

# Review Essay—The First Amendment’s Forgotten Clauses

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John D. Inazu, *Liberty’s Refuge: The Forgotten Freedom of Assembly*. New Haven: Yale University Press, 2012, pp. 288, \$55.00.

Ronald J. Krotoszynski, Jr., *Reclaiming the Petition Clause*. New Haven: Yale University Press, 2012, pp. 336, \$65.00.

The First Amendment Center commissions a survey each year on “The State of the First Amendment.”<sup>1</sup> The survey asks a random sample of Americans whether the First Amendment “goes too far,” whether musicians should be allowed to sing songs with lyrics that others might find offensive, whether public schools should have authority to discipline students for posting offensive material on the internet, and so on. One recurring question asks subjects to identify the rights protected by the First Amendment. As with most surveys about American civics education, the results are presented as a lament. “Sadly,” says one summary of the 2004 survey, “only a small fraction of the survey respondents could name the five freedoms” protected by the First Amendment.<sup>2</sup> Things haven’t improved much since then, according to the Center’s senior vice president: “When only 4 percent of us can name all five freedoms in the First Amendment, as found in the 2012 State of the First Amendment survey, any bit of education is welcome.”<sup>3</sup>

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1. First Amendment Center, State of the First Amendment Survey Reports, *available at* <http://www.firstamendmentcenter.org/sofa>. The First Amendment Center is a joint enterprise of Vanderbilt University and the Newseum.
2. Mike Fancher, Survey Finds Support Rising For First Amendment Freedoms, *Seattle Times*, July 4, 2004, *available at* [http://seattletimes.nwsourc.com/html/localnews/2001971710\\_fancho4.html](http://seattletimes.nwsourc.com/html/localnews/2001971710_fancho4.html).
3. Gene Policinski, Joan Rivers Handcuffs First Amendment To Shopping Cart, Aug. 9, 2012, *available at* <http://www.firstamendmentcenter.org/joan-rivers-handcuffs-first-amendment-to-shopping-cart>. In the 2012 survey, 65 percent of respondents named speech as part of the First Amendment, 28 percent religion, 13 percent press, 13 percent assembly, and 4 percent petition. These figures have been roughly consistent since the survey began in 1997.

## Five freedoms?

I thought there were six: “Congress shall make no law [1] respecting an establishment of religion or [2] prohibiting the free exercise thereof; or [3] abridging the freedom of speech, or [4] of the press; or [5] the right of the people peaceably to assemble, and [6] to petition the Government for a redress of grievances.”

As it happens, the First Amendment Center turns these six into five by combining establishment and free exercise into a single freedom of “religion.” It does not combine speech and press into a generic freedom of “expression,” although courts and commentators frequently do. It also does not combine assembly and petition, even though in 1886 the Supreme Court held that “the right peaceably to assemble was not protected by the [First Amendment], unless the purpose of the assembly was to petition the government for a redress of grievances.”<sup>4</sup> That view has since been repudiated in cases like *Thomas v. Collins*, which protected speech by a labor organizer in part because his audience of workers had assembled to hear him, even though neither he nor they were petitioning the government.<sup>5</sup> Nowadays, it is commonplace to discuss assembling without petitioning, and vice versa.

The distinctness with which modern eyes view the assembly and petition clauses can be seen in two books published in 2012: *Liberty's Refuge* by John D. Inazu of Washington University Law School<sup>6</sup> and *Reclaiming the Petition Clause* by Ronald J. Krotoszynski, Jr. of the University of Alabama Law School. Each is a thoughtful and well-researched exploration of its chosen clause. They share a central complaint: namely, that current First Amendment doctrine gives little independent force to either clause, instead channeling all inquiries into the speech clause. Both books adopt an eclectic approach to constitutional interpretation, where original meaning and historical practice are important but not dispositive considerations for resolving current-day disputes. They share a similar structure, where each book closes with a capstone example of how a judge ought to decide an assembly or petition case (I 173-184, K 185-207).

4. *Presser v. Illinois*, 116 U.S. 252, 267 (1886) (citing *U.S. v. Cruikshank*, 92 U.S. 542, 552 (1875)).
5. *Thomas v. Collins*, 323 U.S. 516, 532 (1945) (“The right thus to discuss, and inform people concerning, the advantages and disadvantages of unions and joining them is protected not only as part of free speech, but as part of free assembly.”).
6. *Liberty's Refuge* has been the subject of other academic book reviews. Several are found in a symposium issue of the Washington University Law Review that includes 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); and John D. Inazu, *Factions for the Rest of Us*, 89 Wash. U. L. Rev. 1435 (2012). The Texas Law Review published a pair of reviews by Ashutosh Bhagwat, *Assembly Resurrected*, 91 Tex. L. Rev. 351 (2012) (book review) and Timothy Zick, *Recovering the Assembly Clause*, 91 Tex. L. Rev. 375 (2012) (book review). See also Richard A. Epstein, *Forgotten No More*, 13 Engage: J. Federalist Soc'y Prac. Groups 138 (2012).

Both authors are deeply committed to what Justice Robert H. Jackson called “the right to differ as to things that touch the heart of the existing order.”<sup>7</sup> Yet despite these similarities, the two books have curiously little to say to each other.

Each book weaves a theory around a clause within the First Amendment to resolve a particular problem arising on particular facts. Inazu’s concern is the ability of voluntary noncommercial groups to exclude unwanted members, even if doing so would conflict with antidiscrimination laws. The book responds to the line of expressive association cases culminating in *Christian Legal Society v. Martinez*,<sup>8</sup> which held that a public university was not obliged to grant official status to a student group that refused to accept gay or non-Christian members. Krotoszynski is chiefly motivated by police practices for regulating demonstrations that effectively prevent protesters from being seen or heard by public officials, such as the “protest pits” and “no protest zones” that have arisen around the nominating conventions of national political parties. His book responds to an entirely different set of judicial opinions, many of them decided by lower courts, upholding protest regulations in the name of security.<sup>9</sup> The cases the authors cite, and the slices of legal and social history they explore, have almost no overlap. Yet the books are but one degree of separation from each other, advocating on behalf of two First Amendment colonies (assembly and petition) dominated by a single colonizer (the free speech clause).

In the interests of full disclosure, I should note that the books are one degree of separation from each other in another sense: both take positions on cases I litigated. Inazu disagrees with the Ninth Circuit’s decision in *Truth v. Kent School District*,<sup>10</sup> which upheld a public school district’s denial of official sponsorship to a student-run Bible Club (I 3, 18). I helped prepare an amicus brief in that case in support of the school district, which relied upon one of

7. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (“[F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom.”).
8. *Christian Legal Soc’y Chapter of the Univ. of California, Hastings Coll. of the Law v. Martinez*, 130 S.Ct. 2971 (2010). Inazu participated as counsel for an amicus supporting the Christian Legal Society. Other Supreme Court cases in this line include *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); *New York State Club Assn., Inc. 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); and *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).
9. *E.g.*, *The Coalition to March on the RNC and Stop the War v. The City of St. Paul*, 557 F. Supp. 2d 1014 (D. Minn. 2008) (Republican national convention); *ACLU of Colorado v. City & County of Denver*, 569 F. Supp. 2d 1142 (D. Colo. 2008) (Democratic National Convention); *Citizens for Peace in Space v. City of Colorado Springs*, 477 F.3d 1212 (10th Cir. 2007) (NATO defense ministers meeting); *Bl(a)ck Tea Society v. City of Boston*, 378 F.3d 8 (1st Cir. 2004) (Democratic National Convention); *Menotti v. City of Seattle*, 409 F.3d 1113 (9th Cir. 2005) (WTO Conference).
10. *Truth v. Kent School Dist.*, 542 F.3d 634 (9th Cir. 2008), *overruled in part on other grounds* by *Los Angeles County, Cal. v. Humphries*, 131 S. Ct. 447 (2010).

my earlier articles.<sup>11</sup> Krotoszynski objects to the Ninth Circuit's decision in *Menotti v. City of Seattle*, which for the most part upheld the "no protest zone" established at the World Trade Organization Convention in Seattle in 1999 (K 34-36). As counsel for the *Menotti* plaintiffs, I share his view that the court gave insufficient weight to speakers' First Amendment interests. This essay will express more disagreement with Inazu than Krotoszynski, so readers should decide for themselves whether I have too many horses in this race to fairly call the results.

Both books are pleasingly well written, sophisticated but not stuffy. Because they do not assume that readers will be intimately familiar with the source material (other than some portions of *Liberty's Refuge* that focus on political science literature that will be unfamiliar to most legal audiences), well-motivated law students would find them accessible. They could be suitable assigned reading for advanced seminars.

This essay describes the books, in clause order, exploring some of the intriguing puzzles identified by each. It closes with some ideas about what it might mean that two books about "forgotten" clauses of the First Amendment, published nearly simultaneously, pass silently like ships in the night.

### Inazu on Assembly

Inazu's approach to freedom of assembly rests on two premises. First, assembly protects not only the ability to gather with others at the same time and place, but to create and control the composition of organized groups. Second, assembly is worth protecting—either as an independent good, or because it contributes to citizens' capacity for dissent and change. Taken together, these premises imply that absent strong countervailing circumstances, private noncommercial groups like a fraternal lodge, a prayer group, or a gay social club should be able to exclude women, nonbelievers, or straight people respectively, because a society containing a multiplicity of homogenous groups is more pluralistic than (and hence superior to) one containing uniformly heterogeneous groups.

Inazu does not take this position because he is keen on invidious discrimination. He is not. But channeling Margaret Mead's famous observation that small groups of thoughtful, committed citizens are the only thing that can ever change the world, Inazu posits that "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" (I 5). The right to form groups of one's choosing—even if they are not overtly expressive or political—is a condition for meaningful dissent. Moreover, a group with an enforceable membership policy "provides a buffer between the individual and the state that facilitates a check against centralized power . . . shape[s] and form[s]

11. Amicus Brief of ACLU of Washington, at 2, 21, 23-25, *Truth v. Kent School District*, 542 F.3d 634 (9th Cir. 2008) (No. 04-35876), 2005 WL 2596965 (citing Aaron H. Caplan, *Stretching the Equal Access Act Beyond Equal Access*, 27 *Seattle U. L. Rev.* 273 (2003)).

identity . . . [and] facilitates a kind of flourishing . . .” (I 5). Preserving a safe space where people may be truly different from the mainstream is so valuable that it is worth the price of allowing some such havens to be used by “racists, bigots, and ideologues” (I 184).

Inazu acknowledges that his two premises (that the assembly right extends to group membership criteria, and that such a right has great constitutional value) find limited support in current case law. The most prominent mentions of the right of assembly in Supreme Court decisions are in cases from the 1930s and 1940s upholding the rights of speakers to address an assembled audience, and in those opinions the rights of speech and assembly are addressed together.<sup>12</sup> The right to form groups has been analyzed not as a question of assembly, but of the unenumerated right of association, which protects group autonomy only as a means to other constitutional ends. “Expressive association” protects the ability to form organizations that allow individuals to more effectively exercise their speech and press rights. As the name suggests, expressive association protects a group’s activities only where those activities facilitate the group’s expression.<sup>13</sup> “Intimate association” protects the ability to join together for companionship, even if non-expressive. While sometimes spoken of as a First Amendment right, intimate association is better understood to be an unenumerated liberty protected by substantive due process.<sup>14</sup> As such, it has been interpreted narrowly, typically protecting only the relationships that closely resemble nuclear or extended families.<sup>15</sup>

Inazu’s first premise involves the definition of assembly. For Akhil Reed Amar, “[t]he core Founding-era right of ‘the people’ to ‘assemble’ centered on citizens’ entitlement to gather in public conventions and other political conclaves.”<sup>16</sup> In *A Right to Discriminate?*—a 2009 book that Inazu jousts against throughout *Liberty’s Refuge*—Andrew Koppelman and Tobias Barrington Wolff state that assembly “has always been understood to mean a right to hold public

12. *E.g.*, *Thomas v. Collins*, 323 U.S. 516 (1945); *Hague v. CIO*, 307 U.S. 496 (1939); *Herndon v. Lowry*, 301 U.S. 242 (1937); *De Jonge v. Oregon*, 299 U.S. 353 (1937).

13. Leading expressive association cases include *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *Healy v. James*, 408 U.S. 169 (1972); *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539 (1963); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Bates v. Little Rock*, 361 U.S. 516 (1960); and *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

14. *See* *Montgomery v. Stefaniak*, 410 F.3d 933, 937 (7th Cir. 2005); *Adler v. Pataki*, 185 F.3d 35, 42 (2d Cir. 1999); *IDK, Inc. v. Clark County*, 836 F.2d 1185, 1192 (9th Cir. 1988).

15. Supreme Court cases exploring aspects of intimate association include *City of Dallas v. Stanglin*, 490 U.S. 19 (1989); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); *Smith v. Org. of Foster Families For Equal. & Reform*, 431 U.S. 816 (1977). Some lower courts have interpreted *Lawrence v. Texas*, 539 U.S. 558 (2003), as an intimate association case. *See* *Flaskamp v. Dearborn Pub. Sch.*, 385 F.3d 935, 942 (6th Cir. 2004).

16. Akhil Reed Amar, *America’s Lived Constitution*, 120 *Yale L. J.* 1734, 1761-62 (2011).

meetings, not to exclude people from associations.”<sup>17</sup> Inazu counters that the framers had a broader vision. For example, they undoubtedly wished to protect the worship services of religious dissenters, which were far from public political conclaves. The memory was still fresh in their minds of British laws forbidding any group of more than five Quakers to assemble for religious purposes, which led to the notorious prosecution of William Penn in 1670 (I 24). In the early 1790s, groups calling themselves “Democratic-Republican Societies” combined public meetings for political debate with social activity like feasts, festivals, and parades (I 26-29). In the antebellum period, abolitionist movements and even slave rebellions were the fruits of voluntary assemblies that may not have appeared, in their embryonic form, to resemble political conventions (I 29-34). Of course, social change was not the goal of every antebellum group. The primary purpose of slave patrol societies was to maintain existing power structures, and they, too, combined their political discussion with socializing over monthly barbeques.<sup>18</sup> For good or ill, the American penchant for forming groups that served both social and political purposes continued in full force in the century after the Civil War, contributing to social movements for labor unions, utopian societies, alcohol prohibition, women’s suffrage, and civil rights. Inazu believes the framers would have recognized the groups giving rise to these movements as manifestations of the right of assembly.

*Liberty's Refuge* amply proves that in its early history, the United States tolerated dissenters forming groups; it does not prove as effectively that these groups expected or enjoyed legal protection for exclusive membership policies. That precise question did not arise in those years, since the government did not force the issue. But Inazu’s presentation of history implies that private organizations had a norm of excluding members who held the wrong status. It seems reasonable to think that many of them did, but in some prominent instances, the inference would be incorrect. The famous Seneca Falls women’s rights convention of 1848 (I 33) was organized and led by women, but some 40 men also participated, Frederick Douglass most prominent among them.<sup>19</sup> The NAACP (I 45-46) was founded as a mixed-race organization.<sup>20</sup> Many of the groups Inazu finds most praiseworthy may have relied on self-selection, rather than blackballing, as the organizing principle of their communities.

Even if history confirms that early American groups routinely posted metaphorical “No Girls Allowed” signs on their tree houses, that might not translate into constitutional protection for the practice. As Joseph Blocher

17. Andrew Koppelman with Tobias Barrington Wolff, *A Right To Discriminate? How the Case of Boy Scouts of America v. James Dale Warped the Law of Free Association* 21 (Yale Univ. Press 2009).
18. See James Loewen, *Lies Across America* 268-73 (New Press 1999) (describing the Beech Island [South Carolina] Agricultural and Police Society).
19. Robert F. Blomquist, *Thinking About Law and Creativity: On the 100 Most Creative Moments in American Law*, 30 *Whittier L. Rev.* 119, 181 (2008).
20. Susan D. Carle, *Race, Class, and Legal Ethics in the Early NAACP (1910-1920)*, 20 *Law & Hist. Rev.* 97, 104-05 (2002).

explains, “[t]he acts of associating and not-associating are neither identical nor interdependent. If the purpose of the associational right were solely to permit people to gather—‘assembly,’ after all, is the enumerated right that association has largely come to replace—then there would be nothing necessary nor even logical about a right to exclude.”<sup>21</sup> *Roberts v. United States Jaycees* announced that freedom of association “plainly presupposes a freedom not to associate,”<sup>22</sup> but that conclusion is not inevitable. Whether a right to gather also connotes a right to separate hinges on a normative question: what is the purpose of the right to gather?

This leads to Inazu’s second premise, regarding the value of association. Inazu argues that assembly should be valued as an end in itself and also as a means for meaningful counter-majoritarian dissent. The drafting history of the First Amendment is sparse, but as Inazu explains, the snippets that relate to assembly can be read to support its role as a mechanism for dissent. Drawing on language found in then-existing state bills of rights, James Madison’s first draft of an assembly clause read, “The people shall not be restrained from peaceably assembling and consulting for their common good.” The “common good” language was consciously dropped from the final version, following an exchange in which Elbridge Gerry objected that if the people could assemble only for the common good—as defined by the government—then the right would protect no more than the government allowed (I 22-23). The textual limitation that assemblies must be “peaceable”—unique in the First Amendment, which does not require that its other rights be exercised peaceably—shows that the framers were aware that groups can be dangerous. We prosecute some of them as conspiracy, riot, failure to disperse, or unlawful assembly. But the requirement that an assembly be “peaceable” was intended to create less of an impediment to group formation than a requirement that the group serve the common good. From this, Inazu deduces that assembly often best serves its purpose when it is *not* for the common good—that is, when its members assemble to further goals at odds with the mainstream.

The Supreme Court did not praise pluralism or the value of organized dissent in its first forays into the right of groups who assemble for purposes that authority figures would deem antithetical to the common good. During the Red Scare following World War I, it viewed radicals’ association with like-minded others as an aggravating factor that made their speech more dangerous.<sup>23</sup> During the McCarthy period following World War II, the Supreme Court routinely affirmed criminal convictions for participation in

21. Joseph Blocher, *Rights To and Not To*, 100 Cal. L. Rev. 761, 793 (2012). *See also id.* at 794-95 (“The decision to treat a particular right to as carrying with it a right not to is just that: a decision, one that is driven by the function of the right, rather than by some mathematical relationship between X and not-X.”).
22. *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984).
23. *E.g.*, *Whitney v. California*, 274 U.S. 357 (1927), overruled in part by *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969) (A state may not criminalize “assembly with others merely to advocate” illegal action); *Gitlow v. New York*, 268 U.S. 652 (1925).

the Communist Party and upheld laws penalizing disfavored groups and their members (I 65-96). A dominant mid-century image—witnesses subpoenaed before Congress to identify their associates—showed that the right to form unpopular groups was no more respected by the legislative branch than the judicial.

The tide began to turn with the civil rights movement. Here, the Supreme Court was willing to uphold the rights of African-Americans to form effective groups, predominantly the NAACP, against restrictions by state or local governments. The key case—and the one that first relied upon the concept of “association” as something distinct from “assembly”—was *NAACP v. Alabama*,<sup>24</sup> which invalidated the state’s attempt to crush the organization by forcing disclosure of its membership list. The state’s invasion of informational privacy hindered association because in the prevailing climate, retaliation against known NAACP members would have been guaranteed. Later cases uniformly rejected similar threats to the organization’s ability to pursue collective action,<sup>25</sup> even while the court continued to uphold restrictions on associations of political radicals.<sup>26</sup> As Harry Kalven wrote, “The Communists cannot win, the NAACP cannot lose” (I 90).

Inazu doubts that the Supreme Court’s NAACP decisions reflect his vision of a right to form genuinely nonconforming groups. Rather, the court believed that unlike the Communists, the NAACP was in fact acting in the common good. Dominant political theorizing at the time posited that interest groups competing with each other would result in harmoniously balanced public policy, so long as they operated within the bounds of a general societal consensus. According to this theory, stifling groups within the realm of acceptable opinion would lead to sub-optimal outcomes, but the same was not true for groups with views outside the mainstream (I 97). After years of enforcing this bounded pluralism, the court finally began to extend its benefits to Communists—although at a time when they could safely be assumed to pose no meaningful threat.

After these mid-century opinions, few cases reached the Supreme Court involving laws that sought to prevent people from forming or supporting voluntary groups.<sup>27</sup> Instead, association-based challenges arose to the

24. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

25. *NAACP v. Button*, 371 U.S. 415 (1963); *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293 (1961); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Bates v. Little Rock*, 361 U.S. 516 (1960).

26. *Communist Party of the United States v. Subversive Activities Control Bd.*, 367 U.S. 1 (1961); *Scales v. United States*, 367 U.S. 203 (1961); *Uphaus v. Wyman*, 360 U.S. 72 (1959); *Barenblatt v. United States*, 360 U.S. 109 (1959); *Adler v. Bd. of Educ.*, 342 U.S. 485 (1952), overruled in part by *Keyishian v. Bd. Of Regents of Univ. of State of New York*, 385 U.S. 589 (1967); *Dennis v. United States*, 341 U.S. 494 (1951); *Am. Commc’ns Ass’n, C.I.O. v. Douds*, 339 U.S. 382 (1950).

27. A significant exception is *Holder v. Humanitarian Law Project*, 130 S.Ct. 2705 (2010), which upheld the power of the government to criminalize—as “material support for terrorism”—activity in support of forbidden groups, even if that activity takes the form of pure speech (I 5).

application of antidiscrimination laws to groups like the Eagles, the Jaycees (Junior Chamber of Commerce), the Rotary Club, or the Boy Scouts. It is in these cases—where the government seeks not to keep people apart but to bring them together—that Inazu believes the court’s tradition of half-hearted protection for assembly has come home to roost.

The 1984 decision *Roberts v. United States Jaycees* established the basic blueprint for judicial review of statutes that treat some membership organizations as “public accommodations” with nondiscrimination obligations. Unless a group is highly selective in its existing membership policies, it will have no claim to intimate association. Unless it can demonstrate that a homogeneous membership is crucial to a message it seeks to express, it will have no claim to expressive association. The Ku Klux Klan would have a constitutional right to exclude African-Americans, because including them as members would contradict the group’s message of white supremacy. By contrast, a business networking club like the Jaycees has no similar right to exclude women, because it has no mission to convey a message of male supremacy. For Inazu, making expressiveness a condition to a right to form an exclusive group fails to recognize that peaceable assembly has independent value beyond its immediate expressive potential. “The right of assembly protects the members of a group based not upon their principles or politics but by virtue of their coming together in a way of life” (I 185-86). It can also be a dicey enterprise for the government to decide which messages a group expresses through its actions. He therefore concludes his book with a thought experiment, writing a “missing dissent” from the unanimously decided *Roberts*. His dissent argues that the Jaycees must be allowed to exclude women, because virtually any forced integration of private groups enforces “a radical sameness that destroys dissenting traditions . . .” (I 184).

Some readers may object that Inazu’s assertion—that nondiscrimination laws lead to “radical sameness”—relies upon a strong dose of essentialism. To believe that all organizations that are open to both men and women are the same as each other, we must also believe that all men share characteristics that all women lack, and vice versa. This disregards any potential for individual variation within demographic groups, including those variations that might cause some to identify as bird lovers or cat fanciers, Republicans or Democrats. It is possible to interpret Inazu’s claim more narrowly, extending only as far as those assemblies whose members hold essentialist beliefs about disfavored demographic groups. The Jaycees are entitled to believe that all women—including those who self-select for membership in the Jaycees—are innately different from the men who currently form the Jaycees, and hence to believe that admitting female members would rob the organization of its distinctiveness. The legislature might not agree with the Jaycees on this point, but the Constitution should protect their right to act on their beliefs. This narrower formula means that the assembly clause does not write essentialism into the First Amendment. But it complicates Inazu’s argument that assembly protects something unrelated to expression of ideology.

Be that as it may, Inazu believes that groups should not be required to prove, as the price for constitutional protection, that their membership restrictions are necessary for expressive purposes. He proposes a different standard for assembly that would not require any inquiry into the communicative impact of a group's membership criteria:

The right of assembly is a presumptive right of individuals to form and participate in peaceable, noncommercial groups. This right is rebuttable when there is a compelling reason for thinking that the justifications for protecting assembly do not apply (as when the group prospers under monopolistic or near-monopolistic conditions) (I 166).

Decoupling expression from control over group membership is an intriguing and potentially powerful idea.<sup>28</sup> Groups do, indeed, form for reasons other than the intentional dissemination of an identifiable message, and perhaps the resulting social spaces can be valuable incubators of alternative viewpoints and lifestyles. The constitutional value of unregulated assembly may well be greater than existing association doctrine gives it credit for. If so, Inazu's approach has helpful potential, discussed below, to shift the law's current focus away from the group's reasons for assembling (which can lapse into a "common good" requirement) and towards the government's justifications for interfering with the group's choices.

But the devil is in the details. It is at the level of application that Inazu is most likely to draw objections. Two problems are particularly important: (a) what constitutes an impairment of the right of assembly, and (b) when should the government's interests outweigh the group's interest in exclusion.

Begin with *Christian Legal Society v. Martinez*,<sup>29</sup> a case that seems close to the heart of *Liberty's Refuge* (I 5, 145-49). The University of California Hastings College of Law had a nondiscrimination policy under which it would grant official recognition only to student groups with open membership policies. A chapter of the Christian Law Society sought recognition, even though it would reject as members anyone who did not meet its definition of Christianity or who engaged in "unrepentant homosexual conduct." The law

28. Inazu's argument here also resonates with the values that C. Edwin Baker identified for assembly in the more traditional sense of face-to-face gathering for a meeting or demonstration. "Communication, however, is only one aspect of assembly. People assemble and associate in order to generate and exercise power, to do things, to engage in activities that are valued in themselves, to engage in activities that often give the people involved an exhilarating sense of power and self-actualization, and to engage in the extraordinary as a way to challenge and change the ordinary and the routine." C. Edwin Baker, *Unreasoned Reasonableness: Mandatory Parade Permits and Time, Place, and Manner Regulations*, 78 *Nw. U. L. Rev.* 937, 948 (1983).
29. *Christian Legal Soc'y Chapter of the Univ. of California, Hastings College of the Law v. Martinez*, 130 S. Ct. 2971 (2010). Elsewhere I have criticized *Christian Legal Society* for its inapt reliance on the public forum analogy. Aaron H. Caplan, *Invasion of the Public Forum Doctrine*, 46 *Willamette L. Rev.* 647, 673 (2010). Inazu also dislikes the public forum discussion in *Christian Legal Society*, albeit for different reasons (I 147-48).

school denied official recognition, which Inazu equates to denial of “the right to exist” (I 5, 149). In fact, the group unquestionably existed.<sup>30</sup> It carried on precisely the types of group activities that Inazu celebrates, such as weekly Bible-study meetings, church services, beach barbecues, lectures, dinners, and informal social activities.<sup>31</sup> It also exercised its right to speak and to petition the government through impact litigation. The group could not claim official school sponsorship, use the school’s name or logo without permission, or seek subsidies from the school’s student activity fund. But it could use school facilities on the same basis as other non-affiliated groups. Inazu is surely correct that the right of assembly should protect against not just laws that forbid group formation, but also those that create significant obstacles to assembling. One such example would be the forced disclosure of member identities that Alabama sought to impose on the NAACP. But a government agency’s refusal to officially sponsor a group that violates the agency’s legitimately chosen principles is not such an obstacle. Parliament abridged the Quakers’ right of assembly when it banned them from worshipping in groups of five or more; it would not have been an abridgment to refuse them the right to hold themselves out as “The Quaker Order of the Church of England” or the right to spend from the Church’s tithes.

If we accept Inazu’s first premise (that the right of assembly includes a right to exclude unwanted members), then *Roberts* would, unlike *Christian Legal Society*, involve impairment of the right: Minnesota’s antidiscrimination law forced the Jaycees to admit female members. Whether this application of state law is constitutional under Inazu’s formula would hinge on how courts apply his proviso allowing the presumptive right of assembly to be rebutted. The details are sketchy, but Inazu proposes that courts should “examine how power operates on the ground,” and then permit government-mandated integration of private noncommercial groups that have “overreached” in a manner that he likens to monopoly power (I 169, 172). As one real-world example, he offers the white primary operated by the nominally private Jaybird Democratic Association in *Terry v. Adams*,<sup>32</sup> whose votes effectively determined the nominees of the state Democratic Party (I 15).

Inazu does not adequately explain why a group’s right to control its membership becomes inconsistent with “the justifications for protecting assembly” merely because the group is powerful. The powerful as well as the weak have reasons to assemble with each other. A better reason to limit the right of assembly would be a straightforward balancing of the group’s interests against those of the government. The reason some states treat membership organizations (like the Jaycees) as public accommodations is that in some communities, access to these groups and their facilities is a *de facto* condition

30. Inazu also employs this idiosyncratic understanding of the word “exist” in his “missing dissent” from *Roberts v. United States Jaycees*, where he asserts that the Jaycees club “depends upon this [sex] discrimination for its very existence” (I 184).

31. *Christian Legal Soc’y*, 130 S. Ct. at 2981.

32. *Terry v. Adams*, 345 U.S. 461 (1953).

for full access to power and advancement and even to participation as an equal citizen. Inazu correctly notes that the Boy Scouts are very likely such a ubiquitous organization (I 172), although he refrains from carrying that thought to its logical conclusion (that *Dale* was wrongly decided). Conversely, Inazu's proposed "missing dissent" from *Roberts* asserts, with little explanation, that unlike the Jaybirds, the Jaycees do not have the type of "power on the ground" that justifies desegregation (I 184). Given Inazu's earlier statement that the record in *Roberts* was insufficiently developed to resolve that question (I 16), readers have only hints as to what might constitute untoward organizational power.

In short, even if Inazu's proposed standard allows him to conclude that *Dale* is right and *Roberts* is wrong, it allows others to conclude the opposite. One could decry the standard for its indefiniteness or praise it for its adaptability. It is the kind of abstraction that facilitates what Cass Sunstein calls "incompletely theorized agreements" to resolve concrete disputes without embarking on a futile attempt to reach consensus on the details of underlying principles in the style of philosopher-kings.<sup>33</sup> But as it happens, Inazu seems not to view the pliability of his standard as its value. Existing law, he says, is faulty in part because it "avoid[s] the hard question at the root of [these] controversies ... whether we are willing to permit difference at the cost of equality" (I 173). It seems unrealistic, and perhaps undesirable, to expect such a hard and abstract question to be resolved in appellate opinions. Nonetheless, Inazu's book is valuable—even for those who may disagree with much of it—because it does grapple with those competing values.

### Krotoszynski on Petition

The conflict explored by Inazu is truly difficult, because it is a clash between sometimes conflicting but genuinely held values. By contrast, Krotoszynski explores a conflict between a genuine constitutional value (the ability to communicate with government) and the mere convenience or preferences of government officials. As a result, his book is less likely to spark academic controversy. It serves more as a prod to live up to our First Amendment values, rather than an attempt to reconfigure them. But Krotoszynski convincingly demonstrates that some prodding is necessary.

The central problem for Krotoszynski is that government officials have become increasingly walled off from citizens, permitting face-to-face encounters only under tightly controlled conditions where the officials are unlikely to be exposed to anything they do not wish to hear. In a trend that accelerated after the Seattle WTO conference in 1999 and the September 11 terrorist attacks of 2001, any major gathering of officials will today be surrounded by a security perimeter that forbids demonstrations, picketing, or leafleting in close to the event. In some cases, demonstrations are both excluded from locations visible and audible to the event and confined to remote, cordoned-off protest areas where they are certain to be ignored.

33. Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 Harv. L. Rev. 1733 (1995).

Krotoszynski shows how “even the most egregious uses of no-protest and free speech zones” are likely to be upheld by the courts as reasonable time, place, and manner regulations (K 32). As currently applied, he argues, the time, place, and manner doctrine has no interest in whether speakers can deliver their messages to their intended audiences in real time and space (K 208-09). As a descriptive matter, this may be an overstatement given decisions in some circuits that expressly acknowledge a right to reach one’s desired audience.<sup>34</sup> But Krotoszynski is undeniably correct to observe—either as a troubling trend or a troubling mainstream legal position—judicial willingness to rely on dubious reasoning to upholding stringent restrictions. The Ninth Circuit intimates that a city’s interest in avoiding bad publicity that would interfere with future convention business is a significant government interest (K 35). The First Circuit holds that adequate alternative channels for communication exist if demonstrators could write a letter to the editor or post a video on YouTube instead of protesting at a convention—in other words, in all cases (K 34). And the Tenth Circuit blithely accepts that a six-person peace vigil poses a significant security risk (K 37). The problem is compounded, because, if a group does not demonstrate near officials, it is unlikely to be covered by the news media. “The right to inveigh against the heavens in an empty field is meaningless . . . ,” writes Krotoszynski, “because it cannot contribute to the formation of collective public opinion; citizens must be able to both access and engage government officials—and each other [through the media]—if deliberative democracy is to function properly” (K 51).

Since many restrictions on protest are based on little evidence of genuine security need, Krotoszynski posits that the actual government interest served in these settings is to render dissent invisible (K 68-70). This is true, in part, because the restrictions are designed not only to insulate government officials from protesters but also to keep them out of range from the press. A Secret Service manual used during the George W. Bush Administration expressly provided that demonstrators should be removed to a secure protest area unless “it is determined that the media will not see or hear” them (K 4). Government activity that hinders speech in order to mute criticism of the government, Krotoszynski argues, is functionally equivalent to sedition law. That the speech restrictions are imposed in the name of national security does not change that assessment, because seditious libel law was always justified by reference to security. Criticizing the sovereign, the theory went, would lead to unrest and potentially violent overthrow of the government (K 7). “Security, dignity [of government officials], and seditious libel all can and do relate to the same core concerns about protecting and keeping governmental power safely in the hands of those who currently hold it . . . .” (K 70). The sedition analogy may not bear as much weight as Krotoszynski places on it, but it is nonetheless evocative. Just like old-fashioned seditious libel prosecutions, current demonstration regulations “reflexively equate dissent—or dissenters—

34. “An alternative is not ample if the speaker is not permitted to reach the intended audience.” *Berger v. City of Seattle*, 569 F.3d 1029, 1049 (9th Cir. 2009) (en banc) (citation omitted).

with the threat of political violence or terrorism” (K 213), even though dissent is not a marker for violence (K 51).

Scholarly opinion has overwhelmingly opposed modern techniques for suppressing in-person dissent on free speech grounds, but the academic consensus has done little to halt government efforts to make in-person demonstration impracticable (K 22). With the free speech approach having proved inadequate, Krotoszynski proposes that constitutional questions about demonstration management might get a fresh start by framing them in terms of the right to petition (K 23). Even though modern political protest activity looks quite different from earlier forms of petitioning, there is nonetheless “a right of access to incumbent government and political party officials for expressive activity that advocates changes in existing government policy . . . ,” even if “the petitioners elect to annex speech, assembly, and association rights to advance their cause in conjunction with petitioning speech” (K 182).

As described by Krotoszynski, petitioning plays a surprisingly large role in the development of Anglo-American political rights. Petitioning was recognized as a right long before the other First Amendment rights came into favor. The story extends back over a thousand years, to before the Norman Conquest, when a petition resembled a lawsuit prosecuted directly before the Crown. In the 10<sup>th</sup> century, there was no right to petition, but kings would, in their discretion, hear some petitions to resolve property disputes that had not been adequately decided by lower courts—in effect, a royal appeal. A right to petition the sovereign for redress of the sovereign’s own actions gained traction with the Magna Carta in 1215. Among the concessions King John made in that document was that any group of four barons believing the King’s agents had acted improperly had the right to “ask that [the King] cause that transgression to be corrected without delay” (K 84). As it developed in the centuries after the Magna Carta, Parliament itself served as a mechanism for petitioning. In the mid-1300s, King Edward III opened each Parliament with an announcement of the King’s willingness to hear petitions from the people. As Parliament itself grew in power over the centuries, the petitions began to be directed directly to it (K 85). Even today, a bag hangs on the back of the Speaker’s chair in the House of Commons where members may deposit petitions from constituents (K 83).

Petitions were not always gladly received. Both King and Parliament occasionally prosecuted petitioners (typically for sedition) in response to petitions deemed impertinent (K 86). A crisis arose around petitioning in 1688, when seven Anglican bishops petitioned King James II for an exemption from his order that they read from the pulpit his declaration proclaiming toleration for Catholics. The bishops were arrested and prosecuted for seditious libel. The controversial prosecution was among the leading causes of the Glorious Revolution that deposed James II in favor of William and Mary of Orange. One condition of the new monarchs’ investiture by Parliament was their agreement to the English Bill of Rights of 1689, which declared among other things that “it is the right of the subjects to petition the King, and all

commitments and prosecutions for such petitioning are illegal” (K 169). By the early 1700s, petitioning “had come to be viewed as the birthright of the English subject” and a method for the unfranchised to have an effect on government (K 87).

The American colonists likewise viewed the ability to petition with immunity as one of the time-honored rights of Englishmen. Most colonial charters included procedures or protections for petitioning, as did many early state constitutions written after independence (K 104). When the first Congress was seated in 1789, petitions began arriving within ten days—and this was before the First Amendment and its petition clause had even been drafted. The practice quickly developed for Congress to vote to refer petitions to a committee, which would prepare a report on how to respond (K 113). There was no guarantee of congressional action, but petitions were taken seriously as a method to set the national agenda. By 1795, one newspaper reported that “the principal part of Congress’s time has been taken up in reading and referring petitions” (K 111).

Petitioning was a central strategy of abolitionists. As early as 1790, Quakers in several states undertook a major petition drive to gather signatures asking Congress to end the slave trade. Slave state congressmen objected that the petition should not even be considered, given that the Constitution prevented any legislation restricting the slave trade before 1808. The petition was nonetheless referred to a committee that drafted a response politely refusing action (K 111-12). In the 1830s and 1840s, abolitionists undertook an increasingly persistent program of petitioning Congress to end slavery in the District of Columbia. The petitions grew so numerous that in 1836, Senator John C. Calhoun proposed that the Senate refuse to receive any of them. A rancorous debate ensued, with many senators objecting that this would violate the people’s right of petition. A compromise of sorts was reached whereby the petitions would be accepted by the Senate but tabled without referral to a committee. The House enacted its own rule tabling antislavery petitions, but went further in preventing them from being read into the record or being mentioned in debate. This so-called “gag rule” was a matter of continual acrimony in the House and was ultimately repealed in 1844 after heroic efforts by then-representative John Quincy Adams (K 116-120).

After the gag rule controversy, Congress’s sense of an obligation to respond substantively to petitions waned. But petitioning did not. Instead, it entered what Krotoszynski considers a “golden age” where political activists used the petition as an organizing tool. The new methods

transformed petitioning from a relatively obscure, but highly effective, legislative practice, into a highly visible public ritual, a key feature of democratic politics at a time when voting rights were not widely distributed or enjoyed . . . . The results of these hybrid petition campaigns, which annexed canvassing, public demonstrations, parades, and rallies, along with sophisticated media campaigns, to the traditional act of submitting a petition to Congress, fundamentally changed what it meant to “petition” (K 127).

The petition as a focal point for mass politics was most visible in the successful social movements for women's suffrage and alcohol prohibition and remained visible during the civil rights movement. The Selma-to-Montgomery march in 1965 is Krotoszynski's favorite example of hybrid petitioning. Large numbers of ordinary people used the presence of their bodies in public places to publicize their grievances. The marchers' grievances, like those of the barons at the time of the Magna Carta, revolved around a denial of political influence: at the climax of the Selma march, a petition demanding voting rights reforms was delivered to Alabama Governor George Wallace. Publicity surrounding the march (and the state's violent attempts to suppress it) drew attention to the need for national legislation, helping ensure passage of the Voting Rights Act of 1965. Judge Frank Johnson's order in *Williams v. Wallace*<sup>35</sup>—forbidding state interference with the march—is for Krotoszynski the exemplar of a judicial opinion that properly understands that the petition clause, in conjunction with other First Amendment rights, guarantees the right to direct messages to government in a meaningful and visible fashion.

To change the legal status quo, Krotoszynski urges greater judicial attention to the values underlying the petition clause.

The Petition Clause can and should provide a qualified right of access to seek a redress of grievances on a public street or sidewalk within the personal hearing and seeing of incumbent government and political party officials. This is not to say that government has no interest in ensuring the personal security of the president, other government officers, or political party leaders . . . [But] federal courts should require that any and all restrictions on protest activity proximate to government officials should be justified by actual—as opposed to merely hypothetical—risks, and that the government should be required to use the least restrictive means possible to address those security concerns (K 183).

Using the petition clause to augment the existing time, place, and manner rules would be a departure from current law. To date, the Supreme Court has given independent force to the petition clause only in the form of the *Noerr-Pennington* exemption from antitrust liability for lobbying and litigation activity (K 160-62). In other factual settings, the court has yet to find that the petition clause protects any more than the speech clause. *McDonald v. Smith*<sup>36</sup> declared that the right to petition is “cut from the same cloth as the other guarantees of the First Amendment” and as a result “there is no sound basis for granting greater constitutional protection to statements made in a petition to the President than other First Amendment expression” (K 158). That decision allowed a plaintiff to sue for allegedly defamatory statements within a petition, even though immunity from suit has been a historical component of the right of petition from the English Bill of Rights onward. The 2011 decision

35. *Williams v. Wallace*, 240 F. Supp. 100 (M.D. Ala. 1965).

36. *McDonald v. Smith*, 472 U.S. 479 (1985).

in *Borough of Duryea v. Guarnieri*<sup>37</sup> also found that the petition clause provided nothing that the speech clause did not, although in dicta it suggested that the right to petition might have independent force in as-yet-unrecognized circumstances (K 158-59).

Would a renewed focus on the historical importance of petition for democratic self-governance, as linked to the practice of public demonstrations, change the current judicial consensus? Krotoszynski discusses a number of potential objections to his proposal, the most serious of which is that special solicitude for petitioning speech could violate the speech clause norm against content discrimination. A rally to reduce handgun deaths through a new gun control law might be judged differently than a rally to reduce handgun deaths through prayer. This is a serious charge, given the heavy emphasis that recent free speech law gives to formal content neutrality.

Krotoszynski proposes two ways out of this dilemma. One is to claim that petitioning and non-petitioning speech differ with regard to their audience, not their content. Whatever the grievance and whatever type of redress is requested, one can recognize petitioning (including hybrid petitioning that consists of political activity organized around a message to government) because it is aimed at public officials (K 178). But it is ultimately hard to say that this is not a content distinction, for how can one know the audience for speech if not from its content? A message and its recipient may be theoretically distinct in the case of a letter and its envelope, but this is not the form of political activity Krotoszynski is concerned about. Moreover, not all speech to the government is a petition for redress of grievances.

The sounder approach owns up to the content discrimination. Despite protestations to the contrary, existing speech clause law does acknowledge differences among subject matters, designating some speech as “core” political or religious speech, and others as fully or partially proscribable (K 177). Petitions may similarly be viewed as constitutionally distinct subject matter, because the text of the First Amendment itself identifies petition as something different from other speech. Content neutrality arguments often depend upon the difficulty of drawing lines: how, for example, can “hate speech” be treated as legally different from other speech when there can be no agreement on what it is? But petitioning the government for redress of grievances must be an identifiable activity, or else the text of the clause would be meaningless.

Accepting that the government ought not prevent people from being seen or heard by their public servants (and the journalists who cover them), do we need to use the petition clause to revive the right to demonstrate in proximity to political leaders? Other authors have looked to the speech clause and the assembly clause to solve the problems that Krotoszynski has

37. *Borough of Duryea, Pa. v. Guarnieri*, 131 S. Ct. 2488, 2495 (2011) (“There may arise cases where the special concerns of the Petition Clause would provide a sound basis for a distinct analysis; and if that is so, the rules and principles that define the two rights might differ in emphasis and formulation.”).

identified.<sup>38</sup> Krotoszynski would undoubtedly applaud if those suggestions became law—but thus far they have not. Krotoszynski persuasively shows that a longstanding constitutional value, stretching back over a thousand years, is being disregarded. It should be revived, whether that comes under the heading of the petition clause or from importation of petition clause values into First Amendment decisions that rely on other terms.

### Speech Clause Hegemony or First Amendment Unity?

A reader might come away from these two thought-provoking books with a smoldering resentment against the speech clause. Its intellectual gravity has proven so strong that judges have sacrificed the independent meaning of the assembly and petition clauses for the illusory promise of a one-size-fits all, speech-based approach.<sup>39</sup> To paraphrase Inazu, the speech clause has imposed a “a radical sameness” (I 184) over our political rights, where the only promise made is that one’s expression (but not one’s choice of a social and cultural circle) will be treated equally (including being equally excluded from the sight and hearing of government officials).

The concern over speech clause hegemony has arisen elsewhere. Other than a *sui generis* line of decisions about differential tax rates for publications, the press clause currently guarantees journalists nothing that the speech clause does not.<sup>40</sup> The speech clause has also absorbed much activity that might alternatively have been considered under the religion clauses. In one line of cases, religious groups have succeeded in gaining equal access to government property by emphasizing that they would be speaking. This success has prompted some concern that if worship is viewed purely a type of speech, its claim to special protection under the establishment and free exercise clauses may be diluted.<sup>41</sup>

If the problem is a hegemonic free speech clause, then it makes perfect sense that *Liberty's Refuge* and *Reclaiming the Petition Clause* have so little to say to each other. On this view, assembly and petition must fight their own liberation struggles against the speech clause, each emphasizing their uniqueness. Yet as

38. *E.g.*, Timothy Zick, *Speech Out Of Doors: Preserving First Amendment Liberties in Public Places* (Cambridge Univ. Press 2009); Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 *UCLA L. Rev.* 543 (2009).

39. This complaint reflects my feeling about the public forum doctrine, which has a habit of turning up where it does not belong. Caplan, *Invasion of the Public Forum Doctrine*, *supra* note 29.

40. *See generally* Sonja R. West, *Awakening the Press Clause*, 58 *UCLA L. Rev.* 1025, 1027-28 (2011) (“[A] majority of the Court has, in essence, dismissed the clause as a constitutional redundancy.”); Potter Stewart, *Of The Press*, 26 *Hastings L.J.* 631 (1975).

41. Lisa Shaw Roy, *The Evangelical Footprint*, 2011 *Mich. St. L. Rev.* 1235, 1287-88 (2011); Richard Esenberg, *Of Speeches and Sermons: Worship in Limited Purpose Public Forums*, 78 *Miss. L.J.* 453 (2009); Mark W. Cordes, *Religion As Speech: The Growing Role of Free Speech Jurisprudence in Protecting Religious Liberty*, 38 *Sw. L. Rev.* 235 (2008).

with many struggles against hegemony, the subjugated populations may have more to learn from each other than they choose to acknowledge.

Neither Inazu nor Krotoszynski purport to adopt “Down with the Free Speech Clause” as their rallying cry. Krotoszynski emphasizes the importance of multi-modal dissent that melds expression, assembly, association, and petition, and Inazu praises assembly in part for its role as a precursor to expression. Nonetheless, one might consider how the stories of two “forgotten clauses” within the First Amendment might interact with each other.

An excellent example of assembly intertwined with petition can be found in *Beauharnais v. Illinois*,<sup>42</sup> a 1952 case mentioned not at all by Inazu and only fleetingly by Krotoszynski. The defendant Joseph Beauharnais was a racial segregationist from Chicago who was prosecuted under a state law criminalizing any publication that “exposes the citizens of any race, color, creed or religion to contempt.” The offending publication was a leaflet whose top half expressly took the form of a petition (it used that word) to the mayor and city council.<sup>43</sup> Its grievance was against “the further encroachment, harassment, and invasion of white people, their property, neighborhoods and persons, by the Negro,” and it sought redress “through the exercise of the police power of the Office of the Mayor of the City of Chicago, and the City Council.” The top portion of the leaflet emphasized its status as a petition, declaring that “We want two million signatures of white men and women.” The bottom portion of the leaflet, however, emphasized assembly by inviting readers to apply for membership in Beauharnais’ new organization, the White Circle League of America. As described in Justice Hugo Black’s dissent, Beauharnais was engaged in what Krotoszynski would call hybrid petitioning, along with the group formation envisioned by Inazu.

Beauharnais is head of an *organization* that opposes amalgamation and favors segregation of white and colored people. After *discussion*, an *assembly* of his group decided to *petition* the mayor and council of Chicago to pass laws for segregation. Volunteer members of the group agreed to *stand on street corners*, solicit signers to *petitions addressed to the city authorities*, and *distribute leaflets* giving information about *the group, its beliefs and its plans*.<sup>44</sup>

Justice Felix Frankfurter’s majority opinion nowhere considered that Beauharnais was involved in group formation and petitioning along with his speech.<sup>45</sup> It instead upheld the conviction on a strained analogy to criminal

42. *Beauharnais v. Illinois*, 343 U.S. 250 (1952).

43. A facsimile of the document appears as an Appendix to Justice Black’s dissent, *id.* at 276.

44. *Id.* at 267 (emphasis added).

45. The majority mentioned petitioning only obliquely, acknowledging it as one of the privileges recognized within the common law of defamation, but concluding that Beauharnais had waived the defense at trial. *Id.* at 264-65. Justice Jackson’s dissent argued that the defense of petitioning for redress of grievances should have been submitted to the jury. *Id.* at 301-02.

libel that most observers believe is no longer good law.<sup>46</sup> But the problem with *Beauharnais* was not a lack of attention to the separate import of the assembly and petition clauses. *Beauharnais* was simply wrong about the First Amendment in its entirety.<sup>47</sup>

The dissents focused on the dangers of government control over public discourse and political organizing, relying on a number of textual sources within the First Amendment. Justice Black's dissent acknowledged injury to assembly and petition rights, but always in conjunction with the freedoms of speech and press, forming a package he referred to as "the vital freedoms intended to be safeguarded from suppression by the First Amendment." Justice William O. Douglas joined Justice Black's opinion, but also wrote a separate dissent that spoke only of the speech clause. Meanwhile, Justice Jackson's dissent combined strands of reasoning sounding in due process, speech, press, and petition. The dissents also acknowledged interest group dynamics. As Justice Jackson concluded, in language that resonates with Inazu's concern about pluralism: "No group interest[ed] in any particular prosecution should forget that the shoe may be on the other foot in some prosecution tomorrow."<sup>48</sup>

A similar holistic approach to First Amendment protection for citizen activism is reflected in many of the Supreme Court decisions from the mid-20th century. While *NAACP v. Alabama* is understood today as an exemplar of expressive association, when it was decided most observers found it difficult to figure out exactly which fragment of text was responsible (I 85). A similar tangle of underlying theories was present in *Hague v. CIO*<sup>49</sup> and *Herndon v. Lowry*,<sup>50</sup> cases viewed today as speech clause decisions. *Thomas v. Collins*, praised by Inazu as the high-water mark of freedom of assembly, never described assembly as a free-standing concept:

46. *E.g.*, *Nuxoll ex rel. Nuxoll v. Indian Prairie School District*, 523 F.3d 668, 672 (7th Cir. 2008) (Posner, J.) ("Though *Beauharnais v. Illinois* has never been overruled, no one thinks the First Amendment would today be interpreted to allow group defamation to be prohibited."); *Dworkin v. Hustler Magazine Inc.*, 867 F.2d 1188, 1200 (9th Cir. 1989) (*Beauharnais* "has been so weakened by subsequent cases such as *New York Times [v. Sullivan]* that . . . [its continued vitality] is highly questionable at best.").
47. Written at a time when the kinks were still being ironed out of the incorporation doctrine, Justice Frankfurter's opinion approached the case as a question about the state's authority to enact social legislation without hindrance from the Due Process clause, where the answer followed from the lessons of *Lochner*. This approach drew criticism from Justice Black that "the Court simply acts on the bland assumption that the First Amendment is wholly irrelevant. It is not even accorded the respect of a passing mention." *Beauharnais*, 343 U.S. at 268.
48. *Id.* at 304 (Jackson, J., dissenting). Justice Black struck a similar note in his conclusion: "If there be minority groups who hail this holding as their victory, they might consider the possible relevancy of this ancient remark: 'Another such victory and I am undone'." *Id.* at 275 (Black, J., dissenting).
49. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939).
50. *Herndon v. Lowry*, 301 U.S. 242 (1937).

It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights, and therefore are united in the First Article's assurance.<sup>51</sup>

Compared to the opinions of the postwar decades, today's judicial writing style—with its emphasis on precise tests and explicit distinctions among doctrines—promises a precision that cannot be delivered.

This brings us back to the importance—or lack thereof—of the question posed every year by the First Amendment Center: How many freedoms does the First Amendment protect?

There is no logical necessity for this particular assortment of rights to be combined in a single legal provision. When James Madison introduced the draft amendments that led to the Bill of Rights, he proposed that several separate sentences be inserted into Art. I, §9, between its third clause banning bills of attainder and *ex post facto* laws and its fourth clause forbidding capitation taxes (since amended). One sentence protected “religious belief or worship” and “the full and equal rights of conscience.” A second guaranteed the people “their right to speak, to write, or to publish their sentiments” and further provided that “the freedom of the press, as one the great bulwarks of liberty, shall be inviolable.” A third said that “the people shall not be restrained from peaceably assembling and consulting for their common good, nor from applying to the legislature by petitions, or remonstrances for redress of their grievances.” Only the vagaries of the committee process combined these separate concepts into the language we know today. The precise combination of concepts found in the First Amendment has not been widely followed. Although constitutions of U.S. states and many other nations include protections for rights relating to religion, expression, and political activity, they are rarely combined into a single provision, let alone a single sentence.

Yet there is power in their close quarters. One of the most moving descriptions of the First Amendment as a unified whole comes from an *amicus* brief in, of all things, a case about legislative redistricting:

The six textual clauses of the First Amendment form a set of concentric circles with the democratic citizen at the focus. The text opens with Establishment Clause protection of private conscience, moves to Free Exercise protection of public displays of conscience, continues with Free Speech protection of individual expression, extends to institutional expression of ideas by guaranteeing a Free Press, then goes on to Free Assembly protection of collective action, and culminates in protecting formal interaction with the government through Petitions for Redress of Grievances. The sequence is not random. The textual rhythm of Madison's First Amendment reprises the life cycle of a democratic idea, moving from the interior recesses of the human

51. *Thomas v. Collins*, 323 U.S. 516, 530 (1945). *See also DeJonge v. Oregon*, 299 U.S. 353, 364 (1937) (“The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental.”).

spirit to individual expression, public discussion, collective action, and finally direct interaction with government. Madison's vision remains one of our most valuable guides to the kind of democracy the Constitution guarantees.<sup>52</sup>

One can quibble that this passage is not a full description of the First Amendment, given its exclusive focus on its political functions at the expense of self-realization or other values.<sup>53</sup> But without doubt it is a stirring evocation of how in an open society rights interact with and reinforce each other. Values behind one type of protection also undergird others, in overlapping but not entirely congruent ways.

Once the various clauses within the First Amendment are seen as parts of a larger system, ecological analogies suggest themselves: the Constitution can be viewed as an ecosystem of political rights. If assembly and petition have indeed become forgotten rights, their troubled status might well suggest larger problems with the habitat, just as the health of indicator species—like the spotted owl in old growth forests or the proverbial canary in the coal mine—can reveal environmental problems that will soon affect others. Under this analogy, Joseph Beauharnais' petition was an indicator species for the health of the First Amendment ecosystem in the early 1950s. And as an indicator it was not far off the mark, given the impact that McCarthyism had on not only the "forgotten" clauses of the First Amendment, but on speech itself.

Read separately, *Liberty's Refuge* and *Reclaiming the Petition Clause* are illuminating in their own ways, even if neither book can be expected to lead to assembly and petition jurisprudence that is distinct from the law of expression. Read together, the books can kindle a greater commitment to the health of our entire ecosystem of liberties.

52. Amicus Brief of the ACLU & the Brennan Center for Justice, at 20, *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (No. 02-1580), 2003 WL 22069782 (Burt Neuborne, Counsel of Record).

53. See, e.g., Martin H. Redish, *The Value of Free Speech*, 130 U. Pa. L. Rev. 591 (1982); Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L.J. 877 (1963).