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Response—Factions for the Rest of Us

John D. Inazu

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FACTIONS FOR THE REST OF US

JOHN D. INAZU*

I am grateful to Washington University School of Law for hosting the recent discussion on my book *Liberty's Refuge: The Forgotten Freedom of Assembly*.[1] I had three objectives in writing *Liberty's Refuge*: one diagnostic, one historical, and one normative. The diagnosis highlights difficulties with the current doctrine of intimate and expressive association.[2] The history excavates the prominent role that the right of assembly occupies in our constitutional and popular past.[3] The normative theory contends that we ought to protect dissenting private groups even at the cost of stability and uniformity.[4] The introductory remarks by Professor Magarian and the three essays from Professors Bhagwat, Vischer, and Appleton address these objectives through generous engagement and thoughtful critique.[5] In the limited space of this response, I focus on six themes prompted by the commentators: expression, violence, relationality, power, funding, and commerciality.

I. EXPRESSION

I am indebted to Professor Bhagwat for emphasizing how the contemporary significance of assembly extends beyond illiberal groups that resist antidiscrimination law. As Professor Vischer notes in his comments, I situated the doctrinal analysis in *Liberty's Refuge* in the Supreme Court's recent case law, which meant that I gave the greatest

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∗ Associate Professor of Law and Political Science, Washington University School of Law. Thanks to William Osberghaus and the editors and staff of the *Washington University Law Review* for their assistance in publishing this response.

1. The panel discussions on "Engaging *Liberty's Refuge*" took place on March 2, 2012, and provided commentary on JOHN D. INAZU, LIBERTY'S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY (2012). In addition to the authors of the three published responses, I thank Bernadette Meyler, Ian MacMullen, and Neil Richards for their thoughtful presentations and Deborah Dinner and Adrienne Davis for chairing the panels. Thanks also to Laura Rosenbury and Kent Syverud for making the event possible and to Beth Mott and Gail Boker for their assistance in organizing it. I owe the title of this essay to Ernie Young, who used the phrase to describe *Liberty's Refuge* when I first explained the book to him.

2. *See* INAZU, *supra* note 1, at 132–49.

3. *See id*. at 20–62.

4. *See id*. at 10–14, 153–73.

5. Gregory P. Magarian, *Entering* Liberty's Refuge *(Some Assembly Required)*, 89 WASH. U. L. REV. 1375 (2012); Ashutosh Bhagwat, *Liberty's Refuge, or the Refuge of Scoundrels?: The Limits of the Right of Assembly*, 89 WASH. U. L. REV. 1381 (2012); Robert K. Vischer, *How Necessary is the Right of Assembly?*, 89 WASH. U. L. REV. 1403 (2012); Susan Frelich Appleton, *Liberty's Forgotten Refugees? Engendering Assembly*, 89 WASH. U. L. REV. 1423 (2012).

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attention to the clash between group autonomy and antidiscrimination law.[6] While I continue to believe that exclusion is essential to expression and meaningful group autonomy, the principles of dissent and pluralism inherent in the right of assembly have far broader implications.[7] Professor Bhagwat highlights these broader principles in two important ways: by critiquing my reliance on expression and by exploring the boundaries of peaceable assembly. I address the first issue in this part and the second in the following part.

Professor Bhagwat argues that "[a]ssembly should be protected not because it is expressive, but because it independently advances the goals of the First Amendment."[8] He suggests that my "focus on the expressive nature of group membership as the reason for its protection seems to abandon that insight, and once again make assembly the handmaiden of speech."[9] While I hope I have not abandoned assembly to speech, Professor Bhagwat rightly notes that my framing of the issues in *Liberty's Refuge* risks that misconception. My emphasis on the inherent expressiveness of assembly was an effort to critique the current doctrinal framework that purports to distinguish between "expressive" and "nonexpressive" associations. But the expressive potential of a group is not the reason that we value assembly. We value assembly because it facilitates dissent, self-governance, and the informal relationships that make politics possible.[10]

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6. Vischer, *supra* note 5, at 1411 ("The scenarios through which Inazu works out the right of assembly tend to focus on the right to exclude, which is understandable given recent Supreme Court case law and the fact that the most pressing challenge to group autonomy is an expanding array of nondiscrimination laws."). For examples of recent cases that have focused on these issues, see, e.g., Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971 (2010); Boy Scouts of America v. Dale, 530 U.S. 640 (2000). *See also* N.Y. State Club Ass'n v. City of New York, 487 U.S. 1 (1988); Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987); Roberts v. United States Jaycees, 468 U.S. 609 (1984).

7. In a forthcoming article, I highlight the ways in which groups express themselves through the activities of exclusion, embrace, expulsion, and establishment. *See* John D. Inazu, *Virtual Assembly*, 98 CORNELL L. REV. (forthcoming 2013).

8. Bhagwat, *supra* note 5, at 1384.

9. *Id.*

10. INAZU, *supra* note 1, at 5 ("[T]he social vision of assembly does more than enable meaningful dissent. It provides a buffer between the individual and the state that facilitates a check against centralized power. It acknowledges the importance of groups to the shaping and forming of identity. And it facilitates a kind of flourishing that recognizes the good and the beautiful sometimes grow out of the unfamiliar and the mundane. Indeed, almost every important social movement in our nation's history began not as an organized political party but as an informal group that formed as much around ordinary social activity as extraordinary political activity."). Professor Bhagwat has expressed similar views. *See* Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. 978, 998 (2011) ("An association is a coming together of individuals for a common cause or based on common values or goals. Associations do not form spontaneously. Individuals seeking to form an association must be

Conversely, I do not mean for my critiques of expressive association and its companion, intimate association, to obscure the legitimate *functions* advanced by the kinds of groups that the Court means to protect through these categories. Intimacy and expressiveness are themselves instrumentally valuable to creating and fostering dissent and self-governance.[11] But constitutional categories like intimate and expressive association will inevitably capture only a subset of the groups that they are designed to protect because functional analyses like intimacy or expressiveness lend themselves to arbitrary judgments. Why, for example, is a family intimate but a college fraternity is not?[12] Or how are the Boy Scouts expressive but a motorcycle club is not?[13] Rather than resort to these politicized judgments, we ought to ensure that we are protecting groups whose First Amendment value and significance is contested, which means that we will inevitably overprotect some groups that most of us do not think further any legitimate constitutional purpose.

This posture of overprotection should sound familiar—it is precisely what we do with our free speech doctrine.[14] Few people find redeeming social value in animal crush videos.[15] But we protect expression of this

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able to communicate their views and values to each other, to identify their commonality. They must also be able to recruit strangers to join with them, on the basis of common values.”).

11. Bhagwat, *supra* note 10, at 994; *see also* Inazu, *supra* note 7 (discussing how assembly facilitates the First Amendment values of identity formation, self-governance, and dissent).

12. *Compare* Roberts v. United States Jaycees, 468 U.S. 609, 619–20 (1984) (noting that “[f]amily 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 distinctly personal aspects of one’s life”), *with* Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y., 502 F.3d 136, 144–47 (2d Cir. 2007) (holding that a college fraternity, in which its members “form deep attachments and commitments and share a community of thoughts, experiences, beliefs and distinctly personal aspects of their lives,” “lack[ed] the characteristics that typify groups with strong claims to intimate association” because of the fraternity’s “size, level of selectivity, purpose, and inclusion of non-members”) (internal quotations omitted)).

13. *Compare* Boy Scouts of America v. Dale, 530 U.S. 640, 649–50 (2000) (concluding that “it seems indisputable that an association that seeks to transmit such a system of values engages in expressive activity”), *with* Villegas v. City of Gilroy, 484 F.3d 1136, 1142 (9th Cir.) (concluding that the Top Hatters Motorcycle Club was not “engaged in the type of expression that the First Amendment was designed to protect”), *vacated*, 503 F.3d 974 (9th Cir. 2007), *and* Villegas v. City of Gilroy, 363 F. Supp. 2d 1207, 1219 (N.D. Cal. 2005) (reasoning that because the Top Hatters “were not engaged in expressive conduct and that no cognizable First Amendment right to ‘speech’ arises in this case . . . no right of association arises here”).

14. *See, e.g.*, Harry Kalven, Jr., *The New York Times Case: A Note on “The Central Meaning of the First Amendment,”* 1964 SUP. CT. REV. 191, 213 (“It must be recognized, of course, that a reason implicit in the breadth of the protection afforded speech is due to the judicial recognition of its own incapacity to make nice discriminations. It reflects a strategy that requires that speech be overprotected in order to assure that it is not underprotected.”).

15. United States v. Stevens, 130 S. Ct. 1577, 1579 (2010) (striking down statutory restrictions on animal “crush videos, which feature the torture and killing of helpless animals and are said to appeal to persons with a specific sexual fetish” (internal quotation marks omitted)).

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nature because we worry that drawing different lines would harm the values underlying the right to free speech.[16] We should have similar considerations in mind when it comes to the right of assembly.

II. VIOLENCE

One of the central claims of *Liberty's Refuge* is that we ought to extend epistemic deference and interpretive charity to the internal practices of private groups.[17] I argue that we should adopt this posture to a much greater extent than current First Amendment doctrine permits. But I also identify a few limiting principles, including the textual limitation of peaceable assembly.[18] Professor Bhagwat rightly asks how we determine when an assembly crosses the threshold from peaceability to violence.

Like Professor Bhagwat, I lack a clear sense of where the peaceability line ought to be drawn. But I think he and I agree where it ought *not* be drawn: the Supreme Court's 2010 decision in *Holder v. Humanitarian Law Project*.[19] That decision addressed a federal statute that prohibited "knowingly provid[ing] a foreign terrorist organization" with "material support or resources."[20] A group of U.S. citizens and associations challenged the statute's curtailment of their efforts to train members of two foreign groups "to use humanitarian and international law to

16. Snyder v. Phelps, 131 S. Ct. 1207, 1220 (2011) ("As a Nation we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate."); *Stevens*, 130 S. Ct. at 1585 ("The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs."). *But cf.* JAMES BOYD WHITE, LIVING SPEECH: RESISTING THE EMPIRE OF FORCE 41 (2006) ("We cannot ask of the Supreme Court . . . that it create a world in which only living speech exists, and in which advertising and propaganda, and other forms of trivializing and dehumanizing speech, have no place, but we can ask of our courts, as of ourselves, that they seek to imagine speech in a worthy way—to distinguish what has real value as speech from that which is destructive of the value of speech . . . .").

17. *See, e.g.*, INAZU, *supra* note 1, at 2–3 ("Many group expressions are only intelligible against the lived practices that give them meaning. The rituals and liturgy of religious worship often embody deeper meaning than an outside observer would ascribe to them. The political significance of a women's pageant in the 1920s would be lost without knowing why these women gathered. And the creeds and songs recited by members of groups ranging from Alcoholics Anonymous to the Boy Scouts reflect a way of living that cannot be captured by a text or its utterance at any one event.").

18. The First Amendment protects "the right of the people *peaceably* to assemble." U.S. CONST. amend. I (emphasis added). For my discussion of the peaceability limitation, see INAZU, *supra* note 1, at 166–67.

19. Bhagwat, *supra* note 5, at 1391 (citing Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010)).

20. 18 U.S.C. § 2339A(b)(1) (2006). The statute defined "material support or resources" to include, among other things, "training," "expert advice or assistance," "personnel," and "service." *Id.* § 2339B(a)(1), g(4).

peacefully resolve disputes," to "engage in political advocacy," and to teach members "how to petition various representative bodies such as the United Nations for relief."[21] The Court rejected the speech and association claims brought by these litigants.[22] In fact, as Justice Breyer noted in dissent, the government suggested during oral argument that the material support provision "prohibits a lawyer hired by a designated group from filing on behalf of that group an amicus brief before the United Nations or even before [the Supreme Court]."[23] That remarkable concession and the constitutional framework that enables it should not mark the boundaries of peaceable assembly.[24]

But where then is the line? I am grateful for Professor Bhagwat's suggestion that *Brandenburg*'s "imminent violence" standard that governs free speech law "may not translate easily into the area of assembly and association."[25] Professor Bhagwat argues that "there is something to the . . . assertion that groups are more dangerous than individuals when it comes to advocacy of violence."[26] He asserts that the law recognizes this difference "most obviously in the fact that it does *not* require violence to be imminent (or even likely) before prosecuting a conspiracy planning specific acts of violence, even though a whole-hearted importation of *Brandenburg* into the assembly/association area would seem to impose such a requirement."[27]

These observations call to mind the Madisonian notion of faction, which, prior to its reinterpretation at the hands of mid-twentieth century pluralism, recognized that dissenting groups were disruptive risks to be tolerated out of necessity, not harmonious spokes in a "balance wheel."[28]

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21. *Holder*, 130 S. Ct. at 2716.

22. *Id*. at 2724–30 (denying free speech claim); *id*. at 2730–31 (denying association claim).

23. *Id*. at 2736 (citing Transcript of Oral Argument at 47–49, 53, Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010) (No. 08–1498)).

24. *Cf.* David Cole, *The First Amendment's Borders: The Place of* Holder v. Humanitarian Law Project *in First Amendment Doctrine*, 6 HARV. L. & POL'Y REV. 147, 149 (2012) ("If [*Holder*'s] doctrinal developments are generally applicable, [the case] has dramatically expanded government authority to suppress political expression and association in the name of national security."). Cole suggests that courts interpreting *Holder* should limit its application to situations "when the government is prohibiting only speech coordinated with or directed to foreign organizations that have been subjected to diplomatic sanctions for compelling national security reasons." *Id*. at 176.

25. Bhagwat, *supra* note 5, at 1389. Brandenburg's "imminent violence" standard allows the government to "forbid or proscribe advocacy of the use of force or of law violation" when "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

26. Bhagwat, *supra* note 5, at 1394.

27. *Id*. at 1394.

28. For a discussion of how the pluralist political theory of David Truman and Robert Dahl "misread Madison and decontextualized Tocqueville," see INAZU, *supra* note 1, at 96–114. The

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Factions remind us that dissenting groups are a double-edged sword: the greater protections that we afford to them, the greater risk of instability we may introduce to the polity. In the context of Professor Bhagwat's concern about violent assemblies, there may well be differences between groups and individuals. But I am not sure that these differences doom a *Brandenburg*-like standard for assembly. Conspiracy law aims at an agreement to commit an illegal act, and it is generally the agreement itself (and some overt act) that triggers liability, not the imminence of the target offense. This focus leaves criminal conspiracy outside of *Brandenburg* even under a free speech analysis.[29] Assemblies that are not criminal conspiracies may thus still be governable under a *Brandenburg*-like standard.[30]

The potential disagreement between Professor Bhagwat and me about the precise contours of the differences between groups and individuals may also be a point at which he and I diverge on the level of political theory. Professor Bhagwat asserts that we "need to have faith in the basic strength and unity of our society."[31] I am not sure that I share that faith. I situated *Liberty's Refuge* within the spirit of the radical democratic theory of Sheldon Wolin.[32] I suggested that Wolin offers a kind of antidote to the stable political agreement envisioned in John Rawls's notion of an "overlapping consensus."[33] While I agree with Professor Bhagwat that some modicum of shared belief must hold us together, I argue that our politics reflects instability more than consensus.

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balance wheel metaphor that gained prominence in mid-twentieth century pluralism comes from DAVID BICKNELL TRUMAN, THE GOVERNMENTAL PROCESS: POLITICAL INTERESTS AND PUBLIC OPINION 502–06 (1951).

29. *See, e.g.*, Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1783–84 (2004) (describing the "First Amendment irrelevance" for "that vast domain of criminal law that deals with conspiracy and criminal solicitation"); *see also* KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE (1989).

30. Of course, that possibility presumes that we can distinguish meaningfully between internal group deliberations and criminal conspiracies, an assumption that is certainly open to challenge in light of our past history. *See* INAZU, *supra* note 1, at 65–96.

31. Bhagwat, *supra* note 5, at 1400.

32. INAZU, *supra* note 1, at 153–56 (discussing SHELDON S. WOLIN, POLITICS AND VISION (2004), and Sheldon S. Wolin, *Democracy, Difference, and Re-Cognition*, 21 POL. THEORY 464 (1993)).

33. *Id.* at 153 (noting that "the political theory of Sheldon Wolin . . . can be read as a counternarrative to the consensus arguments of Robert Dahl and John Rawls").

III. RELATIONALITY

Professors Appleton and Bhagwat both argue that I have misconstrued the doctrinal development of intimate association. Professor Appleton suggests that I am wrong to argue that *Eisenstadt v. Baird* is a case about individual autonomy rather than association.[34] She writes that "issues of contraception necessarily and inherently implicate association" and that "the right to privacy—as defined by the Court in *Eisenstadt*—cannot be 'detached' from the right of association."[35] Professor Bhagwat contends that the majority opinion in *Lawrence v. Texas* asserts that "the Due Process Clause protects liberty, in the form of sexual activity, precisely because that activity is a central aspect of an intimate personal bond."[36] He suggests that "[f]ar from abandoning intimate association, the Court's opinion [in *Lawrence*] seems to whole-heartedly endorse the concept, placing it at the very center of the Court's 'privacy' jurisprudence."[37]

I argue in *Liberty's Refuge* that the concept of intimate association originally rooted in associational privacy became resituated in a jurisprudence of individual autonomy.[38] The most important development in that shift unfolded between Justice Douglas's opinion in *Griswold v. Connecticut* and Justice Brennan's opinion in *Eisenstadt v. Baird*.[39] I contend that Brennan's language in *Eisenstadt* "shifted the focus away from Douglas's emphasis on the marriage relationship" in *Griswold* and "converted an understanding of associational freedom rooted in relationships between people to a right of individual autonomy."[40] I also suggest that *Lawrence*, when viewed through the lens of a post-*Eisenstadt* jurisprudence, reads most naturally as a celebration of individual autonomy rather than relationality—it echoes Justice Kennedy's paean to "the right to define one's own concept of existence" more than Justice Douglas's appeal to "an association that promotes a way of life."[41]

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34. Eisenstadt v. Baird, 405 U.S. 438 (1972).
35. Appleton, *supra* note 5, at 1429.
36. Bhagwat, *supra* note 5, at 1385–86 (discussing Lawrence v. Texas, 539 U.S. 558, 566 (2003)).
37. *Id.*
38. INAZU, *supra* note 1, at 128.
39. *Eisenstadt*, 405 U.S. at 440–55; Griswold v. Connecticut, 381 U.S. 479, 480–86 (1965).
40. INAZU, *supra* note 1, at 128; *see also id*. at 125 (discussing Justice Douglas's original draft of *Griswold* that "made scant reference to a right of privacy and rested . . . almost entirely on the First Amendment freedom of association").
41. *Compare* Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992), *with Griswold*, 381 U.S. at 486.

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To support my interpretation of *Lawrence*, I call attention to the two dissents in *Bowers v. Hardwick*, the 1986 decision that *Lawrence* overruled.[42] Justice Blackmun's dissent argued that "[t]he fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many 'right' ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to *choose* the form and nature of these intensely personal bonds."[43] Blackmun twice cited Kenneth Karst's seminal article "The Freedom of Intimate Association."[44] Justice Stevens's dissent emphasized "the individual's right to make certain unusually important decisions that will affect his own, or his family's, destiny."[45] *Lawrence* relied squarely on the latter dissent: "Justice Stevens' analysis, in our view, should have been controlling in *Bowers* and should control here."[46] The Court's opinion scarcely mentioned Blackmun's dissent and never referenced the right of intimate association.[47]

It may seem odd to spill this much ink over the meaning of *Eisenstadt* and *Lawrence*, two cases that have little to do doctrinally with either the right of assembly or the right of association. But the contested meaning of these cases points toward a larger debate about the nature, or at least the inflection, of our constitutional tradition. Consider H. Jefferson Powell's claim that "Brennan's reading of *Griswold* turned Douglas's reasoning on its head" and signaled "the identification of a radically individualistic liberalism as the moral content of American constitutionalism."[48] If Powell is right, as I believe he is, then we need more than smoke signals from *Lawrence* if we are to recover the relational dimension of intimate association. Otherwise, as I argue in *Liberty's Refuge*, "[i]ntimate association is reduced to intimate individualism."[49]

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42. Bowers v. Hardwick, 478 U.S. 186 (1986). I also note that the briefs of the *Lawrence* petitioners repeatedly raised intimate association arguments. INAZU, *supra* note 1, at 237 n.40.

43. *Bowers*, 478 U.S. at 205 (Blackmun, J., dissenting).

44. *Id*. at 205, 211 (citing Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980)). I discuss Karst's article in INAZU, *supra* note 1, at 136–39.

45. *Id*. at 217 (Stevens, J., dissenting) (quoting Fitzgerald v. Porter Mem'l Hosp., 523 F.2d 716, 719–20 (7th Cir. 1975) (footnotes omitted), *cert. denied*, 425 U.S. 916 (1976)).

46. Lawrence v. Texas, 539 U.S. 558, 578 (2003).

47. Had *Griswold*'s trajectory been left unaltered by *Eisenstadt*, I would venture a guess that we would still have *Lawrence*, but with a majority opinion tracking Justice Blackmun's *Bowers* dissent, not Justice Stevens's.

48. H. JEFFERSON POWELL, THE MORAL TRADITION OF AMERICAN CONSTITUTIONALISM: A THEOLOGICAL INTERPRETATION 176–77 (1993).

49. INAZU, *supra* note 1, at 140.

The preceding discussion also points to limitations inherent in the right of assembly and related questions about the nature and purpose of constitutional protections for groups. Professor Appleton is right to observe that "even a robust freedom of assembly would be unlikely to protect" the "intensely personal and gendered interests" at issue in *Eisenstadt*.[50] While I believe that the interests in *Eisenstadt* are significant, they would not fall within the scope of the theory of assembly that I have articulated.

IV. POWER

I am grateful to Professor Appleton for naming the distinction between subordination and exclusion in *Roberts v. United States Jaycees*.[51] I had not characterized the Jaycees's practices as subordinating (nor, for that matter, did the Court or any of the litigants), but Professor Appleton makes a good argument for construing the case in this way. And she correctly notes that my treatment of *Roberts* "does not grapple with such matters of hierarchy and subordination."[52]

Let me suggest, however, why Professor Appleton's observation does not alter my conclusion that the Jaycees probably ought to have prevailed in that case. In my view, we would still need to ask a series of questions that the *Roberts* majority never addressed, and the Jaycees's right of assembly should have been upheld without answers to those questions suggesting otherwise. Assuming that the Jaycees is a noncommercial group,[53] I would want to know not simply that the group was subordinating women, but why the precise harms resulting from that subordination warranted the state's infringement upon the group and its members. What were the interests at stake, and why should they prevail over the constitutional rights afforded to the members of a private group? The *Roberts* opinion was bereft of contextual analysis: "Nobody offered any explanation of why *this* remedy helped to eradicate gender

50. Appleton, *supra* note 5, at 1431.

51. Roberts v. United States Jaycees, 468 U.S. 609 (1984).

52. Appleton, *supra* note 5, at 1433. I also agree with Professor Appleton's broader critique that I have "overlook[ed] several opportunities to take gender into account." *Id*. at 1434.

53. As Judge Arnold noted in the court below, "[t]he Jaycees does not simply sell seats in some kind of personal-development classroom. Personal and business development, if they come, come not as products bought by members, but as by-products of activities in which members engage after they join the organization. These activities are variously social, civic, and ideological." United States Jaycees v. McClure, 709 F.2d 1560, 1569 (8th Cir. 1983), *rev'd*, Roberts v. United States Jaycees, 468 U.S. 609 (1984).

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discrimination in *these* circumstances sufficient to trump the autonomy of *this* group."[54]

Nor do I think that my assessment of *Roberts* leads me to adopt "a clear divide between public and private" with respect to the Jaycees or an unqualified endorsement of *Roberts* or *Boy Scouts of America v. Dale*.[55] In fact, I suggest that *Roberts* may well present "a closer case" of a group whose overreaching private power might cause it to lose the protections of assembly.[56] Similarly, I contend that the Boy Scouts displayed "quasi-public and quasi-monopolistic" characteristics and that "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."[57]

These questions of private power are extremely complex, and I do not mean to oversimplify them or trivialize the harms that they present. As I wrote in *Liberty's Refuge*, those who are excluded by discriminatory groups:

> . . . are denied opportunities, privileges, and relationships they might otherwise have had. They may be harmed economically, socially, and psychologically. When groups exclude on the basis of characteristics like race, gender, or sexual orientation, the psychological harm of exclusion may also extend well beyond those who have actually sought acceptance to others who share their characteristics. For all of these reasons, there is much to be said for an antidiscrimination norm and the value of equality that underlies it.[58]

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54. INAZU, *supra* note 1, at 16.

55. Appleton, *supra* note 5, at 1423 (citing Boy Scouts of America v. Dale, 530 U.S. 640 (2000)).

56. INAZU, *supra* note 1, at 15–16. The problem is that the Justices in *Roberts* offered no information to let us know whether that was the case—they gave no explanation of the ways in which the Jaycees blurred the divide between public and private. *Id*. at 16.

57. *Id*. at 172, 251 n.36; *see also id*. at 251 n.37 ("Consider the Boy Scouts: Should the focus of the overreaching of private power be at the local or the national level? I find this to be a deeply complicated question, made even more problematic by the quasi-public nature of the Boy Scouts at the federal level. In some ways, the kind of power exerted by the Boy Scouts has been made possible by its national identity. On the other hand, the effects of this power will vary by locality, and local Scout troops might reflect the core understanding of assembly that I have articulated in this book.").

58. *Id*. at 175. I wrote these words in the context of a hypothetical "missing dissent" in *Roberts* that I included at the end of *Liberty's Refuge*, but I have made the same point in John D. Inazu, *The Unsettling 'Well-Settled' Law of Freedom of Association*, 43 CONN. L. REV. 149, 152 (2010).

In this respect, I think that Professor Appleton's "asking the woman question" is extremely important.[59] But she is not quite right to suggest that I ignore that question by failing to "acknowledge the extensive feminist literature on the would-be public-private divide" or by offering "differing treatments of race-based and sex-based discrimination."[60] In critiquing John Rawls's distinction between the "basic structure" of society and "private society," I note that "[f]eminist theorists have famously called attention to this ambiguity with respect to the family."[61] The feminist critique of Rawls is precisely the critique of the "would-be public/private divide." While I find the critique descriptively accurate, I disagree with its normative prescription, which would apply pressure to the public/private divide in order to regulate "private society."[62] I would instead acknowledge that Rawls's distinction is unworkable but argue that we should still protect the domain of private society from state interference. That does not ignore the feminist critique; it weighs the prescriptive outcomes differently.[63]

With respect to the differences between race and gender that Professor Appleton ascribes to me, I make clear that while "we might plausibly treat race differently when considering the boundaries of group autonomy . . . my proposal permits some racially discriminatory groups."[64] My argument

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59. Appleton, *supra* note 5, at 1423 (quoting Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990)).

60. *Id*. at 1426, 1431].

61. INAZU, *supra* note 1, at 158; *see also id*. at 245 n.12 (citing SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY (1989), and Ruth Abbey, *Back Toward a Comprehensive Liberalism? Justice as Fairness, Gender, and Families*, 35 POL. THEORY 19 (2007)).

62. *See, e.g.*, Susan Moller Okin, *"'Mistresses of Their Own Destiny': Group Rights, Gender, and Realistic Rights of Exit*, 112 ETHICS 205, 229–30 (2002) (asserting that the liberal state "should not only not give special rights or exemptions to cultural and religious groups that discriminate against or oppress women" but "should also enforce individual rights against such groups when the opportunity arises and encourage all groups within its borders to cease such practices"). Jeff Spinner-Halev notes that Okin's view represents "[o]ne alternative to Rawlsian ambiguity," which is "simply to say that liberalism will tolerate religions [and other groups] as long as they are liberal." Jeff Spinner-Halev, *Liberalism and Religion: Against Congruence*, 9 THEORETICAL INQ. L. 553, 561 (2008).

63. I should note that *Liberty's Refuge* did not sufficiently engage with the related and important question of exit rights, a concept that has perpetually confounded and divided political theorists. *See, e.g.*, MINORITIES WITHIN MINORITIES: EQUALITY, RIGHTS AND DIVERSITY (Avigail Eisenberg & Jeff Spinner-Halev eds., 2005); George Crowder, *Two Concepts of Liberal Pluralism*, 35 POL. THEORY 121, 128 (2007) (arguing that preserving the right of exit is inescapably "a commitment to individual autonomy"); Leslie Green, *Rights of Exit*, 4 LEGAL THEORY 165 (1998).

64. INAZU, *supra* note 1, at 13–14. In this regard, I do not "treat race-based discrimination differently from discrimination based on sex or sexual orientation." Appleton, *supra* note 5, at 1433. Professor Appleton speculates 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." *Id*. at 1433 n.84. But I do not think that racial classifications by a private group are necessarily "arbitrary"—it is at least conceptually plausible that the group would have an

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is that "treating race differently in all areas ultimately undercuts a vision of assembly that protects pluralism and dissent against state-enforced orthodoxy" and that "[w]e cannot move from the premise that genuine pluralism matters to an effort to rid ourselves of the groups that we don't like."[65]

The normative vision of assembly that I advocate risks instability, violence, racism, misogyny, and a parade of other evils. We should acknowledge those risks and take seriously their potential consequences. We may decide as a society that these are risks not worth taking. But we might also decide that the cost of pluralism means tolerating some forms of discrimination—and subordination—by private groups. The woman question should undoubtedly be part of the conversation, but it ought not presuppose an answer.[66]

V. FUNDING

I confess that I have few helpful insights to offer in response to Professor Appleton's astute observations about the connections between funding and rights. But let me make two brief comments. First, I think that Professor Appleton and I probably agree that the Supreme Court has fallen

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internally coherent and non-arbitrary reason for imposing a racial classification based upon its own norms and practices.

65. INAZU, *supra* note 1, at 14. Professor Appleton is correct that I do not challenge the holding of *Runyon v. McCrary*, 427 U.S. 160 (1976), the 1976 decision that required private schools to end racial segregation. Appleton, *supra* note 5, at 1431. It may be that the unique harms of racial discrimination in private schools (and even more precisely, the exclusion of African-Americans from all-white private schools) justify a categorical carve-out from the protections of assembly, but that carve-out could be narrower than a general prohibition on race-based discrimination in private groups. Alternatively, it may be that we would answer the constitutional question of an all-white private school differently in 2012 than we did in 1976. (I should also underscore the obvious but sometimes unspoken observation that the current state of our educational system is a stark reminder that the end of de jure segregation in public and private schools has not moved us toward a "post-racial" society; nor do I believe that my proposal permitting some racially discriminatory private groups could be justified under a "post-racial" jurisprudence. *Cf.* Mario L. Barnes, Erwin Chemerinsky & Trina Jones, *A Post-race Equal Protection?*, 98 GEO. L.J. 967, 972 (2010) (suggesting that "the history, social reality, and life circumstances of people of color in this country do not support a broad adoption of the post-racial perspective within equal protection analysis").)

66. These questions are further complicated by contested meanings about discrimination and subordination. For example, limitations on the role of women in the leadership of the Catholic Church may be viewed as subordination by many outside (and inside) the Church, but there are plausible narratives from within Catholicism that reject the claim that gendered hierarchy in leadership necessarily equates to subordination. *See, e.g.*, BENEDICT M. ASHLEY, JUSTICE IN THE CHURCH: GENDER AND PARTICIPATION (1996); JOYCE LITTLE, THE CHURCH AND THE CULTURE WAR: SECULAR ANARCHY OR SACRED ORDER (1995); Sara Butler, *Embodied Ecclesiology: Church Teaching on the Priesthood*, *in* WOMEN, SEX, AND THE CHURCH: A CASE FOR CATHOLIC TEACHING 143 (Erika Bachiochi ed., 2010).

short in explaining the contours of the unconstitutional conditions doctrine, under which the denial of a generally available governmental benefit is considered a penalty for purposes of constitutional analysis.[67] The Court's analysis is particularly fuzzy when unconstitutional conditions intersect with government speech.[68] As Joseph Blocher has argued, "Although the government speech doctrine does not permit total bans on the expression of a private viewpoint, it does allow what had previously been thought forbidden: the burdening, even if not silencing, of private viewpoints *because* the government disagrees with them."[69]

The government speech doctrine, at least in its current formulation, threatens longstanding First Amendment jurisprudence by enabling state actors to impose viewpoint-based limitations on generally available funding, use of meeting facilities, and other means of access. I have argued that the Court failed to address these concerns in *Christian Legal Society v. Martinez*,[70] and Douglas Laycock has made similar arguments about *Locke v. Davey*.[71] I disagree with the outcomes of both decisions, but I also find troubling the Court's inability or unwillingness to offer any helpful justifications for its approach to government speech and unconstitutional conditions in these cases.

Second, if we are going to take seriously arguments that distinguish between government tolerating a dissenting group and government

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67. Susan Frelich Appleton, *Standards for Constitutional Review of Privacy-Invading Welfare Reforms: Distinguishing the Abortion-Funding Cases and Redeeming the Undue Burden Test*, 49 VAND. L. REV. 1, 20 (1996) (noting that "[t]he abortion-funding cases remain excruciatingly hard to reconcile with the long line of decisions invalidating 'unconstitutional conditions'"); John D. Inazu, *Justice Ginsburg and Religious Liberty*, 63 HASTINGS L.J. 1213, 1226–29, 1237–40 (2012). For discussions of the unconstitutional conditions doctrine, see generally Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151 (1996), and Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989).

68. Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 541 (2001) ("[W]hen the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee."); *see also* Pleasant Grove City v. Summum, 555 U.S. 460, 467 (2009) (noting that the Free Speech Clause "does not regulate government speech"); Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 553 (2005) ("[T]he Government's own speech . . . is exempt from First Amendment scrutiny.").

69. Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L. REV. 695, 697 (2011). *Cf.* Appleton, *supra* note 5, at 1427 ("Hastings, a public school operating as an arm of the state, made funding decisions that expressed its anti-discrimination values.").

70. Inazu, *supra* note 67, at 1237–40; *see also* Richard A. Epstein, *Church and State at the Crossroads:* Christian Legal Society v. Martinez, 2010 CATO SUP. CT. REV. 105, 110 ("[B]y ignoring the unconstitutional conditions doctrine, [Ginsburg] allowed Hastings far too much discretion in how it treated its student organizations.").

71. Douglas Laycock, *Theology Scholarship, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 246 (2004) (noting that *Davey*'s "deference to prophylactic rules of physical separation to avoid confronting an unconstitutional conditions issue has implications for all constitutional liberties").

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subsidizing that group through generally available funds, then we ought to examine the logical and dramatic consequences of that reasoning for our current political arrangements. Professor Appleton suggests that my analysis of *Martinez* is a "seamless move from private rights to public support" in which "the case for freedom of assembly suffices to make the case for state subsidies and support."[72] But I have not claimed anything more than disagreement with the denial of official recognition and its attendant benefits in *Martinez*.[73] The monetary subsidy to the Christian Legal Society at Hastings College of the Law totaled $250 in travel funds, which were financed by vending machine sales commissions.[74] While revenue from sodas and candy bars purchased by members of the Hastings community can certainly be construed as a subsidy, I am not sure that these facts commit me to a "seamless move from private rights to public support." And if they do, then we have only scratched the surface.

Consider, for example, the federal tax exemption afforded charitable organizations, which the Supreme Court has equated to a government subsidy.[75] How does tax-exempt status relate to the kinds of antidiscrimination norms underlying *Martinez*? Cases like *Bob Jones v. United States*[76] and *Grove City College v. Bell*[77] seem to suggest that

72. Appleton, *supra* note 5, at 1426, 1427.

73. INAZU, *supra* note 1, at 5, 149.

74. Joint Stipulation of Facts for Cross-Motions for Summary Judgment ¶ 37, Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971 (2010) (No. 08-1371), 2010 WL 372139, at *227 [hereinafter Joint Stipulation] ("In early September 2004, Ms. Haddad and Mr. Fong applied to the Office of Student Services for travel funds to travel to CLS-National's annual conference. On or about September 9, 2004, Ms. Chapman informed Ms. Haddad via email that the Office of Student Services had set aside $250.00 in travel funds to cover Ms. Haddad and Mr. Fong's expenses associated with attending the conference."). Travel funds came from vending machine sales commissions. *Id.* ¶ 9 n.2. The society was ineligible for other funding because it was never approved as a registered student organization, *id.* ¶ 9(f), and nothing in the record indicates that the society planned on requesting additional funding. It is, of course, possible to construe the prorated costs of the use of facilities for Bible studies as a kind of monetary subsidy, but as Professor Appleton intimates, this kind of line drawing quickly becomes difficult to sustain. Appleton, *supra* note 5, at 1427 n.33 ("[E]ven if the group meets exclusively in private homes, it will benefit from some state services, such as public utilities and police protection.").

75. *See* I.R.C. § 501(c)(3) (2006) (organizations eligible for tax-exempt status include "[c]orporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes"). For the connection between exemption and subsidy, see, e.g., Regan v. Taxation with Representation, 461 U.S. 540, 544 (1983) ("A tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income."); Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 14 (1989) ("Every tax exemption constitutes a subsidy that affects nonqualifying taxpayers, forcing them to become indirect and vicarious donors.") (internal quotations omitted). *See also* Edward A. Zelinsky, *Are Tax "Benefits" Constitutionally Equivalent to Direct Expenditures?*, 112 HARV. L. REV. 379 (1998).

76. Bob Jones University v. United States, 461 U.S. 574 (1983). Bob Jones University and Goldsboro Christian Schools (the petitioner in a consolidated case) maintained racially discriminatory

private schools—even religious ones—must accept funding constraints arising from federal antidiscrimination law or policy. These private institutions are given a choice: comply with the antidiscrimination condition or walk away from the money. But it is difficult to see how the logic of *Bob Jones* and *Grove City* does not reach *all* tax-exempt organizations.

Professor Appleton reasonably asks "where noninterference ends and state support begins."[78] But even if we were able to establish a bright-line rule for direct funding, the line between noninterference and state support is arguably crossed when a group of students is denied access to an expressive forum created by a state-run institution of higher learning.[79] Here the specific details of *Martinez* are again important to highlight. In addition to withholding modest funding and the use of its logo, Hastings also denied the Christian Legal Society the opportunity to send mass e-mails to the student body, to participate in the annual student organizations fair, and to reserve meeting spaces on campus.[80] These activities are not sponsorship or state support.[81] They are means of participation in the free

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admissions policies, which led the Internal Revenue Service to withdraw their tax-exempt status on public policy grounds. The schools lost at the Supreme Court 8–1. *Id.* at 579–81, 583.

77. Grove City College v. Bell, 465 U.S. 555 (1984). Grove City had refused to sign a Title IX compliance document from the Department of Education that prohibited "discrimination under any education program or activity for which [it] receives or benefits from Federal financial assistance." *Id.* at 560. One of the college's arguments was that the application of the Title IX restrictions violated its "First Amendment rights to academic freedom and association." Brief for Petitioner, Grove City College v. Bell at *80, 465 U.S. 555 (1984) (No. 82-792), 1983 U.S. S. Ct. Briefs LEXIS 292. The Court had little trouble concluding that Title IX's restrictions trumped Grove City's First Amendment rights, noting that "Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that education institutions are not obligated to accept." *Grove City College*, 465 U.S. at 575.

78. Appleton, *supra* note 5, at 1427 n.33.

79. *Cf.* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995) ("The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction. These principles provide the framework forbidding the State to exercise viewpoint discrimination, even when the limited public forum is one of its own creation.") (internal citation omitted).

80. Christian Legal Soc'y Chapter of Univ. of Cal. v. Kane, No. C 04-04484 JSW, 2006 WL 997217, at *172 (N.D. Cal. May 19, 2006); Petition for Writ of Certiorari at 10, Christian Legal Soc'y Chapter of Univ. of Cal. v. Newton, (No. 08-1371) (S. Ct. May 5, 2009); *see also* Joint Stipulation, *supra* note 74, ¶ 62 ("Hastings' General Counsel also informed CLS that while it was free to use chalkboards and generally available bulletin boards on the campus to announce its events, CLS did not have permission to use the Student Information Center for distribution of organization materials, nor the Hastings Weekly or [the law school's student] weekly emails to make announcements.").

81. *See* Joint Stipulation, *supra* note 74, ¶ 13 ("Among other things, the Policies and Regulations provide that Hastings and the University of California 'neither sponsor nor endorse' registered student organizations. Registered student organizations are required to enter into a license agreement in order to use Hastings' name and logos, which provides that the organization 'will inform its members and include in all its written materials that [Hastings] does not sponsor the organization nor its activities

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exchange of ideas.[82] As the Supreme Court noted in an earlier case:

> If an organization is to remain a viable entity in a campus community in which new students enter on a regular basis, it must possess the means of communicating with these students. Moreover, the organization's ability to participate in the intellectual give and take of campus debate, and to pursue its stated purposes, is limited by the denial of access to the customary media for communicating with the administration, faculty members, and other students. Such impediments cannot be viewed as insubstantial.[83]

VI. COMMERCIALITY

While Professors Bhagwat and Appleton both challenge the potential breadth of assembly, Professor Vischer suggests that I may not have gone far enough. Specifically, Professor Vischer questions my proposed line drawing between commercial and noncommercial groups. As he rightly notes, many commercial groups manifest the values that I have located in the right of assembly: "Whether it's a for-profit company taking a stand on animal testing, climate change, same-sex partner benefits, refusals to stock the morning after pill, or countless other morally contested issues, there is regularly a connection between corporate practices and an underlying vision, attitude, or value."[84] These observations expand upon my critique of Justice O'Connor's binary distinction between "commercial" and "expressive" groups.[85] I have argued that Justice O'Connor misses the expressiveness in many commercial groups; Professor Vischer deepens the critique by pointing out that commercial groups can not only be expressive but also manifest "vision, attitude, or value."

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and that [Hastings] assumes no legal responsibility for the organization, its officers or members, or any of its activities.'") (citations omitted).

82. *See Rosenberger*, 515 U.S. at 840 ("[S]tudent life in its many dimensions includes the necessity of wide-ranging speech and inquiry and that student expression is an integral part of the University's educational mission."); *id*. at 835 (noting that universities have a "background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition"); Healy v. James, 408 U.S. 169, 180 (1972) ("The college classroom with its surrounding environs is peculiarly 'the marketplace of ideas.'").

83. *Healy*, 408 U.S. at 181–82.

84. Vischer, *supra* note 5, at 1414. *But cf.* Bhagwat, *supra* note 10, at 1000 ("In contrast to the wide range of broadly democratic associations that deserve First Amendment protection, certain associations whose primary goals are immaterial to democracy do not. The most obvious are commercial associations, including for-profit corporations and other commercial entities such as limited and professional partnerships, whose primary goal is to make money.").

85. INAZU, *supra* note 1, at 135 (critiquing Justice O'Connor's *Roberts* concurrence).

I welcome Professor Vischer's more charitable characterization of commercial groups, and he is right to suggest that I have failed to provide a *principled* reason for excluding commercial groups from the protections of assembly. I do not think that one exists. Professor Vischer's clarifications reinforce the *political* nature of my proposed line drawing between commercial and noncommercial groups. I wrote in *Liberty's Refuge* that:

> [O]ur constitutional, social, and economic history offers broad support for [distinguishing between commercial and noncommercial groups] today—few people endorse a general right of a commercial entity to discriminate in the hiring of its employees or in the customers its serves. Employment law presumes that a commercial entity has no right to discriminate unless it can justify that the discrimination is warranted as a "bona fide occupational qualification." Discrimination on the basis of race, gender, or sexual orientation by commercial groups against customers is even less common. These concessions to antidiscrimination norms in the commercial sector reflect political compromises that reorient but do not eliminate the underlying values clash between equality and autonomy. Their political salience and moral force depends in some ways upon maintaining a workable distinction between commercial and noncommercial.[86]

Professor Vischer has elsewhere suggested reasons against drawing such a line:

> [W]here the marketplace provision of certain goods and services is subject to a society-wide battle over moral norms, allowing the contest to proceed may be more conducive to a healthy and engaged public life than the current inclination to enshrine legally one set of moral norms and negate the others. State power is not marginalized in the moral marketplace, but it is constrained, as it is devoted to ensuring a well-functioning market, not to eviscerating the market through the top-down imposition of particular moral norms.[87]

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86. INAZU, supra note 1, at 167.

87. ROBERT K. VISCHER, CONSCIENCE AND THE COMMON GOOD: RECLAIMING THE SPACE BETWEEN PERSON AND STATE 5 (2010). Professor Vischer's comments on *Liberty's Refuge* highlight a particularly salient example of these tensions: the mandate on contraception coverage issued by the Department of Health and Human Services pursuant to the Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119. Vischer, *supra* note 5, at 1406.

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These arguments are not implausible, and they reflect an ongoing discussion as to "whether market institutions should be included in the concept of civil society."[88] But I am skeptical that a proposal to strengthen group autonomy would gain much traction without drawing this kind of line. As Professor Vischer himself notes, "generally 'commercial entities are not included within the purview of civil society.'"[89]

This understanding of civil society does not mean that commercial groups will be left unprotected in all settings. Indeed, Professor Vischer's own work powerfully argues that the "relational dimension of conscience" may provide an important theoretical anchor for extending statutory protections to certain groups through the political process.[90] In these circumstances, state and local governments may have to decide whether to accept the benefits of those groups at the cost of affording them greater autonomy.[91]

On the other hand, even excluding commercial entities will not fully account for shifting dynamics of public and private power.[92] This shifting

88. Nancy L. Rosenblum & Robert C. Post, *Introduction*, *in* CIVIL SOCIETY AND GOVERNMENT 4 (Robert C. Post & Nancy L. Rosenblum eds., 2002).

89. VISCHER, *supra* note 87, at 166 (quoting Miriam Galston, *Civic Renewal and the Regulation of Nonprofits*, 13 CORNELL J.L. & PUB. POL'Y, 289, 294 (2004)). Jürgen Habermas suggests that "the associations of a civil society [are] quite distinct from both state and economy alike." JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 301 (William Rehg trans., 1996); *see id.* at 366–67 ("[Civil society's] institutional core comprises those nongovernmental and noneconomic connections and voluntary associations that anchor the communication structures of the public sphere in the society component of the lifeworld. Civil society is composed of those more or less spontaneously emergent associations, organizations, and movements that, attuned to how societal problems resonate in the private life spheres, distill and transmit such reactions in amplified form to the public sphere. The core of civil society comprises a network of associations that institutionalizes problem-solving discourses on questions of general interest inside the framework of organized public spheres.").

90. *See* VISCHER, *supra* note 87, at 43 ("Most nonreligious forms of conscience lack constitutional protection unless they can find a foothold in substantive due process, free speech, or the right of association. What we are left with, then, is a legal framework that leaves the liberty of conscience primarily to the legislative process."); *see also id.* at 306 ("[C]onscience's vitality depends on more than the identification and application of particular constitutional rights. Much of the responsibility for conscience falls on political actors.").

91. *Cf.* Vischer, *supra* note 5, at 1416 ("To the extent that Inazu is limiting the right of assembly to non-commercial enterprises, it's not entirely clear why monopolistic status is important to the inquiry unless he has in mind charitable organizations that may be the only provider of key social services in a given community. Even in that context, though, the state needs to proceed carefully, as the alternative to a provider who refuses to provide all the services deemed important by the state may be no provider at all.").

92. INAZU, *supra* note 1, at 17–18. *Cf.* Rosenblum & Post, *supra* note 88, at 2 ("To say that the boundary between civil society and government is located differently in diverse political regimes and that its purposes are justified differently by various political, moral, and religious theories is just the beginning. Within any given state, the boundary is shifting in practice; it responds to the ongoing contingencies of political experience.").

of boundaries is one of the reasons that I have proposed an anti-monopolistic test on the backend of an assembly analysis. As I wrote in *Liberty's Refuge*:

> Sometimes, but rarely, the power exerted by peaceable, noncommercial assemblies will overreach to such an extent that the right would give way to the interests of the state. . . . When courts are unable to offer a convincing account of this overreaching of private power—supported with factual rigor rather than aspirational values—they should defer to the values of assembly.[93]

As the above language makes clear, the anti-monopolistic test is set intentionally high—it will capture few groups. As a consequence, the theory of assembly that I am advocating would allow private noncommercial groups to exert forms of power that many people would find oppressive or unjust. As Professor Bhagwat rightly notes, "power does not require monopoly."[94]

This realm of power short of monopoly is where I suspect the divergent normative intuitions of Professors Bhagwat and Appleton on the one hand, and Professor Vischer and myself on the other, are most apparent. Professor Bhagwat nicely frames the issue:

> What if we knew that access to a group, say, the Jaycees, was important in a particular community in building business contacts? Or a similar situation existed with a particular, all-White or all-Christian country club? To call such situations "monopolistic" strikes me as doing injury to language, but exclusion from such institutions *matters* in very pragmatic ways for the excluded. In those sorts of situations, are we truly comfortable saying that the balance must favor the exclusionary group's assembly rights? The fact is that such groups . . . subvert the social order in meaningful ways by undermining the equality and inclusion norms which participatory democracy is built upon. Clearly, some challenges to social norms by exclusionary groups must be protected, which is why the Ku Klux Klan and the American Nazi Party retain their constitutional protection despite their abhorrent and exclusionary beliefs, but when the group at issue is not a triviality, and its

93. INAZU, *supra* note 1, at 172.
94. Bhagwat, *supra* note 5, at 1398.

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> exclusionary actions start to bite, the proper solution is no longer self-evident.[95]

I agree with everything that Professor Bhagwat writes in this passage. But I suggest that honoring meaningful dissent from the norms of the state means that we must be *especially* vigilant to extend the protections of assembly "when the group at issue is not a triviality." The hard questions begin when speech and assembly start to matter. It costs us little to protect deeply offensive but politically irrelevant groups like the Westboro Baptists.[96] We may face more difficult challenges with the Tea Party, the Occupy Movement, and the groups they inspire.[97]

VII. LIBERTY'S FUTURE

The diagnostic, historical, and normative arguments in *Liberty's Refuge* are interrelated: the normative claim is strengthened by the weight of history and the weaknesses of the current doctrine. But even if I am right on the history and doctrine, the normative argument must still attract some salience in order to be plausible under the kind of constitutional reasoning that underlies today's First Amendment jurisprudence. The normative argument for greater group autonomy is political insofar as the values clash it invokes cannot be fully reconciled—we will ultimately privilege either the state or the non-state group.[98]

But while our resolution of this incommensurability is at some level political, the means by which we resolve it are not irrelevant—constitutional theory, history, and argument still matter. The significance of this last point was highlighted in an exchange that I had with my colleague, Professor Brian Tamanaha, during the discussion at which these papers were presented. Here is a portion of that exchange:

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95. *Id.*

96. *See* Snyder v. Phelps, 131 S. Ct. 1207 (2011).

97. For some preliminary connections between my arguments for assembly and these movements, see Jeremy Kessler, *The Closing of the Public Square*, NEW REPUBLIC (Jan. 12, 2012, 12:00 AM), http://www.tnr.com/book/review/the-closing-the-public-square-john-inazu-timothy-zick. *See also* Todd Gitlin, *Is Freedom of Assembly a Dead Letter*, CHRON. OF HIGHER EDUC. (May 7, 2012, 5:05 PM), http://chronicle.com/blogs/brainstorm/is-freedom-of-assembly-a-dead-letter/46538.

98. One could argue a third option of privileging the individual (or a dissenting faction) within the group. *See, e.g.*, Bernadette Meyler, *The Equal Protection of Free Exercise*, 47 B.C. L. REV. 275 (2006); Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495 (2001). But at least with respect to antidiscrimination norms applied to illiberal groups, the individual (or dissenting faction) aligns with the state.

Professor Tamanaha: What's interesting to me is the tension between the Constitution as a legal document and the nature of the analysis that dominates in the discussion, which is normative analysis. The problem is that if we are going to evaluate the Constitution from a normative standpoint and then come up with a legal hook that gets us there, once we bring the law in, the law carries its own form of analysis. Part of that analysis is precisely textual, the text has some sense of meaning, and that meaning turns us to the historical context, and so it starts pushing back against you. I want to know which of these is compelling the analysis. Are we resurrecting assembly because it's in the Constitution? Had assembly not led to the normative outcomes that you are interested in achieving, would you then go down a different path? And I guess a part of the reason I'm raising this is that constitutional law actually carries the name "law." How does the invocation of some form of legal integrity affect the analysis? I'm really struck by how much preferred normative outcome drives the analysis to the point where it leads to a kind of suspicion that you're couching it in legal analysis and then shaping it whatever way you can to make sure that you're producing the normative outcomes you want. How much does the fact that this is a constitution with the word "assembly" in it really matter in terms of the bottom line here?

Professor Inazu: It matters to the degree that it is a persuasive and salient part of the interpretative tradition that we inherit and carry forward. I actually think one of the most helpful forms of constitutional interpretation may turn out to be related to the philosopher Alasdair MacIntyre's understanding of tradition-dependent argument. I think that approach is going to bring in the kitchen sink to the analysis, and that will include text, history, and precedent, and our values as we perceive them today.

Professor Tamanaha: But it seems to me that whether or not I like your assembly analysis depends upon whether or not I am convinced by your normative vision and if that's the case, then that should be what this is all about, because otherwise I'd say, "Okay, assembly's in the Constitution, but who cares?" So what I'm saying is all the action now has to be about the normative vision, not the extent that you tack back to the word being in the Constitution.

Professor Inazu: I'm not sure that's right. There are people who agree with my normative commitments, and they don't need any

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> convincing. And there are people who hold views so antithetical to my normative commitments that they're never going to be persuaded. I'm actually interested in the people in the middle, and trying to figure out whether there is something in the law that holds us all together. There are normative arguments that frame the salience and the persuasiveness of the account, but it's not all normativity. If there is law going forward, it includes the structures of the law. So I don't think it's a hook to say that we should look at text and cases.[99]

Professor Tamanaha and I agree that the normative dimensions of constitutional law do not unfold in a vacuum. The Constitution is a legal text. Its existence and our practice of legal interpretation constrain the laws that govern us today. What is true for the whole is true of its parts, including "the right of the people peaceably to assemble." We give meaning to assembly through history, politics, and normativity, but also, and indispensably, law. That is one of the aspirations of *Liberty's Refuge*, and I am deeply grateful to the participants in this discussion for pushing us further in that direction.

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99. *See Engaging* Liberty's Refuge at 1:23:02 (Mar. 2, 2012), *available at* http://mediasite.law.wustl.edu/Mediasite/Viewer/?peid=ab40c332eb734b5f810b1012222dacce. I have edited the transcript for clarity (e.g., removing verbal tics, clarifying pronouns, and omitting comments not directly relevant to the focus of the exchange).