

# Recovering the Assembly Clause

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 Timothy Zick\*

## Introduction

I recall driving to work one day several years ago and listening to a radio program on which listeners were invited to call in and test their basic knowledge of the First Amendment. The challenge was to name four of the freedoms listed in the First Amendment, or alternatively to identify the last names of four characters from the animated television show *The Simpsons*. It was a small sample, to be sure, but to both my amusement (as a commuter) and horror (as someone who teaches and writes about the First Amendment) every caller was far more successful naming *Simpsons* characters than identifying First Amendment freedoms.

As I recall, not a single caller mentioned the right “peaceably to assemble.”<sup>1</sup> After reading John Inazu’s book, *Liberty’s Refuge: The Forgotten Freedom of Assembly*, the reasons for this collective memory loss are clearer. As Inazu explains, the freedom of assembly has languished in exile for many decades. Inazu takes the reader on the Assembly Clause’s fateful journey, from its prominence in the early republic,<sup>2</sup> to its 1939 New York World’s Fair glory,<sup>3</sup> to its eventual desuetude.<sup>4</sup> He expertly recounts how historical, political, intellectual, and jurisprudential forces transformed a seemingly clear constitutional guarantee into an also-mentioned right that occasionally plays second fiddle to freedom of speech. Inazu complains that the once-venerable “freedom of assembly” has been eclipsed and replaced by a judicially constructed, and doctrinally constricted, freedom of “expressive association.”<sup>5</sup> As Inazu notes, the Supreme Court has not explicitly based a decision on the Assembly Clause in three decades.<sup>6</sup>

In *Liberty’s Refuge*, Inazu ably comes to assembly’s defense. His account sheds new light on the history and constitutional metamorphosis of a

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1. U.S. CONST. amend. I.
2. JOHN D. INAZU, *LIBERTY’S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY* 29–34 (2012).
3. *Id.* at 55–57.
4. *Id.* at 61–62.
5. *Id.* at 2–3.
6. *Id.* at 62.

critical but now largely forgotten First Amendment freedom. That alone makes the book well worth reading. However, there is much more in the book than exegesis and excavation. Inazu seeks not only to rediscover assembly, in the sense of explaining what happened to it, but also to recover it in a manner that gives it contemporary relevance and force. He argues that a robust freedom of assembly ought to protect the formation, composition, and expression of groups.<sup>7</sup> Inazu makes some provocative claims, in the best sense of that term. He pushes back against prevailing equality norms and principles that tend to cast groups like the Boy Scouts of America and the Christian Legal Society as illiberal villains.<sup>8</sup> He forces readers to grapple with some uncomfortable questions regarding the limits of group autonomy in a liberal democracy. He asks whether a truly robust freedom of peaceable assembly ought to shelter even some racially exclusionary groups.<sup>9</sup>

I share Inazu's desire to return the freedom of peaceable assembly to something like its former glory. In *Liberty's Refuge*, however, Inazu's focus on the rise of expressive association and its relation to a few notable groups dominates the analysis to such an extent that the full import of a rediscovered freedom of assembly may remain somewhat obscured. My principal suggestion is that we try to recover assembly in the fullest and most robust possible sense. To that end, although I will make some critical observations, my Review will also clarify and amplify several of Inazu's central claims. If we can think of the Assembly Clause as an artifact or relic, Inazu has unearthed and exposed it to the light of day. While praising this effort, I want to suggest how we might pull the Assembly Clause fully from the ground.

Part I describes Inazu's account of the freedom of assembly and his central claims. In Part II, I address some concerns regarding interpretive methodology and the substantive implications of the book's principal focus on illiberal and potentially dangerous assemblies. Part III focuses on some of the positive, personal, and public aspects of freedom of assembly, which receive somewhat limited attention in the book. Part IV concludes with a discussion of the implications of a fully recovered right of assembly for traditional forms of public protest, demonstration, and dissent.

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7. *See id.* at 2 (“The central argument of this book is that something important is lost when we fail to grasp the connection between a group’s formation, composition, and existence and its expression.”).

8. *See id.* at 168–72 (arguing that the protections of assembly should apply to groups like the Boy Scouts and the Christian Legal Society).

9. *See id.* at 13 (noting that one of the most difficult issues in balancing the right of assembly with antidiscrimination laws “is whether the right of assembly tolerates racial discrimination by peaceable, noncommercial groups”).

## I. Recovery and Refuge

In *Liberty's Refuge*, Inazu presents compelling historical, intellectual, and jurisprudential narratives in order to further two primary goals. First, he seeks to recover the right to peaceable assembly by tracing its roots and explaining its eventual transformation into a right of expressive association. Second, Inazu articulates a theory of freedom of assembly under which the First Amendment would provide greater refuge to various aspects of group autonomy and liberty.

Inazu begins his examination with what, in retrospect, was clearly assembly's halcyon period. As Inazu explains in Chapter 2, in the early republic citizens routinely invoked and exercised the freedom to peaceably assemble by joining together in societies, civic organizations, public marches, religious rituals, and community festivals.<sup>10</sup> In a fascinating historical account, Inazu demonstrates that the freedom of peaceable assembly has deep social, political, and constitutional roots. He describes how society members, abolitionists, women's suffrage proponents, labor agitators, and civil rights activists all invoked the freedom to peaceably assemble.<sup>11</sup> Inazu effectively narrates assembly's glory days as one of the "Four Freedoms" celebrated at the 1939 New York World's Fair and as a constitutional freedom touted by public figures and the general public.<sup>12</sup> Chapter 2 ends, rather abruptly, with a very brief discussion of what Inazu refers to as the "demise of assembly."<sup>13</sup> As Inazu notes, "by the end of the 1960s, the right of assembly in law and politics was largely confined to protests and demonstrations."<sup>14</sup> By the early 1980s, even this aspect of the right of assembly had been subsumed by First Amendment free speech doctrine.<sup>15</sup>

As Inazu observes, the merger of freedom of assembly and freedom of speech tells only part of the story. Something more momentous and transformative occurred with regard to the Assembly Clause. In Chapters 3 and 4, Inazu demonstrates that during what he calls the "National Security" and "Equality" eras the freedom of assembly was transformed into a right of association.<sup>16</sup> These chapters represent the heart of Inazu's volume and offer its most intriguing insights.

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10. *Id.* at 29–30.

11. *See id.* at 34–44 (describing the abolitionists' use of assemblies and noting that during the Progressive era, the women's movement, the labor movement, and African-Americans all invoked the freedom of assembly).

12. *Id.* at 55–57.

13. *Id.* at 61–62.

14. *Id.* at 61.

15. *See id.* at 62 ("[E]ven cases involving protests or demonstrations could now be resolved without reference to assembly.").

16. *Id.* chs. 3, 4.

Most scholarly attention has focused on the path of freedom of speech during these critical eras. As Inazu explains, however, during these periods the right of individuals to assemble in pursuit of common causes was directly challenged by government and ultimately legitimized in the courts.<sup>17</sup> Inazu carefully examines the political, jurisprudential, and theoretical factors that led to the transformation and eventual interment of assembly. In Chapter 3, he points to the intersection of anticommunist sentiment and the civil rights movement, doctrinal disagreements among Supreme Court Justices, and the influence of pluralist political theorists like Robert Dahl.<sup>18</sup> In Chapter 4, he highlights civil rights activists' challenges to segregationists' claims for group autonomy, the development of the constitutional right to privacy, and the rise of Rawlsian liberalism.<sup>19</sup>

Inazu's central claim is that the combination of these influences produced a weak associative right based upon principles of liberal congruence and consensus. It is difficult to gauge the degree of influence that political events and philosophers have on the process of constitutional interpretation. The right of expressive association appears to have been constructed through a type of common law constitutional interpretation.<sup>20</sup> Having first (wrongly) tethered the right of assembly to the right to petition and later ventured into the realm of constitutional privacy, the Supreme Court eventually arrived at the nontextual and ancillary (to speech) right of association. Nonetheless, in terms of the substance of expressive association Inazu's political and theoretical narratives support his conclusion that the right the Court ultimately recognized "depoliticizes and disembodies expression in order to neutralize dissent."<sup>21</sup> Inazu characterizes the association right as an "enfeebled" version of assembly that restricts group autonomy, suppresses dissent, and pushes groups toward conformity and congruence.<sup>22</sup> In sum, he argues that the "forgetting of assembly and the embrace of association . . . marked the loss of meaningful protections for the dissenting, political, and expressive group."<sup>23</sup>

As part of his restorative project, in Chapter 5 Inazu articulates a "political theory of assembly."<sup>24</sup> He finds intellectual support for this theory in the work of Sheldon Wolin. Wolin criticized Rawls and other consensus

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17. See, e.g., *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 466 (1958) (protecting the NAACP from state scrutiny of its membership lists).

18. INAZU, *supra* note 2, at ch. 3.

19. *Id.* at ch. 4.

20. See generally DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010) (arguing that many areas of constitutional doctrine, including freedom of speech, developed according to common law methods and principles).

21. INAZU, *supra* note 2, at 155.

22. *Id.* at 4.

23. *Id.*

24. See *id.* at 153–57 (citing SHELDON S. WOLIN, *POLITICS AND VISION: CONTINUITY AND INNOVATION IN WESTERN POLITICAL THOUGHT* (2004)) (discussing Sheldon Wolin's scholarship).

theorists for demonizing dissent and disagreement and for falsely equating conformity and politeness with civic reasonableness.<sup>25</sup> Wolin argued that dissent, social conflict, and nonconformity are necessary *destabilizing* components of a healthy democracy.<sup>26</sup> With Wolin and against pluralist and liberal theorists, Inazu argues for a conception of assembly “that resists the state’s push for consensus and control.”<sup>27</sup> Inazu claims that robust protection for group autonomy allows individuals to create distance between individuals and the state. Rather than having democracy’s substance and limits dictated by a monist state, he argues that assembly empowers groups to experiment with various democratic forms and practices.<sup>28</sup> Inazu’s political defense of group autonomy offers a strong counternarrative to that relied upon by antidiscrimination proponents (most notably Andrew Koppelman).<sup>29</sup>

Although he anticipates that a variety of civic, religious, and other groups would benefit from a recovered freedom of assembly, Inazu is particularly concerned with extending protection to groups that act or wish to act contrary to what is commonly perceived to be the “common good.”<sup>30</sup> As Inazu envisions it, a robust freedom of assembly would provide “strong protections for the formation, composition, expression, and gathering of groups, especially those groups that dissent from majoritarian standards.”<sup>31</sup>

Although he discusses other aspects of group autonomy, Inazu focuses primarily on protection for group membership decisions. Thus, according to Inazu’s account, the biggest losers in the gradual disappearance and transformation of assembly into expressive association are groups that resist or fail to comply with pluralist and liberal norms relating to inclusion and equality.<sup>32</sup> Throughout the book, Inazu focuses primarily on groups like the Jaycees, the Boy Scouts (who have recently affirmed their policy against openly gay Scouts or adult Scout Masters),<sup>33</sup> the Christian Legal Society, and all-male fraternities.<sup>34</sup> Invoking equality principles and antidiscrimination laws, plaintiffs and governments pressed such organizations to open their doors to all comers.<sup>35</sup> Courts have mainly, although not uniformly, held that

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25. *See id.* at 154–56 (citing JOHN RAWLS, *A THEORY OF JUSTICE* (1971) and WOLIN, *supra* note 24) (discussing theories of Dahl, Rawls, and Wolin).

26. *Id.* at 156.

27. *Id.* at 162.

28. *Id.* at 5–6.

29. *Id.* at 162–66.

30. *Id.* at 152–53.

31. *Id.*

32. *See id.* at 171 (arguing that under one popular theory of expressive association, “every group that challenged antidiscrimination law” would be subjugated to the state if the state determined that “discrimination is central to the group’s core expression”).

33. Erik Eckholm, *Boy Scouts to Continue Excluding Gay People*, N.Y. TIMES, July 17, 2012, [http://www.nytimes.com/2012/07/18/us/boy-scouts-reaffirm-ban-on-gay-members.html?\\_r=0](http://www.nytimes.com/2012/07/18/us/boy-scouts-reaffirm-ban-on-gay-members.html?_r=0).

34. INAZU, *supra* note 2, at 132–46.

35. *See, e.g.*, *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 645 (2000) (“The complaint alleged that the Boy Scouts had violated New Jersey’s public accommodations statute and its common law

antidiscrimination principles trump group autonomy.<sup>36</sup> In contrast, Inazu envisions a “meaningful pluralism” that countenances “all-male fraternities, all-male Jaycees, and all-Christian student groups,” as well as “all-female sororities, all-female health clubs, and all-gay social clubs.”<sup>37</sup> Perhaps most controversially, Inazu’s conception of group autonomy might be broad enough to grant some First Amendment protection to the exclusionary policies of some private groups that exclude individuals on the basis of race.<sup>38</sup>

Inazu does not address in detail how courts would actually enforce a recovered right of assembly. He defines it as a “presumptive right of individuals to form and participate in peaceable, noncommercial groups.”<sup>39</sup> Inazu briefly considers the textual limitation that is suggested by the adjective “peaceably.” He suggests that this may exclude such things as “[c]riminal conspiracies, violent uprisings, and even most forms of civil disobedience.”<sup>40</sup> Inazu also posits a nontextual limitation, namely that *commercial* groups are not entitled to protection under the Assembly Clause.<sup>41</sup> For groups that are presumptively protected by the Assembly Clause, Inazu proposes that courts apply a “contextual” analysis that considers “how power operates on the ground.”<sup>42</sup> Where private groups overreach, as for example when they exercise monopoly power with respect to certain goods or services, the state may be able to rebut the presumptive protection afforded under the Assembly Clause.<sup>43</sup> However, in most cases, Inazu expects that the presumption will prevail against governmental interference with groups’ autonomous decision making.<sup>44</sup>

*Liberty’s Refuge* is an important contribution to the First Amendment literature. It provides a thick, careful, and intellectually rigorous account of a freedom that has languished for too long and which judges, lawyers,

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by revoking [the Plaintiff’s] membership based solely on his sexual orientation.”); *Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 541–42 (1987) (seeking an injunction on the grounds that an international Rotary Club’s revocation of one of its members’ local charters, because the local club had admitted women members, violated the Unruh Civil Rights Act).

36. *See, e.g., Rotary Int’l*, 481 U.S. at 547 (holding that “application of the Unruh Act to local Rotary Clubs does not interfere unduly with the members’ freedom of private association”). *But see, e.g., Dale*, 530 U.S. at 659 (holding that the First Amendment prohibits the state from requiring that the respondent be readmitted to the Boy Scouts through the application of its public accommodations law, which does not justify such a severe intrusion on the Boy Scouts’ right to freedom of expressive association).

37. INAZU, *supra* note 2, at 11.

38. *Id.* at 14.

39. *Id.* at 166.

40. *Id.* at 167.

41. *Id.* at 167–68. For a critique of this specific limitation, see generally Robert K. Vischer, *How Necessary Is the Right of Assembly?*, 89 WASH. U. L. REV. 1403 (2012).

42. INAZU, *supra* note 2, at 172.

43. *Id.*

44. *See id.* at 169 (arguing that “in almost all cases, the protections of assembly should prevail”).

scholars, and citizens have paid far too little attention to over the past several decades. Inazu's book also tells a cautionary tale about constitutional meaning and textual transformation, and demonstrates the importance of giving full effect to the entirety of the First Amendment's text. *Liberty's Refuge* does not purport to provide a final answer or set of answers regarding the scope and limits of the freedom of assembly. Having recovered the Assembly Clause, Inazu merely points us in the direction of its future enforcement.

## II. Interpreting Assembly

The question of interpretive methodology is an important one, particularly as it relates to a constitutional provision that has been in exile for decades. Having mistakenly abandoned assembly, the Supreme Court could conceivably resurrect it by providing a new substantive account. The recent treatment of the Second Amendment is instructive in this regard. Inazu's account raises several interpretive concerns. What sources ought to be consulted in re-interpreting the right of peaceable assembly? What justifications are there for adopting a distinctly political theory of assembly that focuses primarily on protecting the autonomy of dissenting groups? Should the interpretive model be atomistic, in the sense that it focuses on a single First Amendment provision, or holistic, in the sense that it synthesizes assembly and other rights? Finally, does Inazu's primary focus on dissent and nonconformance risk offering too much protection for illiberal and violent groups? Although these are serious concerns, I think Inazu has offered some convincing responses. I want to amplify a bit on those responses, and to suggest some additional support for them.

### A. *Eclectic and Atomistic Methodologies*

The extent to which the Assembly Clause protects the sort of group autonomy Inazu identifies is not clear from its text. Perhaps assembly is a temporal right—meaning that it applies only to *temporary* groupings or affiliations, which must remain peaceable for their duration. If so, longstanding organizations like the Boy Scouts would find no refuge under the Assembly Clause. Further, we could interpret the requirement that assemblies be “peaceable” as a requirement that they respect equality rights. Under this interpretation, peaceable activity is activity that conforms to certain consensus norms regarding public order and social tranquility. Or, in terms of external limits, one might argue that the Fourteenth Amendment's Equal Protection Clause was intended to modify or limit the First Amendment's protection for freedom of assembly.

As noted earlier, Inazu claims that the Assembly Clause ought generally to protect groups against imposition of consensus norms.<sup>45</sup> He argues that the substantive meaning of the Assembly Clause can be derived in part from political and philosophical principles of dissent and nonconformity. Is this theoretical account attractive because it is consistent with the original understanding? Because it comports with a structural interpretation of the Bill of Rights? Or is Inazu's interpretation simply the best answer given all of the available historical and other evidence we have regarding freedom of assembly?

Inazu acknowledges the importance of interpretive methodology. His approach is refreshingly transparent. Inazu states that he is using an eclectic interpretive model, which is to say that no particular methodology (i.e., originalism, textualism, living constitutionalism) propels his interpretation of the Assembly Clause.<sup>46</sup> Thus, Inazu engages in a textualist approach when he renders a close reading of the text and (correctly, in my view) decouples freedom of assembly from the right to petition government for a redress of grievances.<sup>47</sup> He makes copious use of history, structural arguments, prudential principles, and various other constitutional "modalities" in examining the Assembly Clause. Inazu's political theory of assembly is consistent with these sources; to a large extent, it follows from them.

Eclecticism is a defensible mode of constitutional interpretation. Indeed, for a rights guarantee like the Assembly Clause that has been dormant for so long it may be the best method of recovering meaning.<sup>48</sup> The freedom of assembly is, as Inazu ably demonstrates, a product of historical, social, and political events and influences. Its meaning has been forged over time in the courts, in public debate, in national celebrations, and even in international diplomacy. Inazu's eclectic and interdisciplinary approach rightly takes account of all of these contexts and sources.

Given the centrality of group discrimination to his account, Inazu might have paid somewhat more attention to the intersection of the First Amendment and the Fourteenth Amendment. Moreover, he might have avoided framing the question as one involving a choice between Dahl and Rawls, on the one hand, and Wolin on the other. We are not actually choosing among political theorists or political theories, but among plausible interpretations of constitutional text. However, Inazu's account seems to be consistent with all of the available historical, structural, and other evidence relating to the freedom of assembly. He offers substantial evidence to

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45. *See id.* at 155 (arguing, contrary to the view of consensus theorists, that groups with different, unpopular views should be protected).

46. *Id.* at 17–19.

47. *Id.* at 23–25.

48. *Cf.* STRAUSS, *supra* note 20, at 55 (arguing that "the text and the original understandings of the First Amendment are essentially irrelevant to the American system of freedom of expression as it exists today").



support his interpretation, and suggests reasons to doubt alternative interpretive accounts—including Andrew Koppelman’s historical narrative, which Inazu claims is incomplete and privileges equality concerns over group autonomy and liberty.<sup>49</sup> In light of all of this evidence, as Inazu correctly notes, the burden rests on others to come forward with a more plausible account.

Inazu’s interpretive methodology is both eclectic and atomistic. By atomistic I mean that it focuses intently on a single clause or rights provision and examines it mostly in isolation from other constitutional text. Other constitutional scholars, including some who have examined First Amendment freedoms, have adopted a similar approach.<sup>50</sup> There are both benefits and costs associated with this kind of atomistic methodology.

On the considerable plus side, scholars engaging in atomistic interpretation are able to offer deep historical and intellectual accounts of constitutional rights and other provisions. By zeroing in on the Assembly Clause, Inazu is able to offer a granular, detailed, and intellectually thick account of the right to peaceably assemble. Like eclecticism, atomistic interpretation may be particularly well suited to contexts in which constitutional text has been exiled or significantly transformed over time.

On the cost side, atomistic interpretation can lead to a degree of myopia. Inazu’s approach is situated at the opposite extreme from works like Thomas Emerson’s iconic *The System of Freedom of Expression*.<sup>51</sup> Emerson treated the First Amendment’s expressive liberties—speech, press, assembly, and petition—as part of an interrelated system that served core functions such as individual fulfillment, the search for truth, and self-governance.<sup>52</sup> Emerson incorporated a discussion of the right to peaceably assemble into this systematic account.<sup>53</sup> He interpreted assembly and other First Amendment rights as protections against regulating belief, coercing orthodoxy, and insisting on congruence and conformity.<sup>54</sup>

These are essentially the same core values that Inazu ascribes to the freedom of assembly. Thus, there is apparently some connective tissue that

49. See INAZU, *supra* note 2, at 162–66 (citing ANDREW KOPPELMAN WITH TOBIAS BARRINGTON WOLFF, A RIGHT TO DISCRIMINATE? HOW THE CASE OF *BOY SCOUTS OF AMERICA V. JAMES DALE* WARPED THE LAW OF FREE ASSOCIATION 1–24 (2009)) (summarizing differences between Inazu’s historical narrative and Koppelman’s narrative regarding association).

50. The most notable recent example, which examines the First Amendment’s Petition Clause, is 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).

51. THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 15 (1970).

52. See *id.* at 6–7 (stating that the system of freedom of expression is an essential means of assuring individual self-fulfillment, advancing knowledge and discovering truth, and providing for participation in decision making by all members of society).

53. See *id.* at 286–92 (discussing the vital role that the “various modes of public assembly and petition play in a modern system of free expression”).

54. See *id.* at 292–388 (discussing rights of peaceable assembly and petition).

binds the First Amendment's provisions together. One of the weaknesses of Inazu's atomistic interpretation is that it treats the Assembly Clause as an island of liberty rather than as part of an interlocking and mutually supportive system. This makes it more difficult to determine how freedom of assembly relates to or intersects with other freedoms. Thus we learn from Inazu's account that "assembly is a form of expression" and that it protects groups from state-enforced conformity and congruence.<sup>55</sup> What is less clear, though, is how the freedom of assembly might differ from, support, or operate within the First Amendment's system.

Atomistic interpretation makes it more difficult to determine what marks the freedom of assembly as distinctive or unique relative to other neighboring First Amendment rights. In the context of a public parade or protest, for example, citizens may be engaging simultaneously in freedom of speech, petition, and assembly. What, if anything, is distinctive about the freedom of assembly in this context? What distinguishes it, in either form or substance, from the rights of expression and petition? Early in his account, Inazu notes that assembly overlaps with religious freedoms. Indeed, freedom of assembly's roots can be traced back to the trial of William Penn, a Quaker who was infamously charged with assembling for religious purposes.<sup>56</sup> As Inazu's examples involving Christian campus organizations and Jewish fraternities show,<sup>57</sup> in some important respects the connection between assembly and religious free exercise remains close today. What is distinctive about the Assembly Clause in the context of religious assemblies? Why ought it, rather than the Free Exercise Clause, apply when adjudicating formation and composition questions relating to religious groups?<sup>58</sup>

Other holistic or synthetic interpretive questions occurred to me as I read *Liberty's Refuge*. For instance, might a fully recovered freedom of assembly correct some of the errors, ambiguities, or weaknesses of free speech doctrine? The social pressure to conform to majority norms and to avoid social conflict is quite strong. First Amendment protection for some anonymous speech offers only a partial antidote to privacy concerns.<sup>59</sup> As Inazu suggests, the freedom of assembly provides refuge from state interference with group formation.<sup>60</sup> Perhaps freedom of assembly, rather

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55. See INAZU, *supra* note 2, at 4–5 (highlighting how the right of expressive association provides strong protection for the formation, composition, expression, and gathering of groups and enables meaningful dissent from majoritarian standards).

56. *Id.* at 24–25.

57. *Id.* at 144–45.

58. See generally Ashutosh A. Bhagwat, *Assembly Resurrected*, 91 TEXAS L. REV. 351 (2012) (considering the question of how the Religion Clauses should interact with the Assembly Clause).

59. Cf. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 349–53 (1995) (recognizing in dicta that a state's interest in preventing fraud and libel might justify a limited identification requirement).

60. See INAZU, *supra* note 2, at 4 (arguing that the four principles of the history of assembly collectively counsel for the protection of group formation).

than or in addition to freedom of speech, provides a substantive basis for protection against certain forms of state surveillance. If so, then the relevant First Amendment question would not be whether the state's actions have "chilled" speech in some tangible way, but rather whether they have interfered with a private group's autonomy regarding formation and composition.<sup>61</sup>

To be clear, I am not suggesting that Inazu's interpretation is illegitimate because it lacks Emersonian breadth. Like the eclectic model, the choice to delve deeply and thickly with respect to a right or clause rather than more holistically or comparatively is a valid interpretive scholarly choice. Inazu acknowledges that more systematic work must be done. As he states in the book's conclusion, "if courts were to reaffirm the continued importance of the freedom of assembly, then they would need to explain its doctrinal framework and outline the relationship of assembly to other First Amendment freedoms."<sup>62</sup> But perhaps in this instance what Inazu views as the cart ought to come before the horse. If we were able to more fully recover and explain what is distinctive about the freedom of assembly, we might have more success convincing courts that they ought to reaffirm this forgotten right.

### B. *Recovering Assembly's Darker Side*

Below I discuss some of the more positive social and political functions of assembly. In interpreting the Assembly Clause, Inazu's focus is elsewhere. He is particularly concerned with protecting the membership decisions of nonconforming groups. This orientation could create the impression that a recovered right of assembly will be useful primarily to society's most illiberal and dangerous assemblies. Why recover a right that benefits mobs and troublemakers? As Professor Bhagwat asks in a recent symposium contribution, is the freedom of assembly a refuge for constitutional liberty or a refuge for "scoundrels"?<sup>63</sup> Bhagwat is rightly concerned that the limits of the freedom of assembly be clearly defined, in particular with regard to potentially violent groups. Both in the book itself and in subsequent commentary,<sup>64</sup> Inazu offers some tentative responses to readers' concerns about assembly's darker side. Here, again, I want to elaborate on these responses and to offer some additional observations about the importance of protecting dissent and social conflict as manifested in

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61. See *Laird v. Tatum*, 408 U.S. 1, 13–14 (1972) (holding that plaintiffs who objected to U.S. Army surveillance had not established standing to challenge the data-gathering program because they had not shown any regulatory effect on their expressive activities).

62. INAZU, *supra* note 2, at 186.

63. Ashutosh Bhagwat, *Liberty's Refuge, or the Refuge of Scoundrels?: The Limits of the Right of Assembly*, 89 WASH. U. L. REV. 1381, 1381 (2012).

64. See, e.g., John D. Inazu, *Factions for the Rest of Us*, 89 WASH. U. L. REV. 1435, 1438–40 (2012) (responding to concerns about the line between peaceable and violent assembly).

assemblies. In Part III, I will focus on the more positive aspects of freedom of assembly that receive less attention in Inazu's account.

Inazu argues that freedom of assembly ought to protect against certain forms of state-enforced orthodoxy.<sup>65</sup> In most cases, the freedom of peaceable assembly ought to bar coercive attempts by government to control the internal norms and practices of private assemblies. In a society that celebrates individualism but generally expects group conformity with regard to certain social norms and practices, a conception of pluralism that actually facilitates difference is indeed critically important. Inazu singles out a few organizations such as the Boy Scouts and the Christian Legal Society, which have been involved in recent high-profile disputes.<sup>66</sup> However, this sort of protection is also important to a host of other groups. Among these are American Muslims, Wiccans, Occupy Wall Street protesters, "Birthers," conspiracy theorists, medical marijuana advocates, Tea Party members, day laborers, labor strikers, gun advocates, and other individuals who join together and share creeds, causes, or conditions that many do not view as serving the common good.

It is not easy to be a dissenter or a nonconformist in America. That may strike some as an odd assertion. After all, Americans celebrate countercultural trends and actions. Indeed, they sometimes make heroes of nonconformists. However, it is still far easier to get along if one goes along with prevailing social and political norms. Dissenters and nonconformists face considerable pressures, both from government regulators and prevailing cultural forces, to get on board or in line.<sup>67</sup> Members of the dissenting and other out groups mentioned above can certainly attest to the pressure placed upon them to conform to majority religious, social, and political norms. They are frequently labeled discriminators, bigots, outsiders, weirdos, whackos, whiners, freeloaders, and closed-minded ideologues.<sup>68</sup> Whether they take the form of public protest movements, group memberships, or fringe causes, dissent and nonconformity can still use all the assistance they can get. Dissenting and nonconforming groups are not threats to democracy;

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65. See *supra* note 44 and accompanying text.

66. See *supra* note 8 and accompanying text.

67. See, e.g., Max Abelson, *Occupy Plans 'S17' Wall Street Tie-Up*, WASH. POST, Aug. 30, 2012, at A3 (detailing plans for a demonstration to mark the one-year anniversary of the Occupy Wall Street movement, despite challenges posed by protester "burnout," and recounting how "governments around the world used concussion grenades, gas, riot gear, pepper spray and arrests to disband camps and protests"); Tina Susman & Andrew Tangel, *Protesters March Back to Wall Street*, L.A. TIMES, Sept. 18, 2012, at A8 (noting that more than 180 protesters were arrested during the one-year anniversary demonstration and describing popular criticisms of the movement for its "lack of focus" and its "failure to . . . adopt specific issues").

68. See, e.g., Editorial, *Occupy Plus One Year*, N.Y. POST, Sept. 17, 2012, at 24 (characterizing Occupy Wall Street protestors as "obnoxious outliers" and a "ragtag assemblage of stragglers, radicals, moochers, trust-fund sophists, bums, rapists, drug-dealers, petty criminals and cop-car poopers").

they are central components of our political and constitutional system. One of Inazu's signal contributions is to remind us of this easily forgotten fact.

Of course, there is a darker side to freedom of assembly. Some groups may actually be dangerous. As Professor Bhagwat has observed, a broad freedom of assembly might facilitate the formation and activities of violent groups.<sup>69</sup> Here, though, we must be careful not to adopt a common fallacy. During far too many periods of American history, including the current era, public officials and the public at large have equated assemblies with angry and destructive mobs.<sup>70</sup> Although his historical account is otherwise thick, Inazu underemphasizes this part of assembly's narrative.

Groups that reject consensus norms and occupy positions at the fringe of American culture ought not to be, for that reason alone, considered threats to national security or public safety. Of course, it is true that as collective enterprises, assemblies can be more dangerous than individual actors. None of the individual perpetrators of the September 11, 2001 attacks on the United States could have done as much damage acting alone. Many other dangerous networks, groups, and associations, including separatists and neoracists, currently reside in the United States. As Inazu notes, however, the Assembly Clause protects only "peaceable" forms of assembly. That clearly excludes individuals who assemble for the common purpose of engaging in acts of violence. Freedom of assembly offers no First Amendment immunity or defense for participants in criminal conspiracies such as the September 11 attacks.

Beyond this point, Inazu has conceded that he "lack[s] a clear sense of where the peaceability line ought to be drawn."<sup>71</sup> I do not think this is an acute problem. With regard to violent conspiracies and the like, as Inazu has noted, the First Amendment is essentially irrelevant.<sup>72</sup> This is true whether we are talking about freedom of speech or a recovered version of freedom of assembly. With regard to other out groups that do not intend to or actually engage in violent activities, the presumption of protection ought to apply. As I discuss below, the "peaceably" limitation would seem to present the most acute interpretive difficulties as applied to assemblies engaged in civil disobedience and other nonconforming, but nonviolent, activities. Even here the danger of an expansive right of assembly will likely be minimal. The assemblies at issue are likely to form or act in the open, on public streets and

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69. Bhagwat, *supra* note 63, at 1394–96.

70. See, e.g., Carolyn Jones, *Oakland's Top Administrator Tough Enough for City She Loves*, S.F. CHRON., July 8, 2012, at A1 (profiling Oakland City Administrator Deanna Santana, who issued the final eviction notice to Occupy Wall Street protestors in Frank Ogawa Plaza on the basis of "safety issues," and quoting Santana expressing her concern that "if this place went up in flames, it'd be on me"); Andrew Tangel, *At 1 Year, Occupy's Effect Is Still Hard to Gauge*, L.A. TIMES, Sept. 15, 2012, at A1 ("Polls have shown that the public generally supports Occupy[] [Wall Street's] message but not its disruptive tactics.").

71. Inazu, *supra* note 64, at 1438.

72. *Id.* at 1440 & n.29.

in public parks where regulations define what is and is not lawful in terms of public protests and other forms of outdoor social conflict.

Perhaps Inazu's most provocative claim relates not to violent groups but to private assemblies that engage in racially or ethnically discriminatory practices. As Inazu forthrightly acknowledges, the suggestion that some such groups ought to receive refuge under the Assembly Clause is the most troubling and tentative in his volume.<sup>73</sup>

I am not sure that we ought to protect the membership and other decisions of such assemblies—even if we currently allow them to use the public streets to engage in protest and other forms of expression. I do not think that it suffices to say, as Inazu has in defending this part of his analysis, that some degree of overprotection of freedom of assembly follows ineluctably from the logic of overprotection of freedom of speech.<sup>74</sup> The fact that some offensive and even vile expression is protected as part of the price for a robust freedom of speech does not necessarily answer the question whether we ought to protect discriminatory conduct by private groups or tolerate hateful organizations. Whether the First Amendment ought to protect degrading and hateful expression remains a matter of significant and ongoing debate.<sup>75</sup> Further, the Supreme Court's observation that free speech "may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger" does not necessarily map well onto the sorts of private decision making Inazu discusses in the book.<sup>76</sup> The costs of exclusion and the societal dynamics associated with discriminatory groups may well require a different calculus and some distinct limitations.

Here, though, is another place where examining the ties to other First Amendment rights might bear some fruit. Might there be, for example, some notion of "counter-assembly" under which groups that are offensive to even the most deeply held societal norms are countered by groups that accept such norms?<sup>77</sup> Single-sex educational institutions compete with coeducational ones. Groups espousing traditional heterosexual marriage are countered by numerous gay rights groups. Male-only fraternities coexist on campuses across the country with female-only sororities. The National Rifle Association regularly spars with countless gun control groups. And civil rights groups keep tabs on and challenge racist organizations. Or perhaps we

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73. INAZU, *supra* note 2, at 14.

74. Inazu, *supra* note 64, at 1437.

75. See generally JEREMY WALDRON, *THE HARM IN HATE SPEECH* (2012) (arguing for more regulation of hate speech, contrary to the mainstream position of overprotection).

76. *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

77. See *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (noting that, except in emergencies, the remedy for exposing falsehoods in speech is more speech, not repression), *overruled in part by Brandenburg v. Ohio*, 395 U.S. 444 (1969).

ought to develop a theory of tolerance that is uniquely related to assembly.<sup>78</sup> We might also borrow from the pluralist approach that has developed under the First Amendment's religion clauses.<sup>79</sup> So long as there are meaningful rights of entry and exit, and the group has no monopolistic power or characteristics, the state really ought to remain neutral with regard to the formation and composition of assemblies. Again, I am not sure that we ought to provide these or other justifications for protecting the autonomy of illiberal assemblies. But if we are to do so, more theoretical thought and effort must be devoted to producing a justification for extending assembly so far.

Inazu is undoubtedly correct that if the Assembly Clause is revived in the manner he suggests, we will have to think very carefully about the amount of breathing space we want to create for certain kinds of assemblies. In terms of managing this concern, Inazu has cast significant doubt on the expressive association doctrine. Determining how the problem of invidious discrimination by groups ought to be resolved under the Assembly Clause is a matter that requires further reflection.

### III. The Forms and Functions of Peaceable Assembly

*Liberty's Refuge* offers a compelling argument that institutional autonomy, in particular with respect to membership decision making, is a critical aspect of freedom of assembly.<sup>80</sup> However, a fully recovered freedom of assembly would protect a diverse array of groups and would serve important functions, some of which Inazu addresses only briefly. For the purpose of amplification, and toward the end of taking assembly's fullest possible measure, this Part examines more closely the forms and functions of assembly.

#### A. *Assembly's Diverse Forms*

What is an "assembly"? Although Inazu is an otherwise careful textualist,<sup>81</sup> he does not offer a basic definition of this term (as opposed to a definition of the *right* of assembly itself). An assembly is "a group of people gathered together in one place for a common purpose."<sup>82</sup> The shared space

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78. See generally LEE C. BOLLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* (1986) (advancing the theory that societies that are tolerant of ideas that are legitimately unworthy of protection are strengthened by that tolerance).

79. See generally Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990) (discussing the Free Exercise Clause's origins in religious pluralism).

80. INAZU, *supra* note 2, at 152–53.

81. For example, Inazu convincingly argues that freedom of assembly and freedom to petition government for a redress of grievances are independent and freestanding rights. *Id.* at 23–25. Inazu is also careful to note that "peaceably" limits the scope of the right of assembly. *Id.* at 166–67.

82. NEW OXFORD AMERICAN DICTIONARY 95 (2001).

may be physical or virtual.<sup>83</sup> The common purposes may be social, political, religious, cultural, or educational. Although he acknowledges other forms, Inazu focuses primarily on groups or assemblies that are longstanding, organized institutions. As noted earlier, Inazu's interpretive and normative accounts treat the primary function of freedom of assembly as preserving autonomous space for dissenting and nonconforming organizations and institutions.<sup>84</sup>

In Chapter 2's historical narrative, Inazu describes an extraordinary variety of assemblies. He discusses societies, institutions, congregations, organizations, rituals, feasts, protests, parades, and demonstrations. These types of gatherings have long been a critical part of American social, civic, and political culture. Indeed, they remain so today. After describing this rich history, however, Inazu's analysis conveys the impression that "assembly" and "organization" are synonymous terms and that the core of a recovered freedom of assembly is protection for group autonomy—particularly for certain well-organized, illiberal groups that face public disapproval and discrimination lawsuits. This orientation is in large part owing to Inazu's following the path forged by the Supreme Court, which led ultimately to recognition of the right of expressive association.

As Inazu clearly recognizes, however, assemblies take many forms. Assemblies can be quite small or very large. They can have private or public orientations. Historically, the right to assemble has protected the formation and composition of a diverse array of private groups including social clubs and churches. Some of these private groups are formed with the intention of making public claims, while others seek generally to maintain a more private existence and profile. Indeed, some groups form with the expectation that they and their members will remain completely anonymous.

As the discussion in Chapter 2 also shows, assemblies can be formally or informally organized. We might think of them as being situated on a continuum, ranging from longstanding institutions to spontaneous and casual gatherings. Assemblies may be organized with regard to a specific message or ideology, or they may be looser forms of alliance. They may be heavily regulated, as in the case of political parties, or they may operate mainly beyond and outside the state's control. Assemblies may be aligned against the state, or in some cases constituted specifically to support current public laws and policies.

Finally, assemblies have both collective and individual characteristics. They protect both organizational and individual interests. In his recuperative account, Inazu does not entirely ignore the individual dimension of assembly. But as I discuss below, for the most part he appears to conceptualize freedom of assembly as a form of protection for groups and specifically for their

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83. Inazu examines virtual assemblies in a forthcoming paper. See John D. Inazu, *Virtual Assembly*, 98 CORNELL L. REV. (forthcoming 2013).

84. See *supra* note 44 and accompanying text.



organizational autonomy. However, as a *personal* freedom, the right to peaceably assemble belongs to each of the individuals who choose to participate in the formation and activities of the common venture.

In sum, assemblies in various forms are everywhere and all around us. Indeed, wherever two or more people gather in a common space an assembly has taken place.

The ability to gather in public has been a particularly important aspect of the freedom of assembly. As American history demonstrates, less structured and even spontaneous gatherings were in many cases the principal beneficiaries of a freedom of peaceable assembly. The freedom of assembly has facilitated traditional public displays such as pickets, demonstrations, parades, and protests. In contrast to the civic and religious organizations Inazu focuses on in the book, this is assembly's core dimension.

As Inazu briefly mentions early in the book, the Assembly Clause protects "the occasional, temporal gathering that often takes the form of a protest, parade, or demonstration."<sup>85</sup> Indeed, I think this is not only the traditional but perhaps also the most natural reading of the First Amendment's Assembly Clause. On the infrequent occasions when it has mentioned assembly, the Supreme Court seems to have agreed. Writing for all but one Justice in *Edwards v. South Carolina*<sup>86</sup> in 1963, Justice Stewart described a civil rights demonstration by 187 students on the State Capitol grounds as the exercise of free speech, free assembly, and freedom to petition for redress of grievances "in their most pristine and classic form."<sup>87</sup> The classic assembly consisted of a group of citizens gathered in the public square for a peaceful and temporary demonstration. These individuals were, and as I will explain, in some sense remain, most in need of the refuge of freedom of assembly.

At the end of his historical narrative in Chapter 2, Inazu notes with evident disappointment that by the 1960s the Supreme Court appeared to have limited freedom of assembly to public assemblies, protests, and demonstrations.<sup>88</sup> The real disappointment, as Inazu only briefly mentions, is that within the next two decades the Court buried even this "pristine and classic" form of assembly under an ever-expanding free speech doctrine.<sup>89</sup>

Of course, if the Assembly Clause does not protect the most obvious and traditional associative endeavors, then it could be difficult to establish that it provides refuge for the formation, composition, and expression of civic and other organizations that are highly structured and do not exist to make public claims. Perhaps Inazu believes that protection for the more traditional forms of assembly such as protests, parades, and demonstrations is

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85. INAZU, *supra* note 2, at 2.

86. 372 U.S. 229 (1963).

87. *Id.* at 235.

88. INAZU, *supra* note 2, at 61.

89. *Edwards*, 372 U.S. at 235; INAZU, *supra* note 2, at 61–62.

meaningfully assured under the Free Speech Clause, or that such protection will simply be a natural byproduct of the recognition of group autonomy he espouses. At least in the specific sense Inazu describes and analyzes the concept, group autonomy has not been the central concern of traditional assemblies. Given the challenges to traditional assembly, which included vigilante responses as well as official forms of suppression and abuse, restrictions on formation and composition were subordinate concerns. If we are to fully recover the Assembly Clause, we need to reconceive how it applies to more traditional forms and functions. In other words, the recovery effort ought to begin at assembly's roots.

I do not mean to argue that the freedom of assembly cannot be extended beyond traditional public gatherings, or that its meaning is frozen in time in some originalist sense. As Inazu observes, groups of individuals who have historically joined under an organizational umbrella or operated as hierarchical institutions have long *claimed* to be engaged in acts of assembly.<sup>90</sup> Although most of these groups used repertoires like demonstrations and protests, not all of them did. This history is certainly some evidence of the American public's own interpretation of assembly.<sup>91</sup> Moreover, as a matter of simple definition, the groups whose autonomy Inazu is most concerned with protecting qualify as "assemblies." My concern is not that Inazu has wrongly or illegitimately interpreted the First Amendment's text, but rather that in his effort to transform "association" back into "assembly" Inazu may have given an inordinate amount of attention to a specific subset or type of assemblies, or to a specific problem created by the Supreme Court's interpretive adventurism. After Chapter 2, the more traditional forms of public assembly fade from view. In Part IV, I will examine how a recovered Assembly Clause might facilitate more traditional forms of public contention and dissent.

### B. *Assembly's Functions*

As I have noted, Inazu is principally concerned with demonstrating how and why group autonomy has been harmed by the First Amendment doctrine of expressive association. Under his account, the primary beneficiaries of a recovered freedom of assembly would be dissident, exclusionary, and

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90. I am less certain whether the assembly label applies in cases like *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010). In that case, American citizens sought to engage in peaceful expressive activities such as the teaching of international law to designated foreign terrorist organizations. *Id.* at 2716. These individuals sometimes occupied common space and worked for a common purpose. *See id.* (describing the types of activities in which plaintiffs intended to engage, including training, offering legal expertise, and engaging in advocacy on behalf of the designated foreign terrorist organizations). In that sense, they meet the definition of an assembly. I am not certain how Inazu believes a recovered right of assembly would have assisted the plaintiffs in *Humanitarian Law Project* or altered the Court's analysis. Inazu seems to use the case primarily to demonstrate the ambiguity of the right of "expressive association." INAZU, *supra* note 2, at 4–6.

91. *See generally* JACK M. BALKIN, *LIVING ORIGINALISM* 17–18 (2011) (emphasizing the citizenry's understanding of constitutional provisions as an aspect of constitutional interpretation).

nonconforming organizations or groups. Inazu is particularly concerned with preserving space in which such groups can participate in self-governance (relatively) free from state interference. This is especially important for groups that engage in dissent, fail to conform to consensus norms and practices with regard to such things as political organization and rational discourse, and form alliances whose particular message may not be apparent to outsiders (including, in particular, judges).<sup>92</sup> On Inazu's negative reading, the freedom of assembly allows private groups to resist the state's efforts to impose what Inazu claims are majority norms of consensus, congruence, and conformity.

Inazu addresses some of the most important defensive or negative attributes of a right of peaceable assembly. He argues that assembly is "most relevant when its exercise is challenged by the state."<sup>93</sup> But Inazu's focus on the struggle between certain private groups and the state's mechanisms of control downplays some of the more positive and personal aspects of the freedom of assembly. If we are to fully recover and restore the freedom of assembly, we must exhume not only its various forms but also its diverse functions. Moreover, we ought to consider those functions not from the perspective of the associative right the Supreme Court has recognized, but in light of the recovery of a freestanding, distinct, and robust Assembly Clause that this substitute has replaced.

Again, my goal here is more amplification than criticism. Inazu has a very brief discussion at the beginning of the book concerning what he calls the "social vision of assembly."<sup>94</sup> In addition to enabling meaningful dissent, he notes that the right of assembly "provides a buffer between the individual and the state" and contributes to "the shaping and forming of identity."<sup>95</sup> As Inazu wryly observes, "We lose more than the shared experience of cheese fries and cheap beer when we bowl alone."<sup>96</sup>

I wish Inazu had elaborated on this "social vision."<sup>97</sup> If we accept Inazu's account, then it follows that the collective forgetting of the freedom of assembly has imposed significant social and political costs on American society. In some sense, it is true that constitutional rights are most important when the activities they protect are being directly challenged by the state.

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92. See INAZU, *supra* note 2, at 156–62 (discussing dissenting, political, and expressive assemblies). Although Inazu raises some legitimate concerns regarding the interpretation of group messages, I am more optimistic regarding courts' ability to assess meaning in this and other contexts. See Timothy Zick, *Cross Burning, Cockfighting, and Symbolic Meaning: Toward a First Amendment Ethnography*, 45 WM. & MARY L. REV. 2261, 2375–79 (2004) (discussing judicial interpretation of group membership).

93. INAZU, *supra* note 2, at 156.

94. *Id.* at 5.

95. *Id.*

96. *Id.*

97. As Inazu indicates, the "social vision of assembly" he describes is based upon the work of scholars such as Robert Putnam, Alasdair MacIntyre, Charles Taylor, and Michael Sandel. *Id.* at 5 n.10.

However, it is also the case that the mere existence and recognition of an enforceable and robust constitutional right, such as the right to peaceably assemble with others, can serve critical functions which *precede* such challenges—and, indeed, may even prevent them from ever occurring. Further, even apart from any direct challenges by the state, the right of assembly can serve a variety of positive functions.

First and perhaps foremost, freedom of assembly provides a degree of safety and comfort in numbers. It is true, as discussed above, that this same attribute may increase the danger arising from assemblies. However, let us assume for the moment that we are talking only about “peaceable” assemblies. It may be difficult for contemporary Americans to appreciate the fear those accused in the 1950s of being Communists, or fellow travelers, experienced when they engaged in the simple act of meeting with others in private or public settings.<sup>98</sup> The ability to freely assemble or join with others fortifies individuals. It emboldens them to come forward, and to participate in social and political activities. In addition to creating space for group activities and group autonomy, the freedom of assembly facilitates a variety of *individual* acts of defiance, contention, and expression.

Freedom of assembly also serves various emotional and psychological functions. The act of assembly creates a sense of solidarity or common cause. It excites and energizes individuals, whether they gather to knit scarves, play soccer, pray, or participate in marches or protests. It fosters personal and civic pride by providing outlets and venues for the pursuit of common causes. Freedom of assembly does not simply allow individuals to develop their own identities. It allows otherwise marginalized individuals to be present with others and to communicate specific *identity claims* to the state and to the general public. For many individuals, this is a critical aspect not only of self-governance but also of personal self-esteem. In sum, a robust freedom to peaceably assemble with others facilitates full participation in and enjoyment of communal life.

In political terms, the freedom of assembly encourages and facilitates forms of local engagement. It provides foundation and structure for social and political projects. The ability to join with like-minded others allows citizens to form political associations and encourages them to contemplate future endeavors and initiatives. This may lead to new and unique institutions, including new political organizations and parties. Further, freedom of assembly strengthens and amplifies individual voices. It forces

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98. See *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 103 (1961) (holding that the right to assemble is secondary to the right of Congress “to bring foreign-dominated organizations out into the open where the public can evaluate their activities informedly against the revealed background of their character, nature, and connections”); David E. Bernstein, *The Red Menace, Revisited*, 100 NW. U. L. REV. 1295, 1301 (2006) (reviewing MARTIN H. REDISH, *THE LOGIC OF PERSECUTION: FREE EXPRESSION AND THE MCCARTHY ERA* (2005)) (providing background information about the Smith Act and other restrictions aimed at communists that limited the right of assembly).

officials and other members of the community to take notice by providing a rough depiction of individual preferences. In these representative and democratic senses, assembly acts as an informal method of voting or casting preferences—a way of marking or identifying oneself, often through public affiliations, as supportive of a particular position, cause, or side. Note that assembly serves this particular function whether individuals form a group at the fringes of societal norms or one situated within a majority consensus.

Inazu suggests that the reason for protecting groups' membership and leadership choices is that "the existence of a group and its selection of members and leaders are themselves forms of expression."<sup>99</sup> This obviously raises the question whether the freedom of assembly he espouses is cut from the same speech cloth as the right of expressive association.<sup>100</sup> I don't think that it is. However, had Inazu placed more emphasis on the individual social and political benefits of assembly, the separation would have been much clearer. Many of these functions are nonexpressive. They are a form of social sustenance and a critical part of our political structure. On this view, the fact that assembly protects the Boy Scouts' ability to express its preferences through exclusion is not the central point. The critical aspects of assembly lie beneath the surface of that public message; they are antecedent to the state's challenge to it.

Inazu's account of freedom of assembly is primarily political rather than sociological. However, elaborating somewhat on the positive and personal functions of assembly would have clarified the extent of assembly's independence from speech. More importantly, it would have allowed for a fuller recovery and explication of the variety of functions served by the freedom of assembly.

#### IV. Assembly and Outdoor Contention

As I noted earlier, perhaps the most natural interpretation of the Assembly Clause is that it protects an individual's right to gather with others for some limited period in a public place in order to pursue some common cause. Thus, whenever and wherever two people gather in a public place where they have a right to be, for lawful and peaceful purposes, the Assembly Clause ought to protect their right to do so. As citizens of authoritarian nations will attest, this is not some secondary or minimal constitutional concern.<sup>101</sup> Where the freedom of assembly is recognized and

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99. INAZU, *supra* note 2, at 152.

100. See Bhagwat, *supra* note 63, at 1383 (questioning Inazu's account insofar as it relies upon expressive values).

101. See, e.g., David M. Herszenhorn, *New Russian Law Assesses Heavy Fines on Protesters*, N.Y. TIMES, June 8, 2012, <http://www.nytimes.com/2012/06/09/world/europe/putin-signs-law-with-harsh-fines-for-protesters-in-russia.html> (reporting on enactment of a new Russian law restricting street demonstrations); Jim Yardley, *China Sets Zones for Olympics Protests*, N.Y. TIMES, July 24, 2008, [http://www.nytimes.com/2008/07/24/sports/olympics/24china.html?\\_r=3&ref=world](http://www.nytimes.com/2008/07/24/sports/olympics/24china.html?_r=3&ref=world)

enforced, authorities cannot without good cause require individuals to disperse, desist, disband, or move along. This right to be and to remain in public places lies at the core of the right of peaceable assembly.

Inazu has offered convincing reasons for recognizing other forms of assembly. However, a recovered Assembly Clause would be as or even more important to outdoor politics than to the indoor membership decisions of civic organizations and private businesses.<sup>102</sup> Admittedly, restrictions on public protest and assembly were not Inazu's *raison d'être*. However, as I suggested earlier, a full recovery of the Assembly Clause will not be possible without some consideration of its relation to traditional forms of public assembly and contention. Inazu's account may offer some important insight with regard to this more traditional dimension of freedom of assembly. I want to make this contribution more explicit, and to raise some issues that require further consideration by Inazu and others who are interested in more public forms of dissent and contention.

In my own work, I have emphasized the necessity of adequate physical resources for the effective exercise of public speech, assembly, and petition rights.<sup>103</sup> I have argued that over time, a variety of societal, political, and jurisprudential forces have reduced the supply of public space that is available to individuals and groups who wish to engage in expression and politics out of doors. In brief, these and other forces have produced a significantly diminished public square. In addition, even in the remaining public spaces, individuals who wish to engage in speech, assembly, and petition activities are too often displaced by a variety of regulatory mechanisms, including the construction of "speech zones."<sup>104</sup>

Had it been published prior to my own, Inazu's book would have provided welcome support for my thesis regarding access to public spaces, particularly public forums. According to the Supreme Court, these are places such as public streets and parks, which have "time out of mind" been available "for purposes of assembly, communicating thoughts between citizens, and discussing public questions."<sup>105</sup> As Inazu notes, in the early 1980s the Supreme Court "swept the remnants of assembly within the ambit of free speech law."<sup>106</sup> There assembly's remnants were combined with increasingly anemic public speech and petition rights, which were

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&pagewanted=print (discussing China's repression of free speech assembly rights and the country's attempt to appear less repressive by creating "free speech zones" during the 2008 Olympics).

102. For a recent treatment of this aspect of assembly, see generally Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L. REV. 543 (2009).

103. TIMOTHY ZICK, *SPEECH OUT OF DOORS: PRESERVING FIRST AMENDMENT LIBERTIES IN PUBLIC PLACES* 3–4 (2009).

104. Timothy Zick, *Speech and Spatial Tactics*, 84 TEXAS L. REV. 581, 636 (2006).

105. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939); see also *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45–46 (1983) (describing public forum categories).

106. INAZU, *supra* note 2, at 61.

themselves hemmed in by an increasingly restrictive system of bureaucratic regulations.<sup>107</sup>

Although Inazu focuses primarily on internal group autonomy, his account of the Assembly Clause has important implications for public assembly and contention. To examine some of these implications, I want to consider Inazu's account against the background of the Occupy Wall Street (OWS) demonstrations. The demonstrations, which occurred across the United States (and indeed spread to several foreign nations) during the fall of 2011,<sup>108</sup> are contemporary examples of the sort of public contention that was common during assembly's robust abolitionist, labor, and civil rights periods. In part for the reasons Inazu points to in his book, public discussions and litigation involving the OWS protests focused almost exclusively on free speech concerns.<sup>109</sup> This was so even though the Assembly Clause's language most closely captures the OWS signature repertoire—gathering in public for a common purpose or purposes.

According to Inazu, "The right of assembly is a presumptive right of individuals to form and participate in peaceable, noncommercial groups."<sup>110</sup> OWS is clearly a noncommercial group, and thus entitled to presumptive protection under the Assembly Clause.<sup>111</sup> In addition, the OWS demonstrations served all of the core functions of assembly. They provided critical outlets for dissenters, nonconformists, and dissidents. OWS demonstrations allowed and perhaps emboldened individuals to challenge consensus norms.<sup>112</sup> The assemblies facilitated public dissent, politicized group activity, and provided channels for expression. They created space within which citizens could resist governmental control. The ability to assemble with others in common public spaces provided incubation space for a potential social movement. Further, the OWS assemblies allowed individuals to experiment with unique forms of democratic organization.<sup>113</sup>

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107. See generally ZICK, *supra* note 103 (discussing the restriction of public speech rights under the First Amendment's public forum and time, place, and manner doctrines).

108. *Occupy Wall Street Protests Spread, But Can the Movement Gain Critical Mass?*, WASH. POST, Oct. 13, 2011, [http://www.washingtonpost.com/business/occupy-wall-street-protests-spread-but-can-the-movement-gain-critical-mass/2011/10/13/gIQAzOM2hL\\_print.html](http://www.washingtonpost.com/business/occupy-wall-street-protests-spread-but-can-the-movement-gain-critical-mass/2011/10/13/gIQAzOM2hL_print.html).

109. See, e.g., *Occupy Minneapolis v. Cnty. of Hennepin*, Civ. No. 11-3412 (RHK/TNL), 2011 WL 5878359, at \*4 (D. Minn. Nov. 23, 2011) (holding that sleeping or erecting tents on public property by Occupy protesters is protected free speech).

110. INAZU, *supra* note 2, at 166.

111. See Shelley DuBois, *Occupy Wall Street: Yes, There is Organization*, CNN MONEY (Dec. 7, 2011, 11:35 AM), <http://management.fortune.cnn.com/2011/12/07/occupy-wall-street-yes-there-is-organization/> (describing the "grassroots," noncommercial organization of the Occupy Movement).

112. Cf. INAZU, *supra* note 2, at 5 (discussing the importance of informal group assembly to democracy).

113. See Meredith Hoffman, *Protestors Debate What Demands, If Any, to Make*, N.Y. TIMES, Oct. 16, 2011, <http://www.nytimes.com/2011/10/17/nyregion/occupy-wall-street-trying-to-settle-on-demands.html?ref=occupywallstreet&r=moc.semityn.www> (describing the democratic process for decision making).

OWS became well known not just for its outward displays of commandeering and camping in public places, but also for its internal methods of communication and unique approach to governance by consensus.<sup>114</sup> Finally, as have other public assemblies, the OWS demonstrations “disrupt[ed] social norms and consensus thinking.”<sup>115</sup> They initiated a national and international conversation concerning issues like social equality, fairness, capitalism, and political representation.<sup>116</sup>

Perhaps the most frequently commented-upon aspect of the OWS demonstrations, at least in the mainstream media, was the apparent lack of a coherent message associated with the demonstrations or the group itself.<sup>117</sup> Here Inazu offers a key insight. The First Amendment does not protect assembly solely for the purpose of communicating some identifiable, coherent message. Assembly is protected in its own right; it stands on its own bottom. The act of assembling is thus itself the relevant constitutional event. If individuals want to assemble for the purpose of snapping their fingers, chanting in tongues, or simply showing solidarity or strength through numbers, then they have a First Amendment right to do so (subject, of course, to any permitting and other requirements). Under this approach to freedom of assembly, no further explication of the specific content of OWS’s message would be required.<sup>118</sup> This is a critical point, for public assemblies can often be disorganized, spontaneous, cacophonous, and incoherent.

In the context of the OWS demonstrations, we can more fully appreciate the value of a freestanding freedom of assembly. Thus, perhaps the most significant move Inazu makes in his volume turns out to be textual. By divorcing assembly and petition, he allows for the development of a distinct freedom of assembly. This freedom grants the people the right to be present in and to use certain public places. They may of course do so to speak or to petition government officials. But these activities and rights are distinct from the right to peaceably assemble.

Thus, a full recovery of the Assembly Clause clarifies the extent of the government’s trust obligation regarding public places under its control. It highlights the scope of the “easement” the people possess when they occupy

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114. N.R. Kleinfield & Cara Buckley, *Wall Street Occupiers, Protesting Till Whenever*, N.Y. TIMES, Sept. 30, 2011, <http://www.nytimes.com/2011/10/01/nyregion/wall-street-occupiers-protesting-till-whenever.html?pagewanted=all>.

115. INAZU, *supra* note 2, at 3.

116. Paul Krugman, Op-Ed., *Money and Morals*, N.Y. TIMES, Feb. 9, 2012, <http://www.nytimes.com/2012/02/10/opinion/krugman-money-and-morals.html?gwh=1B8B872410A8FFE1376708CD918AFF25>.

117. See Andrew Ross Sorkin, *Occupy Wall Street: A Frenzy That Fizzled*, DEALBOOK, N.Y. TIMES (Sept. 17, 2012, 8:51 PM), <http://dealbook.nytimes.com/2012/09/17/occupy-wall-street-a-frenzy-that-fizzled/> (lamenting the lack of a coherent message from the movement).

118. See INAZU, *supra* note 2 at 161–62 (observing that assembly itself is expression and multiple interpretations of an assembly are possible).



and use public forums.<sup>119</sup> There has long been some level of discomfort relating to the idea that the First Amendment imposes an affirmative obligation on officials to provide space or other resources for the peoples' exercise of constitutional rights. However, if the First Amendment protects not only discrete activities like speech and petition, but also simple *presence* in public places, then it begins to look very much as if the First Amendment contemplates a degree of affirmative support. After all, assembly had to take place somewhere, and the most natural or obvious place would be something like a public square. Interpreting the Assembly Clause as an independent form of refuge for public dissent fortifies the argument that the First Amendment was intended, at least in part, to facilitate public presence and outdoor politics.

Indeed, recovery of the Assembly Clause might alter or clarify a number of First Amendment doctrines and principles relating to public protests, demonstrations, and other forms of outdoor politics like the OWS demonstrations. Let me highlight just a few examples.

The Supreme Court has attempted to explain how a parade with no clearly identifiable message nevertheless constitutes either a form of expressive conduct or an expressive association.<sup>120</sup> However, once the parade is properly characterized and analyzed as an assembly, courts need not attempt to interpret such gatherings. This insight applies to a variety of public gatherings. For example, where individuals have gathered in a public park for the purpose of feeding the homeless, the fact that no particularized message would be discernible to the public would not make any difference under the Assembly Clause.<sup>121</sup> These and other unique but nonexpressive gatherings could find refuge under the Assembly Clause even if protection is not available to them under the Free Speech Clause or the expressive association doctrine.

The Court has also indicated that picketing on a public sidewalk near a person's residence may be entitled to less protection under the Free Speech Clause because the protesters did not seek to communicate with a broad public audience.<sup>122</sup> That observation, and potential limitation, is simply irrelevant in the context of the freedom to peaceably assemble on a public sidewalk—the actual activity in question. Further, resort in some cases to the Assembly Clause, which by its terms protects a form of conduct, could reduce some of the considerable pressure the courts have placed on the speech–conduct distinction. Indeed, recovery of the Assembly Clause might

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119. Harry Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 13.

120. *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, Inc.*, 515 U.S. 557, 568 (1995) (discussing the expressive nature of parades).

121. *See First Vagabonds Church of God v. City of Orlando*, 610 F.3d 1274, 1292 (11th Cir. 2010), *vacated*, 616 F.3d 1229 (11th Cir. 2010), *reinstated in part*, 638 F.3d 756 (11th Cir. 2011) (upholding permit requirements as applied to the feeding of homeless in public parks).

122. *Frisby v. Schultz*, 487 U.S. 474, 486–88 (1988).

at long last elevate demonstrating, marching, and labor picketing to the status of fully protected First Amendment activities rather than allowing them to be consigned to the lesser-protected rung of expressive conduct.<sup>123</sup>

In many public protest cases decided after the 1960s, including several involving protests near abortion clinics, the Court has used free speech and time, place, and manner doctrines to examine the constitutionality of limits on public contention and dissent.<sup>124</sup> The primary concern in those cases was to what extent speakers should have a meaningful opportunity to engage with their intended audiences.<sup>125</sup> Indeed, in numerous contexts, courts have reviewed regulatory requirements that implicate freedom of assembly, including permit and insurance provisions, as if they affect only the freedom of speech.<sup>126</sup> However, these regulations may have separate and significant effects on assembly rights. Suppose that courts refocused the inquiry in such a way that assembly rather than speech became the primary concern. It is possible that something like the time, place, and manner doctrine would develop in this context. However, it is also possible that different considerations would lead to distinct doctrinal formulations and perhaps even to an expansion of public protest rights.

Let me return a final time to the OWS demonstrations. As noted earlier, the Assembly Clause contains a textual limitation. It recognizes a right “*peaceably* to assemble.” Inazu does not offer a definitive interpretation of this text. It is clear that the Assembly Clause does not protect riotous mobs. Certainly an assembly that engages in vandalism or violent acts can be suppressed. Further, under free speech doctrine authorities may impose basic limitations on public demonstrations for the purpose of ensuring public order and safety.<sup>127</sup>

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123. This would require revisiting statements by the Supreme Court in civil rights-era cases to the effect that the First Amendment provides less protection to acts such as assembly than it does to pure speech. See *Cox v. Louisiana*, 379 U.S. 559, 564 (1965) (suggesting that the freedom to peaceably assemble was linked to expression and inferior to its purest forms); *id.* at 555 (same). Justice Black had even less regard for marching, picketing, and parading. Although he often claimed to be a strict textualist, Justice Black was confident that the state could absolutely bar such activities on the public streets. *Id.* at 581 (Black, J., concurring).

124. See *Hill v. Colorado*, 530 U.S. 703, 719–20 (2000) (examining the constitutionality of a Colorado statute using free speech and time, place, and manner doctrines); *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 762–64 (1994) (same).

125. See *Hill*, 530 U.S. at 716 (“The right to free speech, of course, includes the right to attempt to persuade others to change their views, and may not be curtailed simply because the speaker’s message may be offensive to his audience.”); *Madsen*, 512 U.S. at 774 (“[I]t is difficult . . . to justify a prohibition on *all* uninvited approaches of persons seeking the services of the clinic, regardless of how peaceful the contact may be, without burdening more speech than necessary to prevent intimidation and to ensure access to the clinic.”).

126. See, e.g., *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 326 (2002) (upholding permit requirement for activities in public parks as a valid regulation of speech).

127. See *Hill*, 530 U.S. at 713–14 (explaining that protecting the safety of individuals is a legitimate government interest).

The OWS demonstrations pressed the boundaries of these limits.<sup>128</sup> Insofar as OWS participants were unlawfully present in private spaces, let us assume that the freedom of assembly offered them no refuge. But in many cases, protesters sought to permanently occupy public forums and other public venues.<sup>129</sup> Were these “peaceable” assemblies? As I noted earlier, one could argue that the original or traditional understanding was that the Assembly Clause contemplated the formation and relatively brief presence of the people in public places. However, there is nothing in the Assembly Clause itself that suggests any kind of temporal limitation. There is nothing violent or unpeaceable about the mere act of assembly or even of occupation. So long as the occupation does not disrupt the flow of pedestrian or other traffic, violate any time restriction, or violate noise ordinances and the like, what basis is there for requiring the assembly to disperse?<sup>130</sup>

It seems that at least two fundamental questions must be answered. The first, as I have already suggested, is whether we ought simply to incorporate all of the various time, place, and manner requirements that are not deemed generally to abridge freedom of speech<sup>131</sup> into the assembly context. In that case, courts would likely equate “peaceably” with lawfully. This would essentially mean that in public places where individuals have a right to congregate, the freedom of assembly is coextensive with the freedom of speech. However, this would be inconsistent with recognition of a distinct and separate freedom of peaceable assembly. Second, and perhaps more fundamentally, we need to address whether the Assembly Clause provides some refuge for certain forms of civil disobedience.<sup>132</sup> Since freedom of assembly was not seriously considered in the OWS litigation, the courts never reached these issues.

Like the outer bounds of group autonomy Inazu discusses, none of the foregoing issues has yet received any significant attention in connection with the Assembly Clause. If or once they do, however, we may find that the First

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128. See *In re Waller v. City of New York*, 933 N.Y.S.2d 541, 545 (N.Y. App. Div. 2011) (holding that OWS failed to show a right to a temporary restraining order that would restrict the city’s ability to promote health and safety); James Barron & Colin Moynihan, *City Reopens Park After Protesters Are Evicted*, N.Y. TIMES, Nov. 15, 2011, [http://www.nytimes.com/2011/11/16/nyregion/police-begin-clearing-zuccotti-park-of-protesters.html?pagewanted=all&\\_moc.semityn.www](http://www.nytimes.com/2011/11/16/nyregion/police-begin-clearing-zuccotti-park-of-protesters.html?pagewanted=all&_moc.semityn.www) (describing the events surrounding the denial of the order).

129. Joel Banner Baird, *To Be Occupied: Burlington’s City Hall Park*, BURLINGTON FREE PRESS, Oct. 25, 2011, at A1; Jimmy Vielkind, *A Permanent Occupation?*, TIMES UNION, Oct. 31, 2011, <http://www.timesunion.com/local/article/A-permanent-occupation-2243717.php>.

130. See El-Haj, *supra* note 102, at 578 (noting that, historically speaking, “the government was considered justified in restricting public assemblies only when they created public disorder, because only then were the assemblies no longer within the protection of the constitutional right”).

131. See *Hill*, 530 U.S. at 719–20 (upholding a content-neutral statute designed to protect the access and privacy of patients by prohibiting speech-related conduct within 100 feet of the entrance of any health care facility); *Madsen*, 512 U.S. at 762–64 (holding that certain restrictions imposed on antiabortion protestors were not directed at the content of speech, and thus were permissible as protecting the health and well-being of patients).

132. INAZU, *supra* note 2, at 167.

Amendment affords some additional measure of refuge for traditional forms of public protest and contention. Inazu's partial recovery of the Assembly Clause ought to motivate civil rights litigators, scholars, and courts to start thinking more carefully about assembly's implications in the more traditional contexts of public protest and demonstration.

#### Conclusion

*Liberty's Refuge* is an enlightening account of a First Amendment freedom that has for too long languished in the shadow of freedom of speech and under the weight of a judicially conceived right of expressive association. The Assembly Clause may never again be feted at something like a World's Fair. As Inazu shows, the more immediate impact of its recovery would be felt more locally. Private, nonconforming groups would gain a fuller measure of autonomy from a recovered freedom of assembly. In addition, as I have argued, individuals would enjoy the social and political benefits of a robust and recovered freedom of assembly. Finally, as I have also suggested, traditional public assemblies would occupy firmer constitutional ground. We owe a debt to Inazu for his exhumation of a once—and still—fundamental constitutional liberty. Inazu has invited us to participate in a conversation about a long-forgotten freedom, and has provided compelling reasons to accept this invitation. I look forward to reading his future work and to future discussions regarding the *recovered* freedom of assembly.