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Institutional Autonomy and Constitutional Structure

Randy J. Kozel
Notre Dame Law School

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*Randy J. Kozel**

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INTRODUCTION

This Review makes two claims. The first is that Paul Horwitz's[1] excellent book, *First Amendment Institutions*, depicts the institutionalist movement in robust and provocative form. The second is that it would be a mistake to assume from its immersion in First Amendment jurisprudence (not to mention its title) that the book's implications are limited to the First Amendment. Professor Horwitz presents First Amendment institutionalism as a wide-ranging theory of constitutional structure whose focus is as much on constraining the authority of political government as it is on facilitating expression. These are the terms on which the book's argument—and, to a large extent, the leading edge of contemporary institutionalist thinking—ought to be received, understood, and evaluated.

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First Amendment institutionalism urges greater attention to the nature of institutions as producers of speech and domains for individual communication, reflection, and socialization (pp. 8–11). Its central premise is that by recognizing the unique roles and features of entities such as universities, newspapers, and churches, courts can develop a better and more coherent body of constitutional doctrine.

Professor Horwitz develops the institutionalist case for a revised constitutional jurisprudence. He also goes further, asserting that institutions are more than the sum of their parts. The thrust of his argument is that individual flourishing is best promoted by recognizing the distribution of autonomy among numerous institutions, both public and private. It is not enough for sovereign authority to be divided between the federal government, the states, and private citizens. The nonpolitical institutions that people use to

* Associate Professor of Law, Notre Dame Law School. For helpful comments and conversations, thanks to Randy Barnett, Amy Barrett, Richard Garnett, Bruce Huber, John Inazu, Kristine Kalanges, Daniel Kelly, Jennifer Mason McAward, Mark McKenna, Jeffrey Pojanowski, Zachary Price, Veronica Root, Jay Tidmarsh, and Alexander Tsesis.

1. Gordon Rosen Professor of Law, University of Alabama School of Law.

develop their faculties, construct meaning, and exercise freedom must also be insulated from governmental intrusion.[2]

We might think of this theory in terms of *structural institutionalism*[3]: a conception of the constitutional order in which various institutions outside the realm of political government "develop their *own* visions of what the First Amendment means" (p. 19). Within the scheme of structural institutionalism, the primary role of the First Amendment is to identify those entities in which autonomy resides. Professor Horwitz does not suggest that every conceivable organization, or even every important one, carries with it a zone of autonomy. Such an approach would diminish the sovereign authority of governments beyond recognition. But "First Amendment institutions"—universities, churches, media outlets, and other entities that comprise the "'infrastructure of free expression'"[4]—occupy a special place in society. These organizations "play a central role in the formation and dissemination of public discourse" (p. 82). By recognizing and respecting the autonomy of such institutions, the argument goes, courts can promote discourse, self-actualization, and a richer social environment. They can also confine the reach of government to its proper, and limited, sphere.

Professor Horwitz is not the first to suggest a structural dimension to the First Amendment. Nor is he the first to connect structural objectives with the enterprise of First Amendment institutionalism.[5] The value of *First Amendment Institutions* comes from developing this position systematically and in impressive depth. Through his analysis and juxtaposition of various

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2. *See, e.g.*, pp. 10–11 ("The new approach will involve broad judicial deference to [First Amendment] institutions, recognition that they are, in effect, sovereign spheres in their own right, and a willingness to treat them not as *dependents*, subject to the doctrine laid down by the courts, but as *partners* in shaping First Amendment doctrine.").

3. I prefer "structural institutionalism" to terms like "institutional pluralism" for reasons of clarity. Jurists and commentators, including Professor Horwitz, sometimes use the word "pluralism" to indicate the acceptance of "different approaches" to addressing a problem. P. 141; *see also* Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 130 S. Ct. 2971, 3016 (2010) (Alito, J., dissenting) (invoking the concept of pluralism in a similar sense). The concept of "structural institutionalism" focuses less on the acceptance of divergent approaches and more on the division of power between government, citizens, and institutions.

I note that my use of the term "structural institutionalism" is unrelated to the use of terms such as "structuralism" and "institutionalism" in the political science literature. *See, e.g.*, Peter A. Hall & Rosemary C.R. Taylor, *Political Science and the Three New Institutionalisms*, 44 Pol. Stud. 936 (1996).

4. P. 82 (quoting Jack M. Balkin, *The Future of Free Expression in a Digital Age*, 36 Pepp. L. Rev. 427, 432 (2009)).

5. *See* Richard W. Garnett, *Religious Liberty, Church Autonomy, and the Structure of Freedom*, *in* Christianity and Human Rights 267, 276 (John Witte Jr. & Frank S. Alexander eds., 2010) ("[C]hurch autonomy is — like federalism, like the separation of powers, like 'checks and balances' — a structural principle, whose operation enables self-determining religious communities to play a structural role."); Frederick Schauer, *Towards an Institutional First Amendment*, 89 Minn. L. Rev. 1256, 1268–69 (2005) ("[S]ome of the resistance to taking institutions seriously in the design of First Amendment doctrine may be based on the mistaken belief that the First Amendment exists, at moral bedrock, as an individual right.").

institutions, Professor Horwitz advances the argument that "government is merely one strut" in the "broader infrastructure" of social existence (p. 83). In so doing, he provides a portrait of structural institutionalism as a constitutional ideal.

That, however, cannot be the endpoint of the institutionalist movement. If structural institutionalism is a legitimate constitutional theory, it must emanate from a discernible constitutional source. Notwithstanding his thoroughness in other respects, Professor Horwitz devotes relatively little attention to the question of constitutional foundations. Yet it is ultimately those foundations that will define structural institutionalism's scope and determine its validity as a vision of the constitutional order.

This Review begins in Part I by describing the "institutional turn" as a prescription for constitutional doctrine (p. 68). I focus on the argument's two discrete steps of increasing judicial responsiveness to factual context and acknowledging the considerable autonomy that institutions rightfully possess. In Part II, I contend that Professor Horwitz's defense of institutionalism is best understood as a wide-ranging theory of constitutional structure. The theory, which I call structural institutionalism, depicts an array of different institutions as engaged in a joint enterprise to limit the reach of official orthodoxy. As I explain, the markers of structural institutionalism present themselves in different ways within the various institutions that Professor Horwitz discusses. Finally, Part III integrates structural institutionalism with broader issues of constitutional interpretation by investigating the theory's constitutional foundations.

It warrants noting at the outset that this Review does not provide a normative assessment of First Amendment institutionalism. Instead, my project is to define the structural implications of the institutionalist position and to specify the role of constitutional theory in assessing the position's validity. These steps, I submit, are necessary predicates to evaluating structural institutionalism on the merits.

I. The Institutional Two-Step

Professor Horwitz's thesis can be divided into two parts. First, courts ought to take greater, and more explicit, account of institutional features in crafting constitutional doctrine. Second, courts ought to respond to institutional features in a particular way. Combining the claims yields what we might think of as the institutional two-step.

A. *From Acontextuality . . .*

A popular trope of free speech jurisprudence is the "lonely pamphleteer"[6] who agitates for political reform in the face of a government bent on censoring disfavored ideas (p. 13). The First Amendment wraps itself around the speaker to protect her from, in John Hart Ely's words, "the self-

6. Branzburg v. Hayes, 408 U.S. 665, 704 (1972).

serving motives of those in power."[7] But the reality of modern discourse suggests the need for a richer ideal, one that accounts for the role of institutional actors. Much of the speech that comprises the "market" of ideas[8] emanates from institutions like newspapers, universities, and associations. Institutional actors must take their place alongside the lonely pamphleteer if we are to fully understand the dynamics and implications of free expression. Professor Horwitz states the point plainly: "[W]e 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*" (p. 8).

Enriching the prevailing ideal of expressive activity is a common objective among First Amendment institutionalists. While institutionalist scholars vary in approach—and not all of them would press the case for institutional autonomy as Professor Horwitz does—they generally agree that courts have paid too little attention to the distinctive features of groups and organizations. One pioneer of the institutionalist movement is Frederick Schauer, who urges that First Amendment doctrine be recast to "recognize those informational, investigative, and communicative domains whose more-or-less distinctive properties warrant special First Amendment treatment."[9] Likewise, Richard Garnett defends an institutionalist view of religious organizations[10] and a comparable, though distinct, approach to associations.[11] Other kindred spirits include Joseph Blocher, who emphasizes the role of institutions in promoting a well-functioning marketplace of ideas,[12] and John Inazu, who challenges the doctrinal treatment of free assembly and group autonomy.[13] The thoughtful work of these (and other) scholars offers a host of significant insights, and one of the goals of *First Amendment Institutions* is to draw them together in pursuit of an integrated constitutional theory.

Professor Horwitz also devotes substantial attention to defining the principal problems that institutionalism seeks to rectify. The first pitfall is "acontextuality," which refers to "carving up the world into legal concepts

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7. P. 262 (quoting JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 136 n.* (1980)) (internal quotation marks omitted).

8. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

9. Schauer, *supra* note 5, at 1278.

10. *See* Garnett, *supra* note 5, at 269 ("[J]ust as every person ought to be free from official coercion when it comes to religious practices or professions, religious institutions are entitled to govern themselves, and to exercise appropriate authority, free from official interference . . . .").

11. *See* Richard W. Garnett, *The Story of Henry Adams's Soul: Education and the Expression of Associations*, 85 MINN. L. REV. 1841, 1854 (2001) (urging a shift of "focus from the act of associating to the structural role of associations themselves").

12. *See* Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 829 (2008) ("'[S]peech institutions' deserve deference by lawmakers because, and only to the extent that, they improve the marketplace of ideas.").

13. *See* JOHN D. INAZU, LIBERTY'S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY 150 (2012) ("[W]e have failed to ground protections for group autonomy in an intellectually honest constitutional framework and have relied instead on artificial distinctions and unexamined premises.").

and categories" without adequate attention to factual context (p. 45). We act acontextually when, for example, we invoke the distinction between public and private action "to conclude that Harvard University is more like Wal-Mart than it is like the University of Michigan" (p. 17). We commit a similar mistake when we assume that speech protections should apply no differently to members of the press than they do to any other citizen (p. 151), and when we impose abstract labels like "limited public forum" without acknowledging how much factual complexity is being obscured (p. 236).

The danger of acontextuality is that it can lead courts to disregard "morally relevant details" in resolving disputes (p. 57). Courts that focus obsessively on the public–private distinction might overlook the fact that even public universities are "self-regulating autonomous enterprises" that need discretion to hire and fire faculty if they are to serve their function of contributing to the creation of knowledge (pp. 113–14). Courts likewise might overlook the fact that members of the media play a vital role in newsgathering that justifies a "strong constitutional privilege" against the compelled disclosure of sources, even if no comparable privilege is available to nonjournalists (p. 156). And courts might overlook the fact that associations, as "places in which speech is formed and identities are shaped," must possess "the right to exclude unwanted members" regardless of whether doing so runs afoul of antidiscrimination laws or whether such exclusion is deemed integral to the "clearly articulated message[s]" that the associations broadcast to the public (pp. 224–25).

Acontextuality is not merely problematic in itself; it also lays a foundation for doctrinal inconsistency. Sometimes, despite the legal system's best efforts to operate acontextually, the unique features of institutions become too compelling to ignore. When irrepressible distinctiveness runs up against acculturated fidelity to abstract legal categorization, something has to give. That something, Professor Horwitz contends, is jurisprudential coherence. Courts respond to fact-intensive and context-sensitive distinctions by distorting predefined legal categories instead of recognizing those categories as problematic precisely because they do not track the real world (p. 265).

It is debatable whether First Amendment doctrine is as beset by "institutional agnosticism" as Professor Horwitz sometimes suggests.[14] The Supreme Court has developed context-specific frameworks for resolving disputes over employee speech,[15] student speech,[16] compelled speech,[17] commercial speech,[18] and beyond. Although these frameworks have their weaknesses, it

14. *E.g.*, p. 5.

15. *See, e.g.*, Garcetti v. Ceballos, 547 U.S. 410 (2006); Connick v. Myers, 461 U.S. 138 (1983); Pickering v. Bd. of Educ., 391 U.S. 563 (1968).

16. *See, e.g.*, Morse v. Frederick, 551 U.S. 393 (2007); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

17. *See, e.g.*, PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980); Wooley v. Maynard, 430 U.S. 705 (1977).

18. *See, e.g.*, 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980).

is not obvious that the weaknesses result from acontextuality as opposed to other sources.

That said, Professor Horwitz succeeds in showing that in many situations, the Court has given little import to unique institutional characteristics. Professor Horwitz also provides notable illustrations of cases in which fidelity to abstract categories runs headlong into attention to institutional distinctiveness, resulting in a mix of institutional agnosticism and institutional responsiveness (pp. 58–63). Particularly evocative is his discussion of *National Endowment for the Arts v. Finley*, where the Court upheld an arts funding program whose criteria included "general standards of decency and respect for the diverse beliefs and values of the American public."[19] As Professor Horwitz explains, "The categorical doctrinal tools available to the Court seemed to compel the conclusion that the [program] violated the First Amendment" (p. 61). Only by invoking "[t]he unusual context of arts funding decisions" was the Court able to avoid the apparent implication of its preexisting, institutionally agnostic doctrine (p. 61). A similar lesson emerges from the Court's treatment of the media, whose uniqueness has at once been disavowed and indulged (pp. 153–54). Through these examples, Professor Horwitz demonstrates that courts cannot always swallow the acontextuality they feel bound to espouse.

Like other institutionalists, Professor Horwitz seeks to overcome acontextuality and reorient First Amendment doctrine in real-world characteristics and effects. He does not, of course, go so far as to disavow all abstract legal categories. Nor does he defend the sort of hyper-contextuality epitomized by Holmes's famous justice of the peace, who searched in vain for a law that specifically addressed damage to butter churns.[20] The sweet spot for First Amendment institutionalism is somewhere in the middle: greater sensitivity to the unique factual realities that characterize certain institutions, coupled with increased transparency about the relevance of those realities to constitutional adjudication. The goal is to foster a close connection between constitutional law and "public discourse as we actually experience it" (p. 214).

B. . . . *to Autonomy*

There is a sense in which Professor Horwitz's institutional turn begins not as a theory of expressive liberty but as a theory of likeness, perhaps even a theory of precedent. Acontextuality, he contends, prevents us from trusting our intuition that some things clearly belong together and other things clearly do not (p. 57).

Understanding First Amendment institutionalism as a theory of likeness helps to determine which precedents are relevant to which new disputes. For

19. 524 U.S. 569, 572 (1998) (quoting 20 U.S.C. § 954(d)(1)) (internal quotation marks omitted).

20. P. 42 (citing O.W. Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 474–75 (1897)).

example, the treatment of *private* universities is relevant to the treatment of *public* universities despite the difference in governmental involvement; the practical and functional similarities between the entities are too salient to ignore.[21] Conversely, cases involving the use of governmental property cannot define the rights of student groups in public universities through the mechanical extension of "limited public forum" doctrine; the imposition of abstract legal categories obscures important contextual nuance.[22]

But examining the ways in which two entities are alike does not settle how the entities should be treated for First Amendment purposes, and an institutional *focus* does not necessarily imply the need for institutional *autonomy*.[23] A Supreme Court that was fiercely protective of expression could avoid the perils of acontextuality so long as it took account of institutional differences. So, too, could a Court that viewed freedom of expression as frequently yielding to reasonable regulation. As long as the Court acknowledged institutional characteristics and made sure to treat like institutions alike, the requirement of contextual responsiveness would be satisfied. Whether this resulted in greater or lesser protection of speech would be beside the point.

Professor Horwitz thus adds a second step to his institutional turn. Rather than contenting himself with drawing attention to institutional characteristics, he urges a particular type of judicial response. It is not enough to acknowledge the defining features of First Amendment institutions. Courts must also treat such institutions as possessing *autonomy*. Institutions are more than entities whose domain-specific characteristics and expertise warrant judicial acknowledgement. They are self-contained bodies that are "largely entitled to regulate themselves . . . within some functional limits" (p. 95). They must be recognized as "sovereign spheres of their own, partners rather than servants in the formation of constitutional meaning" (p. 285). Be it a university or church, a library or association, an institution stands shoulder-to-shoulder with the instrumentalities of government.

Autonomy is a striking and powerful word, and the claim that First Amendment institutions enjoy a sphere of autonomy makes it crucial to establish workable criteria for defining what a First Amendment institution is. One prominent characteristic of First Amendment institutions is their "central role in the formation and dissemination of public discourse" (p. 82). For Professor Horwitz, this entails more than being a forum for the exchange of views or a vehicle for their dissemination. A First Amendment institution must also be "foundational or essential to our lives as citizens and

21. *See* p. 17 ("In many circumstances, it is more useful to think about what *kind* of institution we are dealing with than about whether it is a 'state actor' or a 'private actor.' Sometimes a university is a university, no matter who signs the checks.").

22. Pp. 137–38 (discussing Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 130 S. Ct. 2971 (2010)).

23. *See* Richard Schragger & Micah Schwartzman, *Against Religious Institutionalism*, 99 VA. L. REV. 917, 923 (2013) (noting that an institutionalist approach to the First Amendment does not necessarily "argue for any particular form of institutional autonomy; it merely calls for attention to the institutional setting").

participants in a common culture" (p. 85). So, for example, while business corporations are surely "relevant to public discourse," Professor Horwitz denies them institutional status because they are not "fundamental" to the "*infrastructure*" of public discourse.[24] First Amendment institutions also differ from other entities through "their self-regulating quality," which provides a source of constraint apart from governmental regulation (p. 86). Internal and professional "norms, practices, and traditions" can serve "the broader ends of public discourse" without need for intrusive governmental oversight (pp. 87–88). These characteristics separate First Amendment institutions from the multitudes of other organizations that play a role in American culture and society.

II. Institutions and Constitutional Structure

Institutional autonomy has a conceptual corollary for defining the proper role of government. A sphere in which First Amendment institutions are supreme is a sphere in which government is not. The institutional turn is not just a recipe for empowering First Amendment institutions. It is a recipe for limiting government.

It is this limiting function that carries the institutional turn beyond the domain of expressive liberty to establish it as a sweeping theory of constitutional structure. The specific vision that emerges is one of structural institutionalism: just as the Constitution embodies familiar structural principles of federalism and separation of powers, it also grants autonomy to First Amendment institutions as vital safe havens from the threat of governmental overreaching.

A. *Individual Liberty and Governmental Constraint*

Institutions are places where people can meet, share and cultivate their values, and amplify their voices by adding them to a chorus.[25] Structural institutionalism is a means of promoting these benefits. In Professor Horwitz's view, "If we value individualism we must value institutions as well, because of what they mean for individual self-development and self-expression" (p. 270).

Equally important are the implications of structural institutionalism for the organs of the state. Institutional autonomy necessarily limits the power of government. Much as dividing authority between federal and state governments acts as a check on both, so, too, does vesting autonomy in institutions act as a constraint on governments of all types.[26] Structural

24. *See* p. 244.

25. *See, e.g.*, Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984) ("An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed.").

26. *Cf.* Roderick M. Hills, Jr., *The Constitutional Rights of Private Governments*, 78 N.Y.U. L. Rev. 144, 146 (2003) ("By enforcing constitutional rights to protect private organizations

institutionalism recasts political government as "only one among many sovereigns" (p. 222). This theme pervades Professor Horwitz's institutionalist account. Autonomy for religious organizations underscores "the nature and limits of the state" (p. 177). The family unit serves as a "bulwark against the state" (p. 240). The value of associations derives in large part from their status as "threat[s] to the state."[27]

The cabining of governmental authority extends to judges—or, as Professor Horwitz describes them, the "guardians of state sovereignty" (p. 224). Existing jurisprudence "leaves too many decisions in the hands of judges" (p. 97). Structural institutionalism responds by urging judges to respect the role of institutions in the "shaping of constitutional meaning" (p. 287). The role of the courts is not to second-guess institutions' "self-regulatory norms and practices" (p. 287); those matters are the province of the institutions themselves. So long as institutions pursue their "institutional purpose and function," and so long as they abide by professional norms and best practices, they are "largely entitled to regulate themselves" (p. 95).

The point of these proposals is not only, or even primarily, to protect First Amendment institutions as entities. Professor Horwitz contends that a legal regime that infuses institutions with autonomy is one that best promotes the project of personal liberty. The hoped-for result is similar to the aspiration of dividing power between state and federal governments: like federalism, institutionalism "secures the freedom of the individual."[28]

B. *Applications*

The dimensions of structural institutionalism can be sharpened by surveying the various entities that Professor Horwitz would infuse with the status of "First Amendment institutions." Each example serves to demonstrate, sometimes in surprising fashion, the proposed role of structural institutionalism in limiting the power of political government.

1. Religious Organizations

It is fairly easy to see how religious organizations can advance the cause of individual liberty. A citizen's relationship with spirituality and faith can

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. . . courts are actually often performing the same function that they perform when they enforce 'structural' rules such as federalism and separation of powers.").

27. P. 238; *cf.* Inazu, *supra* note 13, at 151 ("Assemblies function in our democratic structure to challenge and limit the reach of the state.").

28. Bond v. United States, 131 S. Ct. 2355, 2364 (2011) ("Federalism secures the freedom of the individual" by, among other things, "denying any one government complete jurisdiction over all the concerns of public life . . . ."); *see also* New York v. United States, 505 U.S. 144, 181 (1992) ("State sovereignty is not just an end in itself: 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.' " (quoting Coleman v. Thompson, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting))); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 Harv. L. Rev. 1153, 1155 (1992) ("The genius of the American Constitution lies in its use of structural devices to preserve individual liberty.").

be central to her identity, fundamentally shaping her outward behavior and her inward conception of self. Intrusive regulation threatens to diminish the extent to which religious organizations are able to provide full and meaningful experiences for their members.

Structural institutionalism responds by limiting governmental involvement in religious affairs. As a doctrinal matter, this means that courts must "avoid intervening" in intrachurch disputes (p. 186). It also means that the Supreme Court was "quite right" in its recent affirmation of a "ministerial exception" limiting the application of employment discrimination laws.[29] Professor Horwitz contends that "the hiring and firing of an employee of a religious organization[ ]remains squarely within the core of the religious entity's sovereignty, whatever the reasons for that decision may be" (p. 188). Religious institutions are subject to governmental oversight in certain circumstances, including instances of sexual abuse; structural institutionalism is consistent with "state intervention . . . when an institution abuses its own members" (p. 189). But the general approach of the courts must be to respect religious entities as "quasi-sovereign spheres" (p. 190).

By safeguarding religious autonomy, structural institutionalism seeks to help individuals find their own "sources of meaning" (p. 193). And not just any sources of meaning: sources that are insulated from state control. The flip side of viewing religious institutions "as sovereign spheres" is acknowledging "limits on the state's power to circumscribe" (p. 193). Religious autonomy forces the government to "recognize that there are other sovereigns" acting within its borders (p. 193). The relationship between the federal government and the states is only one aspect of the constitutional order. Religious institutions must also be part of the conversation.

2. Associations

Nonreligious associations have a prominent role to play in the landscape of structural institutionalism. Civic and social organizations disseminate messages and furnish their individual members with an outlet for doing the same. They also facilitate "social relationships" that "can be central to the formation of our identities" (p. 221). This depiction calls to mind John McGinnis's argument, drawing on Tocqueville's observations, that "civil associations are even better than states at generating social norms so long as these associations cannot coerce individuals to subscribe to them."[30]

As a doctrinal matter, the Supreme Court has tethered the First Amendment protection of associations to their expressive function. Hence the rather remarkable opinions in *Boy Scouts of America v. Dale*, which chronicle

29. P. 187 (discussing Hosanna–Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694 (2012)).

30. John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 Calif. L. Rev. 485, 497 (2002).

the efforts of competing groups of justices to decipher the Boy Scouts' official views on homosexuality.[31] The *Dale* majority concluded that the inclusion of gay scoutmasters would "affect[ ] in a significant way the group's ability to advocate public or private viewpoints,"[32] while the dissenters countered that the Boy Scouts had "fail[ed] to connect its alleged policy [forbidding gay scoutmasters] to its expressive activities."[33] Professor Horwitz reminds us that, notwithstanding the Court's "emphasis on *expressive* association," institutions can help their members exercise liberty in ways beyond the dissemination of an official organizational message (p. 225). He proposes that the "concern should be with associational autonomy, not associational expression" (p. 225). Regardless of "whether an association . . . is expressing a clearly articulated message," the proper question is simply "whether it *is* an association" (p. 225).

Again, this type of argument has salient implications for the power of government vis-à-vis other institutional actors. As with religious institutions, the value of associations derives in significant part from their status as "refuges" from governmental orthodoxy.[34] Whatever meaning an association's members construct by virtue of their participation in the associational community, that meaning is valuable to the extent that—and because—the government cannot change it. For the structural institutionalist, the autonomy of associations is just as much about "contest[ing] the limits of state power" as it is about protecting associational activity and expression (p. 212).

3. The Press

The media play an "*infrastructural* role in public discourse" by "enabl[ing] citizens to engage in informed discussions, decisions, and actions in social life" (p. 151). That role, combined with the media's professionalism and self-regulatory norms, supports their treatment as First Amendment institutions under Professor Horwitz's approach (p. 146).

The trickier issue is whether media autonomy fits the theory of structural institutionalism that I have described. Religious organizations and civil associations provide settings where their members can create bonds and cultivate their views and beliefs. Media outlets do not fit this mold. Although journalists undoubtedly enhance their sense of self through their chosen vocation, newsgathering bodies do not relate to their employees in the same way that churches and associations relate to their members.

Nevertheless, media autonomy fits easily into the theory of structural institutionalism. It simply takes a different shape. The press acts as an "institutional watchdog" (p. 149) and a source of "'organized, expert scrutiny of

31. 530 U.S. 640, 650–53 (2000); *Dale*, 530 U.S. at 665–77 (Stevens, J., dissenting).

32. *Id.* at 648 (majority opinion).

33. *Id.* at 677 (Stevens, J., dissenting).

34. P. 222; *see also* Garnett, *supra* note 11, at 1853 ("[Associations serve as] wrenches in the works of whatever hegemonizing ambitions government might be tempted to indulge.").

government.'"[35] This occurs directly through journalistic reports about the activities of governmental actors. It happens more subtly when the media's contributions to the public repository of knowledge facilitate the development of "good republican citizens" who are "informed about the issues of the day" (p. 148). There are few better checks on government than an engaged and knowledgeable citizenry.[36]

To fulfill these complementary roles of governmental watchdog and facilitator of civic participation, the media must have the authority to undertake their "core institutional functions" without governmental interference (p. 155). For Professor Horwitz, that authority clearly entails a constitutional privilege for journalists to keep their sources confidential (p. 156). It may also include media exemptions from generally applicable laws based on activities such as publishing confidential information and promising anonymity to a source (pp. 157–58). After the institutional turn, it is emphatically not the case that "everyone has the same obligations under the law" (p. 159). The media "serve[ ]the needs of the public" in a distinctive, valuable way, which justifies special legal treatment and extra insulation from governmental regulation (p. 159).

4. Universities

Professor Horwitz vigorously defends the autonomy of universities. That autonomy encompasses decisions about whom to hire, promote, and fire (p. 122). It empowers universities to determine whether student welfare is best served by a no-holds-barred environment for speech as opposed to a highly restrictive speech code (pp. 127–28). And it affords discretion in the admission of students, even on controversial bases such as race (pp. 125–26). To function as "training grounds for public discourse" and places "[w]here [i]deas [b]egin," universities must have room to make these types of decisions without intrusive judicial oversight (p. 107).

A conceptual wrinkle is that Professor Horwitz's argument applies to both private universities and public ones—and yet public universities *are* the government. Treating public universities as autonomous institutions is tantamount to shuffling authority from one organ of government to another. The allocation of discretion to public universities might be beneficial, or it might be detrimental. But so long as the authority remains in the hands of a governmental actor, structural institutionalism seemingly has no role to play.

Or does it? Professor Horwitz describes the proper treatment of public universities as follows: When a university asserts a right to be free from

35. P. 145 (quoting Potter Stewart, "*Or of the Press*", 26 HASTINGS L.J. 631, 634 (1975)).

36. *Cf.* Kurt T. Lash, *The Origins of the Privileges or Immunities Clause* (pt. 1), 98 GEO. L.J. 1241, 1249 (2010) ("The self-serving, and sometimes corrupt, actions of the post-Revolutionary state governments fueled the emergence of a particular strain of popular sovereignty that viewed the people as both sovereign and distinct from their institutions of government, including the legislative branch.").

regulation, the judicial inquiry turns on whether the school policy in question "was the product of a genuine academic judgment, broadly understood" (p. 138). If the university has exercised its academic judgment, it will be treated as an autonomous institution that is "entitled to shape [its] own mission[ ]" (p. 132). But that autonomy extends only to the university's *academic* self. Thus, if the university stops pursuing its academic mission and starts acting like a politically responsive body, the autonomy disappears. The primacy of academic mission explains how Professor Horwitz is able to treat private universities and public universities alike. Once politics are brushed aside, all universities—whether public or private—are defined by their academic "*nature*" and the "role [they] play[ ] in public discourse" (p. 102).

To be sure, it will sometimes be difficult to draw the line between political and academic judgments. But the distinction comports with the theory of structural institutionalism. A First Amendment institution's value is in facilitating the exercise of liberty and the exploration of ideas in a space that is free from governmental intrusion. Notwithstanding their technical status as arms of the government, public universities can promote these goals so long as they are exercising professional judgment rather than pursuing political agendas. Through this effective depoliticization, public universities are enlisted in the project of checking the state.

We can underscore the point by juxtaposing Professor Horwitz's treatment of universities against his discussion of public schools at the elementary and secondary levels. Despite acknowledging the social significance of elementary and secondary schools, Professor Horwitz describes them as presenting only a "[b]orderline" case for autonomy (p. 141). These entities are less concerned than are universities with the production and dissemination of new ideas (p. 143). Another critical difference from the perspective of structural institutionalism is that public schools can be "more like other government actors than like unique institutions" because they depend more heavily on "public decisions by public representatives such as elected school boards" (p. 143). The prevalence of electoral politics prevents the separation of the school as a professional institution from the school as a governmental body. Professor Horwitz responds by proposing a distinction that resembles his approach to public universities: When schools are "clearly follow[ing] political rather than professional norms," no autonomy is warranted (pp. 142–43). By contrast, when schools function as "professional and not just representative institutions," the prospect of autonomy should emerge (p. 143). Autonomy begins where politics ends. That is how structural institutionalism works.

5. Libraries

Libraries can find themselves at the center of First Amendment disputes over issues such as the removal of controversial books and the installation of

internet filters.[37] When such disputes arise, the special role of libraries as "places where views are shaped and changed," as well as their reliance on "professional norms and self-regulation," justifies their treatment as autonomous institutions under Professor Horwitz's approach (pp. 194, 198).

As with universities, the status of libraries is complicated by the fact that many libraries are themselves instrumentalities of government. If structural institutionalism emphasizes the limited domain of governmental authority, how can recognizing autonomy in a government-run organization help the cause? Professor Horwitz's answer, once again, is to compartmentalize the influence of politics. At their best, libraries are independent, professional organizations rather than "whatever governments declare them to be" (p. 195). Likewise, they deserve autonomy only to the extent that their practices are "insulat[ed] . . . from political control" (p. 208). By separating the concepts of professional and political influence, what initially seems like the preservation of governmental power becomes a way to underscore "the limits of government control over First Amendment institutions—even when those institutions are publicly funded" (p. 195).

III. Structural Institutionalism and Constitutional Theory

In its most aggressive form, First Amendment institutionalism seeks to deploy nonpolitical institutions as counterweights against governmental authority. This necessarily calls for recognizing spheres of institutional autonomy that are beyond governmental control. What emerges is a vision of constitutional structure aimed at altering the balance of power between political government and First Amendment institutions.

Seeking to reconceptualize the constitutional status of First Amendment institutions carries a hefty burden. The burden is greater, I submit, than it is for criticisms of Supreme Court decisions that are framed in the decisions' own terms. It is common for criticism of the Court's decisions to take the following form: even if we generally accept the theories and policies that the Court has described as relevant to resolving certain types of disputes, the Court's decisions do not support those theories or advance those policies in the way the Court has asserted or intended.

One reason why this style of argument is prevalent is that it allows commentators to bypass the articulation and defense of fundamental normative and philosophical commitments. Even if I have not made up my mind between, say, originalism and living constitutionalism, I can construct an argument as to whether the Court's conclusions in a given case follow from its premises. I can also evaluate whether the Court has disregarded factors that ought to be relevant based on the underlying theoretical drivers it has cited or implied.

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37. For a recent treatment of the latter issue, see *United States v. Am. Library Ass'n*, 539 U.S. 194, 214 (2003) (plurality opinion), which concluded that "[b]ecause public libraries' use of Internet filtering software does not violate their patrons' First Amendment rights, [the relevant statute] does not induce libraries to violate the Constitution, and is a valid exercise of Congress' spending power."

What Professor Horwitz calls the "weakest" version of First Amendment institutionalism follows this basic formula.[38] The asserted problem with the Court's approach is insufficient attention to contextual realities and the unique characteristics of institutional actors. That deficiency prevents the Court from achieving what it sets out to achieve: striking the appropriate balance between expressive liberty and competing concerns. The solution is to leave much of the Court's theoretical groundwork intact but to enhance it with greater attention to institutional features.

I have claimed that First Amendment institutionalism, at least the potent version that emerges in Professor Horwitz's account, extends beyond the criticism of discrete Supreme Court cases. The theory presents an alternative vision of the constitutional order that reallocates authority among institutional actors. Such a theory requires more to sustain than does a challenge to a particular decision or line of decisions.

Yet Professor Horwitz says relatively little about institutionalism's constitutional foundations. The explanation may be that he understands his pragmatic justifications for institutionalism as themselves representing constitutional arguments. By "pragmatic," I mean the view that the Constitution should be interpreted using a methodology that invokes numerous sources of meaning while retaining a primary focus on "purposes and consequences."[39] Pragmatism might be employed to defend structural institutionalism in the aggregate, or it might lead to independent inquiries into the autonomy of each discrete category of First Amendment institution. Either way, functional and practical considerations would drive the discussion.

A pragmatic defense of structural institutionalism is not the same as an argument that governmental actors should, as a matter of sound policy, delegate substantial authority to First Amendment institutions. The latter approach would conflict with the view of institutional autonomy as a baseline constitutional principle that is beyond the government's power to alter.[40] Instead, the argument must be that a pragmatic reading of the Constitution requires the recognition of spheres of autonomy outside political government, regardless of whether the instrumentalities of government perceive those spheres as good or bad.

First Amendment Institutions is susceptible to this type of pragmatic reading. Professor Horwitz is well aware of the drawbacks of institutionalism. He regularly acknowledges the objections to his prescriptions and devotes a brief chapter to unpacking them (Chapter 11). He seems to conclude that the benefits outweigh the costs. While history and tradition may help to

38. *See* Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 HARV. C.R.-C.L. L. REV. 79, 88 (2009) ("Under this approach, courts would incorporate a substantial degree of deference to the factual claims of [First Amendment] institutions in considering how present doctrine should apply to them.").

39. STEPHEN BREYER, MAKING OUR DEMOCRACY WORK 74 (2010).

40. *Cf.* Michael W. McConnell, *Non-State Governance*, 2010 UTAH L. REV. 7, 7 (criticizing the argument that "any space that may be reserved for non-state entities to control their own affairs is itself a product of state action").

identify which institutions play critical roles in the infrastructure of expressive liberty,[41] the core justification for institutional autonomy can be viewed as pragmatic and functional: it is based on the net benefits that flow from protecting spheres of institutional autonomy.

Yet it is not entirely clear whether Professor Horwitz's institutionalism is a pragmatic theory. And even if it is, uncertainty remains regarding institutionalism's reach. In particular, what about those who are skeptical of pragmatism as a general theory of constitutional interpretation? Does structural institutionalism have anything to say to them? The question is an important one, for the ultimate success of First Amendment institutionalism as a scholarly enterprise will depend on its ability to appeal to judges and constitutional lawyers of varying methodological predilections.

In the Sections below, I offer preliminary thoughts about how we might view structural institutionalism through the lens of some leading theories of constitutional interpretation.

A. *Text, Structure, and Original Meaning*

The threshold issue posed by structural institutionalism is its compatibility with the First Amendment's text. One option for testing this compatibility is to take a clause-by-clause approach. The autonomy of religious institutions might trace back to the Free Exercise or Establishment Clauses. The autonomy of the media might trace back to the Press Clause. The autonomy of associations might trace back to the Assembly Clause. And organizations such as universities and libraries might be sufficiently enmeshed in the creation and dissemination of knowledge to receive their autonomy via the Speech Clause. Alternatively, structural institutionalism could emerge from the First Amendment's clauses as viewed in the aggregate: the idea would be that the enumeration of the Amendment's various freedoms, when taken together, establishes a basis for autonomy across First Amendment institutions.

Under either the clause-by-clause or aggregated approach, the textualist defense of structural institutionalism requires extensive analytical work. It is putting the point mildly to say that the First Amendment's bare text does not, on its own, provide a clear basis for institutional autonomy. To supplement the text, one might turn to history, asking whether there is a historical basis for interpreting the First Amendment's text to protect certain spheres of institutional autonomy.[42] The Amendment's text might also be supplemented by means of constitutional "construction." Where the Constitution's

41. *E.g.*, pp. 86, 148–49.

42. There have been particularly notable efforts in this spirit with respect to religious autonomy. *See, e.g.*, Thomas C. Berg et al., *Religious Freedom, Church–State Separation, and the Ministerial Exception*, 106 Nw. U. L. Rev. Colloquy 175, 181 (2011) ("In rejecting a national establishment of religion, Americans necessarily rejected a role for the federal government to choose church leaders. The First Amendment confirms this rejection, as do early practices and policies."); Douglas Laycock, *Church Autonomy Revisited*, 7 Geo. J.L. & Pub. Pol'y 253, 260 (2009) ("I still believe that the most straightforward way to explain the church autonomy cases

linguistic meaning is underdeterminate, principles of construction serve as tools for filling the void.[43] Perhaps the institutionalist understanding of the First Amendment reflects one such principle. We would still need a normative theory to explain why we should resolve linguistic underdeterminacy in favor of structural institutionalism rather than in some other way.[44] But assuming that such a theory were available, structural institutionalism could theoretically be consistent with text-centric or originalist modes of interpretation notwithstanding the First Amendment's fairly general language.

Much the same would be true if structural institutionalism were defended as an implementing or prophylactic principle for protecting constitutional liberties that are enumerated in the Constitution. Such an approach might suggest, for example, that there can be no effective freedom of religion without church autonomy, no effective freedom of the press without media autonomy, and no effective freedom of speech without autonomy for organizations such as universities, libraries, and associations. The premise would be that structural institutionalism is the best means of implementing the First Amendment's textual commands.[45]

One must also keep in mind that the First Amendment does not exist in a vacuum. As I have suggested, structural institutionalism carries ramifications for the broader division of power within American society. These ramifications could implicate other aspects of the constitutional order. To take just one example, it is worth asking how structural institutionalism might interact with provisions like the Ninth and Tenth Amendments, which play a role—albeit one that scholars continue to debate[46]—in defining

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is in terms of free exercise and not in terms of establishment. But I am now more open to Establishment Clause explanations, because I am much more aware now . . . that the formally established church was a church controlled by the state."); *cf.* Richard W. Garnett, *The Freedom of the Church*, 4 J. CATH. SOC. THOUGHT 59, 76 (2007) ("[I]t remains unclear and unsettled what exactly are the content and textual home in the Constitution for the church-autonomy principle—or even, indeed, if there is such a 'principle.'"); Michael A. Helfand, *Fighting for the Debtor's Soul: Regulating Religious Commercial Conduct*, 19 GEO. MASON L. REV. 157, 177 (2011) (noting that "courts and scholars have long differed as to the constitutional origins of the [church autonomy] doctrine," which restricts judicial resolution of religious questions).

43. Lawrence B. Solum, *The Interpretation–Construction Distinction*, 27 CONST. COMMENT. 95, 106 (2010) ("Interpretation discerns linguistic meaning, but when a text is vague, then the output of interpretation (the semantic content of the text) is vague. In such cases . . . interpretation makes its exit and construction enters the scene.").

44. *See id.* at 104 ("[T]heories of construction are ultimately normative theories . . . .").

45. On constitutional implementation generally, see Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54 (1997).

46. *Compare, e.g.*, RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION 366 (rev. ed. 2013) ("If it is the people *as individuals* who are sovereign, and the people *as individuals* retain their preexisting rights, as is affirmed in the text of the Constitution by the Ninth Amendment, then we are faced with the issue of what the people could have consented to." (footnote omitted)), *with, e.g.*, Kurt T. Lash, *The Inescapable Federalism of the Ninth Amendment*, 93 IOWA L. REV. 801, 805 (2008) ("[There is] a substantial body of evidence indicating that the Ninth Amendment was conceived and received as a federalist provision preserving the people's retained right to local self-government.").

the distribution of rights and obligations under the Constitution. It is also worth considering whether the institutional turn in First Amendment jurisprudence would denigrate rights granted to *individuals*. To be sure, Professor Horwitz emphasizes that the institutional turn is focused on enhancing individual liberty, not reducing it.[47] But in the context of specific altercations between individuals and institutions—for instance, the public university student or professor who is subjected to stringent speech restrictions (pp. 126–30)—it is hard not to perceive institutional autonomy and individual interests as standing in tension.

Of course, I do not mean to claim in this limited space that text-centric defenses of structural institutionalism are valid or invalid. I aim simply to sketch the *styles* of argument that might be used to evaluate structural institutionalism as a constitutional theory.

B. *Common Law Constitutionalism*

Another potential justification for structural institutionalism comes from the common law approach to constitutional interpretation. From the perspective of common law constitutionalism, considerations of text and structure would remain relevant, but the central question would be whether one could describe structural institutionalism as a migration of existing case law toward a sounder jurisprudential approach.[48] Precedent, tradition, and morally desirable results would become the theory's legitimating forces.

Some constitutional lawyers resist common law constitutionalism as a normative theory of interpretation, just as some resist the primacy of factors such as original meaning. But for those who accept common law constitutionalism as an interpretive approach, the validity of structural institutionalism would depend on factors including its role in facilitating an incremental change from what courts are already doing. For the common law constitutionalist, existing precedent serves to "define and limit the role" of normative judgments in shaping the law.[49] Sharp breaks are appropriate only in rare circumstances presenting the most compelling of moral justifications.[50] Were the situation otherwise, common law constitutionalism would become unconstrained by precedent—a contradiction in terms.

To assess its consistency with common law constitutionalism, we must view structural institutionalism against the backdrop of existing jurisprudence. Here the evidence is mixed. On the one hand, Professor Horwitz describes existing law as deviating from the institutionalist ideal in myriad

47. *See, e.g.*, p. 21 ("Nothing in what I write is intended to eliminate vigorous protections for individual speakers or worshippers.").

48. For an influential articulation of common law constitutionalism, see David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. Chi. L. Rev. 877 (1996).

49. David A. Strauss, *Originalism, Precedent, and Candor*, 22 Const. Comment. 299, 300 (2005).

50. *See* David A. Strauss, *The Common Law Genius of the Warren Court*, 49 Wm. & Mary L. Rev. 845, 859 (2007) ("A sharp, nonincremental change can be justified if you are very confident that what has gone before is badly wrong.").

ways.[51] On the other hand, he states that "the institutional turn signifies a partial change in First Amendment doctrine, not a total makeover." (p. 278). The question is how "partial" that change really is. It may be that with respect to some institutions, the move to institutional autonomy could be justified as an incremental extension of existing case law. The government's treatment of religious institutions is a potential example, particularly given the Supreme Court's recent validation of the ministerial exemption as reflecting a church's freedom "to choose those who will guide it on its way."[52] The treatment of associations is a closer call. The Court in *Boy Scouts of America v. Dale* was undoubtedly protective of associational freedom,[53] but its focus on parsing the Boy Scouts' organizational message conflicts with Professor Horwitz's proposed approach to associational autonomy (p. 225). Could the other doctrinal innovations implied by structural institutionalism be described as incremental changes to existing law? If not, are the changes so vital from the standpoint of morality or policy that they warrant even a stark change of direction? One of these questions must be answered in the affirmative for structural institutionalism to find a basis in common law constitutionalism.

C. *Arguments from First Amendment Values*

First Amendment case law is home to a range of animating values. Among them are governmental distrust,[54] individual expression,[55] democratic self-governance,[56] and the pursuit of truth via an "uninhibited marketplace of ideas."[57] Perhaps structural institutionalism is an outgrowth of these values. After all, structural institutionalism envisions certain organizations as bulwarks against the imposition of governmental orthodoxy and domains for the exercise of liberty. We might also defend the theory as enriching the marketplace of ideas, a point that emerges most clearly from

51. P. 49 ("In some cases, the courts are insensitive to contextual and institutional differences that should matter. In others, the courts *are* sensitive to differences in context, but feel compelled to shoehorn their decisions into an acontextual framework.").

52. Hosanna–Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 710 (2012).

53. *See* McGinnis, *supra* note 30, at 533 ("By granting such substantial space for a private organization to exclude individuals whose mere presence is antithetical to their expressive norms, the Court turned the First Amendment into a powerful tool for private articulation of social norms about individual behavior and characteristics.").

54. *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 340 (2010) ("Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints.").

55. *See, e.g.*, First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 777 n.12 (1978) ("The individual's interest in self-expression is a concern of the First Amendment separate from the concern for open and informed discussion . . . .").

56. *See, e.g.*, Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.").

57. Virginia v. Hicks, 539 U.S. 113, 119 (2003).

Professor Horwitz's discussion of universities and the media as contributing to the store of public knowledge.[58]

To the extent that the First Amendment is properly viewed as aspiring to promote these sorts of values, structural institutionalism's desirability depends on its ability to advance that enterprise.[59] Yet there is also a set of deeper questions: What makes a particular First Amendment value worth pursuing in the first place? Must the value be implicit in the Constitution's text or original meaning? Does it draw its legitimacy from a pedigree in judicial precedent? Is the value a heuristic for achieving pragmatically desirable results? Even if it were linked to underlying First Amendment values, the validity of structural institutionalism would still depend on these fundamental issues regarding the proper ends of constitutional adjudication.

D. *Synthesis*

I have offered these preliminary thoughts to emphasize the nature of First Amendment institutionalism as a theory of constitutional structure that must emanate from an identifiable constitutional source. Like other debates over constitutional adjudication, the debate over institutionalism will depend on considerations of interpretive methodology as well as the normative premises that drive methodological choices.[60] For present purposes, my point is simply that the debate is worth having. Professor Horwitz has advanced a potent theory of structural institutionalism that would, if implemented, alter the balance of political and nonpolitical authority in American society. The theory raises numerous issues, but none is more important than pinning down its constitutional basis.

A final inquiry in evaluating structural institutionalism's foundations is how many arguments are in motion: one or more than one? It may be that the theory should stand or fall as a cohesive whole. That understanding is consistent with the spirit of Professor Horwitz's argument, which reads as a single overarching thesis with several complementary parts. The view of structural institutionalism as a unified theory also gives it a broad sweep, depicting institutional autonomy as a concept that is bigger than any particular First Amendment institution. Institutionalists might prefer some autonomy to none, such that the recognition of autonomy for, say, churches or universities but not the media would nevertheless represent a partial victory. Still, the stronger version of structural institutionalism is the integrated one,

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58. *See supra* Sections II.B.3–4.

59. Although he did not frame his argument in institutionalist terms, Ashutosh Bhagwat recently defended associational freedom by connecting it to democratic self-governance. *See* Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. 978, 993 (2011) ("[G]roup action was and is an essential aspect of *meaningful* self-governance.").

60. *See* Randy J. Kozel, *Settled Versus Right: Constitutional Method and the Path of Precedent*, 91 TEX. L. REV. 1843, 1863–75 (2013) (describing the relationship between interpretive methodology, underlying normative premises, and constitutional adjudication in the context of the treatment of judicial precedent).

which enlists various entities in a joint effort to limit the reach of government. It is that version whose constitutional moorings are of greatest interest in assessing the implications and legitimacy of First Amendment institutionalism.

Conclusion

The institutional turn in First Amendment scholarship is a going concern, and Professor Horwitz provides an excellent introduction to the debate. That alone makes his book worthy of attention.

But something else is going on—something that is relevant to anyone interested in the distribution of power in American society. I have suggested that through his systematic approach and his dual emphasis on empowering institutions and constraining governments, Professor Horwitz demonstrates the potential of First Amendment institutionalism to move beyond freedom of expression by engaging the deeper structure of the constitutional order. The resulting theory presents a significant challenge to the existing relationship between governments, individuals, and organizations.

The U.S. Constitution is manifestly concerned with the distribution of power among instrumentalities of government: state versus federal, executive versus legislative versus judicial, Senate versus House. If Professor Horwitz is right, there is another part of the story—one that the First Amendment helps us understand but whose effects extend far beyond the protection of expressive liberty. As the structural dimensions of First Amendment institutionalism become more apparent, the need for a fuller exploration of its implications for constitutional theory will take on increased urgency. That undertaking might well represent the next front in the institutionalist project.