



## Alabama Law Scholarly Commons

---

Essays, Reviews, and Shorter Works

Faculty Scholarship

---

2017

### Positive Pluralism Now Review

Paul Horwitz

University of Alabama - School of Law, [phorwitz@law.ua.edu](mailto:phorwitz@law.ua.edu)

Follow this and additional works at: [https://scholarship.law.ua.edu/fac\\_essays](https://scholarship.law.ua.edu/fac_essays)

---

#### Recommended Citation

Paul Horwitz, *Positive Pluralism Now Review*, 84 U. Chi. L. Rev. 999 (2017).

Available at: [https://scholarship.law.ua.edu/fac\\_essays/29](https://scholarship.law.ua.edu/fac_essays/29)

This Article is brought to you for free and open access by the Faculty Scholarship at Alabama Law Scholarly Commons. It has been accepted for inclusion in Essays, Reviews, and Shorter Works by an authorized administrator of Alabama Law Scholarly Commons.

## REVIEW

### Positive Pluralism Now

Paul Horwitz†

*Confident Pluralism: Surviving and Thriving through  
Deep Difference*

John D. Inazu. Chicago, 2016. 176 pages.

#### INTRODUCTION

A long time ago—roughly between the 2014–2015 academic year and the spring of 2016, when Donald Trump’s presidential candidacy monopolized the public conversational agenda—there was a heated debate about whether our culture was experiencing a reprise of the 1990s and its struggles over “political correctness.” The debate was kicked off by an article in *New York* magazine, in which Jonathan Chait argued that recent campus controversies “would not have shocked anybody familiar with the campus scene from two decades earlier.”<sup>1</sup> Subsequent events, such as protests at the University of Missouri and Yale, buttressed Chait’s claim that political correctness was back.<sup>2</sup>

Both the old and new debates over political correctness were roughly contemporaneous with another phenomenon, of which the “PC debate” is a subcategory: the so-called culture wars. This is the label given to heated arguments in the late 1980s and early

---

† Gordon Rosen Professor of Law, University of Alabama School of Law. My thanks to Rick Garnett and Marc DeGirolami for comments.

<sup>1</sup> Jonathan Chait, *Not a Very P.C. Thing to Say: How the Language Police Are Perverting Liberalism*. (New York Magazine, Jan 27, 2015), archived at <http://perma.cc/L5PK-K2WC>.

<sup>2</sup> See Jonathan Chait, *Can We Start Taking Political Correctness Seriously Now?* (New York Magazine, Nov 10, 2015), archived at <http://perma.cc/L7JD-WMCJ>. For criticisms of Chait’s January 2015 piece and broader defenses of on- and off-campus activism on these issues, see Jonathan Chait, *Secret Confessions of the Anti-Anti-P.C. Movement* (New York Magazine, Jan 30, 2015), archived at <http://perma.cc/8KNU-PJF5> (providing links to many critical responses); John K. Wilson, *The Myth of Political Correctness, 20 Years Later* (Academe Blog, Feb 3, 2015), archived at <http://perma.cc/DJJ3-TZZ2> (arguing that the supposed threat of “political correctness” was a “myth,” then and now); Roxane Gay, *Student Activism Is Serious Business* (New Republic, Nov 11, 2015), archived at <http://perma.cc/QL9Q-8MFQ>.

1990s over hot-button social issues such as school prayer, abortion, pornography, and so on, as well as the identity politics that roiled campuses.<sup>3</sup>

Around the time the political correctness debate returned, the broader culture wars heated up, particularly around religious issues. With some prescience, Professor Douglas Laycock wrote in 2011 that, “[f]or the first time in nearly 300 years, important forces in American society are questioning the free exercise of religion in principle—suggesting that free exercise of religion may be a bad idea, or at least, a right to be minimized.”<sup>4</sup> He tied this development to broader social and demographic developments connected to the culture wars.<sup>5</sup> Conversely, some religious groups were making what political progressives saw as aggressive arguments for legal autonomy or exemptions on such matters as whether religious entities must comply with nondiscrimination laws and whether commercial enterprises must subsidize employee insurance coverage for contraceptive services over the enterprises’ owners’ religious objections. The Supreme Court’s 5–4 decision in *Burwell v Hobby Lobby Stores, Inc.*,<sup>6</sup> in the early summer of 2014, both exemplified these conflicts and presaged new ones, particularly with respect to LGBTQ rights.<sup>7</sup>

Just as the academy is said to be divided between “lumpers” and “splitters,”<sup>8</sup> so there are those who tend to see the world in terms of new developments and those—call us “old folks” or, perhaps more generously, “Ecclesiasticians”—who insist that those developments are actually cyclical.<sup>9</sup> Twenty years is a popular

---

<sup>3</sup> See generally James Davison Hunter, *Culture Wars: The Struggle to Define America* (Basic Books 1991).

<sup>4</sup> Douglas Laycock, *Sex, Atheism, and the Free Exercise of Religion*, 88 U Detroit Mercy L Rev 407, 407 (2011) (emphasis omitted).

<sup>5</sup> See id at 412–23.

<sup>6</sup> 134 S Ct 2751 (2014).

<sup>7</sup> See Paul Horwitz, *The Hobby Lobby Moment*, 128 Harv L Rev 154, 166–77 (2014); Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U Ill L Rev 839, 848–55.

<sup>8</sup> See Bradley C. Karkkainen, “New Governance” in *Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumping*, 89 Minn L Rev 471, 479 (2004).

<sup>9</sup> For examples of this perspective within constitutional law and theory, see Barry Friedman, *The Cycles of Constitutional Theory*, 67 L & Contemp Probs 149, 149 (Summer 2004) (“Seen through the lens of history, it is apparent that arguments about the Constitution have a way of coming around again.”); Paul W. Kahn, *Community in Contemporary Constitutional Theory*, 99 Yale L J 1, 1 (1989) (“American constitutional theory has been cyclical, understanding the Constitution sometimes as a product of will and sometimes as a product of reason.”).

number for cycle spotters.<sup>10</sup> Maybe it is the sweet spot for the cycling of ideas, permitting just the right combination of amnesia and nostalgia. Or maybe it is just an artifact of the human propensity to spot patterns in random data.<sup>11</sup>

Twenty years separate the political correctness controversy of the 1990s from its recent resurgence. Roughly the same span separates the culture wars of the late 1980s and early 1990s from the more recent outbreak. Before that, there was another twenty-year cycle dating back to the social, cultural, and political revolutions of the late 1960s, which some accounts identify as the launching point for the subsequent cycles.<sup>12</sup>

There is a third twenty-year cycle, intimately connected to the other two but less remarked upon: a cycle of interest in *pluralism*. In this picture, pluralism serves as an alternative to the struggles between the polarized camps of left and right, liberal and conservative, secular and religious, or however else the contending sides are described.

“Pluralism” itself is a term susceptible of multiple understandings—and to one big distinction: between pluralism as purely descriptive and pluralism as a good in itself. What is important is that adherents of pluralism were interested in actively *fostering* pluralism. They saw smaller groups and institutions within the nation as having a value of their own, rather than wanting to set universal rules that would hand a final victory to one side or the other in the culture wars.<sup>13</sup> Rather than advocating a single defining vision of justice for society as a whole—say, of equality over liberty or liberty over equality—they were concerned with “the reimagining of society as a bundle of smaller,

<sup>10</sup> In the legal literature alone, it has been spotted in police corruption, see Harold Baer Jr and Joseph P. Armao, *The Mollen Commission Report: An Overview*, 40 NY L Sch L Rev 73, 73 (1995), abortion law, see Sara L. Walsh, *Liquid Lives and Liquid Laws: The Evolution of Abortion Law in Japan and the United States*, 7 Intl Legal Persp 187, 189 (1995), and third-party politics, see Bradley A. Smith, Note, *Judicial Protection of Ballot-Access Rights: Third Parties Need Not Apply*, 28 Harv J Legis 167, 169–71 (1991), among other areas.

<sup>11</sup> See *Apophenia* (Wikipedia), archived at <http://perma.cc/97TG-ZAGR>; Michael Shermer, *Patternicity: Finding Meaningful Patterns in Meaningless Noise* (Scientific American, Dec 1, 2008), archived at <http://perma.cc/MJ4B-RDP3>.

<sup>12</sup> See, for example, Andrew Hartman, *A War for the Soul of America: A History of the Culture Wars* 1–7 (Chicago 2015). Other accounts see the culture wars as extending throughout American history. See generally, for example, Stephen Prothero, *Why Liberals Win the Culture Wars (Even When They Lose Elections): The Battles That Define America from Jefferson's Heresies to Gay Marriage* (HarperOne 2016).

<sup>13</sup> See Daniel T. Rodgers, *Age of Fracture* 191–94 (Belknap 2011).

more intensely bound communities.”<sup>14</sup> This positive<sup>15</sup> form of pluralism “morphed through many different formulations and took a multitude of names.”<sup>16</sup> Its adherents came from *both* camps, “confound[ing] the simple divisions of the culture wars.”<sup>17</sup> For this reason, pluralism was a “political wild card.”<sup>18</sup>

The story of cyclical interest in pluralism is harder to tell as a matter of neat twenty-year intervals, in part because it responds to and thus tends to lag behind the culture-war cycles. Like the culture wars themselves, it has earlier antecedents, which in turn were related to contemporary social developments.<sup>19</sup> In the 1970s, the interest in pluralism and the structures that foster it was described in terms of the importance of “mediating structures,” a label popularized by Professor Peter Berger and Father Richard John Neuhaus.<sup>20</sup> In the 1990s, it was more likely to be put in terms of multiculturalism or communitarianism, but sometimes it was phrased directly in terms of the importance of an active and positive pluralism itself. An example of this is the work of Professor William Galston, whose advocacy of “liberal pluralism”<sup>21</sup> achieved some rhetorical prominence and occasional policy endorsement in the Clinton administration, in which Galston worked.<sup>22</sup>

Given the general inclination of Americans to divide along partisan lines, this kind of pluralism has always been a minority voice in public conversation. And as each cycle’s campus or culture war ebbs and the culture seems to return to the “center” or

<sup>14</sup> *Id.* at 191.

<sup>15</sup> I use “positive” in this Review in the colloquial sense of viewing something as a good thing, not in the academic sense of a descriptive rather than a normative account.

<sup>16</sup> Rodgers, *Age of Fracture* at 191 (cited in note 13).

<sup>17</sup> *Id.* at 181, 194–98.

<sup>18</sup> *Id.* at 191.

<sup>19</sup> See Mark Bevir, *A History of Modern Pluralism*, in Mark Bevir, ed., *Modern Pluralism: Anglo-American Debates since 1880* 1, 12–16 (Cambridge 2012).

<sup>20</sup> See Peter L. Berger and Richard John Neuhaus, *To Empower People: The Role of Mediating Structures in Public Policy* 1–8 (American Enterprise Institute 1977) (“[M]ediating structures are defined as those institutions standing between the individual in his private life and the large institutions of public life.”) (emphasis omitted).

<sup>21</sup> See generally William A. Galston, *Liberal Pluralism: The Implications of Value Pluralism for Political Theory and Practice* (Cambridge 2002).

<sup>22</sup> See William A. Galston, *The View from the White House—Individual and Community Empowerment*, in Peter L. Berger and Richard John Neuhaus, *To Empower People: From State to Civil Society* 58, 61 (AEI 2d ed 1996) (Michael Novak, ed). For a brief overview of pluralism’s occasional and partial political implementation, see generally James P. Pinkerton, *Mediating Structures, 1977–1995*, in Berger and Neuhaus, *To Empower People: From State to Civil Society* 51 (cited in note 22).

to a state of relative calm, interest in pluralism and its literature tends to fade as well.<sup>23</sup>

And now? If the current debate involves sharp conflict of the sort that characterized the earlier cycles of culture-war and PC debates, might we expect the same hunger for alternatives to emerge? Will more people become “eager to reengage with the value of pluralism [ ] as a distinctive approach of its own,”<sup>24</sup> in contrast with those who seek a culture-war victory for either the left or the right?

If a new literature of pluralism emerges in this culture-war cycle, Professor John Inazu’s *Confident Pluralism: Surviving and Thriving through Deep Difference* is likely to be one of its key texts. Inazu’s book is blissfully short, clearly written, aimed at educated general readers rather than academic specialists, and underwritten by personal experiences that cross standard culture-war lines.<sup>25</sup> *Confident Pluralism* is necessary reading for anyone who is frustrated by the belligerence and inflexibility of the current discussion and looking for ways for different deeply held perspectives and tightly knit communities to survive and thrive.

But is it enough? There is reason to doubt it. There is much to admire in Inazu’s book, not least the simple *fact* of its existence. Although this Review takes a mostly critical perspective, that is not a final judgment on the merits of Inazu’s book or of an active, “confident” pluralism. On a substantive level, however, pluralism as a positive approach—as a good in itself, rather than a descriptive fact or a “technical problem . . . to be *managed*”<sup>26</sup>—faces serious questions and difficulties.<sup>27</sup> After providing a critical summary of the book in Part I, I argue in Part II that these questions remain largely unanswered in *Confident Pluralism* because of Inazu’s strategic refusal to stake out a more distinctive and forceful theoretical position on pluralism itself.

*Confident Pluralism* faces problems of timing, as well; the question of timing is the focus of Part III of the Review. Inazu’s book comes along at an awkward moment for two reasons. First, the current culture-war cycle may have crested. Second, the

<sup>23</sup> See Paul Horwitz, *Against Martyrdom: A Liberal Argument for Accommodation of Religion*, 91 Notre Dame L Rev 1301, 1302–03 (2016).

<sup>24</sup> Id at 1304.

<sup>25</sup> See, for example, pp 26–28 (discussing his family’s experience as Japanese American internees during World War II).

<sup>26</sup> Horwitz, 91 Notre Dame L Rev at 1303 (cited in note 23) (emphasis added).

<sup>27</sup> Given that I identify with “positive pluralism,” any criticisms here are certainly also *self*-criticisms.

rise—and ultimately the electoral triumph—of Trump has interrupted that cycle, in ways that disrupt and explode the standard culture wars even more than they exemplify or exacerbate them. For almost a year, and no doubt well into the foreseeable future, cultural and political commentators have shifted their attention abruptly from the usual divisions of left and right over cultural issues to the more immediate issue of the election and its aftermath. Cultural groups themselves have been torn over where they stand on the election and on establishment versus populist politics. Inazu's book thus comes along at a moment when it is simultaneously most needed *and* least likely to make new converts to the pluralist cause.

That is cause for regret. There is value in a forceful, positive pluralism, even if it remains a minority approach that cannot stave off the cycles of culture wars. I hope *Confident Pluralism* is one of the first examples of a new round of pluralist literature.<sup>28</sup> Especially when our social, cultural, and political dialogue seems so polarized and zero-sum, there is some value even in *imperfect* alternatives to that dialogue. Still, I spend more of this Review discussing the problems of positive pluralism than proselytizing for it.

## I. CONFIDENT PLURALISM DESCRIBED

Like a TED talk or self-help book, *Confident Pluralism* starts with an account of symptoms, diagnoses a problem, and offers a set of rules and principles, each with its own neat example, as therapy. In this Part, I describe and critique the building blocks

---

<sup>28</sup> Professor Jacob T. Levy's recent book, *Rationalism, Pluralism, and Freedom* (Oxford 2015), is another important foundation for a new round of pluralism literature. Levy's book distinguishes between two strands of liberalism. "[R]ationalist" liberalism is "committed to intellectual progress, universalism, and equality before a unified law, opposed to arbitrary and irrational distinctions and inequalities, and determined to disrupt local tyrannies in religious and ethnic groups, closed associations, [and] families." Id. at 2. "[P]luralist" liberalism is "skeptical of the central state and friendly toward local, customary, voluntary, or intermediate bodies, communities, and associations." Id. In Professor Abner S. Greene's words, the latter form argues for "recognizing a plurality of norms regarding how best to live, especially considering the tenuous grounding the state has to insist on its position at all times." Abner S. Greene, *Religious Freedom and (Other) Civil Liberties: Is There a Middle Ground?*, 9 Harv L & Pol Rev 161, 192–93 (2015). Levy's book acknowledges the limits of *both* strands but makes clear his sympathies for the pluralist strand, in part because of the relative neglect it has suffered in comparison to rationalist liberalism. See Levy, *Rationalism, Pluralism, and Freedom* at 27–28 (cited in note 28). Greene's own book is another helpful text. See generally Abner S. Greene, *Against Obligation: The Multiple Sources of Authority in a Liberal Democracy* (Harvard 2012).

of that diagnosis, and of Professor Inazu's prescription: the "constitutional commitments and civic practices" that are said to constitute "confident pluralism" (p 8).

#### A. Diagnosing Deep Difference and Prescribing Confident Pluralism

On a variety of important and fundamental issues, "Americans are—and perhaps always have been—a deeply divided people" (p 15). But they "share *some* agreement": they have in common a "modest unity" concerning "many of the background practicalities we need to live as a society" (p 15).

Right now, the differences seem to dominate. They are exacerbated by factors such as political polarization,<sup>29</sup> cultural and geographical sorting,<sup>30</sup> online balkanization,<sup>31</sup> and the tendency of interest group fund-raising operations to heighten their members' sense of emergency and outrage in order to encourage donations and member loyalty.<sup>32</sup> The result is sharp disagreement, even the "demonization" of our adversaries.<sup>33</sup>

Inazu's prescription for this problem is "confident pluralism." It is "a political solution to the practical problem of our deep differences" (p 6). It draws on our "modest unity" in order to make living with and within deep differences more manageable and less fraught (p 15). If that sounds rather general, it is. This and the next Part of the Review explore the questions that "confident pluralism" answers and leaves unanswered. But its core terms, at least, are defined by Inazu in clear language that I cannot improve by paraphrase:

---

<sup>29</sup> See Geoffrey C. Layman, Thomas M. Carsey, and Juliana Menasce Horowitz, *Party Polarization in American Politics: Characteristics, Causes, and Consequences*, 9 Ann Rev Polit Sci 83, 85–87 (2006) (summarizing recent empirical literature demonstrating increased party polarization).

<sup>30</sup> See generally Bill Bishop, *The Big Sort: Why the Clustering of Like-Minded America Is Tearing Us Apart* (Houghton Mifflin 2008); Marc J. Dunkelman, *The Vanishing Neighbor: The Transformation of American Community* (Norton 2014).

<sup>31</sup> See Cass R. Sunstein, *Going to Extremes: How Like Minds Unite and Divide* 79–83 (Oxford 2009) (discussing the phenomenon of "cyberbalkanization").

<sup>32</sup> See Martha Minow, *Religious Exemptions, Stating Culture: Foreword to Religious Accommodation in the Age of Civil Rights*, 88 S Cal L Rev 453, 454–55 (2015). See also Jeffrey M. Berry and Sarah Sobieraj, *The Outrage Industry: Political Opinion Media and the New Incivility* 3–5 (Oxford 2014) (describing liberal fund-raising efforts in the aftermath of Rush Limbaugh's controversial 2012 remarks about Georgetown Law student Sandra Fluke).

<sup>33</sup> Minow, 88 S Cal L Rev at 455 (cited in note 32) (describing conference remarks by Professor Nan Hunter of Georgetown University).



Confident pluralism takes both *confidence* and *pluralism* seriously. Confidence without pluralism misses the reality of politics. It suppresses difference, sometimes violently. Pluralism without confidence misses the reality of people. It ignores or trivializes our stark differences for the sake of feigned agreement and false unity. Confident pluralism allows genuine difference to coexist without suppressing or minimizing our firmly held convictions. We can embrace pluralism precisely because we are confident in our own beliefs, and in the groups and institutions that sustain them. (pp 6–7)

## B. Constitutional Commitments and Requirements

How do we accomplish this? The answer involves a combination of “constitutional commitments and civic practices” (p 8). The constitutional commitments begin with individual rights, especially the rights of speech, religion, assembly, and association, which “remain an important part of the check against majoritarian power and the ability of individuals to establish meaning apart from government orthodoxy—an important part of our modest unity” (p 26). And they extend quickly to two general premises: inclusion and dissent.

Inclusion, often at the core of our equal protection guarantees, stresses “the common aspiration of extending to others basic membership in the political community” (p 29). Dissent emphasizes not only the right to express unorthodox views, but the right “to *reject* the norms established by the broader political community *within our own lives and voluntary groups*” (p 30) (emphases added). A confident political community must, within limits, allow “citizens and the groups that they form” to establish norms of their own—norms that “may be illiberal or inegalitarian, or [ ] may ignore the civic practices of confident pluralism” (p 31).

Inazu acknowledges that “[n]egotiating and renegotiating” the relationship between inclusion and dissent “strains our modest unity,” and thus introduces “a tragic dimension to our efforts at peaceful coexistence” (p 33).<sup>34</sup> Perhaps little more can be said about this. But it does suggest deeper difficulties in actually

---

<sup>34</sup> For discussion of tragedy and religious freedom issues, see generally Marc O. DeGirolami, *The Tragedy of Religious Freedom* (Harvard 2013). For further discussions of tragedy and law, see generally Paul Horwitz, *The Agnostic Age: Law, Religion, and the Constitution* (Oxford 2011); Sanford Levinson, *Constitutional Faith* (Princeton rev ed 2011). See also Horwitz, 128 Harv L Rev at 166–84 (cited in note 7); Paul Horwitz, Book Review, *Permeable Sovereignty and Religious Liberty*, 49 Tulsa L Rev 235, 238 & n 25 (2013).

achieving confident pluralism despite our “modest unity” as a political community.

A series of “requirements” flow from our specific constitutional commitments and the values of inclusion and dissent that underwrite them. First comes the “voluntary groups requirement”: “Government officials should not interfere with the membership, leadership, or internal practices of a voluntary group absent a clearly articulated and precisely defined compelling interest” (p 48). Freedom of association doctrine, by “[s]hifting the constitutional focus [of associational freedom] exclusively to speech,” has failed to fully encompass and protect the freedom of voluntary groups (p 34). It treats association as essentially expressive in value, and associational freedom as an instrumental means of allowing groups to speak to others (pp 34–36). This allows courts to treat as nonexpressive, and thus unprotected by associational freedom, groups that actually *are* expressive in their conduct or self-presentation.<sup>35</sup> More generally, it fails to appreciate the formative, “soul-making”<sup>36</sup> value of group membership itself, and its importance in constituting a fully free, rich, and diverse society.<sup>37</sup>

The “public forum requirement” holds that “[g]overnment should honor its commitment to ensure public forums for the voicing of dissent and discontent. Expressive restrictions in these forums should only be justified by compelling government interests. Private public forums that effectively supplant these government-sponsored forums should in some cases be held to similar standards” (pp 64–65). Inazu is less convincing in linking public forum law to the present status and needs of pluralism, at least until he turns to “private public forums,” most notably online spaces such as Facebook (pp 61–62). But here the gulf between his prescriptions and current law, and the difficulty of applying his proposed multifactor test to determine when these spaces “should be constitutionally required to serve roles akin to

---

<sup>35</sup> See pp 36–39 (providing the wonderful example of the Top Hatters Motorcycle Club).

<sup>36</sup> See Kwame Anthony Appiah, *The Ethics of Identity* 155–212 (Princeton 2005) (defining and analyzing the idea of “soul making”). Professor Kwame Anthony Appiah focuses on the soul-making function of the state, but voluntary and involuntary groups also play a vital role in soul making. See Richard W. Garnett, *The Story of Henry Adams’s Soul: Education and the Expression of Associations*, 85 Minn L Rev 1841, 1849–50 (2001) (“[W]hile it is true that we speak and express ourselves through associations, we are also spoken to and formed by them and by *their* expression.”).

<sup>37</sup> See George Kateb, *The Value of Association*, in Amy Gutmann, ed, *Freedom of Association* 35, 37 (Princeton 1998); Paul Horwitz, *First Amendment Institutions* 220–23 (Harvard 2013).

traditional public forums” (p 63), poses problems for him. Of greatest interest, given current debates over religion and nondiscrimination law, is his argument that courts have unduly expanded the definition of “public accommodation” in laws like Title II of the Civil Rights Act of 1964<sup>38</sup> (pp 63–64).

Last, but not least controversial, is the “public funding requirement”: “When the government offers generally available resources (financial and otherwise) to facilitate a diversity of viewpoints and ideas, it should not limit those resources based on its own orthodoxy” (p 79). As Inazu puts it: “Facilitating pluralism means *funding* pluralism” (p 67) (emphasis added). Stating the point more mildly: given that public forums involve government expenditures, and given “the ubiquity of government dollars in today’s regulatory state” (p 67), it may be that a modern liberal-democratic state that values pluralism at all, and does not simply seek to stamp it out, *inevitably* funds pluralism.

If so, questions arise: Can it do so with deliberate partiality, and in service of what values or criteria? When it purports to make funding generally available, must it fund even discriminatory or illiberal groups? What counts as “generally available,” anyway? For that matter, what counts as “funding”? Direct or indirect subsidies, tax exemptions, or all of the above?

Here, too, a cross-cutting set of academic arguments and legal rulings leaves room for uncertainty about the current state of the law, the course it ought to take, or both. Against recent and increasingly popular arguments that the government should be allowed (or required) to refuse to fund or grant tax exemptions to groups whose conduct violates certain modern liberal norms in order to express governmental “nonendorsement” of those values,<sup>39</sup> Inazu takes a more catholic position. Using the example of governmental reluctance to grant tax-exempt status to a feminist

---

<sup>38</sup> Pub L No 88-352, 78 Stat 243, codified as amended at 42 USC § 2000a et seq. For recent discussion and debate, see generally Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Law*, 66 Stan L Rev 1205 (2014); Richard A. Epstein, *Public Accommodations under the Civil Rights Act of 1964: Why Freedom of Association Counts as a Human Right*, 66 Stan L Rev 1241 (2014).

<sup>39</sup> See, for example, Corey Brettschneider, *When the State Speaks, What Should It Say? How Democracies Can Protect Expression and Promote Equality* 109–41 (Princeton 2012); Steven D. Smith, *Die and Let Live? The Asymmetry of Accommodation*, 88 S Cal L Rev 703, 714 (2015) (raising these arguments to illustrate a concern about the direction of antidiscrimination law and religious accommodation doctrine). For a broader discussion, see generally Austin Sarat, ed, *Legal Responses to Religious Practices in the United States: Accommodation and Its Limits* (Cambridge 2012); Nelson Tebbe, *Government Nonendorsement*, 98 Minn L Rev 648 (2013).

and lesbian-positive magazine, *Big Mama Rag*, in the 1970s, Inazu argues that the tax code, with its special treatment of a wide range of charitable, educational, and religious entities, should be treated as supporting a “pluralistic endeavor for an expansive range of groups” (pp 67–73). We should treat tax-exempt status and generally available funding as a kind of public forum, in which the government cannot pick and choose the recipients of its largesse.

Inazu recognizes that his position faces what we might call the “*Bob Jones* problem”<sup>40</sup> (see pp 74–79). The government, including the judiciary, confronted a host of racially discriminatory private institutions in the wake of the enactment of the modern civil rights laws and largely refused to exempt them from those laws.<sup>41</sup> Later, in *Bob Jones University v United States*,<sup>42</sup> the Supreme Court upheld the denial of tax-exempt status to Bob Jones University, which at the time had a policy forbidding interracial dating by students.<sup>43</sup> Despite never having been applied expansively, *Bob Jones* is seen as forming a crucial (if obviously insufficient) part of the governmental response to institutionalized racism in the United States (p 76). There is no straightforward *principled* way<sup>44</sup> to limit its scope to that case alone and not to, say, the denial of tax-exempt status for entities that discriminate against LGBTQ individuals—a point on which the Obama administration’s solicitor general was suggestively reticent during the oral argument in the same-sex marriage case, *Obergefell v Hodges*.<sup>45</sup>

---

<sup>40</sup> Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 Harv CR–CL L Rev 79, 120 (2009) (using this phrase in a slightly different context).

<sup>41</sup> The *locus classicus* is *Runyon v McCrary*, 427 US 160 (1976).

<sup>42</sup> 461 US 574 (1983).

<sup>43</sup> See *id* at 580–81, 605.

<sup>44</sup> There are certainly practical and historical arguments for treating cases like *Bob Jones* as unique. Central to those arguments is the idea that the history of racism in the United States involves a deep connection between public law and the “private” institutions and social conditions that entrenched racism. This intertwinement demanded responses that encompassed both the private and public, the legal and social realms. See pp 76–77; Horwitz, *First Amendment Institutions* at 233 (cited in note 37); Epstein, 66 Stan L Rev at 1254–61 (cited in note 38). These arguments are more powerful than their critics acknowledge, but they provide no principled answer to arguments that other evils, such as sexism, homophobia, or the mistreatment of animals, also involve interwoven systems of public and private entrenchment and also require bold solutions.

<sup>45</sup> 135 S Ct 2584 (2015). When asked during the oral argument about the denial of tax-exempt status to universities or colleges that oppose same-sex marriage, Solicitor General Donald Verrilli replied, “[I]t’s certainly going to be an issue.” See Transcript of

As Inazu writes, “the *Bob Jones* decision is in some circles akin to a sacred text,” and he is commendably forthright in questioning it (pp 75–77). Like other pluralists,<sup>46</sup> he is inspired here by the late Professor Robert Cover, who agonized over “the power and practice of a government that rules by displacing, suppressing, or exterminating values that run counter to its own.”<sup>47</sup> And Inazu can draw on the words of a liberal icon and eloquent pluralist, Justice William Brennan, who wrote that tax-exempt entities “contribute[ ] to the diversity of association, viewpoint, and enterprise essential to a vigorous, pluralistic society.”<sup>48</sup> But times change. Today, it is unlikely that Brennan’s name or his pluralist prose have the incantatory power they once did for liberals.

### C. Civic Aspirations and Imperatives

Having set out the “constitutional commitments” of confident pluralism, Inazu asks what it would mean to “pursue the civic practices of confident pluralism in our own lives” (p 80). Here, he again offers a mix of general “aspirations” and more specific “imperatives.” The aspirations are familiar enough. In a social world—especially the online world—in which people are caught between unnecessarily dismissive and insulting speech and the tendency to nestle within cocoons of the like-minded, our pursuit of “dialogue and coexistence” must embody aspirations of “tolerance, humility, and patience” (pp 83–85).

This is especially true in our habits of speech and dialogue. Inazu invokes “[c]onfident pluralism’s speech imperative”: the command that we “take steps to soften our tone and move out of our echo chambers” (p 102). Our speech toward others, and our reaction to speech we dislike, should embody those aspirational qualities of tolerance, humility, and patience. We may also ease conflict if we seek actively to bridge our ideological and other gaps. Hence the “common ground imperative,” which urges us to

---

Oral Argument, *Obergefell v Hodges*, Docket No 14-556, \*38 (US Apr 28, 2015) (available on Westlaw at 2015 WL 1929996).

<sup>46</sup> Including me. See Horwitz, *First Amendment Institutions* at 93, 182, 291 (cited in note 37).

<sup>47</sup> Martha Minow, *Introduction: Robert Cover and Law, Judging, and Violence*, in Martha Minow, Michael Ryan, and Austin Sarat, eds, *Narrative, Violence, and the Law: The Essays of Robert Cover* 1, 1–2 (Michigan 1995).

<sup>48</sup> *Walz v Tax Commission of the City of New York*, 397 US 664, 689 (1970) (Brennan concurring). To be clear, Brennan voted with the majority in *Bob Jones*. *Bob Jones*, 461 US at 576.

“bridge relational distance even when we cannot bridge ideological distance” (pp 123–24).

These are somewhat shopworn recommendations. More interesting, if underdeveloped,<sup>49</sup> is the “collective action imperative” (p 115). The subject here is how to “think about tolerance, humility, and patience in the context of collective action[s]” such as “protests, boycotts, and strikes,” in which consumer, worker, or citizen power is mobilized in numbers to force change (p 105). Mozilla Corporation and its Firefox browser were the subject of boycotts when the company named as its CEO Brendan Eich, who had contributed \$1,000 to the campaign for California’s Proposition 8, which limited the legal definition of marriage to that between man and woman (p 111). The company itself, and even Eich in his official capacity, was not said to be unfriendly toward gays and lesbians (p 112). Was this just “marketplace forces at work, influenced by the marketplace of ideas”?<sup>50</sup> When the Dixie Chicks announced to concertgoers that they were ashamed to come from the same state as then-President George W. Bush, listeners attacked them, and radio stations, eager to cater to these vocal consumers, dropped the band from their playlists. Was this “reminiscent of the McCarthy hearings from the 1950s that resulted in actors being blacklisted in Hollywood or the Nazis burning books in 1930s-era Germany”?<sup>51</sup> If we have different reactions to each of these examples, why? When are such actions appropriate or inappropriate?

If the answer depends in part on “power imbalances” (p 107), as Inazu suggests, how do we define the relevant powerful or powerless group? Did the Eich case involve politically vulnerable LGBTQ individuals—or wealthy, politically connected Silicon Valley consumers and companies? When we think about contests between religion and LGBTQ equality or women’s contraceptive rights, do we refer to an undifferentiated “powerful Christian majority,”<sup>52</sup> or do we think more specifically about the smaller and

---

<sup>49</sup> See p 115 (conceding that the collective action imperative is “somewhat underspecified”).

<sup>50</sup> Leslie Gabel-Brett, *In the Marketplace, Free Speech Has a Price* (NY Times, Apr 5, 2014), online at <http://www.nytimes.com/roomfordebate/2014/04/04/the-weight-of-executives-personal-beliefs/in-the-markeplace-free-speech-has-a-price> (visited Mar 26, 2017) (Perma archive unavailable).

<sup>51</sup> Eugene Volokh, *Deterring Speech: When Is It “McCarthyism”? When Is It Proper?*, 93 Cal L Rev 1413, 1423 n 35 (2005) (quoting a 2003 article paraphrasing the views of California Democratic Senator Barbara Boxer).

<sup>52</sup> Zoë Robinson, *The Contraception Mandate and the Forgotten Constitutional Question*, 2014 Wis L Rev 749, 751.

increasingly isolated number of Christians who adhere with unpopular firmness to “traditionalist” positions?

*Confident Pluralism* is right to identify the complexity of collective political action in the marketplace as a pressing current question.<sup>53</sup> But its conclusion—“When we engage in these forms of collective action, we should bear in mind the civic aspirations of tolerance, humility, and patience” (p 115)—is too general to be helpful, even if it is right.

## II. IS CONFIDENT PLURALISM POSSIBLE WITHOUT POSITIVE PLURALISM?

Professor Inazu describes *Confident Pluralism* in pragmatic terms, as “a *political* solution to the *practical* problem of our deep differences” (p 6) (emphases added). In the footnotes, he cites a number of classic pluralist texts, but insists that his book “does not adopt a previously established theory” of pluralism (p 7 n 12). Indeed, it seems fair to conclude that the book neither adopts nor announces *any* theory of pluralism.<sup>54</sup> Inazu’s starting point appears to be less an argument for the value of pluralism as such, and more an acknowledgment of what Professor John Rawls famously called the “*fact of pluralism*”: the simple fact that we live in a community with diverse individuals, groups, traditions, and views, many of them strongly held and conflicting.<sup>55</sup>

There are good reasons to take such an approach. There is a meliorating spirit and even an occasionally proselytizing tone to *Confident Pluralism*. Inazu may nod to the possibility of tragedy, but it is no accident that he concludes his book with the word “hope” (p 133). You do not create a broad-based movement by starting with a small tent: you start with minimally theorized areas of agreement,<sup>56</sup> such as the fact of pluralism or general aspirations like preserving unity despite deep differences.

---

<sup>53</sup> For further discussion, see Horwitz, 128 Harv L Rev at 177–84 (cited in note 7) (discussing changes in and around the culture of the marketplace, as it reflects and incorporates features of the culture wars).

<sup>54</sup> See p 7 n 11 (noting confident pluralism’s “agnosticism about the moral justifications for and moral critiques of the fact of pluralism,” while citing the “normative value of institutions” to distinguish it from what Inazu calls Professor John Rawls’s own agnosticism on these questions).

<sup>55</sup> Pp 4–5 (emphasis added), quoting John Rawls, *The Idea of an Overlapping Consensus*, 7 Oxford J Legal Stud 1, 4 (1987).

<sup>56</sup> See Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 Harv L Rev 1733, 1735–36 (1995) (recommending reliance on incompletely theorized agreements to “produc[e] agreement amidst pluralism”).

One may wonder if this strategy really works here. As Professor Larry Alexander has written, “We do not need theory for what we agree about but for what we disagree about.”<sup>57</sup> Rather, “[i]t is [ ] the area where we disagree that cries for attention, and that area requires theorizing.”<sup>58</sup> For Inazu’s incompletely theorized confident pluralism to work, there must be substantial agreement about *something*, and it must provide a sufficiently solid foundation for readers to be persuaded that his aspirations, requirements, and imperatives are a good idea. Is there anything here that is strong enough to carry that weight?

I rather doubt it. Inazu’s “something” appears to be the descriptive “fact of pluralism”: the unavoidable truth that we live in a nation with a variety of views, groups, and cultures (pp 4–5). But is that a *good* thing, or merely an inconvenient one? If it *is* a good thing, does it apply to a plurality of groups and views generally, or only to the “right” groups? And if we agree in general terms that a diversity of views and cultures is a good thing,<sup>59</sup> do we agree on the right response to it?

As Professor Martin Marty has observed, the American response to the fact of pluralism has hardly been consistently laudatory. He noted the headline of an article published in the 1950s in *The Christian Century*, then an important voice of liberal Protestantism: “Pluralism—National Menace.”<sup>60</sup> Such a response, Marty noted, “fit in well with struggles at midcentury over the character of American politics, ethnicity, and religious life.”<sup>61</sup> Notwithstanding platitudes about building one out of many, the beauty of American diversity, and suchlike, there have always been varied responses—varied *over* time and varied at any *given* time—to the fact of pluralism.

At present, for reasons related to the culture-war cycles noted at the beginning of this Review, there is disagreement over

<sup>57</sup> Larry Alexander, Book Review, *Incomplete Theorizing: A Review Essay of Cass R. Sunstein’s Legal Reasoning and Political Conflict*, 72 Notre Dame L Rev 531, 534 (1997).

<sup>58</sup> *Id.* at 535.

<sup>59</sup> See Sanford Levinson, *Diversity*, 2 U Pa J Const L 573, 578–79, 608 (2000) (noting that “diversity” has “joined ‘family values’ and ‘good medical care’ as something that everyone is for, as demonstrated by the fact that it is becoming ever more difficult to find anyone who is willing to say, in public, that institutional or social homogeneity is a positive good and diversity a substantive harm,” but noting that “those who raise the banner of ‘diversity’ . . . argue bitterly about its meanings,” and that “someone who doesn’t share one’s own views about the concrete meaning of this good is often subject to dismissive contempt”).

<sup>60</sup> Martin E. Marty, *Pluralisms*, 612 Annals Am Acad Polit & Soc Sci 14, 15 (2007).

<sup>61</sup> *Id.*



whether pluralism as such is a good thing and about how to address the fact of pluralism. That is certainly true of *religious* pluralism, in the courts and elsewhere. When the Supreme Court in *Employment Division, Department of Human Resources of Oregon v Smith*<sup>62</sup> rejected a constitutional right to religious accommodation in favor of a rule of neutrality and general applicability, it worried that the dangers of exemptions from general laws would increase “in direct proportion to the society’s diversity of religious beliefs.”<sup>63</sup> Religious pluralism was viewed as a potential threat to a well-ordered society, and state power was seen as the proper response.<sup>64</sup>

At the time, *Smith* was assailed as “an affront [ ] to our society’s hard-won pluralism.”<sup>65</sup> But the broad coalition that supported the congressional response to *Smith*, the Religious Freedom Restoration Act of 1993,<sup>66</sup> has collapsed.<sup>67</sup> The kind of vigorous support for religious pluralism that underwrites legislative or constitutional accommodations for religious groups as such is in bad odor today.<sup>68</sup> The odes to religious pluralism by Justice Brennan that Inazu strategically deploys are out of fashion.<sup>69</sup>

---

<sup>62</sup> 494 US 872 (1990).

<sup>63</sup> *Id.* at 888–90.

<sup>64</sup> See Scott C. Idleman, *Tort Liability, Religious Entities, and the Decline of Constitutional Protection*, 75 *Ind L J* 219, 251–52 (2000); Kent Greenawalt, *Fighting Words: Individuals, Communities, and Liberties of Speech* 138 (Princeton 1995) (“The [*Smith*] decision was statist and majoritarian in a virulent form.”).

<sup>65</sup> Eric Alan Shumsky, *The Religious Freedom Restoration Act: Postmortem of a Failed Statute*, 102 *W Va L Rev* 81, 85 (1999), quoting *The Necessity of Religion: High Court Says Religious Freedom Is a Luxury—Wrong*, *LA Times B6* (Apr 19, 1990), archived at <http://perma.cc/VK5B-JLB5>.

<sup>66</sup> Pub L No 103-141, 107 Stat 1488, codified at 42 USC § 2000bb et seq.

<sup>67</sup> See Martin S. Lederman, *Reconstructing RFRA: The Contested Legacy of Religious Freedom Restoration*, 125 *Yale L J F* 416, 418 (2016).

<sup>68</sup> See Horwitz, 91 *Notre Dame L Rev* at 1310–11, 1315–17 (cited in note 23). The Court did unanimously uphold a prisoner’s statutory religious accommodation claim in *Holt v Hobbs*, 135 S Ct 853 (2015), with the support of a broad range of amici. See *id.* at 862, 866–67. I doubt that *Holt* says much about continued support for religious pluralism, however. Rather, *Holt* may signify that something other than support for religious groups as such, like the fact that the plaintiff was a prisoner and a member of a disfavored minority, is needed to make religious accommodations palatable today. See Marc O. DeGirolami, *Free Exercise by Moonlight*, 53 *San Diego L Rev* 105, 108 n 10 (2016) (noting judicial support for “[s]tatutory claims for religious accommodation by isolated, socially and politically powerless individuals,” but observing that “the absence of conflict with any significant secular political interests . . . in these cases renders it difficult to evaluate the depth of the Court’s commitment to religious accommodation”).

<sup>69</sup> Professor Perry Dane, a former law clerk to Brennan, writes more generally, “The sort of pluralism I treasure might be yesterday’s news.” Perry Dane, *Judaism, Pluralism, and Constitutional Glare*, 16 *Rutgers J L & Religion* 282, 292 (2015).

Across a range of culture-war and other issues, “[o]ur nation is increasingly beset with pluralism anxiety.”<sup>70</sup>

We are still happy to offer general statements in favor of diversity or pluralism. But the mainstream of contemporary liberalism is more concerned with what Professor Richard Boyd calls “the perils of pluralism.”<sup>71</sup> The “rationalist” strand of liberalism, with its “commit[ment] to intellectual progress, universalism, and equality before a unified law,”<sup>72</sup> is dominant. Pluralism is viewed partly as a fact, partly as a good thing—but largely as a problem to be managed through the law.<sup>73</sup> As a recent statement by a majority of the US Commission on Civil Rights suggests,<sup>74</sup> the temptation to insist on the “logic of congruence”—the idea that “morally essential values should be enforced throughout a society,” including private associations, and that through such measures “cultural conflict about essential moral values should effectively be suppressed”<sup>75</sup>—is ascendant in contemporary political liberalism and progressivism.<sup>76</sup> What chances are there for a broadly

<sup>70</sup> Kenji Yoshino, *The New Equal Protection*, 124 Harv L Rev 747, 747 (2011).

<sup>71</sup> Richard Boyd, *Uncivil Society: The Perils of Pluralism and the Making of Modern Liberalism 1* (Lexington 2004).

<sup>72</sup> Levy, *Rationalism, Pluralism, and Freedom* at 2 (cited in note 28).

<sup>73</sup> For a similar conclusion, see Richard W. Garnett, *Religious Accommodations and—among—Civil Rights: Separation, Toleration, and Accommodation*, 88 S Cal L Rev 493, 498–99 (2015) (noting that when the current debate over religious accommodation is seen as one of “religious liberty vs. civil rights” instead of one of “religious freedom and, among, civil rights, . . . [t]his approach tends to produce a narrative in which religious liberty claims and claimants are difficulties to be managed, obstacles to be negotiated, or even enemies to be defeated”) (brackets and quotation marks omitted).

<sup>74</sup> See Martin R. Castro, Chairman of the US Commission on Civil Rights, Letter to President Barack Obama, Vice President Joe Biden, and Speaker of the House Paul Ryan, in *Peaceful Coexistence: Reconciling Nondiscrimination Principles with Civil Liberties* (US Commission on Civil Rights, Sept 2016), archived at <http://perma.cc/BV4Y-PJSS>.

<sup>75</sup> Robert Post, *Law and Cultural Conflict*, 78 Chi Kent L Rev 485, 502 (2003), citing Nancy L. Rosenblum, *Membership and Morals: The Personal Uses of Pluralism in America* 36–41 (Princeton 1998). See also Rosenblum, *Membership and Morals* at 36–38 (cited in note 75) (describing the “logic of congruence” as insisting that “the internal life and organization of associations mirror liberal democratic principles and practices,” including those egalitarian principles and rules instantiated through generally applicable laws).

<sup>76</sup> See *Peaceful Coexistence* at \*29 (cited in note 74) (statement of Chairman Martin R. Castro, US Commission on Civil Rights) (“The phrases ‘religious liberty’ and ‘religious freedom’ will stand for nothing except hypocrisy so long as they remain code words for discrimination, intolerance, racism, sexism, homophobia, Islamophobia, Christian supremacy or any form of intolerance.”). See also *id* at \*25 (noting the report’s first finding: “Civil rights protections ensuring nondiscrimination, as embodied in the Constitution, laws, and policies, are of preeminent importance in American jurisprudence”). Both of these statements exemplify current progressive arguments and tropes in this area: (1) the now-inevitable placement of scare quotes around the phrase “religious liberty,” see pp 23–24; and (2) the apparent position that nondiscrimination laws and policies should take

stated but weakly rooted big-tent argument for confident pluralism in such an environment?

What is needed, I think, is a shift away from thinking about pluralism as a fact to be managed—whether supportively, as in Inazu’s book, or in a more statist and equality-centered way, as in the current position of many rationalist liberals—and toward a view of pluralism as a positive value and a good in itself. I have argued for this before.<sup>77</sup> As before, I leave the shape of this argument underdeveloped here.

That is, perhaps, an admission of sorts. It is *hard* to develop a positive, normative argument for pluralism as a good in itself. And, like a religious liberty–protective or an egalitarian argument about culture-war issues, a positive argument for pluralism must address not only the *goods* of pluralism, but also its inevitable problems and conflicts. Moreover, like those who champion “diversity” without acknowledging its multiple and contested definitions,<sup>78</sup> the positive pluralist must define a particular brand of pluralism, despite *its* multiple and contestable definitions. The moment one defines it, or sets its limits, one begins to invite disagreement and lose allies. One can sympathize with Inazu’s decision to leave pluralism largely undefined and unjustified: to speak in terms of general aspirations and principles, to emphasize the need to work them out in individual cases, and to direct his advocacy to a hypothetical reasonable reader, who will be able to apply multiple factors and recognize sound limiting principles.<sup>79</sup> It may be that people who argue for pluralism as a good in itself are really just arguing for a set of substantive positions and resolutions on

---

precedence over the Free Exercise Clause, or over religious freedom laws (like RFRA) or policies. See *Peaceful Coexistence* at \*108 (cited in note 74) (statement of Commissioner Peter Kirsanow, US Commission on Civil Rights) (criticizing the report’s first finding on these bases). See also Marc O. DeGirolami, *Virtue, Freedom, and the First Amendment*, 91 Notre Dame L Rev 1465, 1507 (2016) (arguing that leading contemporary critics of a strong pluralistic version of religious freedom treat “regulatory rights [and] statutory civil rights” as “stand[ing] in a superior position of legitimacy and importance” to “rights with a textual basis in the Constitution,” like the Free Exercise Clause, and thus “shuffle[ ] the hierarchy of rights and freedoms the better to suit [their] own preferences”); Garnett, 88 S Cal L Rev at 497, 500, 509 (cited in note 73) (noting that religious freedom is itself a “civil right” entitled to equal weight alongside other civil rights, including nondiscrimination rights).

<sup>77</sup> See Horwitz, 91 Notre Dame L Rev at 1302–05 (cited in note 23).

<sup>78</sup> See Levinson, 2 U Pa J Const L at 578–79 (cited in note 59).

<sup>79</sup> See p 63 (listing possible factors by which to judge private public forums); p 37 (asking, of the appeals court decision that the Top Hatters Motorcycle Club was a nonexpressive association, whether it “pass[ed] the test of common sense”); p 12 (asserting that “I would like to think of myself as part of the reasonable middle,” but acknowledging that “what counts as ‘the reasonable middle’ is usually in the eye of the beholder”).

particular issues, and that in this they are in the same position as those who argue more forcefully for liberty or equality, liberalism or conservatism, one side of the culture wars or the other.<sup>80</sup>

I think this point is overstated. I believe there is *something* to the possibility of arguing for pluralism as a distinctive positive good rather than a mere “claim of descriptive sociology” to be managed.<sup>81</sup> There is a real difference between an approach that treats equality (or liberty) as the good to be realized, leaving pluralism to be slotted into or reconciled with that master value, and an approach that starts with pluralism as a positive feature of our society and treats liberty and equality as factors to be weighed and considered as means of helping pluralism itself flourish. At the least, it moves away from the “logic of congruence” and an overly state-centered approach to our social and political structure.<sup>82</sup> And it demands suppleness about the different meanings of “liberty” and “equality” themselves, and about the possibility that the “official” legal versions of these values do not apply everywhere or with equal strength or meaning in different legal and non-legal contexts.<sup>83</sup>

Such an approach demands that we treat the law’s relationship to religious and other groups, and to views that dissent or depart from standard liberal-democratic norms, as “an ‘existential encounter’” between two genuinely legitimate and equally significant groups, “in which each side tries to make sense of and decide whether or how to make room for the other.”<sup>84</sup> The answer to that question is sometimes “badly” or “not at all.” But the positive pluralist approach does not privilege one side of that encounter unduly, or assume that “making room for the other” should be decided only by the state and only on the basis of “preeminent”

---

<sup>80</sup> On this point, and on skepticism toward pluralism as a good in itself generally, I am grateful to Professors Richard Garnett and Marc DeGirolami for discussions.

<sup>81</sup> Levy, *Rationalism, Pluralism, and Freedom* at 27 (cited in note 28).

<sup>82</sup> See Perry Dane, *Master Metaphors and Double-Coding in the Encounters of Religion and State*, 53 San Diego L Rev 53, 54–55 (2016) (noting that “legal pluralists of various stripes [ ] refuse to assume that the state holds a monopoly on the phenomenon of law and legal obligation”).

<sup>83</sup> See Richard W. Garnett, *Religious Freedom and the Nondiscrimination Norm*, in Sarat, ed, *Legal Responses to Religious Practices in the United States* 194, 195–201 (cited in note 39).

<sup>84</sup> Dane, 53 San Diego L Rev at 55 (cited in note 82).

liberal master values. There is room for this approach within liberalism itself, although it may be a minority strain of liberalism.<sup>85</sup> There is room for it *outside* liberalism.<sup>86</sup> And there are pluralist arguments and vocabularies that are not easily slotted into one category or another.<sup>87</sup>

What *is* true is that this positive form of pluralism, and the refusal to align oneself with the standard divides and oppositions of the culture war, will probably remain in the minority, just as it did in previous cycles when pluralism arose as a “third way” solution to the culture wars. Neither liberals nor conservatives—those who rely on the authority of the liberal state and its values or those who appeal to religious authority and values—will necessarily have any interest in adopting an alternative approach or vocabulary. Both sides may see such an approach as subordinate to some master value, or as illegitimate or incoherent. As I discuss in the next Part, they may also reject positive pluralism for reasons of timing: they may reject an approach that requires unnecessary compromise or premature surrender in a war they believe they are winning or are predestined to win.

### III. IS IT TOO LATE?

Perhaps I am selling *Confident Pluralism*—the book and the idea—short. Professor Inazu’s book is grounded in “a confidence in the political arrangement that we call the United States of America,” and in the existence of “some basic level of agreement about how to live with [our deep] differences” (pp 131–33). What if he is right—and at just the right time to help save us? Again, there is room for doubt.

---

<sup>85</sup> See Levy, *Rationalism, Pluralism, and Freedom* at 2 (cited in note 28); Galston, *Liberal Pluralism* at 39–47 (cited in note 21); Mark D. Rosen, *Religious Institutions, Liberal States, and the Political Architecture of Overlapping Spheres*, 2014 U Ill L Rev 737, 768–73 (deriving an argument for “special protections” for religious institutions from Rawls’s original position behind the veil of ignorance).

<sup>86</sup> For example, Professors John Gray and John Kekes both refer to “value pluralism,” which differs from pluralism as such, and argue for its ultimate incompatibility with liberalism. See John Gray, *Where Pluralists and Liberals Part Company*, in Maria Baghramian and Attracta Ingram, eds, *Pluralism: The Philosophy and Politics of Diversity* 85, 94–99 (Routledge 2000); John Gray, *Isaiah Berlin* 141–68 (Princeton 1996); John Kekes, *The Morality of Pluralism* 199–203 (Princeton 1993). For a largely religious argument for “principled pluralism,” see *What Distinguishes the Center for Public Justice?* (Center for Public Justice), archived at <http://perma.cc/9F9A-3LBE>.

<sup>87</sup> See, for example, William E. Connolly, *Pluralism* 3–7 (Duke 2005) (articulating a positivist “multidimensional pluralism” based on a “bicameral orientation” toward politics and contrasted with religious and cultural “unitarians”).

From an optimistic perspective, *Confident Pluralism* is perfectly timed, coming when the culture war is at its height and a solution is all the more welcome. A more pessimistic reading of our situation, however, is that the book is already too late. To be effective, pluralist interventions in a culture-war cycle require a very specific hospitable environment. The intervention must come when there is enough heated disagreement to make an alternative to the shouting seem attractive. But it must also occur while both sides agree that there *is* a war, and think of either side as having a serious chance of winning it, leaving them amenable to compromise and coexistence. That is a pretty small window—and it may already have closed.

This view appears in recent academic discussion as well as more overtly political argument. Professor Andrew Hartman's recent history of the culture wars—published in April 2015, before the new cycle of campus controversy had reached its height with protests at Yale, the University of Missouri, and elsewhere—concludes confidently: “This book gives the culture wars a history—because they *are* history. The logic of the culture wars has been exhausted. The metaphor has run its course.”<sup>88</sup> (Now *that* is a timing problem.) In a slightly different vein, Professor Stephen Prothero argued recently not that the culture wars are over, but that history shows that liberals almost always win them.<sup>89</sup>

Prothero does not view this as a reason for liberals to “press [ ] for total victory in our culture wars.”<sup>90</sup> But others disagree. They think they have already won the culture wars, and that it is time to consolidate their victory. At a minimum, there is no need for political compromise.<sup>91</sup> In a response to Inazu's book<sup>92</sup> and a striking prior post on the *Balkinization* blog,<sup>93</sup> Professor Mark

---

<sup>88</sup> Hartman, *A War for the Soul of America* at 285 (cited in note 12).

<sup>89</sup> See generally Prothero, *Why Liberals Win the Culture Wars* (cited in note 12).

<sup>90</sup> *Id.* at 258.

<sup>91</sup> See William L. Saunders, et al, *Religious Liberty after Hobby Lobby: A Panel of the 2014 Federalist Society National Lawyers Convention*, 48 Conn L Rev 969, 981–82 (2016) (quoting Professor Robin Fretwell Wilson's discussion of a withdrawal of support by LGBTQ, civil liberties, and civil rights groups for legislative compromises involving exemptions from nondiscrimination laws following the Court's decision in *Hobby Lobby*).

<sup>92</sup> See Mark Tushnet, *Tolerance, Humility, Patience, and Asymmetric Accommodations* (Balkinization, June 4, 2016), archived at <http://perma.cc/8SCR-HV6F>. It is amusing, and characteristic of the culture wars, that Professor Steven Smith finds the current state of accommodation asymmetric in the *other* direction. See Smith, 88 S Cal L Rev at 718–25 (cited in note 39).

<sup>93</sup> See Mark Tushnet, *Abandoning Defensive Crouch Liberal Constitutionalism* (Balkinization, May 6, 2016), archived at <http://perma.cc/8KNA-4FPW>.

Tushnet argues that “[t]he culture wars are over; they lost, we won.”<sup>94</sup> The only remaining question is “how to deal with the losers.”<sup>95</sup> The answer is that “taking a hard line . . . is better than trying to accommodate the losers.”<sup>96</sup> To the extent that Inazu’s confident pluralism is perceived (wrongly, I think) as a rearguard measure, a way of securing some last measure of mercy from the victors, it seems less likely than ever to find willing takers.<sup>97</sup>

Tushnet believes “taking a hard line [is] strategically the best thing to do,” but says he is “perfectly happy to have conversation about whether there are better strategies.”<sup>98</sup> I think he *is* wrong, descriptively, strategically, and normatively. Having already put my pluralist cards on the table, I need not expound on the normative point. Descriptively, there is no doubt that there have been significant and long-overdue changes in specific areas, such as the general acceptance of the equal dignity and rights of the LGBTQ community, at least on issues such as same-sex marriage, and no doubt on many others.<sup>99</sup> Not so long ago, even an ostensibly progressive president apparently felt compelled to take a more traditionalist public position on same-sex marriage, long after many (myself included) had reached a contrary conclusion.<sup>100</sup>

But it is hardly clear that the culture wars end once a national majority reaches a consensus on some particular set of issues. For one thing, we do not live in a country with an evenly or randomly distributed population. It is increasingly sorted into separate enclaves. In those enclaves, views may harden as well as soften, and resistance may grow more rather than less fierce.<sup>101</sup>

---

<sup>94</sup> *Id.* (emphasis omitted).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> See Tushnet, *Asymmetric Accommodations* (cited in note 92) (arguing that Inazu’s perceived focus on accommodation by “secular liberals” rather than religious conservatives and others on that side of the line amounts to an asymmetric plea for liberals to be merciful rather than for conservatives to face up to their defeat and advance compromises of their own). See also Barton Swaim, *The Left Won the Culture War. Will They Be Merciful?* (Wash Post, May 27, 2016), archived at <http://perma.cc/8AW9-VFHQ> (describing some recent conservative proposals for principled pluralism or pluralist subsidiarity as a post-defeat effort “to remain who they are and to live as amiably and productively as they can in a culture that doesn’t look like them and doesn’t belong to them”).

<sup>98</sup> Tushnet, *Asymmetric Accommodations* (cited in note 92).

<sup>99</sup> See *Changing Attitudes on Gay Marriage* (Pew Research Center, May 12, 2016), archived at <http://perma.cc/X2YJ-3SCE> (showing a steady increase in the percentage of US adults who favor same-sex marriage).

<sup>100</sup> See Zeke J. Miller, *Axelrod: Obama Misled Nation When He Opposed Gay Marriage in 2008* (Time, Feb 10, 2015), archived at <http://perma.cc/VQE3-G9N7>.

<sup>101</sup> See generally Bishop, *The Big Sort* (cited in note 30) (discussing geographical sorting and its political and cultural effects); Dunkelman, *The Vanishing Neighbor* (cited in

That phenomenon does not make confident pluralism any likelier. But neither does it warrant confidence in a final victory in the culture wars. Moreover, there is always another issue to start the cycle going again. *La lucha continua* is a permanent social fact, not just a slogan.

Strategically, Tushnet offers no evidence that a hard line will win the peace or consolidate liberal gains. He does offer some historical analogies, writing that “[t]rying to be nice to the losers didn’t work well after the Civil War, nor after *Brown*. (And taking a hard line seemed to work reasonably well in Germany and Japan after 1945.)”<sup>102</sup> Historical analogies are always dangerous. Even the ones Tushnet selects are dubious. There were compelling *moral* reasons to take a hard line after the Civil War and the *Brown* decision, but whether taking a harder line faster would have worked better, or would instead have fomented even more reaction, is a matter for historical analysis and conjecture. And it is historically questionable to say that the Allies took a “hard line” after World War II. The proposed Morgenthau Plan *was* a hard line, but it was rejected, to the ultimate benefit of both Germany and US-German relations.<sup>103</sup> And much depends on whether Tushnet has selected either the *right* examples or the *only* ones. Did the harder-line Treaty of Versailles really “work reasonably well”?<sup>104</sup> In eras of greater conservative public consensus, did every conservative move and every conservative judicial decision achieve a lasting gain and cow liberals into acquiescence?

I won’t prolong that argument. Even if the culture wars are not “over,” it may still be true that Inazu’s pluralist intervention

---

note 30) (arguing that shifts in the habits and routines of American “community” have left Americans more isolated from incidental interactions with people of other classes or views); Horwitz, 91 Notre Dame L Rev 1301 (cited in note 23) (discussing the value of accommodation in light of the threat that in its absence some groups will become more, and more fervently, illiberal, even if other segments of that group become more mainstream or liberalized in their views).

<sup>102</sup> Tushnet, *Abandoning Defensive Crouch Liberal Constitutionalism* (cited in note 93).

<sup>103</sup> See Michael Beschloss, *The Conquerors: Roosevelt, Truman, and the Destruction of Hitler’s Germany, 1941–1945* 108, 115–17, 124–25, 148–49 (Simon & Schuster 2002) (describing Treasury Secretary Henry Morgenthau’s proposal to essentially turn Germany into a giant demilitarized agricultural zone and its ultimate rejection by President Franklin Delano Roosevelt in favor of reconstruction and aid).

<sup>104</sup> For a condensed view of the Treaty of Versailles and its effect on interwar Germany, see Colin Storer, *A Short History of the Weimar Republic* 114–40 (I.B. Tauris 2013) (explaining that attempts to evade and overturn the Treaty of Versailles dominated the foreign policy of the Weimar Republic, and that the ultimate failure of “peaceful revision” of the situation contributed to the success of the Nazis by vindicating their more aggressive tactics).



has come too late, at least for the current cycle. There's always the next cycle, of course. But for now, we may be past the point of productive compromise on the issues that Inazu focuses on, or past the point at which people are interested in finding "modest unity" rather than accentuating their "deep differences." And to this suggestion I would add one final, crucial data point—one that seems to me to cut firmly *against* the idea that the culture wars are over, without necessarily making it more likely that Inazu's book will succeed at winning over new adherents to pluralism. That data point is the same one that we started with: the short-fingered data point whose swift political rise so rudely interrupted our good old-fashioned on- and off-campus culture wars. Its name, of course, is President Trump.

This Review was commenced in the fall of 2016, when we did not know whether Trump would win or lose the election, and completed in December 2016, after his stunning victory and in the middle of efforts to come to terms with and explain it. But even before that victory, his rise itself was important. Few now doubt that his rise and ultimate electoral triumph involved *some* kind of meaningful—which is not to say correct or coherent—mass response to the condition of our society and its economic and cultural struggles. On this view, at least *part* of this phenomenon is a distrust of elites, a dislike of political correctness, and a discomfort with what supporters see as the imposition on them of the kind of enforced settlement of the culture wars that Tushnet's posts seemed to advocate.<sup>105</sup> They represent, at least in part, a populist sentiment, mirrored in other ways by those to the left of the mainstream Democratic Party, and directed against the very establishment—generally well credentialed, affluent, and powerful—that Tushnet relies on to take a harder line.<sup>106</sup>

It's understandable that Tushnet's "hard line" post concludes, "Of course all bets are off if Donald Trump becomes President. But if he does, constitutional doctrine is going to be the least of

---

<sup>105</sup> See 'No More Political Correctness' for Trump Supporters (PBS, Apr 10, 2016), archived at <http://perma.cc/8EUP-AHS5>; Conor Friedersdorf, *A Dialogue with a 22-Year-Old Donald Trump Supporter* (The Atlantic, May 27, 2016), archived at <http://perma.cc/CJJ7-YTRP>; Ben Shapiro, *From Victims to Victimizers: The Left's Long Journey* (National Review, Dec 7, 2016), archived at <http://perma.cc/R49L-VFL5> (arguing that, with "the Left [having] already won the culture wars," it overreached, both by seeking to entrench and extend its victories and by having elites "judge red-state Americans as rubes [and] nasties," and that these "Americans reacted by telling the Left to shove it").

<sup>106</sup> See John B. Judis, *The Populist Explosion: How the Great Recession Transformed American and European Politics* 62–87 (Columbia Global Reports 2016).

our worries.”<sup>107</sup> Pithy, to be sure, and perhaps accurate. But those lines were written in May 2016, when most elites still believed the joke would soon be over and the race effectively decided in favor of the “victorious” side in the culture wars. Trump’s victory suggests, contrary to Tushnet’s treatment of this point as an afterthought, that these two things—the urging of a liberal “hard line” and the rise of an anti-elite conservative populist movement<sup>108</sup>—are closely connected.<sup>109</sup> That victory simultaneously disrupted and entrenched the culture wars. It suggested that neither side was interested in the kind of compromise and coexistence that Inazu advocates, at least as long as victory was in prospect. And now that the pre-election expectations of the elite culture warriors have been upset in ways that *might* counsel compromise, there is a good chance that both sides will either double down<sup>110</sup> or head to the barricades on other and bigger issues rather than coming together.

### CONCLUSION

Although this is a critical review, *Confident Pluralism* is a good and valuable book. Its aspirations, principles, and imperatives, to use Professor Inazu’s terms, are all subject to question. But they are reasonable, they *do* listen to both sides, and they offer an attractive ethos with which to approach our cultural divide, however much they leave open to an uncertain resolution.

---

<sup>107</sup> Tushnet, *Abandoning Defensive Crouch Liberal Constitutionalism* (cited in note 93).

<sup>108</sup> The movement is led by a wealthy man, to be sure; but it is hardly unusual that populist movements are led by individuals who are not themselves “of the people,” but who can spark a populist movement or recognize and exploit a populist moment. See Judis, *The Populist Explosion* at 71–74 (cited in note 106).

<sup>109</sup> See Nathaniel Peters, *Stumbling toward a Compromise* (Library of Law and Liberty, Dec 15, 2016), archived at <http://perma.cc/8HBW-3J8L> (quoting a tweet by the columnist Megan McArdle on the day after the election, which pointed to Tushnet’s blog post for those who “want to understand why evangelicals could vote for someone of Trump’s morals”).

<sup>110</sup> Unsurprisingly, Trump’s victory has encouraged some conservatives to simply adopt Tushnet’s recommendation while reversing its terms. See, for example, Randy Barnett, *Abandoning Defensive Crouch Conservative Constitutionalism* (Wash Post, Dec 12, 2016), archived at <http://perma.cc/G3PX-AXUN>. As a libertarian, Professor Randy Barnett’s own recommendations do not track those of cultural conservatives, but I do not doubt that they would agree with the tenor of his post, if not its specifics. See id (“Tushnet want[ed] the courts to ram his side of the culture war down the throats of any recalcitrant Americans he calls ‘losers.’ But the Trump victory represents a repudiation of Tushnet’s claim that the culture war has already been won by the Left. The ‘losers’ have struck back.”).

Most important, in my view, is the *fact of Confident Pluralism*. Like other expressly pluralist interventions, it comes at a moment, during one of our recurring culture wars, in which debate hardens around the poles and those poles move ever farther apart. The culture-war cycles tend to subside. A few years after the campus crises of the 1990s, everyone was focused on other things. But they always come back. In or around each cycle, a pluralist intervention also occurs, and these interventions have provided some of the richest and most inspiring literature, offering a welcome alternative to the tedious trading of blows between left and right, even if they have made relatively few converts.

In this cycle, too, I expect that voices and arguments like Inazu's are destined to remain in the minority. Given that, I think he would not have lost anything, and might have gained something, by forgoing the strategic benefits of incompletely theorized agreement and putting forward a more particular and direct case for a positive pluralism, one that is forthright about advocating pluralism for its own sake, rather than as a kind of conflict-resolution device.

But one voice is too small even to be called a minority. I hope Inazu's will be one of many voices advocating pluralism. If it is, we can expect plural variants of arguments for and definitions of pluralism—some based on the “fact” of pluralism and others based on the value of pluralism itself. I doubt highly that the culture wars are “over,” or even that the current culture-war cycle is over. In that sense, his book is all the more necessary and all the more timely. That is *one* possible lesson of the rise and triumph of President Trump.

Unfortunately, the other possibility is that *Confident Pluralism* comes too late, or at least at the wrong time. Beyond the *outcome* of the election, the fact that it happened this way may suggest that between those who favor a hard line on one side and those who favor populism and revanchism on the other, our differences are too deep, our unity too modest, our interest in bridging the gap too small, and the “reasonable” people in the middle who populate the establishment too weakened by isolation and political realignment to be of much help.

Those of us who find positive pluralism intellectually interesting, or compelling in some deeper sense, or both, are thus likely to remain a minority at best, affecting the debate around the edges but not altering it much. Indeed, given the extraordinary circumstances of the present moment, arguments for pluralism as

a good in itself may be even less influential—and *much* more unwelcome—at present than they usually are during culture-war cycles. Not many populists are interested in having a conversation with elite establishment types about the modest unity that lies at the heart of their deep differences, and vice versa. Nor is either side interested in hearing that, rather than competing for control of the state and the culture, they should be seeking the proliferation of multiple sites of community, culture, and authority, both liberal and illiberal.

Positive pluralists must be optimists of a sort, however. This too will pass. Another cycle will emerge, another culture war will erupt, and again we will argue for pluralism as a genuine and distinct alternative. Like Gatsby, we will believe in the possibility of something that “eluded us then” and probably will elude us again.<sup>111</sup> I see no alternative to this minority fate. That is true whether the pluralism in question is the more positive and potentially radical argument for pluralism as a good in itself or Inazu’s eminently reasonable confident pluralism, with its appeal to the ostensibly shared values of a polity that may not exist. So be it. Anyway, “that’s no matter—tomorrow we will run faster, stretch out our arms farther. . . . And one fine morning—”<sup>112</sup>

---

<sup>111</sup> F. Scott Fitzgerald, *The Great Gatsby* 141 (Cambridge 1992) (Matthew J. Bruccoli, ed).

<sup>112</sup> *Id.* (ellipsis in original).

