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ENTERING *LIBERTY'S REFUGE* (SOME ASSEMBLY REQUIRED)

GREGORY P. MAGARIAN*

The opportunity to introduce this exchange about Professor John Inazu's *Liberty's Refuge: The Forgotten Freedom of Assembly*[1] confers a daunting privilege. Giving a decent account of someone else's argument always makes for rough going, and the task becomes especially difficult when the argument features as much detail and nuance as Inazu has packed into *Liberty's Refuge.* This brief discussion of a book I greatly admire, by an author I am fortunate to know as a colleague and a friend, cannot hope to capture all of the book's important and interesting contributions. I will simply describe three of the book's primary facets. *Liberty's Refuge* is, first, a work of intellectual history: Inazu seeks to recover from history's tall grass a legally respected Anglo-American tradition of assembly. The book is also a work of constitutional interpretation and legal analysis: Inazu aims to revitalize the right of assembly for our time, critiquing the legal decisions that he sees as having buried or distorted assembly and charting a path toward renewed constitutional protection for assembly. Finally, the book is a work of normative political and legal theory: Inazu's legal analysis reflects his powerful normative commitment to the autonomy of groups—assemblies of all manner, size, and repute—that counter the state's power and allow individuals to define themselves through engagement with others. That all sounds rosy, and in many ways, it is. But Inazu's argument leads him into challenging and highly fraught terrain.

As intellectual history, *Liberty's Refuge* traces the origins, rise, and decline of the right of assembly. Inazu offers a rich account of the crucial role assembly played in forming and strengthening our society from the founding of the republic through the 1940s. He explains how the abolitionist movement, the movement for women's suffrage, and the progressive and labor movements of the early 20th century drew inspiration and strength from the right of assembly.[2] Legal protection for assembly allowed these dissident groups to pool their members' strength in order to challenge established arrangements of social and political power. The law took a wrong turn, in Inazu's view, during what he calls

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1. JOHN D. INAZU, LIBERTY'S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY (2012).
2. *Id.* at 20–62.

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the national security era of the 1950s and the Civil Rights Era that followed. National security concerns associated with the Cold War led the government to suppress assemblies by communists and left-wingers.[3] Then the Civil Rights Movement, in Inazu's portrayal, gradually moved from an emphasis on including African Americans in society to an emphasis on barring white-controlled groups from excluding them.[4] These two developments allowed a new legal concept, the freedom of association, to depose the right of assembly.

Inazu's critique of the freedom of association animates *Liberty's Refuge* as a work of constitutional interpretation and legal analysis. He emphasizes that the text of the First Amendment refers to assembly, not association, and he argues that association makes a less robust and less desirable basis for constitutional protection than assembly.[5] In particular, Inazu criticizes freedom of association doctrine for focusing on two narrow ideas: expressive association and intimate association.[6] The Supreme Court, beginning in the late 1950s, decided that groups mattered, for purposes of their constitutional autonomy, if they expressed coherent, usually political messages (e.g., the NAACP)[7] or if they embodied intimate relationships (e.g., families).[8] The Court did not accord constitutional protection to groups that it did not see as performing these functions (e.g., social clubs).[9]

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3. *Id*. at 63–77.
4. *Id*. at 77–96.
5. *Id*. at 3–4.
6. *Id*. at 135–49.
7. *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 618 (1984) (noting that "the Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion. The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties."); *see, e.g.*, NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958) (holding that the NAACP did not have to turn over its membership list to the state of Alabama because its members had a "constitutionally protected right of association"); *see also* INAZU, *supra* note 1, at 77–85 (discussing *NAACP v. Alabama*).
8. *See Roberts*, 468 U.S. at 617–18, 620–21 (noting that "the Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty. . . . Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life."); *see, e.g.*, Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980); *see also* INAZU, *supra* note 1, at 136–38 (discussing Karst's *The Freedom of Intimate Association*).
9. *See Roberts*, 468 U.S. at 617–29 (upholding the application of state antidiscrimination law to require a social club, which the Court characterized as neither an expressive nor an intimate

For Inazu, these two doctrinal categories miss a great deal of what really matters about a wide range of groups: their distinctive characteristics, their importance in forming individual identities, and their role in strengthening communal bonds among individuals. More fundamentally, the Court's freedom of association doctrine, by focusing on what groups do, misses the significance of groups' formation and their very existence as social counterweights to established political power.[10] Inazu's critique of association doctrine leads to incisive and thoughtful critiques of some key, generally well-regarded Supreme Court decisions, notably *Roberts v. United States Jaycees*[11] (for which Inazu provides a "missing dissent")[12] and the recent case of *Christian Legal Society v. Martinez*.[13] Both of those decisions, in Inazu's portrayal, reify the state's commitment to nondiscrimination norms at an unacceptable cost to group autonomy.

The conflict between assembly and nondiscrimination drives *Liberty's Refuge* as a work of normative political and legal theory. Inazu portrays a world in which concerns about discrimination have taken on hegemonic political importance, leading the government—with the Court's acquiescence—to force groups into accepting members the groups would prefer to exclude.[14] The intellectual villains in this story are advocates of political consensus, notably Robert Dahl[15] and John Rawls,[16] whose vision of liberal pluralism *Liberty's Refuge* portrays as promoting social harmony while subordinating groups' role as counterweights to state power.

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association, to admit women as regular members); *see also* INAZU, *supra* note 1, at 132–36 (discussing *Roberts v. United States Jaycees*).

10. *See, e.g.*, INAZU, *supra* note 1, 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."); *id*. at 4 ("The forgetting of assembly and the embrace of association thus marked the loss of meaningful protections for the dissenting, political, and expressive group."); *id*. at 5 (noting that his social vision of assembly "provides a buffer between the individual and the state that facilitates a check against centralized power").

11. *See supra* note 9.

12. INAZU, *supra* note 1, at 173–84.

13. 130 S. Ct. 2971, 2978, 2985 (2010) (concluding that the Christian Legal Society's "expressive-association and free-speech arguments merge" and upholding UC Hastings' policy requiring all student groups, as a condition of receiving official recognition, to comply with the school's nondiscrimination policy because such a condition was "a reasonable, viewpoint-neutral condition on access to the student-organization forum"); *see* INAZU, *supra* note 1, at 145–49 (discussing *CLS v. Martinez*).

14. *See* INAZU, *supra* note 1, at 141–49.

15. *See id*. at 100–09. *See generally* ROBERT DAHL, A PREFACE TO DEMOCRATIC THEORY (1956); ROBERT DAHL, PLURALIST DEMOCRACY IN THE UNITED STATES: CONFLICT AND DISSENT (1967).

16. *See* INAZU, *supra* note 1, at 129–31, 154–55. *See generally* JOHN RAWLS, A THEORY OF JUSTICE (Harvard Univ. Press 1999) (1971); JOHN RAWLS, POLITICAL LIBERALISM (1995).

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Resisting this tendency, Inazu offers a normative theory of the right of assembly, which he defines as "a presumptive right of individuals to form and participate in peaceable, noncommercial groups. This right is rebuttable when there is a compelling reason for thinking that the justifications for protecting assembly do not apply (as when the group prospers under monopolistic or near-monopolistic conditions)."[17]

From other quarters, normative arguments for the values Inazu promotes sometimes emerge as strident, shrill rallying cries. In contrast, *Liberty's Refuge* displays a rare nuance of thought and moderation of tone, even as Inazu steadfastly promotes his theory of assembly. For those of us who advocate strong antidiscrimination laws, several caveats in Inazu's formulation deserve emphasis. He highlights the First Amendment's requirement that constitutionally protected assembly must be peaceable.[18] He proffers the distinction between commercial and noncommercial assemblies as a political compromise to foreclose some potentially thorny disputes.[19] Perhaps the most interesting caveat is Inazu's exclusion of monopolistic or near-monopolistic groups from constitutional protection. This exclusion leads him to question *Boy Scouts of America v. Dale*,[20] a decision whose preference for group autonomy over gay rights might seem to epitomize the values of Inazu's assembly theory. Inazu, however, expresses concern about the result because of the Boy Scouts' distinctive social significance. The Boy Scouts does not simply stand alongside other groups similarly situated; rather, it provides a unique opportunity for social belonging that attracts a great many people and benefits from government support. Inazu suggests that such a group's autonomy interest might properly yield to the social benefits of greater inclusiveness.[21] These caveats render Inazu's assembly theory both provocative and circumspect; it challenges the legal primacy of liberal values of toleration without wholly subordinating those values. Inazu, like many political liberals who may resist his prescriptions, wants to create conditions for ordinary people to challenge established power.

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17. INAZU, *supra* note 1, at 166.

18. *Id*. at 166–67 (noting that the text of the First Amendment protects "the right of the people *peaceably* to assemble" (emphasis added)).

19. *Id*. at 167–68.

20. 530 U.S. 640 (2000) (holding that the Boy Scouts, as an expressive association, had a right to exclude an openly gay scoutmaster from their membership); *see* INAZU, *supra* note 1, at 143–44 (discussing *Boy Scouts of America v. Dale*).

21. *See* INAZU, *supra* note 1, at 251 n.36 ("Of all the litigants to bring cases about group autonomy to the Supreme Court in the past thirty years . . . the Scouts are arguably the litigants least worthy of the constitutional protections of assembly.").

My own deep admiration for *Liberty's Refuge* does the book no great credit, except for one important fact: I remain strongly skeptical about some of Inazu's core claims. Not many works of legal analysis or political theory can win devoted fans among their normative critics. Let me very briefly sketch two of my most substantial objections.

First, I question Inazu's rigid conception of, and decisive reliance on, the public-private distinction.[22] In his juxtaposition of assembly and nondiscrimination, assembly represents beleaguered private aspiration while nondiscrimination norms reflect oppressive state hegemony. That stark dichotomy does not ring true for me. Historically, nondiscrimination norms have resisted hegemonic power, while assemblies of nominally private people have often exercised extraordinary coercive power, even if the assemblies have been neither violent, commercial, nor monopolistic. Socially prominent religious institutions present one familiar example of this phenomenon. At the same time, Inazu never confronts the complex character of contemporary government. In our constitutional democracy, divided by principles of federalism and the separation of powers and further complicated by administrative bureaucracy, railing against "the state" raises more questions than it answers. Moreover, Inazu's exclusion of commercial entities from his right of assembly, while instrumentally appealing, lacks any apparent theoretical basis and has the effect of obscuring the many ways in which concentrations of "private" capital rival and undermine government's coercive authority. These problems may not undermine Inazu's essential conception of assembly, but I think they substantially complicate Inazu's goal of fitting that conception into constitutional law.

Second, as a free speech scholar, I am troubled by Inazu's rejection of expressive association. He makes a strong case that the Court's expressive association doctrine captures too little of what we care about in group formation and group identity. But if, as Inazu seems to suggest, we cannot meaningfully distinguish expressive associations from other associations—if the expressive character of certain associations does not imbue them with any constitutionally distinctive value—then I wonder how we can sustain free speech doctrine as we know it. After all, constitutional protection for expressive freedom depends on the distinction between speech and action. That distinction may be unstable or even

22. For my own views on the public-private distinction in First Amendment law, see Gregory P. Magarian, *The First Amendment, the Public-Private Distinction, and Nongovernmental Suppression of Wartime Political Debate*, 73 GEO. WASH. L. REV. 101 (2004).

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incoherent, but without it, the First Amendment loses all meaning.[23] I doubt scuttling free speech doctrine was on Inazu's agenda when he wrote *Liberty's Refuge*, but his legal analysis points toward that result. Inazu has persuaded me that the Court's formulation of expressive association suffers from internal deficiencies and excessive ambitions. Even so, I think we should attempt to repair that doctrine, and set it in its proper place, before we join Inazu in repudiating it altogether.

My doubts about some of Inazu's conclusions actually reinforce my appreciation of *Liberty's Refuge*. Inazu's clear prose style and relentless intellectual honesty enable and even invite criticism while also forcing critics to acknowledge and confront the force of his ideas. Inazu's avowed goal with this book is to start a discussion, and he has achieved that goal brilliantly. The present exchange, "Engaging *Liberty's Refuge*," marks a ceremonial launch of that discussion, and the discussion will continue and expand as the book engages and challenges new readers.

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23. *See, e.g.*, STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH, AND IT'S A GOOD THING, TOO 105 (1994) (discussing the necessity, and the incoherence, of the speech-action distinction in First Amendment doctrine).