Democracy, Expertise, and Academic Freedom

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Democracy, Expertise, *and* Academic Freedom

A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE

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For Owen:
Il Miglior Fabbro
With affection.

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Introduction

As I type these words, I gaze out at my backyard, and I know that there is a large oak in the northwest corner of my lawn. I have knowledge of this oak both because I can see the tree and because I have reason to trust my senses. My knowledge of this oak should be contrasted to my knowledge that cigarettes cause cancer. I cannot acquire the latter form of knowledge merely by observing the world and by trusting my senses.

In fact I have learned about the carcinogenic properties of cigarettes by studying the conclusions of those whom I have reason to trust. We call such persons "experts." How did these experts come to know that cigarettes are carcinogenic? Certainly not in the same way that I came to know about my oak tree. They instead deployed the full and elaborate apparatus of modern epidemiological and statistical science. This science consists of practices of knowing that can be acquired only through training and instruction. The practices create forms of knowledge that are constantly expanding through speculation, observation, analysis, and experiment. In this book I shall refer to this kind of knowledge as "expert" or "disciplinary" knowledge. Any modern society needs expert knowledge in order to survive and prosper.

In this book I analyze the relationship between the First

Amendment and the practices that create and sustain disciplinary knowledge. The bald words of the First Amendment provide that "Congress shall make no law . . . abridging the freedom of speech." We have traditionally interpreted these words to mean that the Constitution protects a "marketplace of ideas"[1] that we believe produces knowledge. This account of the First Amendment was first articulated by Justice Holmes in his justly famous dissent in *Abrams v. United States,*[2] arguably the origin of all judicial efforts to theorize the First Amendment.[3] Holmes explained:

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.[4]

The United States Supreme Court has since frequently proclaimed that "it is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail."[5] That the point of First Amendment doctrine is to "advance knowledge and the search for truth by fostering a free marketplace of ideas and an 'uninhibited, robust, wide-open debate on public issues'"[6] has become more

or less a constitutional commonplace.[7] Indeed, "the most influential argument supporting the constitutional commitment to freedom of speech is the contention that speech is valuable because it leads to the discovery of truth."[8]

The very concept of a marketplace of ideas has long been subject to devastating objections based upon its various imperfections, inefficiencies, and internal contradictions.[9] But in this book I focus on the marketplace of ideas from a slightly different angle. I inquire into the relationship between the marketplace of ideas and the production of expert knowledge. I argue that such knowledge can be produced only if the norms and practices of a discipline are observed.[10] And a discipline, as the *Oxford English Dictionary* reminds us, refers to "the training of scholars or subordinates to proper and orderly action by instructing and exercising them."

The marketplace of ideas expresses the egalitarian principle that persons cannot be regulated based upon the content of their ideas. We have interpreted the First Amendment to mean that every person has an equal right to speak as he or she thinks right. The state is therefore constitutionally prohibited from disciplining our communication on the basis of an official view about what is proper or correct. The First Amendment stands for the proposition that we are not the students of the state. We are adults who are constitutionally empowered to speak for ourselves.

If expert knowledge depends upon the preservation of disciplines, and if disciplines require maintenance of "proper and orderly action," the very independence jealously safeguarded by the First Amendment is in tension with the production of expert knowledge. If we wish to know whether

cigarettes are carcinogenic or whether high tariffs produce market inefficiencies or whether plutonium-239 has a half-life of about 24,000 years, we cannot intelligently speak for ourselves. We cannot know such matters by reference to our own immediate sensual knowledge. We must instead rely on the results of the disciplinary practices that define atomic physics or economics or medicine.[11] Anyone who has ever submitted a paper to a top-flight professional journal would immediately recognize that these disciplinary practices exclude as much speech as they facilitate. If a marketplace of ideas model were to be imposed upon *Nature* or the *American Economic Review* or *The Lancet,* we would very rapidly lose track of whatever expertise we possess about the nature of the world.[12]

Contemporary technical expertise is created by practices that demand *both* critical freedom to inquire *and* affirmative disciplinary virtues of methodological care, virtues which the philosopher Charles Peirce once called the "method of science" as distinct from the "method of authority."[13] The maintenance of these virtues quite contradicts the egalitarian tolerance that defines the marketplace of ideas paradigm of the First Amendment. Because the practices that produce expert knowledge regulate the autonomy of individual speakers to communicate, because they transpire in venues quite distant from the sites where democratic public opinion is forged, they seem estranged from most contemporary theories of the First Amendment. My object in this book is to inquire what, if anything, can be said about this constitutional hiatus.

I stage this inquiry in three chapters. In Chapter One, I present what I regard as the most convincing account of the normative foundations of our First Amendment. This account

centers on the value of what I call "democratic legitimation," which explains why the First Amendment is committed to the egalitarian premise that every person is entitled to communicate his own opinion. In Chapter Two, I discuss the tension between this entitlement and indicia of reliability that define expert knowledge. I argue that there is indeed a First Amendment principle capable of sustaining the disciplinary practices that produce expert knowledge and that this principle depends upon the constitutional value I call "democratic competence." Understanding the relationship between democratic legitimation and democratic competence is difficult and challenging, because democratic legitimation both requires democratic competence and is in many ways incompatible with it. In Chapter Three, I address the consequences of democratic competence for the production of disciplinary knowledge within universities. I discuss the constitutional foundations of academic freedom, which have been badly misunderstood by many contemporary commentators and court decisions. Finally, in the Conclusion, I underscore the larger theoretical implications of the vision of constitutionalism that I espouse.

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Democratic Legitimation and the First Amendment

In this book I consider the First Amendment as a source of judicially enforced rights. The First Amendment serves this function by establishing distinctive doctrinal tests and standards that courts use to evaluate the constitutionality of government regulations. Following Frederick Schauer, I distinguish between First Amendment "coverage" and First Amendment "protection."[1] The former refers to the kinds of government regulation that should be subject to the special scrutiny exemplified by the distinctive doctrinal tests of the First Amendment; the latter refers to the content of these tests, which determines what courts will allow and what they will forbid. An essential task of First Amendment theory is to explain the scope of First Amendment coverage. We need to know the circumstances in which courts are authorized to deploy the distinctive doctrinal tests and principles of the First Amendment.

The text of the First Amendment refers to "freedom of speech." This has suggested to some, like Justice Souter, "that speech *as such* is subject to some level of protection unless it falls within a category, such as obscenity, placing it beyond the

Amendment's scope."[2] To extend First Amendment coverage to "speech as such" requires an account of what we mean by "speech." Normally any such account begins by distinguishing "speech" from "action." Thus the pioneering First Amendment theorist Thomas Emerson sought to explain the scope of First Amendment coverage by reference to "a fundamental distinction" between "'expression' and 'action,'" a distinction that he believed would have to make up "a crucial ingredient" of any First Amendment theory.[3]

Of course we all can recognize paradigmatic examples of speech and action. Addressing the assembled crowd in Hyde Park is speech; throwing a brick through my neighbor's window is action. But if we try to generalize these paradigmatic examples into systematic principles that distinguish speech from action, we at once run into notorious difficulties. Emerson, for example, sought to define speech as the "communication of ideas."[4] His approach was subsequently adopted by the Supreme Court in *Spence v. Washington,* which held that First Amendment coverage would be triggered whenever "an intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it."[5]

Unfortunately this approach is impossible to reconcile with our actual First Amendment jurisprudence. Even if I throw a brick through my neighbor's window in order to communicate the particularized message that I do not like his religion and that he ought immediately to vacate the premises, and even if the likelihood is great that this message will be understood by my neighbor, no one would think to extend First Amendment coverage to my subsequent prosecution for van-

dalism.[6] It is child's play to multiply such examples. Just think of all the messages deliberately and successfully conveyed by acts of terrorism.

Moreover First Amendment coverage does *not* extend to large patches of perfectly ordinary state legislation, like the Uniform Commercial Code or the imposition of tort liability for the negligent failure to warn, even though such legislation precisely seeks to control the successful communication of particularized messages in language. "We are men," Montaigne writes, "and we have relations with one another only by speech."[7] To define First Amendment coverage by reference to communication in language would constitutionalize virtually all our "relations with one another," and such a conclusion would be neither accurate nor desirable.

To make matters even more complicated, First Amendment coverage has properly been held to extend to a communication that forms part of a "significant medium for the communication of ideas"[8] even if the communication does *not* succeed in conveying a particularized message.[9] The Court, per Justice Souter, recognized in the context of a St. Patrick's Day parade that if the *Spence* requirement of "a narrow, succinctly articulable message" were taken as precondition for First Amendment coverage, constitutional doctrine "would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll."[10]

These examples suffice to demonstrate that it is not possible constitutionally to distinguish speech from action on the ground that the former communicates ideas or uses language. The implication of this conclusion is quite significant, for it

suggests that speech cannot be distinguished from action because of some common property that "speech" possesses but that "action" does not.[11] It follows that the scope of First Amendment coverage cannot be determined merely by observing properties in the world; it does not depend upon the distribution of any natural thing like "ideas" or "speech as such."

Time and again Emerson's efforts to define the scope of First Amendment coverage were frustrated by this fact.[12] But because he was a great First Amendment theorist, one can discern in Emerson's work the seeds of a very different approach to the problem we are considering. Almost casually Emerson notes that the scope of First Amendment coverage may have to be ascertained in light of "the fundamental purposes of the system [of freedom of expression] and the dynamics of its operation."[13] This approach would constitute the polar opposite of *Spence* and the concept of "speech as such." It would determine the reach of First Amendment doctrine not by observing properties of the world—by asking whether regulated behavior communicates ideas—but instead by articulating the purposes of the First Amendment and by developing First Amendment doctrine in ways that serve these purposes. Forms of conduct that realize distinctively First Amendment values would be classified as "speech" that triggers First Amendment coverage.

We can now begin to appreciate why the question of First Amendment coverage is so profound. The actual contours of First Amendment doctrine cannot be explained merely by facts in the world; they must instead reflect the law's efforts to achieve constitutional values. This suggests that we can learn

the purposes we have constructed First Amendment doctrine to achieve by tracing the contours of actual First Amendment coverage.[14]

I.

The text of the First Amendment is mute about its purposes. These must be constructed. Judicial efforts to determine the objectives of the First Amendment are less than a century old. Modern First Amendment doctrine first appears in the great Holmes opinions of 1919,[15] and it does not begin to develop until the 1930s. Both the Court and commentators have ever since vigorously debated what the purposes of the First Amendment ought to be.

All Americans are entitled freely to advocate whatever theory of the First Amendment they find most convincing. But when we speak of the purposes of the First Amendment, we refer to the collective allegiances of the nation, in which are rooted the ground and legitimacy of constitutional law. These allegiances become visible in the historical commitments of the judicially enforced First Amendment. To determine the purposes of the First Amendment, therefore, we must consult the actual shape of entrenched First Amendment jurisprudence.

We need not passively receive this inheritance. We can instead aspire to what John Rawls has termed "considered judgment in reflective equilibrium."[16] We can give our nation's actual jurisprudential commitments, as expressed in its historically decided cases, their most powerful, defensible, and persuasive formulation, and we can then critically re-evaluate received doctrine in light of this formulation. Reflective equi-

librium requires a critical engagement with our own past. Constitutional law depends upon such engagement because "how we are able to constitute ourselves is profoundly tied to how we are already constituted by our own distinctive history."[17]

Over the past decades, and speaking roughly, three major purposes for the First Amendment have been proposed. The first, embodied in the marketplace of ideas theory, is cognitive; the purpose of First Amendment protections for speech is said to be "advancing knowledge and discovering truth."[18] The second is ethical; the purpose of the First Amendment is said to be "assuring individual self-fulfillment" so that every person can realize his or her "character and potentialities as a human being."[19] And the third is political; the purpose of the First Amendment is said to be facilitating the communicative processes necessary for successful democratic self-governance.[20]

Without question the marketplace of ideas theory captures something essential to growth of knowledge. Kant famously grounded enlightenment in the spirit of *Sapere aude*: the "resolution and courage to use one's own understanding without the guidance of another."[21] The marketplace of ideas theory stresses that knowledge cannot grow, and truth cannot advance, unless the law allows us to venture our own ideas and reasons. Yet when we speak of "advancing knowledge and discovering truth," at least in the context of expert knowledge, we refer to something more than mere hypothesis and speculation.

"Standard analysis" in philosophy holds that "knowledge" is "belief that is both true and justified."[22] Philosophers have puzzled forever about how true and justified belief should