

Implementing First Amendment Institutionalism

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Paul Horwitz's *First Amendment Institutions*¹ is a comprehensive treatment of the theory, application, and complexity of an institutional approach to the First Amendment. It is a wonderful book—full of nuanced theoretical analysis,² careful parsing of legal doctrine,³ and bold and innovative arguments that would substantially reshape constitutional law.⁴ Horwitz's work is designed and destined to be among the standard references for judges and scholars who employ an institutional approach to the First Amendment⁵—this reviewer unabashedly among them.⁶

The two main goals of this brief review are to describe the book's arguments and to identify some important questions that the book does not fully answer. The latter are not intended as a criticism. The scope of the work unavoidably encourages the reader to linger on newly-opened vistas, which in turn invite exploration and further questions. This review attempts to sketch a map for those expeditions.

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¹ PAUL HORWITZ, *FIRST AMENDMENT INSTITUTIONS* (2013).

² See, e.g., *id.* at 77-182 (discussing political theory and religious doctrine regarding “sphere sovereignty”).

³ See, e.g., *id.* at 184-89 (discussing constitutional rules regarding church autonomy).

⁴ See *id.* at 10 (suggesting, *inter alia*, that First Amendment doctrine should be modified by “[g]ranteeing the press new constitutional privileges to conceal sources and to engage in newsgathering practices without legal interference” and “[a]llowing libraries to follow their own policies on the use of Internet filters, even when the government demands the use of filters as a condition of funding”).

⁵ See, e.g., Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256, 1260 (2005) (illustrating that the arguments against the institutional approach are inadequate without suggesting the method for employing the institutional approach).

⁶ See Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 823-29 (2008).

I. The Book: *First Amendment Institutions*

Near the outset of *First Amendment Institutions*, Horwitz neatly summarizes his book's main aims:

My goal in this book is twofold: to bring attention to the central infrastructural role played by First Amendment institutions in public discourse and think about how the law might reflect that role, and more generally to encourage us to think about how First Amendment law might be more responsive to the real world of public discourse and less fixated on acontextual legal rules.⁷

The book pursues these two goals in three parts.

The first part of the book is devoted to the basic case for First Amendment institutionalism. Horwitz's foil is the "acontextual" impulse he attributes to many courts and scholars—the effort to be "indifferent to what we might call real world context and highly attentive to legal context."⁸ First Amendment scholars, in particular, "habitually ignore real-world context and focus instead on one central distinction: that between the speaker and the state."⁹ That kind of spot-blindness seems to bother Horwitz as a general matter, but in the book he is specifically focused "on a particular aspect of law's indifference to context: its 'institutional agnosticism.'"¹⁰

His prescription for this deficiency is—not surprisingly—a dose of institutionalism: "I argue that we should take context seriously. In particular, we should take seriously the simple fact that a good deal of the speech and conduct that makes up some of the most important aspects of the lived world of First Amendment activity takes place through *institutions*."¹¹ By First Amendment institutions, Horwitz means those "whose contributions to public discourse play a fundamental role in our system of free speech."¹² This definition is expansive enough to include not

⁷ HORWITZ, *supra* note 1, at 22.

⁸ *Id.* at 5; *see also id.* at 68 ("[L]egal minds carve up the world . . . or at least *yearn* to do so—acontextually. That is, rather than focus on concepts and categories drawn from social life and the everyday world, they focus on broad concepts and categories drawn from legal thought itself.").

⁹ *Id.* at 5.

¹⁰ *Id.*

¹¹ *Id.* at 8.

¹² *Id.* at 12 (quoting Paul Horwitz, *Grutter's First Amendment*, 46 B.C. L. REV. 461, 589 (2005)). Horwitz notes that this definition opens up the thorny problem—faced by many other scholars, including Robert Post—of defining what counts as "public discourse." *See, e.g., id.* at 82-85. I have tried to address that issue elsewhere, but hold it aside for now. *See generally* Joseph Blocher, *Public Discourse, Expert Knowledge, and the Press*, 87 WASH. L. REV. 409 (2012).

I would note, though, that I think Horwitz might over-emphasize the degree to which

only large-scale institutions, such as “the press,” but individual representatives of those institutions—what I would call “organizations”¹³—such as the *New York Times*.¹⁴

The second part of the book measures the first part’s normative analysis against current First Amendment doctrine regarding universities, the press, churches, libraries, and associations. That Horwitz grounds his theoretical discussion in constitutional doctrine is a significant contribution, for it shows the degree to which his theory finds support in existing law, and what changes it would demand. That said, the relationship between Horwitz’s normative account of the First Amendment and the status of existing doctrine could perhaps be clarified. At times, he seems to be operating from an external perspective, criticizing existing doctrine for failing to accommodate institutional perspective:

At least on its face, then, First Amendment doctrine is not driven by contextual factors such as the nature of the speech or the identity of the speaker. Instead, what is doing the doctrinal work in this area is a set of broader categories that are fundamentally legal and acontextual.¹⁵

But as the qualifying clause, “[a]t least on its face,” suggests, the notion that existing doctrine is context-agnostic might be slightly overstated. Indeed, Horwitz himself later notes that “in some respects First Amendment doctrine has *already* taken the institutional turn, albeit not as forthrightly as it might.”¹⁶ Consider public forum doctrine, which Horwitz identifies as an acontextual culprit.¹⁷ Though it might be true that specific applications of public forum doctrine tend to be context-neutral, the very *shape* of the doctrine gives special treatment to the kinds of places—like streets and parks—that “have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing

Post’s conception of public discourse is limited to “the formal political process.” HORWITZ, *supra* note 1, at 84. Post’s account is certainly more state-centered than Horwitz’s, but I read Post as arguing that “First Amendment coverage should extend to all efforts deemed normatively necessary for influencing *public opinion*,” not simply to those regarding the political process. Compare *id.* at 84, with ROBERT C. POST, *DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* 18 (2012) (emphasis added).

¹³ Blocher, *supra* note 6, at 860-63 (describing the critical distinction between speech institutions and speech organizations).

¹⁴ See HORWITZ, *supra* note 1, at 11.

¹⁵ *Id.* at 53.

¹⁶ *Id.* at 81.

¹⁷ *Id.* at 55.

public questions.”¹⁸ This seems like precisely the kind of historical, contextual analysis of the kind Horwitz advocates.

This is nitpicking, to be sure. Horwitz never says that current First Amendment doctrine is fully adverse to his theory. I raise the point only to suggest that keeping his doctrinal friends closer might take some of the sting out of his critique, but would, in doing so, strengthen the normative force of his argument. After all, as Robert Post—a scholarly hero of Horwitz’s¹⁹—points out, “we can learn the purposes we have constructed First Amendment doctrine to achieve by tracing the contours of actual First Amendment coverage.”²⁰

Horwitz’s book concludes by considering various “problems and prospects” of First Amendment institutionalism. Horwitz notes that the institutional turn “is not meant to be the sole guide for First Amendment doctrine,”²¹ and that even within its limited scope, it is not perfect. For one thing, it may fail to capture powerful First Amendment values such as distrust of government or commitment to individualism. Horwitz forthrightly acknowledges these criticisms, and has powerful answers to most of them. The remainder of this review will attempt to identify a few more lines of inquiry.

II. Institutional Rules of Recognition

As should be evident from the account above, one of the many virtues of Horwitz’s book is that it seeks to provide not only a theoretical account of what free speech institutions are and why they are important, but also how doctrine can take account of them. In Horwitz’s hands, First Amendment institutionalism is a tool for judges, and for the apparently increasing proportion of constitutional scholars interested in inputs of constitutional meaning and the resulting outputs of constitutional law.²²

Even assuming that a reader is convinced by the case for First Amendment institutionalism, the road ahead is full of potholes and sharp turns. Successfully translating institutional theory into doctrine means walking a thin line between formalism and functionalism²³—Horwitz steps

¹⁸ *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939).

¹⁹ See HORWITZ, *supra* note 1, at xiii.

²⁰ POST, *supra* note 12, at 4-5.

²¹ HORWITZ, *supra* note 1, at 261.

²² *Id.* at 282-84 (describing this division in constitutional scholarship, and arguing, “[s]cholars involved in rethinking constitutional doctrine should view First Amendment institutionalism as a kindred spirit”).

²³ *Id.* at 78 (noting that “First Amendment institutionalism should carve up the world in functional and institutional ways”); *id.* at 99 (“The institutional turn might seem to favor functionalism over formalism, and in some respects it unquestionably does. But that is not

gingerly in doing so. His central argument is that “law should be responsive to context, specifically including institutional context,”²⁴ not that attention to institutional role can answer all of the hard questions in First Amendment doctrine. This humility is also a virtue of the work. But it is hard to avoid the fact that any form of First Amendment institutionalism will lead to disagreement—perhaps intractable disagreement—on at least three levels:²⁵ which *institutions* are entitled to First Amendment deference, which *organizations* fit within those institutional archetypes, and which *actions* of those organizations should be shielded.

A. Which “Institutions” Get Protection?

As Horwitz notes, “[t]he central question for courts contemplating some version of the institutional turn is how to define the relevant institutions.”²⁶ He is relatively confident that this question can be answered: “It doesn’t take an expert on free speech to identify them. Indeed, that’s the point. We all know these institutions well, because they are woven into the fabric of our everyday existence.”²⁷

On some level, this must be correct. Surely, few people would disagree that the press meets Horwitz’s definition of a First Amendment institution—one whose contributions to public discourse play a fundamental role in our system of free speech. Indeed, the text of the First Amendment suggests as much. But when the institution itself is defined at that level of breadth, the rule of institutional deference is unlikely to resolve controversies in any useful way. Broadening the institutional category is likely to *raise* the costs of decision, by encouraging disputes about whether particular organizations fall within it. For example, there might be broad agreement that the press is entitled to special First Amendment treatment—the Supreme Court itself has often suggested as much, even though doctrine does not really reflect this treatment²⁸—and yet there is wide disagreement about whether bloggers are members of that institution. (Horwitz himself is not convinced that they are, at least not

always or necessarily the case.”).

²⁴ *Id.* at 69.

²⁵ Cf. Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. 1061, 1073–78 (2008) (discussing the proper level of deference between different institutional interpretations of the First Amendment).

²⁶ HOROWITZ, *supra* note 1, at 275.

²⁷ *Id.* at 14.

²⁸ Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025, 1028 (2011) (“The Supreme Court occasionally offers up rhetoric on the value of the free press, but it steadfastly refuses to explicitly recognize any right or protection as emanating solely from the Press Clause.”).

yet.)²⁹ The broader the empire, the harder it will be to govern “the borderlands.”³⁰

Furthermore, as Horwitz recognizes, “not everyone trusts institutions.”³¹ More specifically and problematically, not everyone trusts the *same* institutions. Those who believe “the ‘mainstream media’ have failed us completely”³² are not necessarily the same people who believe “the Boy Scouts and the churches are leviathans.”³³ And as Horwitz notes, the judges tasked with separating the deference-deserving institutions from the chaff might well be inclined to give special treatment to traditional speech institutions like newspapers and universities.³⁴

Rather than relying on a kind of social rule of recognition, one way to identify the institutions worthy of deference is by focusing on the degree to which they police their own speech, or that of the individuals within them. Horwitz repeatedly argues that “First Amendment institutions are *self-regulating*,” in that they “follow[] a set of professional norms that have been drilled into them by training, experience, and institutional culture.”³⁵ He notes that this is a “central feature that distinguishes First Amendment institutions from other institutions and justifies giving them special treatment under the law.”³⁶

But not all forms of self-regulation are worthy of constitutional deference. A “university” that steadfastly opposes intellectual inquiry is self-regulating. Presumably, this is not the kind of self-regulation that merits First Amendment deference. One might respond that any so-called university behaving in that fashion is not in fact a representative of the institutional category, and thus cannot claim the deference to which it might otherwise be entitled.³⁷ This is true, but—as the following section suggests—it is a separate inquiry whether the institutional category of universities is entitled to protection.

B. Which “Organizations” Fit Inside the Institutions?

Even if useful agreement can be reached with regard to institutional

²⁹ HORWITZ, *supra* note 1, at 22.

³⁰ *Id.* at 275-76.

³¹ *Id.* at 267.

³² *Id.* at 269.

³³ *See id.*

³⁴ *Id.* at 265 (“It is possible that under the institutional turn judges would be slow to recognize new speech institutions and quicker to protect ‘traditional’ elite institutions.”).

³⁵ HORWITZ, *supra* note 1, at 15.

³⁶ *Id.* at 86.

³⁷ *Cf.* POST, *supra* note 12, at 78 (arguing that scholarly disciplinary is what makes universities unique, not their titles).

prototypes such as universities or the press, actual cases or controversies will turn not only on those prototypes, but on whether particular organizations fit within them. After all, “the press” will never be a named party to a legal claim—instead, an action will be filed against, or on behalf of, some specific organization claiming to be a member of the “press” class. Identifying these organizations is a distinct inquiry,³⁸ and perhaps a more difficult one. For example, the debate about whether churches are entitled to deference as First Amendment institutions³⁹ is different than the debate about whether the Westboro Baptist Church fits within that institutional category. So when Horwitz describes his approach to First Amendment institutionalism as “singling out general kinds of institutions—newspapers, churches, and so on—and deferring to them as long as they act within proper (but broadly defined) institutional bounds,”⁴⁰ he potentially conflates two distinct and difficult questions. The “borderlands of First Amendment institutionalism”⁴¹ face different problems than its heartland.

As Horwitz notes, considerable diversity exists within institutional archetypes. To take just one example, “[s]ome journalistic entities may strive to be fair and balanced, while others favor the partisan approach typical of the press in earlier periods. (And some may call themselves ‘fair and balanced’ but still practice partisanship.)”⁴² It cannot be the case—and Horwitz does not argue—that organizations are permitted to determine for themselves whether they are part of a deference-deserving institution. Instead, Horwitz seems relatively sanguine about the ability of outside decisionmakers (judges, presumably) to make distinctions: “It may be tough to distinguish the *New York Times* from a local penny-saver in theory, but it is much easier in practice.”⁴³

Whether his optimism is justified is harder to say; the practice of institutionalism can be just as difficult as the theory. To what epistemic or decisional authority does one appeal to determine whether a particular organization, such as a newspaper, is entitled to constitutional deference? One method would be to say that only those organizations that follow the First Amendment-furthering, self-regulating norms of the institution are entitled to special treatment because the existence of those norms are the

³⁸ HORWITZ, *supra* note 1, at 11 n.31 (noting that the book “elide[s], for some purposes (but not others), the distinction” between organizations and institutions).

³⁹ *Id.* at 174-93; see also Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 VILL. L. REV. 273, 273 (2008).

⁴⁰ HORWITZ, *supra* note 1, at 266.

⁴¹ *Id.* at 276.

⁴² *Id.* at 19.

⁴³ *Id.* at 275.

primary reason for deferring to the institution in the first place. Indeed, Horwitz refers to self-regulation as a feature of institutions that “helps us resolve some (though certainly not all) of the boundary questions that First Amendment institutionalism raises.”⁴⁴ One suspects that this is why he is hesitant to treat blogs as a First Amendment institution: they are not as self-regulating as newspapers, which “follow a deep set of norms and practices, all of which are ultimately related to their distinct contribution to public discourse.”⁴⁵

But this is obviously not always true, in either direction. Newspapers do not always follow basic journalistic ethics,⁴⁶ and sometimes bloggers do.⁴⁷ The problem is not only that entities’ behavior is dynamic and ever-changing, but also that professional norms are themselves dynamic. What counted as appropriate behavior for the press at the time of the Founding would almost certainly be unacceptable today. This brings us to the third and final layer of potential disagreement about deference.

C. Which Actions by Covered Organizations Are Entitled to Protection?

Assuming that institutional prototypes can be identified, and various organizations slotted into those institutional categories, a third potential problem remains: how to evaluate the specific actions of those organizations, particularly when those actions seem to run counter to the institutional norms that started the cascade of deference.

Horwitz is not fully committed to deference for all actions of covered institutions: “[C]ourts ought to defer substantially, but not totally, to the self-regulatory norms and practices of First Amendment institutions.”⁴⁸ Thus, “a newspaper cannot invoke its institutional status to shield itself from antidiscrimination laws.”⁴⁹ As Horwitz explains:

Under autonomy-based institutionalism, in short, First Amendment institutions would have substantial scope for self-governance. But courts would still be empowered to ask whether an institution’s actions fell “within the boundaries of behavior broadly consistent with the norms and practices of that

⁴⁴ *Id.* at 86.

⁴⁵ *Id.* at 94.

⁴⁶ See, e.g., Ed Pilkington, *FBI to Investigate News Corporation over 9/11 Hacking Allegations*, THE GUARDIAN (July 14, 2011), <http://www.guardian.co.uk/world/2011/jul/14/fbi-news-corp-hacking-claims>.

⁴⁷ See, e.g., Jacqueline D. Lipton, *What Blogging Might Teach About Cybernorms*, 4 AKRON INTELL. PROP. J. 239, 239-41 (2010) (discussing the development and identification of norms in the blogosphere).

⁴⁸ HORWITZ, *supra* note 1, at 20.

⁴⁹ *Id.* at 21.

institution, *and* whether those norms and practices serve the First Amendment values that are advanced by the role of that institution within the broader society.”⁵⁰

But if the point of First Amendment institutionalism is to serve the values of the First Amendment, then it would seem that the most accurate way to do so would be to simply ask directly whether the organization serves those values, rather than to rely on the inaccurate proxy of an institution’s norms and values.

Of course, the whole theory of institutionalism argues to the contrary.⁵¹ The very idea of Horwitz’s argument is that institutional deference is inherently valuable, and that it will *better* further those values than an acontextual approach. Because I share his enthusiasm for an institutional First Amendment, the questions I raise here are anxious hand-wringing as much as they are criticisms. If I part ways with Horwitz, it is with regard to his conclusion that “the definitional inquiry” for First Amendment institutionalism is not “any more troubling than the kinds of questions courts already ask.”⁵² For the reasons sketched above, I fear that the definitional inquiry *is* particularly difficult, on at least three levels: identifying institutions, deciding which organizations fit within them, and determining which actions of those organizations merit deference. But the difficulty of answering these questions is no reason not to ask them. Indeed, Horwitz’s book provides both an argument for the investigation and a map for its potential solution.

⁵⁰ *Id.* at 93 (emphasis added) (quoting Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 UCLA L. REV. 1497, 1511 (2007)).

⁵¹ *Cf.* Schauer, *supra* note 5, at 1273 n.87 (“I am [concerned] with the identification of concrete and preexisting cultural institutions that might in the large serve important free speech functions, and which thus might be deserving of constitutionally guaranteed autonomy as institutions, even when they do not serve the purposes grounding the recognition of their institutional autonomy in the first instance.”).

⁵² HORWITZ, *supra* note 1, at 276.

