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Book Reviews

Henry Friendly: The Judge, the Man, the Book

HENRY FRIENDLY: GREATEST JUDGE OF HIS ERA. By David M. Dorsen. Cambridge, Massachusetts: Harvard University Press, 2012. 512 pages. $35.00.

Reviewed by Mary Coombs*

For those of us who neither live in the rarefied world of the famous nor are aficionados of self-published memoirs by the earnest and obscure, reading a biography of someone we knew personally is a rare event. David Dorsen's biography of Judge Friendly—in addition to being a surprisingly engrossing read for anyone[1]—was, for someone like me, both confirmatory and revealing.

The reason to remember Henry Friendly and write—or read—his biography is Friendly the Judge.[2] The subtitle calls him the "greatest judge of his era." With this assessment (if not with all his holdings), I can heartily agree.

While one often associates Friendly with a mastery of the law, he also had a concern for getting the facts right, which was somewhat unusual for an appellate judge.[3] He would pore through the record where the lawyers didn't cite to what seemed important to him. I believe that this focus on facts sometimes bridged his concern for reaching an outcome that seemed compatible with justice to the parties and his desire not to distort the law for future cases.[4]

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* I would like to thank Warren Stern, my co-clerk, and my research assistant, Andrea Solano. All remaining mistakes and misjudgments are my own.

1. To misquote ALICE IN WONDERLAND, it is a book with conversations but, unfortunately, no pictures. LEWIS CARROLL, ALICE'S ADVENTURE IN WONDERLAND 1 (Richard Kelly ed., Broadview P. 2d ed. 2011). To be honest, the audience is likely limited to lawyers, which is still enough for respectable sales. (In 2010 there were an estimated 728,200 lawyers in the United States. *Occupational Outlook Handbook*, BUREAU OF LABOR STATISTICS (Apr. 26, 2012), http://bls.gov/ooh/legal/lawyers.htm.)

2. DAVID M. DORSEN, HENRY FRIENDLY: GREATEST JUDGE OF HIS ERA (2012).

3. This focus is perhaps less surprising when one considers his background as a lawyer for whom much of his practice was before administrative agencies and who was steeped in the forms of common law adjudication.

4. One example is Judge Friendly's finding parallels between the theology of Paul Tillich and the claims of Mr. Jakobson, a rather odd conscientious objector (CO), to find that Mr. Jakobson met the statutory standard for CO status. *Id.* at 245–47; United States v. Jakobson, 325 F.2d 409, 415–16 (2d Cir. 1963), *aff'd sub nom.* United States v. Seeger, 380 U.S. 163 (1965).

Dorsen provides an example of Friendly's fact consciousness in his discussion of the *Biaggi* case.[5] Friendly wrote an opinion that released the transcripts of a grand jury investigation only after he knew what the grand jury transcripts revealed; namely, confirming his suspicion that Biaggi was trying to manipulate the courts with his motion to release in part the transcripts of the grand jury that was investigating him.[6]

During my term, we had a case where a would-be author sought the release of the Bureau of Alcohol, Tobacco, and Firearms "raid manual" under the Freedom of Information Act.[7] Judge Friendly's concurring opinion found that the manual was protected by one of the exceptions in the statute and thus said that the plaintiff had no standing to question the constitutionality of the procedures set out therein.[8] Before he wrote that opinion, however, he had instructed me to review the manual and inform him if it did seem to authorize any unconstitutional actions by agents. I believe it mattered to him that, in my estimation, the manual did not.[9]

His working process not only produced masterful opinions with great rapidity, but it also was as good an intellectual training ground as any clerk could receive.[10] Immediately after the day's oral arguments, we were called *seriatim* to discuss the cases for which we were responsible—a discussion that began with him asking us what we thought.[11] If one could give an account of how the case should be decided that met with his approbation (if not his concurrence), one felt an extraordinary sense of achievement (or at least relief for not having stumbled).[12] And, as Dorsen notes, that discussion was immediately followed by the judge dictating his voting memo to his secretary.[13] These were inevitably the first memoranda distributed to the other judges and, one assumes, they guided the way the case would be analyzed.[14] Many judges rightly assumed that they should intellectually

5. DORSEN, *supra* note 2, at 222–26; *In re* Biaggi, 478 F.2d 489, 494 (2d Cir. 1973) (Friendly, J., supplemental opinion) ("It [the majority opinion] rests on the exercise of a sound discretion under the special circumstances of this case.").

6. DORSEN, *supra* note 2, at 222–26.

7. Caplan v. Bureau of Alcohol, Tobacco & Firearms, 587 F.2d 544, 548–49 (2d Cir. 1978).

8. *Id.*

9. I do not know if I was assigned this case in part because I had been a mentee of Yale Kamisar. For a description of Yale Kamisar and his work, see *Yale Kamisar*, U. MICH. L. SCH., http://web.law.umich.edu/_facultybiopage/facultybiopagenew.asp?ID=201.

10. In addition to the interactions with the judge, one learned by watching the production of great legal analysis and by hearing his responses to bad legal work by lawyers and, less frequently, other judges. DORSEN, *supra* note 2, at 87–88.

11. A similar description of the judge's working methods can be found in Lawrence B. Pedowitz, *Judge Friendly: A Clerk's Perspective*, 1978 ANN. SURV. AM. L. xl, xli.

12. As Dorsen notes, Friendly could be quite cutting about poor performances by lawyers, other judges, or clerks. DORSEN, *supra* note 2, at 87–88, 95–97. As I have told colleagues, he did not suffer fools gladly, and from his intellectual perch, there appeared to be many fools.

13. *Id.* at 91.

14. *Id.* at 90–91.

dominate their clerks; I think Friendly made a similar assumption about most other judges.

The description of Friendly as "Greatest Judge of His Era," however, rests not merely on the judge's working method or on his focus with facts, but also on his contribution to jurisprudence.[15] The term brings to mind the iconic great judge of legal theory, Ronald Dworkin's Hercules, who can (as all judges ideally should) find the single best solution to hard cases—one that is consistent both with a defensible interpretation of existing law and with a coherent understanding of deep principle.[16] It also echoes Duncan Kennedy's counter image of the judge as half-consciously following his ideological predispositions in interpreting law in hard cases.[17]

Based on Dorsen's book and my impression, Friendly fits neither model.[18] About as well as any real judge, he sought (most of the time) to get "the law" right, consistent with both his sense of justice to the parties and a set of predilections that did not fit neatly into any simple liberalism or conservatism. His substantive political views were sometimes aligned with conservatism, particularly in his critical stance toward Warren Court constitutional criminal procedure law, which impeded law enforcement even where there was no plausible risk of convicting the innocent and no fundamental right, in his view, at stake.[19] But he also tended to favor

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15. That contribution is circumscribed by the facts that he served on a lower federal court and that I examine a period decades after he was active. His impact was larger than that position would suggest. Since 2000, Supreme Court Justices have cited to Friendly's judicial or other writings by name nineteen times (in Lexis Nexis, within the "Federal Court Cases, Combined" database, search the following: COURT(supreme) and "Judge Friendly" or "Friendly, J." or "Henry J. Friendly" or "Henry Friendly"). This is not simply an artifact of John Roberts being his former clerk; he has also been cited by Ginsburg, Stevens, Souter, Scalia, Kennedy, and Sotomayor. *E.g.*, Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 320 (2007) (Ginsburg, J.); Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 177–79 (2008) (Stevens, J.); Sosa v. Alvarez-Machain, 542 U.S. 692, 712 (2004) (Souter, J.); Wal-Mart Stores v. Samara Bros., 529 U.S. 205, 210 (2000) (Scalia, J.); Brown v. Plata, 131 S. Ct. 1910, 1946 (2011) (Kennedy, J.); Blueford v. Arkansas, 132 S. Ct. 2044, 2057 (2012) (Sotomayor, J.).

16. *See*, RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 116–18 (1978) (theorizing that an ideal judge, such as the metaphorical Judge Hercules, would have complete knowledge of the law and sufficient time to decide all cases; in such circumstances, Judge Hercules could create the perfect rule for a particular case that justifies the law as a whole).

17. Duncan Kennedy, *Strategizing Strategic Behavior in Legal Interpretation*, 1996 UTAH L. REV. 785, 792–93.

18. Interestingly, Friendly himself does not discuss Kennedy in his writings but does briefly mention Dworkin. After noting the jurisprudential debate "generated by" Ronald Dworkin in *Hard Cases*, 88 HARV. L. REV. 1057 (1975), which discussed whether a judge may use policy or only principle in deciding cases where law seems indeterminate, Friendly concludes that "it is not clear to me how far apart, in any practically significant sense, the disputants really are." Henry J. Friendly, *The Courts and Social Policy: Substance and Procedure*, 33 U. MIAMI L. REV. 21, 24 n.14 (1978).

19. DORSEN, *supra* note 2, at 188, 214–15; *see also* Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 142 (1970) (arguing that "with a few important exceptions, convictions should be subject to collateral attack only when the prisoner supplements his constitutional plea with a colorable claim of innocence").

prosecutors or unsophisticated investors in cases involving the regulation of business.[20] He also placed more consistent emphasis than either Dworkin or Kennedy does on the role of the judge in (a) creating and maintaining a coherent and predictable body of law,[21] which he did not see as embodying a substantive preference for conservative and liberal policy choices,[22] and (b) leaving space for institutions to make policy choices (sometimes the government, sometimes private institutions being protected from government).[23] Finally, he was sometimes (though not always, as Dorsen notes)[24] more modest than Hercules. On occasion, after seeking to turn his first analysis (usually from his voting memorandum) into an opinion, he would be brought up short by the existing legal materials and conclude, "It won't write."[25] The winning party might not change, but the argument would be revised to be consistent with his best reading of the law he was interpreting. Perhaps somewhere in the world there is or will be a Hercules who can always find a "right" opinion on every topic consistent with her philosophical principles. In the meantime, we are unlikely to find a better judge than one like Friendly, who so often got it right, who wrote so fluently[26] and so well, and who recognized when it "wouldn't write."

Nonetheless, a biography and a memory must also consider Friendly the Man, particularly as it may help illuminate Friendly the Judge. The book does so, based on interviews with surviving family, a wide range of other judges, and famous folk who could shed light on various aspects of Friendly's life and character. Dorsen also interviewed every clerk Friendly had had. While each of us interacted with him intensely for only a year (and some of us almost not at all beyond that), that year was indeed intense. As the book demonstrates, there were common elements, but our experiences—

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20. DORSEN, *supra* note 2, at 249–53.

21. He similarly criticized administrative agencies, largely in terms appropriate to courts as well, for doing a poor job of "[providing] standards and reasoned analysis" for their conclusions. *Id.* at 295.

22. I think he would reject Kennedy's view that a preference for rules over standards is linked to a substantive "conservative" position. *See* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1753 (1976) (connecting the conservative attack on judicial activism to a preference for judicial rulemaking and application of rules to judicial creation and enforcement of standards).

23. For more on Friendly's jurisprudence, see generally Michael Boudin, *Judge Henry Friendly and the Craft of Judging*, 159 U. PA. L. REV. 1 (2010) (surveying Judge Friendly's judicial decision-making process and noting Judge Friendly's understanding of the importance of predictability and the maintenance of stable rules).

24. At one point, Dorsen chastises Friendly for his "creative, if not cavalier, treatment of precedent." DORSEN, *supra* note 2, at 179.

25. *See id.* at 90–91, 150–51 (collecting examples of Friendly stating that he would change his ruling if one could find authority for the contrary position or expressing discomfort with a result he believed he could not avoid based on the law as it stood). Though he once said that "he could distinguish just about every decision," he sometimes felt more constrained by the body of statutory and decisional law. *Id.* at 89.

26. One stylistic quirk: he had a habit of the "not quite double negative" (like "not unreasonable"). A Westlaw search found twenty-eight Friendly opinions using that locution.

and our assessments of those experiences—varied. In thinking back and in light of the book, I think those differences are in part a result of changes in Judge Friendly over time, in part a result of differences among us, and in part a reflection of the meshing—or not—of our personalities with his.

By the time I clerked for the judge in 1978–1979, he was on the downward arc of a judicial career that lasted from 1959 through 1986. It was clear that the opportunity for a Supreme Court appointment had passed. As Dorsen notes, Friendly was at times "dispirited," if not necessarily clinically depressed.[27] He had difficult relationships with two of his three children.[28]

It may be that his depression was worsening—certainly we rarely saw him cheerful. His eyesight seemed to have gotten worse with time,[29] a disability especially salient for someone whose professional life was so bound up with reading and writing.[30] He seemed to flourish largely in the company of his wife Sophie, who had the warmth and natural social skills he lacked.[31] One feels acutely what a blow it must have been when she predeceased him.[32]

I was very much an atypical choice for a Friendly clerk. I was one of only two women clerks (two years after Ruth Wedgewood) and, as a Michigan graduate, one of only four clerks not from Harvard (more than half), other Ivy League schools, or Chicago.[33] I was also, unusually I believe, a second-life law student; I turned 33 during my clerkship year. Together these may have made for a poor fit for the judge's style in interacting with his clerks, apart from the more intellectual aspects of the court's work.

Friendly was a man of his time, formed in an era before feminism. He lived in a fairly sheltered world, growing up comfortably middle-class in a small city and living for much of his adult life in a luxurious apartment on Park Avenue in Manhattan.[34] Neither his mother nor his wife worked outside the home. In his world, he succeeded by merit and may have been less sensitive to how merit alone would not suffice for all.[35] The judge read

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27. *Id.* at 53.

28. *Id.* at 52–59.

29. *Id.* at 341.

30. He also relied extensively on his prodigious memory. This usually served him well, though clerks could be frustrated by his referring to some prior case that he thought relevant in a way of little use to a clerk with less than a year's tenure and before Westlaw and Lexis, such as "the case with the lawyer from X firm."

31. DORSEN, *supra* note 2, at 36–37, 55–56.

32. *Id.* at 339–40.

33. The other three "outreach" clerks are William Lake from Stanford, Martin Glenn from Rutgers, and William Bryson from the University of Texas. *Id.* at 361–66.

34. *Id.* at 6–10, 37.

35. Dorsen's book gives little sense of Judge Friendly's interactions with or understanding of the lives of racial minorities. His relationship with Judaism and WASP Anti-Semitism was complex, as shown by his somewhat inconsistent responses to Harvard President Lowell's proposal for a quota for Jewish students. *Id.* at 18. My sense is that the judge was also largely insensitive to

widely: law, history, and legal philosophy, but not apparently social sciences or current affairs.[36] His history reading, given his interests and the forms of history most common during his formative years, would have been intellectual and political, not social history.[37] Only one person on the long list of his regular correspondents was a woman.[38] Dorsen notes that when Friendly and others formed Cleary Gottlieb, two of its newly-hired nine associates were women.[39] This was unusual at the time and place.[40] We do not know how Friendly interacted with these women lawyers. I was unsurprised by the anecdote Dorsen recounts of Friendly's shock that Ruth Bader Ginsburg responded negatively when he pulled out a chair for her at a luncheon.[41] I suspect the shock was genuine surprise and dismay. My memory is that the clerks' dinners during his lifetime were held at the Century Association, his club. I doubt that the judge even really noticed that the Association had no women members.[42]

Similarly, I resented—more than many clerks—the "menial" tasks that were expected of us, such as ensuring that the bench was prepared precisely to his requirements for each sitting[43] and that he always had a working pen.[44] When buzzed in, you would enter, take the pen held out in his nonwriting hand, replace the innards with those from a government issue pen and return it to him, all without exchanging a word or glance. What was for him, as Dorsen suggests, a manifestation of routine and hierarchy,[45] felt to me like patriarchy as well.[46]

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class—that there were (and are) people who grow up in economic and family circumstances that do not dare even to dream of Harvard, though their native intelligence might have permitted them to thrive there.

36. *Id.* at 10–14, 54–55.

37. His senior paper at Harvard explored the relations of Church and State in England under William the Conqueror. *Id.* at 16–17.

38. *Id.* at 101.

39. *Id.* at 60.

40. *See* VIRGINIA G. DRACHMAN, SISTERS IN LAW: WOMEN LAWYERS IN MODERN AMERICAN HISTORY 255 (1998) (stating that in 1939, only 14.2% of lawyers in New York were women); David M. Margolick, *Wall Street's Sexist Wall*, NAT'L L.J., Aug. 4, 1980, at 60 (stating that in the 1940s, very few lucky women found positions at New York's most prestigious law firms and almost all found positions in trusts and estates law).

41. DORSEN, *supra* note 2, at 118.

42. He was hardly alone. Women were not admitted until 1989 and then only after a very contentious battle. *See* Felicia R. Lee, *121 Years of Men Only Ends at Club*, N.Y. TIMES, July 28, 1989, at B1, *available at* http://www.nytimes.com/1989/07/28/nyregion/121-years-of-men-only-ends-at-club.html?pagewanted=all&src=pm (describing the end of the long battle to end the male-only policy of the New York Athletic Club and recounting the Century Association's admission of women the previous year).

43. DORSEN, *supra* note 2, at 108.

44. *Id.* at 93.

45. *Id.* at 108.

46. This may be my projection. Other clerks may not have resented this part of the job. In any event, they were unlikely to attribute it to patriarchy.

I do not mean to suggest that the clerkship year was some unrelieved Dickensian misery. His work style meant there was little relaxed interaction between judge and clerk. But clerks and secretaries could often relax and enjoy the chambers on the other side of the judge's closed door. Furthermore, while the judge did not show much of a warm sense of humor with his clerks, he did have wit and cleverness.

Dorsen mentions two opinions that were pivotal in my decision to seek and take a clerkship with Judge Friendly (though he wrote nothing quite so clever the term I was there): *Frigaliment Importing Co. v. B.N.S. International Sales Corp.*[47] and *Nolan v. Transocean Airlines.*[48] I, and at least one of Chief Judge Kaufman's clerks, saw a mix of wit and hostility in the way Judge Friendly, when he had arranged to ride home with Kaufman, would interrogate him during the ride on his views of recent advance sheets or slip opinions. As soon as the ride was arranged, Kaufman would reassign one of his clerks to prepare him for it. Dorsen's story of Kaufman's ignominious role in Friendly's Second Circuit nomination process[49] may go a long way in explaining this behavior, which we both thought showed more than just a desire to save money or make conversation on Friendly's part.[50]

Friendly the Man—like Friendly the Judge—was a complicated individual. And it may be that his personal history was more impressive than even those aspects that made my clerkship a legacy. We always want our heroes without feet of clay. We want those of great accomplishment to be great as people. Life doesn't always cooperate. To the extent that the judicial legacy would have been less had my clerkship been more pleasant, that is a trade I would not—at least in retrospect—have thought worth making.

47. 190 F. Supp. 116, 117 (S.D.N.Y. 1960) ("The issue [in this case] is, what is chicken?"). *Frigaliment* was a contract case brought in diversity where the contract called for chickens and the plaintiff–buyer argued that this did not extend to stewing chickens. Friendly rightly used the standard tools of contract interpretation. As a cook and grocery shopper, I can say that stewing hens would be found in the "chicken" section of the meat and poultry case, but I would have been deeply unhappy if my husband had brought home a stewing hen when the grocery list included "chicken."

48. 276 F.2d 280, 281 (2d Cir. 1960) ("Our principal task, in this diversity of citizenship case, is to determine what the New York courts would think the California courts would think on an issue about which neither has thought."), *vacated and remanded*, 365 U.S. 293 (1961), *adhered to*, 290 F.2d 904 (2d Cir. 1961). Friendly concurred in my assessment (or vice-versa); he called this his "best opening paragraph." DORSEN, *supra* note 2, at 315.

49. DORSEN, *supra* note 2, at 74–75.

50. *Id.* at 120–21.

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On Becoming a Great Judge: The Life of Henry J. Friendly

HENRY FRIENDLY: GREATEST JUDGE OF HIS ERA. By David M. Dorsen. Cambridge, Massachusetts: Harvard University Press, 2012. 512 pages. $35.00.

Reviewed by Frederick T. Davis*

In writing a biography of Henry Friendly, author David Dorsen has taken on an enormous challenge: the subtitle is "Greatest Judge of His Era"—a claim that few who knew Judge Friendly, or are familiar with his remarkable legal legacy, would dispute. Judge Friendly left an unparalleled body of written opinions from his twenty-five-year career on the bench and was a vigorous presence at the very highest level of his profession through prolific writings, energetic participation in groups such as the American Law Institute, and his many professional friends.[1] His opinions remain, even today, among the most cited in the federal jurisprudence;[2] for those who knew him, he was an incomparably towering influence. To summarize the life of this remarkable person, and to offer some explanation of how he developed his formidable skills and extraordinary impact, is no easy task. David Dorsen does a remarkable job. His biography is not only rewarding for those who knew Judge Friendly or are familiar with his work, but also provides a readable and accessible exploration of how one person arrived at such a remarkable level of excellence in his profession.

I was a law clerk for Judge Friendly during the 1972–1973 term of the United States Court of Appeals for the Second Circuit. As it was for every lawyer who had this extraordinary opportunity, the year was one of the most remarkable experiences of my professional life. Unusually for a judge who died more than twenty years ago, his law clerks still reunite every three years or so to share recollections about our year with the Judge and his impact on our own thoughts and careers. This is no group of underachievers—it includes a number of very prominent professors and judges, including the Chief Justice of the Supreme Court—yet the prevailing sentiment is universally one of awe, occasionally tinged with a sense of fear that Judge Friendly might somehow look over our shoulders and remind us of standards of excellence that all of us still strain to meet.

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1. DAVID M. DORSEN, HENRY FRIENDLY: GREATEST JUDGE OF HIS ERA 3, 131–33 (2012).
2. *Id.* at 353–55.

I approached the Dorsen biography with a particular question that has always fascinated me: how was it that the son of a small-town manufacturer in upstate New York became the titan of his profession?[3] Is it possible to find an explanation, or even a description, of his path to brilliance? A few years before he died, Judge Friendly permitted me to spend several hours tape-recording his reminiscence from both before and during his judicial career. While those recordings were transcribed, I never succeeded in editing or publishing them, and thus was thrilled when David Dorsen took them over and skillfully used them in his biography.[4] Complemented by the thorough research he has done and access to Judge Friendly's files, friends, and family, the biography offers some clues to Friendly's emergence as one of the principal legal voices of his generation.

The first clue may seem obvious: Henry Friendly was simply a brilliant intellect, endowed with extraordinary skills. David Dorsen describes, and all of Friendly's law clerks well remember, the Judge's ability to sit down at a table with a ballpoint pen and two pads—one for the text of his opinions, the other for the footnotes—and simply write them out in one draft, often in one sitting, citing precedent from memory and when necessary marching over to find the text of the decision he wanted to quote, from memory pulling exactly the right volume of the Federal Reporter from the shelf. This technical brilliance was not a late development. When he arrived at Harvard College in 1919 at age 16, he had a keen interest in mathematics and took the most advanced course in mathematics available to entering undergraduates.[5] When the grades arrived, he had received the second-highest grade ever received by a student in the history of the course. To his chagrin, however, the holder of the highest grade—by a minuscule margin—was a classmate. That was enough for Henry Friendly: he abandoned any dreams of becoming a mathematician.[6] I had heard this story before doing my oral history with the Judge, and after confirming its basic outlines I was about to move on when I casually asked who the other student had been. It turns out that the competitor had been Marshall Stone, son of future Chief Justice Harlan Fiske Stone, who went on to have a distinguished career as a Professor of Mathematics at Harvard, and is credited with discovering several noted theorems. To be even neck-and-neck with such a scholar would be beyond the competence of virtually any other student, but to Henry Friendly being anything other than the best was insufficient. He later majored in European history, and when the time came for him to defend his thesis in an oral exam, the number of professors and students who wanted to watch was so great that the event took place in the Sanders Theater at Harvard College.

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3. *Id.* at 5–6, 8.

4. *Id.* at 371–72.

5. *Id.* at 14.

6. *See id.* ("He changed his mind [about taking additional math classes] when he compared his performance in one course [with his classmate] Stone's.").

Undoubtedly through his mother, Friendly early on developed a passion for learning and an intellectual curiosity of extraordinary scope. His mother was evidently a woman of intellect and energy.[7] Nor was she lacking in ambition for her near-sighted and unathletic son: after he arrived at Harvard College, she wrote to Professor Felix Frankfurter, who was known to her through a family connection, and who quickly befriended this young prodigy and did his utmost to entice him into the study of law.[8] The persuasion was not immediately successful: Friendly remained fascinated with (and deeply knowledgeable about) European history throughout his life, and upon graduation at the top of his class in 1923 was courted not only by Professor Frankfurter at the law school but by the leading professors in liberal arts to pursue a career in academics.[9] After a year of studying abroad to consider his options, he entered the law school[10]—but only really made up his mind to commit to the practice of law after receiving his first round of grades. He went on to achieve an academic record at Harvard Law School that, according to many, ranks even today as the statistically highest performance of any student in the history of the School.[11]

The key trait that emerges from the Dorsen biography is that once Friendly focused on the law, he made it the passion of his professional life with a sustained and unwavering focus. With energy, curiosity, voracious reading habits, and prodigious memory, he saw the law in all of its dimensions—not as a series of rules to be memorized, nor even as tools to achieve ends, but rather as a process that goes to the core of society and how it is supposed to work. To this passionate commitment he brought insights drawn from his remarkable knowledge of history, literature, and philosophy. A trivial anecdote brought home to me the breadth of his reading and the depth of his ability to recall: once when I was with him he noticed that I was carrying a book and, with characteristic inquisitiveness, asked me what it was. It turned out to be a long and quite dense history of Russia, which I was going to visit for the first time later that year. "Oh," he said, "that seems familiar, I think I read it once." But, he then went on, "I must have read a different book because the one I read was more than one volume." I checked, and sure enough the book I was reading was a one-volume simplification of an exhaustive seven-volume history of Russia—which the Judge had not only read, but mastered: when he questioned me about my meager insights from the slimmed-down version, it was clear that his grasp of the subject many times exceeded mine, even though he had read the lengthy opus more than twenty years before.

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7. *Id.* at 6–7.
8. *Id.* at 20–21.
9. *Id.* at 20.
10. *Id.*
11. *See id.* at 26 (outlining Friendly's excellent academic performance at law school).

When he joined the bench in 1959, Friendly brought to the job prodigious academic skills, broad learning, and more than three decades of challenging practice—which included founding what is today one of New York's major law firms, and serving as General Counsel for Pan American Airways at the apex of its success as the first truly international American airline.[12] But most importantly, he brought an uncanny ability not only to parse a legal issue, but to see it in its three-dimensional context, shorn of ideology or preconceived notions. Before joining the bench, for example, Friendly had had relatively little experience with criminal procedures—he had never been a prosecutor or a criminal defense lawyer.[13] Yet to this day, his decisions in this area are beacons of thoughtfulness and common sense, as well as learning. Many thought of him as a pro-government "conservative," in part based upon a superficial interpretation of one of his well-known articles entitled "Is Innocence Irrelevant?," in which he questioned some aspects of federal review of state criminal convictions via habeas corpus.[14] But in each criminal case before him, his interest was in understanding exactly what happened in the case in question, and whether the procedures met the standards of transparency, honesty, and excellence that society demands. During my clerkship year, he wrote opinions in at least two instances reversing convictions because he felt that the prosecutor or the trial judge had not acted appropriately—even though the innocence or guilt of the accused was not really in question.[15] In each case, he delved into the facts in meticulous detail, and concluded that the process had not satisfied acceptable standards upon which he insisted.

Judge Friendly was an internationalist. His work with Pan Am and his law firm put him at the cutting edge of international business during and after World War II.[16] He read widely in French, once publishing a review of a lengthy French-language legal treatise[17] and, as a student, remarking to a startled professor that a text apparently written in early English was actually in Law French, which Friendly offered to translate.[18] But his heart was in the common law, where his insights derived not only from American precedent but from his deep understanding of English precedent as well. In his

12. *Id.* at 60–61.

13. *Id.* at 81.

14. Henry Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970).

15. *See generally* United States v. Fernandez, 480 F.2d 726 (2d Cir. 1973) (reversing a robbery conviction on the grounds that the trial judge's questioning and discernible distrust of the defense's expert witness was both improper and prejudicial); United States v. Estepa, 471 F.2d 1132 (2d Cir. 1972) (reversing a conviction for the prosecutor's improper use of hearsay before a grand jury).

16. DORSEN, *supra* note 1, at 61–68.

17. Henry J. Friendly, Book Review, 54 HARV. L. REV. 169 (1940) (reviewing JEAN VAN HOUTTE, LA RESPONSABILITÉ CIVILE DANS LES TRANSPORTS AÉRIENS INTÉRIEURS ET INTERNATIONAUX (1940)).

18. Michael Boudin, *Judge Henry Friendly and the Mirror of Constitutional Law*, 82 N.Y.U. L. REV. 975, 977 (2007).

legendary *Kinsman Transit* tort decision,[19] where he explored and essentially recast the law of causation,[20] he delved into English precedent at some length and with noteworthy insight—even though the applicability of that law had not been argued by either party.[21] While respectful of the separation of the powers and the legislative function, he earnestly believed that judges contributed to the making of the law, and did not just interpret it in the manner of his continental counterparts. When the Federal Rules of Evidence were discussed, and ultimately adopted, in the 1970s, they were the culmination of years of work;[22] today they are a fundamental component of federal trial practice. But Judge Friendly was not a fan because he felt that codified rules could never match the nuances and contextual appropriateness of judge-made decisions, and would stultify the flexibility and evolution of the law of evidence. It did not appear to occur to him that many judges, lacking his erudition, memory, and objectivity—Judge Friendly read *Wigmore on Evidence*[23] so thoroughly that he virtually had it memorized—would be helped by having a handy, consistent code of common-sense rules.

What are we to make of this remarkable man, looking back more than 25 years after his death?

On the credenza behind the desk in his chambers, there was a black-and-white photograph of Justice Louis Brandeis, for whom Henry Friendly served as law clerk at the beginning of his legal career after graduating from law school in 1927.[24] On it the Justice had scrawled "To Henry Friendly, a born lawyer." While prescient, these words may understate Judge Friendly's achievement: he was "born" with prodigious skills, but he became a masterful lawyer and judge through hard work, passion, an open mind, a high degree of curiosity, and relentless focus—and, to my mind, with an unwavering, almost brutal insistence upon intellectual honesty. While we are unlikely to see his like again, David Dorsen's biography reminds us of the standards of excellence on which Judge Friendly insisted and the importance they hold for his profession today.

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19. *In re* Kinsman Transit Co., 338 F.2d 708 (1964).

20. *Id.* at 719–26.

21. David M. Dorsen, *Judges Henry J. Friendly and Benjamin Cardozo: A Tale of Two Precedents*, 31 PACE L. REV. 599, 610 n.69 (2011).

22. Paul R. Rice & Neals-Erik William Delker, *Federal Rules of Evidence Advisory Committee: A Short History of Too Little Consequence*, 191 F.R.D. 678, 683 (2000).

23. JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW (2d ed. 1923).

24. DORSEN, *supra* note 1, at 27.

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Henry Friendly: As Brilliant as Expected but Less Predictable

HENRY FRIENDLY: GREATEST JUDGE OF HIS ERA. By David M. Dorsen. Cambridge, Massachusetts: Harvard University Press, 2012. 512 pages. $35.00.

Reviewed by Peter Edelman*

We are fortunate that David Dorsen is Henry Friendly's biographer. Chronicling the life of a judge, in this case a longtime and hardly flamboyant private practitioner before he became a judge, could easily yield a product about which "wooden" would be a compliment. Dorsen is sophisticated, very smart and very wise, a fine lawyer, and a really good writer. He has produced a highly readable and truly interesting book. He combines astute analysis of the voluminous list of cases on which Judge Friendly sat with perceptive discussion of their political and social context and significance—both inside the court and in relation to the world outside. It is actually entertaining.

I was Henry Friendly's third law clerk from 1961–1962, more than fifty years ago. For a variety of reasons, I did not follow closely his judicial output or other writings after that time, so for me that portion of Dorsen's book (which is most of it) was largely new and in many respects fascinating. The first part of the book covers quite well his family life, with which I was already quite familiar, and his earlier career as a practicing lawyer. This is all interesting and important to know to get some idea of Friendly the man outside the court. But it is when Dorsen turns to the judicial substance that I find myself enthralled. It was a totally pleasant surprise to discover how engaging the descriptions and backstories of the cases were.

My experiences as Judge Friendly's law clerk bear out Dorsen's account, although almost entirely on the positive end of the continuum. He was rigorous and demanding but seldom if ever short with me in a hurtful way. I drafted only one opinion, a very short one toward the end of the year, and I distinctly remember feeling something close to ecstatic when he gave me the assignment. I had a similar rush earlier in the year when he allowed me to write a few paragraphs of the opinion in a fairly complicated case. And now and then he asked me to draft a textual footnote. Yes, those were special moments, too. Just out of law school, I thought this was how all judges functioned.

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Friendly's routine was largely as Dorsen describes. He rarely took more than a day to write an opinion. At 5:30 or so, ready to embark for home, he would emerge with a finished draft opinion, at which point (after his secretary, Mrs. Flynn, typed it) it would be my job to cite-check it.[1] The draft often contained citations to old English cases. How did he find them, I wondered. I knew he didn't have the original cases in his office. Did he have a secret door or escape hatch in his office from which he could get to a library that had the cases? There seemed to be two answers. One, he knew some of the citations by heart, and two, he found the citations in later cases and cited the earlier originals. Either way, my job was to check his work. Either way, it was impressive.

Conversations in his office were brief. Whether I was asking or answering a question or putting forward an idea, the drill was largely the same. I would get half a sentence out and he would finish my sentence and then respond. Usually he had grasped instantly and correctly what I was trying to say. (Remember, he was brilliant, and that's an understatement.) I would be somewhat at my peril if I wanted to disagree or suggest that he had not understood what I was trying to say. Mostly he would say gruffly that he had heard me correctly the first time (although sometimes he hadn't) and occasionally I would get a second shot.

(A parenthetical note: I had another boss whose *modus operandi* in office conversations was exactly the same—Robert Kennedy. Kennedy and Friendly were poles apart in many ways, but conversations in their offices about work issues were identical. Just like Friendly, Kennedy would jump in and finish my question or suggestion and then reply. Getting a second bite at it was similarly iffy. Notably, Kennedy was brilliant, too, in an especially intuitive way.)

Dorsen notes that Friendly held grudges and cites one example that involved me.[2] Writing this review gives me a chance to clarify the facts about that. The story was about Judge Friendly's lobbying Robert Kennedy through me in 1966 to get him to ask President Johnson to nominate Judge Edward Weinfeld for a seat on the Second Circuit.[3] The ultimate result was that the appointment went to then-district Judge Wilfred Feinberg (who has been an outstanding appellate judge for the better part of fifty years),[4] and Friendly blamed Robert Kennedy and me for not advocating strongly enough for Judge Weinfeld.[5]

Friendly was wrong on multiple counts. He had to know full well that Senators can only suggest court of appeals nominations to the President, as opposed to the process used for district court appointments when Senators

1. DAVID M. DORSEN, HENRY FRIENDLY: GREATEST JUDGE OF HIS ERA 87, 94 (2012).
2. *Id.* at 119.
3. *Id.*
4. *Id.*
5. *Id.*

from the relevant state are members of the same party as the President.[6] And he should have known that in any event Robert Kennedy and Lyndon Johnson did not like each other very much, to put it mildly. At Kennedy's direction, I told Friendly at least twice that Feinberg's brother was a major donor to Johnson and a personal friend as well, and that Weinfeld should get the labor leaders, David Dubinsky and Jacob Pitofsky, whom he knew well, to lobby the President on his behalf. Kennedy did try quite hard to sell the White House on Weinfeld, and I told Friendly that more than once. When I had first broached the matter to Kennedy, he said immediately that he felt badly about having elevated Judge Irving Kaufman instead of Weinfeld some years earlier when he was Attorney General, and he wanted to rectify the mistake. I had conveyed this to Friendly as well. Nonetheless, Friendly was furious at the Senator and me when Judge Feinberg was named to the seat.

I was frankly hurt by this. I did not go to the annual clerk dinners for a couple of years (I was pretty busy, too), but what Dorsen does not report (which may be my fault) is that my wife Marian and I invited the judge to the naming ceremony for our first child, Joshua, in 1969, and he came specially from New York to Washington to attend. So maybe the grudge was on my side rather than Friendly's, and quite possibly Friendly's attendance at the ceremony was his way of apologizing for his anger three years earlier. When I resumed going to the dinners during the Nixon years, the judge always called on me along with three or four others to talk about my latest activities. As Dorsen points out, Friendly strongly valued people who engaged in public service.

Another personal note, about Friendly's wife Sophie. As Dorsen points out, my then-wife, Arlyn, and I were invited to dinner fairly frequently throughout the year that I clerked.[7] This was more about Arlyn than it was about me, because Arlyn was charming in the same kind of way that Sophie was, and both the judge and Sophie were captivated. Whatever the reason, we saw Sophie's charm and life spirit firsthand and also got to know the Friendly children, especially Joan and her husband, Frank Goodman. Sophie was an extra special person, and we saw the "other" Henry Friendly on those evenings (which, fortunately, seemed to have a positive effect on our office relationship as well).

I did not think of Friendly as conservative or liberal when I clerked for him. I see now that he was in general a moderate conservative in the vein of John Marshall Harlan. But I didn't have the perspective to understand that at the time. This was at least partly because the Harvard Law School of the day enshrined Felix Frankfurter as the model Justice and "neutral principles" as the reigning judicial philosophy, and discussions of legal issues at Harvard (at least as I recall) did not articulate issues in terms of conservative or liberal

6. DENIS STEVEN RUTKUS, CONG. RESEARCH SERV., RL34405, ROLE OF HOME STATE SENATORS IN THE SELECTION OF LOWER FEDERAL COURT JUDGES 1 (2008).

7. DORSEN, *supra* note 1, at 111.

values. We were taught that the Roosevelt Court had settled everything both substantively and in terms of the judicial role.

To me, reflexively, Judge Friendly was the perfect example of the Harvard idea of the law, although that idea was so ingrained in me that I did not even articulate to myself that there was a Harvard idea of the law. (Justice Brennan was a Harvard Law graduate, too, but he had not been on the *Law Review* and the "vibe" I felt at the school was that he was not of the same caliber as Justice Frankfurter. I think this may have been more of an elitist view than a reflection of a philosophical difference, since my sense is that in the Harvard world of the day there was not much of a consciousness about there being such a thing as a liberal versus conservative divide.)

As Dorsen makes amply clear, Friendly was not a down-the-line conservative. Beyond whatever Harvard Law School had done to shape my thinking about how to approach the law, I saw Friendly as a person who looked carefully and thoughtfully for the right answer—certainly for the right answer on the law but also for the right answer in relation to the facts presented in individual cases where there was some give in the law.

This is borne out very clearly in the book. The matter of Philip Kerner is a case in point.[8] Kerner had been denied Social Security disability benefits.[9] It would have been easy to affirm the district court's award of summary judgment to the government. Such outcomes are a daily occurrence. But Friendly, digging into the case, became convinced that Kerner was being unjustly treated and that the evidence in the record did not support the conclusion that Kerner could still perform substantial gainful activity in the economy and was therefore not disabled.[10] Whether Friendly knew it or not, his legal analysis challenged the routine approach to such cases. He said "[m]ere theoretical ability to engage in substantial gainful activity is not enough" and then said "the evidence as to employment opportunities was even less."[11] The government must have been considerably less than pleased at that formulation. If those words had been in a Supreme Court decision, advocates for the disabled would have been overjoyed.

But Friendly wasn't trying to make law. He was trying to do justice for Philip Kerner. He subsequently wrote to a friend that "[t]he way Kerner got polished off was utterly disgraceful."[12] And then, worried that Kerner would lose on remand, he reached out to an acquaintance at a cardiac rehabilitation center to see if he could arrange for Kerner to get medical help. The story goes on, but what I have already said makes the point. He was quite susceptible to getting engaged in the equities of the facts of cases about

8. *Id.* at 174–76.

9. Kerner v. Flemming, 283 F.2d 916, 918 (2d Cir. 1960); DORSEN, *supra* note 1, at 174.

10. DORSEN, *supra* note 1, at 174–75.

11. *See id.* (quoting from *Kerner*, 283 F.2d at 921).

12. *Id.* at 175.

ordinary people and then walking more than the last mile to pursue a just result.

Every law student learns about *Bivens* torts. In *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*,[13] the Supreme Court held that the Constitution creates a cause of action for damages against federal officials who violate the civil rights of private individuals.[14] Friendly's role in the case is a major example of why it is difficult to pigeonhole him ideologically and, as well, of his occasional proclivity to act outside of the usual judicial boundaries.[15]

Friendly was sitting as the motions judge one day when he came across Webster Bivens's motion for leave to appeal *in forma pauperis*. Bivens had sued for damages after federal officers arrested him in his home without a warrant and handcuffed him in front of his wife and children.[16] The district court had dismissed the case, saying what had always been assumed to be the law: federal officials acting in the performance of their duties could not be sued in this kind of case.[17] Friendly, knowing that state officials could be sued under similar circumstances because of 42 U.S.C. § 1983, which had been enacted in the wake of the Civil War, saw an injustice in the disparity between the accountability of state officials and federal officials. He dragooned a recent clerk and by-then Wall Street lawyer, Stephen Grant, to take Bivens's case.[18]

Grant lost. Friendly, who had not been on the panel on the merits, wrote Grant a brief note suggesting that he "take the matter further."[19] Then followed another note suggesting the lines of an argument to make to the Supreme Court. Grant won.[20] Quite a story.

The book is well-stocked with other examples of Friendly's role in cases that piqued his interest on a human level as well as numerous examples of his significant role in cases that went on to the Supreme Court. He became a prolific writer of important books and articles on an array of legal matters, and of letters, sometimes for publication, expressing views on issues of the day. As with his work on the court, he was far from predictable, although there were certainly areas in which he had clear conservative views. He not only had an open mind across a spectrum of issues, but was willing to change his position on thinking about it more. *Baker v. Carr*,[21] decided while I was Judge Friendly's clerk, is an example. I remember the outrage

13. 403 U.S. 388 (1971).

14. *Id.* at 395–96.

15. DORSEN, *supra* note 1, at 183–85.

16. *Bivens*, 403 U.S. at 389–90.

17. *Id.* at 390.

18. *See* DORSEN, *supra* note 1, at 183–84 (discussing how Grant initially stated that he was not a litigator but that Friendly ultimately assigned Grant to represent Bivens).

19. *Id.* at 184.

20. *Id.*

21. 369 U.S. 186 (1962).

he expressed to me about the decision, and I knew that he had written to Justice Frankfurter, calling his dissent "magnificent" and "one of your truly wise and great opinions."[22] I thought at the time that his anger was misplaced and was interested to note in Dorsen's book that Friendly changed his mind about the case a few years later and said so publicly.[23] I was glad to see that, both in itself and for what it says about the man.

In an age in which moderation is increasingly rare in the conservative world, both judicially and politically (realms that increasingly overlap), Henry Friendly is a man to remember with special respect. Had he sat on the Court, I am sure I would have disagreed with many, although far from all, of his opinions and votes, but I know I would have respected his reasoning and scholarship. He was a man of reason, above all.

22. DORSEN, *supra* note 1, at 125.
23. *Id.*

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.

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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]

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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.

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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,

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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

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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

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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.

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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]

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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,

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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).

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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."[1] 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,[2] to its 1939 New York World's Fair glory,[3] to its eventual desuetude.[4] 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."[5] As Inazu notes, the Supreme Court has not explicitly based a decision on the Assembly Clause in three decades.[6]

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.[7] 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.[8] 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.[9]

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.[10] 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.[11] 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.[12] Chapter 2 ends, rather abruptly, with a very brief discussion of what Inazu refers to as the "demise of assembly."[13] As Inazu notes, "by the end of the 1960s, the right of assembly in law and politics was largely confined to protests and demonstrations."[14] By the early 1980s, even this aspect of the right of assembly had been subsumed by First Amendment free speech doctrine.[15]

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.[16] 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.[17] 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.[18] 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.[19]

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.[20] 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."[21] Inazu characterizes the association right as an "enfeebled" version of assembly that restricts group autonomy, suppresses dissent, and pushes groups toward conformity and congruence.[22] 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."[23]

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

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.[25] Wolin argued that dissent, social conflict, and nonconformity are necessary *destabilizing* components of a healthy democracy.[26] 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."[27] 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.[28] Inazu's political defense of group autonomy offers a strong counternarrative to that relied upon by antidiscrimination proponents (most notably Andrew Koppelman).[29]

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."[30] 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."[31]

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.[32] 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),[33] the Christian Legal Society, and all-male fraternities.[34] Invoking equality principles and antidiscrimination laws, plaintiffs and governments pressed such organizations to open their doors to all comers.[35] 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.

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.[36] 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."[37] 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.[38]

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."[39] 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."[40] Inazu also posits a nontextual limitation, namely that *commercial* groups are not entitled to protection under the Assembly Clause.[41] 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."[42] 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.[43] However, in most cases, Inazu expects that the presumption will prevail against governmental interference with groups' autonomous decision making.[44]

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.[45] 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.[46] 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.[47] 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.[48] 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

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.[49] 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.[50] 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*.[51] 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.[52] Emerson incorporated a discussion of the right to peaceably assemble into this systematic account.[53] He interpreted assembly and other First Amendment rights as protections against regulating belief, coercing orthodoxy, and insisting on congruence and conformity.[54]

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

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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.[55] 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.[56] As Inazu's examples involving Christian campus organizations and Jewish fraternities show,[57] 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?[58]

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.[59] As Inazu suggests, the freedom of assembly provides refuge from state interference with group formation.[60] Perhaps freedom of assembly, rather

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.[61]

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."[62] 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"?[63] 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,[64] 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.[65] 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.[66] 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.[67] 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.[68] 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;

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.[69] 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.[70] 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."[71] 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.[72] 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

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.[73]

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.[74] 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.[75] 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.[76] 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?[77] 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

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.[78] We might also borrow from the pluralist approach that has developed under the First Amendment's religion clauses.[79] 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.[80] 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,[81] 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."[82] The shared space

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) (dicussing 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.[83] 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.[84]

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

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."[85] 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*[86] 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."[87] 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.[88] 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.[89]

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

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.[90] 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.[91] 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).[92] 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."[93] 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."[94] 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."[95] As Inazu wryly observes, "We lose more than the shared experience of cheese fries and cheap beer when we bowl alone."[96]

I wish Inazu had elaborated on this "social vision."[97] 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 Tayor, 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.[98] 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

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."[99] 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.[100] 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.[101] Where the freedom of assembly is recognized and

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

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.[102] Admittedly, restrictions on public protest and assembly were not Inazu's *raison d'etre*. 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.[103] 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."[104]

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."[105] As Inazu notes, in the early 1980s the Supreme Court "swept the remnants of assembly within the ambit of free speech law."[106] 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.[107]

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,[108] 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.[109] 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."[110] OWS is clearly a noncommercial group, and thus entitled to presumptive protection under the Assembly Clause.[111] 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.[112] 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.[113]

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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.

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.[114] Finally, as have other public assemblies, the OWS demonstrations "disrupt[ed] social norms and consensus thinking."[115] They initiated a national and international conversation concerning issues like social equality, fairness, capitalism, and political representation.[116]

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.[117] 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.[118] 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.[119] 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.[120] 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.[121] 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.[122] 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

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.[123]

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.[124] The primary concern in those cases was to what extent speakers should have a meaningful opportunity to engage with their intended audiences.[125] 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.[126] 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.[127]

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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.[128] 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.[129] 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?[130]

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[131] 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.[132] 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 (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.

What Is the Essential Fourth Amendment?

MORE ESSENTIAL THAN EVER: THE FOURTH AMENDMENT IN THE TWENTY-FIRST CENTURY. By Stephen J. Schulhofer. New York, New York: Oxford University Press, 2012. 216 pages. $21.95.

Reviewed by Christopher Slobogin*

I. Introduction

To the average American, the Fourth Amendment probably brings to mind a jumbled notion of warrants, probable cause, and exclusion of illegally seized evidence. Compared to the First Amendment, *Miranda*'s right to remain silent,[1] the jury trial guarantee,[2] and the Equal Protection Clause's prohibition on racial discrimination,[3] the right to be secure from unreasonable searches and seizures is not well understood by most of the populace, either in its precise scope or its rationale.

Some confusion about specific Fourth Amendment prohibitions is tolerable and understandable. After all, it is the job of the police and judges, not Joe Q. Citizen, to apply search and seizure law, and even these government actors are more than occasionally flummoxed by the rules. Public ignorance about the Amendment's rationale is perhaps just as excusable, but it is much more unfortunate. People do not always understand why the law appears to prefer a judge's opinion over that of the streetwise cop, why a person who has nothing to hide should care about official surveillance, or why a person who does have something to hide should be able to exclude evidence of guilt because the police violated some arcane rule. As a result, citizens are often outraged by judicial opinions that free defendants on "technicalities,"[4] and seldom are bothered by those court decisions—much more prevalent in the past several decades—that curtail liberty and privacy in the name of crime control and national security.

Stephen Schulhofer sees this as a problem, and in *More Essential Than Ever: The Fourth Amendment in the Twenty-First Century*[5] he tries to redress it. Pitched toward a general audience rather than the legally trained, the book

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1. Miranda v. Arizona, 384 U.S. 436, 444 (1966) ("Prior to any questioning, the person must be warned that he has a right to remain silent . . . .").

2. U.S. CONST. amend. VI.

3. *Id.* amend. XIV, § 1.

4. *See generally* William A. Geller, *Is the Evidence in on the Exclusionary Rule?*, 67 A.B.A. J. 1642, 1645 (1981) (discussing the public policy debate over the exclusionary rule).

5. STEPHEN J. SCHULHOFER, MORE ESSENTIAL THAN EVER: THE FOURTH AMENDMENT IN THE TWENTY-FIRST CENTURY (2012).

provides a passionate defense of the "essential" Fourth Amendment that, as Schulhofer would have it, the Founders intended but the current Supreme Court has ignored. Much of what is said in this book will not be new to Fourth Amendment scholars. But the work's straightforward eloquence provides a strong, popularized brief for interpreting the Fourth Amendment as a command that judicial review precede all nonexigent police investigative actions that are more than minimally intrusive. Schulhofer argues that this interpretation is not only consistent with the intent of the Framers, but remains a crucial means of discouraging government officials from harassing innocent people, promoting citizen cooperation with law enforcement efforts, and protecting the speech and association rights that are indispensable to a well-functioning democracy.[6]

Schulhofer's liberal take on the Fourth Amendment is largely persuasive. This Review points out a few places where Schulhofer may push the envelope too far or not far enough. But, these quibbles aside, *More Essential Than Ever* is a welcome reminder for scholars and the public at large that the Fourth Amendment is a fundamental bulwark of constitutional jurisprudence and deserves more respect than the Supreme Court has given it.

II. Judicial Review as a Means of Protecting Privacy and Limiting Discretion

More Essential Than Ever is composed of eight chapters, the first two of which set up the rest of the book. Chapter 1 sketches out the thesis that was just described. In the course of doing so, Schulhofer describes his views on the core purpose of the Fourth Amendment. While he appears to accept the Supreme Court's stance that the scope of the Fourth Amendment is defined primarily by reasonable expectations of privacy,[7] he reminds us that the Amendment explicitly speaks not of privacy but of "the right of the people to be *secure* in their persons, houses, papers and effects."[8] Thus, he reasons, the Fourth Amendment is not about privacy in the sense of keeping secrets, but rather protects privacy as a means of ensuring people are secure in their ability to control information vis-à-vis the government.[9] To the

6. *See id.* at 6 ("[The Fourth Amendment] offers a shelter from governmental intrusions that unjustifiably disturb our peace of mind and our capacity to thrive as independent citizens in a vibrant democratic society.").

7. *See* Kyllo v. United States, 533 U.S. 27, 33 (2001) (stating that a Fourth Amendment search occurs if "'the individual manifested a subjective expectation of privacy in the object of the challenged search,' and 'society [is] willing to recognize that expectation as reasonable'" (quoting California v. Ciraolo, 476 U.S. 207, 211 (1986))).

8. SCHULHOFER, *supra* note 5, at 7 (citation omitted) (emphasis in original).

9. *See id.* at 10 (arguing that it never would have occurred to Americans in the eighteenth century that "by entering into relationships with others, they had given *the government* unrestricted access to any information they revealed to trusted social and professional associates"). Schulhofer later clarifies that the Fourth Amendment is about "the right to control knowledge about our

argument that innocent people should have nothing to fear from law enforcement discovery of private information, especially when it can be discovered without physical intrusion, Schulhofer has the following riposte: "[S]urveillance can have an inhibiting effect on those who are different, chilling their freedom to read what they choose, to say what they think, and to join with others who are like-minded."[10] And when this occurs without justification, "[it] undermine[s] politics and impoverish[es] social life for everyone."[11]

It has become fashionable to criticize the idea that Fourth Amendment search doctrine is meant to protect privacy. Critics claim that the Fourth Amendment is really about government power,[12] protecting property rights,[13] or preventing coercion.[14] But *all* of the guarantees in the Bill of Rights are about restricting government power. The Fourth Amendment focuses on protecting *particular* individual interests from *certain* types of government power, and Schulhofer is right that privacy, construed to mean control of information from unjustified government access, is the dominant focus of Fourth Amendment doctrine,[15] at least as it applies to searches.[16] The Fourth Amendment's prohibition on unauthorized government monitoring of our activities, thoughts, and plans is a potent limit on official power that protects against trespass and official coercion but also protects against much more.

Chapter 2 provides a survey of the historical conflicts and cases that led to the Fourth Amendment. Schulhofer does a masterful job telling the story of the general warrant. He begins with the sagas of two Englishmen well-

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personal lives, the right to decide how much information gets revealed to whom and for which purposes." *Id.* at 130.

10. SCHULHOFER, *supra* note 5, at 13.

11. *Id.* at 14.

12. *See, e.g.*, Paul Ohm, *The Fourth Amendment in a World Without Privacy*, 81 MISS. L.J. 1309, 1338 (2012) ("The new constitutional lodestar, power, is the Fourth Amendment's third act [after property and privacy] . . . . Power seems to be the amendment's essence, not merely a proxy for something deeper."); Raymond Shih Ray Ku, *The Founders' Privacy: The Fourth Amendment and the Power of Technological Surveillance*, 86 MINN. L. REV. 1325, 1326 (2002) ("The Fourth Amendment protects power not privacy.").

13. Morgan Cloud, *A Liberal House Divided: How the Warren Court Dismantled the Fourth Amendment*, 3 OHIO ST. J. CRIM. L. 33, 72 (2005) (arguing for a Fourth Amendment "*rooted* in property theories" (emphasis added)).

14. William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 446 (1995) (contending that the Fourth Amendment is meant to limit "coercion and violence").

15. *See* CHRISTOPHER SLOBOGIN, PRIVACY AT RISK: THE NEW GOVERNMENT SURVEILLANCE AND THE FOURTH AMENDMENT 23–26 (2007) (arguing that privacy is a central value protected by the Fourth Amendment).

16. Schulhofer confusingly supports his point about the importance of privacy in search cases by referring to cases involving seizures. SCHULHOFER, *supra* note 5, at 7 (describing cases involving the towing of a mobile home and arrests). Seizures are not governed by the expectation of privacy language used in search cases but rather are defined in terms of interference with property or movement. Jacobsen v. United States, 466 U.S. 109, 113 (1984) (seizure of property occurs when there is "some meaningful interference with an individual's possessory interests"); Florida v. Bostick, 501 U.S. 429, 436 (1991) (holding that seizure of a person occurs when he would not "feel free to . . . terminate the encounter").

known to Fourth Amendment scholars: John Wilkes, a member of Parliament whose office was ransacked by government officials seeking proof of seditious libel under a "nameless warrant,"[17] and John Entick, also suspected of sedition, whose papers were seized pursuant to a warrant issued by an executive official rather than a judge and that failed to describe the items sought.[18] Schulhofer also engagingly describes the hullabaloo in the colonies over the writs of assistance that allowed British officials to search any place they desired for evidence of unspecified offenses,[19] and of course he includes an account of James Otis's famous denunciation of the writs in 1761.[20] From this type of evidence, Schulhofer concludes that "there is no doubt that resistance to discretion lay at the heart" of the Fourth Amendment.[21]

Schulhofer is right about that. But he moves from that observation to the further conclusion that this resistance to the tyranny of every "common Officer" requires *ex ante* review by a judge for most searches and seizures.[22] Making that connection takes more work. The *Entick* and *Wilkes* cases involved searches for and seizures of papers, and the writs of assistance were aimed primarily at customed goods held by colonial merchants. The Framers, mostly from the middle and upper classes, may not have cared very much about whether seizures of ordinary criminals and searches for evidence of "street crime" were anticipated by a warrant.[23] Schulhofer himself notes that warrantless arrests for routine felonies were permitted upon "reasonable cause"; that warrantless searches pursuant to arrest were routine; and that searches of ships, wagons, and other property outside the home at least "occasionally" took place without judicial authorization.[24] Even warrantless searches of homes occurred in colonial times.[25]

So while the Framers hated the general warrant, they did not necessarily think specific warrants were or should be the primary means of regulating all types of government investigations. Schulhofer indirectly concedes this point,[26] but insists that modern-day resistance to executive discretion requires a preference for warrants even in situations in which they may not have been

17. SCHULHOFER, *supra* note 5, at 24–26.

18. *Id.* at 26–27.

19. *Id.* at 27–30.

20. *Id.* at 29.

21. *Id.* at 35.

22. *Id.* at 36.

23. Indeed, as Schulhofer points out, James Madison supported the Fourth Amendment because "he feared that popular majorities would enact legislation authorizing broad warrants, to the disadvantage of the new nation's propertied elite." *Id.* at 35.

24. *Id.* at 37.

25. Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 622 (1999) (stating that during the Framing Era "the initiation of arrests and searches commenced when a crime victim either raised the 'hue and cry' or made a sworn complaint," although also noting that the hue and cry was probably relegated to "fresh" cases by the late eighteenth century).

26. SCHULHOFER, *supra* note 5, at 40–41.

required in colonial times.[27] He gives a number of reasons for this position, but the most prominent of them is the rise of organized police forces, aided by technological advances, that have vastly expanded government search and seizure capacity compared to that possessed by the lonely colonial constable.[28]

More broadly, this huge shift in the relative power structure leads Schulhofer to argue for an analytic approach that focuses on original principles rather than original rules, which is an approach he dubs "adaptive originalism."[29] On this last point, Schulhofer is in league with a number of scholars. For instance, Donald Dripps has recently argued that trying to tie modern rules to specific practices that existed in the eighteenth century makes no sense in a whole host of uniquely modern situations, including administrative searches, searches of private papers, investigative stops on less than probable cause, wiretapping, and the use of gunfire to effect the arrest of a fleeing felon.[30] Moreover, even the common law rules that can sensibly be applied today were in the process of changing in the eighteenth century and were not necessarily favored by the Framers.[31] So, like Schulhofer, Dripps would ask whether and to what extent a search and seizure threatens "the priority of individual liberty and privacy, as against public security, that the founders aspired to."[32] The key question remains, however, whether adaptive or aspirational originalism requires the strong warrant requirement that Schulhofer favors.

III. A Critique of Modern Search and Seizure Rules

Chapters 3 through 7 of *More Essential Than Ever* try to answer that question. They address the Supreme Court's jurisprudence in five general areas: the overarching rules governing searches and arrests; the special problems that arise in policing on the streets; the law governing administrative searches such as health and safety inspections, roadblocks and drug testing of school children; wiretapping and other electronic searches; and the dilemmas caused by national security concerns. The theme throughout these chapters is that, in generating current rules, the Supreme Court "has increasingly put police convenience above . . . original Fourth

27. *See id.* at 41 (arguing that though we should respect the Framers' interpretations of searches and seizures under the Fourth Amendment, "that respect cannot take the form of an unreflective commitment to old rules that now have radically different effects in practice").

28. *See id.* at 40 (arguing that eighteenth-century law enforcement was "a small, poorly organized, amateur affair, a far cry from the sizeable force of well-armed, full-time police who only a few years later became a constant presence on the streets of American cities and towns").

29. *Id.* at 39–41.

30. *See generally* Donald A. Dripps, *Responding to the Challenges of Contextual Change and Legal Dynamism in Interpreting the Fourth Amendment*, 81 MISS. L.J. 1085 (2012) (proposing aspirational originalism).

31. *Id.* at 1089.

32. *Id.* at 1128.

Amendment priorities" and thus failed to curb sufficiently the executive branch's discretion to invade privacy.[33]

In Chapter 3, entitled "Searches and Arrests," Schulhofer attacks the Court's unwillingness to exclude evidence when police violate the rule governing no-knock entries,[34] driving home his point with descriptions of several incidents in which residents were killed or harmed when surprised by police.[35] He disagrees with the Court's decisions allowing pretextual traffic stops and cajoled consents,[36] and partly as a way of undermining those decisions he appears to argue that the police should have to obtain a warrant for all nonexigent arrests, or at least for all nonexigent arrests for crimes that would have been misdemeanors at common law.[37] He also seems to think that warrants should be required for searches of cars in all but the most exigent circumstances, given the much-expanded use we make of vehicles in modern times.[38] Finally, he castigates two of the Court's rationalizations for its retrenchment on the exclusionary rule—the increased professionalism of the police and the development of alternative remedies[39]—by arguing that neither development has progressed far enough to justify the trust the Court places in law enforcement.[40] In Schulhofer's mind, the suppression remedy is required in order to deter the police and ensure judicial integrity, and undercutting it as the Court has done breeds lawlessness.[41]

Chapter 4, "Policing Public Spaces," tackles the special problems that arise in defining seizures of people and the scope of stop-and-frisk doctrine.[42] In contrast to many commentators on the liberal end of the spectrum, Schulhofer would not reverse *Terry v. Ohio*,[43] the Court's iconic case sanctioning stops and frisks on reasonable suspicion (a level of justification

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33. SCHULHOFER, *supra* note 5, at 44.

34. *See generally* Hudson v. Michigan, 547 U.S. 586 (2006) (holding that violation of the knock-and-announce rule does not require exclusion of evidence seized as a result).

35. SCHULHOFER, *supra* note 5, at 46–47.

36. Whren v. United States, 517 U.S. 806, 817 (1996) (holding that the Fourth Amendment does not recognize pretext arguments when the police action is based on probable cause); Schneckloth v. Bustamonte, 412 U.S. 218, 249 (1973) (holding that individuals need not be told of their right to refuse consent).

37. *See* SCHULHOFER, *supra* note 5, at 52 (arguing that the common law exception permitting warrantless arrest for felonies "should be interpreted narrowly").

38. Schulhofer states that "[m]ost Fourth Amendment experts find it hard to reconcile the warrant requirement for homes, suitcases, and paper bags with the no-warrant rule for cars," and dismisses "the practical challenges involved in immobilizing cars on the roadside while waiting for a search warrant" by noting the availability of telephonic warrants. *Id.* at 57.

39. *Hudson*, 547 U.S. at 598–99.

40. *See* SCHULHOFER, *supra* note 5, at 67 (commenting that the premise that "executive officers can be trusted to exercise search-and-seizure powers fairly, in the absence of judicial oversight, is precisely the assumption that the Fourth Amendment rejects").

41. *See id.* at 69 ("[T]he evidence shows that official disregard for fair procedure weakens public willingness to respect legal requirements and cooperate with law enforcement efforts to apprehend offenders.").

42. *Id.* at 71–92.

43. 392 U.S. 1 (1968).

short of probable cause).[44] He states that "it is hard to imagine how the Court could have done better" in light of the need to give police flexibility in dealing with "fast-breaking police actions on the street."[45] However, he believes that the Court's subsequent application of *Terry* and related rules—ranging from declarations that seizures do not occur when police chase fleeing inner-city youth or confront factory workers and bus passengers[46] to its holding that reasonable suspicion exists when individuals in high-crime areas run from the police[47]—"bears little relationship to social or psychological reality."[48] These decisions, he argues, have acquiesced in the creation of racially tinged "police states" that "affect thousands of citizens every year, undermining their security, their respect for authority, their sense of acceptance in the wider community, and even their willingness to assist law enforcement efforts to control crime."[49] He urges reversal of these decisions and commends the Court for striking down vagrancy laws that give police discretion to harass people pretextually.[50]

Chapter 5, on "The Administrative State," takes on the most difficult area of Fourth Amendment jurisprudence—searches and seizures that fall outside the paradigmatic investigation of street crime because they focus on garnering evidence for regulatory rather than criminal purposes (as with health and safety inspections of homes) or on special populations (such as drug testing of school children).[51] In these situations the Court has either diluted the warrant requirement by permitting "area warrants" that are not based on individualized suspicion or has done away with the warrant and probable cause requirements altogether on the assumption that "special needs beyond those of ordinary law enforcement" are involved.[52] Following the dissents in these cases, Schulhofer argues instead that departures from the judicial review requirement be permitted only when: (1) the objective of the government's enforcement program is important; (2) normal investigative methods cannot achieve it; (3) the program is implemented through neutral

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44. *See* SCHULHOFER, *supra* note 5, at 77 (arguing that the Court in *Terry* "established a pragmatic framework of relatively flexible powers in order to preserve police capacity to maintain order in public spaces").

45. *Id.*

46. United States v. Drayton, 536 U.S. 194, 200 (2002) (holding that the Fourth Amendment is not implicated when police confront bus passengers and ask for consent to search their luggage); California v. Hodari D., 499 U.S. 621, 626 (1991) (holding that chasing a fleeing person is not a seizure); INS v. Delgado, 466 U.S. 210, 218 (1984) (holding that questioning of factory workers is not a seizure).

47. Illinois v. Wardlow, 528 U.S. 119, 124–25 (2000).

48. SCHULHOFER, *supra* note 5, at 84.

49. *Id.* at 92.

50. *See, e.g.*, Chicago v. Morales, 527 U.S. 41, 63–64 (1999) (striking down a statute criminalizing failure to disperse upon a police command).

51. SCHULHOFER, *supra* note 5, at 93–114.

52. *See generally* Eve Brensike Primus, *Disentangling Administrative Searches*, 111 COLUM. L. REV. 254 (2011).

criteria applicable to all; and (4) the primary purpose of the program is not "prosecutorial."[53] Thus, for instance, Schulhofer believes the Court was correct in holding that a drug testing program aimed at political candidates was unconstitutional[54] (because the government interest was not substantial enough);[55] incorrect in upholding sobriety checkpoints,[56] suspicionless searches of probationers,[57] drug testing of students in nonathletic activities,[58] and spot inspections of junkyards for stolen parts[59] (because less intrusive investigative alternatives were available);[60] and correct in rejecting drug checkpoints[61] and programs designed to test pregnant women for cocaine[62] (because of their dominant prosecutorial purpose).[63] In contrast, health and safety inspections conducted according to neutral criteria[64] and airport checkpoints that monitor everyone do pass muster with Schulhofer.[65]

"Wiretapping, Eavesdropping and the Information Age" is the title of Chapter 6. Schulhofer's primary target here is the Court's so-called "third-party doctrine," which holds that when one knowingly exposes information to others one assumes the risk the government will acquire the information.[66] Relying on this rationale, the Court has concluded that the Fourth Amendment does not apply to government surveillance of travel on public roads and government acquisition of phone logs and bank records.[67] As have many others,[68] Schulhofer notes that under the Court's third-party doctrine,

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53. SCHULHOFER, *supra* note 5, at 97–98.

54. Chandler v. Miller, 520 U.S. 305, 323 (1997).

55. *See* SCHULHOFER, *supra* note 5, at 100–01 (praising the Court for assessing the significance of the State's interest in drug testing political candidates and for determining that it was not substantial enough to outweigh the privacy interests at stake); *Chandler*, 520 U.S. at 318.

56. Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 455 (1990).

57. Griffin v. Wisconsin, 483 U.S. 868, 880 (1987).

58. Bd. of Educ. v. Earls, 536 U.S. 822, 838 (2002); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 665 (1995).

59. New York v. Burger, 482 U.S. 691, 717 (1987).

60. SCHULHOFER, *supra* note 5, at 101.

61. City of Indianapolis v. Edmond, 531 U.S. 32, 48 (2000).

62. Ferguson v. City of Charleston, 532 U.S. 67, 76 (2001).

63. SCHULHOFER, *supra* note 5, at 108; *Ferguson*, 522 U.S. at 83.

64. *See* Camara v. Mun. Court, 387 U.S. 523, 534 (1967) (holding that the Fourth Amendment bars prosecution of a person who has refused to permit a warrantless code-enforcement inspection of his personal residence).

65. Schulhofer also appears to be comfortable with border searches and does not discuss checkpoints for licenses. SCHULHOFER, *supra* note 5, at 105. *Cf.* Delaware v. Prouse, 440 U.S. 648, 657 (1979) (permitting such checkpoints in dictum). Since these seizures might be said to have a dominant "prosecutorial purpose," it is not as clear how they fare under his model.

66. *See generally* Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 MICH. L. REV. 561 (2009) (offering a defense of the often-criticized doctrine).

67. Smith v. Maryland, 442 U.S. 735, 745 (1979) (holding that there is no reasonable expectation of privacy in phone numbers dialed); United States v. Miller, 425 U.S. 435, 442 (1976) (holding that there is no reasonable expectation of privacy in information surrendered to banks).

68. *See* Erin Murphy, *The Case Against the Case for Third-Party Doctrine: A Response to Epstein and Kerr*, 24 BERKELEY TECH. L.J. 1239, 1239 (2009) (arguing against the "current

one cannot reasonably expect privacy from government discovery of information given to a third party even when the disclosure to that party occurs with the understanding it is confidential, is made for a specific purpose only, or is unavoidable if one wants to live in modern society.[69] Schulhofer's adaptive originalism leads him to reject this result.[70] He points out that "[t]he colonists who conferred with friends while planning the American revolution did not think that by sharing confidential information they had lost their right to exclude strangers,"[71] and they certainly did not think they had thereby lost their right to exclude the government.[72] Furthermore, he continues, the Court's equation of citizen or institutional third parties with government agents is nonsensical in the modern age.[73] Schulhofer points out that "we routinely deny government the power to pursue actions that are freely available to individuals"—such as practicing a particular religion—and, more importantly, "[t]he extraordinary resources available to the government give it unique power and unique potential to threaten the liberty and autonomy of individuals."[74]

Thus, Schulhofer believes that the tracking of a car using a GPS device, as occurred in the recent case of *United States v. Jones*,[75] is a Fourth Amendment search that requires a warrant based on probable cause even when it is not effectuated by a trespass on the car[76] (the limitation on the definition of search endorsed by the majority in *Jones*).[77] He strongly endorses Justice Sotomayor's concurring opinion in that case voicing concern that even brief locational tracking can chill freedoms,[78] and he rejects the gist of Justice Alito's concurring opinion, which would apply the

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configuration" of the third-party doctrine rule that holds that "information disclosed to third parties receives no Fourth Amendment protection").

69. SCHULHOFER, *supra* note 5, at 126–34.

70. *See also* Lawrence B. Solum, *Faith and Fidelity: Originalism and the Possibility of Constitutional Redemption*, 91 TEXAS L. REV. 147, 154 (2012) (noting that "[a]lmost all originalists agree that courts should view themselves as constrained by original meaning and that very good reasons are required for legitimate departures from that constraint").

71. SCHULHOFER, *supra* note 5, at 130.

72. *Id.*

73. *See id.* at 128–32 (critiquing the notion that citizens have the option of communicating by means other than the internet or telephone and arguing that those communications should be protected).

74. *Id.* at 136.

75. 132 S. Ct. 945 (2012).

76. *See* SCHULHOFER, *supra* note 5, at 139 (citing *Jones*, 132 S. Ct. at 960 (Alito, J., concurring)) (expressing agreement with Justice Alito's concurring opinion that the police tactics at issue in *Jones* were unacceptable interferences with privacy rights).

77. *See Jones*, 132 S. Ct. at 954 ("It may be that achieving the same result through electronic means, without an accompanying trespass, is an unconstitutional invasion of privacy, but the present case does not require us to answer that question.").

78. *Id.* at 956–57 (Sotomayor, J., concurring) (stating that "[a]wareness that the Government may be watching chills associational and expressive freedoms" and also stating "it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties").

Fourth Amendment only to "prolonged tracking" and only as long as the public does not itself begin engaging in such tracking for convenience or security purposes.[79] Schulhofer would not always require a warrant when government seeks information from third parties or in every case of knowing exposure, however.[80] For instance, he endorses the practice of obtaining records via a subpoena, challengeable by the target.[81] And even in the case of surveillance, Schulhofer would only dictate that a search has occurred when police use "technology that is not widely available,"[82] suggesting that he believes nontechnological surveillance or surveillance with technology that is in "general public use" can escape Fourth Amendment regulation.[83]

Chapter 7 deals with "The National Security Challenge," a development that has threatened to undercut Fourth Amendment principles even further.[84] Schulhofer reminds us that we have come to deeply regret past overreactions to outside dangers and suggests we will similarly end up ruing post-9/11 phenomena such as the detentions in Guantanamo Bay, the Patriot Act's sneak-and-peek warrants,[85] National Security Letters authorizing FBI agents to gather up any records that are useful in "criminal, tax, and regulatory matters,"[86] and the expansion of electronic surveillance powers under the Foreign Intelligence Surveillance Act.[87] To Schulhofer, these departures from the norm can actually have a negative effect on national security because they overwhelm the government with information, distract officials from more effective methods of protecting the country, and discourage cooperation by those groups in society most likely to have information about potential foreign threats.[88]

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79. *Id.* at 962–64 (Alito, J., concurring) ("New technology may provide increased convenience or security at the expense of privacy, and many people may find the tradeoff worthwhile . . . [or] reconcile themselves to this development as inevitable.").

80. *See infra* notes 81–82 and accompanying text.

81. SCHULHOFER, *supra* note 5, at 134.

82. *See id.* at 142 (noting that "no one suggests that government data mining should be prohibited altogether" and that the Fourth Amendment is only intended to "assure that invasive methods of investigation are subject to oversight").

83. The "general public use" nomenclature comes from dictum in *Kyllo v. United States*, 533 U.S. 27, 34 (2001).

84. SCHULHOFER, *supra* note 5, at 144–69.

85. 18 U.S.C. § 3103(a) (2006). Schulhofer would not object to all sneak-and-peek warrants, however. *See* SCHULHOFER, *supra* note 5, at 48.

86. 12 U.S.C. § 3414(a)(5)(A) (2006); 18 U.S.C. § 2709(b) (2006).

87. 50 U.S.C. §§ 1801–1885c (2006 & Supp. IV 2011).

88. *See* SCHULHOFER, *supra* note 5, at 168 (arguing that "[p]roposals . . . to relax Fourth Amendment requirements and 'trade-off' liberty for security . . . make counterterrorism efforts more difficult, not less"). He goes on to discuss the ways in which Muslim Americans are less likely to cooperate with authorities if they believe the police are targeting their communities without explanation. *Id.*

IV. A Critique of the Critique

Schulhofer makes a compelling case for privacy as the linchpin of Fourth Amendment protection and for making *ex ante* review of police search and seizure decisions the default regulatory stance. Also persuasive is his position that the Amendment should be viewed as a crucial means of preserving democracy, encouraging diversity of views, and promoting citizen respect for and cooperation with police work. Finally, adaptive originalism makes eminent sense in a country with a strong foundational document that is over two hundred years old. In short, I am in agreement with the broad strokes of the book. I'm not as sure about all the particulars.

For instance, many vibrant Western democracies have been able to control their police without the draconian remedy of exclusion.[89] Contrary to Schulhofer's assertion,[90] routine suppression of evidence found through a Fourth Amendment violation probably *de*legitimizes the legal system in the eyes of most citizens,[91] and thus may contribute to the dissatisfaction with government that Schulhofer wants to avoid. Furthermore, in many situations—for instance, the violence and property damage that sometimes accompany illegal no-knock entries—monetary restitution is a more commensurate response than exclusion of evidence, as well as more satisfying when the victim of such acts is innocent of the crime and thus cannot resort to exclusion. Properly constructed, an action for damages[92]—the only remedy for illegal searches available in colonial times[93]—is more likely to accomplish all of the goals Schulhofer seeks: respect for government (because it punishes the true perpetrators of the illegality, not the prosecutor); deterrence of misconduct (especially in pretextual traffic and suspect drug possession cases, which wallet-conscious police will decide are not worth pursuing); improved professionalism (resulting from police departments literally having to pay the cost of bad training); and greater use of warrants (which police will realize immunizes them from liability).[94] While Schulhofer argues that an effective damages remedy would foreclose

89. *See generally* Craig Bradley, Mapp *Goes Abroad*, 52 CASE W. RES. L. REV. 375 (2001) (recounting resistance to, or significant limitations on, the exclusionary remedy in Europe, Australia, and Canada).

90. *See* SCHULHOFER, *supra* note 5, at 69 (arguing that "judicial tolerance for Fourth Amendment violations" creates problems for law enforcement because it "discourages law-abiding citizens from offering the cooperation needed to catch and convict offenders in future cases").

91. As Schulhofer admits, "Fourth Amendment requirements often garner little public support [because] [t]hey seem like a gift to those bent on wrongdoing." *Id.* at 171.

92. *See, e.g.*, 42 U.S.C. § 1983 (2006) (providing a civil action for the deprivation of constitutional rights); Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 390–97 (1971) (recognizing an action for damages when a plaintiff's injuries resulted from federal agents' violation of the Fourth Amendment).

93. *See* SCHULHOFER, *supra* note 5, at 67 ("[J]udicial oversight originally did not involve an exclusionary rule; the deterrent to an illegal search was the victim's ability to sue for damages").

94. *See generally* Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 445–46 (summarizing the advantages of a damages remedy).

just as many prosecutions as the exclusionary rule, he may be wrong on that score;[95] in any event, a damages remedy would not flaunt the costs of the Fourth Amendment in the delegitimizing way the rule does, or involve judges, lawyers, and juries in trials they know are charades. As an alternative to attacking police abuse of discretion on the street by vastly reducing arrests for minor crimes (which is the effect of Schulhofer's more stringent arrest warrant requirement), the exclusionary remedy might best be reserved in such cases for evidence not related to the purpose of the search and seizure, a move that should maximize deterrence of pretextual actions and spurious consents.[96]

The procedural justice literature upon which Schulhofer relies to make many of his arguments may also undercut some of his conclusions, especially in connection with regulation of large-scale crime-control efforts.[97] Schulhofer is right that parts of our cities, especially those occupied by minority groups, mimic police states, and the Court's willingness to blink at this state of affairs is outrageous, as well as complicit in discouraging cooperation with the authorities. At the same time, these communities are rife with crime, and their efforts to deal with that problem—through appropriately limited loitering statutes, camera surveillance, drug checkpoints, and the like—should not be foreclosed when they are the product of local democratic deliberations.[98] After all, the Framers themselves passed statutes permitting suspicionless inspections and searches, some of which were aimed at obtaining evidence of crime.[99] The principal defect of most of the administrative search and seizure cases heard by the Supreme Court to date is that they involved ad hoc programs established by the executive branch.[100] If instead authorization from a representative legislative body is required, if the legislation does not single out a discrete

95. *Id.* at 444 ("With an effective deterrent in place, police who lack probable cause will not necessarily give up; the more reasonable assumption is that they will simply get more cause.").

96. Ricardo J. Bascuas, *Lessons from the Highway and the Subway: A Principled Approach to Suspicionless Searches*, 38 RUTGERS L.J. 719, 787–90 (2007) (making this argument).

97. Schulhofer's most explicit work on this subject is Stephen J. Schulhofer et al., *American Policing at a Crossroads: Unsustainable Policies and the Procedural Justice Alternative*, 101 J. CRIM. L. & CRIMINOLOGY 335 (2011).

98. *See* Tracey L. Meares, *Norms, Legitimacy and Law Enforcement*, 79 OR. L. REV. 391, 410–13 (2000) (using loitering statutes to illustrate the importance of involving the community in devising effective law enforcement strategies in order to enhance legitimacy).

99. *See* Fabio Arcila, *The Death of Suspicion*, 51 WM. & MARY L. REV. 1275, 1304–10 (2010) (discussing various Revolutionary period statutes that permitted suspicionless searches).

100. *See, e.g.*, Ferguson v. City of Charleston, 532 U.S. 67, 71–72 (2001) (scrutinizing a policy authorizing drug testing of pregnant women formulated by hospital officials and local police); Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 447 (1990) (involving a highway sobriety checkpoint established by the police department); City of Indianapolis v. Edmond, 531 U.S. 32, 34–35 (2000) (reviewing a drug roadblock established by local police); New York v. Burger, 482 U.S. 691, 693–94 (1987) (examining a junkyard inspection program established by legislation but providing no limits on police discretion); Skinner v. R'y Labor Execs. Ass'n, 489 U.S. 602, 608–12 (1989) (analyzing a drug testing program for railway workers authorized by legislation that provided no standards for implementation).

and insular minority, and if it is implemented in a nondiscriminatory fashion (e.g., across-the-board or randomly), a better balance between crime control and individual rights might be achieved.[101] Nullification of such legislation probably would have more community-denigrating effects than the Court's current jurisprudence.

The same types of points can be made about national security surveillance endeavors, often aimed at accumulating information about thousands or hundreds of thousands of people (virtually all of whom are innocent of any wrongdoing).[102] If, before voting, legislators are required to imagine application of these programs to themselves and all of their constituents, they are not likely to approve *1984*-type laws, as evidenced by Congress's resistance to post-9/11 efforts to expand wiretapping authority[103] and its defunding of the infamous Total Information Awareness data-mining program.[104] And while courts are capable of figuring out when the legislative process is defective or when the police are unfairly implementing a legislatively authorized program, they are not equipped to make the nuanced determination, required by Schulhofer's approach, as to which law enforcement techniques are the most effective, least intrusive, most feasible means of achieving government aims.[105] Schulhofer's added stipulation that prosecution not be the dominant purpose of these programs has the ironic consequence, as he acknowledges, of providing more privacy protection for those who may be engaged in criminal activity than those who are not.[106]

Conversely, when law enforcement has targeted a specific individual, whether for prosecutorial or other reasons, the legislative process cannot work and judicial review before the search and seizure takes place is crucial. For this reason, Schulhofer's disdain for the third-party and knowing-exposure doctrines, which often work to vitiate *ex ante* review, is well-grounded. What is not as clear is why he would require probable cause for technologically sophisticated tracking of any length while permitting the government to obtain bank, credit card, and phone records with a subpoena (which at most requires a showing that the records are somehow relevant to

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101. This approach, based on political process theory, was first proposed by Richard Worf in *The Case for Rational Basis Review of General Suspicionless Searches and Seizures*, 23 TOURO L. REV. 93, 197–98 (2007), and is developed further in Christopher Slobogin, *Government Dragnets*, 73 LAW & CONTEMP. PROBS. 107, 143 (2010).

102. *See, e.g.*, Timothy B. Lee, *House Approves Another Five Years of Warrantless Wiretapping*, ARS TECHNICA (Sept. 12, 2012), http://arstechnica.com/tech-policy/2012/09/house-approves-another-five-years-of-warrantless-wiretapping (reporting on the FISA Amendment Act's goal of intercepting American citizens' international communication).

103. SCHULHOFER, *supra* note 5, at 158–59.

104. Department of Defense Appropriations Act of 2004, PUB. L. NO. 108-87, § 8131, 117 Stat. 1054, 1102 (2003).

105. *See* Slobogin, *supra* note 101, at 127–29 (explaining that while the Court can engage thoughtfully in strict scrutiny analysis in various contexts like time, place, and manner restrictions on speech, it is ill-equipped to analyze the efficacy and necessity of law enforcement techniques).

106. SCHULHOFER, *supra* note 5, at 95–96.

an investigation),[107] or why he would leave entirely unregulated even long-term surveillance with the naked eye or with generally available technology.[108] In terms of intrusiveness and the chilling effect on innocent activity—Schulhofer's concerns—record acquisition would seem at least as intrusive as tracking.[109] Further, tracking with a GPS would seem to be no more inimical to these interests than monitoring travels with the human senses or technology in general public use.[110] An alternative would be to permit both accessing of single-transaction records and short-term tracking—whether the police use naked-eye observation, primitive technology, or sophisticated devices—on reasonable suspicion, while requiring probable cause for acquisition of records containing substantial personal information and more prolonged surveillance.[111]

It is also not clear how Schulhofer would treat undercover investigations, since he does not discuss the relevant case law in the book. Perhaps he would analogize this popular law enforcement technique to naked-eye and low-tech surveillance, in which case, consistent with Supreme Court decisions on the issue, it would be unregulated by the Fourth Amendment.[112] But the ability of undercover agents to insinuate themselves into personal lives can often result in much more intrusion than even long-term tracking, and thus ought to require at least as much justification (as the eighteenth-century disdain for undercover "thief-takers" suggests).[113] Only

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107. United States v. R. Enters., Inc., 498 U.S. 292, 301 (1991) (stating that a subpoena should only be quashed on irrelevance grounds when "there is no reasonable possibility that the category of materials the government seeks will produce information relevant to the general subject of the grand jury's investigation"); United States v. Morton Salt, 338 U.S. 632, 652 (1950) (stating that administrative subpoenas meet constitutional requisites even if they are meant only to satisfy "nothing more than official curiosity").

108. Indeed, Schulhofer's primary concern with data mining appears to be, not its breadth, but its use of technology not widely available to the public. *See* SCHULHOFER, *supra* note 5, at 142 (making the use of "technology that is not widely available" a critical element of a "search" under the Fourth Amendment).

109. *Cf.* Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society,"* 42 DUKE L.J. 727, 737 (1993) (reporting data indicating that perusal of bank records is considered more intrusive, by a significant margin, than tracking a car).

110. Schulhofer notes that, at common law, public movements were not considered private. SCHULHOFER, *supra* note 5, at 123. But research indicates that "conspicuously" following someone down the street is viewed as fairly intrusive, albeit not as intrusive as technological tracking of a car for three days. SLOBOGIN, *supra* note 15, at 112.

111. These points are developed further in Christopher Slobogin, *Making the Most of* United States v. Jones *in a Surveillance Society: A Statutory Implementation of "Mosaic Theory,"* DUKE J. CONST. L. & PUB. POL'Y (forthcoming 2012) and Christopher Slobogin, *Is the Fourth Amendment Relevant in a Technological Age?*, *in* CONSTITUTION 3.0: FREEDOM AND TECHNOLOGICAL CHANGE 11 (Jeffrey Rosen & Benjamin Wittes eds., 2011).

112. *See, e.g.*, Hoffa v. United States, 385 U.S. 293. 302–03 (1966) (holding that the Fourth Amendment does not apply to evidence voluntarily disclosed to an informant).

113. *See* JOHN H. LANGBEIN ET AL., HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 677–81 (2009) (describing police and jury distrust of

when the third party is neither an agent of the government nor an impersonal entity like a bank should the third-party doctrine permit government to acquire the third party's information without any Fourth Amendment justification. In other words, the Fourth Amendment would be inapplicable in third-party scenarios only when the third party is independent of the government and can be said to possess a right (as an autonomous being) to disclose to the government any information he or she sees fit to reveal.[114]

Undoubtedly, Professor Schulhofer would have responses to all of these points. In any event, all of them only attack his thesis at the edges, without disturbing the crucial attributes of the Fourth Amendment's principles that he articulates and defends. *More Essential Than Ever* successfully captures the essence of the Fourth Amendment in a way that should bring home to everyone—not just lawyers and judges, but the "I've got nothing to hide" crowd, the "inner-city folks are all criminals" crowd, and the "government can be trusted" crowd—why it is so important.

thief-takers, who received rewards for turning in thieves that they often enticed into engaging in theft).

114. *See* Mary I. Coombs, *Shared Privacy and the Fourth Amendment, or the Rights of Relationships*, 75 CALIF. L. REV. 1593, 1643 (1987) (arguing that people in possession of information about others, even information that is "private" and obtained through an intimate relationship, have an "autonomy-based right to choose to cooperate with the authorities").