Book Reviews

Forgotten No More. A Review of Liberty's Refuge: The Forgotten Freedom of Assembly

By John D. Inazu

*Reviewed by Richard A. Epstein**

It is a commonplace of constitutional interpretation that the shorter the constitutional provision, the more difficult its interpretation. The truth of that maxim is confirmed in an informative fashion by reading John D. Inazu's careful and well-constructed book, *Liberty's Refuge, The Forgotten Freedom of Assembly*. Inazu's task is to resurrect the freedom of assembly from its relative neglect in First Amendment law. As diligent readers recall, the relevant text reads:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The question of interpretation that preoccupies Inazu asks just how much independent weight should properly be attached to the right of people peaceably to assemble, which is tucked among the First Amendment's more prominent guarantees. Two reasons contribute to its relative neglect. The first relates to the connection between the assembly right and to the right to petition government. The second, and ultimately weightier question, relates to the connection between assembly and the protected freedoms of religion and speech, with which it has been historically linked.

Textually, the Assembly Clause is separated by a stout semicolon from the protections of religion, speech, and the press that precede it. But only a modest comma divides it from the right to petition the government for a redress of grievances. One possible interpretation of the Assembly Clause, therefore, restricts the right peaceably to assemble to the exercise of the right to petition. Inazu makes the persuasive historical case against that contention by showing how this comma does some heavy lifting. (pp. 22-27). He rightly insists that it would be odd in the extreme to assume that assemblies could only be formed to support or oppose particular government policies for which some petition is issued. Assemblies are, after all, powerful ways to express general support or disapproval for government action, even when no particular demands are made. Nor is there any reason why the people cannot assemble to support or oppose the actions of private businesses or charities. Indeed, most assemblies have little to do with petitions to "the government," which in the context of the First Amendment seems restricted to the federal government. They have broader social objectives, including occupying Wall Street.

The harder question is the relationship between any more-generalized assembly right and the broader principle of freedom of association that has been read into the speech and religion clauses through such notable decisions as *NAACP v. Alabama*,[1] which unanimously denied the Alabama Attorney General access to the membership records of the NAACP. Inazu is deeply concerned that this original robust defense of the association freedom has in subsequent years been eroded by rising concern that private associations not be allowed to discriminate in the selection of their membership on grounds of race, sex, and other characteristics that the government from time to time regards as invidious.

There is no doubt that he is correct to raise the tension between associational freedoms on the one hand and the anti-discrimination norm on the other, but it is far from clear to me that switching attention from the speech or religion to assembly is a key step in that laudable agenda. In order to make out his case for this task, Inazu marshals a powerful array of historical records that explains, as the title of his book suggests, the role of the freedom of assembly in thinking about the core values of the American tradition as it relates to assembly, speech, religion, and the press. As late as 1939, he notes, public defenses of "the four freedoms" list the freedom of speech, religions, the press, and assembly. Indeed, in the run-up to the 1939 World's Fair (a big deal at the time, to say the least)[2], one Dorothy Thompson, the long-forgotten "First Lady of American journalism," (p. 56), put freedom of assembly first on the ground that the ability to assemble was necessary to allow for the protection of all other freedoms.

The assembly right was shunted aside, however, by President Franklin Delano Roosevelt, whose refurbished Four Freedoms in his famous 1941 State of the Union Address,[3] were freedom of speech and expression, freedom of religion, freedom from want, and freedom from fear. This rhetorical switch was in line with Roosevelt's broader New Deal agenda. Freedom from want suggests that the state now has an affirmative duty to provide minimum material support for all individuals. Freedom from fear for its part seems to have no clear focus at all, but addresses larger concerns with political and economic uneasiness of the sort that quickly plunged the United States into World War II. The revised Four Freedoms thus presaged Roosevelt's famous 1944 State of the Union Address,[4] which was rife with positive rights to decent homes, fine jobs, and high prices for farm goods, which led to ill-devised programs in housing, labor, and agriculture that still exert their baleful influence today.

For our purposes, however, the key point here is that these popular defenses of various freedoms were not tied explicitly to the constitutional text. Indeed, for a close textualist, Inazu's most significant maneuver is to transform the constitutional text, which refers to the right of the people to peaceably assemble, into the freedom of assembly, a phrase that, unlike freedom of speech, nowhere appears in the Constitution at all. I believe that this subtle transformation undercuts Inazu's

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determined effort to make the Assembly Clause the focal point of an expanded right of freedom of association. The two do not map well into each other.

At the beginning of his volume, Inazu notes that the traditional conception of the assembly right covers "the occasional, temporal gathering that often takes the form of a protest, parade, or demonstration." (p. 2). In my view, that description accurately catches the sense that I have of the clause when read in context. The right to assemble is given to the "people," but it is not a right of all people together to participate in one major assembly, but to form whatever groups they choose to speak in public for whatever positions they take. Inazu is right to insist that the people who assemble are not required to speak for the common good, writ large, but only for their conception of it. (pp. 21-22). But the use of the word "peaceably" before the words "to assemble" does suggest just that short-term focus on public assemblies. A more general right of freedom of association deals with the ability to decide on the membership of permanent organizations, which deal with activities like filing papers and setting up by-laws to which the adverb "peaceably" does not seem to apply at all. What is involved with "peaceably" is a quick effort to indicate that the right to assemble is not absolute, and to suggest further that the use of violent mobs to attack public or private buildings or individuals is indeed not part of the freedom of assembly. Inazu acknowledges these limitations in his own definition of assembly, which covers both "peaceful" and "noncommercial" assemblies. (p. 166).

A good deal of work, however, should be done to explicate the first term, which should cover not only outright forms of violence, but also any determined actions to block the use of public roads and highways, or, of especial relevance today, to occupy as trespassers the private property of other individuals against their will. At this point, the term peaceable assembly fits comfortably into the general classical liberal world view that drives Inazu's analysis. Indeed, with respect to public spaces, temporary use seems to be an important component of the right. The right to assemble in Central Park is the right to run a demonstration, not to camp out for weeks on end. These parks are common property, which precludes their permanent occupation by any one group, and which suggests that the government is under some obligation to fairly allocate protest time to rival groups in parades and parks, a subject that receives too little attention from Inazu. The narrower definition of assembly has the virtue of directing the inquiry to this important and distinctive set of issues within the general First Amendment framework, where it could supplement the discourse that otherwise takes place in connection with speech or religion.

The peculiar noncommercial limitation that Inazu builds into his definition has no clear textual support. It stems, however, from Inazu's huge internal struggle to define the relationship between freedom of association on the one hand and the various reasons to limit that freedom on the other. In my view, this issue arises quite naturally in relation to the free exercise of religion and the freedom of speech, both of which receive explicit textual guarantees in the First Amendment. The largest question is what kind of activities in general justify the limitation on these freedoms. In its broadest sense, this question is as a general matter of libertarian theory indistinguishable from the larger question of what limitations are permissible in dealing with any form of voluntary arrangements, including freedom of association and contract in various business and commercial contexts.

The two key limitations on these freedoms are, first, the use of force and fraud against innocent individuals and, second, the ability to use monopoly power to gain wealth at the expense of the public at large. Inazu, to his credit, organizes his discussion of the these rights in roughly this fashion when he speaks in Chapter 3 of "The Emergence of Association in the National Security Era," and in Chapter 4, when he addresses the discrimination question in his discussion of "The Transformation of Association in the Equality Era." It is worth looking at both in succession.

On the former, the concern with the use of force and fraud against the welfare of the nation did not begin with the threats to national security from fascist and communist groups. Yet the effort to mount a coherent attack against their activities did pose a major challenge to First Amendment theory in such cases spanning from *Schenk v. United States* (1919), and *Abrams v. United States* (1919), through *United States v. Dennis* (1951). No one questioned that direct and immediate threats of force could be actionable, whether done by one person or money. The hard question always concerned the actions prior to any such action, which might or might not result in the occurrence of some illegal act.

Answering that question requires importing into First Amendment law some account of how far back in the chain of activity the government could run before impeding too seriously in the exercise of protected freedom. A communist cell that was planning a bombing attack on a public building was always far game, but what about a group of Communists or Marxists studying the Communist Manifesto, which preaches the forcible overthrow of capitalism. The right response to that, which this nation eventually adopted, was to hold back on these government actions, given the many steps that had to be taken before some small fraction of these groups did any action that encouraged harm. Taking this view, of course, leads Inazu to condemn as overbroad the various loyalty programs of the Truman Administration and the witch hunts of the original House Un-American Activities Committee and its various successors. (pp. 65-72).

But there is no reason why these limitations cannot be grafted onto the general freedom of speech, where in fact they fit better because of the difficulty of thinking of a class membership preparing for their sessions as a kind of assembly. It is for exactly these reasons that the associational freedom protected in *NAACP v. Alabama* has such power. These organizations did not pose anything like an imminent threat of force or violence. Yet, as Inazu notes, even this rule is not absolute. When the issue was the oversight of the Ku Klux Klan in the 1920s, the Supreme Court in *Bryant v. Zimmerman*[5] upheld the New York statute that required the organization to file copies of its "constitution, by-laws, rules, regulations and oath of membership, together with a roster of its membership and a list of its officers for the current year." *NAACP* did not overrule that case, but distinguished it on the ground that the known propensity for violence of the KKK, circa 1928, put it in a different category.

Imminence is, therefore, not the only test. But today, with the KKK a useless remnant of itself, that same statute should be struck down, at least on an as-applied challenge. The nature of these anticipatory remedies in the private law of tort always calls for some level of judicial discretion. That need does not disappear just because we have upped the ante in a constitutional setting.

In one sense, of course, this debate over the imminence of force and fraud takes as its implicit premise that there are indeed on constitutional grounds associational rights of speech and religion. But this point has to be a given. There the basic constitutional guarantee does use the term freedom of speech, without talking about who exercises it. It would be odd indeed if individuals could speak by themselves but could not hope to share the gains from trade that comes from their cooperation in speech activity. It makes no sense whatsoever to think that I am entitled to make my campaign posters and you can prepare your leaflets, but that we cannot join together to reduce our costs of supply and distribution. So long as our basic activities are protected, the associational freedom has to be protected as well. The standard rules of textualism have always allowed for these elaborations off the core case of correction, and corporations, for example, do not lose the protection afforded to their members because state law, for good and sufficient reason, limits their liability for tortious conduct to the assets committed to the corporation, which the many critics of *Citizens United v. FEC*,[6] never quite understand. We get these results whether we work through speech or assembly because the class of public justifications under the police power is largely invariant across the two areas.

Inazu's treatment of the nondiscrimination piece of this problem is more troublesome. As he rightly notes, the principles of freedom of association, no matter where housed, are in obvious tension with the nondiscrimination rules that are so often championed under the banner of equality, especially with respect to race, sex, age, and a wide range of other personal characteristics. But the hard question is how to locate these protections within the larger constitutional context. Inazu hints at the correct basis for analysis insofar as he ties this assertion of state power to the exercise of monopoly power. His definition of assembly picks this up when he notes that the protections afforded the freedom of assembly (or association) do not apply "as when the group prospers under monopolistic or near-monopolistic conditions." (p. 166).

The economic explanation for that lies in the ability of monopolists to engage in price discrimination that does not reflect the costs of supplying a given service to its various groups of customers. But that explanation does not apply to organizations like the Boy Scouts or a men's club that never has that kind of power given the number of private organizations ordinary individuals can join. At this point, outside the relatively narrow class of common carriers (which historically had that kind of power), there is no reason to impose any duty to deal with customers on fair, reasonable, and nondiscriminatory terms.

Under this view, there is no reason to distinguish among the various types of organizations that demand freedom from government intervention on whom they take in or keep out. Indeed, there is every reason to avoid the line-drawing problems that arise when the basic issue is the same across different types of associations. Ordinary businesses in competitive markets should be free to choose their customers and their employees by whatever test they see fit. The single most important application of this right today is for those institutions that wish to engage in affirmative action programs or provide single-sex forms of education or club memberships, to which the attitude should be "be my guest."

In dealing with this issue, Inazu is of two minds. He does not push the monopoly control line with any consistency because it would allow private firms and associations in competitive markets to discriminate on grounds of race, which he thinks is "just different" from other forms of discrimination. (p. 13). He is surely right historically to the extent that private institutions were so under the thumb of segregationist state governments that they had to toe the segregationist line or risk losing their electrical power. But once the public institutions no longer reflect that frightening abuse of power, the intellectual case now goes the other way, and all groups should be allowed to make their appropriate membership adjustments, including those that plump—which is the overwhelmingly popular choice—in favor of some affirmative action program that they should be free to devise in accordance with their own best institutional judgments.

Inazu is right to jump all over Professor Nancy Rosenblum for her argument that the "logic of congruence" requires that the internal structure and practices of private institutions mirror those nondiscrimination rules applicable to government. (p. 11). Here the obvious objection is that she is not likely to want to see the abolition of women's colleges or clubs. Nor do I. But the two-sided view with respect to men's colleges or clubs should give pause to everyone who believes in equal justice under law. The larger objection, however, is that we don't want any congruence between the public and private spheres. That principle applies for most activities in the public sphere, given the evident use of government monopoly power. But even here public universities that are in competition with private ones should, in my view, be able to engage in affirmative action programs without having to meet the strict colorblind standards that apply, say, to the application of the criminal law of burglary.

Yet once he blinks on the question of race, Inazu finds it hard to construct a consistent theory as to when the antidiscrimination principle trumps the freedom of association principle. He is rightly critical of Justice Brennan's effort in *Roberts v. United States Jaycees*,[7] for drawing the line between intimate associations (like marriage and maybe religion) and expressive organizations like the Boy Scouts, which have clear beliefs and broad memberships. I agree heartily with the conclusion that this line will not hold up. But by the same token, the effort to take a notion of assembly or association and assume that it cannot or should not apply to commercial institutions, broadly conceived, shows what I regard as the central deficit of modern constitutional theory: the willingness to divide constitutional rights into first and second class rights, depending on tests that have no grounding in first principles. We owe much to Inazu for his fastidious historical research and his effort to reach a grand synthesis across many constitutional rights. Nonetheless,

it is important to end on this note of warning. The move from association to assembly will not achieve the goals that Inazu wants so long as property and contract rights are forced to ride in the back of the bus.

Endnotes

1 357 U.S. 449 (1958).

2 See Russell B. Porter, *President Opens Fair as Symbol of Peace*, N.Y. Times, May 1, 1939, at 1, which covered five columns of the eight-column layout.

3 Franklin Roosevelt, President of the United States, Annual Address to Congress: The "Four Freedoms" (Jan. 6, 1941), *available at* http://docs.fdrlibrary.marist.edu/od4frees.html.

4 Franklin D. Roosevelt, President of the United States, State of the Union Message to Congress (Jan. 11, 1944), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=16518#axzz1oGC0rByP.

5 278 U.S. 63 (1928).

6 130 S.Ct. 876 (2010).

7 468 U.S. 609 (1984).

The Upside-Down Constitution

By Michael S. Greve

*Reviewed by Robert R. Gasaway**

> "*I must study politics and war, that my sons may have liberty to study mathematics and philosophy, geography, natural history and naval architecture, navigation, commerce, and agriculture, in order to give their children a right to study painting, poetry, music, architecture, statuary, tapestry, and porcelain.*"
>
> John Adams

BREAKING ADAMS' CURSE

O' toiling lawyer, for God's sake put down the brief. Set aside that contract. Review those documents later. And pick up or click into Michael Greve's *The Upside-Down Constitution*—a logically rigorous, practically relevant exploration of America's constitutional foundations, development, and discontents.

Mr. Greve's subject is the present condition of American constitutionalism. To get at the subject, he explores the Founding's first principles and traces their development to the present day. More specifically, the book is about constitutional logic. (By one count, some form of the word "logic" or phrase "constitutional logic" appears on average once every five pages.) It's about how, in Mr. Greve's view, our own Constitution's logic has been turned upside down over time by forgetfulness.

Mr. Greve studies the Constitution's current health by looking through a lens of 200-plus years of American federalism. It turns out that a federalism lens, in Mr. Greve's hands, can illuminate the Constitution's logic and its alleged inversion over the last 75 years. But *The Upside-Down Constitution* is about constitutionalism, not federalism, and it is about logic, not policy. *The Upside-Down Constitution* is about federalism and policy in the same way *Moby-Dick* is about a whaling voyage.

Readers familiar with Mr. Greve will be happy to find that his wit remains in evidence throughout. They may be bewildered to find that he betrays a decided ambivalence toward prevailing "conservative" modes of constitutional interpretation and even toward federalism itself.

Mr. Greve's sweeping thesis is that the Constitution's foundational principles have been forgotten—and inverted—by all sides to the current constitutional debates and, worse still, this forgetting and inversion are principal causes of "our current institutional dysfunctions, public discontents, and fiscal imbalances."

In fact, says Mr. Greve, we have lost our way in a sea of misguided and disconnected erudition. Our Supreme Court crafts magnificent decisions in some cases, but miscarries badly in others. One of our law professors, Bruce Ackerman, recently

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Michael S. Greve's The Upside-Down Constitution *is published by Harvard University Press.*