

# Knowledge Institutions in Constitutional Democracies: Preliminary Reflections

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*This paper argues that “knowledge institutions” should be recognized as an essential component of constitutional democracy. They include government statistical offices and university departments; a free press; libraries and museums. Many of these institutions exist in both private and public forms. Their commonality lies in their having as a central purpose the development or dissemination of knowledge of the world and in their being committed to the application of disciplinary standards in*

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*pursuit of knowledge and evaluation of knowledge claims. These distinctive norms that characterize knowledge institutions transcend public/private (or government/civil society) boundaries. These norms require in turn that knowledge institutions, and those who work within them, enjoy a degree of independence in applying their disciplinary standards for the pursuit of better knowledge, in ways that existing constitutional doctrine (at least in the United States) may not always recognize and support, across areas ranging from administrative law to free speech. Focusing on the role of knowledge institutions and their shared commitments provides a useful new lens through which to think about what democratic constitutionalism requires and what constitutional law should protect and promote.*

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## I. Introduction

Knowledge institutions are fundamental to the success of constitutional democracy. They span the public and the private sectors. They include universities — public and private; the press — both privately-developed press media and some governmentally-supported broadcasting entities; elementary and secondary educational institutions; libraries and museums, public and private; government offices that collect, analyze or make available objective data or other sources of knowledge; and non-governmental organizations (“NGOs”) that do the same. Courts and other parts of the government may also serve as knowledge institutions, as may some online websites like Wikipedia. The field of comparative constitutional studies needs a kind of nomenclature to capture and conceptualize this boundary-crossing but essential set of institutions, central to both the democratic and the constitutionalist components of democratic constitutionalism. This paper aims to make a start.

Knowledge institutions face threats from governments and from social, technological and economic changes. As recent scholarship suggests,<sup>1</sup> threats by governments against knowledge institutions — including institutions of higher learning, the press, and NGOs — often accompany threats to independent judiciaries, to government watchdog offices, and to genuinely free, fair, and open elections in countries with rising authoritarianism. In the last decade we have seen rising illiberalism in countries once regarded as solidly ‘free and democratic’. Several co-existing trends have been identified by scholars, such as Huq and Ginsburg, including attacks on independent courts, on law, and other

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1 See e.g. Tom Ginsburg & Aziz Huq, *How to Save a Constitutional Democracy* (Chicago: University of Chicago Press, 2018) [Ginsburg & Huq]; Mark Graber, Sanford Levinson & Mark Tushnet, eds, *Constitutional Democracy in Crisis?* (Oxford: Oxford University Press, 2018); Wojciech Sadurski, *Poland’s Constitutional Breakdown* (Oxford: Oxford University Press, 2019). On the role of political parties in building or sustaining constitutional democracy, see e.g. Nancy Bermeo & Deborah Yazhar, eds, *Parties Movements and Democracy in the Developing World* (Cambridge: Cambridge University Press, 2016); Steven Levitzky & Daniel Ziblatt, *How Democracies Die* (New York: Crown Publishing Group, 2018).

institutional checks on government;<sup>2</sup> efforts to undermine the competitiveness of elections;<sup>3</sup> “centralization and politicization” of executive power;<sup>4</sup> and a shrinking of the public sphere that provides an epistemic foundation for liberal democracy.<sup>5</sup>

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- 2 See *e.g.* Aziz Huq & Tom Ginsburg, “How to Lose a Constitutional Democracy” (2018) 65:1 *UCLA Law Review* 78 at 127 (quoting honorary speaker of Polish Parliament as saying “[i]t is the will of the people, not the law that matters”).
  - 3 See *e.g.* Kim Lane Scheppele, “An Election in Question: Part II, Writing the Rules to Win” (24 February 2014), online (blog): *The New York Times* <<http://krugman.blogs.nytimes.com/2014/02/28/hungary-an-election-in-question-part-2/>> (describing effect of new election rules and districts drawn by the Fidesz government to assure Fidesz electoral victories in Hungary).
  - 4 Huq & Ginsburg, *supra* note 2 at 118. This consists of attacks on the autonomy, meritocratic orientation, expertise, and impartiality of the bureaucracies that make up so much of government. See *ibid* at 130 (reporting purges or detention of thousands of Ministry of Education officials, judges, university deans, and others in Turkey); “Freedom in the World 2018: Turkey” (2018), online: *Freedom House* <[www.freedomhouse.org/country/turkey/freedom-world/2018](http://www.freedomhouse.org/country/turkey/freedom-world/2018)> (describing Turkish government’s “crackdown on its real and suspected opponents”, dismissing “more than 110,000 people from public-sector positions and arrest[ing] more than 60,000 people”, many held in pretrial detention for long periods, closing civil society organizations, prosecuting journalists and closing media outlets, and arresting civil society and human rights leaders).
  - 5 See generally Huq & Ginsburg, *supra* note 2 at 132–34 (noting attacks on journalists and media in Venezuela, Turkey, Poland, and Russia, including through libel laws, and license revocation). On the prosecution of Ibrahim Kaboglu, a professor of human rights law in Turkey, see *infra* note 29. He has more recently had his passport revoked and his university position terminated. In Hungary, since the 2010 election, there has been a dismantling of institutions of constitutionalism and competitive democracy, with less press and academic freedom. See *e.g.* Franklin Foer, “Victor Orban’s War on Intellect”, *The Atlantic* (June 2019), online: <[www.theatlantic.com/magazine/archive/2019/06/george-soros-viktor-orban-ceu/588070/](http://www.theatlantic.com/magazine/archive/2019/06/george-soros-viktor-orban-ceu/588070/)>. In Poland, there have been attacks on courts, and on critical voices in universities, including criminal and civil defamation suits against our

But governments are not the only threats to the development of that epistemic foundation. Economic threats to serious investigative journalism have been developing for decades, as have concentration of ‘news’ distribution through social media based on largely unknown algorithms and social media’s contribution to the spread of false information.<sup>6</sup> Public distrust of journalists and of academic experts has sometimes been fanned by charismatic political leaders, but also has longstanding roots in public consciousness. Historian Sophia Rosenfeld, explains that over the last 200 plus years, truth in democracies has been contested, veering between popular and elite understandings; truth, she argues, is “understood ... as the product of multiple constituencies in an inegalitarian world pursuing it according to varied methods and as continually open to fresh challenges and revision”.<sup>7</sup> Public mistrust of academia, of expertise and of the press, exacerbate the epistemic challenges of democracy.

Ginsburg and Huq argue that “[t]he practical operation of liberal democracy requires a shared epistemic foundation. ... Where information is systematically withheld or distorted by government so as to engender correlated, population-wide errors, democracy cannot fulfill this epistemic mandate”.<sup>8</sup> I agree. And if the practical operation of constitutional democracy requires some shared epistemic base, a base that is under threat both from some governments and from other forces — economic, technological, and social — a critical set of

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brilliant colleague, Wojciech Sadurski, for criticizing the government. See *infra* note 29 and note 32; see also Sadurski, *supra* note 1.

- 6 See Martha Minow, “The Changing Ecosystem of News and Challenges for Freedom of the Press” (2018) 64:3 *Loyola Law Review* 499 [Minow, “Changing Ecosystem”]; Tim Wu, “Is the First Amendment Obsolete?” (2018) 117:3 *Michigan Law Review* 547; Katie Langin, “False news spreads faster than true news on Twitter — thanks to people, not bots”, *Science* (8 Mar 2018), online: <[www.sciencemag.org/news/2018/03/fake-news-spreads-faster-true-news-twitter-thanks-people-not-bots](http://www.sciencemag.org/news/2018/03/fake-news-spreads-faster-true-news-twitter-thanks-people-not-bots)>.
- 7 Sophia Rosenfeld, *Democracy and Truth: A Short History* (Philadelphia: University of Pennsylvania Press, 2018) at 8.
- 8 Huq & Ginsburg, *supra* note 2 at 130–131; see Rosenfeld, *ibid* at 173 (“commitment to truth-telling or veracity as a moral position is central to maintaining the interpersonal trust that democracy ... needs”).

questions is how to sustain and protect epistemic capacities? How can reliable knowledge be created and tested and disseminated in constitutional democracies? What is the role of law in securing the foundations of knowledge institutions?

Knowledge institutions work together, as part of a system, to sustain the epistemic and ethical base of democratic constitutionalism. But knowledge institutions are sometimes studied in categories that obscure rather than illuminate their connected role in contributing to a sound epistemic base for representative democracy. This does not mean that the same legal analysis should necessarily be applied to public and private entities, or to universities, the press, or government offices; there are institutional differences that matter among them as well. But it is to suggest that there is a benefit to scholarship that conceptualizes knowledge institutions, working together, as part of a knowledge ecosystem requiring constitutional protection and effective self-monitoring.

Part II of this paper discusses what kinds of institutions should be regarded as 'knowledge' institutions. It is not confined to those institutions — universities, the press, NGOs — commonly discussed in U.S. First Amendment terms, but includes government offices devoted to gathering scientific or objective data and may include courts or other governmental bodies. The need to protect knowledge institutions is grounded not only in explicit protections for freedom of expression or research, but also on constitutional commitments to democratic elections as the building blocks of government legitimacy.

Part III of the paper asks why focus on institutions, and argues for the special role of knowledge institutions in a constitutional democracy, based on a commitment to reason and rationality, and to accountability to the voting public, as bases for legitimate governmental decision and action. It argues that, in constitutional democracies, there are several common principles that link these institutions — first, an aspiration to impartiality and objectivity in working towards achieving better understandings of phenomena; second, a commitment to apply the relevant disciplinary standards with appropriate independence; third, an attitude of epistemic humility and openness to one's beliefs being dis-verified; and finally, a commitment to a plurality of sources, so

that not all knowledge institutions derive from or are controlled by the same power holders and so that communities of knowledge in discrete fields are sufficiently pluralistic as to enhance the reliability of their expert conclusions.

The conclusion sketches some possible implications of this framework for further work.

## II. Working Definitions

My basic claim is that knowledge institutions are fundamental to the success of constitutional democracy and should be so recognized. They contribute to a knowledge ecosystem through institutions that span the public and private sphere. These boundary crossing institutions are not a branch of government,<sup>9</sup> nor should they be, but they are an essential component of constitutional democracy.

### A. Knowledge

In philosophy, one widely accepted view is that knowledge is a “justified true belief”.<sup>10</sup> A ‘naturalized’ epistemology develops the idea of justification by arguing that a belief is knowledge if it arises from “a generally reliable process”.<sup>11</sup>

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9 ‘Knowledge institutions’ are conceptually distinct from ‘fourth branch’, ‘democratic integrity’ or ‘supplementary’ institutions designed as parts of governments, see *e.g.* Mark Tushnet, “Institutions protecting constitutional democracy: Some conceptual and methodological preliminaries” (2020) 70:2 *University of Toronto Law Journal* 95; Kim Lane Scheppele, “Parliamentary Supplements (or Why Democracies Need More than Parliaments)” (2009) 89 *Boston University Law Review* 795 at 810–823, though these categories may have some overlaps.

10 See Jonathan Jenkins Ichikawa & Matthias Steup, “The Analysis of Knowledge” in Edward N Zalta, ed, *The Stanford Encyclopedia of Philosophy*, Summer 2018 ed (Stanford: Metaphysics Research Lab, Stanford University, 2018), online: *Stanford Encyclopedia of Philosophy Archive* <[plato.stanford.edu/archives/sum2018/entries/knowledge-analysis/](http://plato.stanford.edu/archives/sum2018/entries/knowledge-analysis/)>; see also Joseph Blocher, “Free Speech and Justified True Belief” (2019) 133:2 *Harvard Law Review* 439.

11 See Ronald J Allen & Brian Leiter, “Naturalized Epistemology and the Law of Evidence” (2001) 87:8 *Virginia Law Review* 1491 at 1494 (quoting Alvin I



Naomi Oreskes' approach considers the relationship between process, context, and participants. For her, science should be trusted for a two-fold reason: "1) its sustained engagement with the world and 2) its social character".<sup>12</sup> Although recognizing that individual scientists or experts may not always be correct, science as a whole is worthy of trust; it is made of "social practices and procedures of adjudication designed to ensure [...] that the process of review and correction are sufficiently robust as to lead to empirically reliable results".<sup>13</sup> The institutional context of science, including academic tenure, and peer review of scholarly work, helps prevent individual biases or errors from having too much influence, provided that the scientific community is sufficiently diverse: "[t]he social character of science forms the basis of its approach to objectivity and therefore the grounds on which we may trust it"; "[d]iversity serves epistemic goals".<sup>14</sup>

Oreskes' argument about the social and contextual basis for trusting science is appealing and applies across academic disciplines outside of those called 'science'. But I am concerned with a somewhat broader understanding of knowledge and of those institutions that work to produce and disseminate knowledge. Consider a recent statement by the American Association of University Professors ("AAUP"), titled *In Defense of Knowledge and Higher Education*, and declaring that "we ... define [knowledge] ... as those

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Goldman, *Epistemology and Cognition* (Cambridge Mass: Harvard University Press, 1986) at 51).

- 12 Naomi Oreskes, *Why Trust Science?* (Princeton: Princeton University Press, 2019) at 55.
- 13 *Ibid* at 57.
- 14 *Ibid* at 58–59. One can agree with Oreskes at a general level, while recognizing that diversity is a broad (and contestable) concept, embracing intellectual, disciplinary, demographic, and other forms of perspective and identity, whose relationship(s) to advancing knowledge have been challenged by some. See *e.g.* Anthony Kronman, *The Assault on American Excellence* (New York: Free Press, 2019) at 107–108 (Kindle edition, 2019) (arguing that current conceptions of diversity, as about race, ethnicity, gender, and sexual orientation, are "defensible in political and legal terms but hostile to the pursuit of truth").

understandings of the world upon which we rely because they are produced by the best methods at our disposal”.<sup>15</sup> Peter Byrne’s work on academic freedom emphasizes that the very idea of scholarship “presupposes a goal of *truer* knowledge”,<sup>16</sup> implying that knowledge is neither static nor certain, but the best understanding possible in a given context and at a given time. Note that this view of knowledge does not necessarily privilege academia: the responsible press may be regarded as a knowledge institution, albeit one working within much more constraints of time and resources than scholars and producing much more contingent and imperfect forms of knowledge.

## B. Institutions

Of course knowledge is produced not only in institutions but also by individuals and in many contexts. But I focus here on knowledge institutions, defined by three criteria:

1. first, an institution is a relatively stable entity, rather than unorganized individuals in society or even individuals organized as ad hoc groups. Knowledge institutions are ongoing, established, and organized entities;<sup>17</sup>

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15 American Association of University Professors, “In Defense of Knowledge and Higher Education” (January 2020) at 2, online (pdf): *American Association of University Professors* <[www.aaup.org/file/DefenseofKnowledge.pdf](http://www.aaup.org/file/DefenseofKnowledge.pdf)> (adopted by Committee A on Academic Freedom and Tenure October 2019 and approved by the AAUP Council November 2019).

16 J Peter Byrne, “Neo-Orthodoxy in Academic Freedom” (2009) 88:1 *Texas Law Review* 143 at 154 [emphasis added].

17 See Daryl J Levinson, “Parchment and Politics: The Positive Puzzle of Constitutional Commitment” (2011) 124:3 *Harvard Law Review* 657 at 681 (referring to institutions as “stable and durable organizational frameworks” for decision making). See also *ibid* at 681, n 69 (quoting Douglass C North, *Institutional Change and Economic Performance* (Cambridge: Cambridge University Press, 1990) as writing that “[i]nstitutions are the rules of the game in a society or, more formally, are the humanly devised constraints that shape human interaction”, and Stephen Skowronek, “Order and Change” (1995) 28:1 *Polity* 91 at 93 as “identifying the central characteristic of an ‘institution’

2. second, the entity is devoted to producing or disseminating knowledge, as one of its central purposes. That is, the entity is oriented towards the production and/or dissemination of knowledge as an important institutional goal; and
3. the institution pursues knowledge through the application of disciplinary standards and norms, designed to promote the reliability and elicit the justifications for conclusions reached or disseminated.

Below I discuss different types of knowledge institutions.

### **C. Constitutional Democracies**

My claim is about the role of knowledge institutions in constitutional democracies. I explain this focus in Part III. Here, I offer a relatively thin definition of ‘constitutional democracy’, to include polities committed to regular and free elections; to those liberal rights that are widely viewed as necessary to free and fair elections — including rights of speech, press, assembly, and broad adult suffrage; and to maintaining enforcement mechanisms to assure fair elections and to protect and secure rights from arbitrary and lawless action. Separation of powers, whether in parliamentary or presidential systems, and judicial review of government acts or omissions are among the enforcement mechanisms that constitutional democracies use.

### **D. What Counts as Knowledge Institutions: a Non-Exhaustive Discussion**

Applying the three criteria set forth above — (1) ongoing entity, (2) whose principal purpose is knowledge production or dissemination, (3) according to disciplinary norms — what institutions should be regarded as knowledge institutions? Information technologies are not equivalent to knowledge

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as the persistence of its rules through time and the creation of ‘durable norms and dependable structures’”).

institutions.<sup>18</sup> As I argue below, universities, the organized press, and government offices charged with objectively collecting or reporting data are plainly knowledge institutions. Some other possibilities are also discussed.

## 1. Higher Education

Knowledge institutions plainly include colleges and universities, the whole of higher education. Institutions of higher education are oriented towards and have as a goal sustaining and advancing the pursuit of knowledge. The AAUP's statement, *In Defense of Knowledge and Higher Education*, elaborated an understanding of knowledge as follows:

The expert knowledge to which we refer is not produced merely by immediate sense impressions. One cannot know the half-life of plutonium-238 merely by staring at a lump of rock [...] One cannot know whether the climate is changing merely by bringing snowballs into the well of the Capitol. To know any of these things, one must use the disciplinary methods of chemistry [...] or atmospheric science. These disciplines cumulatively produce understandings that are continuously tested and revised by communities of trained scholars. Expert knowledge is a process of constant exploration, revision, and adjudication. Expert knowledge, and the procedures by which it is produced, are subject to endless reexamination and reevaluation. It is this process of self-questioning that justifies society's reliance on expert knowledge. Such knowledge may in the end prove accurate or inaccurate, but it is the best we can do at any given time. That is why we are largely justified in relying on it.<sup>19</sup>

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18 Social media, and many websites, are surely part of a large information ecosystem but, because they do not typically apply disciplinary criteria designed towards the production or dissemination of knowledge, I have not treated them as knowledge institutions; rather, they are more an information trading institution without significant filters. *Cf.* Drew Harwell, "Doctored images have become a fact of life for political campaigns. When they're disproved, believers 'just don't care.'", *The Washington Post* (14 January 2020), online: <[www.washingtonpost.com/technology/2020/01/14/doctored-political-images/](http://www.washingtonpost.com/technology/2020/01/14/doctored-political-images/)>.

19 American Association of University Professors, *supra* note 15 at 2–3 [footnotes omitted].

This process of reexamination and reevaluation is characteristic of the academic disciplines that live in universities (and their law schools); these critical mindsets apply to law and government, as well as other fields of inquiry.<sup>20</sup>

The knowledge conveyed in higher education institutions includes grasping causal effects in the sciences, more inclusive and accurate understandings of history, culture, literature and the arts, and appreciating different approaches to philosophy and government, as well as the practices and institutions on which constitutional democracies rest. “Education is one part of maintaining a constitution; it helps forge the ideas and practices necessary to sustain the political order ...”.<sup>21</sup> Higher education institutions play a role in sustaining constitutional democracy as well through their work educating young people in the skills of critical inquiry and other habits of mind that are important for citizens in a democracy.<sup>22</sup> Those habits of mind include independent thinking

- 20 On the role of legal scholars in sustaining constitutional democracy see Liora Lazarus, “Constitutional Scholars as Constitutional Actors” (2020) 48:4 *Federal Law Review* 483 online (pdf): *Sage Journals* <journals.sagepub.com/doi/10.1177/0067205X20955056>. Cf. Michael Ignatieff, “Academic Freedom and the Future of Europe” (lecture delivered at the Centre for Global Higher Education at the UCL Institute of Education, University College London, 11 April 2018), Centre for Global Higher Education Working Paper No 40, online (pdf): *Centre for Global Higher Education* <www.researchcghe.org/perch/resources/publications/wp40.pdf> (viewing the academic freedom and autonomy of universities — like the press and the courts — as ‘counter-majoritarian’ institutions). I do not adopt the vocabulary of counter-majoritarianism: universities, the press, and the courts may use their independence to stand up for majority interests, e.g. in fair electoral processes.
- 21 George Thomas, *The Founders and the Idea of a National University: Constituting the American Mind* (New York: Cambridge University Press, 2015) at 2; cf. Doris K Goodwin, *Leadership in Turbulent Times* (New York: Simon & Schuster, 2018) at 19 (quoting Abraham Lincoln as saying “every citizen must be able to read history to ‘appreciate the value of our free institutions’”).
- 22 On the need to educate citizens for democracy see John Dewey, *Democracy and Education* (New York: Macmillan, 1916) at 225–26 (“Democratic society is peculiarly dependent for its maintenance upon the use in forming a course of

and the courage to express one's thoughts; tolerance for those who disagree or are different; a capacity to engage with others both collaboratively and in reasoned disagreement; and a willingness to devote some effort to participate in sustaining or improving the broader community. Finally, institutions of higher education play a role in advancing the aspiration towards equality of opportunity that is implicit in commitments to democracy, to the presumptively equal right of each adult to participate in the project of self-governance; both in their admissions policies and in the work of educating those in attendance universities and colleges can function as engines of social mobility.<sup>23</sup>

In suggesting the establishment of a national university at the time of the founding, George Washington argued that knowledge contributed to “the security of a free Constitution” in various ways:

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study of criteria which are broadly human”, and devoted to “the problems of living together, ... where observation and information are calculated to develop social insight and interest”); Amy Gutmann, *Democratic Education* (New Jersey: Princeton University Press, 1987) at 173–74 (“[L]earning how to think carefully and critically about political problems, to articulate one’s views and defend them before people with whom one disagrees is a form of moral education to which young adults are more receptive and for which universities are well suited ... The relative autonomy of a university is rooted in its primary democratic purpose: protection against the threat of democratic tyranny... [Universities] can provide a realm where new and unorthodox ideas are judged on their intellectual merits ... Universities thereby serve democracy as sanctuaries of nonrepression”). Cf. George Washington, “First Annual Address” (8 January 1790), online: *The Avalon Project* <[avalon.law.yale.edu/18th\\_century/washs01.asp](http://avalon.law.yale.edu/18th_century/washs01.asp)> (“Knowledge is in every country the surest basis of publick [*sic*] happiness. In one, in which the measures of government receive their impression so immediately from the sense of the community, as in our’s [*sic*], it is proportionately essential”).

- 23 That higher education did so for many decades in the second part of the 20th century seems reasonably clear; whether they are doing so adequately today is less clear, although some schools, including Johns Hopkins, have recently abandoned legacy admissions, a practice that made them less able to function as engines of social mobility. Cf. *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71, art 26 (“higher education shall be equally accessible to all on the basis of merit”).

[b]y convincing those who are entrusted with the publick [*sic*] administration, that every valuable end of government is best answered by the enlightened confidence of the people: And by teaching the people themselves to know, and to value their own rights; to discern and provide against invasions of them; to distinguish between oppression and the necessary exercise of lawful authority; between burthens proceeding from a disregard to their convenience, and those resulting from the inevitable exigencies of society; to discriminate the spirit of liberty from that of licentiousness, cherishing the first, avoiding the last, and uniting a speedy, but temperate vigilance against encroachments, with an inviolable respect to the laws”.<sup>24</sup>

The perceived importance of higher education to the success of the republic is evidenced by the fact that “the creation of a national university was supported by every president from Washington to John Quincy Adams — and would be put forward by later presidents such as Ulysses S. Grant, Rutherford B. Hayes, and James A. Garfield”.<sup>25</sup>

Today, higher education in the United States faces risks and threats of various sorts. Cuts and threatened cuts in government funding for universities and student tuition pose one kind of a challenge. The obstruction to foreign students and scholars posed by “travel bans”, increased security requirements, and slowness and unpredictability in the visa process pose another. Lawrence Bacow, President of Harvard University expressed deep concern in 2019 to the Secretaries of State and Homeland Security that U.S. immigration policy,

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24 Washington, *supra* note 22.

25 Thomas, *supra* note 21 at 5. Even James Madison, sometimes thought of as focusing on institutional checks to promote good government and control ambition and adverse passions, repeatedly sought to establish a national university, both while he was in Congress and as President. *Ibid* at 6, 12, 32; see also, e.g. James Madison, “Transcript For: James Madison’s State Of The Union Address” (9 December 1810), online: *The Monticello Classroom* <[classroom.monticello.org/view/74178/](http://classroom.monticello.org/view/74178/)> (arguing that “*a well-instructed people alone can be permanently a free people*” [emphasis added] and that “a seminary of learning instituted by the National Legislature within the limits of their exclusive jurisdiction” would “strengthen the foundations [and] adorn the structure of our free and happy system of government”).

including increased problems with visas for both students and scholars, is now so “unpredictable and uncertain” that it “poses risks not just to the individuals caught up in it, but also to the entirety of our academic enterprise”, interfering with the essential functions of American research universities.<sup>26</sup> Foreign student enrollments in higher education have declined while, at the same time, the predicted numbers of students graduating from high school and seeking higher education is also likely to be lower. Higher education also faces perceptions that cost and elitist bias obstruct its accessibility, and a worrisome partisan divide in public perceptions of its value to society.<sup>27</sup> More direct attacks on institutions of higher learning were threatened by President Trump.<sup>28</sup>

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- 26 See Letter from Lawrence Bacow, President of Harvard University, to Secretary Michael Pompeo and Acting Secretary Kevin McAleenan (16 July 2019) online: *Harvard University* <[www.harvard.edu/president/news/2019/letter-to-secretary-pompeo-and-acting-secretary-mcaleenan](http://www.harvard.edu/president/news/2019/letter-to-secretary-pompeo-and-acting-secretary-mcaleenan)>.
- 27 See e.g. Andrew Kreighbaum, “Persistent Partisan Breakdown on Higher Ed”, *Inside Higher Ed* (20 August 2019), online: <[www.insidehighered.com/news/2019/08/20/majority-republicans-have-negative-view-higher-ed-pew-finds](http://www.insidehighered.com/news/2019/08/20/majority-republicans-have-negative-view-higher-ed-pew-finds)> (reporting on studies showing that slide in Republicans’ views of the value of higher education, and significant gap between the views of Republicans and Democrats, which began in 2016, persist).
- 28 See e.g. Juan Perez Jr, “Trump Tweet Threatens Tax Exempt Status of Schools”, *Politico* (10 July 2020), online: <[www.politico.com/news/2020/07/10/trump-threatens-schools-colleges-356294](http://www.politico.com/news/2020/07/10/trump-threatens-schools-colleges-356294)> (describing presidential tweets reflecting instructions to the IRS “to review the tax-exempt status of U.S. schools, colleges and universities, ... [and] turn education into a political wedge issue”). The tweets asserted that “[t]oo many Universities [...] are about Radical Left Indoctrination, not Education”, and that “their Tax-Exempt Status ... and/or Funding [...] will be taken away if this Propaganda or Act Against Public Policy continues”. On July 6, 2020, the Trump administration issued an order prohibiting visas for international students attending universities or colleges that were teaching remotely; the order was withdrawn so that such foreign students could remain in the country to complete their degrees in response to a lawsuit by Harvard and Massachusetts Institute of Technology. See Miriam Jordan & Anemona Hartecollis, “U.S. Rescinds Plan to Strip Visas from International Students in Online Classes”, *The New York Times* (last modified 16 July 2020), online:



The relationship of higher education to constitutional democracy is suggested by the degree to which rising authoritarian governments have threatened their institutions of higher education. In Turkey, universities and their faculty have been the object of dismissals, constraints and prosecutions, in conjunction with the rise of more authoritarian leadership.<sup>29</sup> India has seen attacks on students at institutions of higher education.<sup>30</sup> In Hungary, an

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<[www.nytimes.com/2020/07/14/us/coronavirus-international-foreign-student-visas.html](http://www.nytimes.com/2020/07/14/us/coronavirus-international-foreign-student-visas.html)>.

- 29 See e.g. Suzy Hansen, “‘The Era of People Like You is Over’: How Turkey Purged its Intellectuals”, *The New York Times Magazine* (24 July 2019), online: <[www.nytimes.com/2019/07/24/magazine/the-era-of-people-like-you-is-over-how-turkey-purged-its-intellectuals.html](http://www.nytimes.com/2019/07/24/magazine/the-era-of-people-like-you-is-over-how-turkey-purged-its-intellectuals.html)>; “Turkey: Government Targeting Academics”, *Human Rights Watch* (14 May 2018), online: <[www.hrw.org/news/2018/05/14/turkey-government-targeting-academics](http://www.hrw.org/news/2018/05/14/turkey-government-targeting-academics)> (reporting on dismissal of 5800 academics since 2016 coup attempt and the targeting of signatories of the ‘Academics for Peace’ petition criticizing the government’s security measures in the Kurdish southeastern part of the country); Huq & Ginsburg, *supra* note 2 at 130 (reporting Turkish purges or detention of “21,000 private school teachers, ... 1,570 university deans, and 21,700 Ministry of Education officials”); see also Sophia Sideridou, “Kaboglu and Oran v. Turkey: protecting the private life of scholars, yet failing to recognize the academic freedom dimension at issue” (26 November 2018), online (blog): *Strasbourg Observers* <[strasbourgobservers.com/2018/11/26/kaboglu-and-oran-v-turkey-protecting-the-private-life-of-scholars-yet-failing-to-recognize-the-academic-freedom-dimension-at-issue/](http://strasbourgobservers.com/2018/11/26/kaboglu-and-oran-v-turkey-protecting-the-private-life-of-scholars-yet-failing-to-recognize-the-academic-freedom-dimension-at-issue/)> (reporting on prior unsuccessful criminal prosecution of human rights scholars Ibrahim Kaboglu and Baskin Oran for their minority report on human rights issues and criticizing the European Court of Human Rights for failing to address the academic freedom component of Kaboglu’s and Oran’s applications).
- 30 See e.g. “Protect India’s Universities” (2020) 577 *International Journal of Science* 293, online: *Nature Research* <[www.nature.com/articles/d41586-020-00085-6](http://www.nature.com/articles/d41586-020-00085-6)> (describing police attacks on university communities where students and faculty are protesting India’s new law adversely affecting citizenship rights for India’s Muslim community); TV Jayan, “Attacks on students on the rise in India, globally”, *The Hindu Business Line* (27 November 2019), online: <[www.thehindubusinessline.com/news/education/after-turkey-and-china-india-](http://www.thehindubusinessline.com/news/education/after-turkey-and-china-india-)

influential university with foreign faculty and funding was forced out of the country, while the Academy of Science's independence has been undermined.<sup>31</sup> And in Poland, civil and criminal defamation actions have been brought against a leading constitutional scholar critical of the current government, Wojciech Sadurski, by the dominant political party and the public broadcast station, and another action was instituted by the Ministry of Justice against law professors at Cracow University for their critical comments on proposed criminal code reform.<sup>32</sup>

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has-highest-number-of-attacks-on-students-academic-community-report/article30097285.ece>.

- 31 On the forced closure in Hungary of Central European University (CEU) and other intrusions on academic freedom there, see *e.g.* Marc Santora, "George Soros-Founded University Is Forced Out of Hungary", *The New York Times* (3 December 2018), online: <[www.nytimes.com/2018/12/03/world/europe/soros-hungary-central-european-university.html](http://www.nytimes.com/2018/12/03/world/europe/soros-hungary-central-european-university.html)> (reporting on Hungary's ban on certain academic subjects (gender studies) and imposition of new requirements, *e.g.* for campus in university's home country, and application of that law to force the shutdown of CEU notwithstanding its agreement with Bard College); see also Elizabeth Redden, "Central European U Forced Out of Hungary", *Inside Higher Ed* (4 December 2018), online: <[www.insidehighered.com/news/2018/12/04/central-european-university-forced-out-hungary-moving-vienna](http://www.insidehighered.com/news/2018/12/04/central-european-university-forced-out-hungary-moving-vienna)>; Judgment of 6 October 2020, *Commission v Hungary*, C-66/18, Court of Justice of the European Union 2020:414 (finding aspects of Hungary's treatment of foreign higher education institutions to be unlawful). On the government's takeover of the Hungarian Academy of Sciences, see Allison Abbott, "Hungarian Government Takes Control of Research Institutes Despite Outcry" (8 July 2019), online: *Nature* <[www.nature.com/articles/d41586-019-02107-4](http://www.nature.com/articles/d41586-019-02107-4)>.
- 32 On Sadurski, see "Academic Freedom Monitoring Project, University of Warsaw" (20 January 2019), online: *Scholars at Risk Network* <[www.scholarsatrisk.org/report/2019-01-20-university-of-warsaw/](http://www.scholarsatrisk.org/report/2019-01-20-university-of-warsaw/)>; John Morijn, "Open Letter in Support of Professor Wojciech Sadurski" (6 May 2019), online (blog): *Verfassungsblog* <[verfassungsblog.de/open-letter-in-support-of-professor-wojciech-sadurski/](http://verfassungsblog.de/open-letter-in-support-of-professor-wojciech-sadurski/)>; Wojciech Sadurski, "I Criticized Poland's Government. Now it is Trying to Ruin Me", *The Washington Post* (21 May 2019), online: <[www.washingtonpost.com/opinions/2019/05/21/i-criticized-polands-government-now-its-trying-ruin-me/](http://www.washingtonpost.com/opinions/2019/05/21/i-criticized-polands-government-now-its-trying-ruin-me/)>. For later reports, see

Such actions in foreign countries have harmful effects not limited to their own borders. These actions help normalize assaults on academic freedom in ways that may encourage other countries to take similar action or may cause judges, or other decisionmakers, to fail to appreciate what a threat they are.

## 2. Free Press

The free press is another kind of knowledge institution, of especial importance to the reliable disclosure and evaluation of current events and the conduct of elected officials and government offices, in a time frame that — unlike much scholarship, typically produced in a longer time frame — enables voters to make evaluations of performance and policy. Moreover, the press can play an important role in disseminating new knowledge generated by the scholarly community to the general public, knowledge relevant both to the conduct of people's own lives and to their evaluation of government policy.<sup>33</sup> The press

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Gráinne de Búrca & John Morijn, “Repression of Freedom of Expression in Poland: Renewing support for Wojciech Sadurski” (3 June 2020), online (blog): *Verfassungsblog* <[verfassungsblog.de/repression-of-freedom-of-expression-in-poland-renewing-support-for-wojciech-sadurski/](http://verfassungsblog.de/repression-of-freedom-of-expression-in-poland-renewing-support-for-wojciech-sadurski/)> (noting that cases against Sadurski were recently rescheduled on very short notice); John Morijn, “The Trial that Wasn’t, the Impact that Was” (28 January 2020), online (blog): *Verfassungsblog* <[verfassungsblog.de/a-trial-that-wasn-t-an-impact-that-was/](http://verfassungsblog.de/a-trial-that-wasn-t-an-impact-that-was/)>. On the Polish Ministry of Justice’s short-lived lawsuit against law faculty at Cracow University for their criticism of a draft bill amending the criminal code, see Barbara Grabowska-Moroz, Katarzyna Łakomiec & Michał Ziółkowski, “The History of the 48 Hour Lawsuit: Democratic Backsliding, Academic Freedom, and the Legislative Process in Poland” (28 June 2019), online (blog): *IACL-AIDC Blog* <[blog-iacl-aidc.org/2019-posts/2019/6/27/the-history-of-the-48-hour-lawsuit-democratic-backsliding-academic-freedom-and-the-legislative-process-in-poland](http://blog-iacl-aidc.org/2019-posts/2019/6/27/the-history-of-the-48-hour-lawsuit-democratic-backsliding-academic-freedom-and-the-legislative-process-in-poland/)>.

33 Some scholars have urged greater attention to institutional characteristics, *e.g.* of the press, under the First Amendment. See generally Frederick Schauer, “Principles, Institutions and the First Amendment” (1998) 112:1 *Harvard Law Review* 84; Frederick Schauer, “Towards an Institutional First Amendment” (2005) 89:5 *Minnesota Law Review* 1256; Paul Horwitz, *First Amendment Institutions* (Cambridge, Mass: Harvard University Press, 2013).

arguably has an organized, albeit evolving character with debatable boundaries.<sup>34</sup> One of its central purposes is to investigate and report publicly significant facts (and to check the fact claims of the powerful). And journalism is a profession

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34 In the United States there is disagreement on whether the Press Clause applies only to an organized professional press or may apply to ad hoc groups or even individual ‘pamphleteers’. Cf. *Citizens United v Federal Election Commission*, 558 US 310 (2010) at 352 [*Citizens United*] (casting doubt on validity under Free Speech clause of distinguishing media corporations from others in context of regulation of campaign speech or expenditures). For differing views on who or what is protected under the Press Clause, compare Michael W McConnell, “Reconsidering *Citizens United* as a Press Clause Case” (2013) 123:2 Yale Law Journal 412 (arguing that ‘the press’ cannot be limited to the organized traditional press) with Supplemental Brief of Amicus Curiae for the Reporters Committee for Freedom of the Press in Support of Appellant in *Citizens United*, at 12 (providing definition of the press focused on “intent to gather and disseminate news”). In my view the organized professional press, aspiring to standards of journalistic integrity and with the reputational incentives created by regular dissemination of its product, is able to serve important democratic functions in ways that are distinct from those served by the wide range of other speakers whose voices should be protected by the Speech Clause. Even if the case law prohibits distinctions among providers of ‘news’ based on their organizational character for purposes of laws prohibiting certain activities, the organizational character might serve as a basis for other forms of support. See above, McConnell at 433–34 (“The Court permits legislatures to pass special laws protecting the journalism business, but it has not interpreted the First Amendment to require them”). But compare Eugene Volokh, “Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today” (2012) 160:2 University of Pennsylvania Law Review 459 at 461–65 (arguing that, since the founding, press freedoms have generally been understood to protect the press as a technology, along with any of its users, rather than extending only to a certain set of institutions), with Sonja R West, “Press Exceptionalism” (2014) 127:8 Harvard Law Review 2434 at 2443–45 [West, “Press Exceptionalism”] (conceptualizing the press as engaged in ongoing investigating and reporting of news, as distinct from occasional commenters), and Minow, “Changing Ecosystem” *supra* note 6 at 501, 518–19 (conceptualizing the freedom of the press as based on a distinctive “private press industry”).

with disciplinary standards, *e.g.* of verification of information<sup>35</sup> and of journalistic integrity.<sup>36</sup>

According to Sonja West, the U.S. Constitution's founding press freedoms were viewed as "paramount" over and beyond the freedom of speech.<sup>37</sup> There was a broadly shared understanding that the press was essential to self-government, for at least two reasons. First, the press would serve to prevent government tyranny, both by itself serving as a check on government abuse and by providing the public with the information they needed to check on how laws were implemented. Second, the press would also provide a means for each citizen to air his sentiments to all, thereby participating in the process of self-governing discourse.<sup>38</sup> The first set of purposes, she argues, requires a press that has an ongoing, organized character, distinct from "occasional commenters".

Martha Minow also describes the constitutional importance of a privately controlled press: "the freedom of the press defended by the First Amendment of the United States Constitution assumes the existence and durability of a private press industry".<sup>39</sup> She elaborates on how the founders viewed the role of the press:

The Continental Congress sought support for their cause, in part, by extolling the freedom of the press: "The importance of this consists, besides the

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35 See Horwitz, *supra* note 33 at 151 (quoting Bill Kovach and Tom Rosenstiel's identification of principles of journalism, including that "[j]ournalism's first obligation is to the truth ... Its essence is a discipline of verification ... Its practitioners must maintain an independence from those they cover ...").

36 See David A Anderson, "Freedom of the Press" (2002) 80:3 *Texas Law Review* 429 at 483 (describing 'journalistic integrity' and commenting that "the law probably does not forbid reporters from taking money for favorable coverage, but one who did so would risk professional disgrace" and also noting "journalistic autonomy; self-respecting journalists do not allow others to control their voices") [footnotes omitted].

37 Sonja R West, "The 'Press,' Then & Now" (2016) 77:1 *Ohio State Law Journal* 49 at 62 [West, "The Press, Then & Now"].

38 *Ibid* at 66.

39 Minow, "Changing Ecosystem" *supra* note 6 at 501.

advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated into more honorable and just modes of conducting affairs'.<sup>40</sup>

“Freedom of the press”, Minow writes, “came to symbolize liberty for all”.<sup>41</sup>

Definitional questions complicate legal efforts to develop a separate jurisprudence about the press that is distinct from the protections for freedom of speech.<sup>42</sup> Recent scholarship suggests that workable approaches can be

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40 *Ibid* at 520 [footnotes omitted]; see McConnell, *supra* note 34.

41 Minow, “Changing Ecosystem” *supra* note 6 at 501 [footnotes omitted]. See also *ibid* at 520 (“State constitutions, and then the Bill of Rights amending the United States Constitution, emphasized freedom of speech and of the press. Historian Leonard Levy concluded that for the founders, ‘freedom of the press had come to mean that the system of popular government could not effectively operate unless the press discharged its obligations to the electorate by judging officeholders and candidates for office’”) [footnotes omitted].

42 These definitional concerns have inhibited development of U.S. constitutional doctrine (at the federal level) separately protecting the press as an institution. See *e.g.* *First National Bank of Boston v Bellotti*, 435 US 765 (1978) at 801–02 (Burger, CJ); *Citizens United*, *supra* note 34 at 352. Yet a number of state laws do provide protections or special rights to the press. Jonathan Peters, “Shield Laws and Journalist’s Privilege: The Basics Every Reporter Should Know” (22 August 2016), online: *Columbia Journalism Review* <[www.cjr.org/united\\_states\\_project/journalists\\_privilege\\_shield\\_law\\_primer.php](http://www.cjr.org/united_states_project/journalists_privilege_shield_law_primer.php)> (noting that 30 states have shield laws). Sonja West argues that “there exists a naturally evolving subset of speakers who fulfill unique and constitutionally valuable press functions”; “a ‘search’ for these special speakers would logically change as their tools and methods advance. The quest, therefore, should not be to define the press but rather to train our courts to recognize them in action”. West, “Press Exceptionalism”, *supra* note 34 at 2443. The search would be informed by the following distinctive attributes: “Compared to occasional public commentators, ... [t]he press, for example, has knowledge, often specialized knowledge, about the subject matter at issue. The press serves a gatekeeping function by making editorial decisions regarding what is or is not newsworthy. The press places news stories in context locally, nationally, or over time. The press strives to convey important information in a timely manner. The press has accountability to its audience and gives attention to

developed. Professor West, for example, distinguishes the press from mass communications technologies, arguing that in order to truly act as a watchdog on government, more is required “than a passing interest in the news or a mere desire to express” a view; effectively being a watchdog on government, especially as it has grown more complex, she argues, requires time and resources to investigate as well as sufficient background knowledge.<sup>43</sup> It requires, in other words, the capacities to act as a knowledge institution,<sup>44</sup> and the legal rights, protection, and support to enable it to do so.<sup>45</sup> “Regularity of publication” and “established readership” would, West argues, correlate with the devotion of time and resources to investigating potentially newsworthy items.<sup>46</sup>

Whether developed privately or through a mix of private and public support, an independent press is widely viewed today as necessary for a free and open

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professional standards or ethics. The press devotes time and money to investigating and reporting the news. It also expends significant resources defending itself against legal attacks as well as advocating for legal changes that foster information flow. And the press has a proven ability to reach a broad audience through regular publication or broadcast”. *Ibid* at 2444–45 [footnotes omitted]. See also Horwitz, *supra* note 33, at 155–56 (arguing for a constitutional focus on the press as an institution, and limited to those functions of the press in the process of gathering and reporting the news).

43 West, “The Press, Then & Now”, *supra* note 37 at 102–03.

44 On the press as a structural institution contemplated by the Constitution’s free press clause, see Potter Stewart, “Or of the Press” (1975) 26:3 *Hastings Law Journal* 631 at 643 (arguing that the Constitution contemplated and the press needed a degree of institutional autonomy). But see Volokh, *supra* note 34.

45 See Sonja West, “Favoring the Press” (2018) 106:1 *California Law Review* 91 [West, “Favoring the Press”] (arguing that statutes allowing journalists to protect confidential sources or providing special access to proceedings are constitutional and criticizing the decision in *Citizens United* holding unconstitutional a news media exemption to the campaign finance law); Horwitz, *supra* note 33 at 156 (arguing that under an institutional approach the decision in *Branzburg v Hayes* on the confidentiality of press sources should be reconsidered).

46 West, “Press Exceptionalism”, *supra* note 34 at 2437, 2456, 2460–61. See also, notes 33 and 34 above.

society and meaningful democratic governance. Yet as Minow details, the press today in the United States faces serious threats and challenges, many derived from economic and technological changes that have, for example, seen a dramatic diminution in the number and distribution of newspapers and ensuing “news deserts”, as well as the emergence of more partisan-identified news outlets.<sup>47</sup> Moreover, journalists around the world have been subject to escalating verbal attack and physical violence — including the deadly attack on Washington Post reporter Jamal Kashoggi in the Saudi embassy in Istanbul in 2018, the murders of four staffers of the Annapolis Gazette, in Annapolis, Maryland, in 2018, the killings of at least two reporters in India in 2017 (Gauri Lankesh, killed in Bangalore, India) and 2018 (Chandan Tiwari, killed in Jharkhand, India), multiple killings in Mexico, as well as killings of journalists in Afghanistan, Syria, and a number of other countries.<sup>48</sup>

*Normalizing Disrespect for Press and Extraterritorial Effects:* As noted above, attacks on academics and journalists, on academic and press freedoms in one country, may hurt not only that country’s democratic foundations but also the knowledge-building and critical functions of universities and journalists around the world. They may do so through direct efforts by governments to influence and limit academic activities in other countries.<sup>49</sup> But they also may do so by

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47 Minow, “Changing Ecosystem”, *supra* note 6 at 503, 518.

48 See generally, “1365 Journalists Killed Between 1992 and 2020” (2020), online: *Committee to Protect Journalists* <[cpj.org/data/killed/?status=Killed&motiveConfirmed%5B%5D=Confirmed&type%5B%5D=Journalist&start\\_year=1992&end\\_year=2020&group\\_by=year](http://cpj.org/data/killed/?status=Killed&motiveConfirmed%5B%5D=Confirmed&type%5B%5D=Journalist&start_year=1992&end_year=2020&group_by=year)>. While killings of journalists declined in 2019, there were still in that year at least 25 journalists killed in 13 countries. See Siobhan O’Grady, “In the past decade at least 554 journalists have been killed worldwide”, *The Washington Post* (13 December 2019), online: <[www.washingtonpost.com/world/2019/12/30/past-decade-least-journalists-were-killed-worldwide/](http://www.washingtonpost.com/world/2019/12/30/past-decade-least-journalists-were-killed-worldwide/)> (At year’s end, more than 250 journalists around the world were detained by governments).

49 See e.g. Elizabeth Redden, “Prosecution in China of students for tweets he posted while studying in the U.S. raises free speech concerns”, *Inside Higher Ed* (31 January 2020), online: <[www.insidehighered.com/news/2020/01/31/prosecution-china-student-](http://www.insidehighered.com/news/2020/01/31/prosecution-china-student-)



inspiring — and normalizing — restrictions on journalistic or academic freedoms from one country to another<sup>50</sup> and thereby limiting the spread of knowledge and information by academics and journalists.

### 3. Government Offices and NGOs that Collect or Report Data

Knowledge institutions are not limited to universities and the press but include both government and nongovernmental offices devoted to the gathering, evaluation, and dissemination of objective information. NGOs of various sorts are understood to provide important epistemic space for democratic dialogue and learning. Private institutions devoted to the creation and dissemination of knowledge — newspapers and other news sources, universities, libraries, museums,<sup>51</sup> NGOs devoted to objective data gathering and dissemination —

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tweets-he-posted-while-studying-us-raises-free-speech> (reporting that a former University of Minnesota student received a 6-month prison sentence on his return to China for tweets made while at Minnesota that mocked Chinese President Xi Jinping); Austin Ramzy, “China Uses Growing Clout to Stifle Critics Abroad, Rights Group Says”, *The New York Times* (14 January 2020), online: <[www.nytimes.com/2020/01/14/world/asia/china-human-rights-watch.html](http://www.nytimes.com/2020/01/14/world/asia/china-human-rights-watch.html)> (describing recent report by Human Rights Watch on many countries but focusing on China); “Obstacles to Excellence: Academic Freedom & China’s Quest for World Class Universities” (24 September 2019), online: *Scholars at Risk Network* <[www.scholarsatrisk.org/resources/obstacles-to-excellence-academic-freedom-chinas-quest-for-world-class-universities/](http://www.scholarsatrisk.org/resources/obstacles-to-excellence-academic-freedom-chinas-quest-for-world-class-universities/)>; “China: Government Threats to Academic Freedom Abroad” (21 March 2019), online: *Human Rights Watch* <[www.hrw.org/news/2019/03/21/china-government-threats-academic-freedom-abroad](http://www.hrw.org/news/2019/03/21/china-government-threats-academic-freedom-abroad)> (reporting instances of universities in other countries experiencing pressures from the Chinese government about who could speak on campus and Chinese students studying abroad fearing monitoring from their government).

- 50 Cf. Kim Lane Scheppele, “Autocracy Under Cover of the Transnational Legal Order” in Gregory Shaffer, Tom Ginsburg & Terence C Halliday, eds, *Constitution Making and the Transnational Legal Order* (Cambridge: Cambridge University Press, 2019) 188 at 207 (describing how repressive techniques spread).
- 51 Libraries and museums may be either public or private but in either event can provide a disciplined, curated repository of sources of knowledge. In later work,

have played important roles in preserving knowledge from destruction at the hands of powerful authorities.<sup>52</sup> Attacks on the integrity and independence of such private NGOs are associated with attacks on universities and on the press; threats to NGOs have been reported in a number of countries recently and are associated with rising authoritarianism and declining commitment to free and open societies.<sup>53</sup> As I argue below, having multiple such independent sources is an important protection for both knowledge and constitutional democracy.

Here, however, I will focus primarily on government offices charged with the objective collection, evaluation, and analysis of data, for threats to their

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I hope to discuss the distinctions between offices that collect and analyze data, and libraries and museums, which collect and make accessible works by others.

- 52 See e.g. Ian McNeely & Lisa Wolverson, *Reinventing Knowledge: From Alexandria to the Internet* (New York: WW Norton & Company, 2018) at 39 (on the role of monasteries in the first millennium).
- 53 See Arch Puddington, “Breaking Down Democracy: Goals, Strategies, and Methods of Modern Authoritarians” (June 2017) at 22–28, online (pdf): *Freedom House* <[freedomhouse.org/sites/default/files/June2017\\_FH\\_Report\\_Breaking\\_Down\\_Democracy.pdf](https://freedomhouse.org/sites/default/files/June2017_FH_Report_Breaking_Down_Democracy.pdf)> (describing threats to civil society organizations in Russia, China, Venezuela, and Iran, as well as in democracies like including India and Indonesia and “in settings where democracy’s prospects are unclear, as with Ecuador, Hungary, and Kenya”); see also, e.g. Judgment of 18 June 2020, *European Commission v Hungary (Transparency of Associations)*, C-78/18, EU:C:2020:476 (finding that certain restrictions on civil society organizations receiving support from abroad were unjustified and contrary to EU law). On recent laws targeting human rights NGOs in Israel, see “Five Quick Points on Israel’s Contested NGO Law and Netanyahu’s Intentions to make It Even Tougher”, *Haaretz* (11 June 2017), online: <[www.haaretz.com/israel-news/5-quick-points-on-israel-s-contested-ngo-law-1.5482801](http://www.haaretz.com/israel-news/5-quick-points-on-israel-s-contested-ngo-law-1.5482801)> (NGO Funding Transparency Law); see also Yotam Berger, “NGO Law Will Not Apply to Us’ Israeli Anti-occupation Groups Say”, *Haaretz* (17 July 2018), online: <[www.haaretz.com/israel-news/ngo-law-will-not-apply-to-us-israeli-anti-occupation-groups-say-1.6289109](http://www.haaretz.com/israel-news/ngo-law-will-not-apply-to-us-israeli-anti-occupation-groups-say-1.6289109)>. A proposed but not enacted law would prohibit filming Israeli Soldiers in the West Bank. See Jonathan Lis, “Israel Plan to Jail Anyone Filming Soldiers in the West Bank Hits Legal Wall”, *Haaretz* (17 June 2018), online: <[www.haaretz.com/israel-news/israeli-plan-to-jail-anyone-filming-soldiers-hit-legal-wall-1.6179262](http://www.haaretz.com/israel-news/israeli-plan-to-jail-anyone-filming-soldiers-hit-legal-wall-1.6179262)>.

independence and integrity have important ripple effects throughout society and other knowledge institutions. It may be startling to think of government offices as part of a knowledge system infrastructure. Yet government offices exist that have important data-gathering functions on which academics and journalists rely, and administrative bodies or executive departments may be charged with making detailed policy based on their expert judgment about ongoing challenges and data.

A surprisingly large number of government entities exist whose purpose can be understood as contributing to a body of shared, objective knowledge of facts.<sup>54</sup> Organized and ongoing offices like a census bureau, a tax bureau, a ministry of agriculture, a bureau of labor statistics, a bureau of justice statistics, are typically charged with the collection, verification, and publication of data. They are sometimes specifically charged by statute to act objectively, or in accordance with scientific rules.<sup>55</sup> Such offices typically employ professionals in the relevant fields and do so systematically and for purposes of obtaining objective data. They thus meet my three criteria for being a knowledge institution.

The U.S. Constitution requires that every 10 years, an ‘enumeration’, or census, of persons, be conducted for purposes of apportioning representatives among the States; many federal statutes, in turn, use the Census data to distribute federal resources to the states. The Census Bureau was created in 1902 to provide a more stable organization for this decennial collection of data about the population mandated by the Constitution. The results are used to allocate seats in the House of Representatives and for a number of other purposes under

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54 I am indebted to HLS student Alisha Jarwala for her research assistance in identifying relevant US federal statutes; I draw from and rely on her work in this section.

55 In the United States, the Census is constitutionally required to occur at ten year intervals; so this specific knowledge function is required by the Constitution. This is not a universal constitutional requirement even among federal states. See *e.g. Commonwealth of Australia Constitution Act 1900* (UK), 1900, 63 Vic, c 12, s 51(xi) (empowering parliament to make laws regarding a census and statistics but without direction as to timing).

federal law. Allocations of power and resources turn on the accuracy of such efforts.

The Census Bureau's website refers to itself as "factfinder for the nation", noting the uses of Census data "for basic research in many academic fields".<sup>56</sup> The taking of the decennial population census is only one of many knowledge-creating duties assigned to the Census Bureau.<sup>57</sup> The Director of the Census Bureau is to be appointed "without regard to political affiliation", and must "have a demonstrated ability in managing large organizations and experience in the collection, analysis, and use of statistical data"; the term of office is five years and no one can serve more than two terms.<sup>58</sup> One may infer from these provisions that the data collection is to be nonpartisan and based on accepted approaches to collecting and analyzing statistical data.

A number of departments include bureaus specifically charged with collecting or disseminating statistical information, such as the Bureau of Justice Statistics,<sup>59</sup> the Bureau of Labor Statistics,<sup>60</sup> the Bureau of Transportation

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56 US Census Bureau, "Factfinder for the Nation: History and Organization" (3 May 2000), online (pdf): *United States Census Bureau* <[www.census.gov/history/pdf/cff4.pdf](http://www.census.gov/history/pdf/cff4.pdf)>.

57 See 13 USC §141(a), (d) (2012) (in addition to decennial census, requiring a mid-decade data collection). Other sections of Title 13 impose other duties on the Bureau to collect information. See *e.g.* 13 USC §161 (requiring the taking of a census of governments).

58 *Presidential Appointment Efficiency and Streamlining Act of 2011*, § 3, 13 USC § 21 (2012).

59 "Bureau of Justice Statistics" (last visited 4 November 2018), online: *USA.gov* <[www.usa.gov/federal-agencies/bureau-of-justice-statistics](http://www.usa.gov/federal-agencies/bureau-of-justice-statistics)> ("publishes information on crime, criminal offenders, victims of crime, and the operation of justice systems").

60 "Bureau of Labor Statistics" (last visited 4 November 2018), online: *USA.gov* <[www.usa.gov/federal-agencies/bureau-of-labor-statistics](http://www.usa.gov/federal-agencies/bureau-of-labor-statistics)> ("measures labor market activity, working conditions, and price changes in the economy").

Statistics,<sup>61</sup> and the National Agricultural Statistics Service.<sup>62</sup> Federal libraries, research services, and archives play key knowledge related roles: The Library of Congress describes its mission to provide “Congress with *objective* research to inform the legislative process, administe[r] the national copyright system, and [to manage] the largest collection of books, recordings, photographs, maps and manuscripts in the world”.<sup>63</sup> The Congressional Research Service likewise describes itself as providing *objective* research, which, though sometimes confidential, is often made public.<sup>64</sup> The Congressional Budget Office “produces independent, nonpartisan, analysis of economic and budgetary issues to support the Congressional budget process”; it has a stated commitment to objectivity, impartiality, and nonpartisanship.<sup>65</sup> The National Archives

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- 61 “Bureau of Transportation Statistics” (last visited 4 November 2018), online: *USA.gov* <[www.usa.gov/federal-agencies/bureau-of-transportation-statistics](http://www.usa.gov/federal-agencies/bureau-of-transportation-statistics)> (“collects and publishes comprehensive transportation statistics”).
- 62 “National Agricultural Statistics Service” (last visited 4 November 2018), online: *USA.gov* <[www.usa.gov/federal-agencies/national-agricultural-statistics-service](http://www.usa.gov/federal-agencies/national-agricultural-statistics-service)> (“studies and provides the market with detailed information about U.S. agriculture”).
- 63 “Library of Congress” (last visited 4 November 2018), online: *USA.gov* <[www.usa.gov/federal-agencies/library-of-congress](http://www.usa.gov/federal-agencies/library-of-congress)> [emphasis added].
- 64 See “Congressional Research Service” (last visited 4 November 2018), online: *USA.gov* <[www.usa.gov/federal-agencies/congressional-research-service](http://www.usa.gov/federal-agencies/congressional-research-service)> (describing itself as serving “the Congress throughout the legislative process by providing comprehensive and reliable legislative research and analysis that are timely, *objective*, authoritative, and confidential, thereby contributing to an informed national legislature”) [emphasis added]. On other nonpartisan offices in the Congress, see Jess M Cross & Abbe R Gluck, “The Congressional Bureaucracy” (last visited 12 December 2020) Center for the Study of the Administrative State, CSAS Working Paper No 20–23 online (pdf): *Administrative State* <<https://administrativestate.gmu.edu/wp-content/uploads/sites/29/2020/10/Cross-Gluck-The-Congressional-Bureaucracy.pdf>>.
- 65 “Congressional Budget Office” (last visited 4 November 2018), online: *USA.gov* <[www.usa.gov/federal-agencies/congressional-budget-office](http://www.usa.gov/federal-agencies/congressional-budget-office)>; see “Objectivity, Congressional Budget Office” (last visited 5 November 2018), online: *Congressional Budget Office* <[www.cbo.gov/about/objectivity](http://www.cbo.gov/about/objectivity)>.

“preserves U.S. government records, manages the Presidential Libraries system, and publishes laws, regulations, Presidential, and other public documents”.<sup>66</sup>

Other federal entities have missions to advance knowledge and enable informed government policy in specific substantive areas. The Centers for Disease Control and Prevention, for example, works “to create the expertise, information, and tools that peoples and communities need to protect their health”;<sup>67</sup> the Food and Drug Administration (“FDA”) is “responsible for protecting the public health by assuring the safety, efficacy, and security of human and veterinary drugs, biological products, medical devices, our nation’s food supply, cosmetics, and products that emit radiation ... and also provides accurate, science-based health information to the public”;<sup>68</sup> the National Institutes of Health conducts and supports medical research (and has been the largest source of funding for medical research in the world).<sup>69</sup> National Aeronautics and Space Administration scientists “conduct groundbreaking research across earth science, planetary science, heliophysics and astrophysics to answer some of the most profound questions facing humanity”, and aim to “expan[d] human knowledge of the Earth and of phenomena in the atmosphere

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66 “National Archives and Records Administration” (last visited 4 November 2018), online: *USA.gov* <[www.usa.gov/federal-agencies/national-archives-and-records-administration](http://www.usa.gov/federal-agencies/national-archives-and-records-administration)>.

67 “Centers for Disease Control and Prevention” (last visited 4 November 2018), online: *USA.gov* <[www.usa.gov/federal-agencies/centers-for-disease-control-and-prevention](http://www.usa.gov/federal-agencies/centers-for-disease-control-and-prevention)>.

68 “Food and Drug Administration” (last visited 4 November 2018), online: *USA.gov* <[www.usa.gov/federal-agencies/food-and-drug-administration](http://www.usa.gov/federal-agencies/food-and-drug-administration)>.

69 See “National Institutes of Health” (last visited 4 November 2018), online: *USA.gov* <[www.usa.gov/federal-agencies/national-institutes-of-health](http://www.usa.gov/federal-agencies/national-institutes-of-health)>; Roderik F Viergever & Thom CC Hendriks, “The 10 Largest Public and Philanthropic Funders of Health Research in the World: What They Fund and How They Distribute Their Funds” (2016) 14:1 Health Research Policy and Systems 1; Rachel Silver, “National Institutes of Health (NIH) Founded – 1887” (2 May 2014), online (blog): *IMARC Research* <[www.imarcresearch.com/blog/bid/344355/national-institutes-of-health-nih-founded-1887](http://www.imarcresearch.com/blog/bid/344355/national-institutes-of-health-nih-founded-1887)>).

and space”.<sup>70</sup> And the Environmental Protection Agency “protects people and the environment from significant health risks, [and] sponsors and conducts research”, as well as developing and enforcing environmental regulations.<sup>71</sup>

The number and variety of government organs devoted to research activity — either for pure knowledge purposes or to serve as a basis for policy-making — illustrates how much government and the public need knowledge for “accurate, science-based” information and decisions. Yet the legal infrastructure for protecting the independence of those offices and professional employees in them may not be adequate.

As both Bruce Ackerman and Robert Post have argued, albeit from different perspectives, knowledge-based *competence* is an important component of democratic self-government.<sup>72</sup> Effective, competent governance is both a purpose of having a constitution and a necessary prerequisite to the protection of individual rights and to the “pursuit of happiness”.<sup>73</sup> As Robert Post suggests, there are domains of self-government in which what matters most is the equal participation (through speech and voting) of citizens in general (which Post

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- 70 “Science and Research” (last visited 29 March 2021), online: *NASA.gov* <<https://www.nasa.gov/careers/science>>; *National Aeronautics and Space Act*, 51 USCA § 20102(d)(1), (f) (2010).
- 71 “Environmental Protection Agency” (last visited 4 November 2018), online: *USA.gov* <[www.usa.gov/federal-agencies/environmental-protection-agency](http://www.usa.gov/federal-agencies/environmental-protection-agency)>; see also *EPA Purpose and Functions*, 40 CFR §1.3 (2020) (providing for EPA coordination and support of “research and antipollution activities carried out by State and local governments, private and public groups, individuals, and educational institutions”).
- 72 See Bruce Ackerman, “The New Separation of Powers” (2000) 113:3 *Harvard Law Review* 633 at 688–97; Robert C Post, *Democracy, Expertise and Academic Freedom: A First Amendment Jurisprudence for the Modern State* (New Haven: Yale University Press, 2012). Cf. Matthew C Stephenson, “The Qualities of Public Servants Determine the Quality of Public Service” (2019) 2019:5 *Michigan State Law Review* 1177 (discussing the importance of civil servants’ competency).
- 73 See *United States Declaration of Independence* (1776); see generally Vicki Jackson & Yasmin Dawood, eds, *Constitutionalism and a Right to Effective Government* (Cambridge: Cambridge University Press) [forthcoming in 2022].

refers to as the domain of “democratic legitimation”); and there are domains in which what is needed is the best possible (or at least good enough) expert understandings — a domain Post refers to as that of “democratic competence”.<sup>74</sup> Both are important, he argues, because “educated and informed public opinion will more intelligently and effectively supervise the government”.<sup>75</sup>

Other scholars agree on the need for both “expert” and democratic components in decision-making:<sup>76</sup> even issues that call for expert judgment should include what Bruce Ackerman calls “special forms of legitimation” necessary in a democracy. Thus, he praises the Administrative Procedure Act for recognizing “that regulatory decisionmaking [*sic*] needs special forms of legitimation that enhance popular participation, provide ongoing tests for bureaucratic claims of knowledge, and encourage serious normative reflection upon the policy choices inevitably concealed in abstract statutory guidelines”.<sup>77</sup>

Cass Sunstein emphasizes the superior capacity of executive branch entities to “genuinely understand the facts” in complex areas involving medical or scientific knowledge.<sup>78</sup> As Sunstein elaborates, many government agencies or departments have features of knowledge institutions:

With respect to the acquisition of information, the executive branch is usually in a far better position than the legislative and judicial branches. It has a large stock of specialists, often operating in teams, and the teams often have an

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74 Post, *supra* note 72 at 34 (“Democratic *legitimation* requires that the speech of all persons be treated with toleration and equality. Democratic *competence*, by contrast, requires that speech be subject to a disciplinary authority that distinguishes good ideas from bad ones. Yet democratic competence is necessary for democratic legitimation”).

75 *Ibid* at 35.

76 See Blocher, *supra* note 10 at 442 (“A well-functioning democracy relies on expert knowledge”).

77 Ackerman, *supra* note 72 at 697.

78 Cass R Sunstein, “The Most Knowledgeable Branch” (2016) 164:7 University of Pennsylvania Law Review 1607 at 1612.



impressive degree of epistemic diversity. Some of those specialists have spent many years studying and working on the subject.<sup>79</sup>

As this account suggests, some government offices may be regarded as knowledge institutions. Offices like the Bureau of Justice Statistics, or the FDA, are ongoing organizations; their mission includes the development and dissemination of facts; and they may apply disciplinary modes, sometimes borrowed from academic fields, sometimes developed internal to their offices, and subject to external review according to the reason-giving discipline of administrative review, for assessing the validity of their factual and justificatory claims. In these respects, they are ‘knowledge institutions’.

Sharing Ackerman’s concern for competence and integrity of knowledge-based decisions in government, the National Task Force on Rule of Law and Democracy, cochaired by Preet Bharara and Christine Todd Whitman, in a 2019 report discussed the need for “Integrity and Accessibility of Government Research and Data”, while advancing an ideal of unbiased and accessible government research. Concerned with the “growing politicization of government science”, it argued that “objective data and research are essential to effective governance and democratic oversight”.<sup>80</sup> It noted a number of incidents of improper pressures on objective research that had occurred recently, as well as worrisome failures to fill important senior positions. And it expressed concern that “[g]overnment research that is guided by politics, not the facts, can lead to ineffective and costly policy, among other harms ...”.<sup>81</sup> It thus advanced proposals to “create scientific integrity standards and require agencies to establish

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79 *Ibid* at 1613.

80 Preet Bharara et al, “National Task Force on Rule of Law & Democracy: Proposals for Reform Volume II” (3 October 2019) at 1, online (pdf): *Brennan Center for Justice at New York University School of Law* <[www.brennancenter.org/sites/default/files/2019-09/2019\\_10\\_TaskForce%20II\\_0.pdf](http://www.brennancenter.org/sites/default/files/2019-09/2019_10_TaskForce%20II_0.pdf)>. *Cf.* Matthew C Stephenson, “Information Acquisition and Institutional Design” (2011) 124:6 *Harvard Law Review* 1422 at 1423 (“Good information is the lifeblood of effective governance”).

81 Bharara et al, *ibid* at 1.

protocols for adhering to them [including standards for how public officials interact with career researchers], prohibit politically motivated manipulation or suppression of research, ensure the proper functioning of scientific advisory committees, and increase public access to government research and data”.<sup>82</sup>

In addition to examples cited by this report,<sup>83</sup> other concerns have been raised about threats to the objectivity of scientific and professional offices in the government.<sup>84</sup> Thus, for example, in response to reports that an ad hoc committee on climate change was being established, with involvement by a well-known skeptic of climate change who believes that increased carbon dioxide is good for the planet, some 58 leaders in the military and national security communities across administrations of different parties expressed concern that political pressures “[i]mposing a political test on reports issued by the science agencies, and forcing a blind spot onto the national security assessments that depend on them, will erode our national security”.<sup>85</sup> In May 2020, months into

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82 *Ibid* at 2.

83 *Ibid* at 1 (noting, *inter alia*, that “the secretary of commerce [was instructed] to have the National Oceanic and Atmospheric Administration (NOAA) ... issue a misleading statement in support of the president’s false assertion about the trajectory of a hurricane, contradicting an earlier statement released by the National Weather Service. The secretary of commerce reportedly threatened to fire top NOAA officials in pressuring them to act”; that the Agriculture Department “relocated economists across the country after they published findings showing the financial harms to farmers of the administration’s trade policies”; and that the “Interior Department reassigned its top climate scientist to an accounting role after he highlighted dangers posed by climate change”).

84 See *e.g.* John Shattuck, Amanda Watson & Matthew McDole, “Trump’s First Year: How Resilient Is Liberal Democracy in the US?” (February 2018), online (pdf): [carrcenter.hks.harvard.edu/files/cchr/files/trumpsfirstyeardiscussionpaper.pdf](http://carrcenter.hks.harvard.edu/files/cchr/files/trumpsfirstyeardiscussionpaper.pdf) (noting displacement of professional staff at EPA by outside industry lobbyists; efforts to intimidate scientists through surveillance; refusals to permit EPA scientists to speak about their research; resignation of the EPA Director of Science and Technology).

85 Dino Grandoni, “White House’s plans to counter climate science reports ‘will erode our national security,’ 58 former officials warn”, *The Washington Post* (5 March 2019), online: [www.washingtonpost.com/climate-](http://www.washingtonpost.com/climate-)

the COVID-19 pandemic, a high-ranking government scientist said he was removed from his positions as deputy assistant secretary of Health and Human Services and director of an office responsible for procuring vaccines after he raised concerns about the president's advocacy for using an unproven medical treatment against the virus.<sup>86</sup> And a State Department analyst, it was reported, resigned in the summer of 2019, because he was required to delete from written testimony reference to scientific studies supporting his assertions about climate change.<sup>87</sup>

Government, in this country and elsewhere, has long been involved in providing support for scientific research, either directly or by encouraging private initiatives. Government offices are often required to make expert

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environment/2019/03/05/white-house-plans-counter-climate-change-will-erode-our-national-security-former-officials-warn/>. But see Scott Waldman, "Trump White House shelves 'adversarial' review of climate science", *Science* (9 July 2019), online: <<https://www.sciencemag.org/news/2019/07/trump-white-house-shelves-adversarial-review-climate-science>> (indicating that the plan had been shelved).

- 86 See Michael D Shear & Maggie Haberman, "Health Dept. Official Says Doubts on Hydroxychloroquine Led to His Ouster", *The New York Times* (last modified 14 May 2020), online: <[www.nytimes.com/2020/04/22/us/politics/rick-bright-trump-hydroxychloroquine-coronavirus.html](http://www.nytimes.com/2020/04/22/us/politics/rick-bright-trump-hydroxychloroquine-coronavirus.html)>. The scientist subsequently told the press he worried that the administration made decisions based on political expediency rather than science. *Ibid.*
- 87 See Timothy Puko & Warren P Strobel, "State Department Analyst Resigns After White House Blocked Climate Change Testimony", *The Wall Street Journal* (10 July 2019), online: <[www.wsj.com/articles/state-department-analyst-resigns-after-white-house-blocks-climate-change-testimony-11562780573](http://www.wsj.com/articles/state-department-analyst-resigns-after-white-house-blocks-climate-change-testimony-11562780573)> (describing the resignation of Rod Schoonover). More recently, an official at the Department of Homeland security was fired for reporting, accurately, that there was no evidence of significant fraud in the 2020 presidential election. See David E Sanger & Nicole Perlroth, "Trump Fires Christopher Krebs, Official Who Disputed Election Fraud Claims", *The New York Times* (17 November 2020), online: <[www.nytimes.com/2020/11/17/us/politics/trump-fires-christopher-krebs.html](http://www.nytimes.com/2020/11/17/us/politics/trump-fires-christopher-krebs.html)>.

findings that support, in a reasoned and objective way, their design of rules and policies. Especially in areas where the government is the largest or dominant funder of research (as in medical research), it is particularly important that scientific decisionmakers be able actually to exercise objective, independent judgments on matters within their expert knowledge. Yet scientists and other professionals who work in government or share interests with those who do suggest that the law needs to address the demands of research integrity within the government much more clearly than it does at present.<sup>88</sup> Modifying First Amendment doctrine addressing the speech of government employees may be a part of this effort,<sup>89</sup> but more may well be needed to recognize *ex ante* the institutional characteristics of good knowledge institutions in how these offices as a whole are dealt with within the government.

#### 4. Courts as Knowledge Institutions

Courts seem at first very different from universities, or the press, or government science offices. They are not self-initiating pursuers of facts, truth, or knowledge. Their dispute resolution function sometimes requires that settlement and finality be valued over accuracy.<sup>90</sup> Yet, arguably they meet the criteria set forth above for being viewed as a knowledge institution.

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88 See Jeff Ruch, “Emerging Law of Scientific Inquiry – A Bumpy Birth”, *Fisheries News & Science* 42:7 (27 June 2017) 353, online: *American Fisheries Society* <[fisheries.org/2017/06/emerging-law-of-scientific-integrity-a-bumpy-birth/](http://fisheries.org/2017/06/emerging-law-of-scientific-integrity-a-bumpy-birth/)>.

89 Critiques of *Garcetti v Ceballos*, 547 US 410 (2006), are widespread, notwithstanding the modest retrenchment on its scope in *Lane v Franks*, 573 US 228 (2014). See generally Heidi Kitrosser, “The Special Value of Public Employee Speech” (2015) 2015 Supreme Court Review 301; Helen Norton, *The Government’s Speech and the Constitution* (Cambridge: Cambridge University Press, 2019); Judith Areen, “Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance” (2009) 97:4 *Georgetown Law Journal* 945.

90 See Allison Orr Larsen, “Constitutional Law in an Age of Alternative Facts” (2018) 93:2 *New York University Law Review* 175 at 223 (noting that science rejects finality while courts seek it).

First, they are ongoing institutions. Second, is their purpose the production of knowledge? Arguably yes. Trials are often characterized as a search for truth, for justified knowledge of what happened in a disputed factual setting.<sup>91</sup> Trial courts function as finders of fact — within the constraints of having to decide something, based on the evidentiary materials presented and applying the applicable burden of proof. Courts, then, are factfinders — at least in a contingently final sense — that is, as final between the parties,<sup>92</sup> even if not ‘final’ in the judgment of history. Courts or court-like bodies have played a significant role in providing mechanisms to determine and/or disseminate facts about important historical events — in the Nuremberg trials at the close of World War II, for example, and in some more recent reconciliation processes involving a past regime’s human rights abuses.<sup>93</sup> Third, do courts apply

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- 91 Cf. Barbara J Shapiro, *A Culture of Fact: England, 1550-1720* (Ithaca: Cornell University Press, 2000) at 30 (“[W]e consider the courtroom, as others have considered the scientific experiment, as a site of knowledge making, that is, a setting where a variety of participants engage in creating or determining the ‘truth’ of something by a set of site-specific rules”). Criminal laws against perjury and professional rules requiring that lawyers be honest with the tribunal reinforce the court’s truth-determining roles. Cf. Adam Winkler, “Trump’s Wildest Claims Are Going Nowhere in Court. Thank legal ethics.”, *The Washington Post* (22 November 2020), online: <[washingtonpost.com/outlook/trump-lawyers-legal-ethics/2020/11/20/3c286710-2ac1-11eb-92b7-6ef17b3fe3b4\\_story.html](https://www.washingtonpost.com/outlook/trump-lawyers-legal-ethics/2020/11/20/3c286710-2ac1-11eb-92b7-6ef17b3fe3b4_story.html)>.
- 92 See e.g. *Federal Rules of Civil Procedure*, Rules 59–60 (US) (providing, inter alia, that vacatur based on new evidence is available only if the evidence could not have been discovered in time to move for new trial); *Antiterrorism and Effective Death Penalty Act of 1996*, 28 USC § 2254(d)(2) (2012) (habeas corpus relief unavailable with respect to previously adjudicated claim unless the finding was ‘unreasonable’ based on evidence presented at original trial).
- 93 On the S.A. Truth and Reconciliation process, see John Dugard, “Reconciliation and Justice: The South African Experience” (1998) 8 *Transnational Law & Contemporary Problems* 277; cf. Martha Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence* (Boston: Beacon Press, 1998) at 71–72 (describing South Africa’s Truth and Reconciliation Commission, while noting how its procedures differed from trials, for example, by providing victims “the chance to tell their

‘disciplinary’ standards designed to promote the search for knowledge? It is fair to say that they do, although the rules of procedure and evidence are not devoted only to the development of truth but serve other values as well. But the adversarial process is widely defended as a reliable way to elicit truth; and, although this claim has also been challenged, it is nonetheless a disciplinary method relatively consistently applied and intended to improve the reliability of judicial factfinding.<sup>94</sup> And despite some scholarly critics, other scholars have written appreciatively of the role of actual trial processes in eliciting better forms of knowledge about socially contentious matters.<sup>95</sup>

Courts also may play a role in promoting the reliability of executive and administrative agency evaluation of factual and causal claims. In *Department of Commerce v New York*,<sup>96</sup> for example, the Court considered whether the Commerce Department’s explanation of a decision concerning the addition of a question on citizenship met requirements for “genuine justifications” and “reasoned” decisionmaking. As the Court explained:

The reasoned explanation requirement of administrative law, after all, is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public. Accepting contrived reasons would defeat the purpose of the enterprise. If judicial review

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stories before sympathetic listeners”, *ibid* at 71, and make a public record, without being subject to cross-examination).

- 94 On the historic connection in Great Britain between the development of the concept of facts (as distinct from law) in the legal community, and the evolution of the idea of facts and how they are established in the sciences, see Barbara Shapiro, “The Concept ‘Fact’: Legal Origins and Cultural Diffusion” (1994) 26:2 *Albion: A Quarterly Journal Concerned with British Studies* 227.
- 95 See Kenjo Yoshino, *Speak Now: Marriage Equality on Trial* (New York: Crown Publishing Group, 2015).
- 96 *Department of Commerce v New York*, 139 S Ct 2551 (2019). *Cf. Massachusetts v EPA*, 549 US 497 at 534 (2007) (finding that the EPA had not explained “its refusal to decide whether greenhouse gases cause or contribute to climate change” as statute required).

is to be more than an empty ritual, it must demand something better than the explanation offered for the action taken in this case.<sup>97</sup>

Perhaps a purpose of judicial review is to assure that agency decision-making is itself “more than an empty ritual”, and is based on a genuine and competent evaluation of the state of knowledge and how that affects government policy.<sup>98</sup>

In Chief Justice Roberts’ 2019 Year-End Report on the Federal Judiciary, he makes a different claim for the role of courts as knowledge institutions — for their educational role: “By virtue of their judicial responsibilities, judges are necessarily engaged in civic education ... When judges render their judgments through written opinions that explain their reasoning, they advance public understanding of the law”.<sup>99</sup> So we might see courts as both developers of knowledge, in their factfinding and decisional roles, and as disseminators of knowledge, in their explanatory and educational role. Courts bring well-instantiated aspirations towards impartiality and objectivity in factfinding to their work, attitudes that in some respects overlap with aspirations towards independence and objectivity in academic research and analysis and journalistic independence in reporting the news. At least in the highly polarized U.S.

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97 *Ibid* at 2575–76.

98 But *cf. infra* note 156 (noting *Little Sisters of the Poor*); Sunstein, *supra* note 78 at 1613–14 (“For the judiciary, a great problem is that it cannot acquire information on its own. It must depend on arguments and briefs, and hence, on advocates ... [J]udges are generalists who usually lack specialized knowledge of technical areas ... [E]ven when they are specialists, their own understanding of a particular problem is likely to be only partial, simply because they must depend on advocates. And because advocates are self-interested, clever, and often superb with rhetoric, they will present judges with highly stylized and distorted pictures of reality ... Because of the distorting prism of litigation, judges may never be made aware of [important facts about agency consideration]”).

99 Chief Justice John Roberts, “2019 Year-End Report on the Federal Judiciary” (2019) at 2, online (pdf): *Supreme Court of the United States* <[www.supremecourt.gov/publicinfo/year-end/2019year-endreport.pdf](http://www.supremecourt.gov/publicinfo/year-end/2019year-endreport.pdf)>.

context, courts are an “impartiality resource”,<sup>100</sup> a place in government that can be trusted — more than some other places — to find facts and law with independent judgment and application of professional norms.

## 5. Congress?

It is not uncommon for U.S. federal courts to praise the factfinding capacities of the Congress and suggest that Congress’s factfinding capacities about legislative or social facts are superior to those of courts.<sup>101</sup> A considerable body of scholarly writing agrees.<sup>102</sup> Others are more skeptical. Thus, Professor Sunstein notes:

[i]n theory [...] Congress can obtain its own information by holding hearings or consulting experts. But members of Congress are also generalists, their staffs

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- 100 Vicki C Jackson, “Thayer, Holmes, Brandeis: Conceptions of Judicial Review, Factfinding, and Proportionality” (2017) 130:9 *Harvard Law Review* 2348 at 2378 [Jackson, “Thayer, Holmes, Brandeis”] (discussing courts as an “impartiality resource” and arguing that courts “offer advantages over legislatures as relatively objective fora for factfinding”).
- 101 See *e.g.* *Gonzales v Carhart*, 550 US 124 at 165 (2007) (“[W]e review congressional factfinding under a deferential standard . . .”); see also *Turner Broadcasting System, Inc v FCC*, 520 US 180 at 199 (1997) (“The Constitution gives to Congress the role of weighing conflicting evidence in the legislative process”); *Katzenbach v Morgan*, 384 US 641 at 653–56 (1966) (asserting that it was for Congress to ‘weigh’ facts and considerations relating to *Voting Rights Act* provision at issue). But see *e.g.* *Shelby County v Holder*, 570 US 529 at 547–57 (2013).
- 102 See *e.g.* “Judicial Review of Congressional Factfinding”, Note, (2008) 122:2 *Harvard Law Review* 767 at 768; see also, *e.g.* Ruth Colker and James J Brudney, “Dissenting Congress” (2001) 100:1 *Michigan Law Review* 80 at 116–20 (critiquing judicial ‘micromanaging’ of legislative factfinding as inconsistent with Congress’s access to informal information gathering and with Congress’s “democracy-based aspects of information gathering . . . [its] political relationship to the electorate”). *Cf.* Daniel A Crane, “Enacted Legislative Findings and the Deference Problem” (2014) 102:3 *Georgetown Law Journal* 637 (arguing that Congress lacks comparative advantage in finding facts but that its enacted findings of fact have normative value that warrants deference in virtue of their being enacted).



are relatively small, and they have to focus on reelection. When they are described as “experts” – on environmental issues, health care, or foreign policy – it might be true, but it might also be hyperbolic. Within Congress, members are usually experts at one thing: doing what it takes to get reelected. But in terms of substantive issues, they tend to lack the bandwidth to become experts.<sup>103</sup>

In other words, Professor Sunstein suggests, the electoral incentive, which plays so important a role in enhancing the democratic accountability and thus legitimacy of the Congress, is in tension with the development and application of technical, expert ‘competence’, including the competence to master complex bodies of knowledge.

I am skeptical that Congress should be regarded as a knowledge institution. It plainly is an ongoing, organized institution. But does it have as one of its principal purposes the production or dissemination of knowledge? That is unclear. The most basic responsibility of the legislature is to *act* — to act on behalf of the electorate towards the public good, whether in enacting legislation or in checking and exercising oversight of the executive and administrative parts of government. To be sure, doing these tasks well should depend on a sound epistemic base. And Congress has created entities — including the Congressional Research Service within the Library of Congress — to help provide this epistemic base. Moreover, Congressional hearings have elicited important knowledge that has informed the public, and at times legislation or oversight; the congressional speech and debate immunity has enabled Members of Congress to spread information, important to public oversight of the government, on the record.<sup>104</sup> But whether the production and dissemination of knowledge is a primary aim of Congress is, at best, debatable.

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103 Sunstein, *supra* note 78 at 1616. There are, to be sure, several offices created by Congress to provide legislators with expert advice on matters relevant to the legislative process. See above, text at note 64.

104 See *e.g.* Norton *supra* note 89 at 219 (noting that Senator Mike Gravel read excerpts of the Pentagon Papers into the congressional record to make them more publicly accessible; and that Senators Wyden and Udall similarly announced their critique of Obama administration secret interpretations of

But even greater uncertainty surrounds the third criteria I have applied in identifying knowledge institutions — that facts are found or knowledge generated or selected by some form of disciplinary standards. To the extent that any such standards exist in the practice of the Congress, they are unclear and indeterminate. Congress need not include findings of facts to justify its legislation nor hear witnesses on important matters it decides.<sup>105</sup> And there is nothing in congressional procedures close to the standards of relevance, or other evidentiary or procedural standards, designed to enhance the reliability of factfinding, that exist with respect to judicial proceedings;<sup>106</sup> for example, judges and jurors must be present when relevant evidence in a case is presented; members of Congress — even of the relevant committee — need not. While the limits, if any, of Congress’s power to investigate have been broad,<sup>107</sup> the lack

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federal domestic surveillance law, leading to further investigation and disclosures).

- 105 See *e.g.* *Heart of Atlanta Motel Inc v United States*, 379 US 241 at 252–53 (1963) (upholding 1964 Civil Rights Act notwithstanding absence of legislative findings); *cf.* Vicki C Jackson, “Federalism and the Uses and Limits of Law: Printz and Principle” (1998) 111:8 *Harvard Law Review* 2180 at 2238–39, n 255 (noting, in discussing the Gun Free School Zones Act at issue in *United States v Lopez*, 514 US 549 (1995), that “neither the committee reports nor the statute itself includes either findings or a jurisdictional nexus to the interstate commerce requirement that made palpable Congress’s reliance on its authority under the Commerce Clause”). The Senate evidently need not even hear witnesses in ‘trying’ articles of impeachment. “Day in Impeachment: Senate Votes Against Calling Witnesses”, *The New York Times* (31 January 2020), online: <[www.nytimes.com/live/2020/trump-impeachment-trial-01-31](http://www.nytimes.com/live/2020/trump-impeachment-trial-01-31)>.
- 106 For an example of proposals that judicial deference should track the actual procedures for factfinding used, see *e.g.* Eric Berger, “Deference Determinations and Stealth Constitutional Decision Making” (2013) 98:2 *Iowa Law Review* 465 at 501–05.
- 107 *McGrain v Daugherty*, 273 US 135 at 174–75 (1927); *Sinclair v United States*, 279 US 263 (1929); *Eastland v US Servicemen’s Fund*, 421 US 491 at 504, n 15 (1975) (quoting *Barenblatt v United States*, 360 US 109 at 111 (1960)). But *cf.* *Trump v Mazars* 140 S Ct 2019 (2020) (USCS) (finding congressional subpoenaes insufficiently justified).

of a regular, disciplined approach to factfinding in the Congress makes it difficult to identify it as, in general, serving as a knowledge institution.<sup>108</sup>

### III. Why Focus on Knowledge Institutions in Constitutional Democracies?

Knowledge institutions are central to any government's ability to govern effectively; even the most autocratic of governments will require some knowledge, to exercise and maintain their own powers.<sup>109</sup> But knowledge institutions are of especial importance in constitutional democracies. Indeed, philosophers have argued that truth itself is a democratic value, because "democracies have a political interest in promoting deliberative decision-making procedures such as rational legislating processes and participatory politics", which requires that democracies specially value the means of pursuing true knowledge.<sup>110</sup>

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108 This may not be true for all legislatures. Cf. German Federal Constitutional Court, 9 February 2010, '*Hartz IV Case*' (2010), 125 BVerfGE 175 (Germany) (implying that a demanding empirical basis of legislative consideration would be required for laws limiting social welfare support).

109 See e.g. Melissa M Lee & Nan Zhang, "Legibility and the Informational Foundations of State Capacity" (2016) 79:1 *Journal of Politics* 118 (suggesting that all governments need knowledge and that, with better knowledge of local practices, views, and persons, the state will have improved ability to assess and collect taxes and produce or encourage the production of goods); see also Stephen Holmes, *Passion and Constraint: On the Theory of Liberal Democracy* (Chicago: University of Chicago Press, 1995) at 119 (describing Jean Bodin's theory that monarchs enhance their own power by accepting limitations upon it, context of eliciting information: "A wise prince will realize that he can personally benefit from whatever freedom of speech he concedes. A king who repressed the Estates, for example, would deprive himself of a vital source of information. Appearing at the meeting of the Estates, a prince can acquire politically indispensable knowledge which would otherwise be unavailable").

110 Michael Patrick Lynch, "Truth as a Democratic Value" (lecture delivered at the American Society of Political and Legal Philosophy, Princeton University, 27 September 2019), 2021 *NOMOS YB* [forthcoming in 2021] (arguing that "it is in a democrac[y]'s interest, *qua* democracy, to protect and fairly distribute the means by which citizens can pursue true beliefs"); Michael P Lynch, *In Praise of*

## A. Why Constitutional Democracies as a Focus?

The *democratic* component of democratic constitutionalism contemplates the active involvement of citizens. On thin versions of democracy, voters' key role is in checking decisions of those in power by being able to vote them out.<sup>111</sup> On thicker versions, citizens participate more actively, influencing government bodies' agendas and policy outcomes not just by voting but by commenting, petitioning, proposing, and critiquing.<sup>112</sup> On either version, or others that lie between, knowledge relevant to evaluating representatives and to the policy choices confronted must be accessible to voters. Such knowledge would also include an understanding of the basic normative premises of a democratic republic.<sup>113</sup>

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*Reason: Why Rationality Matters for Democracy* (Cambridge, Mass: MIT Press, 2012). On the role of deliberative democracy itself in tending to produce good decisions, see e.g. David Estlund & Hélène Landemore, "The Epistemic Value of Democratic Deliberation" in Andre Bächtiger et al, eds, *The Oxford Handbook of Deliberative Democracy* (New York: Oxford University Press, 2018).

- 111 See e.g. Joseph A Schumpeter, *Capitalism, Socialism, and Democracy* (New York: Harper & Brothers, 1942) at 250.
- 112 See e.g. Jane Mansbridge, "Recursive Representation in the Representative System" (2017) Harvard Kennedy School Working Paper No RWP17-045, online (pdf): *Harvard Kennedy School* <research.hks.harvard.edu/publications/getFile.aspx?Id=1603>.
- 113 These might encompass the presumed equality in public life of all adults; tolerance of those who are different; a norm of reciprocity of reasoning and conduct in public life; acceptance of peaceful mechanisms of constitutional disputing, such that those who lose in constitutionally specified dispute resolution processes — in elections, in legislative, judicial or administrative proceedings — accept their loss; and, perhaps, that elected representatives owe duties both to their particular constituents and to the country as a whole. There may be disagreement about some of these. But there are surely some norms that are necessary to secure the future of democratic republics, and some knowledge institutions — notably universities — are suitable sites to engage in reasoned discussion and analysis of these. See e.g. Ronald Daniels, "The University's Covenant with Liberal Democracy" in Mark Lasswell, ed, *Fight for Liberty: Defending Democracy in the Age of Trump*, (New York: PublicAffairs, 2018) at

Knowledge institutions are also central to the *constitutionalist* component of democratic constitutionalism. Constitutionalism here refers, in a simplified sense, to the application of the rule of law to the government itself.<sup>114</sup> Any understanding of the rule of law demands that the laws and what they require be knowable, and laws to be enforced with some degree of consistency.<sup>115</sup> Knowledge of the law, about what it is, how it is being applied, and how it can be improved, are necessary to securing the ‘constitutionalist’ part of constitutional democracy.

## 1. Knowledge Institutions and Constitutional Text

Some knowledge institutions receive special constitutional recognition in constitutional texts. The U.S. Constitution protects freedom of the press, and ‘academic freedom’ has been recognized by courts as protected by the First

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263; Harold T Shapiro, *A Larger Sense of Purpose: Higher Education and Society* (Princeton: Princeton University Press, 2005) at 97–119; Ann Colby et al, *Educating Citizens: Preparing America’s Undergraduates for Lives of Moral and Civic Responsibility* (San Francisco: Jossey-Bass, 2003); but cf. Stanley Fish, *Save the World on Your Own Time* (New York: Oxford University Press 2008) at 67–72 (arguing that it is not the place of universities to cultivate civic or ethical values); Clark Kerr, *The Uses of the University*, 5th ed (Cambridge, Mass: Harvard University Press, 2001) at 65–68 (describing the modern university as a “prime instrument of national purpose” increasingly merged with industry in maximizing economic growth).

114 Cf. Charles H McIlwain, *Constitutionalism: Ancient And Modern* (Ithaca: Cornell University Press, 1947) at 21–22 (constitutionalism “is a legal limitation on government; ... the antithesis of arbitrary rule; its opposite is despotic government, the government of will instead of law”); see also Andrés Sajó & Renáta Uitz, *The Constitution Of Freedom: An Introduction To Legal Constitutionalism* (Oxford: Oxford University Press, 2019) at 13.

115 See generally Lon Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964); Jeremy Waldron, “The Rule of Law” in Edward N Zalta, ed, *The Stanford Encyclopedia of Philosophy*, Summer 2018 ed (Stanford: Metaphysics Research Lab, Stanford University, 2018), online: *Stanford Encyclopedia of Philosophy* <plato.stanford.edu/entries/rule-of-law/> (characterizing Fuller as arguing that rule of law principles require that laws be “general, public, prospective, coherent, clear, stable, and practicable”).

Amendment's 'speech' clause.<sup>116</sup> The right of association, anchored by the free speech clause as well as the "the right of the people peaceably to assemble", also supports a wide range of private associations, including those that function as knowledge creators or disseminators. As for the courts, the tenure and salary protections of Article III enable federal judges to serve as relatively objective and impartial adjudicators — both as finders of fact in traditional party disputes and as evaluators of presumptive findings of "legislative" or "social facts" by other branches of government; and judges in the U.S. are immune from civil liability for their judicial rulings.<sup>117</sup> (Congress's Speech and Debate Clause immunity might be understood as creating an autonomous space for discussion and the pursuit of knowledge,<sup>118</sup> but, as argued earlier, Congress is not a knowledge institution, and the immunity can be misused to utter false and defamatory statements.)

Other national constitutions provide explicit protections to the press and to universities. Thus, South Africa's constitution (Section 16) protects "freedom of expression, which includes freedom of the press" as well as "academic freedom and freedom of scientific research". In addition, some constitutions explicitly recognize the institutional component of academic freedom, protecting the "autonomy" of institutions of higher education. Albania's (Article 57 Section 7) guarantees "the autonomy and academic freedom of higher education institutions".<sup>119</sup> Brazil's constitution (Article 207) provides that "Universities

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116 In other countries, specific constitutional protections may also extend to particular knowledge institutions. For example, see Eric Barendt, *Academic Freedom and the Law: A Comparative Study* (Oxford: Hart Publishing, 2010) at 117–8, 123 (describing how German Basic Law, Article 5, protects both a free press and 'freedom of research').

117 US Const art III; *Stump v Sparkman*, 435 US 349 (1978).

118 US Const art I, §6.

119 While Albania's Constitution guarantees "freedom of artistic creation and scientific research" (*The Constitution of the Republic of Albania*, 1998, CDL-REF(2016)064, art 58), in Armenia, Article 38(3) of the Constitution guarantees that "the institutions of higher education ... have the right to self-governance, including to academic and research freedom" (*The Constitution of the Republic of Armenia*, 1995 [amended 2015]), while another provision,

enjoy autonomy with respect to didactic, scientific and administrative matters, as well as autonomy in financial and patrimonial management". Croatia's (Article 68) likewise guarantees "the autonomy of universities".<sup>120</sup> Finland's constitution (Section 123) provides that "universities are self-governing".<sup>121</sup> Peru's (Article 18) provides "guarantees [of] academic freedom and rejects intellectual intolerance", and states that "every university is autonomous in its regulations, governance, and academic, administrative and financial regimes". Of 194 constitutions surveyed, at least 106 included references either to academic freedom, university autonomy or both (or cognates).<sup>122</sup> In addition to those constitutions already mentioned, a number of others provide explicit protection for the press, as in Italy (Article 21), Germany (Article 5), and Canada (*Charter of Rights and Freedoms*, Section 2). Argentina's Constitution prohibits federal statutes "that restrict the freedom of the press" (Section 32) and guarantees citizens the right "to publish their ideas through the press without previous censorship" (Section 14).<sup>123</sup>

Texts alone do not determine levels of actual protection, nor do they explain why they address the institutions they do. But they are one data point suggesting

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Article 43, gives "everyone ... freedom of literary or fine arts, scientific and technical creation".

120 This guarantee is extended as well to "freedom of scientific, cultural and artistic creativity" in Article 68 (*Constitution of the Republic of Croatia*, 1990, 28/2001).

121 And Section 16 of Finland's constitution guarantees "freedom of science, the arts and higher education" (*The Constitution of Finland*, 1999, 73/1999).

122 Research Memorandum on Global Constitutional Safeguards for Science to Professor Vicki C Jackson from Sam Stratton (June 13, 2020) supplemented by Email to Professor Vicki C Jackson from Sam Stratton (24 August 2020) (both on file with author) (research is on database of Constitute Project, at <[www.constituteproject.org/search?lang=en](http://www.constituteproject.org/search?lang=en)>). The data gathered by this Research Assistant is still being analyzed; I am very grateful to Sam Stratton for his research assistance.

123 See also *Declaration of Rights of Man and Citizen*, 26 August 1789, art II (France); *Loi du 29 juillet 1881 sur la liberté de la presse*, 29 July 1881. (France) [Law of 29 July 1881 on Freedom of the Press].

that some knowledge institutions have been formally recognized as of importance in constitutional democracies.

Knowledge institutions may also be affected by general constitutional rights — such as rights of freedom of expression, or association, rights of contract, and rights to due process — that are not limited to institutions that produce knowledge.<sup>124</sup> Knowledge institutions may be helped, or hurt, by other legal regimes enacted by legislatures or regulators or developed by courts, across a range of areas including antitrust law, corporate law (including non-profits), internet regulation, tax laws, government spending and licensing programs, patents and copyrights, defamation law, and others. Together, these legal regimes regulate, in some respects constitute, and should protect the knowledge ecosystem.

## 2. Special Role of Knowledge Institutions in Constitutional Democracies

As noted above, even illiberal or totalitarian governments need knowledge. Moreover, universities and libraries predate modern notions of constitutions and democracy, and have existed and continue to exist in non-democratic countries.<sup>125</sup> But knowledge institutions, as organs of epistemic objectivity, play special roles in representative democracies.

Unlike in a monarchy or autocracy, where a single or a small number of rulers need to be well informed about the world, in a democracy the people as a whole — or at least a sufficient swathe of the people and their elected representatives — need access to information to be able to identify patterns of social and economic fact, as well as knowledge of relevant national and world history that bear on current issues. Knowledge is needed to help (individuals,

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124 See *e.g.* *Dartmouth College v Woodward*, 17 US (4 Wheat) 518 (1819). See also Ernest Young, “Dartmouth College v Woodward and the Structure of Civil Society” (2019) 18:1 *University of New Hampshire Law Review* 41.

125 See *e.g.* McNeely & Wolverson, *supra* note 52 (discussing, *inter alia*, libraries in ancient Greece and Egypt; the development of universities between 1100 and 1500 in Bologna and Paris, etc.).



NGOs, and political parties) evaluate and develop policy positions and be able to distinguish claims that are well founded from those that are not. While this may be true for many forms of government, the role of such knowledge in representative democracies is to enable the people, and the different groups in which they are associated, to participate in the development of policies and make good decisions about public matters for their own lives and the lives of their community.

Knowledge is needed to evaluate the performance in office of elected officials and to engage in reasoned argument with one's fellow voters. Knowledge — not just substantive knowledge but also including certain habits of mind, including critical thinking, considering different sides of an issue where there is reasonable disagreement, and the like — is needed to be able to resist manipulations by those in high office, or those running for office, or by foreign powers, or by other interest groups, and to be able to evaluate arguments by opposing candidates for public office and for opposing positions on issues of policy. And knowledge is needed in order for the rule of law to be in effect and for the law to serve justice — so that laws, how they are enforced, and what their effects are, can be known, and evaluated and, where appropriate, changed.

Practitioners and theorists of representative democracy have emphasized the centrality of this epistemic base: Early U.S. Presidents argued for a national university to help educate young people (*inter alia*) about how to evaluate their representatives;<sup>126</sup> Alexander Meiklejohn, writing just after World War II, emphasized that self-governance requires wise voters with true knowledge of facts.<sup>127</sup> Courts in the post-World War II era, including the U.S. Supreme

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126 See text, *supra* text at note 22 (quoting President George Washington's argument for a national university to help citizens learn "to distinguish between oppression and the necessary exercise of lawful authority; between burthens proceeding from a disregard to their convenience, and those resulting from the inevitable exigencies of society").

127 Alexander Meiklejohn, *Free Speech and its Relation to Self-Government* (New York: Harper Brothers Publishers, 1948) at 25, 62, 69, 87; see also Dewey, *supra* note 22; Gutmann, *supra* note 22. For a suggestion that democracy requires knowledge, and that the pursuit of knowledge in a democracy requires

Court, have concluded that “informed public opinion is the most potent of all restraints upon misgovernment”.<sup>128</sup> The right to education has been widely understood (*San Antonio School District v Rodriguez* notwithstanding<sup>129</sup>) as fundamental in democratic societies.<sup>130</sup> Elections and referenda in democratic societies, then, require a knowledge base among voters or those from whom voters take their cues.

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fair elections, see Rosenfeld, *supra* note 7 at 173, 165–166 (asserting that “democracy ... cannot survive without any commitment to verifiable truth and truth-telling” and that combatting the “post-truth” phenomenon, as “symptom or cause of” democratic deterioration, requires protecting the integrity of elections).

128 *Pittsburgh Press Co v Pittsburgh Commission on Human Relations*, 413 US 376 at 382 (1973) (quoting *Grosjean v American Press Co*, 297 US 233 at 250 (1936)).

129 In *San Antonio Independent School District v Rodriguez*, 411 US 1 (1973) the US Supreme Court rejected a federal constitutional challenge to the financing of public education in Texas through local property taxes, notwithstanding plaintiffs’ argument that there was a fundamental right to education. Most U.S. states, by contrast, provide in their own constitutions for rights to public education. See Emily Zackin, *Looking for Rights in All the Wrong Places* (Princeton: Princeton University Press, 2013). For a recent decision finding a federal fundamental right to a basic minimum education including for literacy, see *Gary B v Whitmer*, 957 F (3d) 616 at 642–60 (6th Cir 2020), rehearing granted, 958 F (3d) 1216 (6th Cir 2020) (vacating panel decision).

130 See *e.g. Yated v Ministry of Education* (2002), HCJ 2599/00 (Supreme Court, Israel) Dorner J (affirming a fundamental right to education in Israel; noting that many national constitutions, as well as the constitutions of American states, recognize a fundamental right to education; and stating: “One cannot exaggerate the importance of education as a social tool. This is one of the most important functions fulfilled by the government and the State. Education is critical for the survival of a dynamic and free democratic society. It constitutes a necessary foundation for every individual’s self-fulfillment. It is essential for the success and flourishing of every individual. It is crucial to the survival of society, in which people improve their individual well-being and thus contribute to the well-being of the entire community”); *Unni Krishnan & Others v State of AP and Others* (1993), 1 SCC 645 (India Supreme Court, India) (inferring from the justiciable right to life, and from a nonjusticiable Directive Principle, a constitutional right to a free public education up to age 14).

Knowledge institutions collect information from which knowledge may be obtained; they generate knowledge, and they disseminate information and knowledge according to some form of disciplinary criteria. (Thus, much of social media should be viewed not as ‘knowledge institutions’ but rather as a new form of ‘communications’ technology, although some blogs facilitated by the internet might be viewed as part of academic or press institutions.)<sup>131</sup> Knowledge institutions differ in both their institutional characteristics and in the kinds of knowledge they are expected to produce. In academic life, the quality of knowledge generated is evaluated according to the distinctive academic norms of different disciplines. And what makes for good legal, scientific, literary, or historical knowledge generated by university faculty is evaluated according to different norms than what makes for good journalistic reporting on the activities of government officials. Yet together, these multiple different institutions constitute a knowledge ecosystem within which voters, representatives, and policymakers act.

## **B. Why Institutions as a Focus?**

Individuals are essential to the creation of knowledge. Protection of individual rights including freedom of thought, freedom of expression, freedom of research, and freedom of writing — are all essential to sustaining democratic constitutionalism. Indeed, despite the ‘institutional’ turn in some First Amendment scholarship,<sup>132</sup> much writing about constitutional rights continues to focus on the protection of rights held and asserted by individuals. Yet institutions may make special contributions to the epistemic base of constitutional democracy, for the following reasons.

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131 See *e.g.* Horwitz, *supra* note 33 at 168–71; *cf.* Yochai Benkler, “A Political Economy of Utopia?” (2019) 18 *Duke Law & Technology Review* 78, 82 (“Wikipedia has enough activated users ... to overcome ... efforts to distort information”).

132 See *e.g.* Schauer, “Principles, Institutions, and the First Amendment” *supra* note 33; Schauer, “Towards an Institutional First Amendment” *supra* note 33 at 1259–60; Horwitz, *supra* note 33.

## 1. Rights Exercised by or Within Institutions are More Likely to be Respected

Adam Chilton and Mila Versteeg's work suggests that when organizations are given, or are a special location for the exercise of rights, those rights may be better protected.<sup>133</sup> Such protection does not necessarily arise through judicial enforcement, nor through voting, they argue, but through other kinds of pressures those organizations can bring to bear on governments: Organizations can provide focal points and overcome collective action problems; they can thereby impose costs on governments for departures from rights more effectively than individuals acting on their own. To be sure, universities, the press, and government offices are not within their paradigm of the most effective organizations, which are organized membership entities like trade unions, political parties, and religious groups.

Nonetheless, as organized, ongoing entities they may well be able to contribute to the protection of individual rights of free speech, free research, free and informed voting and the like through the force of their ideas, norms, and cultures.<sup>134</sup> Academics who work in universities; civil servants who work in

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133 Adam Chilton & Mila Versteeg, *How Constitutional Rights Matter* (Oxford: Oxford University Press, 2020).

134 Cf. Margo Schlanger, "Offices of Goodness: Influence without Authority in Federal Agencies" (2014) 36 *Cardozo Law Review* 53 (analyzing how offices that are advisory, value-infused, and internal to an agency can protect particular 'precarious values' not central to the agency's mission by, e.g. heightening internal awareness). While older sociological studies of institutions focused on their formal structural characteristics, the new institutionalism gives more attention to normative, cultural and ideational bases of institutional influence and legitimacy. See e.g. John W Meyer & Brian Rowan, "Institutionalized Organizations: Formal Structure as Myth and Ceremony" (1977) 83:2 *American Journal of Sociology* 340; Lynne G Zucker, "The Role of Institutionalization in Cultural Persistence" (1977) 42:5 *American Sociological Review* 726. For a useful synthesis, see W Richard Scott, *Institutions and Organizations: Ideas, Interests, and Identities*, 4th ed (Thousand Oaks: Sage Publications, 2014) at 55–85 (arguing that institutions rest on regulative, normative, and cultural-cognitive pillars). There is widespread agreement, he writes, that "[i]nstitutions constrain and regularize behavior". *Ibid* at 59.

knowledge-generating government offices; journalists employed by major publishers — may all be empowered and protected by working within the legal ambit of their entity. Universities, the press, and those leading government offices also typically have some incentives to maintain their existing functions, capacities, and stature.<sup>135</sup>

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Institutionalized norms and cultural ideals of knowledge-seeking and knowledge dissemination may be a mechanism — apart from coordination, reciprocity and asset specific investment, discussed by Chilton and Versteeg, *supra* note 133 and Levinson, *supra* note 17 — that may help reinforce their protective role. See above, Scott at 60 (suggesting that there are not only coercive but also ‘normative’ and ‘mimetic’ ways that institutions influence behavior). The role of norms is also central to Douglass North’s definition of ‘institutions’ — as distinct from organizations — in his Nobel Prize acceptance speech, Douglass C North, “Economic Performance through Time” (prize lecture delivered at the Nobel Prize, 9 December 1993), online: *The Nobel Prize* <[www.nobelprize.org/prizes/economic-sciences/1993/north/lecture/](http://www.nobelprize.org/prizes/economic-sciences/1993/north/lecture/)>, where he stated: “Institutions are the humanly devised constraints that structure human interaction. They are made up of formal constraints (rules, laws, constitutions), informal constraints (norms of behavior, conventions, and self imposed codes of conduct), and their enforcement characteristics”.

135 Cf. Levinson, *supra* note 17 at 683–87, 711 (explaining that institutions endure because they provide useful coordination functions, reciprocal benefits, and represent a set of specific investments). These attributes help explain the continuity of universities; and may help explain both the longtime endurance of major sources of journalism and the increasing fragility of older newspapers as the internet has lowered the capital costs necessary for the physical production of newspapers and magazines. Well organized bureaucratic offices in government may have some of these attributes as well, including the reputational interests of current and former members of well-regarded government offices in seeing the office’s stature maintained. Whether more time-limited public commissions or task forces charged with reporting on particular occurrences could be viewed as knowledge institutions will be discussed in later work.

## 2. Institutions Can Advance the Search for ‘Truer Knowledge’ with Less Damage to Free and Open Inquiry Than Coercive Government Regulation

A second reason to focus on knowledge institutions is because of the dangers of invoking the coercive powers of government regulation to promote knowledge production and testing. As we have all too vividly seen in recent days, authoritarian governments have used the COVID-19 pandemic to assert coercive control over the reporting of “fake news” — often consisting of criticism of government responses to the epidemic.<sup>136</sup>

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136 See Jacob Mchangama & Sarah McLaughlin, “Coronavirus Has Started a Censorship Pandemic” (1 April 2020), online: *Foreign Policy* <[foreignpolicy.com/2020/04/01/coronavirus-censorship-pandemic-disinformation-fake-news-speech-freedom/](https://foreignpolicy.com/2020/04/01/coronavirus-censorship-pandemic-disinformation-fake-news-speech-freedom/)> (describing the use of laws targeting ‘fake news’ as “tools to suppress criticism and accurate information just as readily as misinformation”); “Would-be Autocrats are Using COVID-19 as an Excuse to Grab More Power”, *The Economist* (23 April 2020), online: <[www.economist.com/international/2020/04/23/would-be-autocrats-are-using-covid-19-as-an-excuse-to-grab-more-power](https://www.economist.com/international/2020/04/23/would-be-autocrats-are-using-covid-19-as-an-excuse-to-grab-more-power)>; Lasse Schuldt, “Abstract Panic: On Fake News, Fear and Freedom in Southeast Asia” (14 April 2020), online (blog): *Verfassungsblog* <[verfassungsblog.de/abstract-panic-on-fake-news-fear-and-freedom-in-southeast-asia/](https://verfassungsblog.de/abstract-panic-on-fake-news-fear-and-freedom-in-southeast-asia/)> (describing the measures taken by various governments in Southeast Asia to suppress “fake news”). On the potential for misuse of such laws against critics of the government, see Gábor Halmay & Kim Lane Scheppele, “Orbán is Still the Sole Judge of his Own Law” (30 April 2020), online (blog): *Verfassungsblog* <[verfassungsblog.de/orban-is-still-the-sole-judge-of-his-own-law/](https://verfassungsblog.de/orban-is-still-the-sole-judge-of-his-own-law/)>; Kim Lane Scheppele, “Orbán’s Emergency” (29 March 2020), online (blog): *Verfassungsblog* <[verfassungsblog.de/orbans-emergency/](https://verfassungsblog.de/orbans-emergency/)> (on Hungary); see above, Schuldt (on the Philippines); Steve Rosenberg et al, “Coronavirus: Is pandemic being used for power grab in Europe?”, *BBC News* (18 April 2020), online: <[www.bbc.com/news/world-europe-52308002](https://www.bbc.com/news/world-europe-52308002)> (on Russia). See generally Joel Simon, “Covid-19 is Spawning a Global Press-Freedom Crackdown” (25 March 2020), online: *Columbia Journalism Review* <[www.cjr.org/analysis/coronavirus-press-freedom-crackdown.php](https://www.cjr.org/analysis/coronavirus-press-freedom-crackdown.php)> (describing governments around the world “cracking down on journalists and implementing sweeping restrictions under the guise of combating misinformation and ‘fake news’” in response to the pandemic).

Yet testing and authenticating justifications for beliefs that something is true are essential to advancing knowledge. Having institutions that, lacking power to put people in jail, have the soft power to decide what counts as good work — whether an editor questioning a journalist on fact checking, or one faculty member challenging another’s work in her area — is a less dangerous way of trying to promote the search for knowledge, without suppressing that very search.<sup>137</sup>

### 3. Disciplinary Norms Developed Through Knowledge Institutions Can Temper Government Decisions

When expert knowledge or truth claims can be evaluated by the disciplinary standards of an ongoing knowledge institution, it may be more manageable for courts, and other government bodies, to assess whether the exercise of individual rights to assert truth claims (challenged as defamatory or inaccurate) were based on a generally reliable methodology, and, if so, to protect their makers from adverse coercive consequences. Indeed, as Robert Post has argued, in order to take proper account of interests in what he calls “democratic competence”, courts in some circumstances will need “to apply the authoritative methods and truths of medical science [or other bodies of expert knowledge] in order to determine” what speech can be regulated.<sup>138</sup> The authority of particular methods is more easily established through institutional practices than by sole individuals.

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137 Cf. Rosenfeld, *supra* note 7 at 160 (arguing the need for “small-bore ways of modeling (without legislating) truth-telling and lie-detecting as epistemological and ethical commitments in public life ... [reinforcing them] as a fundamental form of democratic practice”). In the United States, moreover, government regulation of “public noncommercial factual falsity” is of doubtful constitutionality. Frederick Schauer, “Facts and the First Amendment” (2010) 57 UCLA Law Review 897 at 915.

138 See *e.g.* Post, *supra* note 72 at 54 (offering as examples what kind of medical advice constitutes malpractice, or whether astrologists can be prohibited from offering commercial services (at 51–56)); *infra* note 148.

For these three reasons, then, a focus on institutions is a useful supplement to more traditional foci on individuals in understanding the knowledge infrastructure of constitutional democracies. *A caveat:* Institutions and institutional design can only do so much. Almost any institution can be subverted if controlled by persons who do not have democratic constitutionalist temperaments or commitments. So the traits that are valued in society may bear on the likely success of its institutions. Civic and social education may be a partial response to this challenge.

### **C. Shared Principles?**

Finally, there are some shared principles for thinking about knowledge institutions in constitutional democracies that can be identified to help inform a holistic, ‘knowledge ecosystem’ view of the epistemic foundations of democracy. I offer the following thoughts: (1) that the purpose of pursuing knowledge is to improve understandings of human and natural phenomena and, where possible, identify objectively verifiable understandings; (2) through the independent application of appropriate disciplinary standards; (3) with an attitude of epistemic humility and awareness that current understandings may be challenged or disproven; (4) in a decentralized system of sources of knowledge. These four principles are relevant in thinking about both public institutions and private institutions.

#### **1. Objectivity and Improved Understandings**

Despite recent attacks on the possibility of truth or objective knowledge — attacks that may spring from a healthy commitment to the legitimacy of multiple perspectives on the experiences of different groups over time in law, history, arts, or sciences; or from an appreciation of the ways in which science itself is socially situated or constructed;<sup>139</sup> or from a snarky contempt for truth

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139 There is considerable debate about the nature of scientific knowledge. For varying perspectives, compare *e.g.* Thomas Kuhn, *The Structure of Scientific Revolutions*, 3rd ed (Chicago: University of Chicago Press, 1996) at 52–53, 66–68, 126 (arguing that science progresses not through the accumulation of data but by discovering anomalies that lead to new paradigms and theories) and



captured by Steven Colbert's phrase, "truthiness"; or from Orwellian assertions, by high officials, of "alternative facts"<sup>140</sup> — government policies should be based on a well-informed understanding of the likely facts or likely ranges of consequences of differing actions and inactions, in order to fulfill basic constitutional purposes of advancing and protecting the well-being and rights of members of the polity.<sup>141</sup> Of course, there will often be reasonable

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Karin Knorr Cetins, *Epistemic Cultures: How the Sciences Make Knowledge* (Cambridge, Mass: Harvard University Press, 1999) at 3–5, 8–11 (arguing that different science cultures employ different methodologies and tools) with e.g. Robert K Merton, "The Normative Structure of Science" in Norman W Storer, ed, *The Sociology of Science: Theoretical and Empirical Investigations* (Chicago: University of Chicago Press, 1973) 267 at 270 (arguing that scientific knowledge develops through empirical confirmation of predictions and that the sciences reflect commitment to certain goals, including disinterestedness and skepticism) and Alexander Bird, "What is Scientific Progress?" (2007) 41:1 *Noûs* 64 at 64–67, 86–87 (arguing that science makes progress through the accumulation of knowledge, so that accumulating false or accidentally true solutions from false theories should not be viewed as scientific progress); and Karl Popper, *The Logic of Scientific Discovery*, translated by Karl Popper, Dr. Julius Freed & Lan Freed (New York: Routledge Classics, 2002) [Popper, *Scientific Discovery*] (arguing that falsifiability, or the ability of theories or beliefs to be disverified, is the key to empirical science). With thanks to Sam Weinstock, Harvard JD expected 2022, for analysis and descriptions of most of these works.

- 140 Joëlle Anne Moreno, "Extralegal Supreme Court Policy-Making" (2015) 24:2 *William & Mary Bill of Rights Journal* 451 at 451 (Colbert invented 'truthiness' in 2005); Jim Rutenberg, "'Alternative Facts' and the Costs of Trump-Branded Reality", *The New York Times* (22 January 2017), online: <[www.nytimes.com/2017/01/22/business/media/alternative-facts-trump-brand.html](http://www.nytimes.com/2017/01/22/business/media/alternative-facts-trump-brand.html)> (noting assertion by Trump senior adviser Kellyanne Conway of 'alternative facts').
- 141 On the purpose of a state and of its constitution, see generally N W Barber, *The Principles of Constitutionalism* (Oxford: Oxford University Press, 2018) (purpose is to promote the well-being of its members). On objectivity: objectivity here depends at least in part on some ability to separate 'facts' from 'values'. See Michael Schudson, *Origins of the Ideal of Objectivity in the Professions: Studies in the History of American Journalism and American Law, 1830-1940* (New York: Garland Publishing, 1990) at 3 ("Facts ... are assertions about the world open to independent validation"); see also, Schudson

disagreement; aspiring to resolve those disagreements on the best available information — and with the humility to revisit decisions when new facts, new knowledge emerges — is all that can reasonably be expected.

Recognizing that objectivity may represent more of an aspiration than an attainable goal, given important differences in perspectives, it should nonetheless be possible to strive for more, rather than less, accurate understandings of facts about the world in the fields of the natural sciences, mathematics, economics, history, and the social sciences. There are “facts of the matter” on some topics and open-minded objective evaluation will discern them.<sup>142</sup>

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at 5–6 above (a dominant version of objectivity about facts being that they must be “submitted to established rules of intersubjective consensus, the ordered, collective criticism of a scientific community. Any statement must be tried before a jury of qualified observers or the rules they have established”). See also Jackson, “Thayer, Holmes, Brandeis”, *supra* note 100 at 2379, 2385 (discussing “intersubjective empirical verifiability” and arguing that “[f]acts have traditionally been understood to involve objectively ascertainable phenomena, about what has happened in the past and what is likely to happen in the future. The quality of being a ‘fact’ contemplates that persons with different values can nonetheless agree on the existence or likelihood of the phenomena denoted by the term ‘facts’”) [footnotes omitted].

- 142 Or so I believe, along with many other scholars. See *e.g.* Rosenfeld, *supra* note 7 at 143 (“[I]t ... remains entirely possible to believe that much of the world we experience is socially constructed without denying the existence of mind-independent facts and ... a mind-independent reality behind them”); Schauer, *supra* note 137, at 900-901 (to similar effect). On the emergence of an express commitment to ‘objectivity’ as a self-reflective goal in both journalism and the law in the 1920s, see Schudson, *ibid* at preface (attributing this phenomena to “intellectual life more broadly ... [making] reflective journalists aware of how strongly subjective journalistic judgment ordinarily is” with “legal realism [arising] in the same cultural atmosphere and [causing] a similar kind of shift in legal thinking”). Perhaps we are in the midst of another intellectual sea change in which, rather than ‘objectivity’, some other norm of professional judgment is emerging. *Cf.* Jill Lepore, “After the Fact”, *The New Yorker* (21 March 2016) at 91 (arguing that the role of ‘facts’ is being challenged by the role of ‘data’, or by ‘faith’, and that contemporary concerns for civil society require either “some epistemic principles other than empiricism on which everyone can agree or else

While some constitutional systems seem to recognize the value of governments aspiring to objectivity in determining the facts, others do not. The U.K. Cabinet Manual for example, lists “objectivity” as one of the seven “principles of public life”,<sup>143</sup> and it requires Ministers to respect the impartiality of the Civil Service.<sup>144</sup> Article 73 of the Kenya Constitution describes “objectivity and impartiality” as constitutionally required elements of leadership. No analogous, general commitment to objectivity and impartiality exists in the U.S. at the federal level.

Should constitutional democracies articulate a principled commitment to the institutional infrastructure to support gathering and disseminating reliable information? And promote aspirations towards objectivity or impartiality by government officials in evaluating facts and their implications? Can academics, many of us steeped in respect for the value of recognizing diversity of perspectives and viewpoints, find a way to embrace and articulate legal frameworks for promoting more reliable, rather than less reliable, understandings of important social and scientific facts? Promoting aspirations towards objectivity in identifying facts relevant to public decisions will also entail

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... some method other than reason with which to defend empiricism”, possibly rooted in “common practical and ethical commitment” *ibid* at 94).

143 UK, Cabinet Office, *Cabinet Manual* (London: Cabinet Office, 2011) at 26, online (pdf): *Gov.UK* <[www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/60641/cabinet-manual.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/60641/cabinet-manual.pdf)> [“UK, Cabinet Manual”].

144 *Ibid* at 4 (“15. Ministers hold office as long as they have the confidence of the Prime Minister. They are supported by impartial civil servants. *Civil servants are required to act with honesty, objectivity, impartiality and integrity. Ministers must uphold the political impartiality* of the Civil Service, and not ask civil servants to act in any way which would conflict with the Civil Service Code ...”) [emphasis added]. The ‘core’ civil service obligations of honesty, objectivity, integrity and impartiality are defined at Section 7.4: objectivity means “basing your advice and decisions on rigorous analysis of the evidence” (at 57); integrity means “putting the obligations of public service above your own personal interests” (at 57); impartiality means “acting solely according to the merits of the case and serving equally well governments of different political persuasions” (at 57).

articulating the grounds for respecting particular disciplinary — whether academic, journalistic, or judicial — norms of proper factfinding and understanding the purposes for which facts asserted in these different domains warrant respect in public decision-making domains.

## 2. Epistemic Humility

A commitment to objectivity in the pursuit of knowledge entails some degree of epistemic humility, or a willingness to consider empirical, reasoned challenges to current views of knowledge. Scientific or other academic methods may be revised, in pursuit of better understandings of how to develop and/or how to test knowledge of the world. As noted earlier, Peter Byrne argues that “we need academic freedom because all scholarship presupposes a goal of *truer knowledge* that may conflict with prevailing ideology”.<sup>145</sup> This idea of “truer knowledge” embraces the coexistence of knowledge — “those understandings of the world upon which we rely because they are produced by the best methods at our disposal” (AAUP) — and the possibility of revision or future correction, to “truer knowledge”. But epistemic humility is not the same

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145 Byrne, *supra* note 16 at 154; see also Popper, *Scientific Discovery*, *supra* note 139 (arguing that while the truth of empirical theories can never be fully verified, they can be falsified); cf. Karl Popper, *The Open Society and Its Enemies* (Princeton: Princeton University Press, 2020) at 466–67 (associating ‘open societies’, in contrast to totalitarianisms, as engaged in ‘rational and critical’ reflection and decision making). Whether scientific discovery is motivated more by efforts to dis-verify (per Popper), or by development of new theories or paradigms to account for anomalous observed phenomena (per Kuhn), a recent work argues that what ties science together is commitment to a procedure of presenting and arguing from empirical evidence. See Joshua Rothman, “How Does Science Really Work?”, *The New Yorker* (28 September 2020), online: <<https://www.newyorker.com/magazine/2020/10/05/how-does-science-really-work>> (reviewing and describing claims of Michael Strevens, *The Knowledge Machine: How Irrationality Created Modern Science* (New York: Liveright Publishing Corporation, 2020) (arguing that modern science is based on the “iron rule of explanation”, requiring scientific argument to be based only on empirical data)).

as epistemic relativism; it does not mean that any idea or claim is just as good as another.<sup>146</sup>

### 3. Independence in Applying Disciplinary Standards

Two inter-related ideas are important. First, that knowledge institutions develop and apply standards for determining what counts as knowledge within their disciplines. Among different disciplines and in different institutions (*e.g.* academia, the press), there are differing standards, but a common commitment should exist to honesty in identifying and assessing information and to the kind

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146 For example, epistemic humility does not mean that “climate change deniers” have a view deserving of as much respect and deference as the scientific consensus that climate change is a real and significant threat. See Naomi Oreskes, “Beyond the Ivory Tower: The Scientific Consensus on Climate Change” (2004) 306:5702 *Science* 1686. Indeed, epistemic humility in the context of aspirations to objectivity might instead imply that ideas outside of the scientific or learned consensus should be subject to rigorous review, skepticism and careful testing. Humility is an attitude that recognizes that the views of any group or individual, no matter how learned they might be, are possibly wrong. It is only through the testing, probing, and skeptical evaluation of others in the field that views outside the current consensus can emerge to become the basis for action. The consensus view on climate change went through that testing and probing to become the consensus view; it is my understanding that the scientific community has evaluated the evidence that doubters have raised, and if anything, the consensus view has been reinforced. See Earth Science Communications Team, “Scientific Consensus: Earth’s Climate is Warming” (last visited 16 December 2020), online: *NASA: Global Climate Change* <[climate.nasa.gov/scientific-consensus/](http://climate.nasa.gov/scientific-consensus/)>; Peter Doran & Maggie Kendall Zimmerman, “Examining the Scientific Consensus on Climate Change” (2011) 90 *EOS* 22, online (pdf): *Advancing Earth and Space Science* <[agupubs.onlinelibrary.wiley.com/doi/abs/10.1029/2009EO030002](http://agupubs.onlinelibrary.wiley.com/doi/abs/10.1029/2009EO030002)>. But epistemic humility does require defenders of a current consensus to continue to evaluate new evidence that is presented by doubters, and it requires those doubters to attempt to continue to put forward evidence and to engage in the scientific process of testing. Epistemic humility does not require treating the expressed views of politicians, not subject to knowledge-oriented disciplinary standards, as if they were scientists willing to engage in the truth-seeking processes of science.

of integrity of which rules against plagiarism are just one aspect. In some disciplines, replicability will be important to the reliability of information claimed to be true; in others, disclosure of the basis for the conclusion drawn will be necessary. The idea that claims about truth, or about a new understanding of a phenomenon, must be based on evidence and reasoning that others can evaluate seems common to most disciplines.<sup>147</sup>

Second, knowledge institutions must enjoy some degree of autonomy in applying those standards. That is, when their application of standards is challenged before an outside body, they should receive some presumptive respect by courts or regulators. So, for example, it has been observed that in defamation cases findings of actual malice may be avoided where a press defendant has applied the ordinary methods of journalism, such as fact-checking and editorial supervision, characterized by the responsible press.<sup>148</sup> Likewise, courts in challenges to academic decisions by universities, whether they be expelling a student on academic grounds, or refusing tenure to a faculty member, typically (though not always) defer.<sup>149</sup>

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147 This methodological commitment is perhaps a manifestation of the idea that a claim that is true by coincidence cannot be treated as knowledge. See Blocher, *supra* note 10 at 463.

148 For suggestions that in applying the ‘actual malice’ standard of *New York Times v Sullivan*, 376 US 254 (1964) in defamation actions courts have looked to the application of journalist practices of professional verification, see Horwitz, *supra* note 33 at 152–53; see also Randall P Bezanson, “The Developing Law of Editorial Judgment” (1999) 78:4 Nebraska Law Review 754 at 830–38; Brian C Murchison et al, “Sullivan’s Paradox: The Emergence of Judicial Standards of Journalism” (1994) 73:1 North Carolina Law Review 7 at 30.

149 See e.g. *Board of Curators of University of Missouri v Horowitz*, 435 US 78 (1978); *Regents of University of Michigan v Ewing*, 474 US 214 (1985); see also *Vanasco v National-Louis Univ.* (7th Cir 1998). Perhaps in contrast to strongly ‘institutionalist’ positions, I do not think that recognizing reasons to defer to institutions’ independent judgments — for example, to universities’ autonomy in applying academic standards — necessarily rules out recognizing the need for independent judgment by, and respect for academic freedoms of, their individual faculty. See also Lazarus, *supra* note 20 at 492–95 (discussing

#### 4. Decentralization

At the same time, another principle for the epistemic infrastructure of constitutional democracy is maintaining a diversity of sources generating knowledge by decentralized decisionmakers. The economic market operating on its own may not conduce to maintaining multiple private sources of information; positive action by governments may be required to prevent the conglomeration of news. Academic disciplines, too, may benefit from being shaken up by new competitors, to avoid too much confidence and too little humility about the limits of any one generation's knowledge and wisdom. What might be seen as 'merely' a form of statutory anti-trust or competition policy may, in fact, be closely related to the positive tasks of constitutional government in sustaining genuine freedom of the press,<sup>150</sup> or enabling both academic collaboration and competition in the development of academic disciplines.

*Note on Some Tensions:* These ideas — for example, aspiring towards objectivity through adherence to disciplinary methodologies and sustaining decentralized sources of knowledge — may come into tension with each other. Reliable data collection and findings are often promoted through standardization of procedures for the collection and production of knowledge within specific disciplines; homogenization, in these senses, may be beneficial to adherence to particular methodologies. Yet such homogenization may be in tension with maintenance of a diversity of knowledge producers in the area. But resolving or accommodating such tensions (or tensions between these ideas and other constitutional values) is something that law does. My goal here is not to attempt that resolution, especially at the high level of generality at which I have discussed these principles; but rather to work to identify leading principles, of which there may be others, that knowledge institutions should embody, serve or be characterized by.

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scholars' duties of independence, self-awareness, intellectual honesty, and integrity).

150 See Minow, "Changing Ecosystem" *supra* note 6.

## IV. Conclusion: Thoughts for Future Work

What does a framework accepting knowledge institutions as a critical component of democratic constitutionalism imply for further work? For one thing, citizens, scholars, and legal actors might recognize obligations, even if nonjusticiable, on the part of governments actively to protect institutional sources of knowledge, whether in private universities and libraries, public universities or government offices, or in the public or private press.<sup>151</sup> If constitutional democracies recognize an obligation to promote — or at least not to hinder — the search for knowledge, might this imply obligations of competence and objectivity in lawmaking and rulemaking? Or presumptive obligations for governments and their officials to make government-held information available and not to lie about government matters?<sup>152</sup> Should journalists who are associated with the ongoing institutional press be accorded privileges justified by the role of the press and by the accuracy-enhancing ethical norms of the organized press?<sup>153</sup> Should courts adjust their standards of review

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- 151 See Vicki C Jackson, “Pro-constitutional Representation: Comparing the Role Obligations of Judges and Elected Representatives in Constitutional Democracy” (2016) 57:5 *William & Mary Law Review* 1717; see also Vicki C Jackson, “Legal Scholarship and Knowledge Institutions in Constitutional Democracy” (Summer 2019), online: *Association of American Law Schools* [www.aals.org/about/publications/newsletters/summer2019/legal-scholarship-and-knowledge-institutions-in-constitutional-democracy/](http://www.aals.org/about/publications/newsletters/summer2019/legal-scholarship-and-knowledge-institutions-in-constitutional-democracy/). (Knowledge institutions bridge the public-private boundary. Later work may explore the value of retaining some distinctions between rules applicable to public and to private entities, at the same time suggesting the need for a more functional analysis perhaps through ideas of public-private hybridity).
- 152 See Vicki C Jackson, *Governments as Knowledge Promoters and a Presumptive Duty Not To Lie* (August 2020) [unpublished, on file with author]; see also Helen Norton, “The Government’s Lies and the Constitution” (2015) 91 *Indiana Law Journal* 73.
- 153 See Vicki C Jackson, *Knowledge Institutions in Constitutional Democracy: For a Reinigorated First Amendment Freedom of the Press* (August 2020) [unpublished, on file with author]. Hard questions will arise about defining the press, including about whether particular enterprises do or do not adhere to disciplinary norms of journalism especially in the context of highly



based on an evaluation of knowledge-based legislative or executive competency? Or modify judicial factfinding processes?<sup>154</sup> Should government employees be better protected from adverse employment decision for their job-related speech on matters of public concern?<sup>155</sup> Should administrative law recognize obligations conducive to an objective search for knowledge on which to base policy decisions?<sup>156</sup> And how might governments, universities, the legal profession, and others promote forms of civic education that foster respect for democracy, for reason, and for knowledge-based democratic decisions?<sup>157</sup>

The frame of knowledge institutions helps enlarge the constitutional vision applied to particular doctrinal questions, as well as to broader questions of the role and purpose of government that lie at the heart of constitutionalism. It is

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commercialized and highly polarized mass media. On the possible effects of public perception of press polarization, see Jisu Kim and Soojong Kim, “News organizations as fact-checkers: Any potential issue?” (17 December 2020), online (blog): *Balkin* <[balkin.blogspot.com/2020/12/news-organizations-as-fact-checkers-any.html](http://balkin.blogspot.com/2020/12/news-organizations-as-fact-checkers-any.html)>.

- 154 See Vicki C Jackson, *Knowledge, Democratic Decisions and Judicial Review* (August 2020) [unpublished, on file with author].
- 155 Compare the U.S. approach in *Garcetti v Ceballos*, 547 US 410 (2006) with the arguably greater protection afforded under European law (see Council of Europe, “Whistleblowers and their Freedom to Impart Information” (May 2017) online (pdf): *Council of Europe* <[rm.coe.int/factsheet-on-whistleblowers-and-their-freedom-to-impart-information-ma/16807178d9](http://rm.coe.int/factsheet-on-whistleblowers-and-their-freedom-to-impart-information-ma/16807178d9)>).
- 156 Compare *Little Sisters of the Poor Saints Peter & Paul Home v Pennsylvania*, 140 S Ct 2367 at 2385–86 (2020) (holding that there is no basis in the Administrative Procedure Act to require ‘open-mindedness’ by decisionmakers) with UK, Cabinet Manual, *supra* note 143 and *supra* note 144 (setting forth ‘principles of public life’ including ‘objectivity’, ‘openness’, ‘integrity’, and ‘honesty’). I address such issues in Vicki C. Jackson, *Anti-constitutional Administrative Law* (February 2021) [unpublished, on file with author].
- 157 See Vicki C Jackson, *Knowledge Institutions and Civic Education in Constitutional Democracy* (August 2020) [unpublished, on file with author]; see also Vicki C Jackson, “Law Schools and Civic Education”, *Association of American Law Schools News* (Fall 2019), online: <[www.aals.org/about/publications/newsletters/aals-news-fall-2019/law-schools-and-civic-education/](http://www.aals.org/about/publications/newsletters/aals-news-fall-2019/law-schools-and-civic-education/)>.

my hope that in my own subsequent work, and in the work of others,<sup>158</sup> these issues can be more deeply explored. Given the rise of illiberal hostility to knowledge-based decisions in contemporary democracies, the challenges are urgent.

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158 Cf. Lazarus, *supra* note 20 (arguing, *inter alia*, that constitutional scholars can function as “integrity institutions” in constitutional democracy).