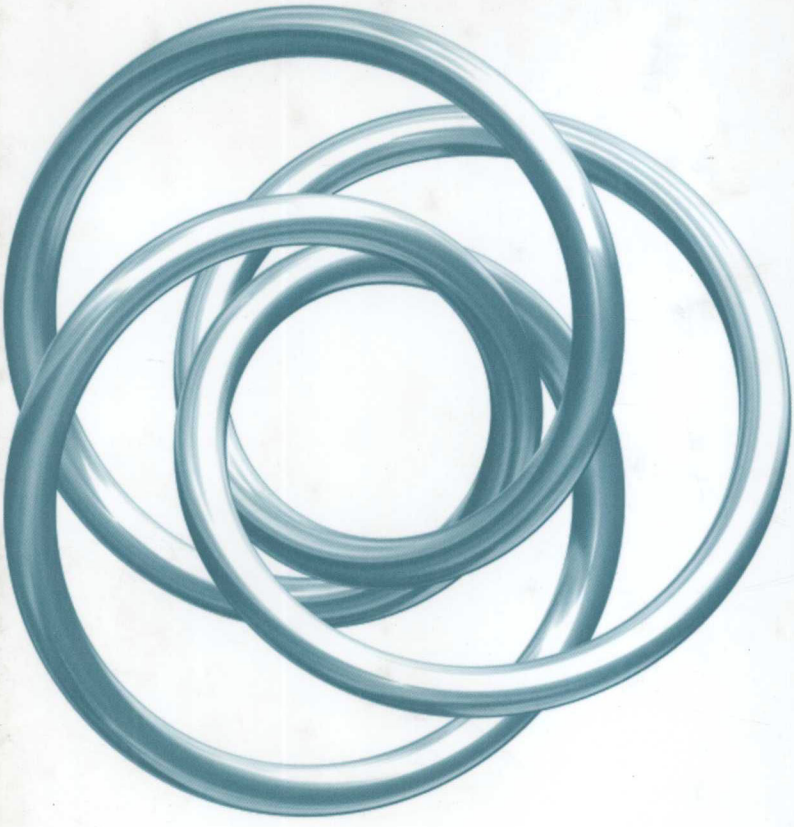

First Amendment Institutions

Paul Horwitz

First Amendment Institutions

Paul Horwitz

HARVARD UNIVERSITY PRESS
Cambridge, Massachusetts, and London, England 2013

Printed in the United States of America

Library of Congress Cataloging-in-Publication Data
Horwitz, Paul.
First Amendment institutions / Paul Horwitz.
p. cm.
Includes bibliographical references and index.
ISBN 978-0-674-05541-4 (alk. paper)
1. United States. Constitution. 1st Amendment. 2. Freedom of speech—United States. 3. Freedom of the press—United States. 4. Freedom of religion—United States. 5. Assembly, Right of—United States. I. Title.
KF4770.H67 2012
323.440973—dc23 2012012114

To Kelly

Then came the churches
Then came the schools
Then came the lawyers
Then came the rules

Dire Straits, *Telegraph Road*

Acknowledgments

It's fitting, given the subject of this book, that it is the product of a great many institutions. Although all the material in this book is new, it represents the culmination of work I have been doing on the subject of First Amendment institutions practically since I entered teaching, as a visitor at the University of San Diego College of Law and a tenure-track professor at Southwestern Law School, with a brief visit at Notre Dame Law School. The majority of the work was completed at the University of Alabama School of Law, where I now teach. I thank all of those institutions. I am especially grateful to Alabama, its dean Kenneth Randall, my faculty colleagues, the wonderful library staff, my students, and my assistants Donna Warnack and Donna Tucker for their help and support. I am grateful to Elizabeth Knoll, my editor at Harvard, for her patience during the protracted gestation of the book. Two anonymous reviewers for the Press provided extraordinarily, and dauntingly, detailed comments on the manuscript. Their suggestions have much improved it. Alas, any faults that remain are mine.

I would like to thank the following journals for allowing me to explore some of the ideas presented in this book in previous articles: the *Boston College Law Review,* NEXUS, the *UCLA Law Review,* the *Notre Dame Law Review,* the *Harvard Civil Rights-Civil Liberties Law Review,* and the *Northwestern University Law Review.* I am grateful to those journals for supporting this work, and especially to the "Harvard Civil Rights-Civil Liberties Law Review" for

publishing my article "Churches as First Amendment Institutions: Of Sovereignty and Spheres," from which I drew heavily in writing Chapter 7. Research assistance on the articles was contributed by Adam Cohen, Andy Hayden, Jennifer Michaelis, and Martha Rogers. Research assistance on the book was provided by Martha Rogers and Noah Jones, with help in its final stages by Michelle Marron, and Aisha Mahmood. I also owe thanks to a student of mine at Notre Dame, Angelen Brookshire, for introducing me to the work of Abraham Kuyper.

For comments on earlier articles and on some or all of the manuscript itself, I thank—among others—Larry Alexander, Carl Auerbach, Amy Barrett, Charles Barzun, Thomas Berg, Joseph Blocher, Bill Brewbaker, Peg Brinig, Al Brophy, Chris Cameron, Dale Carpenter, Doug Cassel, Marc DeGirolami, Michael C. Dorf, Michael B. Dorff, Fernand Dutile, Dave Fagundes, David Fontana, Amy Gajda, Rick Garnett, Cheryl Harris, John Harrison, Deborah Hellman, Rick Hills, John Jeffries, Bill Kaplin, Cathleen Kaveny, Leslie Kendrick, Sung Hui Kim, Michael Kirsch, Ron Krotoszynski, Chris Lund, Dan Markel, Diane Mazur, Michael McConnell, Scott Moss, John Copeland Nagle, Patricia O'Hara, Michael Olivas, Mike Pardo, Robert Post, Gowri Ramachandran, Angela Riley, John Robinson, Bob Rodes, Connie Rosati, Frederick Schauer, Richard Schragger, Micah Schwartzman, Maimon Schwarzchild, Paul Secunda, Steve Smith, Jason Solomon, Daniel Solove, Kelly Strader, Rob Vischer, Johan Van der Vyver, Leland Ware, James Weinstein, Adam Winkler, Nicholas Wolterstorff, and the late Fred Zacharias. The earlier articles, as well as portions of the manuscript of this book, were presented at the Arizona State University's Sandra Day O'Connor College of Law (under the auspices of the legal blog *Prawfsblawg*), Brigham Young University Law School, Chapman Law School, the University of Houston Law Center, the New England School of Law, Notre Dame Law School, UCLA Law School, the University of San Diego College of Law, Southwestern Law School, the University of St. Thomas Law School in Minnesota, the University of Virginia Law School, and Yale Law School; I appreciate the hospitality shown me on those occasions.

My dear friends Rick Garnett of Notre Dame and Nelson Tebbe of Brooklyn Law School generously organized a roundtable conference in the fall of 2011 to discuss the full book manuscript at Notre Dame Law School, under the generous sponsorship of Notre Dame's Program in Church, State,

and Society, and with the participation of Joseph Blocher, Anuj Desai, Frederick Mark Gedicks, John Inazu, Randy Kozel, and Mark Tushnet. I could not think of a sweeter reminder that ideas emerge not from individuals alone, but from a network of friends and institutions.

Camille Smith, formerly an editor at Harvard University Press, provided freelance editing services on this book. She wrestled the manuscript down from an unruly behemoth to—well, to a smaller unruly behemoth. Despite its remaining flaws, she refined and improved the book immeasurably.

I owe a special debt of gratitude to two scholars, Robert Post and Frederick Schauer, whose work in this area has inspired so much of my own thinking. I hope I have built on and extended their work, but this book would not exist if they had not been there first.

As I write in Chapter 10, although this book focuses mostly on larger institutions like the press and universities, the family is the original institution, the little sovereign from which everything else flows. So it is here. My children, Samantha and Isaac, put up with my frequent physical or mental absences while I was writing this book. And my wife, Kelly Riordan Horwitz, whose own work as an elected member of the Tuscaloosa City Board of Education has taught me much about what institutions look like in practice, has been my best friend and touchstone in life. I lovingly and gratefully dedicate this book to her.

Contents

Introduction

A Day in the Life . . .

Your day begins like any other: in the company of others.

You and your spouse wake to the sound of the radio. As you prepare breakfast and get the children ready for school, NPR plays in the background. The headlines this morning start with yesterday's ruling by the Supreme Court, holding that civil rights laws cannot generally interfere with a church's decision on whom to hire or fire to perform key "ministerial" duties such as providing religious instruction to children in a church school.[1] Curious for more information, you turn surreptitiously to your iPhone (which is not allowed at the breakfast table—a family rule) and read in a *New York Times* story that one law professor has said of the decision, "Obviously, churches are not 'above the law.' . . . However, governments are not permitted to resolve essentially religious disputes and questions."[2] You find yourself agreeing with both parts of the quote—and wondering how both can be true.

Your mind wanders, as it will. As NPR drones on in the background—first with a story about the role of Super PACs in the Republican primaries,[3] then with a short item about a fringe candidate's complaint that he has been excluded from a debate on the local NPR station[4]—you wonder whether congressional Republicans have gotten anywhere with their plans to defund NPR following Juan Williams's dismissal from the network.[5] No matter; it's time for work.

You drop your two children off at school. You are a little worried about your 16-year-old. He was recently disciplined by the principal for taking part in a skit at a school assembly that the principal believed was loaded with subtle but offensive innuendo; the principal did not take kindly his defense that the skit was a political satire.[6] He was also caught recently trying to download materials at his local library that, when you were his age, would have been utterly beyond your comprehension.[7] You mutter a prayer for strength under your breath—and realize that you have forgotten it is Wednesday: your church study group will be meeting tonight.

You teach constitutional law at a local university. Your 19-year-old daughter attends the university as well and lives at home with you. By the time you drop her off on campus, edging your car around a small clump of Occupy Wall Street protesters, your mind is off somewhere else again, and you barely hear her shutting the car door. Your colleagues have been arguing with the dean of the law school over whether a candidate for a faculty position is really qualified for the job. As if that weren't bad enough, the dean has complained that you are the lowest grader in the law school and are hurting students' chances of getting jobs. You loathe grade inflation and wonder whether you can stand on your rights; tenure must be good for something, right?[8]

That night your spouse, a local newspaper reporter, shares her own problems. The mayor and some local business owners have complained about a story she wrote pointing to longstanding ties between the business owners and the mayor, who recently convinced the City Council to ease zoning restrictions in the downtown core. One of the business owners has threatened to sue. Once upon a time, her editor would have laughed off such threats.[9] But the newspaper was recently sold, and the new publisher is concerned about the cost of liability insurance.[10] In the meantime, the mayor has threatened to restrict her access to the press briefings he holds occasionally.[11] She asks you whether he can get away with it.

As the two of you drift off to sleep, your spouse's mind is filled with thoughts of the press, of editors and publishers, of the role of journalism, of her pride in contributing to the public's knowledge of current affairs and local government. Your thoughts, in these waning moments, are quite different. Phrases drift past your closed eyes in some Latinate script: "public forum," "content-neutral," "state actor," "neutral and generally applicable" . . . All is quiet.

. . . of Public Discourse—and the First Amendment

This book is about what happens when we take this story seriously. The day I have described is somewhat eventful, but not unusual. It is a day in the life of the real world of public discourse as a lived experience. It has touched on three of our central First Amendment freedoms: freedom of speech, of the press, and of religion. But it has not been a solitary day, filled with isolated individuals fighting against a monolithic and repressive state. It has been filled with the *institutions* that help make our First Amendment freedoms, and public discourse itself, possible and meaningful.

A central argument of this book thus focuses on a feature shared by much important First Amendment speech: it is *institutional.* Institutions form a central part of the infrastructure of public discourse, or what Jack Balkin has called the "infrastructure of free expression." They are places in which some of the most vital First Amendment activities occur. In Richard Garnett's words, they are "the scaffolding around which civil society is constructed, in which personal freedoms are exercised, in which loyalties are formed and transformed, and in which individuals flourish."[12] The object of this book is to help us see these institutions for what they are, understand how they function and how they help form the infrastructure of public discourse—and ask how the law of the First Amendment ought to respond to them.

That the day described above was full of what I will call "First Amendment institutions"—universities, schools, newspapers, churches, libraries, and so on—should be evident to every reader: given their infrastructural role, these institutions are pervasive in our lives and our actual experience of the world of speech and worship. What may be more surprising to nonlawyers, however, is just how little language the law has to express the same concepts and institutions—to reflect in its own language just what the lived experience of public discourse looks and feels like.

Imagine, for example, the following characters:

- Carla reports for the *Daily Star,* a local newspaper. A disgruntled employee at City Hall feeds her documents revealing that the mayor is distributing no-show municipal jobs in exchange for political contributions. The district attorney presses Carla to reveal her source before the grand jury. She refuses.

- Josh is a blogger. Most of his blog posts consist of his views on drinking, sports, and pop culture.
- Oxbridge is an old and prestigious private university. In keeping with its Quaker roots, it refuses to allow military recruiters on campus.
- Agricultural Tech is a state university. In keeping with the political views of its faculty, it refuses to allow military recruiters on campus.
- Floor-Mart is a major retail chain. It has fired Penelope, a cashier, because customers have objected to her unmarried pregnancy.
- God-Mart, a local megachurch, has fired Priscilla, a receptionist, because congregants have complained about the scandal of her unmarried pregnancy.

As "Sesame Street" used to ask, which of these things is not like the other? Which are the same, and which are different? And why?

How you answer these questions depends on how you carve up the world. Some—perhaps your spouse, in the story that opened this book—might focus on the subject involved: matters of public versus private concern, politics versus art, and so on. Others might focus on the institution in question: churches, newspapers, libraries, museums, retailers. Or it could be something less relevant. (Josh the blogger and Priscilla have red hair; the other individuals are blondes.) All of these distinctions make more or less sense in different circumstances. But we all use them.

Now imagine posing the same questions to lawyers or judges looking at these scenarios for purposes of the First Amendment. Their answers would be quite different from those of the average citizen. They would focus less on the real-world nature of these speakers and institutions, and more on the complex set of doctrines courts use to interpret the First Amendment. In formulating their answers, they would ask, Are some of the characters participating in a "public forum"? If so, what kind? A "limited public forum"? A "traditional public forum"? If government intervention is involved, what form does it take? Is the government regulating the "time, place, or manner" of the speech? Is it engaging in "content" or "viewpoint" discrimination? Is the speech "high-value" or "low-value"? Above all, the lawyer or

judge would ask who is doing the speaking and who is doing the censoring. Is the speaker a "state actor" or a "private actor"? Is the censor the state or a private entity?

These distinctions are strikingly different from the ones average citizens would draw. Lawyers and judges see differences where laypeople see similarities, and vice versa. For legal professionals, somewhere between Grover and the bar exam, something changed in the way they view the world. Once we recognize this, we are on to something important—something that affects not only First Amendment law but the law more generally.

The Lure of Acontextuality

What changed, in brief, is this: in many ways, at many times, law is indifferent to context. Put more mildly, it is indifferent to what we might call real-world context and highly attentive to legal context. Lawyers do not see car accidents, for instance, in the visceral, physical way that laypeople do. They see concepts: "torts," "negligence," "damages," and so on. These concepts may in turn influence the layperson's thinking. In our litigious society, the first thing victims of car accidents often ask, after checking that their limbs are intact, is whom to sue. Still, real people start with real events, more or less. Lawyers, in contrast, get to "real things only indirectly, through categories, abstractions and doctrines."[13]

This way of carving up the world is widespread among First Amendment experts. They habitually ignore real-world context and focus instead on one central distinction: that between the speaker and the state. On one side is the speaker, often thought of as an individual soapbox orator, a "lone pamphleteer[ ] or street corner orator[ ] in the Tom Paine mold."[14] Even when the speaker is not one but many people, we describe it with individualistic language, as a single "parade," or "march," or "demonstration": a single entity with many legs but one voice. On the other side is the state—powerful, coercive, censorious, an imposing and undifferentiated mass. Most First Amendment doctrine begins with a speaker and a state censor.

In this book I focus on a particular aspect of law's indifference to context: its "institutional agnosticism." In Frederick Schauer's words, First Amendment doctrine "presupposes the undesirability of having a rule, principle, or doctrine for one institution that is not applicable to another."[15]

A worldview that divides the free speech universe between "speakers" and "the state" leaves little room for the special role institutions play in public discourse. From this perspective, the differences between Oxbridge and Agricultural Tech are more important than the similarities: one is a private speaker and the other is "the state." The similarities between Oxbridge and God-Mart are more important than the differences: both are private "speakers." And there is no difference between any of those institutions and Josh the blogger, or between a parade and a soapbox orator: they are all simply "speakers."

Identifying this pattern does not tell us whether it is a good or bad thing. There are strong arguments for this tradition of acontextuality and institutional agnosticism. Two concerns, in particular, are central to the courts' approach to the First Amendment. The first is fear of government censorship. If we allow legislatures or courts to draw lines on an institutional or contextual basis, we lose sight of a central lesson of the First Amendment: that government *any*where is a potential threat to free speech *every*where. We create "an opening for the dangers of government partisanship, entrenchment, and incompetence."[16] The second is fear that the state is incapable of drawing sound distinctions between speakers based on context or their institutional nature.

This second fear has driven judicial doctrine for decades. Consider the differences, if any, between Carla the reporter and Josh the blogger. Intuitively, most of us see *some* difference between a professional newsgathering organization like the *Star* and a pajama-clad blogger who takes to the Internet to share his views on various trivialities. But what if we are considering whether some speaker, individual or institutional, ought to enjoy a constitutional privilege as a "journalist" to refuse to disclose the identity of a confidential source to a grand jury? Then our commonsense intuitions may prove inadequate to the task. As the Supreme Court said in 1972, that question "would present practical and conceptual difficulties of a high order." This inquiry has only grown more complicated over the years. Both lone bloggers and mighty newspapers, for instance, publish over the Internet, using the same conduit to convey information. Perhaps the Court was prescient when it refused to "embark the judiciary on a long and difficult journey to such an uncertain destination" by creating such a privilege for anyone.[17]

The courts' tendency toward acontextuality is hardly unique to the First Amendment. Its traces are evident whenever lawyers and judges carve up the world according to legal categories rather than real-world contexts. Before we can reach any conclusions about whether this habit is good or bad, we must first recognize it *as* a habit. Once we do, we will see it everywhere. Indeed, its hold on the law is so strong that we might call it an obsession.

Just as we see this obsession everywhere, so we see its limits wherever we look. It is evident that the law—especially First Amendment law—does not and cannot always ignore the context of speech or the institutional nature of the speaker, and that it does not and cannot always treat the "state" as a monolithic entity. Again and again, courts abandon, or carve out exceptions to, the context-insensitive rules that they so often assert are the very foundation of the rule of law, and certainly of the First Amendment.

A few years ago, for example, the Supreme Court faced the question of whether public libraries could be required, as a condition of receiving public funding, to install Internet filters to ensure that patrons could not access obscene or child pornographic websites and that minors could not view harmful materials. The usual route to a decision would have led through the Court's public forum doctrine, which focuses on which *legal* category a state-owned speech "forum" falls into. But the Court was forced to concede that public forum doctrine was "out of place in the context of this case." Instead, it had to "examine the role of libraries in our society."[18]

These exceptions to the rule of acontextuality are as revealing as the rule itself. The law is often said to require generality and consistency of application. When courts cannot fulfill those requirements, we know something important is going on. When they flout those requirements but continue to insist that they *are* requirements, we know something has gone awry.

So it is with First Amendment law. The tensions created by the courts' efforts to follow a rule of rigid acontextuality, and the gaps and fissures created in the law when they cannot—when they are forced to admit that some standard doctrine is "out of place"—have led to increasing incoherence in First Amendment doctrine.[19] This suggests that First Amendment doctrine is in serious need of revision, that something deeper is going on that needs to be brought to the surface—or both.