Assembly Resurrected

LIBERTY'S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY. By John D. Inazu. New Haven, Connecticut: Yale University Press, 2012. 288 pages. $55.00.

Reviewed by Ashutosh A. Bhagwat*

After a long period triggered by 9/11 and the Bush Administration's response to it, when constitutional law was focused on issues such as executive power and the Fourth Amendment, the First Amendment is back in the forefront of judicial and academic attention. In the past several years, the Supreme Court has issued a series of important, even path-breaking, decisions focused on the scope and limits of the freedom of speech.[1] At the same time, academic attention has turned to the role that First Amendment freedoms, including freedoms other than free speech, play in our society. Important examples include Timothy Zick's *Speech Out of Doors*,[2] which discusses the relationship between assembly, expression, and public places[3] and Ronald Krotoszynski's *Reclaiming the Petition Clause*,[4] which examines the role that the Petition Clause of the First Amendment can play in modern politics.[5] We have also seen a flurry of recent law review articles examining the rights of association and assembly, and their relationship to democratic self-governance.[6] These are, in short, exciting times for those interested in First Amendment freedoms and their place in the constitutional order.

---

* Professor of Law, U.C. Davis School of Law. Thanks to Ben Strauss for excellent research assistance and to Ralph Mayrell and the staff of the *Texas Law Review* for inviting me to write this Review.

1. *See, e.g.*, United States v. Alvarez, 132 S. Ct. 2537, 2551 (2012) (holding that an act criminalizing false claims to military medals was a violation of free speech); Snyder v. Phelps, 131 S. Ct. 1207, 1220 (2011) (holding that nondisruptive antihomosexual picketing outside a funeral was protected free speech); Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2741–42 (2011) (holding that an act prohibiting sales of violent video games to minors was a violation of free speech); United States v. Stevens, 130 S. Ct. 1577, 1592 (2010) (holding that an act criminalizing the creation, sale, or possession of depictions of animal cruelty was overbroad and therefore facially invalid under the First Amendment protection of speech); Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 913 (2010) (holding that political speech may not be suppressed "based on the corporate identity of the speaker").

2. TIMOTHY ZICK, SPEECH OUT OF DOORS: PRESERVING FIRST AMENDMENT LIBERTIES IN PUBLIC PLACES (2009).

3. *Id.* at 5–6, 21–24.

4. RONALD J. KROTOSZYNSKI, JR., RECLAIMING THE PETITION CLAUSE: SEDITIOUS LIBEL, "OFFENSIVE" PROTEST, AND THE RIGHT TO PETITION THE GOVERNMENT FOR A REDRESS OF GRIEVANCES (2012).

5. *Id.* at 14–19.

6. *See generally, e.g.*, Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. 978 (2011) (arguing that First Amendment rights are interrelated mechanisms that serve to advance democratic

John Inazu has jumped into this ferment with his book *Liberty's Refuge: The Forgotten Freedom of Assembly*.[7] *Liberty's Refuge* is an excellent book with a dual agenda: one part descriptive and one part normative. The focus of the book is the right, delineated in the First Amendment, "of the people peaceably to assemble."[8] Inazu begins by tracing the central role that the right of assembly played historically in political struggles and in public perceptions of the First Amendment, through the middle of the twentieth century.[9] He then traces the gradual transformation of the right of assembly, explicitly listed in the text of the Constitution, into a nontextual right of "association" during the 1940s and 1950s, what he calls "the national security era,"[10] as well as the narrowing of the right of association, combined with the complete abandonment of assembly as an independent right during the period beginning in the early 1960s, which he dubs "the equality era."[11] These chapters constitute the descriptive, historical part of *Liberty's Refuge*, and they tell a novel and fascinating story. Inazu concludes, however, normatively, by making the case for the revival of freedom of assembly as a robust, independent constitutional right that will provide substantial protection to the internal composition and dynamics of groups. He argues, referring to several Supreme Court cases, that the modern right of association fails to provide such protection and criticizes this development as inconsistent with both the history and the purposes of the First Amendment.[12]

---

self-government); Tabatha Abu El-Haj, *Changing the People: Legal Regulation and American Democracy*, 86 N.Y.U. L. REV. 1 (2011) [hereinafter El-Haj, *Changing the People*] (describing the extensive role of assembly and association in nineteenth-century elections and politics); Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L. REV. 543 (2009) [hereinafter El-Haj, *Neglected Right*] (characterizing public demonstrations as historically being integral to American democracy and describing the narrowing of the right of assembly today); John D. Inazu, *The Forgotten Freedom of Assembly*, 84 TUL. L. REV. 565 (2010) (discussing the importance of the right to freedom of assembly to democracy through a historical account of the right); John D. Inazu, *The Strange Origins of the Constitutional Right of Association*, 77 TENN. L. REV. 485 (2010) (describing the underpinnings of the right of association and its relationship to basic notions of democracy). This recent scholarly explosion builds on earlier work examining association, from both a legal and social science perspective. *See generally* MARK E. WARREN, DEMOCRACY AND ASSOCIATION (2001) (examining the interplay between associational life and democracy); FREEDOM OF ASSOCIATION (Amy Gutmann ed., 1998) (highlighting the individual and civic values of associational freedom in liberal democracies); Richard A. Epstein, *The Constitutional Perils of Moderation: The Case of the Boy Scouts*, 74 S. CAL. L. REV. 119 (2000) (discussing the balance between freedom of association and nondiscrimination in response to a case holding that the Boy Scouts had the right to dismiss a homosexual scout leader under the freedom of association); Jason Mazzone, *Freedom's Associations*, 77 WASH. L. REV. 639 (2002) (describing how freedom of association promotes popular sovereignty); Katherine A. Moerke & David W. Selden, *Associations Are People Too*, 85 MINN. L. REV. 1475 (2001) (describing essays that address the limits on freedom of association and the relationship of the government with religious associations).

7. JOHN D. INAZU, LIBERTY'S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY (2012).

8. U.S. CONST. amend. I.

9. INAZU, supra *note* 7, ch. 2.

10. *Id.* ch. 3.

11. *Id.* ch. 4.

12. *Id.* at 144–49.

Finally, Inazu concludes by setting forth a "theory of assembly," which he argues would restore the freedom of assembly to its rightful place.[13]

There is much to admire in *Liberty's Refuge*. The history that Inazu recounts, and the story of doctrinal transformation that he tells, are fascinating and well worth the read. In addition, Inazu sets forth a compelling argument that the modern association right has failed in its primary purpose of protecting the group autonomy that must exist for effective democratic self-governance. I agree with much of what Inazu has to say in this regard. In Parts I and II of this Review I will summarize Inazu's thesis in more detail, pointing to its strengths as well as highlighting a few areas where I disagree. In Part III, I turn to another issue, which I believe is raised by aspects of Inazu's argument though not particularly explored, which is the relationship between the freedom of assembly and *other* provisions of the First Amendment. In particular, I look at the problem of religious groups and their role as "associations" or "assemblies" protected by the First Amendment. I ask whether the religious character of a group has any implications for the types of protection it receives and what the interplay might be between the assembly and association rights, and the Religion Clauses of the First Amendment, in addressing this question. The relationship between the association right and the Religion Clauses came to the fore in the Supreme Court's recent decision in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*,[14] but has not been much explored in the literature. In these brief pages, I hope to begin that conversation.

I. The Gradual Demise of Assembly

At the heart of *Liberty's Refuge* lies a historical narrative. In these chapters, John Inazu recounts the central role that freedom of assembly played in American politics and culture from the Revolutionary Era through the 1940s, and then describes the decline and eventual disappearance of assembly in constitutional and political discourse. This part of the book is a *tour de force*, weaving together historical, legal, political, and intellectual developments in a way that is both compelling and highly digestible even to those without a deep background in either constitutional history or political science. This historical story itself makes *Liberty's Refuge* well worth the read.

Inazu's story begins with the drafting history of the Assembly Clause in the First Congress in 1789.[15] His description is extremely illuminating for a number of reasons. First, it leaves no doubt about the widespread agreement among the founding generation of the significance of the assembly right,

13. *Id.* ch. 5.
14. 132 S. Ct. 694 (2012).
15. INAZU, *supra* note 7, at 22–25.

despite the fact that the protection of assembly (unlike the petition right with which it is paired, on which more later) had no clear precedent in English law.[16] Inazu traces this consensus to that generation's knowledge of and sympathy with the travails of the famous Quaker (and founder of Pennsylvania) William Penn in his struggles with the religious establishment of England.[17] Notably, Inazu emphasizes that this history supports the proposition that the Framers understood the assembly right to fully encompass religious gatherings.[18]

Second, Inazu's drafting history clears up an important ambiguity about the scope of the assembly right resulting from the language of the First Amendment. The relevant text reads, "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[19] Prominent scholars, including Jason Mazzone, have read the syntax of this closing portion of the Amendment to link assembly and petition, so that what the Constitution protects is a right of the people to assemble but only for the purpose of petitioning the government for a redress of grievances.[20] Inazu convincingly refutes this reading. He points out that the original proposals and drafts of what became the First Amendment stated two distinct rights: a right of the people "to assemble and consult for their common good," and a right to petition for a redress of grievances.[21] The language of the "common good" was eventually dropped, but not in order to narrow the assembly right or link it to petitioning; instead, it was dropped to ensure that the reference to the common good was not invoked to try and narrow the range of protected assemblies.[22] In short, Inazu argues, the history of the Assembly Clause reveals a desire on the part of the Framers to protect a right that is fundamental and extremely broad in scope.[23]

From drafting history, Inazu proceeds to a broad summary of the role that the assembly right played in American political history in the century and a half following the First Amendment's ratification in 1791. The history is a fascinating one, rich and eye-opening. It encompasses such seminal moments as the debate over the Democratic–Republican Societies of the 1790s,[24] the use of public meetings as a form of democratic activism in the

16. James Gray Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 U. PA. L. REV. 287, 330 & n.185 (1990).

17. INAZU, *supra* note 7, at 24–25.

18. *Id.* at 25.

19. U.S. CONST. amend. I.

20. Mazzone, *supra* note 6, at 713–16.

21. INAZU, *supra* note 7, at 23.

22. *Id.* at 22–24.

23. *See id.* at 25 ("The text handed down to us thus conveys a broad notion of assembly in two ways. First, it does not limit the purposes of assembly to the common good . . . . Second, it does not limit assembly to the purposes of petitioning the government.").

24. *Id.* at 26–29.

Jacksonian era,[25] the efforts of southern states to suppress assemblies of slaves and free blacks throughout the antebellum period,[26] and the embracing of public assemblies in the North during this period by both the abolitionist and burgeoning women's rights movements.[27] Moreover, the right of assembly continued to play a central role in social movements well into the twentieth century, including the suffrage movement, the Civil Rights movement, and (most importantly) the radical labor movement epitomized by the Industrial Workers of the World (IWW).[28] The story Inazu tells about the importance of public assemblies to American politics throughout this period is, as I said, an engrossing one, and one which opens up a whole new perspective on the nature of American democracy before World War II inaugurated the modern era of suburbanization, disaffection, and national interest groups. If there is any criticism to be made of this part of Inazu's story, it is that it is incomplete. Because Inazu's primary focus (as we shall see) is on the postwar era and the decline of assembly, he fails to explore in depth a number of other episodes during the pre-modern era where associations and assemblies played an important part in political developments.[29] But this is a minor point—on the whole, Inazu successfully conveys the cultural significance of assembly in American democracy up to World War I, and his narrative sets the stage nicely for the heart of his story.

That story begins to take off when the Supreme Court enters the stage in the Red Scare prosecutions of the 1920s.[30] As Inazu notes, the interwar period was an odd one for the right of assembly. On the one hand, scholarly and political defenses of the right of assembly continued and if anything increased.[31] On the other hand, the actual right of assembly was subject to unprecedented restrictions as part of, first, the federal government's efforts to silence critics of American involvement in World War I, and then, second, Red Scare suppression of communist movements.[32] And throughout this period the Supreme Court consistently failed to provide any meaningful protection to dissident groups. Indeed, as Inazu discusses, in the seminal

---

25. *Id.* at 29–31.

26. *Id.* at 30–33.

27. *Id.* at 33–35.

28. *Id.* at 44–48.

29. *See, e.g.*, El-Haj, *Neglected Right*, *supra* note 6, at 554–55 (discussing street meetings in the early Republic); *id.* at 561–69 (describing the liberal legal regime governing public assembly through most of the nineteenth century); Mazzone, *supra* note 6, at 642–44 (discussing women's clubs in nineteenth-century America); *see also* El-Haj, *Changing the People*, *supra* note 6, at 40–51 (highlighting the wide variety of festive street politics that persisted well into the nineteenth century).

30. *See* INAZU, *supra* note 7, at 50 (quoting Justice Brandeis's famous concurring opinion in *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)).

31. *See id.* at 49 (noting that libertarian interpretations of the First Amendment and political references to free speech and assembly increased during the interwar years).

32. *Id.* at 49–50.

case of *Whitney v. California*,[33] a majority of the Court opined that Anita Whitney's decision to assemble with the Communist Party was *more* dangerous and less worthy of protection than the speech of individuals.[34] Justice Brandeis's seminal separate opinion, joined by Justice Holmes, did provide robust protection for free speech *and* assembly rights,[35] but it received only two votes out of nine.[36]

Whitney v. California probably represents the nadir of First Amendment rights in the Supreme Court and in the nation as a whole. As a consequence of the election of Franklin Delano Roosevelt as President in 1932 and the enactment of his New Deal by a transformed Congress, the political tone of the country changed dramatically in the 1930s (these changes were themselves, of course, a product of the social upheaval triggered by the Great Depression).[37] Political support for assembly rights, especially for labor organizers, expanded greatly in this period.[38] And in 1937, in *De Jonge v. Oregon*,[39] a majority of the Supreme Court wholeheartedly embraced the idea of extending assembly rights even to those meeting under the auspices of the Communist Party.[40] The Court confirmed this view soon thereafter in *Herndon v. Lowry*,[41] and most significantly, in 1939 a plurality of the Court endorsed the idea that the people have a right to assemble even on publicly owned land such as streets and parks.[42] The public rhetoric of this period, some of which was triggered by the *Hague v. CIO*[43] litigation, saw the freedom of assembly enshrined in popular culture as one of the "Four Freedoms" underlying American democracy, co-equal with religion, speech, and the press.[44] As late as 1945, the Supreme Court was still according vigorous protection to the freedom of assembly, that time in the labor context.[45] Freedom of assembly, it would seem, had fully and finally taken its place at the center of our political liberties.

---

33. 274 U.S. 357 (1927).

34. *Id.* at 372.

35. *Id.* (Brandeis, J., concurring); *see also* Bhagwat, *supra* note 6, at 983–84 (noting the central role that assembly and association rights played in the *Whitney* case even though it is generally cited as a case about free speech).

36. *Whitney*, 274 U.S. at 372 (Brandeis, J., concurring).

37. *See* INAZU, *supra* note 7, at 51–52 (discussing the changes in political and labor rhetoric concerning assembly during the 1930s).

38. *Id.*

39. 299 U.S. 353 (1937).

40. *Id.* at 364–66.

41. 301 U.S. 242, 263–64 (1937).

42. Hague v. CIO, 307 U.S. 496, 515–16 (1939).

43. 307 U.S. 496 (1939).

44. INAZU, *supra* note 7, at 54–58.

45. Thomas v. Collins, 323 U.S. 516, 539–40 (1945) (finding that a Texas statute requiring a union official to obtain an organizer's card as a condition precedent to union activity is an unconstitutional restraint upon petitioner's rights of free speech and free assembly).

As it happens, things turned out otherwise. Within little more than a decade, freedom of assembly as a separate right was in decline, and within forty years, it had largely been interred. Telling the story of how this happened, and tying these legal developments to the larger political and intellectual history of the postwar era, constitutes the core of *Liberty's Refuge* and Inazu's most original contribution to our understanding of the First Amendment.

What happened to the freedom of assembly? In broad terms, Inazu argues, what happened was that assembly was "swept within the Court's free speech doctrine."[46] The specific path by which this occurred, however, has much to do with the rise of another, nontextual constitutional right: the right of association. As Inazu notes, the rise of the associational right in the Supreme Court in the 1950s is closely tied to two developments: McCarthyite persecution of communists and Southern persecution of civil rights activists.[47] It was in reviewing various legislative and executive attacks on communists that the Court first began to refer to a "right of association" implicit in the Constitution, albeit in the early days generally to reject the right.[48] But by 1957 the Court had relied on an association right in at least two cases to place limits on the power of the federal and state governments to punish mere affiliation with the Communist Party.[49] In discussing the McCarthy-era cases, Inazu makes much of what he sees as a doctrinal division among the Justices, between those (notably Justices Douglas and Black, but also Justice Brennan and Chief Justice Warren) who favored an *incorporation* approach, which rooted the associational right in the First Amendment as incorporated against the states in the Fourteenth Amendment, and those (notably Justices Frankfurter and Harlan) who favored a *liberty* approach, which rested on the Fourteenth Amendment alone with no particular reference to the First.[50] Inazu's view seems to be that the association right would have been more secure if it had firmly been linked to the First Amendment. In light of later developments, I am somewhat unconvinced of the significance of this now largely defunct doctrinal division and find this part of Inazu's doctrinal story therefore less convincing. But in any event, the main point is that the McCarthy-era cases set the stage for the

46. INAZU, *supra* note 7, at 63.

47. *See id.* at 64 (noting that the "primary political factor" in the rise of the associational right was "the historical coincidence of the Second Red Scare and the Civil Rights Movement").

48. *Id.* at 65–73.

49. Sweezy v. New Hampshire, 354 U.S. 234, 249–50 (1957) (holding that placing a professor in contempt for refusing to answer questions regarding his knowledge of the Progressive Party constitutes an unconstitutional abridgment of his right to associate with others); Wieman v. Updegraff, 344 U.S. 183, 191–92 (1952) (holding that a statute requiring certain state employees to take an oath regarding their membership in or affiliation with certain proscribed organizations was unconstitutional).

50. INAZU, *supra* note 7, at 71–77.

next key step in the Court's jurisprudence in this area: its seminal 1958 decision in *NAACP v. Alabama ex rel. Patterson*.[51]

The issue in the *Patterson* case was whether the State of Alabama could require the NAACP—the preeminent civil rights organization in the nation—to disclose its membership lists,[52] despite the fact that public disclosure of NAACP membership would undoubtedly have subjected members to economic and even physical retaliation. The Supreme Court unanimously held that it could not, because mandated disclosure violated NAACP members' "right to freedom of association."[53] Importantly, as Inazu notes, the majority opinion (by Justice Harlan) begins by citing the *De Jonge* and *Thomas* cases, and giving a nod towards freedom of assembly.[54] The opinion then proceeds, however, to rest primarily on a right of "association," a word that does not appear in the Constitution.[55] Moreover, the opinion ends up quite ambiguous about the link between the associational right and the First Amendment, including the Assembly Clause in particular.[56] Nonetheless, the right of association had definitively arrived, and in subsequent cases involving both the NAACP and communists, the Court continued to recognize a right of association while remaining obscure about its source and scope (and continuing to favor civil rights claimants while disfavoring communist claimants).[57]

By the mid-1960s, the transformation of the textual assembly right into a nontextual association right was largely complete. As Inazu acknowledges, however, this transformation need not have had significant substantive implications. There was no apparent reason to believe that "association" would prove a narrower right than assembly, and as Inazu also notes, scholars of this period, while recognizing the doctrinal developments, did not generally attribute much significance to them.[58] It is at this point that Inazu makes what to my mind is his most valuable contribution to our understanding of legal change. Inazu does so by tying doctrinal changes in the Court's jurisprudence to the broader intellectual climate, and in particular the rise to dominance in the postwar period of pluralist political theory as epitomized by the work of Robert Dahl.[59] At its heart, the pluralist vision of American society was an extremely positive and optimistic one, envisioning society as constituted by a harmonious balance among interest groups,

---

51. 357 U.S. 449 (1958).

52. *Id.* at 451.

53. *Id.* at 462.

54. *Id.* at 460; INAZU, *supra* note 7, at 81.

55. *See Patterson*, 357 U.S. at 460 ("It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.").

56. *See id.* (recognizing "the close nexus between the freedoms of speech and assembly").

57. INAZU, *supra* note 7, at 84–93.

58. *Id.* at 94–96.

59. *Id.* at 96–114.

mediated through the democratic process.[60] Far from being dirty words, such as Madison's "factions" and modern "special interests," pluralistic interest groups were the vehicles through which citizens could meaningfully participate in politics.[61] This vision seemed a natural response to state-centered fascism, but also to excessive individualism. It provided a logical intellectual foundation for the protection of associational rights, since interest groups had to be permitted to organize and exist in order to play their proper, benevolent role in society. But in the assumptions underlying pluralism lay a grave threat. As Inazu perceptively emphasizes, pluralist theory accepted the legitimacy only of groups which themselves accepted the basic premises of American democracy.[62] Groups outside of that broad consensus had no useful role to play, and so could even be suppressed.[63] Inazu argues convincingly that this view "was bereft of either authority or tradition in American political thought,"[64] and certainly his earlier history of public assemblies bears out this view. In particular, the pluralist vision of groups operating within a consensus completely ignores the role that groups can play in resisting the "tyranny of the majority," in Tocqueville's words.[65] And though the influence of pluralist theory declined in response to the turbulence of the Vietnam War era, its impact on the rights of association and assembly, Inazu argues, continued.[66]

These developments bring Inazu to the final chapter in his historical story (though not in *Liberty's Refuge*): what Inazu calls the "transformation of association" into a narrow and stunted right, and the concomitant abandonment of assembly as an independent right altogether. To understand the arc of Inazu's story, it is useful to begin where Inazu ends, with his bête noire, the Supreme Court's 2010 decision in *Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez* (*CLS*).[67] *CLS* is a complicated case, raising issues too convoluted to fully

60. See ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 132–33 (1956) (arguing that a foundational consensus among political participants necessarily underlies a functioning democratic system).

61. *See id.* at 137, 145–46, 150–51 (1956) (arguing that "[a] central guiding thread of American constitutional development has been the evolution of a political system in which all the active and legitimate groups in the population can make themselves heard at some crucial stage in the process of decision").

62. INAZU, *supra* note 7, at 105–06.

63. *Id.*

64. *Id.* at 106.

65. *Id.* at 114.

66. *See id.* at 116 ("[T]he largely unquestioned pluralist consensus that gave the Court its baseline for acceptable forms of association in the late 1950s and early 1960s opened the door for the egalitarianism that emerged in the 1970s and placed certain discriminatory associations beyond its contours.").

67. 130 S. Ct. 2971 (2010). Full disclosure: I was a member of the faculty at U.C. Hastings College of the Law, the defendant in this litigation, both when the events at issue occurred and during the litigation. I, therefore, of course personally know all of the individuals on the

explore here.[68] Briefly, however, the case arose when U.C. Hastings College of the Law, a public law school located in San Francisco, denied "registered student organization" status to a student organization consisting of Christian students.[69] The reason was that the organization, the Christian Legal Society or CLS, required its members and officers to sign a "Statement of Faith," which among other things stated adherence to certain Christian doctrines and also condemned sexual activity outside of heterosexual marriage.[70] Hastings concluded that these provisions discriminated against potential members on the basis of religion and sexual orientation, and so violated a Hastings policy which required student organizations to accept "all comers"—i.e., any student who wished to join.[71] The Court, by a 5–4 vote, upheld the Hastings policy.[72] Crucially, the Court's analysis focused almost entirely on free speech doctrine; the majority explicitly declined to analyze separately CLS's "freedom of association" claim, concluding that it had little independent significance because, in essence, from the majority's perspective CLS's association rights only had significance in so far as they were linked to its speech rights.[73] How could this have come to pass, where a claim by a private group to control its own membership would be analyzed as a *free speech* issue, with association relegated to secondary status and the freedom of assembly not even mentioned? It is this doctrinal (and cultural) transformation that Inazu traces and seeks to explain, once again telling a compelling and complex story.

The trigger for the "transformation" of the associational right was the birth of what Inazu calls the "equality era," with the enactment of key civil rights legislation in 1964, as well as judicial decisions in the 1960s interpreting Reconstruction-era legislation to bar private racial discrimination.[74] Until these developments, the significance of association to civil rights was to protect the autonomy of civil rights organizations such as the NAACP.[75] With the enactment of legislation banning private discrimination, however, associational rights potentially became a barrier to civil rights, if private groups could successfully invoke associational rights to resist racial integration. This problem first came to the Court in 1976 in

---

defendants' side and indeed many of the plaintiffs as well. I did not, however, have any personal involvement in those events.

68. For a fuller examination of the litigation and its implications, see generally Symposium, *The Constitution on Campus: The Case of* CLS v. Martinez, 38 HASTINGS CONST. L.Q. 499 (2011).

69. *CLS*, 130 S. Ct. at 2980–81.

70. *Id.*

71. *Id.*

72. *Id.* at 2978, 2995, 2998, 3000.

73. *Id.* at 2984–86; *see* INAZU, *supra* note 7, at 147–48.

74. INAZU, *supra* note 7, at 120–21.

75. *See, e.g.*, NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 466 (1958) (holding that the NAACP was protected under the Fourteenth Amendment to pursue its "lawful private interests privately and to associate freely with others").

Runyon v. McCrary.[76] The primary holding in that case was that the Civil Rights Act of 1866 barred racial discrimination in admissions by a private, nonsectarian school.[77] Along the way, however, the Court also rejected an associational claim raised by the school, though on grounds that were doctrinally far from clear.[78] *Runyon* was nonetheless significant in clarifying that ideologically motivated, private discrimination could be regulated consistent with the right of association.[79]

The key, next step in the evolution of association, and the foundational case for modern association analysis, is *Roberts v. United States Jaycees*.[80] At issue in *Roberts* was whether the Jaycees, a national organization dedicated to "promoting the interests of young men,"[81] had a constitutional right to exclude female members, in violation of state law.[82] The Court held (unanimously) that it did not.[83] In analyzing the Jaycees' associational claim, Justice Brennan's majority opinion draws a critical distinction between two rights of association: a right of "intimate association" protected by the Due Process Clause,[84] and a right to associate for expressive purposes (since described as a right of "expressive association")[85] protected by the First Amendment.[86] The majority (reasonably) found no intimate-association issue because the Jaycees are not an intimate group even on the most generous definition.[87] Its rejection of expressive association, however, was more problematic. The Court held that the purpose of expressive association was solely to protect associations who advance expressive goals, and because the inclusion of women into the Jaycees would not "impede the organization's ability to . . . disseminate its preferred views," there was no constitutional violation.[88] In one fell swoop, the Court completed the process of converting what had been a freestanding, textual right of assembly into a nontextual and ancillary right of association for expressive purposes. It should be noted that this transition occurred even though the Court rooted this right squarely in the First Amendment (suggesting that Inazu's concerns

76. 427 U.S. 160 (1976).

77. *Id.* at 172–74.

78. INAZU, *supra* note 7, at 123–24.

79. *See Runyon*, 427 U.S. at 176 (stating that the freedom of association protects the right of parents "to send their children to educational institutions that promote the belief that racial segregation is desirable, and that the children have an equal right to attend such institutions. But it does not follow that the *practice* of excluding racial minorities from such institutions is also protected by the same principle.").

80. 468 U.S. 609 (1984).

81. *Id.* at 627.

82. *Id.* at 612.

83. *Id.* at 612, 631.

84. *Id.* at 617–18.

85. *Id.*; INAZU, *supra* note 7, at 135–40.

86. INAZU, *supra* note 7, at 135–40.

87. *Roberts*, 468 U.S. at 619–21.

88. *Id.* at 618, 627.

about "incorporation" versus "liberty" may be off the mark).[89] The difficulty was that instead of focusing on "assembly," the Court focused on "speech" as the source of the associational right.

What intellectual forces produced this truncation of a formerly hallowed right? The pernicious influence of pluralism may have been the root cause, but Inazu traces the specific intellectual impetus to "The Rise of Rawlsian Liberalism."[90] In Inazu's view, the form of liberalism associated with John Rawls's *Theory of Justice*, as expounded by later writers including notably Ronald Dworkin, built on pluralism by tying pluralist visions of harmony with specific commitments to equality and regard for others.[91] This predisposition, Inazu suggests, naturally led lawyers and judges inculcated with the liberalism of the 1970s (including Justice Brennan) to prioritize equality principles over the autonomy of dissenting groups.[92] I must confess that unlike Inazu's pluralism story, which I find quite persuasive, his discussion of Rawlsian liberalism leaves me a bit cold. There is no doubt that Rawls and Dworkin represent a particular form of moderate–left thinking in the United States of the 1970s and 1980s. But were they, and especially legal thinkers like Dworkin, really shapers of opinion? Or were they merely rationalizers for a liberal consensus that was the outgrowth of the Civil Rights Movement and other social movements? Just as much of liberal jurisprudential writings from that period seem designed primarily to defend *Roe v. Wade*, one wonders if the embrace of equality over liberty was similarly designed to provide intellectual justification for a fait accompli—the legislative and judicial achievements of the civil rights era.

In any event, as Inazu points out, the *Roberts* reformulation of association has largely been adhered to since 1984.[93] The primary exception is *Boy Scouts of America v. Dale*,[94] in which the Court upheld the right of the Boy Scouts to exclude a gay assistant scoutmaster on the somewhat forced theory that inclusion of a gay assistant scoutmaster would interfere with the Boy Scouts' ability to express a message of hostility to homosexuality, thereby violating the Scouts' right of expressive association (the result would, of course, have been much easier to defend on a pure assembly or association theory).[95] But *CLS* retreated to some extent from that position;[96]

89. *See* INAZU, *supra* note 7, at 74–75 (discussing the differences between the incorporation argument and the liberty argument).

90. *Id.* at 129–32.

91. *See id.* at 129 ("Pluralist political thought insisted on a consensus bounded by shared democratic values; Rawlsian liberalism presumed an 'overlapping consensus' in which egalitarianism rooted in an individualist ontology trumped and thus bounded difference.").

92. *See id.* ("Like the pluralist assumptions that preceded them, the Rawlsian premises of consensus and stability pervaded political discourse and influenced the ways in which the equality era reshaped the right of association.").

93. *Id.* at 142 (discussing N.Y. State Club Ass'n v. City of New York, 487 U.S. 1 (1988) and Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987)).

94. 530 U.S. 640 (2000).

95. *Id.* at 655.

and in any event, given the confusions inherent in the expressive association doctrine, it remains far from clear what the exact scope of the *Dale* decision was and how it could be reconciled with *Roberts*. So for now, association remains a truncated right, limited to facilitating speech, and as Inazu notes, "The Court . . . has not addressed a freedom of assembly claim in thirty years."[97]

II. Inazu's Theory of Assembly

Inazu's historical story of doctrinal evolution ends with, as he sees it, the evisceration of any form of substantial group-autonomy rights in *CLS*. *CLS*, however, is in Inazu's view not where the Court went truly wrong; it is instead the predictable fallout from earlier errors. The key error, Inazu argues, was the Court's reformulation in *Roberts v. U.S. Jaycees* of the association right into dual, narrow rights of intimate and expressive association.[98] This left a gaping hole in protection of group rights. Intimate association protects small familial (and perhaps family-like) groups; and expressive association protects groups that are directed at speech (and perhaps other First Amendment activities such as petitioning the government or the exercise of religion).[99] But what about other groups, which are not familial in any meaningful sense and also not primarily expressive, but which nonetheless provide a critical space within which citizens can jointly develop their values and their capacity for self-governance? The *Roberts* reformulation, Inazu convincingly argues, leaves little or no protection for the internal autonomy of such groups, and therefore, leaves them at the mercy of tyrannical democratic majorities.[100]

Enter assembly. The core of the normative argument in *Liberty's Refuge* is that the time is ripe for a reinvigoration of the textual right of assembly in order to cure the deficiencies of the modern association doctrine. Inazu takes the position that interpretative theory fully supports a turn back to assembly as the key source of group rights.[101] He also convincingly demonstrates that the history of group rights in this country fully supports a right of autonomy of dissenting, nonconformist groups,[102] contrary to views of scholars such as Andrew Koppelman who argue that the "right to discriminate" recognized in *Boy Scouts v. Dale* was an historical

---

96. *See generally CLS*, 130 S. Ct. 2971 (2010) (deciding the case on other grounds, but noting that U.C. Hastings could condition the Christian Legal Society's status as a registered student organization on its acceptance of persons of all religious beliefs, even though one of the Society's purposes was to express solely Christian beliefs).

97. INAZU, *supra* note 7, at 62.

98. *Id.* at 135.

99. *Id.* at 140.

100. *Id.* at 135–41.

101. *See id.* at 5 (arguing that "[r]ecovering the vision of assembly remains an urgent task").

102. *See id.* at 4 (arguing that the four principles of the history of assembly collectively counsel for the protection of groups "that dissent from majoritarian standards").

aberration.[103] The Assembly Clause would, Inazu argues, protect dissident groups as well as nonexpressive social and religious groups in a way that association fails to do.[104]

In addition to his interpretative and historical arguments, Inazu also presents a political theory of assembly, drawing upon the work of Sheldon Wolin[105] as a counterweight to the consensus-driven narrative of Dahlian Pluralism and Rawlsian Liberalism.[106] It is necessary, he argues, to protect *dissenting* and *political* assemblies, groups that reject certain consensus norms on a nonnegotiable basis, and that seek to engage in a form of politics outside of the accepted politics of state institutions.[107] Inazu also asserts that recognizing a vibrant assembly right will advance *expressive* goals, curing some of the shortcomings of expressive association by recognizing the variety and complexity of the ways in which groups can be expressive.[108] As I have argued elsewhere, I find this last argument less convincing.[109] It seems to me that one of the great advantages of supplementing "expressive association" with the textual right of assembly is precisely that it rejects the pernicious idea that groups deserve protection only to the extent that they are expressive. Even nonexpressive social and religious groups contribute to the goals of the First Amendment by protecting and advancing democratic self-governance in critical ways,[110] and so lie fully within the coverage of the First Amendment. To emphasize the expressive nature of assemblies might undermine this critical point. At bottom, however, this is a relatively minor point of disagreement. There is no doubt that Inazu fully accepts the view that nonexpressive groups are entitled to constitutional protection,[111] and so

---

103. *Id.* at 162–66 (discussing ANDREW KOPPELMAN WITH TOBIAS BARRINGTON WOLFF, A RIGHT TO DISCRIMINATE? HOW THE CASE OF *BOY SCOUTS OF AMERICA V. DALE* WARPED THE LAW OF FREE ASSOCIATION (2009)).

104. *Id.* at 150–53.

105. *Id.* at 153–56 (discussing SHELDON S. WOLIN, POLITICS AND VISION: CONTINUITY AND INNOVATION IN WESTERN POLITICAL THOUGHT (2004)).

106. *Id.*

107. *Id.* at 156–60.

108. *Id.* at 160–62.

109. *See* Ashutosh Bhagwat, *Liberty's Refuge, or the Refuge of Scoundrels?: The Limits of the Right of Assembly*, 89 WASH. U. L. REV. 1381, 1383–84 (2012) (arguing that Inazu's emphasis on the expressive nature of assembly undermines the argument that the Assembly Clause is an "independent and co-equal" First Amendment right, and that assembly "should be protected not because it is expressive, but because it independently advances the goals of the First Amendment"). For Professor Inazu's response to my critique, *see* John D. Inazu, *Factions for the Rest of Us*, 89 WASH. U. L. REV. 1435, 1436 (2012) (replying that the emphasis on the inherent expressiveness of assembly was intended as a critique of the doctrinal distinction between expressive and nonexpressive associations and reaffirming that assembly is valuable because it facilitates "dissent, self-governance, and the informal relationships that make politics possible").

110. For a more detailed discussion of the link between groups and democratic self-governance, see Bhagwat, *supra* note 6, at 991–99.

111. *See* Inazu, *supra* note 109, at 1436 ("[T]he expressive potential of a group is not the reason that we value assembly.").

the space between his views and mine are primarily a question of rhetoric and emphasis.

Inazu concludes by setting forth in full-blown form his theory of assembly. He defines assembly as "a presumptive right of individuals to form and participate in peaceable, noncommercial groups."[112] By adopting this broad view, Inazu seeks to avoid the limitations of the *Roberts* approach, and to affirm that the assembly right is a stand-alone right of group autonomy and not merely a handmaiden to other First Amendment liberties. But, inevitably, Inazu also is forced to recognize limits on the scope of assembly. The definition itself restricts protection to *peaceable* groups, a limitation which he acknowledges raises difficult boundary questions,[113] and excludes commercial groups.[114] Finally, and most significantly, Inazu excludes from protection groups which "prosper[] under monopolistic or near-monopolistic conditions."[115] As examples of such groups, he cites the famous Jaybird Association, which was the subject of the *Terry v. Adams*[116] litigation, and a hypothetical student group "providing exclusive access to elite legal jobs."[117] Inazu urges a "contextual analysis," focused on "how power operates on the ground," in applying this exception,[118] but ultimately he is clear that it is a narrow one. Inazu is a bit unclear about exactly why he would deny coverage to such "monopolistic" groups, but presumably the reason is that the social harm caused by the exclusion from such groups of individuals subject to discrimination outweighs the value of protecting the assembly right in such contexts.

All of the above points to some important questions raised but not answered by *Liberty's Refuge*. There is no question in my mind that Inazu's arguments do a great service in pointing out how ahistorical and theoretically problematic the *Roberts* reformulation and narrowing of group rights really was. I am also willing to accept Inazu's premise that this damage can be undone by resurrecting the textual assembly right from its premature demise—though one is left uncertain at the end of *Liberty's Refuge* why the same goals might not be accomplished by a broadening of the association right. Perhaps the answer lies in some combination of the fact that the doctrinal damage done by *Roberts* is at this point too entrenched to be reversed, and that the textual roots of assembly makes it a better repository for a stand-alone right of group autonomy.

---

112. INAZU, *supra* note 7, at 166.

113. *Id.* at 167. For a discussion of the ambiguities surrounding the exclusion of violent assemblies, *see* Bhagwat, *supra* note 109, at 1389–92.

114. INAZU, *supra* note 7, at 167.

115. *Id.* at 166.

116. 345 U.S. 461 (1953).

117. INAZU, *supra* note 7, at 172.

118. *Id.*

The unanswered questions raised by *Liberty's Refuge* concern Inazu's concept of dissenting political assemblies. Dissent is at the heart of the concept of assembly endorsed by *Liberty's Refuge*. And for Inazu, the quintessential example of a dissenting assembly is the Christian Legal Society, denied the right to define its own membership in *CLS*. But why is CLS a "dissenting" group? Certainly, in the doubly liberal environment of a law school located in San Francisco, a conservative Christian group opposed to homosexuality qualifies as "dissenting," in the sense of being out of the mainstream politically and socially. But similar groups, located in many, many social contexts in many, many parts of this country would fit comfortably in the mainstream, and it is LGBT groups that would be "dissenting." In those contexts, is defending the right of groups such as the Boy Scouts, unless they are "monopolistic," to exclude homosexuals truly advancing "dissent"? Similarly, consider the United States Jaycees. The Jaycees are a highly regarded, national group with a great deal of prestige. Is such a group, or the Rotary International (a defendant in similar litigation), truly a "dissenting" group, requiring judicial protection of their right to exclude women against a hostile, tyrannical majority? There is something distinctly odd about this picture.

This raises an even more basic question: *why* should we favor group autonomy even at the expense of other social values such as equality and social peace? That we have historically done so is a good starting point, but it does not provide a fully satisfactory answer, especially in light of the fact that we as a society have quite consciously and properly distanced ourselves from many of the exclusionary practices of the past. Inazu argues that the reason is to ensure that our society retains a true pluralism, rooted in differences in fundamental values.[119] Moreover, despite the capaciousness of Inazu's theory and his commitment to group autonomy (which I do not for a moment question), the actual instances of conflict that he discusses in recent years overwhelmingly involve *religious* groups and values. I close my discussion by briefly considering why that might be so, and what a particularized focus on religious assemblies teaches us about assembly, association, and the role of the state. Lurking in the background here are two provisions of the First Amendment, the Establishment and Free Exercise Clauses, which get very little notice in *Liberty's Refuge*, but which I suggest may deserve more attention.

III. The Elephant in the Room: Religious Assemblies and the Religion Clauses

At the heart of *Liberty's Refuge* is a normative claim that for reasons both historical and theoretical it is important to grant constitutional

119. *See id.* at 11 (arguing against the political theory of consensus liberalism underwriting weakened group autonomy and resulting in the loss of meaningful pluralism).

protection to the internal autonomy of dissenting, nonconformist groups. Inazu is also clear about the sorts of groups that he has uppermost on his mind. One such group, as noted earlier, is the Christian Legal Society. Another group Inazu mentions is the Chi Iota Colony of the Alpha Epsilon Pi (AEPi) fraternity.[120] AEPi is a national social fraternity for Jewish college men, and the Chi Iota Colony was seeking to become an AEPi chapter at the College of Staten Island.[121] The college denied Chi Iota's request to be granted official recognition (and access to funds) because Chi Iota refused to admit women.[122] Chi Iota sued, but was unsuccessful because both its intimate and expressive association claims were weak.[123] Finally, Inazu clearly believes that the Supreme Court was correct in *Boy Scouts v. Dale* in upholding the Boy Scouts' right to exclude a gay assistant scoutmaster.

What do these groups have in common? On its face, it is the desire to exclude others. But that cannot be the end of it. Inazu, for example, seems quite sympathetic with the Court's decision in *Runyon* rejecting a private school's right to racially discriminate in admitting students.[124] Instead, CLS, the Boy Scouts, and, to a lesser degree, Chi Iota appear sympathetic because of the ideological, and in particular *religious* and *moral*, underpinnings of their actions. CLS is of course an explicitly religious organization, and the Boy Scouts themselves, even though not sectarian, clearly root their beliefs and actions in religious values—which is why the Scouts exclude not only homosexuals, but also atheists.[125] Chi Iota is the least obviously religious of these groups, but even its Jewish identity has a clear religious element—though Inazu tellingly suggests that Chi Iota's claim may well have been hurt by the fact that "[a]lthough [Chi Iota's] Jewish roots suggest religious freedom interests, most of its members were nonpracticing Jews."[126] The plain implication is that an explicitly religious group's claims would (or should) be even more persuasive than Chi Iota's.

Nor is Inazu's concern with religiously oriented groups idiosyncratic. There was a time, in the McCarthy and Civil Rights eras, when associational rights were claimed primarily by nonconformist political groups such as the Communist Party, the NAACP, and other civil rights organizations. Later, during the 1970s and 1980s, associational issues arose in the context of eliminating race and gender segregation. In today's world, however, the battles over association, assembly, and group autonomy focus primarily on

120. *Id.* at 144–45.

121. Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y., 502 F.3d 136, 142 (2d Cir. 2007).

122. *Id.*

123. *Id.* at 149 & n.2.

124. INAZU, *supra* note 7, at 123.

125. *See* Barnes-Wallace v. City of San Diego, 530 F.3d 776, 780 (9th Cir. 2008) (explaining that the Boy Scouts "maintain that agnosticism, atheism, and homosexuality are inconsistent with their goals and with the obligations of their members").

126. INAZU, *supra* note 7, at 145.

religion. One line of cases pits religiously oriented groups seeking to exclude others on the basis of either religion or sexual orientation against state nondiscrimination policies.[127] In another line of cases, disputes have arisen over attempts by religious groups to meet—i.e., to assemble—on public property[128] or to obtain access to public benefits.[129]

---

127. *See, e.g.*, *CLS*, 130 S. Ct. 2971, 2978 (2010) (pitting a law school chapter of the Christian Legal Society with membership requiring a statement of faith against the school's all-comers nondiscrimination policy); Boy Scouts of Am. v. Dale, 530 U.S. 640, 644 (2000) (placing the Boy Scouts of America, which maintained a policy against homosexuality, agnosticism, and atheism, against New Jersey's public accommodations law); Truth v. Kent Sch. Dist., 542 F.3d 634, 637–41 (9th Cir. 2008) (pitting a school Bible Club seeking to exclude nonbelievers against school district's nondiscrimination policy), *overruled on other grounds by* L.A. Cnty. v. Humphries, 131 S. Ct. 447 (2010); Christian Legal Soc'y v. Walker, 453 F.3d 853, 857–58 (7th Cir. 2006) (pitting a Christian student organization seeking to exclude homosexuals against a university nondiscrimination policy); Hsu *ex rel.* Hsu v. Roslyn Union Free Sch. Dist. No. 3, 85 F.3d 839, 847–48 (2d Cir. 1996) (placing a high school Bible club seeking to exclude nonbelievers against the school's generally applicable nondiscrimination policy).

128. *See, e.g.*, Good News Club v. Milford Cent. Sch., 533 U.S. 98, 102, 107 (2001) (finding a school's exclusion of a Christian children's club from meeting after hours at school, based on its religious nature, to be unconstitutional viewpoint discrimination); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 393–95 (1993) (finding a school district violated the First Amendment by denying a church access to school premises to exhibit film series on family and child-rearing issues); Widmar v. Vincent, 454 U.S. 263, 264–67 (1981) (finding a public university could not prohibit a registered religious group from use of university facilities which were generally available for use by other registered groups); Bronx Household of Faith v. Bd. of Educ. of N.Y., 650 F.3d 30, 32–33 (2d Cir. 2011) (reversing an injunction against the city board of education and school district, which had excluded a church from religious worship practices on school grounds); Faith Ctr. Church Evangelistic Ministries v. Glover, 480 F.3d 891, 902, 918–19 (9th Cir. 2007) (reversing a preliminary injunction against a county excluding a religious nonprofit organization from holding worship services in the public library meeting room); Donovan *ex rel.* Donovan v. Punxsutawney Area Sch. Bd., 336 F.3d 211, 214 (3d Cir. 2003) (finding a public high school's denial of permission for a religious club to meet on school premises during student activity period constituted viewpoint discrimination in violation of First Amendment); Fairfax Covenant Church v. Fairfax Cnty. Sch. Bd., 17 F.3d 703, 704 (4th Cir. 1994) (finding a regulation allowing a school to charge churches an escalating rate for use of school facilities discriminated against religious speech in violation of the First Amendment); Grace Bible Fellowship v. Me. Sch. Admin. Dist. No. 5, 941 F.2d 45, 47–48 (1st Cir. 1991) (holding that by allowing other organizations to use facilities for expressive activities, the school district created a public forum from which it could not bar a religious organization); Gregoire v. Centennial Sch. Dist., 907 F.2d 1366, 1369 (3d Cir. 1990) (allowing a religious group to conduct activities, not limited to those of a secular nature, in a high school auditorium).

129. *See, e.g.*, Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 822–23, 845–46 (1995) (holding that a state university's refusal to fund the printing of religious student publications while funding nonreligious publications violated the right to free speech); Everson v. Bd. of Educ., 330 U.S. 1, 17 (1947) (holding that taxpayer-funded reimbursements for parochial school students' bus fares do not violate the First Amendment); Badger Catholic, Inc. v. Walsh, 620 F.3d 775, 776–78 (7th Cir. 2010) (holding that a public university's funding of student-group programs where prayer sessions occur does not violate the Establishment Clause); Rocky Mountain Christian Church v. Bd. of Cnty. Comm'rs, 612 F. Supp. 2d 1163, 1180 (D. Colo. 2009) (holding that the equal-terms provision of the Religious Land Use and Institutionalized Persons Act, as applied, does not violate the Establishment Clause); Every Nation Campus Ministries at San Diego State Univ. v. Achtenberg, 597 F. Supp. 2d 1075, 1078–79 (S.D. Cal. 2009) (holding that a public university's refusal to formally recognize Christian student groups that refuse to comply with the nondiscrimination policy does not violate the groups' First Amendment rights); Roman Catholic Found., UW-Madison, Inc. v. Regents of the Univ. of Wis. Sys., 578 F. Supp. 2d 1121, 1133 (W.D.

And even outside of the courtroom, the most prominent modern examples of groups claiming autonomy and the right to choose their membership selectively also tend to involve religious groups. It is, for example, inconceivable (and of course illegal) for any significant commercial entity to exclude women from leadership positions, and even most noncommercial entities appear to have admitted women since the battles of the 1980s.[130] Yet it remains true that major religious sects, including the Catholic Church,[131] Orthodox Jewish congregations,[132] and the Mormon Church,[133] continue to exclude women from the clergy. In short, in the modern world, the epitome of the "dissenting, political" assembly that Inazu seeks to defend is the religious assembly.

It is also worth noting that the linkage between assembly—or for that matter speech—rights and religion is not merely a modern one. In *Liberty's Refuge*, Inazu himself points to the importance of the tradition of religious nonconformity associated with William Penn and Roger Williams in helping to develop American ideas of free expression and assembly.[134] He also notes that during the actual debates in the First Congress over the Assembly Clause, a specific reference was made to the English prosecution of William Penn for holding a *religious* assembly of Quakers which did not comply with the strictures of the established Church of England.[135] Elsewhere, Inazu has more explicitly explained and explored the religious roots of the very term "assembly," noting that going back to the early Christian era the term (and its Greek predecessor *ekklesia*) always had political *and* religious connotations.[136] Similarly, Akhil Amar has noted that during the antebellum era among abolitionists "the core right of assembly at issue seems to be the right of blacks 'to assemble peaceably on the Sabbath for the worship of [the]

Wis. 2008) (holding that the Establishment Clause does not compel a public university to categorically refuse funding for a student group's "worship, proselytizing or sectarian religious instruction").

130. Including in 1991 the epitome of the "Old Boys Club," the Skull and Bones secret society at Yale, though not without a fight. Dennis Hevesi, *Shh! Yale's Skull and Bones Admits Women*, N.Y. TIMES, Oct. 26, 1991, at 21; *see also Yale Alumni Block Women in Secret Club*, N.Y. TIMES, Sept. 6, 1991, at B2 (reproducing an AP report that the Skull and Bones society "obtained a court order temporarily blocking the all-male club from admitting women").

131. Ryan W. Jaziri, *Fixing a Crack in the Wall of Separation: Why the Religion Clauses Preclude Adjudication of Sexual Harassment Claims Brought by Ministers*, 45 NEW ENG. L. REV. 719, 721 n.17 (2011) (citing MARCI A. HAMILTON, GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW 190 (2005)).

132. Ilana S. Cristofar, *Blood, Water and the Impure Woman: Can Jewish Women Reconcile Between Ancient Law and Modern Feminism?*, 10 S. CAL. REV. L. & WOMEN'S STUD. 451, 462 (2001).

133. Elisabeth S. Wendorff, *Employment Discrimination and Clergywomen: Where the Law Has Feared to Tread*, 3 S. CAL. REV. L. & WOMEN'S STUD. 135, 140 (1993).

134. INAZU, *supra* note 7, at 12–13 & 13 n.28.

135. *Id.* at 24–25.

136. John D. Inazu, *Between Liberalism and Theocracy*, 33 CAMPBELL L. REV. 591, 601 & n.44 (2011).

Creator.'"[137] There is thus good precedent for the modern centrality of religious groups and religious speech in First Amendment disputes.

When one recognizes the central role that religious groups play in modern association/assembly disputes, however, a conundrum arises: why do these cases typically turn on the Speech and Assembly Clauses of the First Amendment, and the related right of association, rather than on the First Amendment provisions which expressly address religion—the Establishment and Free Exercise Clauses? One might think that these provisions, whose very purpose is to protect religious autonomy, would provide greater protection to religious groups than the generic rights of assembly or association. But that is not the case. The Christian Legal Society did in fact join a Free Exercise claim to its primary speech and association claims in the *CLS* litigation, but the Court dismissed the argument in a casual footnote, citing its decision in *Employment Division v. Smith*[138] for the proposition that because Hastings' "all-comers" policy was a generally applicable rule that did not target religion, it raised no free exercise issues.[139] Nor is the *CLS* decision an aberration in this regard. Lower courts have also relied upon *Smith* to conclude that the Free Exercise Clause grants less protection to the associational rights of religious groups than does expressive association.[140]

Decisions such as *CLS* would seem to suggest that the Religion Clauses play second fiddle to speech, assembly, and association claims by religious groups. The truth, however, is rather more muddled, as demonstrated by the Supreme Court's recent, important decision in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*. The issue in *Hosanna-Tabor* was whether the First Amendment created a "ministerial exception" to antidiscrimination statutes, which shielded religious institutions from antidiscrimination claims brought by ministers and other employees (the litigation arose when a teacher at a religious school brought a lawsuit under the Americans with Disabilities Act).[141] The Court held that the Religion Clauses required such an exemption.[142] The government and the plaintiff argued to the Court that instead of turning to the Religion Clauses, the Court should look to the right of association as the source of any such exemption, but the Court rejected this argument as "untenable," and indeed,

---

137. AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 245 (1998) (quoting JACOBUS TENBROEK, EQUAL UNDER LAW 124–25 (1965)).

138. Emp't Div. v. Smith, 494 U.S. 872 (1990).

139. *CLS*, 130 S. Ct. 2971, 2995 n.27 (2010) (citing *Smith*, 494 U.S. at 878–82).

140. Salvation Army v. Dep't of Cmty. Affairs of N.J., 919 F.2d 183, 194–96 (3d Cir. 1990); Wiley Mission v. N.J. Dep't of Cmty. Affairs, Civil No. 10-3024, 2011 WL 3841437, at *13 (D.N.J. Aug. 25, 2011); Jews for Jesus, Inc. v. Port of Portland, Or., No. CV04695HU, 2005 WL 1109698, at *15 (D. Or. May 5, 2005).

141. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 700–01, 705–06 (2012).

142. *Id.* at 705–06.

"remarkable."[143] The difficulty with this argument, the Court said, was that it would grant religious organizations no more autonomy than secular associations, and that was inconsistent with the fact that the First Amendment, through the Religion Clauses, "gives special solicitude to the rights of religious organizations."[144] In other words, the *Hosanna-Tabor* Court read the Religion Clauses as granting religious associations *greater* protection than the general association right. And again, there are lower court cases consistent with this view.[145]

Consider the *CLS* and *Hosanna-Tabor* cases, which were decided less than two years apart. Both involved attempts by religious groups to exclude individuals—in *CLS* from membership and in *Hossana-Tabor* from employment. In both instances, the exclusion was religiously motivated. Yet *CLS* was litigated primarily, and unsuccessfully, as a freedom of association/free speech case, while *Hosanna-Tabor* was litigated successfully as a religion case. *Hosanna-Tabor* was a unanimous decision, and while the Court divided sharply in *CLS*, not even the dissenting justices invoked the Religion Clauses as a basis for protecting CLS's autonomy. This is not to say that the results in the two cases are necessarily inconsistent. *CLS* was different from *Hosanna-Tabor* in that it did not involve a flat attempt by the State to regulate a religious entity. It involved only denial of official recognition and benefits (including funding and use of government property), and everyone seemed to acknowledge that the government could not have simply required CLS to admit members it wished to exclude. But the question does remain why in one case the Religion Clauses provided powerful protection for religious autonomy, while in the other they were brushed off as irrelevant. And more generally, the question raised by these cases is whether the religious nature of an association matters in determining the level of constitutional protection to which it is entitled.

It should be noted, moreover, that the uncertain lines between the Religion Clauses and the rest of the First Amendment are not limited to the associational context. In a separate line of modern cases, the Supreme Court has analyzed exclusion of religious groups from public property or public benefits as a species of viewpoint discrimination, violating the Free Speech Clause.[146] As my colleagues Vik Amar and Alan Brownstein have pointed out, however, this move and the concomitant failure of the Court to analyze these cases under the Religion Clauses is highly problematic and raises nontrivial questions about the general viability of laws banning

143. *Id.* at 706.

144. *Id.*

145. *See, e.g.*, Irshad Learning Ctr. v. Cnty. of DuPage, 804 F. Supp. 2d 697, 717–18 (N.D. Ill. 2011) (holding that the allegations adequately alleged that the county violated free exercise rights under the First Amendment and the Illinois Constitution).

146. Good News Club v. Milford Cent. Sch., 533 U.S. 98, 107–12 (2001); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 828–46 (1995); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 392–96 (1993).

discrimination on the basis of religion.[147] The truth is that while the Court pays occasional attention to the relationship between speech and religion, at a systematic level it seems blissfully unaware of the complexities here.

A full answer to these difficult questions is far beyond the scope of this Review, even limited to the problem of association. Any exploration, however, must begin with the question that, as I noted earlier, is largely elided in *Liberty's Refuge*: Why the First Amendment protects group autonomy, and for that matter, religious freedom. Part of the answer, Inazu suggests, lies in the need to protect dissent, including moral and religious dissent. I think, however, that this can only be part of the answer. Another part of the answer must lie in distrust of the state. The Constitution is, after all, at heart a structural document, and the limitations it places on state power, including those in the Bill of Rights, reflect structural concerns about misuse of that power. And those concerns are in turn rooted in the need to ensure that the sovereign people remain in charge of their government.[148] In other words, dissent is valuable precisely because it is an essential component of popular sovereignty and democratic self-governance. The scope of constitutional protection for assemblies and associations turns not on general principles regarding the proper role of private groups in our society, but rather on the appropriate relationship between such groups and the state.

Here, I think, is where the limits of freedom of association, or as Inazu would have it the Assembly Clause, become apparent. If the issue we are exploring is the proper relationship between religious groups and the state, those bodies of law are unlikely to provide useful answers because they do not distinguish between religious and other groups. But religion *is* different, a point that the Constitution recognizes in the Religion Clauses, especially the Establishment Clause. Exactly how religious assemblies differ from secular ones, however, is far from easy to pin down. Perhaps *Hosanna-Tabor* is correct in suggesting that government interference in the internal structure of religious groups is more constitutionally problematic than interference in secular groups. But on the flip side, it is also true that governmental benefits flowing to religious groups raise difficult constitutional questions that benefits to secular groups do not. This is not to say that the inclusion of a group like CLS in a general, neutral scheme of governmental benefits such as the Hastings Registered Student Organization program would violate the Establishment Clause—under current doctrine it

147. Alan Brownstein & Vikram Amar, *Reviewing Associational Freedom Claims in a Limited Public Forum: An Extension of the Distinction Between Debate-Dampening and Debate-Distorting State Action*, 38 HASTINGS CONST. L.Q. 505, 537–39 (2011).

148. For more detailed examinations of these themes, see generally AMAR, *supra* note 137 (chronicling the changing interpretation of the Bill of Rights throughout history) and ASHUTOSH BHAGWAT, THE MYTH OF RIGHTS: THE PURPOSES AND LIMITS OF CONSTITUTIONAL RIGHTS (2010) (arguing that the primary purpose of constitutional rights is to restrict governmental power, thereby maintaining the proper structural balance between individuals and the state).

almost certainly would not.[149] But such benefits can raise difficult problems, especially if they come with conditions. Consider the fact that governments regularly condition benefits or funds on recipients agreeing to restrict their conduct in particular ways, including commonly surrendering the right to discriminate.[150] No one seems to seriously believe that such conditions generally raise constitutional concerns. But what about when the recipient is a religious organization? I would posit that at a minimum we should be concerned about such state intrusion into the inner workings of religious groups, even if we would not be concerned about secular groups, and that the source of such concerns is not the Assembly Clause of the First Amendment but the Religion Clauses.

149. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 652–53 (2002) (holding that a program, which provides tuition aid for students to attend participating public or private schools of their choosing, does not offend the Establishment Clause, even though governmental aid reaches some religious institutions indirectly through the program); *Rosenberger*, 515 U.S. at 845–46 (holding that a public university does not violate the Establishment Clause when it provides funding for a wide range of student organizations, even if some are religious organizations).

150. *See, e.g.*, Education Amendments of 1972 §§ 901, 904, 20 U.S.C. §§ 1681, 1684 (2006) (barring discrimination based on sex or blindness); Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–634 (2006) (barring age-based discrimination); Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794 (2006) (barring disability-based discrimination); Civil Rights Act of 1964 § 601, 42 U.S.C. § 2000d (2006) (barring discrimination based on "race, color, or national origin"); Americans with Disabilities Act of 1990 § 102, 42 U.S.C. § 12112 (2006) (barring disability-based discrimination in employment).