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## Institutions in Context

John D. Inazu  
*Washington University School of Law*

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## INSTITUTIONS IN CONTEXT

John D. Inazu\*

PAUL HORWITZ, *FIRST AMENDMENT INSTITUTIONS* (2013). Pp. 384. Hardcover \$ 49.95.

Paul Horwitz's *First Amendment Institutions* is a welcome addition to First Amendment scholarship.<sup>1</sup> Horwitz calls for us to take institutions and their contexts seriously.<sup>2</sup> He makes a strong case for greater scholarly and judicial attention to institutions, and he shows us why "acontextual" First Amendment thinking and doctrine lead to rigid formalism and missed opportunities.<sup>3</sup> Horwitz enhances his argument with five nuanced chapters on specific institutions: universities, presses, churches, libraries and associations.<sup>4</sup> These chapters bring to life our diverse institutions and their differences.

It is less clear whether the descriptive differences that Horwitz highlights warrant the doctrinal differences that he advocates. In other words, even if Horwitz is right to call our attention to institutions, do his observations translate to First Amendment doctrine that can meaningfully distinguish between these institutions? The doctrinal uncertainty is particularly noticeable when Horwitz introduces the last of his case studies: associations. In some ways, Horwitz's chapter on associations blurs—and thereby renders vulnerable—the distinctive contours that he lays out for universities, presses, churches, and libraries.<sup>5</sup> At the same time, the boundaries of these other case studies face internal pressures from the various entities that lay claim to each of them. In this sense, Horwitz's "institution" calls to mind Wittgenstein's "game" and the difficulties of definitional boundaries.<sup>6</sup> That kind of fuzziness works for Wittgenstein's thought experiment of "family resemblances," but it poses a far greater challenge for a theory that plays out in legal doctrine applied to actual controversies.<sup>7</sup> Or so I shall argue.

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\* Associate Professor of Law and Political Science, Washington University. Thanks to Rick Garnett, Randy Kozel, and Nelson Tebbe for helpful comments on an earlier version of this review. Thanks to Mark Gruetzmacher for research assistance.

1. PAUL HORWITZ, *FIRST AMENDMENT INSTITUTIONS* (2013).

2. *Id.* at 8-24.

3. *Id.* at 42-67.

4. *Id.* at 107-238.

5. *Id.* at 211-38.

6. LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (G.E.M. Anscombe trans., Basil Blackwell & Mott, Ltd. 3d ed. 1958) (1953).

7. The category of "religion" raises similar definitional difficulties. See George C. Freeman III, *The Misguided Search for the Constitutional Definition of "Religion,"* 71 GEO. L.J. 1519, 1564 (1983) ("Courts simply cannot use 'religion' as a term of art without converting the right to the free exercise of religion into a seemingly

I turn first to the pressures internal to Horwitz's institutional categories by focusing on two of his core examples: universities and churches.<sup>8</sup> I then examine Horwitz's chapter on associations and suggest broader implications than he acknowledges. I conclude by offering a different way to parse Horwitz's argument: embracing his institutional distinctiveness *within* the time-honored public-private distinction that he rejects.

#### THE UNIVERSITY

The university occupies a central role in Horwitz's First Amendment landscape: "[u]niversities are so well established and so bound by tradition that they serve as a paradigmatic example of a First Amendment institution."<sup>9</sup> Horwitz highlights many unique aspects of the university: academic freedom,<sup>10</sup> tenure,<sup>11</sup> curricular development,<sup>12</sup> selective admissions,<sup>13</sup> and student speech.<sup>14</sup> Each of these contributes to the university's "self-regulating" character, which is for Horwitz one of the key features of a First Amendment institution.<sup>15</sup> But the crux of the university's institutional distinctiveness is its "uniquely academic contribution to public discourse."<sup>16</sup>

What exactly is an "academic contribution?" And does a public discourse approach really improve upon our current First Amendment framework?<sup>17</sup> Horwitz's framing of the institutional distinctiveness of a university encounters both functional and definitional challenges. In other words, his account raises questions about what a proper university *does* and what *constitutes* a proper university.

The question of what a university *does* suggests that some institutions that we can surely classify as universities will not always function as such. My alma mater, Duke University, may not be fulfilling its academic contribution to public discourse during fraternity and sorority rush, or when its men's basketball team brings home another national championship.<sup>18</sup> But Duke is still incontrovertibly a university (and presumably a

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illimitable right of personal autonomy."); Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CALIF. L. REV. 753 (1984); John D. Inazu, *The Freedom of the Church (New Revised Standard Version)*, 21 J. CONTEMP. LEGAL ISSUES 335, 361-64 (2013).

8. These selections are not arbitrary. Setting aside (for the moment) religious universities, which blend aspects of both institutional categories, the separate institutions of churches and universities share in common the advancement of contested normative and metaphysical claims about the nature of the world and the nature of humanity. They are for this reason among the most important institutions in our society. See, e.g., ALASDAIR MACINTYRE, *THREE RIVAL VERSIONS OF MORAL ENQUIRY: ENCYCLOPEDIA, GENEALOGY, AND TRADITION* 216-36 (1990); STANLEY HAUERWAS, *THE STATE OF THE UNIVERSITY: ACADEMIC KNOWLEDGES AND THE KNOWLEDGE OF GOD* (2007).

9. HORWITZ, *supra* note 1, at 140.

10. *Id.* at 109-10.

11. *Id.* at 122.

12. *Id.* at 123-24.

13. *Id.* at 125-26.

14. *Id.* at 126-28.

15. *Id.* at 120.

16. *Id.* at 121.

17. Horwitz critiques two existing First Amendment doctrines in the context of the university: state action and public forum. These doctrines are not without their problems, but it isn't clear that rejecting them wholesale for a functionalist institutional approach clarifies or simplifies the landscape. For my consideration of the importance of the public forum doctrine, see John D. Inazu, *The First Amendment's Public Forum*, 55 WM. & MARY L. REV. (forthcoming 2015).

18. On the challenges that big-time athletic programs pose for colleges and universities, see CHARLES T. CLOTFELTER, *BIG-TIME SPORTS IN AMERICAN UNIVERSITIES* (2011).

First Amendment institution, even if some of its actions are not protected under a heightened standard).<sup>19</sup>

In contrast to the function of a university, the question of what *constitutes* a university suggests that some educational institutions may fall below Horwitz's threshold for a "university." In other words, not "just any institution that calls itself a university qualifies for the kind of legal autonomy First Amendment institutionalism prescribes."<sup>20</sup> Horwitz intimates that McDonald's "Hamburger University" is one such example.<sup>21</sup> He posits "for-profit institution[s], like DeVry University or Phoenix University" as another "boundary" case.<sup>22</sup> Those institutions "might offer some of the basic services that other universities do but without providing all of the governance structures."<sup>23</sup>

Horwitz argues "that simply presenting such examples suggests that these sorts of boundary questions will often be easier for courts to address sensibly than we might fear."<sup>24</sup> I am not so sure. Consider Horwitz's claim that "the core of First Amendment institutionalism is that an institution serves a well-established function that forms part of the infrastructure of public discourse and that it operates as a substantially self-regulating institution."<sup>25</sup> How do universities stack up against this theoretical justification for institutional autonomy? Horwitz acknowledges that "not all universities are the same,"<sup>26</sup> but he seems not to account for the degree of diversity within the category of "university."

We can illustrate the difficulty posed by this diversity by sampling some of the institutions of higher learning in Horwitz's own backyard.<sup>27</sup> Begin with Horwitz's employer, the University of Alabama. In addition to the law school, the state's flagship university has twelve other academic divisions,<sup>28</sup> an endowment of close to a billion dollars,<sup>29</sup> and some would argue, a football team.<sup>30</sup> Its 1,314 faculty and 3,663 staff help educate over 33,000 students.<sup>31</sup>

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19. Horwitz suggests that "[o]nly [a university's] academic decisions will be entitled to institutional autonomy." HORWITZ, *supra* note 1, at 121. This standard leaves open the question of who decides whether a decision is "academic," and what kind of deference that decision is entitled.

20. *Id.* at 120.

21. *Id.* Hamburger University is "the 'global center of excellence for McDonald's operations training and leadership development.'" *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* Universities must make "a uniquely academic contribution to public discourse." *Id.* at 121.

26. *Id.* at 141.

27. Although Horwitz never explicitly says so, I assume that his category of "university" also includes colleges (like Davidson College) that aren't technically universities. The only evidence to the contrary would be his mention of the "nine colleges in the American colonies." *Id.* at 108. However, even this is not explicit, as he never ties this reference directly to his contemporary use of "University."

28. *Academics*, THE UNIVERSITY OF ALABAMA, <http://www.ua.edu/academics.html> (last visited October 26, 2014).

29. National Association of College and University Business Officers and Commonfund Institute, *Almanac of Higher Education 2013: College and University Endowments, 2011-12*, THE CHRONICLE OF HIGHER EDUCATION, <http://chronicle.com/article/CollegeUniversity/136933> (click forward arrow under table twice) (last visited October 26, 2014). See also Wayne Grayson, *UA System Fund Nears \$977 Million in Value*, TUSCALOOSA NEWS (May 18, 2012), <http://www.tuscaloosaneews.com/article/20120518/news/120519746?p=2&tc=pg&tc=ar>.

30. The football team plays its home games in Bryant-Denny Stadium, which seats over 100,000 and has undergone over \$100 million of renovations in the last two decades. See Adam Jones, *UA Stadium Expansion Cheaper than Expected*, TUSCALOOSA NEWS (Apr. 17, 2009), <http://www.tuscaloosaneews.com/article/20090417/NEWS/904169969>.

31. See Dr. Yardley S. Bailey, *Data Summary*, UNIVERSITY OF ALABAMA SYSTEM at 15, 60, & 64 (Aug.

Shelton State Community College is five miles down the road from the Crimson Tide. Founded in 1979,<sup>32</sup> Shelton State is “a public open-admission comprehensive community college whose primary mission is to provide accessible postsecondary education, training, and community educational opportunities.”<sup>33</sup> The Humanities & Communications Arts department offers courses in history, humanities, mass communications, philosophy, religion, and speech.<sup>34</sup> The historically black two-year school also houses the Fire College, which is responsible for training paid and volunteer fire fighters and EMTs throughout the state.<sup>35</sup>

Just over 100 miles southeast from the University of Alabama, Maxwell Air Force Base is home to Air University. The educational arm of the Air Force includes the Air Command and Staff College (offering master’s degrees and other training to mid-level officers), the Judge Advocate General’s School (providing instruction and continuing education for lawyers and paralegals), the Community College of the Air Force (offering two-year associates degrees), and a number of other programs. Air University employs hundreds of military and civilian faculty to accomplish its pedagogical objectives.<sup>36</sup> It also houses Air University Press, the *Air & Space Power Journal*, *Strategic Studies Quarterly*, and a host of other publications.<sup>37</sup>

Heritage Christian University lies 130 miles due north of the University of Alabama. The Churches of Christ school has an enrollment of eighty-eight students.<sup>38</sup> Its primary focus is an undergraduate program leading to a bachelor’s degree in Biblical Studies.<sup>39</sup> All students major in Bible and may choose a minor in Biblical History, Biblical Languages, Counseling, Family Life (Youth) Ministry, New Testament, or Old Testament.<sup>40</sup> Every student is required to participate weekly in two hours of a Christian service project.<sup>41</sup>

Is there a way to construe the institutional category of “university” that includes the

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2013), <http://uasystem.ua.edu/wp-content/uploads/2012/05/2013-DATA-SUMMARY-BOOK-FOR-THE-WEB-10-08-13.pdf>.

32. *Campus History: History of Shelton State Community College*, SHELTON STATE COMMUNITY COLLEGE, [http://www.sheltonstate.edu/discover\\_sssc/campus\\_history.aspx](http://www.sheltonstate.edu/discover_sssc/campus_history.aspx) (last visited October 26, 2014).

33. *Mission, Vision, & Values*, SHELTON STATE COMMUNITY COLLEGE, [http://www.sheltonstate.edu/discover\\_sssc/mission\\_vision\\_values.aspx](http://www.sheltonstate.edu/discover_sssc/mission_vision_values.aspx) (last visited October 26, 2014).

34. *Humanities & Communications Arts*, SHELTON STATE COMMUNITY COLLEGE, [http://www.sheltonstate.edu/instruction/humanities\\_communications\\_arts.aspx](http://www.sheltonstate.edu/instruction/humanities_communications_arts.aspx) (last visited October 26, 2014).

35. *Catalog and Student Handbook: Fall 2006 - Summer 2007*, SHELTON STATE COMMUNITY COLLEGE at 5, available at <http://www.sheltonstate.edu/Uploads/files/Admissions/catalog/06-07/intro2.pdf>. “The Alabama Fire College and Personnel Standards Commission/Shelton State Community College is responsible for training the thousands of paid and volunteer fire fighters, industrial fire protection personnel, rescue squad members, and emergency medical personnel throughout the state of Alabama . . .” *Id.*

36. *Fact Sheet*, MAXWELL AIR FORCE BASE, <http://www.maxwell.af.mil/library/factsheets/factsheet.asp?id=13308> (last visited October 26, 2014). See also 2013 *Annual Report*, THE AIR UNIVERSITY, [http://www.au.af.mil/au/audocs/AU\\_2013\\_Annual\\_Report\\_Web\\_Version.pdf](http://www.au.af.mil/au/audocs/AU_2013_Annual_Report_Web_Version.pdf) (last visited October 26, 2014).

37. *Publications*, THE AIR UNIVERSITY, <http://www.au.af.mil/au/awc/publications.htm> (last visited October 26, 2014).

38. *Heritage Christian University Stats, Info and Facts*, CAPPEX, <https://www.cappex.com/colleges/Heritage-Christian-University> (last visited October 26, 2014).

39. *About Us*, HERITAGE CHRISTIAN UNIVERSITY, <http://www.hcu.edu/about> (last visited October 26, 2014).

40. *Academics*, HERITAGE CHRISTIAN UNIVERSITY, <http://www.hcu.edu/academics/undergraduate> (last visited October 26, 2014).

41. *Christian Service*, HERITAGE CHRISTIAN UNIVERSITY, <http://www.hcu.edu/service> (last visited October 26, 2014).

University of Alabama, Shelton State Community College, Air University, and Heritage Christian University, but excludes DeVry University (or at least some for-profit universities) and Hamburger University? If so, what is it?<sup>42</sup> Each of these institutions has a “self-regulating quality” that includes internal “norms, practices, and rules.”<sup>43</sup> Each is engaged in the transmission of skills and knowledge from teachers to students in a shared endeavor that includes college credit.<sup>44</sup> Many of the students at Hamburger University complete their training online, but the University of Alabama also offers the opportunity to “earn your bachelor’s, master’s, or doctoral degree through flexible distance and online programs.”<sup>45</sup> The faculty at DeVry University and Hamburger University may not spend much time on academic research, but neither do the faculty at Shelton State or Heritage Christian (or the football coach at the University of Alabama).<sup>46</sup> DeVry University may be “for-profit,” but Air University’s existence is devoted to the United States Air Force and Heritage Christian follows the Good Book—none of these defining missions is self-evidently related to “public discourse.”

Even the modern research university—ostensibly the core example of a university—raises serious theoretical tensions with the justifications that Horwitz offers for First Amendment institutions. In many cases, the immense influence of government and corporate dollars, the vast revenues and resources from affiliated hospitals and clinics, and the constant pressures of high profile athletics, take the modern research university far afield from the “public discourse” justification that Horwitz assigns to it. In fact, Horwitz’s justification faces pressure even within the activities most central to the production of knowledge and facilitation of discourse. As Alasdair MacIntyre noted a generation ago, social pressures require that universities “produce more cogent justifications for their continued existence and their continued privileges than they have hitherto been able to do out of what have suddenly been revealed as the astonishingly meagre cultural and intellectual resources of the academic *status quo*.”<sup>47</sup> And MacIntyre’s indictment came at a time when the tuition at private postsecondary schools averaged \$9,083, not the \$24,525 sticker price today.<sup>48</sup>

The questions of what a university does and what constitutes a university are not

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42. Consider also that many of the high schools in Alabama offer advanced placement classes that qualify for college credit. Some of those classes are taught by highly educated teachers, and some of those teachers pursue academic writing and engage in other forms of public discourse.

43. HORWITZ, *supra* note 1, at 87-88.

44. See, e.g., *College Credit Connection*, MCDONALDS, [http://www.aboutmcdonalds.com/mcd/corporate/careers/training\\_and\\_development/hamburger\\_university/college\\_credit\\_connection.html](http://www.aboutmcdonalds.com/mcd/corporate/careers/training_and_development/hamburger_university/college_credit_connection.html) (last visited October 26, 2014) (detailing opportunity for college credit through Hamburger University).

45. See *Bama By Distance*, UNIVERSITY OF ALABAMA, <http://bamabydistance.ua.edu/> (last visited October 26, 2014).

46. See, e.g., *Faculty*, HERITAGE CHRISTIAN UNIVERSITY, <http://www.hcu.edu/faculty> (last visited October 26, 2014) (“While every Bible instructor is fully credentialed with degrees from institutions such as Brite Divinity School, Hebrew Union College-Jewish Institute of Religion, and Brandeis University, each instructor also has personal experience in local ministry, stateside campaigns, and foreign missions.”).

47. MACINTYRE, *supra* note 8, at 221 (emphasis in original).

48. Average tuition and fees at private, 4-year nonprofit and for-profit degree granting postsecondary institutions. See *Average Undergraduate Tuition and Fees and Room and Board Rates Charged for Full-time Students in Degree-granting Postsecondary Institutions, by Level and Control of Institution: 1963-64 Through 2012-13*, NATIONAL CENTER FOR EDUCATION STATISTICS, [http://nces.ed.gov/programs/digest/d13/tables/dt13\\_330.10.asp](http://nces.ed.gov/programs/digest/d13/tables/dt13_330.10.asp).

easily answered in the context of today's higher education landscape. And the ambiguities and tensions surrounding those questions complicate the justifications that Horwitz offers for treating the university as a First Amendment institution. Indeed, with respect to the university, Horwitz's functionalist inquiry ultimately complicates the kind of categorical line-drawing on which his institutionalist approach depends.

#### THE CHURCH

The institutional category of church confronts similar difficulties. Horwitz's chapter on churches opens with references to "religious entities," "religious organizations," "religious groups," "religious functions," and "religion"—all in the first paragraph.<sup>49</sup> Horwitz seems to settle on the term "religious entities" but that description is latent with ambiguity. Does it include a Catholic charity, a religious hospital, or Hobby Lobby?<sup>50</sup> What about "parachurch" ministries?<sup>51</sup> Does it include Heritage Christian University, or a Lutheran elementary school?<sup>52</sup> If not all of these, then why not, and how do we justify protections for some religious institutions but not others?

Horwitz posits that there is a "strong case for treating religious entities as First Amendment institutions and granting them a significant degree of legal autonomy."<sup>53</sup> One might be able to derive that premise from within constitutional law.<sup>54</sup> But Horwitz seeks a theoretical grounding that encompasses more than constitutional doctrine. He writes that "arguments about the infrastructural or institutional role of churches and other religious organizations have, both historically and today, been expressed in explicitly religious terms."<sup>55</sup> That is not quite right. All of the arguments that Horwitz enlists are expressed in explicitly *theological* terms, and theology requires a particularity that "religion" does not.<sup>56</sup> That is one reason, as I have argued elsewhere, that religious institutionalist arguments grounded in the "freedom of the church" confront a translatability challenge that may be insurmountable.<sup>57</sup>

This theological particularity creates a problem for Horwitz. In seeking to assuage readers who might find theological justifications off-putting or irrelevant, Horwitz argues

49. HORWITZ, *supra* note 1, at 174.

50. See *Little Sisters of the Poor Home for the Aged v. Sebelius*, 13-CV-2611, 2013 WL 6839900 (D. Colo. Dec. 27, 2013); *Overall v. Ascension*, 13-11396, 2014 WL 2448492 (E.D. Mich. May 13, 2014) (hospital); *Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751 (2014).

51. See *Conlon v. Intervarsity Christian Fellowship*, Case No. 1:13-CV-1111, WL 1340752 (W.D. Mich. April 3, 2014) (applying ministerial exception to campus ministry organization and noting that "Plaintiff does not dispute that IVCF is a religious organization that may assert the ministerial exception"). See also MARK A. NOLL & CAROLYN NYSTROM, *IS THE REFORMATION OVER?* 85-86 (2005) (noting that "parachurch groups [are] only loosely connected to an ecclesiastical structure").

52. See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012) (recognizing ministerial exception in case involving "called teacher" at Lutheran school).

53. HORWITZ, *supra* note 1, at 175.

54. In fact, I think that is probably the most charitable reading of the Court's effort to distinguish *Employ't Div. v. Smith*, 494 U.S. 872 (1990), in its recent decision in *Hosanna-Tabor*. See Inazu, *supra* note 7, at 360-61 (discussing the tensions raised that *Hosanna-Tabor* raises with *Smith*).

55. HORWITZ, *supra* note 1, at 175.

56. Inazu, *supra* note 7, at 365.

57. *Id.* at 365-66. I have also questioned Horwitz's reliance on Dutch-Calvinist theology for a more broadly construed theoretical argument. *Id.* at 342 n.21 ("Protestant theology for Horwitz is really just circumstantial, and the theory—at least the way that he deploys it—does not rely in any meaningful way on either the theology or the contemporary salience of the Dutch-Calvinist tradition.").

that churches nevertheless easily qualify as First Amendment institutions because “they are surely well-established, self-governing institutions with a longstanding infrastructural role in public discourse and a unique set of contributions to make to it.”<sup>58</sup> Here, Horwitz’s claim may prove too much. Some sectarian denominations do not have “a longstanding infrastructural role in public discourse.”<sup>59</sup> Certain nondenominational churches and house churches are neither “well-established” nor “self-governing.”<sup>60</sup> A church using LSD as its “blessed sacrament” surely offers a “unique set of contributions,” but one wonders if those contributions easily qualify it as a First Amendment institution.<sup>61</sup>

More fundamentally, if First Amendment institutional prerequisites exist for churches apart from theological justifications, it is not clear what work the theological arguments are doing. Conversely, if the non-theological institutional prerequisites are really as generalized as Horwitz suggests, then it is not clear why one would draw the line at churches but not other private groups. Why, for example, is a therapy group or an artists’ collective differently situated than a church on the justification that Horwitz has offered?

#### ASSOCIATIONS

I have suggested above that Horwitz’s categories of churches and universities encounter significant definitional challenges. The more we push at the boundaries by introducing examples with “family resemblances,” the less clear the initial justifications for the distinctive categories become. That tension is even more acute when we turn to the chapter of *First Amendment Institutions* that most overlaps with my own scholarship: associations.<sup>62</sup> Horwitz characterizes associations as “where people and ideas meet.”<sup>63</sup> But that description is also true of churches and universities. And here we begin to see one of the problems with imposing institutional categories: most institutions are sufficiently multifaceted that they are doing different things at different times (or many things at the same time). Consider, for example, a religious university, which can be a university (“where ideas begin”), a religious organization (“where souls are saved”), and an association (“where people and ideas meet”).<sup>64</sup> How are we to sort the relevant First Amendment doctrine for such an institution?

Horwitz’s chapter on associations also complicates his theory by shifting away from

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58. HORWITZ, *supra* note 1, at 176 (“Those who resist the religious overtones implicit in calling the church a ‘sovereign sphere’ may translate those terms easily enough into the less exalted language of First Amendment institutionalism.”).

59. It also unclear whether or why the “public discourse” justification should be a primary argument for the institutional protections offered to churches. It does not underlie the free exercise clause. *See, e.g.*, Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1139 (1990) (noting that religious freedom embodies “counterassimilationist” ideals that allow people “of different religious faiths to maintain their differences in the face of powerful pressures to conform”).

60. *See, e.g.*, ‘House Churches’ Keep Worship Small, Simple, Friendly, USA TODAY (July 22, 2010, 1:20 PM), [http://usatoday30.usatoday.com/news/religion/2010-07-22-housechurch21\\_ST\\_N.htm](http://usatoday30.usatoday.com/news/religion/2010-07-22-housechurch21_ST_N.htm) (“House church[es] . . . have no clergy and everyone is expected to contribute to the teaching, singing and praying . . . ‘The only consistent thing about house church is that each one is different.’”).

61. *See United States v. Kuch*, 288 F. Supp. 439, 448 (D. D.C. 1968) (rejecting a religious exemption claim for LSD and marijuana use).

62. *See, e.g.*, JOHN D. INAZU, *LIBERTY’S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY* (2012).

63. HORWITZ, *supra* note 1, at 211.

64. *See, e.g.*, Richard W. Garnett, *Whom Should a Catholic University Honor?: “Speaking” with Integrity*, 49 J. CATHOLIC LEGAL STUDIES 233 (2010) (describing multiple purposes of a Catholic university).



the public discourse justification that underlies his other institutional categories. Recall that Horwitz believes “the core of First Amendment institutionalism is that an institution serves a well-established function that forms part of the infrastructure of public discourse and that it operates as a substantially self-regulating institution.”<sup>65</sup> But when he turns his gaze to associations, Horwitz largely abandons the public discourse justification and focuses instead on “social relationships” that “can be central to the formation of our identities.”<sup>66</sup> In fact, “[a]ssociations are vital to the formation of individual citizens regardless of whether they engage in expressive activity toward the public” and “it is less important that associations convey a particular *message to others* than that they serve as a source of *meaning to their members*.”<sup>67</sup> Those justifications seem far afield from the public discourse justification. In fact, they could even impede or counteract public discourse by reinforcing what Cass Sunstein has called “enclave deliberation.”<sup>68</sup>

By noting the shift in justification, I do not mean to suggest that Horwitz’s arguments for associations are unpersuasive or unimportant. To the contrary, I think he is right to press them quite apart from the public discourse justification.<sup>69</sup> But these arguments apply with similar force to universities and churches, which suggests that they might also justify heightened protections for those institutions. And if those justifications are sufficient, then why or, to what extent, do we care about the public discourse justification for those other institutions?

The twofold shift in the chapter of associations—the move away from the “public discourse” function and the blurring of the line between “associations” and other institutions like universities and churches—gestures toward what I think is the real force behind Horwitz’s argument: “associational autonomy, not associational expression.”<sup>70</sup> In an earlier review of Horwitz’s book, Professor Randy Kozel characterized this argument as “structural institutionalism.”<sup>71</sup> As Kozel notes, in its “most aggressive form,” Horwitz’s institutionalism “seeks to deploy nonpolitical institutions as counterweights against governmental authority.”<sup>72</sup> This reframing of Horwitz’s argument brings it in line with a strand of recent First Amendment scholarship that examines constitutional protections for groups apart from an instrumental “expressive” purpose.<sup>73</sup>

65. HORWITZ, *supra* note 1, at 120. Universities must make “a uniquely academic contribution to public discourse.” *Id.* at 121.

66. *Id.* at 221 (“Associations are important to our infrastructure of public discourse, but they are not important simply because they involve public discourse . . . . Associations matter as much as for the fact of belonging to them as they do for whatever messages they happen to express.”). Horwitz at times suggests that associations “form a fundamental part of the infrastructure of public discourse” and “are sources of values . . . both challenging and refreshing the state and public discourse.” *Id.* at 222. For Horwitz, “[t]his meaning-creating capacity serves a vital infrastructural role in public discourse.” *Id.* at 228. But these public discourse characterizations are outliers in the chapter on associations. And they suggest more of an instrumental or structural role for public discourse, which could be attributable to almost any institution (not just First Amendment institutions).

67. *Id.* at 221-22 (emphasis in original).

68. CASS SUNSTEIN, *REPUBLIC.COM 2.0* 76 (2007).

69. *See, e.g.*, INAZU, *supra* note 62, at 156-62.

70. HORWITZ, *supra* note 1, at 225.

71. Randy J. Kozel, *Institutional Autonomy and Constitutional Structure*, 112 MICH. L. REV. 957, 958 (2014).

72. *Id.* at 970. Kozel writes that the Constitution “grants autonomy to First Amendment institutions as vital safe havens from the threat of governmental overreaching.” *Id.* at 964. He also observes that Horwitz “says relatively little about institutionalism’s constitutional foundations.” *Id.* at 971.

73. *See, e.g.*, INAZU, *supra* note 62; Ashutosh A. Bhagwat, *Assembly Resurrected*, 91 TEXAS L. REV. 351 (2012); Ashutosh A. Bhagwat, *Associational Speech*, 120 YALE L.J. 978 (2011); Tabatha Abu El-Haj, *Changing*

I find Kozel's interpretation the most helpful way to understand Horwitz's theoretical approach to institutions. But Kozel's reading points toward both a broadening and flattening of Horwitz's institutional categories: it is difficult to confine structural institutionalism to a particular subset of non-state institutions. Consider, for example, an observation that I have made in other contexts: one of the reasons that we care about associations in our constitutional landscape is that they protect the informal and inchoate relationships out of which public discourse emerges.<sup>74</sup> Potato sack races and pageants forged relationships in the early suffragist movement.<sup>75</sup> Dinners and parties coalesced into the Harlem Renaissance.<sup>76</sup> Gay bars and informal networks led to Stonewall.<sup>77</sup> Without extending protections to these less defined groups, the lens of an institutional approach becomes fundamentally conservative, resisting innovation and new forms of collective action. Horwitz's privileging of "self-regulated," "relatively stable," and "established" institutions may inadvertently reinforce this conservatism.<sup>78</sup>

#### CONTEXT IN PUBLIC AND PRIVATE

If the preceding commentary seems overly negative or deconstructive, I do not mean it to be so. Horwitz is on to something important with his institutional and contextual focus. But the significance of his contribution is obscured by the blurring of his categories and justifications. While this blurring is to some extent unavoidable, Horwitz unnecessarily complicates it with his discussion of the state action doctrine. In this final section, I want to suggest that rejecting Horwitz's approach to state action strengthens the rest of his argument.

In a book that registers dissatisfaction over the lack of context in First Amendment doctrine, it is not without irony that Horwitz dismisses one of the few existing contextual doctrines by taking aim at the state action doctrine.<sup>79</sup> To be sure, Horwitz scores some commonsense and rhetorical points by suggesting that a private university like Harvard has more in common with a public university like Michigan than it does with a private non-university like Wal-Mart.<sup>80</sup> But the state action distinction is still a fairly good proxy

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*the People: Legal Regulation and American Democracy*, 86 N.Y.U. L. REV. 1 (2011); Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L. REV. 543 (2009); John D. Inazu, *The Forgotten Freedom of Assembly*, 84 TUL. L. REV. 565 (2010); Michael W. McConnell, *Freedom by Association*, FIRST THINGS 39, 41 (Aug./Sept. 2012); Timothy Zick, *Recovering the Assembly Clause*, 91 TEXAS L. REV. 375 (2012).

74. John D. Inazu, *Virtual Assembly*, 98 CORNELL L. REV. 1093, 1097-1102 (2013).

75. INAZU, *supra* note 62, at 44-45.

76. *Id.* at 47.

77. Dale Carpenter, *Expressive Association and Anti-Discrimination Law After Dale: A Tripartite Approach*, 85 MINN. L. REV. 1515, 1525-33 (2001).

78. HORWITZ, *supra* note 1, at 15. Horwitz at one point refers to institutions that "might be thought of as 'emerging' First Amendment institutions whose evolving culture and self-regulatory practices might one day merit a substantial amount of legal autonomy." *Id.* at 22. He suggests that even prior to this grant of autonomy, these inchoate institutions "may well still merit strong legal protection." *Id.* These are important concessions, but it isn't clear how Horwitz reconciles them with the boundaries that he wants to draw around First Amendment institutions. For example, what "strong legal protections" would Horwitz provide to emerging First Amendment institutions, and how would he distinguish protection-worthy emerging institutions from "regular" emerging institutions that may not evolve into First Amendment institutions?

79. *Id.* at 100.

80. *Id.* at 17 ("First Amendment institutionalism argues that this distinction is often less important than the basic idea of thinking about institutions, public or private, in terms of their functions and roles in society. . . Sometimes a university is a university, no matter who signs the checks."). *Cf. id.* at 102 ("Public

in other ways.

The First Amendment has long been understood to be a restriction against government restrictions: “Congress shall make no law . . . .”<sup>81</sup> Horwitz notes that courts and legislatures have at times blurred that line, most notably during the Civil Rights era and the push to end the hold of public and private segregation in the Jim Crow South.<sup>82</sup> Some scholars have argued for an even greater dissolution of the line.<sup>83</sup> Horwitz offers a qualified endorsement of these latter arguments: “[i]n cases involving First Amendment institutions, it may be less important to ask whether a particular institution is public or private than to ask what the *nature* of that institution is and what role it plays in public discourse.”<sup>84</sup> In some cases, “we might be better off thinking about the *institutional* nature of First Amendment institutions than about their nominally public or private status.”<sup>85</sup>

Although I appreciate the normative concerns raised about the state action doctrine (and, in particular, the forms of coercive power that can be advanced by non-state actors),<sup>86</sup> I have never understood arguments to abandon the doctrine as a matter of constitutional law.<sup>87</sup> One reason that the public-private distinction seems to work decently as an initial sorting mechanism is that we have structured many of our relationships around institutions that depend on it.<sup>88</sup> There are no private military bases and there are very few public churches.<sup>89</sup>

Similar aspects of public and private hold true in the context of Horwitz’s other institutional categories. For example, it seems plausible to me that the University of Alabama, Shelton State, and Air University are all state actors subject to the restrictions of the First Amendment in a way that Heritage Christian University is not. Horwitz argues that “[a]s First Amendment institutions, universities, consistent with their own sense of what their mission demands, should have the choice to be ‘politically correct’ or ‘politically incorrect’—provided they do so *as* universities.”<sup>90</sup> But almost nobody would want Air University to limit its students to men, even if it determined that its pedagogical mission would be better advanced with gender homogeneity. And most people would balk

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broadcasters may have a different set of owners than private broadcasters. But the contribution they make to public discourse is the same, and they follow the same professional norms. If we must assign such an entity a “dominant characterization,” it may make more sense to treat it as a “journalist” than as a “state actor.”)

81. U.S. CONST. amend. I.

82. “Even under current doctrine, the public-private distinction is not a bright line. This is most obvious in the field of race relations.” HORWITZ, *supra* 1, at 101.

83. See, e.g., Gregory P. Magarian, *The First Amendment, The Public-Private Distinction, and Nongovernmental Suppression of Wartime Political Debate*, 73 GEO. WASH. L. REV. 101, 144 (2004) (noting critiques against the public-private distinction); Nelson Tebbe, *Associations and the Constitution: Four Questions About Four Freedoms*, 92 N.C. L. REV. 917, 941 (2014) (same).

84. HORWITZ, *supra* note 1, at 102 (emphasis in original).

85. *Id.* at 102 (emphasis in original).

86. See, e.g., SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* (1989); Ruth Abbey, *Back Toward a Comprehensive Liberalism? Justice as Fairness, Gender, and Families*, 35 POL. THEORY 5 (2007).

87. For a defense of the state action doctrine, see Lillian BeVier & John Harrison, *The State Action Principle and Its Critics*, 96 VA. L. REV. 1767 (2010).

88. Cf. Martha Minow, *Partners, Not Rivals?: Redrawing the Lines Between Public and Private, Non-Profit and Profit, and Secular and Religious*, 80 B.U. L. REV. 1061, 1081 (2000) (“Commitment to some form of distinction between the public and private realm is also vital to a vibrant pluralist society.”).

89. To be sure, each of these institutions has some blending of influences, but the categories of public and private work pretty well in these instances.

90. HORWITZ, *supra* note 1, at 237 (emphasis in original).

at the University of Alabama requiring every class to start with a prayer to God to consecrate the activities of teaching and learning, even if the administration concluded that divine petitions would be pedagogically useful. Conversely, while some people would be concerned if Heritage Christian University adopted either of these practices, many people would recognize that its private status renders these kinds of decisions sufficiently autonomous. Indeed, the autonomy granted to Heritage Christian to pursue these practices *as pedagogically justified practices* is one way that Horwitz's institutional arguments take shape.

On the other hand, we may have good reason to adopt a contextual approach for *public* actors subject to the First Amendment. We can think of these contextual differences on at least three levels, which can be illustrated by returning to the university example. First, the government employees who run a public university are different than the government employees who staff a courthouse or fly military airplanes or guard prisons. Second, within the institutional category of public university, it may be that we want more or less latitude under the First Amendment at the University of Alabama (a state institution that serves a diverse constituency) than we do at Air University (a federal institution focused narrowly on the Air Force and related military endeavors).<sup>91</sup> Finally, as Horwitz suggests, within each discrete example of each institution, we might distinguish between certain functions and certain actors who engage in those functions.

#### CONCLUSION

*First Amendment Institutions* gives us important theoretical and doctrinal tools to begin to think about the unique benefits and burdens of the groups, organizations, and institutions that we form. But the First Amendment implications of those entities are better understood within the public and private ordering of our society. In other words, they are better understood in context.

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91. Line-drawing within educational facilities also raises ambiguities over who decides which personnel advance the "academic contribution to the public discourse." HORWITZ, *supra* note 1, at 237. Justice Thomas has expressed similar concerns about classifying "ministers" under the ministerial exception recognized in *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 711 (2012) (Thomas, J., concurring):

Judicial attempts to fashion a civil definition of 'minister' through a bright-line test or multi-factor analysis risk disadvantaging those religious groups whose beliefs, practices, and membership are outside of the 'mainstream' or unpalatable to some. Moreover, uncertainty about whether its ministerial designation will be rejected, and a corresponding fear of liability, may cause a religious group to conform its beliefs and practices regarding 'ministers' to the prevailing secular understanding.

*Id.* (citing *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 336 (1987)).