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LIBERTY'S REFUGE, OR THE REFUGE OF SCOUNDRELS?: THE LIMITS OF THE RIGHT OF ASSEMBLY

ASHUTOSH BHAGWAT*

I. INTRODUCTION

Professor John Inazu's recently published book, *Liberty's Refuge: The Forgotten Freedom of Assembly*,¹ is a truly impressive achievement. It is a good book for all of the usual reasons: it is well-researched, well-written, and persuasive. But *Liberty's Refuge* is more than just well done—it is an important book in the contribution it makes to our understanding of the First Amendment. In this book, Professor Inazu has discovered and reintroduced to the rest of us the lost history of a very important constitutional right—the right to peaceable assembly protected by the First Amendment. He successfully makes the case for the central role that this right played in historical understandings of the First Amendment, and then demonstrates how, in the past half century, this right declined and eventually was almost forgotten by both the Supreme Court and our society as a whole. That accomplishment is in itself a significant addition to our understanding of constitutional history, and one he should be proud of.

Liberty's Refuge, however, is not just a historical work; it is also a theoretical and normative one. Professor Inazu's theoretical focus is on how the decline of the assembly right, and its replacement by the modern, truncated right of expressive association, can be tied to other historical and philosophical developments of the 1950s and 1960s, notably the challenges posed by the McCarthy and Civil Rights eras, and the dominance of political philosophy by first the pluralism of Robert Dahl and then the liberalism of John Rawls. In particular, he notes how both of these philosophies, while purporting to provide an explanation and justification for liberal democracy, contained within them strong normalizing assumptions that tended to discourage radical difference and dissent. These tendencies influenced the courts in ways that lead them to

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1. JOHN D. INAZU, *LIBERTY'S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY* (2012).

transform a broad (and textual) right of assembly into a narrower (and nontextual) right of expressive association (as well as a narrow, for other reasons, right of intimate association). This explanation enriches our knowledge of how this doctrinal transformation occurred and succeeds unusually well in relating doctrinal evolution to the greater world, an accomplishment notably rare in legal scholarship.

Finally, *Liberty's Refuge* and Professor Inazu's previous work² are an important component of an emerging scholarly focus on the role of broader First Amendment liberties, which seeks to undo some of the damage done by the myopic focus of the Supreme Court and most modern First Amendment scholars on the Free Speech Clause of the First Amendment. This scholarship seeks to bring to the foreground First Amendment rights other than free speech, including not only assembly but also association and petition, and to understand the critical role that those rights play in the democratic process and popular self-governance.³ In the course of doing so, this scholarship seeks to help us understand in important ways how the various First Amendment liberties work in concert to advance self-governance, and indeed seeks to re-envision the nature of the democratic process itself.⁴ This scholarship, as a whole, has the potential to radically alter contemporary understandings of the nature, role, and significance of the First Amendment. Professor Inazu's particular contribution to this scholarship has been to reveal the central role that public assembly historically played in the democratic process, and the prominence that the assembly right historically held in the public consciousness. He also demonstrates the capaciousness of the assembly right, especially in contrast to the stingy scope the Supreme Court has given to assembly's modern cousin, the right of expressive association. And building on all of this, he provides a powerful argument for why it is *worth* rediscovering and reviving the Assembly Clause. He shows in particular that dissident groups, even nonexpressive groups, have important contributions to make to popular democracy and to the broader

2. See, e.g., John D. Inazu, *The Forgotten Freedom of Assembly*, 84 TUL. L. REV. 565 (2010); John D. Inazu, *The Strange Origins of the Constitutional Right of Association*, 77 TENN. L. REV. 485 (2010).

3. See, e.g., MARK E. WARREN, *DEMOCRACY AND ASSOCIATION* (2001); FREEDOM OF ASSOCIATION (Amy Gutmann ed., 1998); Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L. REV. 543 (2009); Ronald J. Krotoszynski, Jr. & Clint A. Carpenter, *The Return of Seditious Libel*, 55 UCLA L. REV. 1239, 1299–1300 (2008); Jason Mazzone, *Freedom's Associations*, 77 WASH. L. REV. 639 (2002).

4. See, e.g., Tabatha Abu El-Haj, *Changing the People: Legal Regulation and American Democracy*, 86 N.Y.U. L. REV. 1 (2011); Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. 978 (2011).

process of developing and questioning our basic commitments as a society. This role, he shows, has been severely compromised by the Supreme Court's abandonment of assembly in favor of expressive association because modern law provides little protection to the internal autonomy of nonexpressive associations. This is not only a shame, but also a blow to constitutional values because nonexpressive associations, and the role they play in civil society, directly advance the underlying purposes of the First Amendment to protect the process of democratic self-governance.

In short, *Liberty's Refuge* is an important book with a lot of original and interesting things to say about the First Amendment. In many ways, however, my favorite thing about this book is not just what it says, but how it says it. Impressively, while advancing strong and controversial positions, Professor Inazu somehow avoids the trap into which so much constitutional scholarship falls of purporting to provide a final and complete theory which provides the grounding for an entire area of law and rejecting all other perspectives as wrong-headed. Instead, this book self-consciously sets out to start a conversation about important questions: how and why forgotten First Amendment rights such as peaceable assembly should be revived, and what role assembly promises to play in the political process.⁵ This conversation promises to be a rich and exciting one.

II. POINTS OF DIVERGENCE

My praise for *Liberty's Refuge* does not, of course, mean that I agree with everything that Professor Inazu has to say. My disagreements are not fundamental, yet they are not trivial either, and in some respects they may reflect more basic differences between us on the relationship between First Amendment liberties and the democratic process.

Perhaps my greatest point of divergence is that I think Professor Inazu overemphasizes the *expressive* nature and purpose of assembly. The most telling illustration of this is his argument that private groups' choices of membership and leadership should be protected because "the existence of a group and its selection of members and leaders are themselves forms of expression,"⁶ and so any distinction between expression and conduct by groups, such as the distinction relied upon by Justice Ginsburg's majority

5. See, e.g., INAZU, *supra* note 1, at 17 ("The aspiration of this book is to get us thinking in that direction, not to insist that I have arrived at the best possible solution.").

6. *Id.* at 152.

opinion in *Christian Legal Society v. Martinez*, is unsustainable.⁷ Ironically, however, by rooting protection for assembly in its expressive nature, he falls into precisely the same error that he (correctly) lambasts the Supreme Court for. As he notes, the key, unfortunate turn in the Supreme Court's jurisprudence in the area of assembly and association was its abandonment of a stand-alone right of group autonomy, originally rooted in the Assembly Clause but later transmogrified into nontextual "association," into a narrower right for groups to organize for expressive purposes alone. In other words, assembly/association became a subsidiary right to speech. This transition started with the founding association case, the Supreme Court's 1958 decision in *NAACP v. Alabama*, which relied on an association right to strike down Alabama's efforts, during the Civil Rights era, to force a civil rights organization to disclose its membership lists.⁸ It culminated in *Roberts v. United States Jaycees*, in which the Court rejected the Jaycees' claim to a First Amendment right to exclude female members on the (dubious) grounds that admission of women would not substantially interfere with the Jaycees' ability to communicate their views.⁹ The Court's key analytic failure in these cases, I would argue—and have argued¹⁰—is its failure to recognize that the right of group autonomy protected by the First Amendment (whether under the rubric of the Assembly Clause, as Professor Inazu convincingly argues it should be, or a under a nontextual right of association), while sharing common purposes with other First Amendment rights, is an independent and co-equal right to the right of free speech. Assembly should be protected not because it is expressive, but because it independently advances the goals of the First Amendment—to say nothing of the fact that it is separately protected by the text of the First Amendment, without any hint that it is a subsidiary right to speech. Yet Professor Inazu's 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. To the contrary, the reason private groups have a constitutional right to select their members and leaders is not because that selection is expressive, but because that selection is an essential aspect of assembly. It is indeed constitutive of assembly, since surely the right to assemble and associate is at core a right to choose whom to assemble and associate with. And again, the reason that the Constitution must protect such group

7. *Id.* at 148 (discussing *Christian Legal Society v. Martinez*, 130 S. Ct. 2971 (2010)).

8. *Id.* at 81–84 (discussing *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958)).

9. *Id.* at 132–35 (discussing *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984)).

10. Bhagwat, *supra* note 4, at 988–89.

choices is because a group which cannot define its own membership, leadership, and mission cannot play the critical roles that such groups must play in the process of self-governance. Groups whose membership is, to any significant extent, controlled by the government cannot possibly provide safe havens for citizens within which they can collectively organize, develop the skills needed for effective self-governance, and jointly develop their values and beliefs. Nor can such groups act as counterpoints to the power of the State, another essential role for such groups in maintaining the delicate balance between the People and the State that is at the heart of self-governance. The fact that group choices also have an expressive component is at best marginally relevant.

Another point on which Professor Inazu and I diverge, which I suspect may point to some deeper disagreements, has to do with his analysis of the Supreme Court's decision in *Lawrence v. Texas*.¹¹ In *Lawrence*, of course, the Court held that a Texas statute banning same-sex sodomy violated the Due Process Clause of the Fourteenth Amendment.¹² Professor Inazu describes the reasoning of the majority opinion in *Lawrence* (authored by Justice Anthony M. Kennedy) as relying purely on the theory that the Due Process Clause, as interpreted in *Griswold v. Connecticut*,¹³ protected certain forms of liberty, while ignoring an alternative approach built on the "right of intimate association."¹⁴ I fundamentally disagree. While Justice Kennedy's opinion in *Lawrence* is not always entirely pellucid about its doctrinal reasoning, and admittedly never uses the phrase "intimate association," the opinion repeatedly emphasizes that the core of the problem with statutes banning sodomy is that they "do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals."¹⁵ And again, in explaining why the Constitution protects private sexual conduct, the Court has this to say: "When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring."¹⁶ In other words, Justice Kennedy was saying 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. Far from abandoning intimate

11. 539 U.S. 558 (2003).

12. *Id.* at 564–79.

13. 381 U.S. 479 (1965).

14. INAZU, *supra* note 1, at 139 (noting "[t]he Court's avoidance of intimate association in *Lawrence*").

15. *Lawrence*, 539 U.S. at 567.

16. *Id.*

association, the Court's opinion seems to whole-heartedly endorse the concept, placing it at the very center of the Court's "privacy" jurisprudence.

Our different readings of *Lawrence* may (though I confess uncertainty on this point) also point to a deeper disagreement between us regarding the relationship between "intimate" and "expressive" association. As Professor Inazu persuasively argues, a key moment in the development of the Supreme Court's jurisprudence regarding the right of "association" occurred in 1984, in *Roberts v. United States Jaycees*.¹⁷ As noted earlier, the Court in that case rejected the Jaycees' claimed First Amendment right to reject female members.¹⁸ As Professor Inazu notes, in the course of doing so, the Court drew a sharp distinction between two forms of association: "intimate association" among family members (and perhaps others, under *Lawrence*), protected by the Due Process Clause; and "expressive association" for the purposes of speech, protected by the First Amendment.¹⁹ He correctly criticizes this distinction, primarily because it seems to leave completely outside of constitutional protection associations, or assemblies, which are neither intimate nor primarily directed at expressive activities, but which nonetheless are worthy of protection.²⁰ To this point, I could not agree with him more. I also agree with his criticism of the narrow ambit of the concept of intimate association, as originally developed by Kenneth Karst,²¹ because it fails to recognize that nonintimate associations can perform many of the same functions as intimate associations in helping individuals define themselves and develop their values collectively. Where I may part company with Professor Inazu is in my understanding of *why* the Constitution protects these sorts of activities. He seems to suggest that they are protected because they are intrinsically valuable.²² I disagree. I would argue that the Constitution is a structural document, and should be understood to protect not particular, substantive values, but rather a system of government—in particular, a system grounded in principles of popular sovereignty.²³ Thus

17. 468 U.S. 609 (1984).

18. See *supra* note 9 and accompanying text.

19. INAZU, *supra* note 1, at 132–33.

20. *Id.* at 136.

21. *Id.* at 136–37 (discussing Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 629 (1980)).

22. See INAZU, *supra* note 1, at 136–38 (discussing values advanced by associations, including expression and "self-definition").

23. For a more complete exposition of these ideas, examining their application to a wide range of constitutional disputes, see ASHUTOSH BHAGWAT, *THE MYTH OF RIGHTS: THE PURPOSES AND LIMITS OF CONSTITUTIONAL RIGHTS* (2010).

the First Amendment protects a range of activities which directly enable the sovereign people to engage in activities relevant to self-governance, and to maintain a distance from, and control over, their government. These activities of course include exchanging ideas via speech and the press, but they also include petitioning, public assembly, and a host of other collective undertakings which help citizens develop their values, organize themselves, and when necessary place themselves in a position to assert their collective authority over public officials. That is the underlying theory of the Constitution.

Enter assemblies/associations. Private groups protected by the right of assembly/association are of course relevant to self-governance because they provide vehicles for citizens to jointly express themselves. But more than that, such groups (including but not limited to religious assemblies) provide a crucial space within which citizens can develop their values and hone the skills needed for self-governance, shielded from the overbearing influence of the State.²⁴ Citizens can also, through assemblies/associations, hope to have their voices heard by both fellow citizens and public officials, exert pressure on officials, and meaningfully participate in the process of self-governance, in ways that individuals acting alone have no realistic hope of accomplishing. In this regard, all groups, intimate and non-intimate, expressive and non-expressive, have a role to play. From this perspective, the reason why we protect intimate associations is precisely the same reason why we protect large, political assemblies/associations, such as the Sierra Club, and everything in between.²⁵ The key question is whether an assembly/association is of a sort that I call a “democratic association”—one whose activities, broadly defined, are more than tangentially relevant to the process of self-governance, also broadly defined. Even on the Court’s view, intimate associations, such as nuclear families,²⁶ and expressive associations, such as the Sierra Club, receive broad constitutional protection. But what about a group of longstanding and intimate friends? Or a book club, which sometimes reads nonfiction, political books? Or indeed, a book club that reads fiction? These types of groups don’t easily fit into the Court’s schema, but are *clearly* central to citizens’ development of values and beliefs as well as political habits and skills.

24. See Bhagwat, *supra* note 4, at 997–98.

25. Indeed, I have argued elsewhere that the reasons why we protect certain forms of intimate conduct, such as decisions on whether to bear children, may have similar roots. See BHAGWAT, *supra* note 23, at 225–60.

26. And even non-nuclear families. See *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

I think that Professor Inazu and I agree that all of these groups are worthy of constitutional protection. I am left, however, with two uncertainties. The first is grounded in my understanding that what Professor Inazu is proposing is to replace the Court's current "expressive association" jurisprudence with the freedom of assembly. I am left with some doubts, however, whether this broad spectrum of groups can comfortably be situated within the freedom of assembly as he defines it. The second, and to my mind more profound difficulty, to which I now turn in more detail, is this: if we accept a capacious understanding of the types of private groups that are entitled to constitutional protection, then how do we go about determining the *limits* of that protection—i.e., what groups *cannot* claim the shield of the First Amendment?

III. THE LIMITS OF ASSEMBLY

It should be clear by now that in my view, *Liberty's Refuge* makes an invaluable contribution to an important, emerging intellectual movement. In closing, I want to briefly consider an issue that Professor Inazu only touches upon lightly, but which I think in the modern era is likely to emerge as central: what the limits of the right of assembly are. There must be some limits. Presumably there is widespread agreement that no matter how strong the rights of private groups to select their members, *commercial* entities do not have a right to engage in racial (or other forms) of discrimination in selecting their employees.²⁷ There are surely other limits as well. I want to focus, however, on a particular aspect of the boundary problem: at what point a private group becomes sufficiently threatening to the social order that it falls outside the right of assembly/association. This problem has been at the bottom of almost all of the great First Amendment disputes of the twentieth century from the foundational decision in *Whitney v. California*²⁸ to the McCarthy era Communist prosecutions²⁹ to the very recent case of *Holder v. Humanitarian Law Project*.³⁰ While the problem of subversive associations had receded from significance at the end of the McCarthy era, today, in the Age of Terror, it appears to be regaining its prominent place (as *Holder* demonstrates). It is therefore incumbent upon us to re-examine this problem with fresh eyes. In this short space, and in emulation of

27. For a discussion of why this is so, see Bhagwat, *supra* note 4, at 1000–01.

28. 274 U.S. 357 (1927).

29. See, e.g., *Dennis v. United States*, 341 U.S. 494 (1951).

30. 130 S. Ct. 2705 (2010).

Liberty's Refuge itself, my goal is to highlight some omissions and issues and start a dialogue, not to prescribe answers.

A. Violent Assemblies

In considering the scope of First Amendment protections for private groups that threaten the social order, the obvious starting point is, of course, the text. Notably, the First Amendment explicitly limits its protection to “the right of the people *peaceably* to assemble.”³¹ So a riot is not a protected assembly, and Professor Inazu notes, courts have used this limitation to also exclude from protection criminal conspiracies and “even most forms of civil disobedience.”³² Of course, this exclusion of “unlawful assemblies” (a circular term if ever there was one) clearly is an extension of the constitutional text when applied to nonviolent conspiracies and peaceful civil disobedience, raising concerns about its scope and application. Professor Inazu recognizes this problem, and suggests that the solution may be to import the requirement of imminent violence from the Court’s free speech doctrine (specifically, from the *Brandenburg* test for incitement)³³ into the assembly area.³⁴ For reasons I will come to, however, I have concerns that *Brandenburg* may not translate easily into the area of assembly/association. All we can seemingly say safely for now is that actual violence is of course unprotected, and through a sort of negative penumbra we can also probably exclude without much concern groups that are planning specific violence (i.e., violent conspiracies). As to nonviolent conspiracies (i.e., groups planning specific, nonviolent crimes), they do not fit well within the textual exclusion of non-peaceable assemblies, but it does not seem too controversial to suggest that groups whose primary aims are criminal make little or no contribution to the democratic self-governance, the underlying goal of the First Amendment, and so can safely be excluded from constitutional protections given the obvious, social harms they threaten. It should be noted, however, that even this seemingly uncontroversial exclusion can be problematic at its borders—for example, if a group planning a nonviolent act of civil

31. U.S. CONST. amend. I (emphasis added).

32. INAZU, *supra* note 1, at 166–67.

33. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

34. INAZU, *supra* note 1, at 167 (“A similar danger once threatened our free speech jurisprudence and prompted the Court to protect advocacy short of ‘imminent lawless action’ in that area of the law. An understanding of the peaceability constraint on assembly ought to operate with a similar deference.”).

disobedience for political reasons was charged with conspiracy, before any law had been violated.

Even in the context of violent assemblies, moreover, some uncertainty exists—notably, whether an individual who associates with a violent group, but does not himself or herself engage in or advocate violence, could nonetheless be punished. This was the core issue in *Whitney v. California*, and in that case the Court clearly held that mere membership in a subversive group was subject to prosecution, quite apart from actual participation in planning or engaging in violence.³⁵ Furthermore, it is significant that when the majority affirmed Anita Whitney's conviction for criminal syndicalism, it clearly rejected claims rooted in "rights of free speech, assembly, and association,"³⁶ and Justice Brandeis, in his iconic separate opinion, was equally clear that what was at stake was not just free speech, but also (and I have argued primarily) assembly.³⁷ Indeed, the majority strongly suggests that the fact that assembly as well as speech was at stake weakened Whitney's claim because "such united and joint action involves even greater danger to the public peace and security than the isolated utterances and acts of individuals."³⁸

It should be acknowledged, however, that even during the early period the Court did not always reject assembly and association claims related to subversive groups. Notably, in its seminal 1937 decision recognizing the freedom of assembly, *De Jonge v. Oregon*,³⁹ the Court held that the freedom of assembly forbade a conviction simply for attending a lawful meeting held under the auspices of the Communist Party.⁴⁰ And at the end of the McCarthy era, in *Scales v. United States*,⁴¹ it clarified that the First Amendment (in particular, the freedom of association protected by that provision) permitted only the punishment of "active" membership in a subversive organization such as the Communist Party, requiring a showing that an individual "specifically intend[s] to accomplish [the aims of the organization] by resort to violence."⁴² Finally, at the end of the 1960s, when the period of intense anti-Communism of the McCarthy era had passed, the Court overruled *Whitney* in *Brandenburg v. Ohio* and granted significant constitutional protection to radicals by requiring that violence

35. 274 U.S. 357, 371–72 (1927).

36. *Id.* at 371.

37. *Id.* at 372–79 (Brandeis, J., concurring); Bhagwat, *supra* note 4, at 983–84.

38. *Whitney*, 274 U.S. at 372.

39. 299 U.S. 353 (1937).

40. *Id.* at 365.

41. 367 U.S. 203 (1961).

42. *Id.* at 229 (quoting *Noto v. United States*, 367 U.S. 290, 299 (1961)).

be both likely and imminent before speech could be prosecuted as incitement.⁴³ It should be noted, however, that *Brandenburg* is quite explicitly a free speech case only, and provides little clarity on the status of protection for subversive groups.⁴⁴

Finally, whatever certainty had developed in this area of law has been thrown into doubt by the Court's 2010 decision in *Holder v. Humanitarian Law Project*,⁴⁵ which raises some serious questions about the modern Court's willingness to grant substantial constitutional protection to association with dangerous private groups. At issue in *Holder* was the application of a federal statute banning the provision of "material support or resources" to designated terrorist organizations, as applied to U.S. citizens seeking to provide peaceful legal advice and other training to designated terrorist groups, meant to facilitate only the lawful, nonviolent purposes of those groups.⁴⁶ The Court conceded that application of this law imposed a content-based restriction on the plaintiffs' speech, but upheld the law because the Court, as a result of the national security/foreign affairs context of the litigation, deferred to executive and congressional findings that the law was necessary to control the violent activities of those groups.⁴⁷ In concluding its free speech analysis, the majority emphasized that "we in no way suggest that a regulation of independent speech would pass constitutional muster, even if the Government were to show that such speech benefits foreign terrorist organizations."⁴⁸ In other words, the Court held that speech supporting terrorism was protected if it was engaged in unilaterally, but not if it was coordinated with (i.e., articulated in association with) a designated organization. Interestingly, however, the Court then went on to reject a freedom-of-association claim against the statute because the statute did not by its terms bar *membership* in designated organizations, but only material support to them.⁴⁹ Thus the majority reached the peculiar result that association with and membership in a terrorist organization is protected, so long as the association does not in any way assist the organization—leaving an interesting question about what exactly the majority meant by the word "association." Finally, however, it should be acknowledged that the precise reach of the holding in *Holder* is quite unclear because of the

43. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

44. *Id.* at 447–48.

45. 130 S. Ct. 2705 (2010).

46. *Id.* at 2712.

47. *Id.* at 2727–31.

48. *Id.* at 2730.

49. *Id.*

foreign affairs context which triggered judicial deference—indeed, the majority specifically recognized that its holding did not necessarily mean that “Congress could extend the same prohibition on material support at issue here to domestic organizations.”⁵⁰

In short, the current state of the law regarding the right to “assemble” or “associate” with groups that advocate or engage in specific violence is deeply uncertain, beyond the common ground that actual participation in or even planning of violence is unprotected. Can one be convicted for attending a meeting organized by an animal rights group that has been known in the past to vandalize laboratories and continues to support such conduct by its members? Or what about simply meeting with a domestic jihadi group that is planning violence, if the individual does not assist or commit to assisting violence? This latter issue is raised quite directly by the December 2011 conviction of Tarek Mehanna under the same material-support statute upheld in *Holder*, in that Mehanna’s conviction was based not on any proof of actual plotting of violence, but rather on the facts that Mehanna distributed jihadi literature online and that he allegedly considered himself a part of Al Qaeda’s “media wing.”⁵¹ Free speech doctrine would suggest that such conduct cannot be punished absent proof of imminent and likely violence,⁵² but as noted earlier it is not at all clear that the *Brandenburg* test was ever intended to cover assembly and association. Moreover, *Holder* casts grave doubts on the proposition that *Brandenburg* does apply, most notably by endorsing the idea, first advanced in *Whitney*, that mere association with subversive groups such as foreign terrorist groups “helps lend legitimacy to [such] groups—legitimacy that makes it easier for those groups to persist, to recruit members, and to raise funds” and so provides a justification for punishing such association.⁵³

B. Subversive Assemblies

Once one moves beyond groups that are themselves violent, or are planning explicit violent (or other illegal) action, the problem becomes even murkier. What, in particular, are we to do with a group that advocates violence for political or ideological reasons in the abstract, but cannot be

50. *Id.*

51. Abby Goodnough, *U.S. Citizen is Convicted in Plot to Support Al Qaeda*, N.Y. TIMES, Dec. 21, 2011, at A26.

52. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

53. *Holder*, 130 S. Ct. at 2725.

shown to be planning any specific violence? Examples of such groups abound. That is almost certainly the best description of the Communist Party (and other far-left parties) during the first Red Scare and during the McCarthy era, since in none of the cases sustaining prosecutions of Communists was any showing made of specific plans to engage in violence. In modern times, examples of such groups are legion, ranging from antiabortion groups to animal rights groups to neo-Nazi and survivalist groups to jihadi groups. Indeed, even an overly exuberant Occupy Wallstreet protestor who condemns bankers using intemperate language might fit into this category.

Such groups can take two forms. First, there is the assembly that engages in pure, abstract advocacy of violence, stating that violence is justified for religious or ideological reasons, but does not itself plan to engage in any violence. Examples of such groups range from the Communist Party to jihadi congregations. Other groups, in combination with explicitly or implicitly advocating violence, might provide its members or third parties with specific information which might assist violence, such as information on how to construct a bomb,⁵⁴ or information about potential victims, such as the addresses and photographs of abortion providers⁵⁵ or others who for whatever reason are targeted for violence.⁵⁶ In either case, the question posed is whether such groups, and members of such groups, can be prosecuted consistent with the strictures of the First Amendment.

This is the core problem that has shaped the Court's First Amendment jurisprudence over the past century. The early answer given by a majority of the Supreme Court—once again, most clearly in *Whitney v. California*—was that such groups deserved no protection at all because they “partake[] of the nature of a criminal conspiracy.”⁵⁷ Nor was this an isolated episode in American history. As Professor Inazu discusses in detail, the Court's failure to protect “subversive” groups such as the Communist Party continued full bore during the McCarthy era, most notably in its affirmance of the Smith Act prosecutions of the leadership of

54. See, e.g., *United States v. Featherston*, 461 F.2d 1119 (5th Cir. 1972).

55. See, e.g., *Planned Parenthood v. Am. Coal. of Life Activists*, 290 F.3d 1058 (9th Cir. 2002) (en banc).

56. See, e.g., *United States v. White*, 610 F.3d 956 (7th Cir. 2010); Peter Slevin, *Blogger's Case Could Test the Limits of Political Speech*, WASH. POST, Aug. 16, 2009, at A4; Hal Turner GUILTY: Blogger Convicted after Threatening Judges over Chicago Gun Ban, HUFFINGTON POST (May 25, 2011, 6:20 PM), http://www.huffingtonpost.com/2010/08/13/hal-turner-guilty-blogger_n_681881.html.

57. *Whitney v. California*, 274 U.S. 357, 372 (1927).

the Communist Party in *Dennis v. United States*,⁵⁸ and into the 1960s.⁵⁹ In the past forty years, since *Brandenburg* was decided in 1969, there has undoubtedly been far greater legal protection, and societal tolerance, for such groups—though again, the 2010 *Holder* decision as well as the broader legal and social changes attendant to the “War on Terror” do raise some serious questions about our continuing commitment in this regard. The question I pose here, however, is not what level of protection current law provides to such groups, but rather what level of protection we should provide.

Professor Inazu’s position on this issue seems relatively clear, albeit undeveloped. He explicitly criticizes the *Dennis* decision,⁶⁰ and in the course of discussing the potential slippery slope problems associated with the traditional concept of “unlawful assembly,” he advocates importing into assembly jurisprudence the *Brandenburg* test’s requirement of imminent and likely violence.⁶¹ I wonder, however, whether the *Brandenburg* test is truly the best solution. Even in the speech context, for example, I have argued that *Brandenburg* overprotects certain forms of factual speech that facilitate violence.⁶² In the context of assemblies, however, the problem is even more serious. At heart, the difficulty lies in the fact that there is something to the *Whitney* majority’s assertion that groups are more dangerous than individuals when it comes to advocacy of violence.⁶³ The law recognizes this 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,⁶⁴ even though a whole-hearted importation of *Brandenburg* into the assembly/association area would seem to impose such a requirement. And even with respect to merely subversive, but not explicitly violent groups, *Brandenburg* may not be adequate to the task. Groups are dangerous. A group of individuals who start off merely discussing the propriety or need for violence, as an abstract matter, can evolve into a group planning violence quite easily.

58. 341 U.S. 494 (1951).

59. INAZU, *supra* note 1, at 65–71, 84–87, 89–91.

60. *Id.* at 178.

61. *Id.* at 167.

62. See Ashutosh Bhagwat, *Details: Specific Facts and the First Amendment*, 86 S. CAL. L. REV. (forthcoming Nov. 2012).

63. See *Whitney v. California*, 274 U.S. 357, 372 (1927) (noting “[t]hat . . . united and joint action involves even greater danger to the public peace and security than the isolated utterances and acts of individuals is clear”).

64. See *United States v. Fullmer*, 584 F.3d 132, 158 (3d Cir. 2009) (upholding conspiracy conviction while conceding that defendant’s actions did not satisfy *Brandenburg* test); *United States v. Rahman*, 189 F.3d 88, 114–15 (2d Cir. 1999).

Moreover, the very fact of a *group*, an assembly, arguably makes that transition easier. Individuals who interact with each other regularly, especially in some isolation from the broader community, can build up a set of shared, dissident values which can diverge dramatically from commonly held social beliefs. In general, we celebrate such diversity, but when those values touch on violence, this can be a profoundly dangerous process. Members of a group that endorses violence can build up each other's beliefs, form a sense of solidarity, and ultimately push each other on into a commitment to action. Of course, the same can happen to an isolated individual, but that seems a less likely or dangerous conversion (the occasional Ted Kaczynski notwithstanding). Indeed, in the incitement cases the Court was faced with individuals engaging in public *speech*, a situation where the danger of violence seems particularly distant since it requires converting others in the course of public debate to a violent path, a rather difficult undertaking.⁶⁵ This is why the *Brandenburg* test has not been found to unduly sacrifice the social interest in preventing violence when applied to free speech. With subversive groups, however, the dangers of eventual violence seem much more substantial.

Another way of thinking about this problem is from a law-enforcement perspective. There is no doubt that historically, the law was used to silence dissident and subversive speakers far too easily. In the post-*Brandenburg* era, we have constrained such uses of the law because of a broadly shared sense that speech is less dangerous than we thought, and repression more socially harmful. It is not clear, however, that that balance carries over easily when dealing with groups. Groups are important, and receive First Amendment protection, precisely because they are powerful vehicles for collective action that can build up their members' common values and commitments. While this is a critical part of participatory democracy generally, it can also be highly dangerous. In dealing with groups that advocate violence, meet regularly, and seem to be steeling themselves towards eventual action, is it really reasonable to expect law enforcement officials, and for that matter society at large, to wait until violence is both imminent and likely before action can be taken? Some greater flexibility does seem in order.

On the other hand, it also seems clear that not all groups that support or advocate violence or unlawful behavior in the abstract can be denied constitutional protection. Such an approach would threaten to recreate all

65. See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Dennis v. United States*, 341 U.S. 494 (1951); *Gitlow v. New York*, 268 U.S. 652 (1925); *Abrams v. United States*, 250 U.S. 616 (1919).

of the pathologies of the Red Scare and McCarthy eras, with all the attendant harms to the democratic process. The need for some substantial level of protection for subversive groups is particularly important because there is no clear line between groups advocating violence and groups condemning particular social practices (whether it be abortion, animal testing, the activities of Wall Street, or what have you) in such strong terms as to induce violence in its members or third parties. For that reason, to deny all protection to groups which advocate violence, as Robert Bork once proposed,⁶⁶ would threaten the existence of much of the radical fringes of our politics, both on the left and the right. The line-drawing here is extraordinarily difficult (and beyond the reach of this essay). Too much protection risks impeding legitimate social efforts to control violence and its sources. Too little protection risks falling into what Professor Inazu identifies as the pluralist trap, where the price of constitutional acceptance is conformity to majoritarian norms.⁶⁷ And the line is inevitably a wavering one, turning on the (largely indeterminate) question of how likely a group is to evolve into violence.

C. *“Out” Assemblies and Protecting the Social Order*

Finally, it is worth noting that the problem of violent and subversive assemblies, and their place in the constitutional order, is only a subset of a broader set of questions surrounding the limits of societal tolerance for dissent and so-called “out” groups. As Professor Inazu quite reasonably points out, the entire point of a constitutionally protected freedom of assembly is to protect such groups—dissenters who do not accept the basic, shared premises of contemporary liberal democracy.⁶⁸ After all, groups located within the broader social consensus do not need protection from majoritarian politics. They also do not tend to push towards changing or reconsidering consensus values. Such challenges, however, are essential if a system of participatory democracy is to remain vibrant and flexible. We the People, after all, change over time, and one of the core purposes of a system of self-governance, and of the First Amendment, is to ensure that those changes can occur independently of the State, eventually to be reflected in the composition of the State. Thus in principle, we as a society

66. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 29–32 (1971).

67. INAZU, *supra* note 1, at 97, 103–07; *see id.* at 155 (discussing Sheldon Wolin’s distinction between “diversity,” which pluralistic liberalism tolerated, and “difference,” which it did not).

68. *Id.* at 156–58.

should celebrate, and certainly protect, all groups that challenge our values, even accepting that such groups will teach the propriety or necessity of acting contrary to those values.

Obviously, there are limits to this principle. For one thing, the right of assembly (like the right of speech) cannot provide *carte blanche* to ignore the criminal law. Members of groups who center their identity on illegal conduct (whether it be violence, polygamy, drug use, or any number of other things) can be punished for their conduct, even though the practical effect of punishment is to eviscerate the group. And as noted earlier, some restrictions on groups who tend towards violence also may be permissible. But what about groups that threaten the social order in more subtle ways than actual law-breaking? Clearly we cannot condemn such groups out of hand, or all protection is lost. But should we protect them fully?

Professor Inazu's instinct is clearly that we should, and at first blush I tend to agree. But even he concedes that "fully" does not mean without limit. He reaches this conclusion in particular in response to the problem typified by the facts of *Terry v. Adams*.⁶⁹ *Terry* involved a challenge to the Jaybird Democratic Association.⁷⁰ The Jaybirds was a purportedly private group of Democratic voters in Texas.⁷¹ Every year, prior to the Democratic primary election, it held an election amongst its members, from which African American voters were excluded.⁷² The winner inevitably went on to win the Democratic primary, and then the general election (Republicans being in short supply in Texas at that time).⁷³ The Jaybirds were not violent (at least as indicated in the facts) and shared a common ideology of racial exclusion.⁷⁴ In *Terry*, the Supreme Court held that the Jaybirds' exclusion of black voters violated the Fifteenth Amendment, through an aggressive interpretation of the state action doctrine.⁷⁵ The broader question, however, is whether the First Amendment protects the right of groups like the Jaybirds to exclude non-white voters, just as it protects the right of the Boy Scouts to exclude homosexual scout masters.⁷⁶ Professor Inazu concludes that it does not, because the Jaybirds operated in "monopolistic or near-monopolistic conditions."⁷⁷ Under the same

69. 345 U.S. 461 (1953).

70. *Id.*

71. *Id.* at 463.

72. *Id.*

73. *Id.*

74. *Id.* at 463–64.

75. *Id.* at 469–70.

76. *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

77. INAZU, *supra* note 1, at 166; *see id.* at 172.

principle, he concedes that a group that, for example, provides “exclusive access to elite legal jobs” would also lose its presumptive constitutional right to select its members.⁷⁸ Presumably (though he does not fully explain) this is because with respect to such a group, the line between “private” and “public” begins to blur, as suggested by the *Terry* decision itself.

While I agree with Professor Inazu as to the result in *Terry*, I think he may seriously underestimate the difficulties posed by his approach. For one, power does not require monopoly. What if we knew that access to a group, say, the Jaycees, was important in a particular community in building business contacts?⁷⁹ 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, like the Jaybirds, 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,⁸⁰ but when the group at issue is not a triviality, and its exclusionary actions start to bite, the proper solution is no longer self-evident.

Nor is the problem limited to exclusion and a group’s right to choose its membership. One Nazi is not especially dangerous, unless violent. But many Nazis can be. During the process of Hitler’s rise to power, he and his Nazi Party did not operate in “monopolistic conditions” (though after he was elected he of course created a monopoly of power). And the problem was not exclusion—presumably his victims had no interest in joining the Nazi Party. But at some point, as the Nazis moved from the putsch-attempting fringe to a position of influence, did a line get crossed where even a society founded on principles of self-governance legitimately could have stamped out the Nazi Party (even if such a society could not silence Hitler himself until violence was “imminent” and “likely”)?

78. *Id.* at 172.

79. *Cf. Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984).

80. *See, e.g., Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978).

Indeed, the problem may be deeper than this. One of the characteristics of “out” groups is that they tend to retreat from broader society to maintain their homogeneity and sense of identity. This is true of groups from the Amish and Shakers to survivalists and neo-Nazis. Of course, that retreat must be protected to some extent. But it is important to recognize that this separation itself causes substantial harm to the social fabric. Isolation breeds radicalism and makes it easier to de-humanize one’s opponents. Such retreat is tolerable if the number of groups and individuals that take that path remains small. But if substantial parts of a society start to retreat from one another, danger lurks in the form of the breaking of the basic consensus needed to run a liberal democratic society.⁸¹ Of course, there seems little danger at present that the United States might suffer the fate of Yugoslavia or Iraq. But there is no doubt that the level of political and cultural consensus in this country has eroded in recent years, due in part at least to a splintering of society into ideological groupings which are increasingly extreme and isolated from one another. At what point may we deploy regulation to try and counter this trend without violating the freedom of assembly? The answer may be not at all, but the question is surely worth asking.

IV. THOUGHTS ON A PATH FORWARD

I close with some extremely preliminary thoughts on how the law of freedom of assembly/association might begin to take into account the concerns recounted above. Clearly in this limited space a full examination of this extremely complex set of questions is impossible. I do, however, wish to share a few thoughts on considerations that need to be taken into account in formulating a more complete approach, in order (in Professor Inazu’s spirit) to begin a conversation.

First and foremost, as Professor Inazu emphasizes, context matters tremendously.⁸² There can be no off-the-shelf answer to the question of when a private group crosses the line into being a sufficient threat to the social order to forsake constitutional protection. The same kind of group which in one context is sufficiently disempowered and realistically incapable of serious violence or harm (Nazis in Idaho) might well in different contexts clearly cross the line into subversion (Nazis in 1931 Germany). Serious attention must be given to the role of a group in

81. For a broader examination of these concerns in the context of the Internet, see CASS SUNSTEIN, *REPUBLIC.COM 2.0* (2007).

82. INAZU, *supra* note 1, at 168–73.

society, its strengths and weaknesses, and its relationship to violence or other antisocial behavior, based on actual facts rather than conjecture. Obviously, this places a significant burden on public officials—law-enforcement officials in the first instance, and eventually judges—to engage in reasoned and careful analysis, but there seems no escaping this.

Second, following from the first, public officials, and the public more generally, need to have faith in the basic strength and unity of our society. Even in these politically divided times, there is little doubt that the vast majority of American citizens, of all political ideologies, races, religions, and cultures, share a basic commitment to liberal democratic values which make the risks posed by subversion far lower than in a profoundly divided society. Failure to recognize our bedrock strengths can easily lead our society to fall prey to the extreme fears and pathologies of the Red Scare and McCarthy eras. There is little doubt that terrorism is to our era what communism was to earlier eras, and extreme care needs to be taken to ensure that reasonable caution does not degenerate into panic and witch-hunting.⁸³ To date, judicial decisions dealing with enemy combatants and the detainees at Guantanamo⁸⁴ suggest that at least the Supreme Court has avoided this pathology, unlike in earlier periods of panic, but *Holder v. Humanitarian Law Project*⁸⁵ gives me pause.

Third, precisely because of the danger that a sense of panic can invade not only the public conscious but the judiciary as well, vague tests are dangerous. They are particularly dangerous in our legal system because even if the Supreme Court has the political isolation and fortitude to act as a counterweight to the political branches, lower courts are far less insulated. There are good, empirical reasons to believe that even in contexts where the stakes are not nearly as high as with subversive and potentially violent groups, the lower courts systematically apply First Amendment and other constitutional doctrines developed by the Supreme Court in ways that are inconsistent with, and often less protective than, what the Court's precedents would seem to require.⁸⁶ Certainly there are signs that in the context of the "War on Terror," the lower federal courts are inclined to be less protective of constitutional freedoms than the

83. Cf. *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring) ("Men feared witches and burnt women.").

84. See *Boumediene v. Bush*, 553 U.S. 723 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

85. 130 S. Ct. 2705 (2010).

86. See Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783; Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793 (2006).

Supreme Court.⁸⁷ In view of these tendencies, any doctrinal formulation of the limits of the right of assembly must rely on relatively clear rules which place a high burden of proof on those seeking to deny constitutional protection to a particular assembly or association, if they are to provide any significant constitutional protection to dissident groups in practice.

Fourth, in defining the limits of assembly, we must always keep in mind the deep link between freedom of assembly and democratic self-governance. The freedom of assembly protected by the First Amendment, like the freedom of speech and the press, and the right to petition the government for a redress of grievances, is foremost and at heart a political liberty, designed to protect and enhance the process by which We the People govern ourselves.⁸⁸ In recognizing this link, it is important to adopt a capacious understanding of the kinds of things that constitute self-governance, rather than focusing narrowly on explicit political debate and voting.⁸⁹ But nevertheless, self-governance and popular sovereignty lie at the heart of the First Amendment. As a consequence, the further a group strays from contributing to a democratic society, the less need there is for protection—recognizing all the time that such contributions can take many forms, including challenging the comfortably held shibboleths of the time and teaching nonconforming values, but not (as Justice Holmes might be read to suggest) violence against the social order.⁹⁰

Finally, we must recognize the interrelated nature of the great liberties protected by the First Amendment. In the Supreme Court's language, they are "cognate" rights that are independent but oftentimes operate in tandem.⁹¹ Thus, when an assembly is also advancing other First Amendment interests, whether it be speech, religion, petitioning (or otherwise interacting with the State) or more broadly advancing participatory democracy, the right is at its strongest. This is not to say that we should not protect non-expressive, non-religious assemblies—that was the Court's grave mistake, which Professor Inazu correctly lambasts.⁹² But the further an assembly moves from the forms of political activism and

87. See, e.g., *Odah v. United States*, 611 F.3d 8 (D.C. Cir. 2010); *Al Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010); *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005).

88. For a more complete exposition of these thoughts, see Bhagwat, *supra* note 4, at 989–94.

89. See *id.* at 995–99.

90. *Cf. Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting) ("If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way:").

91. See *Thomas v. Collins*, 323 U.S. 516, 530 (1945); *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937).

92. INAZU, *supra* note 1, at 135–49.

value-formation protected by the First Amendment, the greater perhaps our willingness should be to balance the freedom of assembly against the need for social stability.

V. CONCLUSION

In the past few pages, I have laid out some thoughts on what the limits might be to the right to freedom of assembly protected by the First Amendment with respect to so-called “subversive” groups. The main contribution I hope to make here is not to identify what those limits should be, but rather to establish that there must be some limits. First Amendment scholarship and jurisprudence, however, has barely begun to think seriously about these questions, other than the tendency to borrow in an unthinking way from free speech law. On the ground, however, there is no doubt that in the Age of Terror government officials and judges are regularly posed with exceedingly difficult questions about how these limits should be identified, questions which tend to be skipped over or handled with breezy disdain, thereby seriously undermining the First Amendment. At the same time, an absolutist position, that an assembly loses constitutional protection only when it can be shown to threaten imminent and likely violence, seems to substantially undervalue the important social interests at stake here. It is time to begin a serious dialogue about how to reconcile constitutional liberties and legitimate social concerns in this area because we can surely do better than we have to date.