fact and law (some people whose convictions have been upheld aren't "really" felons), and even law (though in a sense much of my own skeptical writings about judicial review could be recast as consisting of challenges to the epistemic authority of courts with respect to law).