Washington University Law Review

Volume 89 | Issue 6

2012

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Recommended Citation

Susan Frelich Appleton, *Commentary—Liberty's Forgotten Refugees? Engendering Assembly*, 89 Wash. U. L. Rev. 1423 (2012).
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LIBERTY'S FORGOTTEN REFUGEES? ENGENDERING ASSEMBLY

SUSAN FRELICH APPLETON*

John Inazu's impressive book, *Liberty's Refuge: The Forgotten Freedom of Assembly*,[1] interweaves two projects. First, it critiques the Supreme Court's development of the freedom of association. Second, it makes the case for reviving the freedom of assembly in order to strengthen constitutional protection for the rights of groups, in particular, groups' "right to exclude."[2] Many aspects of Professor Inazu's arguments no doubt strike some readers as promising, while other readers will find them provocative.

A thorough review of *Liberty's Refuge* lies beyond the scope of this essay, which has a very limited objective: to consider a few examples illustrating the additional insights that a feminist lens might bring to the analysis. Consistent with my modest agenda, the lens that I use is a very elementary one, without refractions reflecting the many variations in feminist theory.[3] Instead, this essay undertakes merely what Katharine Bartlett once called "ask[ing] the woman question."[4]

With this objective in mind, I have selected three specific issues: Professor Inazu's treatment of the always-contested divide between public and private, his overly narrow reading of the Supreme Court's intimate association doctrine, and his failure to distinguish exclusion from subordination. Although asking the woman question illuminates some of what is absent from Professor Inazu's analysis, I offer these comments with both collegial enthusiasm for his scholarship and commitment to "engaging" with the ideas that *Liberty's Refuge* sets forth.[5]

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1. JOHN D. INAZU, LIBERTY'S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY (2012).
2. *See id*. at 9–10, 166; *see also id*. at 181 (noting how "forced inclusion of unwanted members unquestionably alters the content of [an organization's] expression").
3. *See generally, e.g.*, MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY (2d ed. 2003).
4. Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 837–49 (1990).
5. This essay stems from my comments as a panelist at the conference "Engaging *Liberty's Refuge*," on March 2, 2012, at Washington University School of Law.

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I. OF PUBLIC AND PRIVATE

Professor Inazu offers the following definition of the constitutional right he seeks to recover:

> The right of assembly is a presumptive right of individuals to form and participate in peaceable, noncommercial groups. The 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).[6]

When claiming this right for groups, Professor Inazu asserts a clear divide between public and private. Accordingly, organizations like the Jaycees[7] and Boy Scouts[8] should be able to invoke the freedom of assembly because they are "private groups," not "public accommodations."[9] Thus, he criticizes the Supreme Court's reliance on freedom of association in *Roberts v. Jaycees*[10] and its decision that the organization must allow women to become full members, despite more exclusive gender-based rules.[11] Although Professor Inazu supports the outcome in *Boy Scouts of America v. Dale*,[12] in which the Court permitted the exclusion of an openly gay scoutmaster, he disagrees with aspects of the Court's approach, including its reliance on expressive association[13] and its failure to question whether the Boy Scouts may properly be classified as a public accommodation under New Jersey law.[14]

Despite the clarity that Professor Inazu attributes to the distinction between private groups and public accommodations, as he understands these categories, he ignores—and thus completely erodes—any public/private dichotomy when he turns his attention to asserted infringements of rights by the state. In two cases against which he takes particularly sharp aim, *Christian Legal Society (CLS) v. Martinez*[15] and *Chi Iota v. City University of New York*,[16] the alleged violations of the

6. INAZU, *supra* note 1, at 14, 166.
7. *See* Roberts v. Jaycees, 468 U.S. 609 (1984).
8. *See* Boy Scouts of America v. Dale, 530 U.S. 640 (2000).
9. INAZU, *supra* note 1, at 165, 168, 183.
10. 468 U.S. 609 (1984).
11. INAZU, *supra* note 1, at 132–43, 174–84.
12. 530 U.S. 640 (2000).
13. INAZU, *supra* note 1, at 143–44.
14. *Id*. at 168.
15. 130 S. Ct. 2971 (2010).
16. 502 F.3d 136 (2d Cir. 2007).

freedom of assembly arose from the failure of the schools in question, both state institutions, to provide affirmative support for exclusive groups, whose membership rules conflicted with the schools' policies of nondiscrimination. Thus, for example, in *Martinez*, the Court upheld the decision of Hastings College of the Law (a division of the University of California) to withhold benefits such as funding and the use of its logo from an organization that refused to accept members who did not share its beliefs about religion and sexual activities, in violation of the school's "acceptance of all comers" policy for officially recognized student groups.[17] In explaining this result, the majority observed that, although the "First Amendment shields CLS against state prohibition of the organization's expressive activity, . . . CLS enjoys no constitutional right to state subvention of its selectivity."[18] Similarly, in *Chi Iota*, the court reasoned that the refusal of the public university[19] "to subsidize the [male-only] Fraternity's activities does not constitute a substantial imposition on the group's associational freedom."[20]

Professor Inazu's vision for protecting groups' freedom to determine their membership is one that privileges such organizations' private preferences even as it demands the support of public institutions. For example, when criticizing *Martinez* and *Chi Iota*, Professor Inazu alludes only briefly to the issue of state subsidization, emphasizing instead the importance of public support to the exercise of private groups' protected First Amendment right:

> Sometimes a group must choose between receiving benefits and adhering to its policies at the cost of those benefits. But withholding some benefits (like access to meeting space or e-mail lists or the opportunity to be part of a public forum) can be akin to stamping out a group's existence. After *Martinez*, the Hastings Christian Group That Accepts All Comers can exist, and Christian Legal Society for Hastings Law Students That Can Sometimes Meet on Campus as a Matter of University Discretion if Space Is Available but Can't Recruit Members at the Student Activities Fair can exist. But the Hastings Christian Legal Society—whose views and

17. 130 S. Ct. at 2979.
18. *Id*. at 2978.
19. 502 F.3d at 138.
20. *Id*. at 148.

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> purposes are in no way sanctioned by and able to be explicitly disavowed by Hastings—cannot.[21]

Professor Inazu's assumption of a permenable boundary between public institutions and private groups omits reference to an extensive feminist literature on the would-be public/private divide. Feminist legal theorists have long challenged this purported distinction and its resulting subordination of women, with family law's insistence on a "private realm"[22] emerging as a recurring theme in such scholarship.[23] Yet, for me, asking the woman question about Professor Inazu's conceptualization of the freedom of assembly calls to mind, first and foremost, the Supreme Court's abortion-funding cases.[24] These cases held that even constitutional rights recognized as fundamental[25] do not give rise to entitlements to state support, even when such state support is necessary to permit exercise of the right.[26] Thus, even if the absence of support would extinguish for indigent women practical realization of the right to choose abortion, the state can express its own anti-abortion value judgments in how it directs its funding.[27] In clearly signaling its understanding of abortion as a negative right,[28] the Court invoked additional examples to make the point, observing that the parental right to choose private schooling for one's children does not require state-subsidized tuition.[29] Later cases have

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21. INAZU, *supra* note 1, at 149.

22. *See* Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

23. *E.g.*, MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY (2004); Nadine Taub & Elizabeth M. Schneider, *Women's Subordination and the Role of Law*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 328 (David Kairys ed., 3d ed. 1998); Frances Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REF. 835 (1985); Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L.J. 1394, 1416 (2009). Indeed, Professor Inazu devotes considerable attention to the American suffragists in the early twentieth century (*e.g.*, INAZU, *supra* note 1, at 44–45) without acknowledging how their movement to obtain the vote, at bottom, constituted a frontal attack on women's subordination effectuated through the constructs of coverture and the traditional private sphere. *See* Reva Siegel, *She the People*, 115 HARV. L. REV. 947 (2002).

24. Harris v. McRae, 448 U.S. 297 (1980); Maher v. Roe, 432 U.S. 464 (1977).

25. At the time the abortion-funding cases were decided, a majority of the Court classified the choice to terminate a pregnancy as a fundamental right, subject to strict constitutional scrutiny. *See* Roe v. Wade, 410 U.S. 113, 155 (1973).

26. *Harris*, 448 U.S. at 316–17. Similarly, the state is under no obligation to support a woman's decision to carry a pregnancy to term. *See* Susan Frelich Appleton, *When Welfare Reforms Promote Abortion: "Personal Responsibility," "Family Values," and the Right to Choose*, 85 GEO. L.J. 155 (1996).

27. *Harris*, 448 U.S. at 314–15; *Maher*, 432 U.S. at 474.

28. Susan Frelich Appleton, *Beyond the Limits of Reproductive Choice: The Contributions of the Abortion-Funding Cases to Fundamental-Rights Analysis and to the Welfare-Rights Thesis*, 81 COLUM. L. REV. 721, 734 (1981).

29. *Harris*, 448 U.S. at 318.

underscored the Court's steadfast preference for interpreting constitutional guarantees as negative rights, affording no claim to affirmative governmental support.[30] Put differently, *Martinez*, *Chi Iota*, and the abortion-funding cases are consistent in their treatment of constitutional rights, state value judgments, and public support.

Professor Inazu fails to explain why he assumes the freedom of assembly constitutes a positive right that compels state support, such as funding for the CLS from Hastings College of the Law or use of the school's logo.[31] Just as withholding financial support from abortion provides a way for a state to express its value judgment "to favor normal childbirth,"[32] Hastings, a public school operating as an arm of the state, made funding decisions that expressed its anti-discrimination values. At the same time, the negative right enjoyed by CLS protected its ability to assemble free from interference by the state.[33]

Certainly, I can imagine arguments contending that the abortion-funding cases do not control in disputes about the freedom of assembly. Textual distinctions offer one basis, given that the abortion-funding cases invoked the Fourteenth Amendment, which protects against "deprivations" of liberty,[34] while the freedom of assembly finds its source in the First Amendment, which permits "no law" on listed matters.[35] Doctrinal complexities—from principles governing public fora[36] to an intricate web of precedents on "unconstitutional conditions"[37]—could provide additional openings. Yet, *Liberty's Refuge* pursues no such path, instead noting that the distinction between public and private remains elusive[38] and then

30. *See* Town of Castle Rock, Colo. v. Gonzales, 545 U.S. 748 (2005); DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189 (1989).

31. *See* Ashutosh Bhagwat, *Situating* CLS v. Martinez, 38 HASTINGS CONST. L.Q. 543, 555–58 (2011).

32. *Maher*, 432 U.S. at 477.

33. Interesting questions arise about where noninterference ends and state support begins. Hastings permitted CLS to use school facilities for its meetings and activities and to post announcements on its chalkboards and bulletin boards. 130 S. Ct. 2971, 2981 (2010). And, of course, even if the group were to meet exclusively in private homes, it would benefit from some state services, such as public utilities and police protection. References to such line-drawing have arisen in the context of abortion as a negative right. *See* Webster v. Reprod. Health Servs., 492 U.S. 490, 523–24 (1989) (O'Connor, concurring in part); *see also* INAZU, *supra* note 1, at 123 (discussing *Gilmore v. City of Montgomery*, 417 U.S. 556, 574 (1974), and its suggestion that even negative rights might require use of "generalized governmental services," such as electricity and water).

34. U.S. CONST. amend. XIV, § 1.

35. U.S. CONST. amend. I.

36. *See, e.g.*, Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995).

37. *See, e.g.*, Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415 (1989).

38. *See* INAZU, *supra* note 1, at 17, 110–11.

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suggesting that making the case for freedom of assembly suffices to make the case for state subsidies and support.[39]

Nonetheless, asking the woman question about the woman question that Professor Inazu overlooks reveals a possible upside: perhaps Professor Inazu's willingness to blur public and private could help achieve reforms for which several feminist scholars have called. Examples of such reforms include more vigorous state protections from family violence,[40] state assistance in exercising reproductive choices,[41] state support for caregiving,[42] and state recognition of nontraditional family or intimate relationships[43]—not to mention better appreciation for the inextricability of the state from the "private realm."[44] Read broadly, Professor Inazu's seamless move from private rights to public support could spark new conversations about such matters.

II. OF INTIMATE ASSOCIATIONS

Liberty's Refuge contends that First Amendment case law went wrong when it developed the doctrine of freedom of association, in particular the branch protecting "intimate association," which has failed to respect the freedom to exclude that Professor Inazu would find in the Assembly Clause.[45] According to one possible reading, Professor Inazu is simply advocating a supplement to the freedom of association. Under a more plausible reading of his book, however, Professor Inazu wants a "do over," that is, a slate cleansed of existing precedent on freedom of association and its limits so that a new jurisprudence of assembly can take its place.[46] Hence, asking the woman question requires considering what it would

39. *Id.* at 149.

40. *See, e.g.*, Jane Aiken & Katherine Goldwasser, *The Perils of Empowerment*, 20 CORNELL J. L. & PUB. POL'Y 139 (2010); Catharine A. MacKinnon, *Substantive Equality: A Perspective*, 96 MINN. L. REV. 1, 13–15 (2011).

41. *See, e.g.*, Catharine A. MacKinnon, *Privacy v. Equality: Beyond* Roe v. Wade, *in* FEMINISM UNMODIFIED 93 (1987); West, *supra* note 23, at 1409.

42. *See, e.g.*, FINEMAN, *supra* note 23.

43. *See, e.g.*, NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW (2008).

44. *See, e.g.*, Olsen, *supra* note 23.

45. INAZU, *supra* note 1, at 132–49.

46. *Cf.* Saenz v. Roe, 526 U.S. 489, 527–28 (1999) (Thomas, J., dissenting) (expressing surprise but interest in the majority's reliance on the Fourteenth Amendment's Privileges or Immunities Clause, given "the current disarray of our Fourteenth Amendment jurisprudence" and the possibility that decisions under this clause might "displace, rather than augment, portions of our equal protection and substantive due process jurisprudence").

mean for the Court to scrap intimate association and, with it, all that this freedom has meant in the struggle for legal feminism and gender equality.

Against this background, the Court's privacy cases about contraception emerge as paradigmatic. Professor Inazu seems willing to accept the first of these cases, *Griswold v. Connecticut*,[47] which in 1965 stated that association "involve[s] more than the 'right of assembly,'"[48] described marriage as an intimate association,[49] and held that penumbras of several different constitutional guarantees protect a right of privacy encompassing married couples' use of contraceptives.[50] By contrast, Professor Inazu directs especially harsh criticism at *Griswold*'s sequel, *Eisenstadt Baird*,[51] in which the Court invoked *Griswold* and the Equal Protection Clause to identify the privacy right at stake as one concerning decisionmaking about life-altering choices, such as reproduction;[52] to conclude that the right belongs to the individual;[53] and to strike down a law criminalizing the distribution of contraceptives to unmarried persons.[54] For Professor Inazu, *Eisenstadt* epitomizes the distortions worked by the Court's association doctrine. He quotes with approval H. Jefferson Powell, who wrote that *Eisenstadt* heralded "the identification of a radically individualistic liberalism as the moral content of American constitutionalism."[55] In condemning the transition from *Griswold* to *Eisenstadt*, Professor Inazu observes that "[t]he right of privacy utterly detached from the right of association had no First Amendment basis; it came rather from the 'liberty' of the Due Process Clause of the Fourteenth Amendment."[56]

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47. 381 U.S. 479 (1965).

48. *Id*. at 483.

49. The majority stated:

> Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Id. at 486.

50. *Id*. at 484–85. *See* INAZU, *supra* note 1, at 124–28.

51. 405 U.S. 438 (1972).

52. *See id*. at 453 ("If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.").

53. *See id*. (stating that "the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup").

54. *Id*. at 454–55.

55. INAZU, *supra* note 1, at 128 (quoting H. JEFFERSON POWELL, THE MORAL TRADITION OF AMERICAN CONSTITUTIONALISM 176–77 (1993)).

56. INAZU, *supra* note 1, at 129.

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Yet, issues of contraception necessarily and inherently implicate association. In other words, the right to privacy—as defined by the Court in *Eisenstadt*[57]—cannot be "detached" from the right of association. For women especially, contraception makes possible sexual association without what *Eisenstadt* conceptualized as the penalty of unwanted pregnancy.[58] Indeed, pregnancy itself might well constitute the most intimate of associations,[59] from which follows what we might understand as a "right to exclude," to borrow Professor Inazu's term[60]—a term that nicely captures one way to think about what contraception accomplishes in a quite physical sense.[61] Of course, this right to exclude uniquely affects women. It should come as no surprise that Kenneth Karst's pivotal article on intimate association states that "*Eisenstadt* is correctly seen as a case involving the status of women."[62]

In the years since *Eisenstadt*, the freedom that it protects has reached farther, acquiring greater salience for men. With the official demise of most disadvantages based on illegitimacy[63] as well as increasingly aggressive measures designed to impose and enforce child support obligations, in the name of personal responsibility,[64] men now have a

57. *See supra* note 52 (quoting *Eisenstadt*).

58. *See* 405 U.S. at 448 ("It would be plainly unreasonable to assume that Massachusetts has prescribed pregnancy and the birth of an unwanted child as punishment for fornication. . . ."); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 225 (noting affirmative interest in sexual expression while controlling reproduction).

59. *See, e.g.*, Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988).

60. *See supra* note 2 and accompanying text.

61. *Cf., e.g.*, EILEEN MCDONAGH, BREAKING THE ABORTION DEADLOCK: FROM CHOICE TO CONSENT (1996) (conceptualizing abortion as akin to self-defense, with the fetus as an active agent to whose intrusion the woman must consent).

62. Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 676 (1980). Put differently, *Eisenstadt* stands out as an important case in its own right for women, even if one concludes that *Eisenstadt* is not a necessary step to recognizing the liberty and privacy protected in *Lawrence v. Texas*, 539 U.S. 558 (2003), which in turn struck down Texas's prohibition of same-sex sodomy, even when taking place in private spaces. Further, it remains an open question whether the holding and reasoning in *Lawrence* would provide direct support on the issue posed in *Eisenstadt*, namely, the constitutionality of the ban on the (public) distribution of contraceptives to unmarried individuals. *See, e.g.*, Williams v. Morgan, 478 F.3d 1316, 1322 (11th Cir. 2007) (holding *Lawrence* inapplicable to Alabama's statute prohibiting the distribution and sale of sex toys). *But see* Carey v. Population Servs. Int'l, 431 U.S. 678, 687–88 (1978) (analyzing restrictions on access to contraceptives under the same standard governing restrictions on use); Reliable Consultants, Inc. v. Earle, 517 F.3d 738, 744 (5th Cir. 2008) (citing *Carey* to conclude that *Lawrence* applies to Texas's statute prohibiting the distribution of sex toys).

63. *See, e.g.*, Clark v. Jeter, 486 U.S. 456 (1988); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972).

64. *See, e.g.*, Susan Frelich Appleton, *Illegitimacy and Sex, Old and New*, 20 AM. U.J. GENDER, SOC. POL'Y & L. 347, 360–64 (2012) (tracing current preoccupation with "personal responsibility").

considerable stake in the availability of contraception.[65] Of course, matters of paternity entail not only financial obligations but also the intimate association known as fatherhood, as various legal authorities have begun to recognize.[66] This is so, according to case law, even if the man and child would never meet in person.[67]

Exploring the woman question about access to contraception fills gaps in Professor Inazu's analysis. Even if intimate association fails to achieve all the protection that Professor Inazu seeks for group rights, this closer reading of *Eisenstadt* reveals that the doctrine he seems ready to scuttle safeguards valuable and substantial interests. Further, these are intensely personal and gendered interests that even a robust freedom of assembly would be unlikely to protect.

III. OF EXCLUSION, INCLUSION, AND HIERARCHY

Liberty's Refuge posits a clash of constitutional values: equality versus group autonomy.[68] As Professor Inazu describes the competing "constitutional visions," they entail "a radical sameness that destroys dissenting traditions or the destabilizing difference of a meaningful pluralism."[69] When faced with cases about race-based discrimination in which the courts have chosen equality or "radical sameness," Professor Inazu seems ready to accept the current state of the law, with no call to turn back the clock. For example, Professor Inazu does not quarrel with the Supreme Court's 1976 ruling in *Runyon v. McCrary*,[70] which required private schools to abandon racial segregation. Instead, he notes "*Runyon*'s *symbolic* importance" and comments that "[f]ew people today believe that private schools ought to have a constitutional right to exclude African Americans."[71]

When the issue changes from race-based discrimination to sex-based discrimination, however, Professor Inazu switches gears. In contrast to his approval, or at least tolerance, of the forced inclusion mandated by *Runyon*, Professor Inazu mounts an extended attack, including a "missing

65. *See, e.g.*, Dubay v. Wells, 506 F.3d 422 (6th Cir. 2007).

66. *See, e.g.*, Rivera v. Minnich, 483 U.S. 574, 583–86 (1987) (Brennan, J., dissenting); I. Glenn Cohen, *The Right Not To Be a Genetic Parent?*, 81 S. CAL. L. REV. 1115, 1125 (2008) (positing the concept of "attributional parenthood" that culture and society recognize apart from law).

67. *See, e.g.*, A.Z. v. B.Z., 725 N.E.2d 1051 (Mass. 2000); Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992).

68. INAZU, *supra* note 1, at 148, 184.

69. *Id*. at 184.

70. 427 U.S. 160 (1976).

71. INAZU, *supra* note 1, at 123 (emphasis in original).

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dissent," in response to the Supreme Court's ruling in *Roberts v. Jaycees*,[72] which held that the private organization in question must admit women as full members.

By pointing out Professor Inazu's differing treatments of race-based and sex-based discrimination, I have already posed and addressed one version of the woman question. And, by extension, one can see related questions of gender arising from Professor Inazu's approval of *Dale*, which upheld the exclusion of gays from the Boy Scouts,[73] and his criticism of *Martinez*, which validated the inclusion of gays and lesbians as a condition for state support.[74]

Yet even beyond these issues, a closer look at *Roberts* reveals complexities that Professor Inazu's call for a right to exclude ignores. As the facts of *Roberts* show, the Jaycees did not exclude women entirely; rather, women were permitted to join the organization as associate members, who could not vote, hold office, or participate in leadership or awards programs—all opportunities open to "regular" members.[75] To the extent that Professor Inazu correctly states that "association is itself a form of expression—[whom a group] selects as its members and leaders communicates a message,"[76] the message sent by the Jaycees was one of gender hierarchy. Including women in the group's activities would probably not alter the demographics, given that women were already associate members, but permitting women to join as full voting members might well produce different organizational politics and decisionmaking. From this perspective, the case does not raise the issue of a right to exclude, but instead the issue of a right to subordinate. The Court's references to "dignity" in *Roberts* reinforce this interpretation.[77]

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72. 468 U.S. 609 (1984); *see also* INAZU, *supra* note 1, at 174–84.

73. Boy Scouts of America v. Dale, 530 U.S. 640 (2000). For further discussion of the case, see *supra* notes 12–14 and accompanying text.

74. Christian Legal Society v. Martinez, 130 S. Ct. 2971 (2010). For further discussion of the case, see *supra* notes 15–21 and accompanying text.

75. Roberts v. Jaycees, 468 U.S. 609, 613 (1984). True, older men were also confined to the inferior status, but the policy still discriminates. *Cf., e.g.*, Geduldig v. Aiello, 429 U.S. 125, 162 & n.5 (1976) (Stevens, J., dissenting) (repudiating the conclusion that singling out pregnancy for disadvantageous treatment does not constitute sex discrimination just because the one class encompasses "nonpregnant persons," both male and female).

76. INAZU, *supra* note 1, at 148. This analysis clearly has implications for an organization such as Hastings College of the Law, even though it is public, not private, as in *Martinez*. Hastings is engaging in expressive association when it excludes from official recognition and support organizations that do not welcome all students as members. This observation, in turn, leads back to the reasoning in the abortion-funding cases, that expenditures of public funds express state value judgments. *See supra* notes 24–30.

77. 468 U.S. at 625.

Recall *Boy Scouts of America v. Dale*,[78] in which the Court upheld the organization's decision to exclude an openly gay scoutmaster on the theory that inclusion would contravene the Scouts' official position on homosexuality, given the group's expressive activity.[79] As the Court explained, "[t]he presence of an avowed homosexual and gay rights activist in an assistant scoutmaster's uniform sends a distinctly different message from the presence of a heterosexual assistant scoutmaster" even if the latter opposes the Scouts' anti-homosexuality policy.[80] The Court continued: "The Boy Scouts has a First Amendment right to choose to send one message but not the other."[81]

Now, assume that the organization permitted gays to join and serve but confined them to secondary roles—something less than full Boy Scouts, perhaps Associate Boy Scouts. Then, the message conveyed would not simply be that the organization is limited and exclusive, but rather that it is hierarchical and that its message is clearly one about the inferiority of gays. This hypothetical would make the case parallel to *Roberts v. Jaycees*.[82] It would also evoke comparisons to recent state and federal case law holding that confining same-sex couples to civil unions and domestic partnerships, while reserving marriage for different-sex couples, impermissibly demeans gays, lesbians, and their families by relegating them to a type of second-class citizenship.[83]

Professor Inazu's treatment of *Roberts* does not grapple with such matters of hierarchy and subordination, which are classic aspects of the woman question. Nor does he explain why, in setting limits on the right to exclude, he would treat race-based discrimination differently from discrimination based on sex or sexual orientation.[84] Yet, other scholars

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78. 530 U.S. 640 (2000).

79. *Id*. at 655.

80. *Id*.

81. *Id*. at 656.

82. 468 U.S. 609 (1984).

83. *See, e.g.*, *In re* Marriage Cases, 183 P.3d 384, 401, 433, 452 (Cal. 2008); Goodridge v. Dept. of Pub. Health, 798 N.E.2d 941 964 (Mass. 2003); *id*. at 972 (Greaney, J., concurring); *see also* Perry v. Brown, 671 F.3d 1052, 1063 (9th Cir. 2012) ("Proposition 8 [which would eliminate same-sex marriage and return such couples to domestic partnerships] serves no purpose, and has no effect, other than to lessen the status and human dignity of gays and lesbians in California, and to officially reclassify their relationships and families as inferior to those of opposite-sex couples.").

84. *See supra* notes 70–74 and accompanying text. I suspect that Professor Inazu probably finds racial classifications arbitrary and largely irrelevant to group identity but sees some "real differences" supporting classifications based on gender or sexual orientation. *See* Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1004 (1984) (discussing Supreme Court doctrine on "real differences" in cases about sex and gender). Yet, in the context of the freedom of assembly, such generalizations reflect stereotyping that the Supreme Court has repudiated. *See, e.g.*, Nevada Dept. of Human Res. v. Hibbs, 538 U.S. 721, 730 (2003) (emphasizing the impermissibility of gender

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have recognized subordination as an often distinctive characteristic of sex- and gender-based discrimination, unlike some race-based discrimination.[85]

IV. CONCLUSION

Liberty's Refuge makes valuable contributions to our understanding of the freedom of assembly, group rights, and the antecedents and consequences of some of the Supreme Court's most notable opinions. By overlooking several opportunities to take gender into account, however, the book risks leaving women as liberty's forgotten refugees. Yet, making room for the woman question in the conversation that Professor Inazu has launched should advance his project and its goals. After all, the woman question is simply a question, inviting participants in the conversation to offer their own, sometimes dissenting, answers.

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stereotyping); J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 135–36, 138–39 (1994) (noting similarities between race-based generalizations about jurors and condemning the striking of jurors based on gender stereotypes). Alternatively, Professor Inazu might see the history of slavery as meriting remedies that the history of gender oppression does not justify. *But see* DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE REPRODUCTION, AND THE MEANING OF LIBERTY 22–55 (1997) (noting how even slavery oppressed women more than their male counterparts). *See also* NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 61 (2000) (recounting historical justifications for slavery based on an analogy to marriage by citing beliefs that "[j]ust as women were fitted by nature and God to conform to their place as wives, enslaved African Americans were suited for slavery, and slavery, like marriage, was a relationship of unequals benfiting both parties").

85. *E.g.*, Mary E. Becker, *Needed in the Nineties: Improved Individual and Structural Remedies for Racial and Sexual Disadvantages in Employment*, 79 GEO. L.J. 1659, 1668 (1991) ("This desire for subordination, rather than aversion, may be a greater part of discrimination against women than against racial minorities. Sexist men do not, as a general rule, try to avoid all contact with women. On the contrary, they desire contact in certain subordinating forms, such as having women as secretaries and dependent wives. In contrast, many whites would prefer to avoid all contact with African Americans . . . ."); Elizabeth F. Emens, *Intimate Discrimination: The State's Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1307, 1335–36 (2009) (quoting Mary Becker).