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HOW NECESSARY IS THE RIGHT OF ASSEMBLY?

ROBERT K. VISCHER*

As a political culture seemingly hard-wired for the full-throated championing of individual rights, we are not quite sure what to do with liberty claims by groups. Whether we are talking about corporate speech rights,¹ the treatment of religious student groups at public universities,² the limits of the ministerial exception,³ the Boy Scouts' right to discriminate,⁴ or churches' access to public schools,⁵ we have seen a recent spate of conflicts involving groups that have spawned both political battles and landmark Supreme Court rulings. As such, our uneasiness with the right of association as a constitutional matter may have something to do with our uneasiness with the freedom of association as a political matter. We do not quite know what to do with groups. Judging from the public reaction to the

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1. *Citizens United v. Federal Election Comm'n*, 130 S. Ct. 876 (2010). *See also, e.g.*, Mimi Marziani, *Growing backlash against 'Citizens United,'* NAT'L LAW J., Jan. 23, 2012 ("The logic of *FEC v. Citizens United* quickly led to the creation of Super PACs, mutant political groups that can collect and spend unlimited amounts on electioneering, limited only by impotent rules that supposedly prevent them from directly strategizing with candidates . . .").

2. *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971 (2010) (upholding public university's right to require that all student groups be open to all students). *See also, e.g.*, Pierce Greenberg, *Vanderbilt administrators defend nondiscrimination policy to packed town hall*, NASHVILLE CITY PAPER, Jan. 31, 2012, <http://nashvillecitypaper.com/content/city-news/vanderbilt-administrators-defend-nondiscrimination-policy-packed-town-hall> (reporting on controversy surrounding Vanderbilt University's requirement that leadership of Christian student groups be open to non-Christians).

3. *Hosanna-Tabor Evang. Luth. Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012) (affirming that First Amendment guarantees churches the right to select their own ministers without clarifying the scope of "ministers"). *See also, e.g.*, Jeff Zeleny & Michael Luo, *Obama Seeks Bigger Role for Religious Groups*, N.Y. TIMES, July 2, 2008, at A1 (reporting on Sen. Obama's proposal to forbid employment discrimination by recipients of federal funding); Dana Milbank, *Charity Cites Bush Help in Fight Against Hiring Gays; Salvation Army Wants Exemption From Laws*, WASH. POST., July 10, 2001, at A1.

4. *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000). *See also, e.g.*, Ian Urbina, *Boy Scouts Lose Philadelphia Lease in Gay-Rights Fight*, N.Y. TIMES, Dec. 6, 2007, at A26 (reporting on city's eviction of Scout troop over policy discriminating against gays); John Iwasaki, *Atheist expects Boy Scouts to change, but not soon*, SEATTLE POST-INTELLIGENCER, Dec. 29, 2002, at B1 (plus media controversies re gays and atheists).

5. *Good News Club v. Milford Central Sch.*, 533 U.S. 98 (2001) (upholding Christian group's right to use public school facilities on same terms as other community groups). *See also, e.g.*, Kate Taylor, *Mayor Defends Ban on Church Services in Schools*, N.Y. TIMES BLOG, Feb. 13, 2012, <http://cityroom.blogs.nytimes.com/2012/02/13/bloomberg-defends-schools-ouster-of-worship-services/> (reporting on New York City's decision to ban churches from holding services in public schools).

Court's *Citizens United* ruling,⁶ we do know that Americans tend to reject the notion that the corporate person possesses rights on par with the natural person.⁷ And while citizens are more inclined to defend the autonomy of religious groups, it is not clear whether that inclination is just a relatively weak extension of our traditionally strong commitment to individual religious liberty, or whether there is meaningful recognition of the importance of group liberty. Especially outside the context of religious organizations, the deference owed to groups by the surrounding political community remains unsettled.

Today's most contentious debates about legal protection for group autonomy have focused on the group's freedom to defy the political community's judgment as to what the common good entails, whether that judgment is expressed as broadly applicable nondiscrimination laws, limitations on the right to decline to provide certain morally contested goods or services, or conditions attached to government funding. When a group claims a right of moral autonomy, the claims encounter rougher political terrain than similar claims made by individuals. Because we cannot easily place the group's asserted right of moral autonomy within the prevailing individual-versus-state paradigm for analyzing claims of conscience, we tend to view groups as interlopers masquerading as individuals. Groups do not have consciences; individuals do, and we struggle to understand a group claim for moral autonomy as anything other than an artificial claim of conscience. The pantheon of conscience's heroes includes Thoreau, Gandhi, and King, not the Boy Scouts, Walgreen's, or Catholic Charities. Invoking a right of group conscience has enjoyed limited traction in our political discourse. Indeed, we often believe that the best way to honor individuals' consciences is by empowering them to overcome obstacles presented by groups.

Contrast our legal tradition's lionization of Daniel Seeger, who objected on moral grounds to military service,⁸ with the cursory dismissal of the claims raised by Elane Photography, a husband-and-wife photo agency in New Mexico that declined on moral grounds to shoot a same-sex commitment ceremony. The agency was fined nearly \$7000 for

6. *Citizens United*, 130 S. Ct. at 876.

7. See, e.g., *Two years after Citizens United, voters fed up with money in politics*, PUBLIC CAMPAIGN ACTION FUND (Jan. 19, 2012), <http://campaignmoney.org/files/DemCorpPCAFmemoFINAL.pdf> (reporting that 62 percent of Americans oppose the *Citizens United* decision).

8. *United States v. Seeger*, 380 U.S. 163, 187 (1965) ("In light of his beliefs and the unquestioned sincerity with which he held them, we think the Board, had it applied the test we propose today, would have granted him the exemption [from military service].").

violating the state's anti-discrimination law.⁹ Part of the difference, no doubt, is the commercial nature of the enterprise, and I will address that aspect below. But part of the difference is the belief that, as long as the husband and wife who comprise the photo agency are not coerced as individuals into engaging in conduct that they believe is immoral, it does not matter if the corporate form that they have chosen is implicated in the objectionable conduct. As one noted civil rights scholar (and current member of the Equal Employment Opportunity Commission) remarked, "if you run a wedding photography service, even if you don't like the fact that those two gays are getting married, you'd better have someone on your staff who will take those pictures."¹⁰

As I argue in a recent book,¹¹ I believe that such responses derive from a superficial understanding of conscience. I need to explain why in order to provide a broader context for my reaction to Professor John Inazu's effort to reclaim the right of assembly.¹² Suggesting that the owners of Elane Photography can honor their consciences by keeping their moral beliefs out of the marketplace ignores the external orientation of conscience: *conscientia* refers to moral belief *applied* to conduct. Respecting conscience as an internalized set of beliefs does not authentically respect conscience. Similarly short-sighted is the idea that the owners can avoid the problem by hiring an employee who is willing to shoot events that they themselves deem morally objectionable. This solves nothing unless we only see conscience in individualist terms, as though its claims apply to its bearer's own conduct and no further. In reality, conscience refers (literally) to shared moral belief, and while not every claim of conscience will actually be shared, such claims are, by their nature, susceptible to sharing. As such, the owners' refusal to make hires that would permit them to offer a "full service" photography agency is not an imperialist expansion of conscience's interior domain; it is a natural outgrowth of conscience's relational dimension. Institutions do not possess a conscience in any real sense, but they do embody distinct moral identities that are shaped by their constituents' consciences. When we preclude the cultivation and maintenance of such institutional identities, it is not just moral pluralism that suffers; it is the cause of conscience itself.

9. *Willcock v. Elane Photography*, HRD No. 06-12-20-0685 (N.M. Human Rights Comm'n Apr. 9, 2008), available at <http://volokh.com/files/willocockopinion.pdf>.

10. *Gay Rights Law Faces Legal, Religious Challenges*, NPR TALK OF THE NATION (June 16, 2008), <http://www.npr.org/templates/story/story.php?storyId=91554986> (comments of Chai Feldblum).

11. ROBERT K. VISCHER, *CONSCIENCE AND THE COMMON GOOD: RECLAIMING THE SPACE BETWEEN PERSON AND STATE* (2010).

12. JOHN INAZU, *LIBERTY'S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY* (2011).

I believe that we need to recapture the relational dimension of conscience—i.e., the notion that the dictates of conscience are defined, articulated, and lived out in relationship with others. My moral convictions have sources beyond myself, and my sense of self comes into relief through interaction with others. When I live according to the dictates of my conscience, I communicate the normative implications that flow from my perception of reality; my conscience makes truth claims that possess authority over conduct—my own and the conduct of those who share, or come to share, my perception. Conscience connects a person to something bigger than herself, not only because we form our moral convictions through interaction with the world around us, but also because we invest those convictions with real-world authority in ways that are accessible to others. This is the relational dimension of conscience.

As such, if our society's commitment to conscience is grounded solely in the language and legal framework of individual rights, we are not fully committed to conscience. Conscience's substance and real-world implications are relational by their very nature. Though conscience is intensely personal, the nature of conscience directs our gaze outward, to sources of formation, to communities of discernment, and to venues for expression. When the state closes avenues by which persons live out their core beliefs—and admittedly, some avenues must be closed in the interest of peaceful co-existence—there is a cost to the continued vitality of conscience.

There are many examples we could use to explore this dynamic, but let's use one that everyone has been talking about lately: the Obama administration's mandate on contraception coverage. Pursuant to the Patient Protection and Affordable Care Act,¹³ the Department of Health and Human Services ("HHS") announced that it would require all employers offering health insurance to cover certain types of preventive care at no additional cost to their employees. Contraceptives and sterilizations are part of the mandate, including products considered by some to be abortifacents. The mandate exempted "religious employers," which were defined as an employer who:

- (1) has the inculcation of religious values as its purpose;
- (2) primarily employs persons who share its religious tenets;

13. Pub. L. 111-148, 124 Stat. 119 (2010).

(3) primarily serves persons who share its religious tenets; and (4) is a non-profit organization [as defined elsewhere].¹⁴

As widely commented, the ministry of Jesus himself would have not qualified as “religious” under this definition.

What I am interested in for purposes of this discussion is how defenders of the mandate have framed the conscience issue. The Obama administration’s press secretary noted that “this approach does not signal any change at all in the administration’s policy on conscience protections.”¹⁵ The implementing regulations addressed the conscience objection head-on, explaining that:

Nothing in these final regulations precludes employers or others from expressing their opposition, if any, to the use of contraceptives, requires anyone to use contraceptives, or requires health care providers to prescribe contraceptives if doing so is against their religious beliefs. These final regulations do not undermine the important protections that exist under conscience clauses and other religious exemptions in other areas of Federal law. Conscience protections will continue to be respected and strongly enforced.¹⁶

Kathleen Sebelius, the HHS Secretary, used similar reasoning in defending the mandate, emphasizing that the new rule does not preclude “a Catholic doctor, for example, [from refusing] to write a prescription for contraception,” nor “does it affect an individual woman's freedom to decide not to use birth control.”¹⁷ The liberty of conscience is satisfied, under these terms, as long as the employer can tell its employees that the use of contraceptives is immoral, and as long as no individual is forced to use contraceptives or prescribe them. In my view, this marginalizes both the action-oriented pull of conscience, as well as its relational dimension.

The Obama administration did not go as far as some of the mandate’s defenders, though, who insisted that overcoming the institutional obstacles to contraceptive coverage was necessary to vindicate the conscience rights of employees. Eric Bugyis, for example, described the mandate as “a

14. See Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 45 C.F.R. Part 147.

15. Jay Carney, Press Briefing, Jan. 31, 2012.

16. See *supra* note 14.

17. “It’s important to note.” Kathleen Sebelius, *Contraception rule respects religion*, USA TODAY, Feb. 5, 2012, <http://www.usatoday.com/news/opinion/editorials/story/2012-02-05/Kathleen-Sebelius-contraception-exemption/52975092/1>.

victory for all those who care about the religious liberty of individuals and the freedom of individual conscience, which by definition is meant to be protected from the unwelcome coercion by institutions to do things (or not do things) that are not relevant to the performance of one's explicit duties to them, including one's employer."¹⁸ In the same vein, Vyckie Garrison accused the religious employers of "taking away women's freedom of conscience and giving it to the Church."¹⁹ The liberty of conscience, in these terms, is not just about protecting the individual from being coerced by the state to act in ways that she considers to be morally impermissible. The liberty of conscience empowers the individual to enlist third parties in supporting her choice to undertake actions that she deems morally permissible. Conscience as positive liberty for individual consumers precludes conscience as negative liberty for group providers.

For the reasons set out earlier, I believe that these critics' characterizations of the conscience interests at stake, as well as the Obama administration's focus on the liberty of individual providers, overlook the relational dimension of conscience. We should work to avoid forcing an organization to choose between dropping health care coverage for its employees and directly facilitating its employees' use of a product that it deems immoral. My point, though, is not to argue the merits of the contraception mandate, but to briefly sketch the case for robust—but not unlimited—autonomy for groups to stake out their own moral identities and explore whether the current legal tools available to groups are sufficient to make that case. If they are, then Inazu's book is a well-written and interesting academic exercise. If the current tools are not sufficient, though, then Inazu's book may be the start of something big.

The political debate about the HHS mandate is playing out right now. It is entirely possible that my argument about the relational dimension of conscience—i.e., that groups are essential venues through which individuals form, express, and live out the dictates of conscience—will fail to find traction politically. My argument might fail either as a general proposition or in a particular context, such as the HHS mandate, where state interests may be judged by the public to be more compelling than the employers' interests. If voters take a pass on my invitation to maintain

18. Eric Bugyis, *Obama Defends Conscience*, COMMONWEAL BLOG (Jan. 21, 2012), <http://www.commonwealmagazine.org/blog/?p=16864>.

19. Vyckie Garrison, *Why the Birth Control Mandate is Not About "Freedom of Conscience,"* RH REALITY CHECK (Feb. 14, 2012), <http://www.rhrealitycheck.org/article/2012/02/13/why-birth-control-compromise-is-not-about-%E2%80%9Cfreedom-conscience%E2%80%9D> (emphasis omitted).

space for religious institutions to decline to cover contraceptives, does the Constitution provide backup protection?

One potential source of protection is the right of association under the First Amendment. As Inazu so ably explains in his book, the right of association does not help unless the group is found by the courts to qualify as an intimate or expressive association. In *Roberts v. Jaycees*, the Court explained that special protection for intimate associations is warranted because these “personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs . . . thereby foster[ing] diversity and act[ing] as critical buffers between the individual and the power of the State.”²⁰ Further, protecting these relationships from which “individuals draw much of their emotional enrichment from close ties with others” will thereby safeguard the ability “to define one’s identity.”²¹

In the hypothetical *Roberts* dissent that he includes in his book, Inazu points out that the distinction “between intimate and nonintimate associations is unconvincing” because “all of the values, benefits, and attributes that the majority assigns to intimate associations are equally applicable to many if not most nonintimate associations.”²² Nevertheless, courts are not going to find that Catholic Charities, St. Luke’s Hospital, Ave Maria University, or the other employers objecting to the mandate qualify as intimate associations.

Gaining status as an expressive association might also prove difficult, though of course all of the associations I just mentioned are expressive as that term is commonly understood. Inazu correctly notes that “communicative possibility exists in joining, excluding, gathering, proclaiming, engaging, or not engaging,” and that “[o]nce a relational association is stipulated between two or more people, any act by those people—when consciously undertaken as members of the association—has expressive potential reflective of that association.”²³ Under the current interpretation of the right of association, though, even organizations that undeniably express messages to some constituents as part of their animating purpose—e.g., Catholic colleges or charitable organizations—may be hard-pressed to persuade a court that messages to employees about contraceptive use fall within the scope of that expressive function. The district court in *Christian Legal Society v. Martinez* found that the student

20. *Roberts v. Jaycees*, 468 U.S. 609, 619 (1984).

21. *Id.*

22. INAZU, *supra* note 12, at 180.

23. *Id.* at 161.

group failed to submit “any evidence demonstrating that teaching certain values to other students is part of the organization’s mission or purpose, or that it seeks to do so by example, such that the mere presence of someone who does not fully comply with the prescribed code of conduct would force CLS to send a message contrary to its mission.”²⁴ Just as, in the Court’s view, the presence of a non-complying member would not, “by their presence alone . . . impair CLS’s ability to convey its beliefs,” courts would likely find that complying with a legal requirement to cover contraceptives would not impair the Catholic college’s, hospital’s, or charity’s ability to convey their beliefs.

The Free Exercise Clause may be similarly unavailing in light of *Employment Division v. Smith*, which upheld neutral laws of general applicability even if these laws burden religious exercise. The implementing regulations for the HHS mandate clearly were written with *Smith* in mind, as they explained that “[t]he contraceptive coverage requirement is generally applicable and designed to serve the compelling public health and gender equity goals described above, and is in no way specially targeted at religion or religious practices.”²⁵ Though the Supreme Court’s recent 9–0 ruling in *Hosanna-Tabor* brought new attention to the Free Exercise Clause, the ministerial exemption affirmed by that case applies only to employment decisions in the (still murky) category of “ministers.” Outside that context, the Free Exercise Clause has been famously “eviscerated” by *Smith*.²⁶ The number of exceptions permitted

24. *Christian Legal Soc’y v. Kane*, No. C 04-04484 JSW, 2006 WL 997217, at *22 (N.D. Cal. May 19, 2006).

25. The federal Religious Freedom Restoration Act (“RFRA”) may offer a viable cause of action in this context, though there is a split of opinion on that question. 107 Stat. 1488, 42 U.S.C. § 2000bb et seq. In any event, my focus here is whether the Constitution provides a remedy in the event that political support for associational autonomy in this context proves unsustainable.

26. See, e.g., Kent Greenawalt, *Religion and the Rehnquist Court*, 99 NW. U. L. REV. 145, 157 (2004) (exploring what is left of the “eviscerated Free Exercise Clause”); Winnifred Fallers Sullivan, *Religious Freedom and the Rule of Law: Exporting Modernity in a Postmodern World?*, 22 MISS. C. L. REV. 173 (2003) (“[T]he free exercise clause has simply been eviscerated . . .”). See also Rodney J. Blackman, *Showing the Fly the Way Out of the Fly-Bottle: Making Sense of the First Amendment Religion Clauses*, 42 U. KAN. L. REV. 285, 407 (1994) (arguing that further application of the reasoning in recent Supreme Court cases would “render the Free Exercise Clause virtually judicially dead” for minority religious practices); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 140 (1992) (arguing that the neutrality principle incorrectly places “the freedom of citizens to exercise their faith . . . [at the mercy of the] vagaries of democratic politics . . .”).

under the mandate may open up a potential challenge consistent with *Smith*,²⁷ but its prospects are far from certain.

All of this goes to establishing the timeliness and importance of Inazu's book: does the right of assembly he prescribes offer the promise of protection for group autonomy that is currently lacking in constitutional interpretation? I think it does, at least under Inazu's understanding of the right as encompassing much more than a right of petition.²⁸ He defines the right of assembly as:

[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).²⁹

The scenarios through which Inazu works out the right of assembly tend to focus on the right to exclude, which is understandable given recent Supreme Court case law and the fact that the most pressing challenge to group autonomy is an expanding array of nondiscrimination laws. But given the values that Inazu locates as lying at the heart of the right of assembly, the right would also include a group's practices beyond questions of membership. On this front, Inazu's emphasis on the value of dissent is instructive. He sees "pluralism and dissent" as being "among our nation's deepest cultural commitments," noting that "[d]issenting practices confront an ever-present challenge by the state to domesticate their

27. As Tom Berg explains:

[T]he small-employer exception to the HHS mandate [for example] is . . . primarily driven by a concern that small businesses experience a disproportionate imposition from the rule. And then the argument kicks in that religious freedom interests should receive similar consideration, because those organizations likewise experience a serious burden, unless there's a compelling interest in making the distinction. Although the government might respond that the reason for the small-employer exception is simply that each one does not undercut coverage as much as each large employer, we all know the obvious logic of aggregation across a category. Here, when you exempt all entities under 50 employees, you cut out 20-40 million employees For the government to accept that big a hole in the mandate but then to say religious organizations deserve very little accommodation may not target religious conscience, but there's a decent argument that it significantly devalues it.

Thomas C. Berg, *On Rob's Questions About the HHS Mandate and Smith*, MIRROR OF JUSTICE BLOG (Apr. 16, 2012), <http://mirrorofjustice.blogs.com/mirrorofjustice/2012/04/on-rob-questions-about-the-hhs-mandate-and-smith.html>.

28. INAZU, *supra* note 12, at 6 ("[T]he text of the First Amendment and the corresponding debates over the Bill of Rights suggest that the framers understood assembly to encompass more than petition.").

29. *Id.* at 14.

destabilizing tendencies.”³⁰ Dissent is not an uncontested American value, though, as “[p]owerful countervailing visions of stability and consensus from mid-twentieth-century pluralism and Rawlsian liberalism have sought to bind our country together at the cost of silencing the margins of dissent.”³¹ While not every group dissents, Inazu contends that “the groups that shape the boundaries of autonomy are those that reject consensus norms.”³²

It is the protection of a group’s dissent function that makes the right of assembly so potentially valuable, and such an obvious fit for religious groups that dissent from the government’s view of contraception as a core element of health care. By championing a group’s right to live out its values, even if the group does not set out with the explicit purpose of transmitting those values, Inazu’s retrieval of the right of assembly provides a new dimension to our ongoing struggle over the role of groups in our legal framework. He has not purported to provide the final and conclusive word on the right of assembly’s potential contribution or operation, but he has initiated an important and overdue conversation. In keeping with that theme, let me continue the conversation by asking three questions that were prompted by his analysis.

First, why is the right of assembly limited to noncommercial groups? Even in the debate over the HHS contraception mandate, critics have wondered why for-profit employers or insurers are presumed to fall outside the scope of any prudent exemption. In the context of political speech, courts have refused to draw lines between non-profit and for-profit organizations. In *Citizens United*, the Supreme Court held that “political speech does not lose First Amendment protection simply because its source is a corporation.”³³ The Court’s resistance to excluding corporations from free speech protection is functional: the reasons we value free speech apply to individuals, non-profit groups, and for-profit corporations. As the Court recognized twenty-five years before *Citizens United*, “Corporations and other associations, like individuals, contribute to the ‘discussion, debate, and the dissemination of information and ideas that the First Amendment seeks to foster.’”³⁴

30. *Id.* at 156.

31. *Id.* at 152.

32. *Id.* at 156.

33. *Citizens United*, 130 S. Ct. at 900 (internal quotation marks omitted).

34. *Pac. Gas & Elec. Co. v. Pub. Util. Comm’n of Cal.*, 475 U.S. 1, 8 (1986) (plurality opinion) (internal quotation marks omitted).

By the same token, why is it not the case that “corporations and other associations, like individuals,” contribute to values that the *right of assembly* seeks to foster? We need to do more than draw distinctions in form, for the Court has prohibited the government from banning “political speech simply because the speaker is an association that has taken the corporate form.”³⁵ While a formal distinction is easy, a functional distinction is more elusive. Whatever value the assemblies of the ACLU, Habitat for Humanity, and the PTA contribute by their very existence, a for-profit corporation that defies prevailing moral wisdom or stakes out a religiously inspired dissenting position contributes the same kind of value. Some of the most contentious battles between the government and groups attempting to cultivate distinct moral identities have involved for-profit corporations, ranging from Wal-Mart,³⁶ to law firms,³⁷ to dating services,³⁸ to pharmacies.³⁹

Commercial speech has traditionally been afforded less protection than noncommercial speech, but there is some doubt whether lesser protection for commercial speech makes sense,⁴⁰ and the rationales usually offered do not necessarily apply to assembly. Charles Fischette, for example, argues that commercial speech “is generally less susceptible to chilling effects because of the economic motivations supporting it.”⁴¹ Similarly, C. Edwin Baker asserts that:

Ideally, the content, the form, and particularly the intensity and direction of the propagation of commercial speech is determined by

35. *Citizens United*, 130 S. Ct. at 904.

36. See Peter Lattman, *Wal-Mart Sued Over Not Stocking Morning-After Pill*, WALL ST. J. L. BLOG (Feb. 2, 2006), <http://blogs.wsj.com/law/2006/02/02/wal-mart-sued-over-not-stocking-morning-after-pill/>.

37. See Editorial, *Unveiled Threats*, WASH. POST, Jan. 12, 2007 (responding to Defense Department official who gave interview in which he suggested that clients should boycott law firms that defended Guantanamo Bay detainees).

38. See Beth DeFalco, *eHarmony agrees to provide same-sex matches*, MSNBC.COM (Nov. 20, 2008), http://www.msnbc.msn.com/id/27821393/ns/technology_and_science-tech_and_gadgets/t/eharmony-agrees-provide-same-sex-matches/ (“Online dating service eHarmony said Wednesday it will launch a new Web site which caters to same-sex singles as part of a discrimination settlement with New Jersey’s Civil Rights Division.”).

39. See Gretchen Ruethling, *Illinois Pharmacist Sues Over Contraceptive Rule*, N.Y. TIMES, June 10, 2005 (“A pharmacist in Illinois has filed a lawsuit challenging an order by Gov. Rod R. Blagojevich requiring pharmacies to dispense birth control and emergency contraceptives without delay.”).

40. “The commercial speech exception has continually eluded theoretical justification . . .” C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1, 1 (1976).

41. Charles Fischette, *A New Architecture of Commercial Speech Law*, 31 HARV. J.L. & PUB. POL’Y 663, 667 (2008).

calculating its positive contribution to profits. A standard given and enforced by the structure of the competitive market rather than the speaker's value choice or prejudice lies at the source of commercial speech.⁴²

As such, “[t]he domination of profit, a structurally required standard, breaks the connection between speech and any vision, or attitude, or value of the individual or group engaged in advocacy,” and thus “the content and form of commercial speech cannot be attributed to individual value allegiances.”⁴³

This just does not do justice to the reality of the corporate landscape.⁴⁴ Whether it's a for-profit company taking a stand on animal testing, climate change, same-sex partner benefits, refusals to stock the morning after pill, or countless other morally contested issues, there is regularly a connection between corporate practices and an underlying vision, attitude, or value. Further, the “domination of profit” is not a “structurally required standard.” We tend to define the corporation's sole purpose as profit maximization, but that may reflect an overly narrow understanding of shareholders' interests. In terms of fostering loyalty among shareholders, customers, and employees, prudent managers may be led to make non-profit-maximizing decisions that support the corporation's moral identity. Lyman Johnson, critiquing the law-and-economics movement, observes that “[t]he dignity, inherent worth, and enormous energy and initiative of the individual are rightly valued, but to conceive of human existence solely as a vast collection of individuals is to fail to explain many of our existing social arrangements and interactions and to provide no solid moral foundation for genuinely selfless behavior.”⁴⁵ Profit maximization is not a legal requirement for corporations, publicly traded or not.⁴⁶

42. See Baker, *supra* note 40, at 14.

43. *Id.* at 17.

44. See Robert K. Vischer, *The Morally Distinct Corporation: Reclaiming the Relational Dimension of Conscience*, 5 J. OF CATHOLIC SOCIAL THOUGHT 323 (2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1028881.

45. Lyman Johnson, *Individual and Collective Sovereignty in the Corporate Enterprise*, 92 COLUM. L. REV. 2215, 2248 (1992).

46. Even scholars who take a “contractarian” approach to the corporation leave room for objectives beyond profit maximization:

An approach that emphasizes the contractual nature of a corporation removes from the field of interesting questions one that has plagued many writers: what is the goal of the corporation? Is it profit (and for whom)? Social welfare more broadly defined? . . . Our response to such questions is: ‘Who cares?’ If the *New York Times* is formed to publish a newspaper first and make a profit second, no one should be allowed to object. Those who came in at the beginning actually consented, and those who came in later bought stock at a

Enron famously pursued profit to the exclusion of longer-range interests. But not every company is Enron. Interstate Batteries' mission statement is "[t]o glorify God as we supply our customers worldwide with top quality, value-priced batteries, related electrical power-source products, and distribution services."⁴⁷ The fast food chain Chick-fil-A sacrifices potential profit by closing all of its stores on Sundays.⁴⁸ At ServiceMaster, a statue of Jesus washing his disciples' feet stands outside the company headquarters, and no one earns more than twelve times the amount earned by the lowest-paid employee.⁴⁹ After a fire burned down its mill, the Malden Mills CEO cited his Jewish faith as the reason for keeping his employees on the payroll and under the company's benefits coverage even though they had no work to do.⁵⁰

If a for-profit corporation dissents from the moral norms embodied in a particular law, and we are confident that the dissent is not solely related to the avoidance of an economic burden, why should we not want to protect its right of assembly? In *Roberts*, Justice O'Connor's concurring opinion highlighted the fact that the Jaycees promote commercial opportunities to its members, reasoning that groups that are engaged primarily in commercial activities warrant less protection from government intrusion than groups engaged primarily in activities covered by the First Amendment.⁵¹ Inazu recognizes that this "posits a false dichotomy between commercial and express[ive] associations," as "some commercial associations are expressive."⁵²

So why introduce the distinction into the right of assembly? Inazu might want to maintain a commercial / noncommercial distinction in order to make the right of assembly more palatable as a matter of constitutional interpretation. Giving Wal-Mart a constitutional right to ignore legal mandates—though that right would not enjoy blanket immunity from

price reflecting the corporation's tempered commitment to a profit objective. . . . Corporate ventures may select their preferred 'constituencies.'

Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416, 1446 (1989).

47. See Victor Godinez, *Some Corporate Execs Follow Spiritual Beliefs*, DALLAS MORNING NEWS, Dec. 25, 2001.

48. See *Faith in the Workplace*, RELIGION & ETHICS NEWSWEEKLY (Jan. 28, 2005), <http://www.pbs.org/wnet/religionandethics/week822/cover.html>.

49. See Marc Gunther, *God & Business*, FORTUNE (July 9, 2001), http://money.cnn.com/magazines/fortune/fortune_archive/2001/07/09/306536/index.htm.

50. See Timothy L. Fort, *Business as Mediating Institution*, 6 BUS. ETHICS Q. 149 (1996).

51. *Jaycees*, 468 U.S. at 639 (O'Connor, J., concurring) ("The State of Minnesota has a legitimate interest in ensuring nondiscriminatory access to the commercial opportunity presented by membership in the Jaycees.").

52. INAZU, *supra* note 12, at 135.

countervailing state interests, I assume—may understandably be a bridge too far.

The political sensitivities raised by the potential expansiveness of the right of assembly leads to a second question: are Inazu's concerns best addressed through the Constitution, or are his questions more properly addressed to political actors? More precisely, does the nature of the inquiry contemplated by Inazu fit more comfortably within the contours of a political resolution than a judicial one? Under his framework, courts need to inquire into a group's "peaceability" and commercial nature, among other criteria. My hesitation does not stem from the fact that Inazu proposes a highly fact-intensive determination of whether the right of assembly should overcome the opposing state interests—after all, courts are often better at fact-finding than legislatures are. It is the nature of the facts that lie at the heart of the inquiry. Inazu explains:

In my view, we are better off with a contextual analysis that allows courts to examine how power operates on the ground. This approach would ask courts to evaluate challenges to the exercise of the right of assembly in the specific contexts in which those assemblies exist.⁵³

Pursuant to this standard, Inazu suggests that the state is justified in overcoming the right of assembly when a group has a monopoly or near-monopoly. That makes sense based on my assumption that Inazu is concerned with maintaining access to goods or services deemed essential by the political community. The state's intervention should be triggered by demonstrable access problems, not simply by abstract notions of customer rights. Let me suggest, though, that ensuring access may be facilitated more effectively by the state's professional licensing function, rather than by case-by-case adjudication of a constitutional right. In the pharmacy context, for example, the state could be legislatively empowered to declare a market failure with respect to particular pharmaceutical products and to require the provision of those pharmaceuticals as a condition of licensing in a given geographic area.

To the extent that Inazu is limiting the right of assembly to noncommercial enterprises, it is not entirely clear why monopolistic status is important to the inquiry unless he has in mind charitable organizations that may be the only provider of key social services in a given community. Even in that context, though, the state needs to proceed carefully, as the

53. *Id.* at 15.

alternative to a provider who refuses to provide all the services deemed important by the state may be no provider at all.

It is easier to make such context-driven judgments legislatively than judicially, but perhaps, in light of the important values served by the continued viability of even unpopular groups, we need a constitutional right of assembly to keep a proverbial thumb on the scale. Underlying Inazu's exhaustive research and careful tracing of the right of assembly's demise is a heartfelt concern for the ability of groups to flourish in a legal and political culture that often appears inescapably oriented toward individualism. Americans are quick to resist state encroachments on an individual's right to "define one's own concept of existence, of meaning, of the universe, and of the mystery of human life,"⁵⁴ and non-state associations may get painted with the same broad brush as obstacles to the full realization of an individual's autonomy. Unless a particular group serves a function deemed worthy by the political community, the group may be increasingly hard-pressed to resist state encroachments on its own autonomy.

My tendency to favor political resolutions in debates involving groups may be overlooking the reason why the right of assembly was included in the First Amendment's text—groups are unlikely to get a fair shake politically in situations where we need them most. In this regard, the right of assembly provides a degree of countermajoritarian protection for dissent in a way that the artificially narrow expressive and intimate rights of association do not.

This leads to my third and final question. Inazu makes a powerful case that the right of association, as presently construed by courts, is inadequate to the task. But is it beyond reclamation? If interpreted differently, would the right of association prove capable of carrying the burden that Inazu lays on the right of assembly?

My instinct tells me that Inazu is right, that we actually need to look beyond the right of association for more robust protection of associational rights. The right of assembly is a potentially more powerful resource, if for no other reason than the fact that it is found in the text of the Constitution. (Witness the ongoing battles over the right to privacy.) Further, the right of association has origins in natural law reasoning that have grown increasingly contested. Seen in this light, it may not be that courts have shifted on the right of association, but that the epistemological foundations

54. *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992).

on which the right of association was originally based have shifted on the courts.

Consider the important precursors to the right of intimate association. In *Meyer v. Nebraska*,⁵⁵ the Court struck down a state law banning the teaching of foreign languages to students before they graduated from eighth grade, reasoning that there was insufficient justification for state interference “with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own.”⁵⁶ In *Pierce v. Society of Sisters*,⁵⁷ the Court held that the state could not require parents to send their children to public schools, for “[t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only.”⁵⁸

Taken together, these cases establish the right of parents to direct the education of their children. For our current purposes, the more salient point is that the decisions are premised on the recognition that the parent-child association is not a creation of the law, and that the parental care-giving authority on which the relationship rests does not represent a delegation of state authority. These are natural law cases. The Supreme Court deferred to a pre-legal sovereignty within the family that stems from the natural fact of care-giving relationships and the associational autonomy on which their function depends.

Today criticism of these cases abounds, and the holdings have been narrowly construed, even on issues within the education arena.⁵⁹ *Meyer* and *Pierce* are accused by Barbara Woodhouse of being animated by “a conservative attachment to the patriarchal family, to a class-stratified society, and to a parent’s private property rights in his children and their labor,” reflecting a “narrow, tradition-bound vision of the child as essentially private property.”⁶⁰ And *Meyer* in particular is seen as having “announced a dangerous form of liberty, the right to control another human being.”⁶¹ The legal recognition of parental authority in such cases

55. 262 U.S. 390 (1923).

56. *Id.* at 401.

57. 268 U.S. 510 (1925).

58. *Id.* at 535.

59. *See, e.g.*, *Fields v. Palmdale Sch. Dist.*, 447 F.3d 1187, 1191 (9th Cir. 2006) (“[W]e affirm that the *Meyer-Pierce* due process rights of parents to make decisions regarding their children’s education does not entitle parents to enjoin school boards from providing information the boards determine to be appropriate in connection with the performance of their educational functions . . .”).

60. Barbara Bennett Woodhouse, “*Who Owns the Child?*”: *Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 997 (1992).

61. *Id.* at 1001.

generally underscores the “bias towards adults’ possessive individualism,” which “objectifies children and places physical control and possession of the children, rather than demonstrated service or shared concern for their well-being, at the center of controversy.”⁶²

In another landmark right of association case, *Griswold v. Connecticut*, the Court struck down a state ban on the use of contraceptives.⁶³ Because the prohibition applied to married couples, the Court ruled that it violated a “right of privacy older than the Bill of Rights—older than our political parties, older than our school system.”⁶⁴ Marriage, the Court observed, is:

[A] coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.⁶⁵

The ancient lineage of marital associations kept its constitutional relevance for only a few years. In *Eisenstadt v. Baird*, the Court struck down a Massachusetts ban on the distribution of contraceptives even though the statute exempted married couples. The court reasoned that, while the right of privacy in *Griswold* “inherited in the marital relationship,” the married couple “is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup.” As such, “[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”⁶⁶ Over the intervening decades, courts have become even less inclined to defer to marriage as an ontological reality that lies beyond the law’s reach.⁶⁷

62. Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents’ Rights*, 14 CARDOZO L. REV. 1747, 1811 (1993).

63. *Griswold* also identified *Meyer* and *Pierce* as being based on the right of association. See *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).

64. *Griswold*, 381 U.S. at 479.

65. *Id.* at 486.

66. *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (citations omitted). See also INAZU, *supra* note 12, at 128 (quoting Jeff Powell) (In *Eisenstadt*, “Brennan’s reading of *Griswold* turned Douglas’s reasoning on its head” and signaled “the identification of a radically individualistic liberalism as the moral content of American constitutionalism.”).

67. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 954 (Mass. 2003) (“Simply put, the government creates civil marriage . . . [T]here are three partners to every civil marriage: two willing spouses and an approving State.”).

These developments within the jurisprudence of intimate associations do not call into question the relatively unbroken line of cases upholding the right of association for groups that are more obviously expressive,⁶⁸ though if the group has not staked its expressive identity on the point under dispute, even that dimension of the right seems less than secure.⁶⁹ More broadly though, if the right of association has limited power to protect the autonomy of natural relationships such as the one between parent and child, or longstanding social institutions such as marriage, it takes little imagination to see that the autonomy of other social groups may be even more precarious. If we are less prepared to give normative weight to the “natural” existence of given social relationships, we may be more inclined to condition the relationship’s legitimacy on its reflection of certain democratic attributes or civic virtues.

Though Inazu does not trace the right of association’s vulnerability back to a loss of confidence in any natural moral order, he is keenly aware of the conditional nature of the state’s tolerance of groups. He explains:

The thin protections of the right of association are underwritten by a political theory of consensus liberalism, which purports to be ‘procedural’ or ‘neutral’ but whose espoused tolerance extends only to groups that endorse the fundamental assumptions of liberal democratic theory.⁷⁰

Nancy Rosenblum famously calls this the “logic of congruence,”⁷¹ and the idea is captured insightfully by Inazu’s observation that “assemblies as forms of expression were supplanted by associations as means of expression.”⁷²

As we grow more suspicious that “natural” rights can be used to mask injustices inherent in the status quo, we are less likely to grant blanket privileges to any particular category of relationships. The freedom becomes conditioned on the cultivation of certain democratic attributes or

68. *See, e.g.*, *NAACP v. Button*, 371 U.S. 415 (1963).

69. *See, e.g.*, *Dale*, 530 U.S. at 697 (finding it “farfetched to assert that Dale’s open declaration of his homosexuality, reported in a local newspaper, will effectively force [the Boy Scouts] to send a message to anyone simply because it allows Dale to be an Assistant Scoutmaster.”) (Stevens, J., dissenting on behalf of himself and three other Justices).

70. INAZU, *supra* note 12, at 11.

71. The “logic of congruence” requires “that not only political institutions and public accommodations but also voluntary social groups function as mini-liberal democracies, with a view toward cultivating and sustaining self-respect.” This requires “that the internal life and organization of associations mirror liberal democratic principles and practices.” NANCY L. ROSENBLUM, *MEMBERSHIP AND MORALS: THE PERSONAL USES OF PLURALISM IN AMERICA* 36 (1998).

72. INAZU, *supra* note 12, at 65.

civic virtues within or through the relationship. Laura Rosenbury, for example, concedes the legitimacy of parental authority within the home, but sees a greater state role in ensuring that children are exposed to a variety of influences outside the home. Rather than viewing the formative social spaces between home and school as additional venues through which parents can raise their children consistently with the parents' priorities and values, she sees horizon-expanding functions in the Boy Scouts, sports leagues, and other civic or religious activities. Rosenbury laments the fact that pluralism only exists between families. She explains:

Our society is pluralistic because many types of families are permitted to exist largely free from state indoctrination. In contrast, pluralism rarely exists within families. Children are generally exposed to just one belief system within the family, or at most two. Therefore, although children may not be standardized by the state, they often are standardized within their own families. Pluralism may exist on a broad, societal level, but children rarely experience pluralism on a micro level, within their own families.⁷³

We should be hesitant to “cede childrearing between home and school to the control of parents and their surrogates,” she contends, because we stand to lose “[i]mportant opportunities to expose children to the diversity of the broader society.”⁷⁴ The law has a role to play in mitigating the family's impact on the child by ensuring that she is exposed to diverse moral influences. My point is not that Rosenbury is wrong; my point is that her analysis reflects a broader hesitation to extrapolate constitutional “oughts” from the “is” of natural relationships that are central to the human experience. In fact, on a range of issues beyond physical abuse and neglect, we may be more willing to use state authority to bring the “is” closer to a state-defined “ought.” If parents do not agree with the political community's judgment that a commitment to individual autonomy means that a child should be able to achieve a critical distance from the parents' worldview, the political community may owe less deference to the family's choices. The liberty of association is by no means eradicated in these contexts, but we may be more willing to attach strings to its exercise.

We can see a similar dynamic operating in a variety of today's debates involving non-family groups, including the battle over the HHS contraception mandate. Consider a statistic cited repeatedly by the

73. Laura Rosenbury, *Between Home and School*, 155 U. PA. L. REV. 833, 893 (2007) (emphasis omitted).

74. *Id.* at 894–95.

mandate's defenders that "98 percent of Catholic women . . . have used contraception."⁷⁵ Putting aside the questionable accuracy of the statement,⁷⁶ how should this statistic play into our debate about the mandate? If the vast majority of a group's members defy the group's teaching on a particular issue—but have nevertheless chosen to remain members—does the political community owe less deference to the group on that issue? If the answer is yes, then the political community is projecting some significant democratic assumptions onto the group. The Catholic Church is no longer an alternative form of expression; it is a means of expressing its members' views in the same democratic form as other associations worthy of autonomy. In part because some of the bedrock right of association cases are grounded in natural order arguments that are increasingly contested, a textual anchor may be needed. Inazu has provided just that, and I look forward to seeing how the conversation unfolds over the months and years to come.

75. Cecilia Munoz, Director of White House Domestic Policy Council, *Health Reform, Preventive Services, and Religious Institutions*, THE WHITE HOUSE BLOG (Feb. 1, 2012), <http://www.whitehouse.gov/blog/2012/02/01/health-reform-preventive-services-and-religious-institutions> ("According to a study by the Guttmacher Institute, most women, including 98 percent of Catholic women, have used contraception.").

76. See Glenn Kessler, *The claim that 98 percent of Catholic women use contraception: a media foul*, WASH. POST BLOG (Feb. 17, 2012), http://www.washingtonpost.com/blogs/fact-checker/post/the-claim-that-98-percent-of-catholic-women-use-contraception-a-media-foul/2012/02/16/gIQAkPqIR_blog.html.