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■ **"Assembly Resurrected"**

Texas Law Review, Vol. 91 (Forthcoming)

UC Davis Legal Studies Research Paper No. 314

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This is a review of Professor John Inazu's book *Liberty's Refuge: The Forgotten Freedom of Assembly* (Yale University Press 2012). *Liberty's Refuge* is an excellent book with a dual agenda, one descriptive and one normative. The focus of the book is the right, delineated in the First Amendment, "of the people peaceably to assemble." Inazu begins by tracing the central role that the right of assembly played historically in political struggles, and in public perceptions of the First Amendment, through the middle of the Twentieth Century. He then traces the gradual transformation of the right of assembly, explicitly listed in the text of the Constitution, into a non-textual right of "association" during the 1940s and 1950s, as well as the narrowing of the right of association, combined with the complete abandonment of assembly as an independent right, during the period beginning in the early 1960s. Inazu concludes normatively, by making the case for the revival of freedom of assembly as a robust, independent constitutional right that will provide substantial protection to the internal composition and dynamics of groups.

The bulk of my review summarizes Inazu's argument, and relates his thesis to the ongoing scholarly revival of interest in the First Amendment, especially aspects of the First Amendment aside from freedom of expression. I conclude by considering one important question which Inazu's book does not focus on closely, which is the distinctly religious nature of the private groups – i.e., "assemblies" – which are the focus of Inazu's analysis. I note that in recent years most of the disputes over group rights have involved religious or quasi-religious groups such as the Boy Scouts, the Christian Legal Society, and a myriad of religious groups seeking access to public property or resources. When one recognizes the central role that religious groups play in modern association/assembly disputes, however, a conundrum arises: why do these cases typically turn on the Speech and Assembly Clauses of

the First Amendment, and the related right of association, rather than on the First Amendment provisions which expressly address religion – the Establishment and Free Exercise Clauses? I note that in fact, recent Supreme Court decisions are quite incoherent on the question of whether regulation of religious groups is best analyzed through assembly/association or the religion clauses. But religion is different, a point that the Constitution recognizes in the religion clauses, especially the Establishment Clause, and by the Supreme Court's recent decision in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*. In particular, the Constitution treats religious and secular groups differently in how they relate to the state, suggesting that we should be looking to the Religion Clauses rather than other, more generalized parts of the First Amendment to resolve these issues.

"Section 5 of the Voting Rights Act and the 'Aggregate Powers' of Congress over Elections"

UC Davis Legal Studies Research Paper No. 313

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In *NAMUDNO v. Holder*, the Supreme Court suggested that Section 5 of the Voting Rights Act of 1965 was unconstitutional. The Court explained that Section 5, requiring preclearance of electoral changes in certain jurisdictions, rests on Congress's Fifteenth Amendment enforcement power, yet does not appear congruent and proportional to recent unconstitutional discrimination as required by *City of Boerne v. Flores*. Further, it imposes substantial federalism costs both because it interferes with local electoral practices, and because it does not apply uniformly to all states. *NAMUDNO* disposed of the case on other grounds, but an appeal squarely presenting the issue is before the Court.

This article proposes that *NAMUDNO* overlooks the fact that the Constitution grants Congress a portfolio of powers to regulate elections. In other contexts, the Court has referred to "an aggregate of the powers of the Congress," reading several powers together to understand the Constitution's intended scope. Several other provisions sustain Section 5: the Elections Clause (Article I, § 4) as to federal elections, and the Guarantee Clause (Article IV, § 4) as to state elections. Both provisions appear in the legislative history, and the court has previously discussed both in support of the Act. The Elections Clause and the Guarantee Clause grant Congress direct powers, so unlike legislation based on the Reconstruction Amendments, there is no necessity to measure Section 5 against constitutional violations. In addition, although Section 5 does not apply to all states, it is "uniform" under the Court's decisions requiring uniform exercise of federal powers.

Section 5 is a heartland exercise of the powers of Congress. The Elections Clause authorizes Congress to prevent misconduct in one state that might disadvantage other states or distort the national government. The Guarantee Clause is designed, among other things, to ensure that minorities do not wrongfully usurp lawful majorities of voters. The history of African American suffrage involved disenfranchisement of absolute majorities or of minorities so large that they could win with only a sliver of the non-African American vote. Today, in a closely divided nation, it is plausible that African Americans could provide the margin of decision in many elections. Accordingly, Congress legislated well within its powers when it enacted Section 5.

"The Gordian Knot of the Treatment of Secondhand Facts Under Federal Rule of Evidence 703 Governing the Admissibility of Expert Opinions: Another Conflict between Logic and Law"

University of Denver Criminal Law Review, Forthcoming
UC Davis Legal Studies Research Paper No. 310

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According to some studies, attorneys offer expert testimony at more than 80% of the trials in the United States. When an expert testifies, his or her direct testimony usually has a syllogistic structure: The expert vouches for the validity of a scientific theory or technique (the major premise); the expert then specifies the case-specific data that the theory or technique will be used to evaluate (the minor premise); and the result of the application of the major premise technique to the minor premise data is the expert's opinion (the conclusion).

In the Supreme Court's celebrated decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the Court held that Federal Rule of Evidence 702 determines which types of theories and techniques an expert may use as his or her major premise. In *Daubert* and its progeny, the Court explained that the theory or technique must be supported by enough, methodologically sound empirical reasoning to qualify as reliable "scientific, technical, or...specialized knowledge" under Rule 702.

In contrast, Rule 703 regulates the kinds of data that the expert may factor into his or her minor premise. As at common law, the expert may rely on personally observed facts and facts included in an hypothesis if other witnesses have already presented admissible evidence of all the elements of the hypothesis. However, the innovation in Rule 703 was that it also authorized the expert to rely on out-of-court, secondhand reports that were inadmissible under the hearsay if it was the reasonable, customary practice of specialists in the field to consider such reports. Until recently, the conventional wisdom has been that there was no need for the expert's proponent to independent, admissible evidence of the facts stated in such secondhand reports. Moreover, the orthodox view was that the judge should instruct the jury that although they could use not use the secondhand reports as

substantive evidence, they could consider the reports in evaluating the quality of the expert's reasoning and the weight of the expert's opinion.

Earlier this year the Supreme Court handed down its decision in *Williams v. Illinois*, 132 S.Ct. 221, 183 L.Ed.2d 89 (2012). *Williams* was a criminal case posing the question of whether a forensic scientist's reference to another laboratory's report violated *Crawford v. Washington*, 514 U.S. 36 (2004). *Crawford* announced that the Confrontation Clause forbids the introduction of a "testimonial" hearsay statement against an accused unless (1) the accused had a prior opportunity to question the declarant and (2) the declarant is unavailable at trial. However, the *Crawford* Court indicated that the Confrontation Clause is inapplicable to out-of-court statements used for a nonhearsay purpose at trial.

In *Williams*, the prosecution argued alternatively that the laboratory report had not been prepared for a testimonial purpose and that the report had not been used at trial for a substantive, hearsay purpose. The prosecution contended that like Rule 703, state law permitted the expert to use the report for a nonhearsay purpose. Five justices (a plurality led by Justice Alito and Justice Thomas concurring) voted to affirm *Williams*' conviction on the ground that the report was not testimonial. The plurality did so for the stated reason that the police had not identified a suspect at the time of the laboratory's test. Justice Thomas also characterized the report as testimonial but on the different ground that the report was informal.

Strictly speaking, the affirmance by that five-justice majority mooted all the other issues in the case. However, between Justice Thomas' concurrence and Justice Kagan's dissent, five justices – the 703 majority – expressly rejected the conventional wisdom about Rule 703. Those justices concluded that in order to decide whether to accept an expert opinion, the jury must use the secondhand reports for a substantive, hearsay purpose. Yet neither Justice Thomas nor Justice Kagan discussed the procedural implications of that conclusion.

The purpose of this article is to explore those implications. This article contends that the 703 majority is correct in asserting that it is illogical for the jury to accept the expert's opinion if an essential premise of the opinion is false. However, the thesis of the article is that although the falsity of an essential premise of an opinion renders the opinion irrelevant, in most cases it is sound to assign the relevance decision to the jury. Analogizing to the conditional relevance procedure codified in Federal Rule 104(b), the article argues that in the typical case it is a satisfactory solution to use of the sort of jury instructions mentioned in Justice Alito's plurality opinion. As a general proposition, it is unnecessary to empower the judge to decide whether the premises are true and to exclude the opinion if the judge concludes that an essential premise is false.

I do not presume to believe that such a short time after the rendition of *Williams* I can clearly forecast the ramifications of the 703 majority's conclusion. However, three things are clear. One is that the 703 majority's view is a fundamental challenge to the conventional wisdom about Rule 703. The second is that although the 703 majority's view is not a formal holding in *Williams*, lower courts are likely to pay attention to the fact that five Supreme Court justices forcefully expressed the view. The third is that while the formal holding in *Williams* affects only criminal cases, the 703 majority's view is of interest to any litigator who offers or opposes expert testimony.

"Anatomy of a Modern Day Lynching: The Relationship between Hate Crimes Against Latina/os and the Debate over Immigration Reform"

North Carolina Law Review, Forthcoming

UC Davis Legal Studies Research Paper No. 311

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This is a contribution to a symposium in the *North Carolina Law Review* on "Race Trials." For more than a decade, Congress unfortunately has been unable to pass legislation meaningfully reforming and improving the current immigration system. For reasons that will be laid out in the following pages, we unfortunately conclude that, absent such reform as well as other measures, the United States can expect racially-charged rhetoric, at times erupting in violence, to continue to sporadically grab the national headlines. Effective immigration reform might help ameliorate the civil rights costs of the current immigration enforcement scheme.

While waiting for Congress to act, the nation should take steps to ensure that the justice system effectively, efficiently, and fairly responds to civil rights deprivations, including hate crimes against Latina/os and immigrants. Besides responding to civil rights deprivations linked directly and indirectly to the enforcement of the current immigration laws, the measures would help generally improve the justice system's responses to racially-charged cases.

Our contribution to the "Race Trials" symposium considers the protracted legal battles to bring justice to the perpetrators of the killing of a young Mexican immigrant in rural Pennsylvania. From that sensational case, we attempt to draw more general civil rights lessons. The article specifically contends that hate crimes directed at Latina/os, which have been at consistently high levels for the entire twenty-first century, are in no small part tied to the prolonged -- and overheated -- national debate over immigration.

History offers lessons about today's hate violence directed against immigrants and Latino/as. As the terrorism of African Americans by the Ku Klux Klan for the century following the Civil War aptly demonstrates, hate violence has long been employed to maintain unequal power relationships in U.S. society, specifically racial subordination by whites of minority groups. Nor was such terrorism limited to the notorious Klan. Whippings, beatings, and lynchings of Blacks throughout the twentieth century by ordinary citizens were part and parcel of a concerted effort to ensure the survival of Jim Crow.

We in no way mean to suggest that the violence against Latina/os is identical to the unbridled terrorism directed at African Americans before and after the abolition of slavery for hundreds of years in the United States. That violence, however, serves a similar function of attempting to maintain racial hegemony in times of change and ferment.

At the dawn of the new millennium, Latina/o migration is figuratively and literally changing the face of communities across the country. These changes have brought forth responses. Hate crimes against Latina/os and immigrants, in addition to a racially-charged debate over immigration and the proliferation of state immigration enforcement laws, represent a troubling response to the changing racial demographics of the United States.

Part I of the article offers background surrounding the divisive national debate over immigration reform. Part II provides the context surrounding the tragic killing of a Mexican immigrant by a group of white teenagers in rural Pennsylvania, as well as the subsequent state and federal efforts to punish the wrongdoers and local police who sought to cover up the crime and shield the teens from criminal prosecution. As we shall see, although the U.S. government's efforts yielded decidedly mixed success, they nonetheless demonstrated a meaningful, visible public commitment to bringing justice to the wrongdoers.

Part III of the article outlines a variety of possible reforms that might help punish and deter hate violence directed at Latina/os and immigrants. The prescriptions all center on the need to address the deeply corrosive influence of race on the debate over immigration and, more generally, on the modern American justice system. They range from broad measures such as the enactment of comprehensive immigration reform to more focused remedies such as creating procedures designed to better enforce the ban on race-based preemptory challenges in jury selection.

"Does Geoengineering Present a Moral Hazard?"

Ecology Law Quarterly, Forthcoming

UC Davis Legal Studies Research Paper No. 312

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Geoengineering, a set of unconventional, untested, and risky proposals for responding to climate change, has attracted growing attention in the wake of our collective failure so far to mitigate greenhouse gas emissions. Geoengineering research and deployment remain highly controversial, however, not only because of the risks involved, but also because of concern that geoengineering might undermine climate mitigation and adaptation efforts. The latter concern, often described as a moral hazard, has been questioned by some but not carefully explored. This article examines the critical question of whether geoengineering presents a moral hazard by drawing on empirical studies of moral hazard and risk compensation and on the psychology literature of heuristics and cultural cognition. The article finds it likely that geoengineering efforts will undermine mainstream strategies to combat climate change and suggests potential measures for ameliorating this moral hazard.

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