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The Value of Institutions and the Values of Free Speech

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Response

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Should the First Amendment pay attention to the setting in which speech occurs, giving more protection to some institutions than to others? The very suggestion is a heresy. The First Amendment, to a degree unknown elsewhere in American law, has been characterized by a certain kind of blindness. It has largely been blind to the popularity of the speech involved, blind to whether the speech is favored or disfavored by the government, and blind to the identity of the speaker. On the other hand, some institutions—the professional media, libraries, and universities, for example—are especially good at serving as a check against government abuse, informing us about important public issues and helping us acquire knowledge. Some institutions are better First Amendment citizens than others. If we want a robust First Amendment, why should we be blind to that?

Much scholarship identifies a problem and then suggests an answer that tries to solve or at least ease the problem identified. Professor Schauer's creative and provocative proposal for "an institutional First Amendment" attempts to do both.[1] Let us start with some possible problems with his solution and then move to some potential problems with his problem.

I

Professor Schauer proposes that we "carve up" the First Amendment and grant varying degrees of protection to institu-

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1. *See* Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256 (2005).

tions based upon the degree to which they can generally be expected to serve important First Amendment values.[2] The "institutional press," by which one might mean media businesses like the *New York Times* and CBS News (as opposed to other information providers, like Internet bloggers), would be one such privileged actor because of its role in exposing government abuse and providing information critical to a well-functioning democracy. Another privileged institution would be libraries, where the public acquires knowledge. A third would be universities. For the libertarian-leaning First Amendment advocate, what is not to like in giving these obviously important speech institutions even more protection than they receive now?

Let us initially dispense with one possible complaint about the proposal. Professor Schauer's proposal requires us to distinguish between "the institutional press and the lone pamphleteer, between the Internet and an adult theater, between libraries and medical clinics, and between the National Endowment for the Arts [NEA] and the National Institutes of Health [NIH],"[3] among others. Some might object that line drawing is itself objectionable. But the fact that a First Amendment theory calls for line drawing is not a sufficient objection to that theory. Line drawing is both inevitable and desirable in First Amendment doctrine.

There might be a related objection to such line drawing on the ground that the necessary distinctions among institutions will be especially hard to make. But the line-drawing problems created by distinctions like Professor Schauer's do not seem insuperable. While John F. Burns's Pulitzer Prize-winning reporting for the *New York Times* and Matt Drudge's scandal mongering for his eponymous Web site might share some characteristics, I have faith that courts could distinguish the two. For the most part, the possible line-drawing difficulties do not seem that much more difficult than other line-drawing problems in the First Amendment.

So why has the Court been reluctant to draw distinctions among types of speakers or institutions? Two of Professor Schauer's answers do not seem very compelling. He suggests that judges do not like to draw legal lines on the basis of prelegal categories and that courts are for institutional reasons re-

2. *See id.* at 1273–77.
3. *Id.* at 1260.

luctant to make the requisite empirical judgments.[4] There are very few "prelegal" categories even imaginable today. Certainly the *New York Times* and like media outlets have a legal existence confirmed by property, tort, and contract law that is different from the existence of an individual blogger. Though difficult to tame, the Internet too is bounded by law, as of course are libraries, medical clinics, and government bodies like the NEA and the NIH. Also, as Professor Schauer notes,[5] courts make difficult empirical judgments all the time, a fate best described by Justice Holmes in, of all things, a famous free speech opinion: "Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge."[6]

Line drawing is only objectionable when we have reason to believe that the particular way a proposal calls for it is likely to raise the very kind of problems the First Amendment should avoid. This is where Professor Schauer's proposal runs into some real objections. To see why, it is worth recalling two dominant themes of First Amendment jurisprudence as well as the particular dangers that these themes help guard against.

One dominant theme of free speech jurisprudence is *agnosticism*. A reluctance to make certain kinds of distinctions characterizes First Amendment doctrine. For example, the preference for content neutrality in speech regulation shows a reluctance to allow the government to favor one message over another.[7] Thus, the state may not prohibit sexist messages while allowing nonsexist messages.[8] It may not ban advocacy of slavery while permitting advocacy of abolition. It may not criminalize Nazi speech while authorizing anti-Nazi speech. While we as citizens may not be neutral about which sets of these beliefs are right and valuable, the First Amendment takes no position on them. It is agnostic about message.

This agnosticism has extended to speaker identity, mostly on the theory that regulations directed at particular speakers will tend to reflect hostility to the speaker's probable message.

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4. *See id.* at 1264–69.

5. *See id.* at 1266–67.

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

7. *See* Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 691–94 (1991).

8. *Cf.* R.A.V. v. City of St. Paul, 505 U.S. 377, 391–96 (invalidating an ordinance that criminalized fighting words that "communicate messages of racial, gender, or religious intolerance").

The government could not ban speech by Republicans, for example, or by people earning less than $25,000 per year. Even short of outright prohibition, the state could not grant special privileges only to certain classes of speakers. For example, the state cannot give only Democrats prime-time television slots to communicate their message. The First Amendment is agnostic about speakers, demanding that they be neither restricted nor given special privileges based on their identity.

A second dominant theme of First Amendment jurisprudence has been *skepticism*. The First Amendment is skeptical of speech regulation in general, and especially of some types of reasons offered for government suppression of speech. For example, I have argued that the First Amendment is especially skeptical of paternalistic justifications for speech regulations.[9] The government may also not restrict speech because it fears people will be persuaded by it to do something harmful.[10]

These themes of agnosticism and skepticism serve to guard against three types of problems that raise special First Amendment concerns. One is *government partisanship*, favoring one set of views or one ideology over another. A second is *government entrenchment*, favoring current political power holders over challengers. The third is *government incompetence*, the danger that the government (including courts) will make mistakes that harm free speech values.[11]

My concern with Professor Schauer's proposal for institution consciousness is that the necessary line drawing entailed by his proposal increases the risks of all three problems. That is, favoring some speakers and institutions over others risks reintroducing the problems of partisanship, entrenchment, and incompetence. It offers another opportunity for these *bêtes noires* of the First Amendment to reappear. Why is this?

First, the lines between institutions favored and institutions disfavored will be drawn by judges who are being appointed in an increasingly partisan atmosphere. This atmosphere argues for giving them *less*, not *more*, opportunity to favor their own interests. It counsels a set of First Amendment rules more characterized by blindness to differences than consciousness of differences. While I might trust Professor Schauer

9. Dale Carpenter, *The Antipaternalism Principle in the First Amendment*, 37 CREIGHTON L. REV. 579, 584–614 (2004).

10. David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 335–46 (1991).

11. *See* Carpenter, *supra* note 9, at 632–33.

to make the relevant distinctions in a principled fashion and to apply them in a nonpartisan way, day by day I grow more skeptical of the federal judiciary's ability to do so.[12]

Second, the institutions favored by courts and even academics will tend to be traditional ones. They will choose institutions that represent dominant modes of analysis and ideas because such institutions are widely perceived by the decision-making class of academics and judges to be most valuable. This bias might tend to favor mainstream institutions and ideas at the expense of "the poorly financed causes of little people."[13] Is it an accident that an institution-conscious First Amendment favors institutional media, libraries, and universities? These are the media sources the decision-making class reads, the locations where they research, and the places at which they are employed. To accept Professor Schauer's proposal, then, we must be willing to shed some of our skepticism about government justifications for speech regulation.

Every time we "carve up" the First Amendment we run these risks. We run them when we try to distinguish obscenity from permissible explicit material, subversive advocacy from incitement, a public forum from a nonpublic forum, speech from conduct, and so on. Each of these lines of demarcation is an opening for the dangers of government partisanship, entrenchment, and incompetence. We run the risks, however, because they are thought to be worth it in a given context. Agnosticism and skepticism counsel against introducing yet another chance for more such carving up to erode the pluralistic values of the First Amendment, at least unless we have a very good reason to do so. Do we?

II

Professor Schauer offers several concrete problems and one overarching problem that an institution-conscious First Amendment might address.[14] None of these problems seems compelling enough at this stage to run the risks created by a newly institution-conscious First Amendment.

Let us look at a couple of concrete problems that Professor Schauer argues are created by institution blindness. One problem he identifies is that current doctrine protects fewer rights

12. *See, e.g.*, Bush v. Gore, 531 U.S. 98 (2000).
13. Martin v. City of Struthers, 319 U.S. 141, 146 (1943).
14. *See* Schauer, *supra* note 1, at 1270–73.

for the institutional press "than exist in many countries with a far more constricted view of freedom of speech and freedom of the press in general . . ."[15] These include rights of access to information and rights to shield confidentially obtained information.[16] These potential access and confidentiality rights go unprotected largely because of the difficulty the Court thinks it would have in distinguishing real reporters from insignificant freelancers and imposters. "A Supreme Court unwilling to distinguish among the lone pamphleteer, the blogger, and the full-time reporter for the *New York Times* is far less likely to grant special privileges to pamphleteers and bloggers than . . . to grant privileges to no one," argues Professor Schauer, so it has opted to grant informational and confidentiality privileges to no one.[17] That seems right, but so what? There is little evidence that the institutional press in the United States has less access to confidential government information than does the press in countries with more formal rights to such information.

Consider the effect of having no constitutional protection of confidentiality for the institutional press. Despite the absence of constitutional protections shielding their identities, confidential sources inside the government still speak to reporters, revealing important information to the public. Part of the reason for this is that prosecutions for revealing confidential information are so rare. Another reason is that many states have enacted their own shield laws giving reporters' sources some protection.[18]

Now consider the effect of having no constitutional right guaranteeing the institutional press access to government records. Has this seriously limited the public's knowledge of government activity? It is hard to know for sure, in part because government records in this country and many others are already largely open by statutory requirement. More than fifty developed countries—including the United States and its constituent states—have freedom of information laws.[19] Official secrecy has been seriously eroded, though not eliminated, by such laws. It is hard to know what a constitutional mandate

15. *Id.* at 1270–71.

16. *Id.*

17. *Id.* at 1272.

18. *See* REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *Introduction* to THE REPORTER'S PRIVILEGE COMPENDIUM (2002), *available at* http://www.rcfp.org/cgi-local/privilege/item.cgi?i=intro.

19. *Out of the Darkness*, ECONOMIST, Jan. 1, 2005, at 41.

could helpfully do beyond the access already guaranteed. Moreover, even though these laws apply equally to everybody (including the sweaty-palmed blogger), the institutional press is best situated to take advantage of them. This is because the institutional press has access to more resources, has superior incentive and interest, and has greater expertise. Thus, even without a constitutional privilege for the institutional press, it already has greater access to hidden government information as a practical matter.

A second practical problem Professor Schauer cites is that current doctrine obliges us "to treat mass distribution of detailed instructions for causing harm in the same way that we treat an individual speaking to a live audience . . ."[20] It is not clear that this is much of a problem. Individual counseling to harm may be even more harmful than mass communications of the same instructions because individual counseling is more focused. Even if it is a problem, it does not seem like a problem properly addressed by an institution-conscious First Amendment. Instead, it might be a problem for the boundaries of First Amendment coverage as a whole. It is not immediately clear why instructions for mass killing should enjoy *any* free speech protection, regardless of whether those instructions are conveyed to a larger audience or to a single person.

The larger problem Professor Schauer addresses is dilution.[21] Think of water as a metaphor. The idea is that the broader the coverage offered by the First Amendment, the more shallow that coverage will tend to be. Like a finite quantity of water, the First Amendment may be diluted if it is spread over too large an area. This argument is sometimes offered against giving protection to commercial speech, for example.[22] A court willing to give commercial advertising constitutional protection likely would not give it full protection; instead, the dilution theory maintains, the lesser protection given to commercial speech might then be given to core political speech.

The dilution problem seems right in theory. The trouble is that there is very little evidence for it in practice. The experience of the past eighty-five years of serious First Amendment scrutiny of speech regulation suggests the opposite of what a dilution theory would predict. That is, the trajectory of the

20. Schauer, *supra* note 1, at 1271 (citation omitted).
21. *See id.* at 1271–72.
22. *See id.*

First Amendment has been both to expand the scope of coverage and to deepen it, not to weaken coverage as it has steadily expanded. Even as the Court deepened the First Amendment's protection for subversive advocacy,[23] it expanded its coverage in areas formerly thought completely unprotected by tightening the definition of things like libel[24] and obscenity.[25] Similarly, Justice Powell's fears that protection of commercial speech would weaken protection for political speech[26] have so far proved unfounded. Indeed, the current Court, presiding over the most robust First Amendment in American history, is the most libertarian we have ever had on speech issues. And two of its most libertarian members when it comes to protecting speech have otherwise been its most conservative and progovernment members.[27] Thus, our free speech sea is deeper and broader then it has ever been. Dilution is a theory trapped by a metaphor.

III

The institution-conscious First Amendment does preserve a form of blindness. In granting some institutions greater constitutional protection than others, it is blind to whether the preferred institution is actually serving important free speech interests in a given case. That is, for example, reporters for the institutional press would enjoy some form of privilege to shield confidential sources, even where a particular exercise of the privilege did not serve First Amendment values.[28] There would be manifold difficulties in trying to decide which instances of shielding served First Amendment values and which did not. The dangers of partisanship, entrenchment, and incompetence would always lurk. So the institution-conscious First Amend-

23. *Compare* Schenck v. United States, 249 U.S. 47, 52–53 (1919) (affirming conviction under "clear and present danger" standard), *with* Brandenburg v. Ohio, 395 U.S. 444, 447–49 (1969) (reversing conviction under a stricter standard).

24. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–82 (1964).

25. *Compare* Roth v. United States, 354 U.S. 476, 487–92 (1957) (defining "obscenity"), *with* Miller v. California, 413 U.S. 15, 24 (1973) (narrowing the definition of "obscenity").

26. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455–56 (1978).

27. For example, Justice Scalia joined the Court's decision to strike a ban on flag burning, *Texas v. Johnson*, 491 U.S. 397, 398, 420 (1989), and Justice Thomas supported the invalidation of a federal restriction on child pornography, *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 259–60 (2002).

28. Schauer, *supra* note 1, at 1275.

ment does not attempt to draw lines around valuable speech with any precision. Certain institutions will be trusted with greater protection because protecting them is a rough proxy for protecting free speech values. That modesty about judicial capabilities and that evidence of both skepticism and agnosticism seem sensible. Carving up the First Amendment in ever-thinner slices to serve its larger purposes, after all, might undermine them.