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.” Subsequent events, such as protests at the University of Missouri and Yale, buttressed Chait's claim that political correctness was back.

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

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1990s over hot-button social issues such as school prayer, abortion, pornography, and so on, as well as the identity politics that roiled campuses.\(^3\)

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."\(^4\) He tied this development to broader social and demographic developments connected to the culture wars.\(^5\) 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.*,\(^6\) in the early summer of 2014, both exemplified these conflicts and presaged new ones, particularly with respect to LGBTQ rights.\(^7\)

Just as the academy is said to be divided between "lumpers" and "splitters,"\(^8\) 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.\(^9\) Twenty years is a popular


\(^5\) See id at 412–23.

\(^6\) 134 S Ct 2751 (2014).


\(^9\) 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.\textsuperscript{10} 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.\textsuperscript{11}

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.\textsuperscript{12}

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.\textsuperscript{13} 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,


\textsuperscript{12} See, for example, Andrew Hartman, \textit{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, \textit{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).

\textsuperscript{13} See Daniel T. Rodgers, \textit{Age of Fracture} 191–94 (Belknap 2011).
more intensely bound communities."14 This positive form of pluralism "morphed through many different formulations and took a multitude of names."16 Its adherents came from both camps, "confound[ing] the simple divisions of the culture wars."17 For this reason, pluralism was a "political wild card."18

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.19 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.20 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"21 achieved some rhetorical prominence and occasional policy endorsement in the Clinton administration, in which Galston worked.22

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

14 Id at 191.
15 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.
16 Rodgers, Age of Fracture at 191 (cited in note 13).
17 Id at 181, 194–98.
18 Id at 191.
20 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).
to a state of relative calm, interest in pluralism and its literature tends to fade as well.\textsuperscript{23}

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 [\textsuperscript{24}] as a distinctive approach of its own,”\textsuperscript{24} 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 \textit{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.\textsuperscript{25} \textit{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”\textsuperscript{26}—faces serious questions and difficulties.\textsuperscript{27} After providing a critical summary of the book in Part I, I argue in Part II that these questions remain largely unanswered in \textit{Confident Pluralism} because of Inazu’s strategic refusal to stake out a more distinctive and forceful theoretical position on pluralism itself.

\textit{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


\textsuperscript{24} Id at 1304.

\textsuperscript{25} See, for example, pp 26–28 (discussing his family’s experience as Japanese American internees during World War II).

\textsuperscript{26} Horwitz, 91 Notre Dame L Rev at 1303 (cited in note 23) (emphasis added).

\textsuperscript{27} 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. 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

28 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, cultural and geographical sorting, online balkanization, 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. The result is sharp disagreement, even the “demonization” of our adversaries.

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:

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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).34 Perhaps little more can be said about this. But it does suggest deeper difficulties in actually

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. More generally, it fails to appreciate the formative, “soul-making” value of group membership itself, and its importance in constituting a fully free, rich, and diverse society.

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

35 See pp 36–39 (providing the wonderful example of the Top Hatters Motorcycle Club).
36 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) (“While it is true that we speak and express ourselves through associations, we are also spoken to and formed by them and by their expression.”).
traditional public forums" (p 63), poses problems for him. Of
greatest interest, given current debates over religion and nondis-
crimination 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 196438 (pp 63–64).

Last, but not least controversial, is the “public funding re-
quirement”: “When the government offers generally available re-
sources (financial and otherwise) to facilitate a diversity of view-
points 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 discrimina-
tory or illiberal groups? What counts as “generally available,”
anyway? For that matter, what counts as “funding”? Direct or in-
direct subsidies, tax exemptions, or all of the above?

Here, too, a cross-cutting set of academic arguments and le-
gal 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 val-
ues,39 Inazu takes a more catholic position. Using the example of
governmental reluctance to grant tax-exempt status to a feminist

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38 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 Liber-
tarian 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 As-

39 See, for example, Corey Brettschneider, When the State Speaks, What Should It
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 Nonendorse-
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” (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. Later, in Bob Jones University v United States, 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. 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 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.

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41 The locus classicus is Runyon v McCrary, 427 US 160 (1976).
43 See id at 580–81, 605.
44 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 intertwining 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.
45 135 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, 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." 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." 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

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


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

These are somewhat shopworn recommendations. More interesting, if underdeveloped, 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”? 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”? 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,” or do we think more specifically about the smaller and

49 See p 115 (conceding that the collective action imperative is “somewhat underspecified”).
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. 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.54 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.55

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,56 such as the fact of pluralism or general aspirations like preserving unity despite deep differences.

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53 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).
54 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).
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.”\(^{57}\) Rather, “[i]t is [ ] the area where we disagree that cries for attention, and that area requires theorizing.”\(^{58}\) 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,\(^{59}\) 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.”\(^{60}\) Such a response, Marty noted, “fit in well with struggles at midcentury over the character of American politics, ethnicity, and religious life.”\(^{61}\) 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


\(^{58}\) Id at 535.

\(^{59}\) 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”).


\(^{61}\) 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 Smith62 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."63 Religious pluralism was viewed as a potential threat to a well-ordered society, and state power was seen as the proper response.64

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

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63 Id at 888–90.
68 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").
Across a range of culture-war and other issues, “[o]ur nation is increasingly beset with pluralism anxiety.”

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.” The “rationalist” strand of liberalism, with its “commit[ment] to intellectual progress, universalism, and equality before a unified law,” 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. As a recent statement by a majority of the US Commission on Civil Rights suggests, 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”—is ascendant in contemporary political liberalism and progressivism. What chances are there for a broadly
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.77 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,78 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.79 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
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.80

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.81 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.82 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.83

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."84 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"

80 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.
82 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").
84 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. There is room for it outside liberalism. And there are pluralist arguments and vocabularies that are not easily slotted into one category or another.

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.

85 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).


87 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."88 (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.89 Prothero does not view this as a reason for liberals to "press[] for total victory in our culture wars."90 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.91 In a response to Inazu's book92 and a striking prior post on the *Balkinization* blog,93 Professor Mark

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90 Id at 258.
Tushnet argues that "[t]he culture wars are over; they lost, we won." The only remaining question is "how to deal with the losers." The answer is that "taking a hard line . . . is better than trying to accommodate the losers." 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.

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." 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. 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.

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.

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94 Id (emphasis omitted).
95 Id.
96 Id.
97 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”).
98 Tushnet, Asymmetric Accommodations (cited in note 92).
99 See Changing Attitudes on Gay Marriage (Pew Research Center, May 12, 2016), archived at http://perma.cc/2YJ3-3SCE (showing a steady increase in the percentage of US adults who favor same-sex marriage).
101 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.)” 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. 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”? 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

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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).


104 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. 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.

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

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105 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”).

our worries." 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—are closely connected. 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 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.

107 Tushnet, Abandoning Defensive Crouch Liberal Constitutionalism (cited in note 93).
108 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).
109 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").
110 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. 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—”

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112 Id (ellipsis in original).