

# INSTITUTIONS AS LEGAL AND CONSTITUTIONAL CATEGORIES

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*Institutions and institutional categories pervade the world and pervade human thinking, but institutional categorization plays a smaller role in constitutional doctrine than might be expected. Although constitutional doctrine often uses categories of the law's own making, and often draws distinctions based on the character of the act or (less-frequently) the character of the agent who engages in some act, it only reluctantly provides for different constitutional rules for different social institutions. There are some plausible reasons for this reluctance, but most of the reasons turn out on closer inspection to be less sound than is commonly thought.*

## INTRODUCTION

Law carves up the world. In a universe of almost infinite particulars, the law with its categories groups together particulars that are in important respects different, and separates particulars that are in important ways similar. It is hardly self-evident, for example, to the man on the Clapham omnibus that Bill Gates and a starving widow should be entitled to the same compensation when they suffer similar injuries as a result of similar negligence, but that is how the law typically operates. Nor would he expect that someone who just barely proves his case will be entitled to full damages, while someone who just barely fails to prove his case will be entitled to nothing at all, but again this is the approach of the law. In these and countless other instances, the law's concepts, categories, and distinctions organize the world in ways that, in theory, serve the law's own purposes.

Of course, this function of dividing and categorizing the world is not unique to law. Other social institutions necessarily divide and categorize as well, although they cleave the world's particulars in different ways and along different lines and for different purposes. And it is not just relatively

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formal and structured institutions like the law that perform such tasks of dividing and categorizing. Language may be the most obvious example of a categorizing institution that lacks a formal institutional structure, but there are many others, for categorization is part and parcel of the entirety of human thinking. Indeed, categorization is the only way in which we can organize and negotiate an overwhelming world whose vast array of particulars demands that it be sorted into categories.

When the law is dividing and organizing the world for its own purposes, it often employs categories that are more or less unique to law, and that have been designed from the outset to serve law's characteristic functions. In sorting people into plaintiffs and defendants, appellants and appellees, intervenors and amici and witnesses and class members, for example, the law does not track the divisions of the world. Nor does the law hew to the world's categories when it groups together acts into categories like tort, assumpsit, estoppel, and replevin. And when the law confronts the raw and simple facts of the world, it uses categories like state action, due process, interpleader, and laches to treat those facts as malleable in the service of the law's goals.

Yet, although the law often uses such categories of its own creation, at other times law's categories are parasitic on the categories of the prelegal and extralegal world.<sup>1</sup> Holmes mocked his apocryphal Vermont justice of the peace for supposing that the law could possibly have any use for a category like "churn,"<sup>2</sup> but the legal world has time and again proved him wrong, employing with a frequency that Holmes did not anticipate categories that would exist even were there no law at all, categories such as "principal residence," "automobile," "farm animal," and "particulate."<sup>3</sup>

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1. See Mary Jane Morrison, *Excursions Into the Nature of Legal Language*, 37 CLEV. ST. L. REV. 271 (1989) (distinguishing the law's use of its own meanings from the law's use of meanings from the larger world).

2. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 474-75 (1897). For my extended commentary on this example, its meaning, and its implications, see Frederick Schauer, *Prediction and Particularity*, 78 B.U. L. REV. 773 (1998).

3. The claim here is a conceptual and not a causal one. Yes, the law is a necessary condition for the effective operation of a modern industrial facility, and law is thus causally necessary for the existence of automobiles. But the artifact that we call an "automobile" can be described without presupposing the legal system or the rules of law, and it is thus unlike "interpleader" and "corporation," and also unlike, to use the common example, those elements of games that presuppose the constitutive rules of those games, elements such as "home run," "checkmate," and "double bogey." See H.L.A. HART, *Definition and Theory in Jurisprudence*, in ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 21 (1983) (analyzing legal terms whose meanings presuppose the legal system and substantive legal rules); JOHN R. SEARLE, *SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE* 33-42 (1969) (describing constitutive rules and distinguishing them from regulative rules).

As these and countless other examples show, the law frequently makes use of the preexisting categories of the world. Despite this willingness at times to use prelegal categories, however, the law has demonstrated a frequent and at times peculiar reluctance to employ the extralegal world's institutionally demarcated categories. We know that any complex society develops numerous formal and informal institutions like markets and schools and the law itself, but the law less than we might think draws its doctrinal and categorial<sup>4</sup> lines in ways that recognize preexisting social institutions. Obviously the law's reluctance to employ institutional categories is not complete, and the fact that there are discrete areas of law to deal with banking, nonprofit organizations, and the sale of securities, for example, shows that the law sometimes recognizes institutional categories when it needs to, and that it has the ability on occasion to organize itself around and along such categories. But when we focus our attention in particular on constitutional law, we see that institutional categories and distinctions appear to be much more the exception than the rule. First Amendment doctrine, for example, generally ignores the obvious institutional differences between lone dissenters and corporate communicators,<sup>5</sup> just as state action doctrine treats as equivalent the decisions of the U.S. Congress and those of a lone village bureaucrat,<sup>6</sup> and just as a restriction on abortion or flag desecration becomes no more or less unconstitutional if it is the product of an open referendum than when it is a nonpublic decision made by an administrative agency.<sup>7</sup>

My goal on this occasion is to examine preliminarily the place of institutional categories in constitutional analysis.<sup>8</sup> I spend some time

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4. The word "categorical" refers to categories, and is to be distinguished from "categorical," whose connotations of something absolute or non-overridable are irrelevant when we are talking about the properties and consequences simply of categories as categories.

5. See *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (recognizing full First Amendment protection for corporate political advocacy).

6. Cf. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961) (finding state action in a discriminatory decision by a lessee restaurant in a city-owned parking structure).

7. For an argument urging some change in the basic proposition described in the text, see Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation*, 56 TENN. L. REV. 291 (1989) (suggesting the possibility of greater deference to governmental decisions taken by direct democracy).

8. I do not claim to have created or led this type of inquiry. In addition to the works in this entire symposium, important components of a growing literature include Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771 (1999); Roderick M. Hills, Jr., *The Constitutional Rights of Private Governments*, 78 N.Y.U. L. REV. 144 (2003); Paul Horwitz, "Or of the [Blog]," 11 NEXUS 45 (2006); Mark D. Rosen, *Institutional Context in Constitutional Law: A Critical Examination of Term Limits, Judicial Campaign Codes, and Anti-Pornography Ordinances*, 21 J.L. & POL. 223 (2005); Mark D. Rosen, *The Surprisingly Strong Case for Tailoring Constitutional Principles*, 153 U. PA. L. REV. 1513 (2005).

documenting, more anecdotally than systematically, my premise that such categories are substantially underrepresented in constitutional law, but I then shift my attention from description to evaluation. If it is indeed the case that constitutional doctrine systematically ignores a range of socially important institutional distinctions, is this because ignoring them serves some important constitutional or legal purpose, or is this just the unfortunate residue of a Holmesian view of the world, a view that believes that the law works best when it divides the world according to its own purposes, abjuring the prelegal divisions of the world? And if this is so, what problems does such a posture cause, and how might some of these problems be lessened were constitutional doctrine and the agents who create it to have a different view of the importance of institutions and institutional distinctions to constitutional law?

## I. DEFINITIONAL PRELIMINARIES

Because my aim is to examine institutions as potential legal and constitutional categories, it is important at the outset that I specify what I mean both by “categories” and by “institutions.” With respect to the former, it might be best to start with a few examples from existing constitutional doctrine. Consider initially the categories that shape equal protection analysis. As every law student knows, governmental classifications that are based on race (or skin color or ethnicity or national origin) are treated as impermissible unless they are justified by a compelling governmental interest.<sup>9</sup> By contrast, classifications based on gender are subject to a different analysis; they can survive constitutional scrutiny only if the government demonstrates that the classification is substantially related to the achievement of an important governmental interest.<sup>10</sup> Still different standards apply to classifications based on alienage<sup>11</sup> and illegitimacy,<sup>12</sup> while classifications drawn on most other grounds need of course meet only the minimal scrutiny of the rational basis standard.<sup>13</sup>

For purposes of equal protection analysis, therefore, the relevant initial categories are race, gender, alienage, illegitimacy, and (more or less) everything

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9. See *Loving v. Virginia*, 388 U.S. 1 (1967); *Korematsu v. United States*, 323 U.S. 214 (1944).

10. See *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982); *Craig v. Boren*, 429 U.S. 190 (1976).

11. See *Bernal v. Fainter*, 467 U.S. 216 (1984); *Graham v. Richardson*, 403 U.S. 365 (1971).

12. See *Clark v. Jeter*, 486 U.S. 456 (1988); *Mathews v. Lucas*, 427 U.S. 495 (1976).

13. See *New Orleans v. Dukes*, 427 U.S. 297 (1976); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955); *Ry. Express Agency v. New York*, 336 U.S. 106 (1949).

else, for this is how equal protection doctrine carves up the world of governmental classifications and distinctions. In the formal language of the analysis of rules, these categories represent the *protasis* of a rule,<sup>14</sup> for they specify at the outset the conditions under which some rule applies and under which the prescriptions of the rule will be brought to bear. Taken together, the various protases constitute the categorial structure of some territory of doctrine, for the various protases serve the initial sorting function of determining which rules are to be applied to which types of governmental action.

So too throughout constitutional law. In post-*New York Times Co. v. Sullivan*<sup>15</sup> defamation law, for example, the important initial distinction is one that distinguishes public officials and public figures,<sup>16</sup> on the one hand, from every other libel and slander plaintiff, on the other.<sup>17</sup> If the plaintiff is a public official or a public figure, then the actual malice standard of *Sullivan* applies. But if the plaintiff is neither, then that plaintiff, by virtue of the U.S. Supreme Court's decision in *Gertz v. Robert Welch, Inc.*,<sup>18</sup> need only prove that the publisher was negligent in order to prevail. Turning to abortion, the pre-*Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>19</sup> trimester framework provides still another example of a crisp categorial structure, for prior to *Casey* the standard of permissibility for evaluating state restrictions on abortion hinged on whether the restrictions applied to the first, second, or third trimester of pregnancy.<sup>20</sup> Similarly, the applicability of the Fourth Amendment's warrant requirement depends initially on whether the searched premises (or the methods of search) were within the zone in which the subject of the search had a reasonable expectation of privacy, and thus the two relevant categories are the premises in which (or methods against which) such a reasonable expectation exists and those premises (or methods) as to which it does not.<sup>21</sup> And for a final example, consider the

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14. For an explanation of the protasis and apodosis as the principal components of the formal structure of any rule, see GIDON GOTTLIEB, *THE LOGIC OF CHOICE* (1968), and FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* (1991).

15. 376 U.S. 254 (1964).

16. See *Curtis Publ'g Co. v. Butts*, 388 U.S. 130 (1967).

17. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

18. *Id.*

19. 505 U.S. 833 (1992).

20. *Roe v. Wade*, 410 U.S. 113 (1973).

21. See, e.g., *Samson v. California*, 126 S. Ct. 2193 (2006); *Bond v. United States*, 529 U.S. 334 (2000); *United States v. Padilla*, 508 U.S. 77 (1993); *Katz v. United States*, 389 U.S. 347 (1967).

Supreme Court's recent application in *Crawford v. Washington*<sup>22</sup> and subsequent cases of the Sixth Amendment's Confrontation Clause to evidence in which the witness—the "declarant," in the formal language of hearsay law—is not available to be confronted and cross-examined by the defendant. After *Crawford* and the 2006 companion cases of *Davis v. Washington* and *Hammon v. Indiana*,<sup>23</sup> the Confrontation Clause applies to those forms of out-of-court statements that are deemed to be "testimonial," but not to those statements, even if made to law enforcement officials, that are not testimonial. The relevant category is accordingly "testimonial," for the fact of some interrogation lying within or without that category is what determines whether the constraints of the Sixth Amendment will be applicable.

For my purposes here, therefore, a category is that subdivision of the world that first determines whether the Constitution applies, and, if so, proceeds to determine which constitutional rule or which block of constitutional doctrine is to be applied to that subdivision. These categories thus divide up constitutional law—among racial, gender, illegitimacy, alienage, and other classifications; between public officials and private figures; among the trimesters of pregnancy; between testimonial and nontestimonial, and so on. In these and countless other instances, the constitutional categories not only divide up constitutional law, but also divide up the terrain of the world to which constitutional law applies.

Defining "institutions" is slightly more challenging, but again some examples may assist. Unlike those parts of the world that exist without human intervention, and which philosophers call "natural kinds"<sup>24</sup>—gold, rain, skin, and crocodiles, for example—and unlike those human-created objects that are often called "artifacts"<sup>25</sup>—automobiles, screwdrivers, oil paintings, and glue, for example—institutions are more complex, for they not only are the product of human creation, but also exist by virtue of a more multifaceted set of rules and relationships. A cylindrical piece of wood with which a person can strike a leather-covered spheroid is an artifact, but baseball is an institution. My considerate or empathetic treatment of another human being is an act, but etiquette is an institution. So too are more formal institutions like the U.S. Senate, the Chase Manhattan Bank, Harvard University, and the American Red Cross. But although all of

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22. 541 U.S. 36 (2004).

23. 126 S. Ct. 2266 (2006), consolidated with *Davis v. Washington*, 126 S. Ct. 2266 (2006).

24. See BRIAN ELLIS, SCIENTIFIC ESSENTIALISM (2001).

25. See CREATIONS OF THE MIND: ARTIFACTS AND THEIR REPRESENTATION (Eric Margolis & Stephen Laurence eds., 2007); Lynne Rudder Baker, *The Ontology of Artifacts*, 7 PHIL. EXPLORATIONS 99 (2004).

these entities and constructs are properly understood as institutions, what is most important for our purposes here is that such institutions come not only in tokens like those just mentioned, but also in *types*. Legislatures. Banks. Schools. Universities. Nonprofit Organizations. Corporations. Newspapers. And so on and on and on. These institution types pervade our collective existence, and they are omnipresent features of the world we inhabit and construct. We can scarcely imagine what it would be like to live without institutions, and their existence may well be a significant marker of the movement from primitive to advanced.

Yet although the idea of an institution is obvious, the importance of institutions in the immediate context is that they form a large and essential part of the categorial structure of modern thought. We see the world not only in terms of natural kinds and artifacts, but also in terms of institutions, and the distinctions between institutions frequently mark the boundaries between the objects of our perception and our cognition. And it is precisely this role for institutional categories that makes their relative absence from constitutional doctrine so worthy of comment.

## II. ON THE PAUCITY OF INSTITUTIONAL CATEGORIES

Although institutions are all around us, it is striking how insignificant a role they appear to play in constitutional categorization, and indeed this descriptive claim, though not essential to my conclusion, is an important part of my central argument in this Article.<sup>26</sup> Yet while I obviously believe that this claim is an important one, it is nevertheless crucial to make clear at the outset that my background descriptive empirical premise about the comparative underuse of institutional categories is statistical and not absolute.<sup>27</sup> Consequently, I do not claim that institutions *never* provide the basis for constitutionally relevant categories. Nor could I, for there are salient examples of

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26. To be more precise, I argue that institutional categories are underused in constitutional law, and that it would be desirable if their use were to increase. But even if I am wrong about the former, it would still be valuable to identify the very idea of institutional categories and to endorse their existing and potentially greater use.

27. See *supra* text accompanying note 25. For an argument explicitly agreeing with my normative sympathy to the employment of institutions as the basis for constructing constitutional categories, but disagreeing with me that they are now rare, see Anuj C. Desai, *The Transformation of Statutes Into Constitutional Law: How Early Post Office Policy Shaped Modern First Amendment Doctrine*, 58 HASTINGS L.J. 671 (2007).

institutional categorization.<sup>28</sup> But although institutions do occasionally appear in the categorial structure of constitutional law, their rarity is suggested by the substantially larger number of doctrinal areas in which institutions might plausibly provide the basis for constitutional categories, but turn out, often surprisingly, not actually to have been so employed.

Perhaps the most obvious examples come from the free speech and free press dimensions of the First Amendment.<sup>29</sup> And of these examples, one of the most interesting is the persistent refusal of the Supreme Court to treat the Press Clause as having independent force beyond what would be provided by the Free Speech Clause itself, and thus the refusal of the Court to treat the press differently than it treats other speakers.<sup>30</sup> For all of the plain differences between the institutional press and various other individual, organizational, and corporate speakers, the existing doctrine insists on ignoring those differences, and does so even at the cost of arguably rendering part of the constitutional text superfluous.<sup>31</sup>

Indeed, the refusal of the Supreme Court to treat the press as different despite its identifiably distinct institutional status is part of a larger pattern of treating First Amendment doctrine as institutionally blind. With the exception of the special case of broadcasting,<sup>32</sup> the nature of the

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28. One such example arguably comes from the public function strand of state action doctrine, *see* *Marsh v. Alabama*, 326 U.S. 501 (1946), because the determination of which nominally private entities serve inherently or traditionally governmental functions has an unavoidably institutional dimension.

29. Because I have dealt with the First Amendment aspects of my larger claim about constitutional categories at some length in previous writing, the discussion and examples I offer in this Article here will be somewhat abbreviated. For a more thorough examination, see Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256 (2005) [hereinafter Schauer, *Towards an Institutional First Amendment*]; Frederick Schauer, *The Supreme Court, 1997 Term—Comment: Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 4 (1998) [hereinafter Schauer, *Principles, Institutions, and the First Amendment*]; Frederick Schauer & Richard Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803 (1999).

30. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 798–802 (1978) (Burger, J., concurring). The proposition that the Press Clause should be recognized as granting to the institutional press rights it does not have under the Free Speech Clause has been the subject of considerable debate. Compare David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455 (1983), and Potter Stewart, "Or of the Press," 26 HASTINGS L.J. 631 (1975), with Anthony Lewis, *A Preferred Position for Journalism?*, 7 HOFSTRA L. REV. 595 (1979), and William W. Van Alstyne, *The Hazards to the Press of Claiming a Preferred Position*, 28 HASTINGS L.J. 761 (1977).

31. The locus classicus for the argument that any interpretation of the Constitution that renders some part of the constitutional text superfluous or meaningless is to be disfavored is *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

32. See *FCC v. Pacifica Found.*, 438 U.S. 726 (1978); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969).

medium of communication rarely matters under existing First Amendment doctrine, and thus the Internet,<sup>33</sup> commercial telephone sex services,<sup>34</sup> books,<sup>35</sup> magazines,<sup>36</sup> and movies<sup>37</sup> are all treated almost identically for purposes of obscenity and indecency law, just as individual speakers are treated the same as the institutional press for defamation and privacy purposes,<sup>38</sup> and just as unconstitutional conditions doctrine and the related doctrines about nonpublic forums refuse to draw distinctions among public funding of the arts,<sup>39</sup> public advocacy of democracy,<sup>40</sup> publicly funded medical services,<sup>41</sup> and public school employees,<sup>42</sup> among others. Throughout First Amendment doctrine, it is the speech and not the speaker that generally matters, and, accordingly, obvious institutional differences among types of speakers are routinely ignored, including those institutional differences whose recognition might well serve important First Amendment values and purposes.

Interestingly, much the same institutional blindness characterizes the existing doctrine under the religion clauses of the First Amendment. Although the Supreme Court in *Roemer v. Board of Public Works of Maryland*<sup>43</sup> made explicit reference to the importance of considering “the character of the aided institutions”<sup>44</sup> in determining which forms of funding of public educational institutions were permissible under the Establishment Clause, the more recent *Rosenberger v. Rector & Visitors of the University of Virginia*<sup>45</sup> headed in a different direction; by relying heavily on cases involving the primary and secondary schools in evaluating the permissibility of support for religious organizations at a state university, *Rosenberger* showed that

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33. See *Ashcroft v. ACLU*, 542 U.S. 656 (2004); *Ashcroft v. ACLU*, 535 U.S. 564 (2002); *Reno v. ACLU*, 521 U.S. 844 (1997).

34. See *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115 (1989).

35. See *Kaplan v. California*, 413 U.S. 115 (1973).

36. See *Miller v. California*, 413 U.S. 15 (1973).

37. See *Jenkins v. Georgia*, 418 U.S. 153 (1974).

38. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Garrison v. Louisiana*, 379 U.S. 64 (1964). For an analysis of the distinction and its potential, even if not actual, usefulness in First Amendment analysis, see Steven Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 UCLA L. REV. 915 (1978).

39. See *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998).

40. See *Rust v. Sullivan*, 500 U.S. 173 (1991) (relying on the implausibility of prohibiting Congress from creating the viewpoint-based National Endowment for Democracy as providing a foundation for the permissibility of viewpoint-based restrictions on speech of publicly funded healthcare providers).

41. See *supra* text accompanying note 30.

42. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983).

43. 426 U.S. 736 (1976).

44. *Id.* at 766–67.

45. 515 U.S. 819 (1995).

differences among different types of schools were to be treated as largely inconsequential. And in the large number of cases denying free exercise claims for exemptions on religious grounds from neutral and generally applicable statutes or regulatory schemes,<sup>46</sup> the Court has similarly said essentially nothing about any possible institutional differences among those claiming exemptions or among the various regulatory schemes from which exemptions were being claimed.

Turning the analysis away from the First Amendment, we encounter the same reluctance with respect to institutional categories in numerous other doctrinal areas. One of the most striking is state action doctrine, where, although governmental action comes in many different institutional forms, the doctrine treats them all as essentially equivalent. It would not be implausible to imagine that governmental actions taken by referendum would be treated differently from those taken legislatively,<sup>47</sup> that governmental actions taken legislatively would be treated differently from executive action, that the actions of police officers would be evaluated differently from those of administrative agencies, and so on. And, by the same token, actions taken by heavily governmentally subsidized or regulated but still nominally private institutions might be treated differently from those that are more plainly private.<sup>48</sup> Yet despite the seeming plausibility of such an institutionally sensitive approach, state action doctrine employs the same factors to determine the existence of state action regardless of the institutional setting in which they occur.

So too with equal protection doctrine. Although there have been persistent calls to substitute for the existing doctrinal structure, with its distinct levels of scrutiny, a somewhat more of a sliding-scale or all-things-considered approach to equal protection analysis,<sup>49</sup> there has not been, surprisingly, much discussion of the possibility of having the degree of scrutiny turn not on the type of distinction drawn—race, gender, illegitimacy, and so on—but rather on the location in which it exists. Some institutional recognition in fact does leak into the existing doctrinal structure, as when the particular characteristics of a university become germane in cases like

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46. See, e.g., *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988); *Bowen v. Roy*, 476 U.S. 693 (1986); *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983); *United States v. Lee*, 455 U.S. 252 (1982).

47. See Michelman, *supra* note 7.

48. E.g., *Jackson v. Metro. Edison Co.*, 419 U.S. 345 (1974).

49. See, e.g., *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 460 (1985) (Marshall, J., concurring in part and dissenting in part); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 98–99 (1973) (Marshall, J., dissenting).

*Regents of the University of California v. Bakke*<sup>50</sup> and *Grutter v. Bollinger*,<sup>51</sup> but by and large the tenor of the cases is just the opposite, with more or less the same considerations and the same analysis applied to issues of discrimination and affirmative action in the context of electoral districts,<sup>52</sup> government contracts,<sup>53</sup> broadcasting licenses,<sup>54</sup> and many, many others.

### III. FROM DESCRIPTION TO DIAGNOSIS

I recognize that my empirical claim is hardly airtight, nor could it be. Empirically and descriptively, I intend to suggest that there are numerous areas of constitutional law in which institution-specific categories of doctrine might usefully play a larger role than they do now, and that the aggregate conclusion to be drawn from the existence of these doctrinal pockets of institutional hostility is that institution-averse constitutional doctrine is more the rule than the exception. But for me to be right about this, it would be necessary to demonstrate more effectively than I have done so far that in numerous instances an institution-based constitutional category would be superior to some existing category, and that this superiority pervaded constitutional law. That indeed is my suspicion, and it is what I assert here, but moving from assertion supported by anecdote to much more substantial demonstration would require article-length discussions of each doctrinal area in which this claim might be true. And although I have previously done something along these lines for the speech and press dimensions of the First

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50. 438 U.S. 265 (1978).

51. 539 U.S. 306 (2003), decided along with *Gratz v. Bollinger*, 539 U.S. 244 (2003). Paul Horwitz correctly takes *Regents of the University of California v. Bakke* and *Grutter v. Bollinger* as suggesting a First Amendment-based account of the differences between the university-based affirmative action cases and other affirmative action decisions. Paul Horwitz, *Grutter's First Amendment*, 46 B.C. L. REV. 461 (2005). My argument in this Article is not inconsistent with Horwitz's, but is arguably broader. If affirmative action means something different in the context of a state university than it does in other institutions, this difference might be crystallized in terms of the First Amendment. But a thorough institutional approach to equal protection analysis would not require that the institutions marked out for institution-specific treatment be institutions, like universities, that are connected with some area of special constitutional concern. So if it could be established, for example, that hospitals or homeless shelters have important institution-specific characteristics that were germane to equal protection principles, the fact that neither hospitals nor homeless shelters have a connection with a particular constitutional value would make little difference.

52. See *Shaw v. Hunt*, 517 U.S. 899 (1996); *Shaw v. Reno*, 509 U.S. 630 (1993).

53. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

54. See *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990).

Amendment,<sup>55</sup> the constraints of time and space make it impractical to do the same thing here for freedom of religion, equal protection, due process, search and seizure, state action, and the numerous other doctrinal areas in which I suspect that what is very likely true for the First Amendment is true there as well.

So with this disclaimer out of the way, on this occasion I simply announce, and only as a potentially testable hypothesis, that the aversion to institutional categories pervades constitutional doctrine, and that in numerous areas of constitutional doctrine an institution-specific approach might be preferable to the categorial approach that now exists, or might at least be taken more seriously than it has been up to now. But if we assume for the sake of argument that this hypothesis would actually be borne out by more empirically grounded analysis, the question then turns from description to explanation. If institutional categories have been treated by the courts as largely foreign to constitutional analysis, or at least more foreign than they might have been, then why might that be, especially given the undoubted salience of institutions and institutional demarcation in modern life?

One possible explanation for such aversion to institutional categorization goes back to Holmes, with a nod as well to Ronald Dworkin. Shortly after sneering at the Vermont justice of the peace for thinking there could be such a thing as churn law and for supposing that “churn” could be a legally relevant category,<sup>56</sup> Holmes went on to observe:

The same state of mind is shown in all our common digests and textbooks. Applications of rudimentary rules of contract or tort are tucked away under the head of Railroads or Telegraphs or go to swell treatises on historical subdivisions, such as Shipping or Equity, or are gathered under an arbitrary title which is thought likely to appeal to the practical mind, such as Mercantile law. If a man goes into law it pays to be a master of it, and to be a master of it means to look straight through all the dramatic incidents and to discern the true basis for prophecy.<sup>57</sup>

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55. See Schauer, *Towards an Institutional First Amendment*, *supra* note 29; Schauer, *Principles, Institutions, and the First Amendment*, *supra* note 29; Schauer & Pildes, *supra* note 29; see also Frederick Schauer, *Is There a Right to Academic Freedom?*, 77 U. COLO. L. REV. 907 (2006).

56. “There is a story of a Vermont justice of the peace before whom a suit was brought by one farmer against another for breaking a churn. The justice took time to consider, and then said that he had looked through the statutes and could find nothing about churns, and gave judgment for the defendant.” Holmes, *supra* note 2, at 474–75.

57. *Id.* at 475.

Consistent with a common contemporary view among cognitive psychologists about expertise,<sup>58</sup> and indeed about learning in general,<sup>59</sup> Holmes treats as the “master” of the law the person who sees the deep doctrinal structure, who understands the relationships that are at the heart of the law (and thus at the heart of the ability to predict future judicial decisions), and who is not swayed by the so-called dramatic incidents that grab the attention and tug at the heartstrings but which have little to do with what the law is all about.

It is not much of a leap from the Holmesian view to the view that genuine real-world institutions like universities, museums, city councils, and even trimesters are just the kind of shallow dramatic incidents that Holmes would have scorned along with categories like Railroads, Telegraphs, Shipping, and Mercantile Law. And insofar as Holmes accurately captured a widespread view of what law is really all about (apart from whether the widespread view is correct<sup>60</sup>), it should come as little surprise that those who fancy themselves as Holmesian legal sophisticates would strive to avoid framing their categories in real-world, prelegal, institutional terms, and would instead seek to employ categories that appeared lawlike to the core, such as state action, public forum, limited-purpose public figure, suspect classification, fundamental right, testimonial interrogation, and burden on interstate commerce. If we are looking to at least partially explain the avoidance of institutional categories in constitutional law, we need look no farther than the legacy of a Holmesian view that to craft categories by piggybacking on existing societal demarcations is not really the appropriate way to do law, and not really the appropriate route to understanding the deep structure of how the law operates.

Holmes’s view bears an interesting affinity with that of Ronald Dworkin, who has long insisted that law in general, and constitutional law in particular, is the forum of principle, the forum in which courts should and do play the preeminent role, with the task of policymaking to be left to

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58. See generally THE CAMBRIDGE HANDBOOK OF EXPERTISE AND EXPERT PERFORMANCE (K. Anders Ericsson et al. eds., 2006); THE NATURE OF EXPERTISE (Micheline T.H. Chi et al. eds., 1988).

59. See Susan M. Barnett & Stephen J. Ceci, *When and Where Do We Apply What We Learn?: A Taxonomy of Far Transfer*, 128 PSYCHOL. BULL. 612 (2002).

60. Which it most probably was not, as illustrated by prominent works premised on the legal relevance of prelegal categories like ponds and animals. See GLANVILLE L. WILLIAMS, *LIABILITY FOR ANIMALS: AN ACCOUNT OF THE DEVELOPMENT AND PRESENT LAW OF TORTIOUS LIABILITY FOR ANIMALS, DISTRESS DAMAGE FEASANT AND THE DUTY TO FENCE IN GREAT BRITAIN, NORTHERN IRELAND, AND THE COMMON LAW DOMINIONS* (1939); Samuel D. Warren & Louis D. Brandeis, *The Law of Ponds*, 3 HARV. L. REV. 1 (1889).

the legislatures and administrative agencies.<sup>61</sup> And for Dworkin, more implicitly than explicitly, the categories of principle are categories that are expressed as moral abstractions—dignity, liberty, equal concern and respect, and the like—and not in terms of existing social institutions. Dworkin can thus plausibly be interpreted as suggesting that to attempt to craft law in terms of empirically contingent social institutions would take courts out of the realm of principle and into the realm of policy, and doing so would take courts away from performing the function to which they have traditionally and properly been assigned in a rights-based democracy.

Like Holmes's skepticism about the law's use of real-world categories, Dworkin's claim about the distinction between policy and principle in terms of what courts do and should do is likely descriptively mistaken, for common law courts base their decisions on policy with a frequency that Dworkin neglects.<sup>62</sup> But my concern here is limited to that of the consequences of some attitude being held, and not with whether the proposition embedded in that attitude is actually true. So if attitudes or perspectives like those of Holmes and Dworkin are reflective of a larger worldview about what the law is, what it does, and how it does it—or at least what courts do and how they do it—and if that worldview is sufficiently prevalent among legal decisionmakers that it contributes to some reluctance to design legal doctrine along real-world institutional lines, then the fact that both Holmes and Dworkin may have been, at least in part, descriptively mistaken about the law is beside the point. Or, perhaps, it is not that it is beside the point, but rather that it provides still another reason for resisting the implications of an attitude that is itself reflective of a descriptively mistaken view about how law, or at least contemporary American law, operates.

This conclusion in turn suggests another explanation for the resistance to institutional categories, and that is the apparent resistance to having the categorial structure of American constitutional law turn on contingent empirical propositions whose truth and details are potentially beyond the epistemic abilities of appellate courts in general and the Supreme Court in particular. Although it plainly requires empirical inquiry in the particular case to determine whether something in the world is a public forum, or is a classification based on race, or is a decision dictated by a governmental entity, or is a regulation that has a negative causal effect on the flow of

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61. See RONALD DWORKIN, *A MATTER OF PRINCIPLE* (1987); RONALD DWORKIN, *LAW'S EMPIRE* (1986); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977).

62. See MELVIN A. EISENBERG, *THE NATURE OF THE COMMON LAW* (1988); Frederick Schauer, *The Limited Domain of the Law*, 90 VA. L. REV. 1909 (2004).

interstate commerce, such case-specific empirical inquiries—typically relegated to trial court fact-finding—appear to be different from the sort of largely nonempirical analyses necessary in the first place to create the law-soaked categories of public forums, suspect classifications, state action, and burdens on interstate commerce. But the creation of the categories in the first instance is much more of a task for the appellate courts, and the creation and management of categories like university, art, railroad, police department, and referendum appear to require actual empirical knowledge about universities, art, railroads, the police, and referendums. Consequently, there is perhaps lying behind the existing preference for legally created categories a lurking suspicion that empirical inquiry into the very existence and real-world contours of some institutional constitutional category is beyond the investigative abilities of the appellate courts.

Yet although there is indeed value to some skepticism about the fact-finding abilities of appellate courts,<sup>63</sup> it is simply mistaken as a descriptive matter to think that appellate courts do not with great frequency make de novo empirical determinations in the course of designing legal and constitutional doctrine. When the Supreme Court in *New York Times Co. v. Sullivan*<sup>64</sup> created the actual malice standard on the basis of its determination that any other standard would produce excess caution—the “chilling effect”<sup>65</sup>—on the part of publishers, it appeared to rely on nothing but its own empirical suppositions for the conclusions about the effects of different rules on publisher behavior, just as it did much the same in relying on its own empirical assessment of the relationship between the exclusionary rule and police behavior when it first established the exclusionary rule in *Mapp v. Ohio*.<sup>66</sup> And much the same could (and should) be said about the Court’s assessment of public reaction in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>67</sup> about its determination of likely public impressions in state action<sup>68</sup> and religious entanglement and endorsement<sup>69</sup> cases, and, of course, about its more widely discussed determination of the educational consequences of enforced racial segregation in schools.<sup>70</sup> Consequently, insofar as one argument against the use of institutional categories appears to hinge

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63. See Frederick Schauer, *The Dilemma of Ignorance: PGA Tour, Inc. v. Casey Martin*, 2001 SUP. CT. REV. 267.

64. 376 U.S. 254 (1964).

65. *Id.* at 300.

66. 367 U.S. 643 (1961).

67. 505 U.S. 833 (1992).

68. See *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961).

69. See *Lynch v. Donnelly*, 465 U.S. 668 (1984).

70. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

on the belief that appellate courts are ill-equipped to make the empirical determinations that initially creating such categories would require, it seems far too late in the day to consider this as a fatal objection.

Much the same applies to the related argument that the contours of modern institutional life are far too fluid to make institutional categories sufficiently stable to ground predictable legal doctrine. Intrinsically legal categories are enduring, the argument might go, but institutional categories might change with changes in the institutions themselves, to the detriment of the stability that law, more than other forms of social decisionmaking, seeks to achieve.

But although institutional categories are indeed susceptible to change as the institutions on which they are based themselves change, there is no reason to believe that the empirically contingent boundaries of numerous social institutions are any more susceptible to change than are the empirical conclusions that, as noted just above, underlie numerous other dimensions of constitutional doctrine. Indeed, there may be some reason to believe that the very nature of institutions as institutions gives their boundaries a stickiness that we do not see in some of the other empirical aspects of legal rules. Given that institutions tend to develop incrementally and to emerge from a complex network of rules and relationships, it would be surprising if their contours could change easily or quickly. Moreover, if significant changes in the contours of our institutions do occur, there is no reason to believe that courts cannot make changes accordingly. And even if appellate courts were to be slow to recognize the need for such changes, this would be little more than one additional manifestation of the way in which legal doctrine, typically in the service of the frequently desirable values of stability and predictability, is itself often slow to adapt to changes in the external world. The broadcast-band scarcity rationale that provided the foundation for *Red Lion Broadcasting v. FCC*,<sup>71</sup> for example, was very likely empirically and technologically obsolete even when the case was decided,<sup>72</sup> and undoubtedly is now, thirty-eight years later, but such empirical clumsiness does not mean that the ensuing category is not workable as a category, nor does it imply that such an empirically misgrounded category cannot nevertheless provide meaningful guidance to those who must accommodate their behavior to the doctrine upon which the category is based.

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71. 395 U.S. 367 (1969).

72. See THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., REGULATING BROADCAST PROGRAMMING 192-94 (1995).

There are thus numerous reasons to be skeptical of many of the standard arguments deployed against the use of institutional categories in constitutional law. This is not to say that an institutional category is necessarily a good one just because of its institutional character, although there are obvious advantages in tailoring a legal category to a category that those who apply the law already understand and perceive. Nor is it to make the positive argument for this or that institutional category, although it will often be the case that institutional demarcations will reflect differences of potential constitutional importance. Still, my principal argument is only that in the design of constitutional categories there are good reasons not to exclude institutional lines just because they are institutional. My argument here is thus best seen primarily as an argument against an objection, rather than being a full-blown positive argument for the employment of institutional categories.

#### IV. ON THE DISTINCTION BETWEEN SHAPE AND SIZE

Some commentators sympathetic to the greater use of institutional categories in constitutional law might see such categories as embodying a desirable attention to context.<sup>73</sup> For such commentators, the attention to institutional context is a component of an attention to context in general, an attention they believe will improve legal and constitutional decisionmaking. Yet although such increased attention to context may well be desirable at times, the argument for increased attention to context takes us in another direction, for it is important to recognize that “institutional” and “contextual” are quite different things. Insofar as calls for more context in legal or constitutional adjudication are typically calls for greater particularism in adjudication, there is nothing about an institutional focus for constitutional categorization that has any valence one way or another on the question of particularism versus generalization. An institutional category can be large (the press) or small (political advocacy newsletters published by nonprofit organizations), just as can any other variety of category. There are indeed interesting and important issues surrounding the size and the rigidity of constitutional categories,<sup>74</sup> but those issues are analytically distinct from questions about the source of those categories, and about the relationship between those categories and the categories of the extralegal world.

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73. See, e.g., Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 UCLA L. REV. 1497 (2007).

74. See Frederick Schauer, *Justice Stevens and the Size of Constitutional Decisions*, 27 RUTGERS L.J. 543 (1996).

Indeed, not only are institutional categories neither inherently nor necessarily smaller, more flexible, or more contextual than noninstitutional categories, but they may also often be larger and more rigid. In other words, institutional categories may function in an important way as rules. Were we to conclude that a certain institution can be the basis for a relevant constitutional category, we would often, even if not necessarily, be saying that the institution is a repository for certain constitutionally important values, that the relationship between the institution and the values is probabilistic and not universal, and that protecting or fostering the institution would have the tendency to serve those values. To grant special protection to the institutional press under the Press Clause of the First Amendment, for example, is not to deny that there will be unfortunate applications of that protection that a more particularized or contextual approach might avoid. No plausible definition of the institutional press is going to exclude from that category—and the protections it might putatively deliver—the *National Enquirer*, for example, and its more down-market equivalents. And a putative positive constitutional right of journalistic access emanating from such protection is as likely to be availed of by Geraldo Rivera as by Bob Woodward or Linda Greenhouse. Nevertheless, it may still be the case that granting protection to all who fit the definition of the institution will, despite the overinclusiveness of the category, be more effective in serving some value than will be applying the value directly to individual cases.

For me, therefore, institutional categories serve as rules—as intermediating devices whose more or less rigid application will serve the values lying behind the rules more effectively than will direct application of those values on a more particularistic basis. And although this is most obvious when the institutional categories are surrogates for the values underlying various rights—as in the case of some special protections for the institutional press—the same holds true outside of the context of rights. Were questions of state action or separation of powers, for example, to be determined according to institutionally designed categories, the end result might also be to serve more effectively the array of values that lie behind the basic state action and separation of powers principles.

### CONCLUSION

To repeat, my argument here has largely been a negative one. Rather than making the positive case for the use of institutional categories in general, or for the use of particular institutional categories in particular

doctrinal contexts, I have attempted principally to show why most of the arguments *against* using institution-specific categories in law in general and in constitutional law in particular do not carry the day. To demonstrate that the arguments against this approach are unsound, however, is not to show that the approach is sound in general, or that it is sound in specific instances. That must await future work, by me, hopefully, and by others, but an important preliminary is to remove the most obvious obstacles, and that is the principal aim of this Article.

It is worth closing, however, with a more global observation. In keeping with the typical conceit of the academic that no problem or issue or argument is so large or so important that it cannot usefully be seen as but a component of a still larger and more important problem, issue, or argument, I want to suggest that an inquiry into institutional categories is best understood as a component of a more encompassing jurisprudential agenda. And that agenda is best described as an inquiry, both descriptive and normative, into the categorial structure of law, and thus into the metaphysics and ontology of law itself. What kind of a thing is law, and what kind of parts does it or might it have? Perhaps at that level of abstraction there is not much of interest to say about the metaphysics and ontological status of law, but we will not know that unless we first examine these questions in a somewhat more particular and concrete way, and that is what I have attempted to do here.

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