

*First Amendment Institutions*. By Paul Horwitz. Cambridge, MA: Harvard University Press, 2013. Pp. 384. \$49.95 (cloth). ISBN: 9780674055414.

Institutions such as universities, libraries, churches, press, and private clubs surround us, but the law, in many respects, fails to see them. That is, until recently: courts are increasingly confronting claims by institutions—particularly religious institutions—to a measure of autonomy from otherwise applicable civil laws. For example, in 2012, the Supreme Court decided, in the case of *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, 132 S. Ct. 694 (2012), that churches were entitled to a “ministerial exception” exempting them from antidiscrimination laws that might otherwise apply to their hiring and firing of key ministerial employees. Indeed, this and other issues addressed by Paul Horwitz’s excellent book, *First Amendment Institutions*, have become even more pressing since its publication. For example, the Supreme Court’s 2014 decision in *Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751 (2014)—and the still-pending legal challenges brought by nonprofit institutions in its wake—have further stoked scholarly interest in the rights and roles of institutions in democratic society. Small wonder that his book, which is also nuanced, persuasive, and elegantly argued, has already been cited dozens of times in the legal literature.

But Horwitz’s contribution extends beyond the immediate, politically salient questions about the right of religiously oriented entities to be exempt from a generally applicable insurance mandate. *First Amendment Institutions* instead argues for a new orientation in First Amendment doctrine—one that would take institutions more seriously as autonomous entities entitled to a degree of deference from the judiciary. In so doing, it seeks to free First Amendment law from its relentlessly “acontextual” bent, in favor of doctrine that is built from the bottom up, recognizing the rich and vibrant array of private and public organizations that form a vital part of the “‘real world’ of public discourse” (69–70). Because they play a central role in civil society and shape individual identities in important ways, institutions not only should be recognized by the law, they also should be afforded a degree of special treatment—a level of autonomy from the state that is commensurate with their identity as “First Amendment institutions” (13–15, 85, 95).

Horwitz begins by briefly outlining the current state of First Amendment doctrine, which in many ways is ensnared by the “lure of acontextuality,” too often preferring formalistic categories that are constructed from the top down over a bottom-up doctrine that recognizes the complexities of the real world and the role of different kinds of institutions in that real world (42–67). He then turns to the difficult task of defining what constitutes a “First Amendment institution.” Horwitz contends that, in order to qualify as an institution with this special constitutional stature, an organization must play a significant, infrastructural role in public discourse, and it must be self-regulating (82–88). “Public discourse” is defined broadly, embracing discourse beyond the merely political: it includes “democratic deliberation—but also art, high and low culture, and all the elements of shared discussion that constitute a vital part of our social lives” (83). Yet, this intentionally broad definition of what may constitute public discourse is counterbalanced by the fact that an institution, in order to qualify for special protection, must play an essential, structural role in the production or dissemination of that meaning (82–85). The universe of possible First Amendment institutions is further limited by the reality that only the more stable and established institutions in American society are likely to have the kind of central role in public discourse and the mechanisms of internal governance that Horwitz contemplates. Such institutions include universities, the press, churches, libraries, and private voluntary associations (107–238). There will be grey

areas and borderline questions, of course; but these do not undermine the overall usefulness of Horwitz's taxonomy.

In the second section of the book, Horwitz applies his new institutional thinking to each of these categories of institutions and delineates the specific implications of the "institutional turn" for particular areas of First Amendment doctrine. For example, taking the autonomy of universities seriously would support greater leeway for universities to engage in affirmative action in admissions and to regulate speech on campus; it would also limit the government's ability to require universities to accept military recruiters and to conform to antidiscrimination laws (125–28, 130–40). Similarly, private voluntary associations like the Boy Scouts or Kiwanis would have greater authority than they do under existing law to regulate their membership. Under current doctrine, only so-called expressive associations have a wide scope of autonomy to determine their membership regardless of antidiscrimination norms, and only when accepting a particular individual as a member would undermine the association's message (218–20). In Horwitz's view, such voluntary associations should be able to exclude or dismiss members whose views or identities are inconsistent with the association's overall mission, whether or not that mission is easily recognized as an "expressive" one, so long as the club or group meets the criteria of a First Amendment institution (220–23). Associations should receive some deference from courts, moreover, in identifying the nature of their mission and whether accepting a particular member would undermine it. In every case, however, an institution is entitled to deference from courts and autonomy from the state only so long as it is acting in its institutional role—that is, so long as it is both self-regulating and performing the functions of education, meaning-making, and identity formation that allow it to contribute meaningfully to public discourse (15, 20, 95). The autonomy of institutions must remain bounded, not limitless, with an important role for courts to play in adjudicating disputes between institutions, protecting the rights of individuals within institutions, and safeguarding the public good (178).

Horwitz readily admits that there may be drawbacks to according a wider realm of autonomy to institutions. One primary concern is that, in some cases, this autonomy may amount to a license to discriminate (223). Yet, as Horwitz insists throughout the text, the issue is not whether his approach is a perfect one: "The issue is whether an approach that takes seriously the institutions that contribute to the infrastructure of public discourse might, on balance, improve First Amendment law, even when the less than ideal conduct of individual First Amendment institutions has been factored in. It is, in short, a matter for comparative analysis" (267). Additionally, it is important not to understate the potential benefits of an institutional analysis, which may increase the richness of public discourse by encouraging the diversity of contributions that institutions can make to it, and at the same time encourage the institutional responsiveness to both internal and external criticism and change in order to avoid heavy-handed, top-down regulation (14–15, 21).

*First Amendment Institutions* makes a scholarly contribution that extends beyond even the capacious domain staked out by its title. It is part of a broader movement to take institutions seriously—a movement that includes, most notably, the work of Frederick Schauer, as well as that of the New Governance theorists. Horwitz repeatedly recognizes his debt to these scholars, and he also notes that hints of institutionalism have long appeared in Supreme Court case law. But Horwitz's book is unique in the way it develops a holistic, balanced institutional approach to First Amendment questions and rigorously applies that approach to many important contemporary issues. Moreover, there is much to admire in the nuanced picture that Horwitz paints of modern First Amendment institutions, which in his view are organizations united by a large swath of common values and a common mission, but also characterized by internal disputation, dissent, growth, and change. Finally, Horwitz carefully steers clear of romanticization and radical anti-government cynicism. For the most part, his approach to institutions in civil society is moderate and

circumspect, recognizing both the valuable contributions they offer and the potential for abuse if institutions are accorded too much sovereignty.

Except when it comes to churches. In the chapter addressing how much deference should be accorded religious institutions, Horwitz's argument becomes distinctly immoderate—even, as he acknowledges, “provocative” (177). He is willing to grant to religious institutions a degree of autonomy exceeding that given to other voluntary associations. Indeed, with respect to religious institutions, Horwitz advocates “sovereignty” for churches, rather than the more limited “autonomy” or “deference,” which he would provide to universities, libraries, and the press (184–89). In light of Horwitz's overall argument, this move is problematic.

First, given that enhancing public discourse is the touchstone of Horwitz's analysis, it is not clear that religious organizations should be entitled to as much autonomy as other organizations, let alone *more* autonomy. Religious institutions only sometimes contribute significantly to public discourse—and even then, only in a narrow sense. Although religious voices were important to the abolitionist and civil rights movements, for example, religious institutions are not part of the infrastructure of political discourse in the way that newspapers or libraries are. Even if we accept Horwitz's broader definition of public discourse as including “all the ways in which we form a common culture,” it is not clear that religious organizations should qualify (83). Surely, religious discourse is not generally seen as common or shared in the way that the discourses surrounding democracy and American culture would be. Religious speech divides as much as it unites.

Second, Horwitz argues that institutionalism is necessarily limited by the need for courts to play a role in protecting individuals within organizations from abuse or harm by their institutions (183), but the degree of sovereignty that he would grant to religious organizations belies this claim. Again, unlike the other institutions Horwitz discusses, churches are in his view entitled to dictate the rules governing internal matters, as well as to determine what counts as an internal matter. He rejects any place for courts in discerning, for example, whether the reasons for firing a church employee relate to the mission or goals of the religious institution, arguing that such employment decisions should “remain[] squarely within the core of the religious entity's sovereignty, whatever the reasons for that decision may be” (188). Indeed, Horwitz even considers expanding the existing “ministerial exception” beyond key ministerial employees: “Churches, *qua* churches, might be entitled to substantial decision-making autonomy with respect to membership and employment matters, regardless of the nature of the employee or the grounds of discrimination” (188). It is unfathomable that courts could play their essential role in protecting individuals from illegal discrimination if they are forbidden to inquire into the reasons for religious employers' actions.

It is worth noting, moreover, that as with many institutions, there is a grey area as to what actually constitutes a religious institution. Perhaps a church or a temple or a mosque would unequivocally qualify as such, and a large corporation whose chief executive officer happens to be religious would not. But many other types of entities have begun to claim religious-organization status—from nonprofit organizations operated by religious groups, to religious universities and hospitals that employ large numbers of nonreligious individuals, to closely held corporations whose bylaws or charter documents incorporate religious principles. The greater the sovereignty accorded to religious institutions, the more incentive such organizations will have to claim that status in order to avoid liability for employment decisions or to evade government mandates with which they disagree.

Finally, Horwitz's approach to religious institutions is troubling because he would protect their power to flout even their own rules and corporate principles. By Horwitz's own account, one of the primary reasons for granting institutions a measure of autonomy is that they are self-regulating. Moreover, all other institutions—universities, libraries, voluntary associations, and the press—

are to be given autonomy only when they are acting in their institutional role. For example, universities would not necessarily be immunized from liability for discriminating on the basis of race in certain employment decisions. Although the primary resistance to such discrimination would probably come from its own stakeholders, Horwitz notes that “prejudice is not an academic value”; thus, the courts would be entitled to intervene to impose sanctions for discriminatory conduct (118). Similarly, libraries’ decisions to manage their collections might not be protected from judicial oversight if there is evidence that the decisions were political rather than professional in nature (208). In the case of churches, by contrast, Horwitz urges that “courts should avoid intervening even where a church appears to have departed from its own norms” (186).

In part, this remarkable treatment of religious organizations can be justified, as Horwitz suggests, by the unique incompetence of courts to resolve matters of church doctrine and organization, as well as by the problems that can arise when the state becomes excessively involved in religious matters. But it is surprising to see such a dramatic departure with respect to religious institutions, when Horwitz’s approach to other institutions is so balanced and circumspect. Indeed, it is fair to say that courts are also profoundly incompetent to resolve matters pertaining to the mission, beliefs, and organizational structure of the Boy Scouts, and that it is dangerous for the state to become too involved in the details of what is taught in institutions of higher education. But these institutions do not receive the degree of deference that Horwitz advocates for religious organizations.

Nonetheless, we should judge *First Amendment Institutions* as we should judge institutionalism itself: by asking whether it brings something important, and under-appreciated, to the fore, and whether we are better off with its perspective than without it. On those terms, this helpful, original, and thoughtful study has surely succeeded.

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