

Chapter 44

Freedom of Association

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44.1 Introduction to association*

Some 170 years ago Alexis de Toqueville wrote that no one and especially 'no legislator can attack [the freedom of association] without impairing the very foundations of society'¹ If Michael Walzer is to be believed, de Toqueville's fears of impaired foundations have been realized. Walzer asserts that 'associational life in the advanced capitalist and social democratic countries seems increasingly at risk. Publicists and preachers warn us of a steady attenuation of everyday cooperation and civic friendship . . . The Hobbesian account of society is more persuasive than it once was.'² If we continue to ignore the foundational nature of associations, Walzer concludes, we do so at our own peril.³

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In the first edition of this book, I argued that associations were essential components of a well-ordered society because they made good the promise of a variety of other

1 *Democracy in America* (1835) 222.

2 'The Civil Society Argument' in Chantall Mouffe (ed) *Dimensions of Radical Democracy* (1992) 89, 90.

3 Concerns about the fragility of associational life are not unique to advanced Western democracies. South Africa is fortunate to have a reasonably rich array of trade unions, civics, media, political parties, universities, legal structures, traditional communities, financial facilities and religious institutions. There is, however, a *thinness* about South African civil society.

This palpable thinness may be a function of a number of different historical antecedents. First, Apartheid was enormously successful in disrupting traditional ways of life, in flattening out, if not eliminating, the public space necessary for the spontaneous creation of a variety of secondary and tertiary associations and in re-inscribing invidiously exclusive communities. Second, much of the foreign money and energy that sustained the fight against Apartheid has disappeared. Third, as those once outside government have become part of government, the institutions from whence they came have lost some of their robustness. Fourth, the dominance of unbridled global market capitalism over the last decade may be responsible for the ongoing debasement of associational life.

rights and freedoms. I still believe that proposition to be true. However, the general framework for my defense of associational rights has shifted markedly.

I now claim that casting associational freedom as a *correlative* — or even a derivative — of other constitutional rights seriously underestimates the importance for individual and group identity of the *constitutive* attachments rooted in our associations. Given the centrality of associations for both the creation and the maintenance of identity — and the heterogeneity and *arationality* of choice in the domain of identity formation⁴— we should tread very carefully when we decide which associations merit constitutional solicitude.⁵ This second set of justifications is not a function of arid, philosophical considerations. It flows from some immediate concerns raised by the jurisprudence of our courts.

That said, recent studies of South African civil society suggest a richness that is not readily apparent. See Mark Swilling and Bev Russell 'The Size and the Scope of the Non-Profit Sector in South Africa' in *Johns Hopkins Comparative Nonprofit Sector Study* (2002). In their contribution to the *Johns Hopkins Study*, Swilling and Russell broadened the definition of Non-Profit Organization (NPOs) to fit South Africa's transition from exclusive authoritarianism to constitutional democracy. Co-operatives, burial societies and stokvels all provide kinds of community that standard analytical markers would not have captured. The study shows that the NPO sector has a full-time equivalent (FTE) workforce of 645,316, as compared with 534,000 in mining or 436,187 in national government departments. That number places South Africa well above the average of the 28 countries surveyed. South Africa's NPO FTE workforce percentage (7.9%) compares favourably with the US (11.9%), Norway (9.1%), Germany (8.0%) and more than favourably with Japan (4.6%), Italy (3.2%), Brazil (2.5%) and Mexico (0.7%). These South African NPOs have been in existence for an average of 19 years, with religious NPOs (38 years) and health NPOs (31 years) showing remarkable staying power. Moreover, NPO management is predominantly black (73%) and female (59%).

But as Swilling, Russell and others are quick to admit, those numbers don't tell the whole story. More than 53% of South Africa's NPOs must be classified as informal, voluntary community-based organizations (CBOs). The size and capacity of such CBOs will vary. As a general rule, however, their limited size and institutional capacity place significant limits on their ability to source funding and partnerships — whether public or private — that would enable them to survive, let alone flourish. See Gavin Andersson, 'Partnerships between CBOs, NGOs and Government in South Africa' (1999) USAID Policy Paper (Manuscript on file with author). Gerhard Kraak 'The South African Voluntary Sector in 2001' (2001) 3 *Development Update* 44.

At least one working assumption in this chapter is that a successful social democracy must be willing to provide various kinds of support for the creation and the maintenance of primary, secondary and tertiary associations. It may have to support associations that compete with one another in both the public and the private realm. Mr Justice Dennis Davis and I have argued that state support for various associations is a necessary pre-condition in South Africa both for rational public discourse and individual and group flourishing, see Stu Woolman and Dennis Davis 'The Last Laugh: *Du Plessis v De Klerk*, Classical Liberalism, Creole Liberalism and the Application of Fundamental Rights under the Interim and Final Constitutions' (1996) 12 *SAJHR* 361. See also Stu Woolman and Li Yu, 'The Selfless Constitution: Arationality and Agency in Identity Formation, Social Change and Constitutional Theory' (Forthcoming 2004). South Africa has developed a remarkably sophisticated legal framework for engaging civil society organizations in the development of public policy. See, eg, the Nonprofit Organizations Act 71 of 1997, the Lotteries Act 57 of 1997, the National Development Agency Act 108 of 1998, the Taxation Laws Amendment Act 30 of 2000, the National Economic Development and Labour Council Act 35 of 1994 and the Local Government Municipal Systems Act 32 of 2000. While these Acts favour established and institutionalized NPOs, they still create the basis for a broader participatory democracy. The challenge for South Africa is to create mechanisms that tap the 53% of NPOs that lack the institutional capacity to engage both the state and other actors in civil society.

A second working assumption of this chapter is the modern Toquevillian inclination to valorize private, formalized associations is unwarranted. There is no reason that public entities — statutory bodies or organs of state — cannot serve as meaningful settings for associational activity. Cf *Law Society of the Transvaal v Tloubatla* 1999 (11) BCLR 1275, [1999] 4 All SA 59 (T).

4 The extension of the term 'arationality' is discussed below in § 44.1(b).

This revised and enhanced appreciation for the freedom of association has led to the identification of a third strand of justifications for associational freedom: *capture*. Capture, unlike the correlative or the constitutive justifications for association, is unique to freedom of association. It is a function of — one might even say a necessary and logical consequence of — the very structure of associational life. In short, capture justifies the ability of associations to control their association through both exclusionary membership policies and the manner in which they order their internal affairs. Without the capacity to police their membership and their internal affairs, many associations would face such threats as hostile transformation or even extermination. Individuals, groups or even states opposed to the values of a given association could use ease of entrance, flexibility of voice or difficulty in discharge to change fundamentally the nature of an association. In a

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world without high transaction and switching costs for the creation of associations, this risk of penetration and alteration would be a tolerable state of affairs. We could form and unform associations as we liked.⁶ However, we do not live in such a world. In our world, because the costs of creating and maintaining associations are quite high, the fragility of associations means that most associations have an intrinsic interest in controlling entrance, voice and exit.⁷

Dissociation or the right not to associate is often viewed as an inevitable component of and thus fourth justification for the right to associate. Concerns about capture reveal, in part, why this is so. However, the domain of cases engaging the issues of compelled or forced association does not fall neatly or entirely within the domain of cases engaged by capture. Dissociation therefore demands a distinct line of analysis.⁸

5 As I note below in §44.1(b), constitutive attachments are not just of instrumental import and are not just important for the preservation of individual identity. The various associations that are the loci for such attachments provide the setting for all meaningful action and are a necessary precondition for any society, let alone a well-ordered one.

6 With regard to our constitutive attachments, most of the associations that give our life meaning are not chosen by us nor created by us nor structured by us. See § 44(b) *infra*.

7 For more precise definitions of entrance, voice and exit see § 44.1(c) *infra*. See also Albert Hirschman *Exit, Voice and Loyalty* (1970); Evelyn Brody 'Entrance, Voice and Exit: The Constitutional Bounds of Freedom of Association' (2002) 35 *UC Davis LR* 821.

8 Freedom *simpliciter* is a fifth justification often offered for associational rights. Many people have a gut sense that they must be free to choose those persons with whom they wish to associate. To some extent, it *is* just plain obvious that a liberal democratic society must be committed to some level of associational choice. However, as I have already intimated above and as I will argue further below, there are significant descriptive and prescriptive constraints on associational freedom. That is, we are not as free as we would like to think with regard to the associations to which we belong, nor are we as free to structure associations however we might like, nor, finally, should we be able to simply associate with whomever we please, however we please, whenever we please. The extent of and the limits of the 'freedom' in freedom of association shall become clear as we discuss the other grounds for protecting and sometimes limiting associational rights.

A sixth, and related, justification is the public/private distinction. The notion is that freedom of association is intended to protect a sphere of individual, and often private, autonomy. This justification is so under-inclusive and over-inclusive as to lack meaningful content. Though we want our intimate associations protected, we clearly also want to safeguard associations which are quite public — political parties, universities, trade unions, civics, professional regulatory bodies, park boards. Some of our intimate associations, the family, for example, control a range of social (read public) goods that may demand state intervention (read children). Most importantly, a

The foregoing grounds for protecting associations ought to suggest the fairly high degree of imprecision with which we often use the term 'association'. Associations may be formal or informal. They may be ascriptive in character or

voluntary. They may be incorporated or unincorporated.⁹ They may be public or private or some mix of the two. Consider the following list:

Nuclear families, extended families, friends, acquaintances, burial societies, fellow workers, neighbours, citizens, civics, lovers, sexual partners, religions, sects, book clubs, dinner guests, bowling clubs, fraternities, political parties, political action groups, stokvels, political lobbies, trade unions, corporations, non-governmental organizations, charities, guilds, professional regulatory bodies, schools, universities, committees, museums, park boards, economic trade associations, parent-teacher associations, school boards, tenant associations, co-op boards, landless peoples movements, co-operatives, internet forums, foundations, trusts.

The manifestly manifold nature of associations reflected in this list reveals, in turn, the brute fact that all human activity, well *almost* all human activity, involves some form of associational behaviour.

The plethora of associational forms makes it difficult to fit all associations into a single analytical framework.¹⁰ One can try. One might be inclined to break down the above list into three distinct categories. We can identify primary associations — such as families — where the contact is relatively intimate and our choice relatively limited. We can identify secondary associations — a parent-teacher association — where the engagement is focused, somewhat less intimate and somewhat more voluntary. We can identify tertiary associations — the Reproductive Rights Alliance — where our involvement is intermittent and our connection as transitory as we might like. As we shall see, however, even this thin schematic has limited heuristic value.

public/private distinction fails to explain how many associations host mechanisms that distribute a broad array of goods. For example, a university can supply cultural goods, economic goods, intellectual goods, recreational goods, intimate goods, empowerment goods and so on. A university is not unique in this regard — a museum or an internet site might well do the same. The point then is a simple one. Associations often provide a range of goods beyond those with which they are identified. Those secondary goods may be as important to the members as the primary goods.

9 Some commentators have asserted, without argument, that 'associations must have some sort of constitution, or at least a structure of decision-making before they will be protected.' Johan De Waal, Iain Currie and Gerhard Erasmus 'Association' in *The Bill of Rights Handbook* (2001) 341, 343. With respect, neither the grounds for protecting associational freedom nor the variety of South African associations that deserve protection warrant such a cramped understanding. (Likewise the author's unjustified asymmetrical treatment of the freedom to associate and the freedom to dissociate — the former must satisfy some set of formal requirements, the latter need not — underscores the need for analysis and not mere assertion.)

Of course, associations may need a constitution in order to satisfy statutory requirements for tax benefits or public funding. See, eg, the Nonprofit Organizations Act 71 of 1997, the Lotteries Act 57 of 1997, the National Development Agency Act 108 of 1998 and the Taxation Laws Amendment Act 30 of 2000. But that descriptive fact about statutory recognition has no bearing on the prescriptive character of constitutional protection.

10 David Cole notes that because 'virtually all conduct is at least potentially associational', we are presented with 'serious challenges to crafting a coherent jurisprudence.' 'Hanging with the Wrong Crowd: Of Gangs, Terrorists and Freedom of Association' (1999) *Sup Ct Rev* 203, 204. This difficulty does not prevent one from identifying an array of justifications for the freedom. To give up on a unified theory of everything associational does not require one to give up on theory.

Each member of the broad church of associations identified above possesses dimensions of involuntariness, choice, intimacy, recreation, politics, inclusion, participation and exclusion. No tripartite division addresses such core concerns in advance.

On the other hand, one can identify a golden thread running through all four primary justifications for associational freedom. This leitmotif might best be

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described as social capital.¹¹ Social capital *is* – and *is a function of* – our collective effort to build and to fortify the things that matter. It is our collective grit and elbow grease, our relationships and their constantly re-affirmed vows. Social capital emphasises the extent to which our capacity to do anything is contingent upon the creation and maintenance of forms of association which provide both the tools and the setting for meaningful action.¹² Social capital is often treated as ephemera. That makes sense. It is so hard to see. In fact, it is this elusive quality that makes social capital so fragile. It is made up, after all, not of bricks and mortar, but of relationships and commitments and the trust, respect and loyalty upon which they are dependent.¹³ Social capital links up the four primary justifications for the protection of associational life in the following manner. Social capital cuts across the various forms of associational life buttressed by other rights – the correlative. Social capital is what keeps our intimate, economic, political, cultural, traditional, reformist and religious associations going. Without it, nothing works. Social capital explains at least part of what is at stake for both individual identity and social cohesion – the constitutive. Social capital recognizes that we store the better part of our meaning in fundamentally involuntary associations. Squander that social capital, nothing that matters is. Social capital recognizes the dominant rationale for ceding control over

11 In the course of writing this chapter, I contrived 'social capital' as an apt neologism for what is ultimately at stake in most associational conflicts. But it is no neologism at all. Upon completion of this chapter, Gavin Anderson and Brahm Fleisch kindly directed me to the growing body of literature in sociology, political science and development studies on the definition, the value and the history of 'social capital'. See, eg, Robert Putnam *Bowling Alone: The Collapse and Revival of American Community* (2000) and *Making Democracy Work: Civic Traditions in Modern Italy* (1993); James Coleman *Foundations of Social Theory* (1990); Pierre Bourdieu 'Forms of Capital' in JC Richards (ed) *Handbook of Theory and Research for the Sociology of Education* (1986) 241. In *Bowling Alone*, Putnam defines social capital as follows:

Whereas physical capital refers to physical objects and human capital to the properties of individuals, social capital refers to social networks and the norms of reciprocity and trustworthiness that arise from them. In that sense, social capital is closely related to what some have called 'civic virtue'. The difference is that social capital calls attention to the fact that civic virtue is most powerful when embedded in a sense network of social relations. A society of many virtuous but isolated individuals is not necessarily rich in social capital.

Bowling Alone (supra) at 19. There is a signal difference between Putnam's account of social capital and the one developed in these pages. First, in this chapter, social capital is not assumed to be desirable primarily because of its instrumental link to civic virtue and the well-ordered society. Social capital is simply a cause and an effect of all stable associational frameworks. It is a predicate good for most other social goods. Second, because associational life is the necessary setting for most meaningful action, it makes little sense to speak, as Putnam does, of virtuous individuals in isolation. Virtue is a feature of human life that can exist only in the context of a densely woven fabric of social practices that define the good life.

12 Our deployment of our social capital is how things get done. In the absence of significant stores of social capital, the only tool for collective action is coercion.

13 See Anette Baier 'Trust and Antitrust' in *Moral Prejudices* (1995) 95, 96, 98, 128–129.

membership and purpose to the association — capture. Social capital recognizes both the real and the figurative sense of ownership that animates associational life. If anyone and everyone can claim ownership of and in an association, then no one owns it. Social capital takes seriously the threat of various kinds of compelled association. Trust, respect and loyalty have no meaning where the association is coerced. These several

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virtues can be earned, but never commanded. No trust, respect or loyalty: no social capital. No social capital: none but the most debased association.¹⁴

The obvious importance of social capital aside, I am not going to force some grand theory about the necessary conditions for a social democracy into the limited confines of a chapter on freedom of association. Rather, in the pages that follow, I hope to show how each of the four aforementioned grounds for protecting associational life support both social capital *and* different indicia for determining the level of support a particular kind of association should receive. The notions of the 'constitutive', the 'correlative', 'capture' and 'dissociation' should also enable us to unpack some of the reasoning behind existing South African case law on association.

(a) Associations as Correlative

Associational freedom makes participatory politics meaningful and genuinely representative politics possible. An individual is unlikely to have either the ability or the resources necessary to mount an effective campaign to convince large numbers of his peers that his position on a particular subject is correct. However, a like-minded group of individuals — with their collective insight, effort and resources — is far more likely to make itself heard. Once heard, they have the opportunity to influence fellow members of society. If they are able to influence a sufficiently large number of their fellow citizens, they can, perhaps, translate their influence into the election of representatives. These representatives, who wield the real power, may then effect the desired political change. Associations thereby provide the bridge from individual efforts to collective political action.¹⁵

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Associational freedom also secures so-called private goods. Most of us believe that our intimate associations are crucial to our self-understanding.¹⁶ The freedom of

14 The rhetoric should not be mistaken for the following logically transitive proposition: (1) if a = b; (2) if b = c; (3) then a = c. Trust, respect and loyalty may be pre-condition for social capital, but social capital is not reducible to those virtues.

15 The argument for constitutionally protecting political association might also be stated in the negative. That is, associational freedom acts as a brake on majoritarian tyranny by making it possible for individuals and minorities to challenge existing political majorities. The first challenge consists simply of a demonstration of numerical strength. The second challenge consists of developing arguments designed to persuade members of the existing majority to switch their allegiance and ultimately turn the present minority into the majority. Associations, on this account, make majorities fluid. And the more fluid the majority, so the argument goes, the less likely it will be to squash a minority: members of a fluid majority may well recognize that they could be on the receiving end should allegiances shift once again. See de Toqueville (*supra*) at 223. See also Dennis Davis 'South Africa and Transition: From Autocracy to What?' (1992) 18 *Centre for Applied Legal Studies Working Papers* 23 (only local and intermediate political associations can apply the sort of pressure necessary to spur the party elites into action and thereby ensure that the benefits of political liberation result in economic and social liberation); Robert Dahl *Polyarchy: Participation and Opposition* (1971).

association prevents the state from exercising too substantial an influence over our decisions about whom to love and how to love them.¹⁷

Associational freedom protects cultural goods. Cultural practices and affiliations — like intimate relationships — often form an integral part of our self-understanding.¹⁸ Cultural associations sustain these practices and affiliations. If, therefore, we wish to safeguard these basic or primordial attachments from undue state interference, then we must be willing to place cultural associations securely within the freedom's protective sphere. We might also wish to protect cultural associations for more instrumental reasons. For one thing, cultural associations often act as effective buffers between the individual and state power. For another, the greater the number of and more varied our cultural associations, the more enriched our national culture and our individual lives tend to be. For a third, cultural associations, like other associations, tend to fill the breach left by the decline of familial hierarchies and the concomitant increase in market-driven individualism. They mediate the anomie of modern society, often perform welfare functions the state is unable or unwilling to undertake, and generally function as the glue preventing social disintegration.

Associational freedom realizes economic goods. Business associations, for example, may realize certain efficiencies or advances through the sharing of price, product and technical information. Optimally, and ultimately, the benefits of such shared knowledge should flow to the consumer in the form of lower prices and better products.

Associational freedom advances social goods. The freedom enables individuals and communities to organize around particular issues of concern. It thereby permits these groups to contest and ameliorate the structure of social power in ways that are not directly political. It also allows them to organize in pursuit of activities that they just happen to enjoy.

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Associational freedom realizes social-uplift or substantive-equality goods. It frees labour to bargain collectively so that it may compete with capital on a more equal

16 But that self-understanding does not mean that we, as individuals, do have or should have relatively unfettered control over decisions about intimate relationships. See § 44.1(b) *infra*. See also Jed Rubenfeld 'The Right of Privacy' (1989) 102 *Harvard LR* 737 (The general effect of anti-contraception, anti-abortion, anti-homosexuality or anti-miscegenation laws is to force one's life into extremely limited patterns—patterns which inform, if not dictate, the totality of one's life. Seen this way, a right to intimate association is not about 'the freedom to do certain, particular acts' but rather the 'freedom not to have one's life too totally determined by a progressively more normalizing state'.)

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18 See Kenneth Karst 'Paths to Belonging: The Constitution and Cultural Identity' (1986) 64 *North Carolina LR* 303. Karst notes that cultural groups establish many of our 'primordial affinities'. These affinities 'not only provide a tie to other people, but also offer us our very selves'.

footing.¹⁹ It frees women to form educational institutions suited to their particular needs. If we believe that the economic empowerment of subordinated groups is a sufficiently pressing social goal, then we may want to insulate such associations from significant state interference so that these groups can advance their historically subordinated interests.²⁰

The foregoing list of goods should suggest that the sphere of liberty secured by the freedom of association is important for three very basic reasons. First, individuals (and groups) are freed to pursue or maintain those attachments which they believe are constitutive of their being. Such attachments might be intimate, cultural, religious or social. Secondly, individuals (and groups) are further freed to realize — spontaneously, if not consciously — a most important instrumental goal: a rich and varied civil society. This rich and varied civil society in turn serves many ends: facilitating social debate and participatory politics, providing a buffer between the individual and the state, sustaining a vibrant culture, and ensuring economic progress and advancement. Thirdly, the foregoing list of goods should also imply that if we withdraw constitutional protection from these various forms of association, our ability to protect individuals from the abuses of state power, as well as unchecked social and economic power, will be significantly diminished.²¹

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(b) Associations as Constitutive

(i) Associations as Constitutive of the Self

19 This chapter's treatment of association reflects several notable lacunae: it does not discuss closed-shop agreements, management bargaining units, or codetermination statutes mandating employee participation in corporate policy-making structures. These specialized areas of labour association law are at a distance from traditional associational concerns, are largely subsumed by the provisions governing labour relations entrenched in s 23 of the Final Constitution and the Labour Relations Act 66 of 1995, and are therefore best dealt with in the chapter on Labour Relations. See C Cooper 'Labour Rights' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition March 2004) ('*Constitutional Law of South Africa* (2nd Edition OS, July 2006) Chapter 53. The chapter will engage trade unions in so far as their practices shed light on associational issues generally. See also Report on Freedom of Association, Theme Committee Four, Fundamental Rights, Constitutional Assembly (1995)('The freedom in so far as it affects trade unions and employer associations should be dealt with separately under the rights and freedoms concerning labour relations.')

20 See Deborah Rhode 'Association and Assimilation' (1986) 81 *Northwestern University LR* 106 (associations of individuals from historically disadvantaged groups may engage in exclusionary practices, that would be deemed unjustifiable in associations made up of individuals from advantaged groups, where the social meaning of the association and exclusion is not invidious). See also Cathi Albertyn, Beth Goldblatt and Chris Roederer (eds) *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (2001) 123 for an allusion to the Act's potential for asymmetrical treatment of exclusionary practices in historically disadvantaged and non-disadvantaged associations. Thus, discrimination is not, ipso facto, an evil. What Professors Albertyn, Goldblatt and Roederer do not engage – and in fairness, cannot do so adequately given the limits of space – is the necessity of discrimination for life generally and for meaningful association in particular. However, when they do engage association-based discrimination, it seems to be given unduly short shrift. Too egalitarian an orientation so flattens and distorts associational life as to make it unintelligible. See § 44.2(b) infra.

21 For a general discussion of freedom of association under the Constitution of the Republic of South Africa Act 200 of 1993 ('Interim Constitution' or 'IC') as well as a detailed analysis of US, Canadian and German jurisprudence up through 1994, see Stu Woolman and Johan de Waal 'Freedom of Association: The Right to Be We' in David van Wyk, John Dugard, Bertus de Villiers & Dennis Davis (eds) *Rights and Constitutionalism* (1994) 338-86.

Associational freedom is often justified on the ground that it enables individuals to exercise relatively unfettered control over the various relationships and practices deemed critical to their self-understanding. But autonomy as the basis for associational freedom overemphasizes dramatically the actual space for self-defining choices. In truth, our experience of personhood, of self-consciousness, is a function of a complex set of narratives over which we exercise little in the way of (self) control.

Our notion of 'selfness' is a function, a very useful by-product, of a complex array of semi-independent neural networks that control the body's journey through life. This complex set of dispositional states are a function of both the deep grammar of our brains and the social endowments that have evolved over time to determine various patterns of behaviour. It should be apparent from this brief account that the self or the mind is a valuable abstraction and *not* an entity — or an internal observer or a boss — that stands back from experience and then dictates to the body what it does in response to various stimuli.²²

Each self then is *just* a centre of narrative gravity. Each centre of narrative gravity — each self — is a set of different, but overlapping narratives. Each narrative, or storyline, reflects a complex set of experiences and dispositional states organized around a particular form of behaviour. 'I' consist of narratives around my roles as a male, as an academic, as an English speaker, as a son, as a sexual being, as an American, as a tennis player, as a sleeper, as a cook, as a Jew, as a disabled person, as a friend of Anthony, as a listener, as a teacher, as a New Yorker, as bald, as the Managing Editor of *Constitutional Law of South Africa*. The list of narratives is not infinite — but it is almost as long and as varied as my life. The self then is that centre of narrative gravity, that self-representation, which holds together and organizes information, various storylines and dispositional states that make up my sense of 'me'. It is unique. The variety of narratives that make up 'me' is different in a sufficiently large number of respects to allow me to differentiate my 'self' from any other 'self'. It is relatively stable. Though my narratives and dispositional states are always changing, my self-representations enable me to see my 'self' as remaining relatively consistent over time.²³

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It is socially and physically determined. The self, and its various narratives, is thoroughly a function of physical capacities and social practices over which we have little control or choice.²⁴

22 This understanding of the self draws heavily upon contemporary analytic theories in the philosophy of mind. These accounts often rely, in turn, upon current studies in empirical psychology and neuro-physiology. See, in particular, the works of Daniel Dennett *Elbow Room* (1984), *Consciousness Explained* (1991) and *Freedom Evolves* (2003). See also Andrew Pessin and Sandy Goldberg (eds) *The Twin Earth Chronicles* (1996); Derek Parfit *Reasons and Persons* (1984). (This account elides the extensive debate around consciousness and identity. A literature review of that debate clearly does not belong here.) This 'de-centered' characterization of the self also features in many contemporary psychoanalytic, post-structuralist and post-modern theories of personhood. However, this functionalist account of the self does not share many of the epistemic commitments — and the anxieties of doubt — of much of what counts as post-modern.

23 Individuals who have suffered through accidents or illnesses often experience a radical break in terms of the self. A sense of self 'before' and a sense of self 'after'. Such is the difference between these different self-representations that an individual will often say 'I am not the same person'. Of course, they are correct. The different set of dispositions makes them a different person. (Many of us will have a similar sense of otherness when we think back upon our childhood.)

The conclusions we draw from this account of the self for our understanding of associational life are fairly straightforward. This account of the self should dispel the notion that individuals are best understood as 'rational choosers' of the ends they seek. The self should be seen as the inheritor and the executor of a rather heterogeneous set of practices — of ways of responding to or acting in the world. The centrality of inherited practices or social endowments for both the creation and the maintenance of identity introduces an ineradicable element of *arationality* into the domain of individual decision-making. That is, despite the dominance of the enlightenment vision of the self as a rational agent, the truth of the matter is that the majority of our responses to the world are *arational*. They are not reflective. They are not critical. They are not chosen. They just are.²⁵ It is this heterogeneous variety of associations and practices into which we are born and in which we continue to reside that determine substantially our responses to various events or phenomena. If this is so, then as a constitutional matter, the model of a rational individual moral agent which undergirds much of our current jurisprudence ought to be supplanted with a vision of the self that is more appropriately located in the associations to which we all belong.

Take for example the way in which our courts have dealt with Rastafarians in *Prince*²⁶, homosexuals in *National Coalition for Gay and Lesbian Equality I* and

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*II*²⁷ and sex workers in *Jordan*.²⁸ What links all of the judgments — majority and minority alike — is the model of the self as a rational moral agent.²⁹

24 See Richard Dawkins *The Selfish Gene* (1976) and *The Extended Phenotype* (1982) for a useful account of how patterns of learned behaviour — memes — replicate themselves over time through individuals, groups and societies. Like genetic replication, we need not be aware of the process of memetic replication for it to occur. Of course, human beings differ meaningfully from other species in their capacity to exercise some control over both genetic and memetic replication.

25 This use of the term *arational* may strike some as deeply counterintuitive. It may seem to sweep into the ambit of the arational, various processes most people are apt to describe as falling within the domain of the rational. The point is not to argue about terms. I would be happy to concede various natural and social processes as counting as amongst the many kinds of rational operations in which we engage. The point is the authorship of the processes themselves. We employ many natural and social processes in a fashion clearly intended to secure various ends. The fit between our means and ends, as well as the choice of the ends themselves, is often just what we mean by rational. We did not, as individuals, and often as groups, consciously create many of these processes. They are not the product of any one person's capacity to reason (though various individuals will have contributed to this vast array of processes). In this respect, they are *arational*. So when I say these responses 'just are', I am not denying that there might not be good reasons for them being so. I only deny that the ultimate source of the reasons, evolutionary adaptation or social adaptation, does not lie within the individual alone. Cf Edmund Burke 'Speech on Conciliation with America' (22 March 1775) (Burke wrote that 'it is a great mistake to imagine that mankind follows up practically any speculative principle, either of government or freedom, as far as it will go in argument or logical illation.') Like me, Burke is sceptical of reasoning from the bottom up. Unlike me, Burke is deeply cynical about our collective capacity for rational discourse.

26 *Prince v President, Cape Law Society* 2002 (2) SA 794 (CC), 2002 (3) BCLR 231 (CC) ('*Prince*') (Rastafarian use of cannabis in religious ritual justifiably impaired by criminal sanctions because the legislature has power and duty to enact legislation prohibiting conduct considered by it to be anti-social — whether court agrees with this assessment or not).

27 *National Coalition for Gay and Lesbian Equality v Minister of Justice and others* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC) ('*NCGLE I*'); *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC) ('*NCGLE II*').

The result of this dominant mode of analysis is that it overestimates the capacity of the individual to choose his or her own ends. Conversely, it underestimates the centrality of associations, endowments and practices for the formation of individual identity. If we were to shift our constitutional analysis to one in which we see associations as constitutive of the self, then we might be willing to treat individuals who participate in non-dominant forms of behaviour with greater respect. Eliminate the notion that individual Rastafarians 'choose' to smoke an illicit substance and supplant it with the assessment that Rastafarians simply engage in a marginal, but not especially dangerous, form of life. The result should be that we are willing to take more seriously the need to create a space for what many in our society view as aberrant practices.³⁰ Exemptions for other ways of being in the world supplant the desire to sanction non-conformist or non-dominant forms of behaviour. Judicial solicitude for rational individual choice — a stance that often inclines toward the belief in a single justifiable form of behaviour — is displaced by judicial solicitude for the arational, constitutive attachments that form the better part of our identity.

The recognition of the self as a function of arational, constitutive attachments does not mean that we must give each of these attachments our imprimatur of constitutional approval.³¹ Within the constraints of these social endowments, we

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still possess the capacity to make critical assessments. Within the constraints of these social endowments, we still possess the capacity to make reasoned judgments about right and wrong, good and evil.³² Indeed, it is the varied forms of attachments and dispositions that make up the self which provide each of us, and our society

28 See *S v Jordan (Sex Workers Education and Advocacy Task Force and others as Amici Curiae)* 2002 (6) SA 642 (CC) ('*Jordan*') (Women's right to engage in commercial transactions involving sex, though private and often involving economically marginalized classes, insufficient to outweigh state's interest in proscription through criminal sanction).

29 See *NCGLE I* (supra) and *NCGLE II* (supra).

30 See *Case v Minister of Safety and Security* 1996 (3) SA 617 (CC), 1996 (5) BCLR 609 (CC) ('*Case*') at para 99. In *Case*, Justice Langa distinguishes permissible from impermissible pornography. Criminal sanctions for child pornography make sense on the grounds of coercion and an inability to provide consent. Criminal sanctions on pornography featuring bestiality are not to be justified on the same grounds. But what if they were? Animals, or those persons with their interests at heart, would, at best, be indifferent to any distinction between our use for them as food and as sexual objects. Justice Sachs provides the putative grounds for such distinctions in *NCGLE I* (supra) at para 118: 'There are very few democratic societies, if any, which do not penalize persons for engaging in inter-generational, intra-familial, and cross-species sex, whether in public or in private . . . The privacy interest is overcome because of the perceived harm.' Aside from the fact that most societies, historically, have not only permitted but promoted inter-generational sex, neither tradition nor the status quo is an argument. With respect, it is just this sort of non-argument argument about 'perceived harm', that makes it so difficult for minority/aberrant practices to be taken seriously. Justice Sachs uses 'democratic societies' — and thus majority rule — as a screen. But as the honorable justice knows, it is accepted wisdom that a primary justification for judicial intervention in a constitutional democracy is to protect discrete and insular minorities against laws animated by the trivial 'harms' experienced by the majority.

31 We might begin with a predisposition in favour of creating a space for non-conformist behavior: let us say the disposition to smoke cannabis as a part of Rastafarian religious ritual. However, if this disposition were linked to a disposition to sell cannabis and other drugs to individuals outside the Rastafarian community, and this disposition led to behaviour that endangered the general welfare of society, then we would be well within our rights to ask that the sale of cannabis outside the Rastafarian community be legally proscribed.

collectively, with the critical leverage necessary for discriminating between more and less valuable forms of behaviour.

Thus, the recognition of associations as constitutive of the self does not mean that we eschew hard constitutional choices. It means, rather, that we ought to think twice before we differentiate individually between our preferred way of being in the world and that way of being preferred by others. Freedom of association rightly understood forces us to attend to the *arationality* of our most basic attachments and to think twice before we accord our arational attachments preferred status to the arational attachments of others.

(ii) Associations as Constitutive of Social Life

The constitutive nature of our attachments forces us to attend to another often overlooked feature of associations. We often speak of the associations that make up our lives as if we were largely free to choose them or make them up as we go along. I have suggested why such a notion of choice is not true of us as individual selves. It is also largely not true of associational life generally. As Michael Walzer has convincingly argued, there is also a 'radical givenness to our associational life.'³³ What he means, in short, is that most of the associations that make up our associational life are *involuntary* associations. We don't choose our family. We

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generally don't choose our race or religion or ethnicity or nationality or class or citizenship. Moreover, even when we appear to have the space to exercise choice, we rarely create the associations available to us. The vast majority of our associations are already there, culturally determined entities that pre-date our existence or, at the very least, our recognition of the need for them. Finally, even when we overcome inertia and do create some new association (and let me not be

32 The emphasis in this section on the arational sources of the self should *not* be understood as diminishing the place of reason in ethical, political and legal thought (or most fields of human inquiry for that matter). First, the place of instrumental reason and the ability of human beings to recognize regularities in the world means, at the very least, that we are able to discriminate between better and worse ways of realizing our preferred ends. Second, the more de-centered the self, the more varied forms of life the self draws upon, the more tools the self will have when deciding upon the preferred vision of the good life. Third, this account is not averse or opposed to the existence of some deep grammar of human reason — married to long-standing social conventions — that commits us to such varied ends as the family, the collective and the individual. Some may think it convenient that such a species of naturalism results in a commitment to such imperfectly reconcilable goods as freedom, equality, dignity and democracy. However, putting aside the current dominance of liberal and social democracy, these values or ends have competed with one another for primacy of place for several millennia. How one settles, *in a rational manner*, the differences between these ultimate ends is the very meat of ethical and political thought. Fourth, though there may be plenty of instances in which the evidence for our beliefs about the world leaves room for a certain amount of theoretical indeterminacy, I take it as given that most of our beliefs about the world are true *and* that we, humans, share most of those beliefs. Only under such general conditions of shared understanding does it even begin to make sense to talk about disagreement. Thus, though Ptolemy and I may not share certain theories about the solar system, we certainly would share most other beliefs about things in this world. This identity of belief sets between Ptolemy and myself would be obvious if you were able to watch — and to interrogate — both what we do and say. Moreover the near identity of belief sets would enable us to settle many an 'apparent' dispute. See, for example, Donald Davidson *Inquiries into Truth and Interpretation* (1985), 'On the Very Idea of a Conceptual Scheme' (1974) 47 *Proceedings and Addresses of the American Philosophical Association* 1; Wilfred VO Quine *Word and Object* (1960); Daniel Dennett *The Intentional Stance* (1987).

33 Michael Walzer 'On Involuntary Association' in Amy Gutmann (ed) *Freedom of Association* (1998) 64, 67.

understood to underestimate the value of such overcoming), the very structure and style of the association is almost invariably based upon an existing rubric. Corporations, marriages, co-edited and co-authored publications are modelled upon existing associational forms. So gay marriages may be a relatively new legal construct — but marriage itself is a publicly recognized and sanctioned institution for carrying on intimate or familial relationships. Even in times of transformation and revolution, reiteration and mimicry of existing associational forms are the norm.³⁴

Perhaps Walzer's most interesting challenge flows from his invitation to think about what it might mean for individuals to lack involuntary associational ties, to be 'unbound, utterly free?'³⁵ One image, he suggests, might be that of wild horses. But this very image is the antithesis of what makes us human. We are human, and not merely feral, because of the involuntary associations into which we are born and which have been sustained and developed over time. Even schools designed to enable us to make the most of our freedom do not let us do whatever we so wish. We have to learn to be free. And even then, our freedom is predicated upon associations which were and continue to be involuntary in important respects.

As with the above account of the self, this account of the involuntariness of associational life is not meant to undermine the importance of associational *freedom* for a truly democratic society. Issues of access, of coercion, of choice, of voice, of exit must be constantly negotiated in order to ensure both fairness and flourishing for all members of a society. The emphasis on *involuntariness* in associational life is meant to bracket that conception of freedom which suggests that any impediment to free association is a denial of that which is most fundamentally human. Those impediments are, in many respects, the precondition for such freedom. A reasonably equal and democratic society must, it would seem, mediate the givenness of our associational life and the aspirations of all of us to discriminate (and sometimes choose) between those associational forms which still fit and those which do not. It is often the case that not choosing to leave an association, but to stay, is what we truly cherish as freedom.³⁶ Indeed, as Walzer suggests, we ought to call such decisions to reaffirm our commitments 'freedom simply,

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without qualification.³⁷ It is, for the most part, he concludes, 'the only freedom that free men and women can ever have.'³⁸

34 The French Revolution returns to direct democracy. The Cambodian revolution looks to traditional forms of communal or agricultural organization. Less radical revolutions, like the American and the South African, harken back to the republicanism of the Greek polis or iterate the modern idiom of a constitutional democracy committed to universal human rights.

35 Walzer 'On Involuntary Association' (supra) at 70.

36 We commit and recommit to marriages, friendships, religions, countries, employers. We stay with people or institutions out of loyalty, and because this is just who we are. Sometimes we fight for our country. At other times, we carry on the fight, generally peaceably, within our country. Both fights reflect our loyalty and commitment to our country.

37 Walzer, 'On Involuntary Association' (supra) at 73.

38 Walzer, 'On Involuntary Association' (supra) at 73.

The constitutional insights to be drawn from this account of involuntary association are much the same as the naturalized account of the self above. To understand what 'freedom' actually means requires us to pay particular attention to the unchosen conditions of such freedom: to the real space in which choice obtains. This understanding in no way diminishes our responsibility to engage in a casuistic, case-by-case analysis of associational claims. It does, however, sound a cautionary note both for those who trumpet freedom as the ultimate trump and for those who would treat all associations as suspect and therefore as instruments to advance the egalitarian ends of the state.³⁹

(c) Associations and Capture

There is something about the very structure of associations that makes them worth protecting: capture.⁴⁰ Capture is a function of — one might even say a necessary and logical consequence of — the very structure of associational life. In short, capture justifies the ability of associations to control their association through selective membership policies, the manner in which they order their internal affairs and the discharge of members or users. Without the capacity to police their membership and dismissal policies, as well as their internal affairs, associations would face two related threats. First, an association would be at risk of having its aims substantially altered. To the extent the original or the current *raison d'être* of the association matters to the extant members of the association, the association must possess the ability to regulate the entrance, voice and exit of members. Without built-in limitations on the process of determining the ends of the association, new members, existing members and even outside parties could easily distort the purpose, the character and the function of the association. Second, and for similar reasons, an association's very existence could be at risk. Individuals, other groups or a state inimical to the values of a given association

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could use ease of entrance into and the exercise of voice in an association to put that same association out of business.

In a world without high transaction and switching costs for the creation of associations, the risk of such penetration and alteration might be a tolerable state of affairs. (Then again, in a world of pre-dominantly involuntary association, we might rather fight than switch.⁴¹) But, it almost goes without saying, in the real world the costs of creating and maintaining associations is quite high. Just starting an association — be it religious, cultural, economic, political or intimate — takes enormous effort. To fail to take such efforts seriously, by failing to give individuals

39 On how one chooses between due recognition for the various associational sources of the self and the need for the state to intervene in order to ensure that its citizens have adequate access to those associations deemed preconditions for liberal democracy as well as individual and group flourishing, see § 44.2 *infra*.

40 An association's control over selective membership policies (entrance), its internal affairs (voice), exclusionary or discharge procedures (exit) would seem to explain much, though not all, of the content of the right to disassociate. But the converse is not the case: the grounds for disassociation do not explain the notion of capture. Cf Johan De Waal, Iain Currie and Gerhard Erasmus 'Association' in *The Bill of Rights Handbook* (2001) 341. The authors describe the right to disassociate as including 'the rights not to establish an association, to stay out of existing associations, to dissolve an association and to resign from an association.' *Ibid* at 343. For a more precise account of disassociation or *forced* association, see § 44.1(d) *infra*. See also Nicholas Haysom 'Association' in Halton Cheadle, Dennis Davis and Nicholas Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2002) 247, 251; Halton Cheadle 'Labour Relations' in Cheadle et al (*supra*) at 363.

'ownership' over the fruits of their continued labour is to risk creating significant disincentives to form, to build and to maintain their relationships. Thus, whether we are talking about a marriage, a corporation, a church, a political party, a cricket board, a dinner party, a trade union, a golf club, or a law society, we will want to give them a certain amount of room to govern their affairs and to operate without interference by outside parties. And this *is* what we do. Marriages are subject to a contract — a contract that, vis-a-vis monogamous relationships anyway, excludes other parties from the family. Private corporations are structured — through articles of incorporation and by-laws — to exclude non-members from participation in the operation of the corporation without the appropriate approval. Such participation may occur, amongst other ways, through the legally sanctioned purchase of shares of ownership or ownership outright or through being hired by an existing member or empowered employee of the corporation. A church may have a covenant or articles of faith to which a member must swear in order to gain entrance and to which they must adhere to retain membership. A golf club membership may require nomination and fees. A law society might require a test or a period of training to secure admittance. It might require community service, dues and fairly strict law-abiding behaviour in order remain a practitioner in good standing. To fail to permit a marriage, a corporation, a church, a golf club or a law society to govern its boundaries and its members in appropriate ways would make these arrangements impossible to maintain. It would, in some respects, be equivalent to saying that anyone and everyone owns these associations — which is, of course, tantamount to saying that no one owns them.

I use the notion of property in both a literal and a figurative sense. In a quite literal sense, most associations have tangible property that makes the pursuit of its ends possible. Thus, for example, if a Congregationalist Church is to pursue its

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mission of imparting the received wisdom of the Church and enabling its members to engage in shared devotion, then it will often require buildings, a parsonage, books, musical instruments and furniture. The Church may also run schools and host events designed to promote the church's teachings amongst the young and the masses. How it disposes of such property — and who owns that property — can be said to be governed by the constitution that governs the Church's financial affairs as well as the legal regime that governs property generally. In a quite literal sense, we might want to prevent capture of the Church's property by, let us say, a group of persons who wish to create a similar appreciation for the Korean language and culture. The normal regime of property in a liberal democratic state would be one means of preventing the use of unsavoury means for the realization of such ends.

There is also a figurative sense of ownership and property bound up with, but not identical to, the literal sense. This figurative sense involves the capacity of like-minded individuals to work together to realize shared ends and to share in the gratification of such ends. In the case of a marriage or a religious entity or a cultural formation, the goods are often identical to the means of attaining them. Thus, the coming together to pray in a Congregationalist Church is both a means of making manifest individual faith and an end in itself. These means and ends are governed by

41 Moreover, as I have already argued, many, if not most, of the associations to which we belong are involuntary associations. They are involuntary in the sense that they preexist us and constitute who we are as individuals and communities. They are involuntary in the sense that we have a limited range of associations to which we can belong. They are involuntary in the sense in that even when we are as free as can be we are generally not free to disown all of the associations of which we are a part. Some may choose to be Thoreau, others forced to be Crusoe. But even the Thoreaus and Crusoes amongst us are not unencumbered.

articles of faith. The manner of prayer, the content of belief and the binding rituals are set out in rules. Adherence to this set of rules, and the capacity to generate new rules, should matter as much as the rules which govern more tangible forms of property. For if there is no set of rules said to express the beliefs of the members — even if this set of rules is unwritten — then there is a real sense in which anything goes and anyone belongs. The figurative property regime of associational membership in a liberal democracy should ensure that a Congregationalist Church is able to define and maintain itself as such, and that it need not worry about a sudden transformation into some other denomination.

Both senses of property and ownership matter. It is the purpose of freedom of association to ensure that both are protected from *capture* by those who would use them for ends at a variance with the existing and rightful members of the association.⁴²

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(i) Entrance

As we have seen, associations pursue a variety of different ends. In the pursuit of these ends, associations may require the control of a substantial amount of property or may be charged with the distribution of a wide variety of goods. In any case, the kind of association under scrutiny will often dictate the kind of control we wish to give it over entrance.

Marriages will generally be exclusive affairs — entrance to which may be determined by the individuals involved or, in some cases, the families of those individuals. Trade unions may likewise limit entrance to those who are employed in the given trade and are willing to use collective bargaining to determine the terms of their employment. Religious institutions may be entitled to restrict entrance to individuals who have sworn to uphold the tenets of the faith and agree to demonstrate continued adherence through the performance of required ritual. Likewise, only by keeping out persons who might not have the commitments of the Reproductive Rights Alliance or the Alliance Francaise at heart — only by controlling entrance — would each Alliance be assured of maintaining some control over the means necessary to pursue their respective ends.⁴³ The literal and figurative sense

42 As least part of what animates those concerned with 'freedom' in freedom of association is what we describe here in terms of capture: the notion that like minded individuals ought to be free to do what they like with whom they like and to set up associations to that end without fear of undue interference or penetration. Capture, and its dual metaphors of property and ownership, captures this first meaning of 'freedom'. The power to exclude from one's associational property and to prevent its capture by others reflects a second notion of 'freedom' — the right not to be forced to associate with others. This ground for 'freedom' of association is exhausted by notions of capture and disassociation. A third justification for 'freedom' is autonomy and self-realization. It would seem that our account of association in terms of the correlative, the constitutive and the dual senses of ownership intrinsic to capture provide ample room for a self to fashion itself to the extent it can and the extent it will.

43 If the Alliance Francaise is to pursue its mission of teaching the French language and creating a greater appreciation for French culture, then it will require buildings, books, musical instruments, cinemas, computers and furniture. The Alliance Francaise may also give away scholarships or host events designed to promote the language and culture. Let us assume that a group of persons wished to create a similar appreciation for the Korean language and culture. One possible step towards the realization of such a goal would be to gain control of the Alliance Francaise. While French dictionaries might not prove useful, the buildings and other goods under the current control of the Alliance Francaise certainly would.

of property and ownership does real work because only this dual understanding of property enables the various associations to carry out their various ends.

How much control do we cede to the existing members of an association to determine who is entitled to entrance? Again, it depends. We tend to cede a great deal of control over entrance to marriages to the parties concerned. We can easily

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imagine intervention where a party is being coerced into such an arrangement.⁴⁴ We tend to cede a great deal of control over membership in religious institutions. A liberal democratic state is on very shaky ground when it starts to decide on matters we tend to believe belong to some transcendental domain — even where such rules run counter to liberal democratic principles. However, when we move on to more public institutions such as trade unions or universities or law societies, then we may want such institutions to bear some sort of burden of demonstrating that the grounds for exclusion are reasonably or even inextricably linked with the purposes of the institution. The state should accept my exclusion of a potential mate from the bonds of matrimony on the grounds that she snores, or even from a religious denomination on the alleged grounds that snoring is the devil's work. But because snoring seems wholly unrelated to the aims of a trade union, a university or a law society (unless, of course, it happens on the job, in the class, or during trial), the state should be willing to interfere with the entrance requirements of any such institution that uses snoring as a bar.⁴⁵ The basis for the distinction between the two groups of associations should be obvious. It is not clear what, if anything, a state would gain through interference in snoring-based entrance criteria for marriages and religions. It is, however, clear that issues of power, participation and opportunity in a liberal democratic society may require that institutions designed to deliver such goods — trade unions, political parties, universities and so — must do so in a fair

One obvious objection to this example is that associations such as the Alliance Francaise often do not have members in the deliberative and quasi-political sense that we have been using the notion. Many tertiary associations are not run by their members. They may be established by trusts and run by trustees. In such cases (and such cases may represent a large percentage of associations), the concerns about permeability, contestability and capture may have limited purchase. The example is, however, designed to highlight what is at stake for those associations which have *not* put their basic principles beyond the reach of the shifting viewpoints of the individuals who pay dues, participate in the management of the association or simply make use of the association's goods and services.

Another objection, it must follow, is that such associations rarely undergo the kind of hostile takeover we tend to attribute to Wall Street kingpins. Perhaps so. Perhaps not. Struggles for control, I would argue, are a salient feature of all associational settings. Sometimes the strife is limited to the control of a law faculty and the aims it pursues. Sometimes it takes place between various parties to a marriage and individuals outside a marriage. Sometimes insiders and outsiders collude to take control of a country. Control over entrance is one way we control the manner in which associations may, over time, come to view their mission differently and how we account for — or indeed control — such change.

44 Westerners tend to be more uneasy about polygamous unions than monogamous ones. But we seem ready to create conventions to cover those kinds of marriages — and cede the requisite control over them — to the extent we are convinced that coercion is less of an issue.

45 See Martin Redish and Christopher McFadden 'HUAC, the Hollywood Ten and the First Amendment Right of Non-Association' (2001) 85 *Minn LR* 1669. The members of the Hollywood studios that shunned or boycotted persons with previous connections to the Communist Party did not have an associational purpose bound up with such anti-Communist precepts prior to the exclusion of the Hollywood Ten. On my account, therefore, the studios would be hard pressed to show any connection between their exclusionary practice and their associational purpose. The only question, hypothetically, would be the grounds for the state's intervention on the Hollywood Ten's behalf.

manner — a manner that is in some sense is congruent with the values of a liberal democratic society.⁴⁶

(ii) Voice

Part of the purpose of the Reproductive Rights Alliance is to give voice or expression to the virtues of reproductive choice. Suppose, however, that reproductive choice is anathema to a large number of individuals. Assume that these individuals join the Alliance in order to shift its message — to change its voice. Only by giving the Alliance — and its existing leadership or trustees — the power to control its message, and if need be expel members whose views conflict with its stated mission, can the Alliance be certain that it can continue to voice its support for reproductive rights. Similarly, freedom of association, and related freedoms of expression, thought, conscience, assembly or petition, would be relatively hollow if the state could simply intervene in order to alter the Alliance's message in a manner that suited the majority of citizens and their representatives.⁴⁷ Thus, capture analysis is tied to the belief that many associations exist both to give *expression* to various ways of being in the world and to provide a setting in which such ways of being may continue to flourish.

But 'voice' throws up at least five difficult questions. First, what is the voice of an association? Second, how is that voice established? Third, how does one account for shifts in the positions of the members of an association that would require a shift in voice? Fourth, on what grounds would a state be entitled to interfere in the internal affairs of an association to change the message or alter the manner in which the message is formed? Fifth, how much expression or clear articulation must an association give to its values in order to be understood to actually possess an expressive component — or is the generally accepted conduct of its members sufficient?

What is the voice of an association? The voice of an association must have at least two dimensions: (1) what the association says it is about; (2) what the association does in the world. The two should be relatively co-extensive. That is, there should be a relatively tight fit between word and deed. In this respect, the voice of an association may be judged in much the same way as a person. If a person says they believe in reproductive choice, but thwarts the ability of others to

46 Nancy Rosenblum 'Compelled Association, Public Standing, Self-Respect and the Dynamic of Exclusion' in Amy Gutmann (ed) *Freedom of Association* (1998) 75-108. While Rosenblum recognizes the logic of congruence, she is absolutely adamant that state intervention take note of two other associational dynamics. First, liberal democracies by their very nature must make provision for exclusion, and for exclusion that does not necessarily require rational defence. Second, a primary problem for liberal democracies is not exclusion *per se* but social anomie, a failure to connect that is not a necessary outgrowth of exclusionary practices. Histories of exclusion and histories of dislocation may overlap with one another in South Africa. But one must take care not to mistake the one for the other and assume that the appropriate corrective is simply to eliminate all vestiges of exclusion. The proper response may be for the state to develop institutions that create opportunities for greater participation and that serve the associational needs of historically disadvantaged communities. That the drafters of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 have conflated exclusion and dislocation seems relatively self-evident. See § 44.2(b) *infra*.

47 It is critical to note that exclusionary practices often protect unpopular minority views. See Katherine Moerke and David Selden 'Associations Are People Too' (2001) 85 *Minn LR* 1495.

secure such services – either by bombing clinics or funding pro-life campaigns – then we might have cause to wonder whether they mean what they say.⁴⁸

How is an association's voice established? Of course, saying that the voice of an association is established through both word and deed oversimplifies the exercise. Associations are often made up of members who do not share exactly the same set of beliefs and who do not believe in the same course of action. Moreover, there may be no clear annunciation of belief nor a clear mechanism for such articulation. Or, as is often the case, persons in a position to articulate the association's beliefs to the public may not, in fact, reflect the beliefs of the members. Many associations are *not* set up like little democracies. They may not have structures for debate. The members may not possess equal status in determining the message. When we think about how hierarchical families, churches, fraternities and corporations often are, we should take care before we attempt to introduce democratic principles into the mix. Indeed, part of living in a liberal democratic society means a certain level of acceptance for associations that do not conform to the basic, organizing principles of a liberal democratic state.

This apparent difficulty in determining the message of an association suggests two somewhat compatible strategies to deal with questions three, four and five above. First, we should be reluctant to attribute a clear set of beliefs or values unless we have clear evidence of such beliefs or values. Second, we should be reluctant to interfere in the spontaneous construction of such a set of beliefs or values by the members of an association. That is, we should be chary about imposing a state-sanctioned value on an association unless we have clear evidence that the association in question has no apparent belief regarding the subject under scrutiny.

How does one account for and respond to shifts in the positions of the members of an association that would require a shift in voice? The two prophylactic rules in the paragraph above offer a start. Moreover, unless a good reason exists to interfere in the internal affairs of the association in question in order to determine the message, we should be reluctant to push the analysis any further.

On what grounds would a state be entitled to interfere in the internal affairs of an association to change the message or alter the manner in which the message is formed? With certain kinds of association the threshold for interference in determining the voice ought to be quite high. With families, religious groups and traditional communities, the first inclination of a liberal state ought to be to allow the members to work out their voice on their own. Only in circumstances of obvious coercion, and where parties concerned have little opportunity to articulate their voice through exit, should the state show a willingness to intercede.⁴⁹ Such an approach adheres to the logic of associational life: associations are both constitutive and involuntary in important respects, but we can never allow them to use their involuntariness as a mechanism for abuse. So a liberal state should be willing to

48 Of course, it goes without saying that word or deed alone will not necessarily establish what an individual believes. Self-deception, weakness of the will, cognitive dissonance can all create disjunctions between word and deed, word and word and deed and deed. Nor is there any simple way to determine a person's or an entity's beliefs or propositional attitudes. Perhaps the best approach is to adopt an intentional stance: a strategy of interpretation that presupposes the rationality and the relative transparency of the people that we hope to understand.

49 See the discussion of coercion as a ground for state interference at § 44.2(d) *infra*.

intervene where children's well-being is at stake because they do not control either the voice of the family or their own exit. A liberal state

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should be willing to intervene where women in traditional communities likewise lack a voice or a meaningful opportunity to exit — and where a desire to be heard or to exit is made express.⁵⁰ With other kinds of association, the threshold for interference in determining the message should be quite low. For example, because political parties are essential for the effective operation of most liberal democracies, we would want a relatively unfettered accounting of just what the members of a party advocate. That means we can reasonably require a party to be open to all those who wish to belong and who can satisfy some basic conditions of membership.⁵¹

The articulation and the control of voice becomes can become an issue even for those associations which do not have — as with a particular party — a particularly expressive function. Take the Boy Scouts, for example. They have a very elaborate set of structures, codes and activities designed to raise virtuous and publicly-spirited young men. But what if a homosexual scoutmaster — who heretofore has not made his sexually orientation known — is 'outed' by a newspaper? Can the central leadership of the Boy Scouts — who heretofore have not made sexually orientation an explicit part of their code — now argue that all their previous actions and statements have demonstrated that homosexuality has always been anathema to the Scouts and that the mere sexual orientation of the homosexual scoutmaster makes such a person an inappropriate leader of young men? As I discuss below, such a scenario does not lend itself to a simple resolution.⁵² Competing interests within the organization, the lack of clarity of institutional purpose (which could be said to bind members in advance) and the quasi-public, quasi-private nature of the organization all make both the construction and the attribution of voice a difficult exercise.

(iii) Exit

Controlling entrance and voice is only possible if an association controls exit. The Reproductive Rights Alliance, or any such association, must be able to determine whether a person has complied with the basic dictates of the association. If not, it must also be able to expel her from the association. That is not to say that every association ought to be able to discipline and punish members however it sees

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fit. For classically voluntary, secondary associations in which members have a legitimate expectation of ongoing participation, the association's expulsion

50 How express such intent should be will be a matter for debate. But paternalism in the guise of correcting 'false consciousness' is always a danger when intervening on behalf of adults.

51 The problem of multiple voting and membership — that is, persons belonging to all parties in an effort to skew all results towards their singular preferences — is at least partially controlled by only permitting registration with a single party. Thus, if I am really an ANC stalwart masquerading as a DA supporter, then a registration restriction locks me into a particular organizational setting. I lose, at least publicly, my ability to influence the construction of an ANC voice. Some broad commitment, in advance, to the positions of the party coheres with arguments from capture and democracy. But no advance set of commitments can control wilful deception nor wilful deception en mass.

52 See § 44.1(c)(vi) infra.

procedures may have to satisfy two basic requirements: (a) the grounds for the expulsion ought to be tied directly to the purpose of or the management of the association; (b) a member of the association should receive some form of fair hearing should she wish to contest the expulsion.⁵³

As our discussion of involuntary associations should have made clear, exit is also critical for the members of an association. No association can be truly said to be free if its members are coerced into remaining. It goes without saying that some associations are easier to walk away from than others. Families, religions, ethnic groups, races and states are notorious difficult to shrug off.⁵⁴ Thus, as we have already noted, sometimes the walking away is notional — one never 'really' leaves. Constitutional law in a liberal democracy must take such notional departures seriously. And it must make real breaks possible. Just as a liberal democratic state must be willing to intervene where the coercive conduct of association threatens the physical well-being of a member, it must also be willing to create some measure of opportunity for its citizens to leave associations. That cannot possibly mean an obligation to find everyone the job, the family, the religion, the community that best fits him or her. But it may mean creating institutions — say the Human Rights Commission or the Commission for Gender Equality — that help to foster awareness of situations in which involuntary associations become intolerable. It may also mean that we give all citizens the resources — primarily through education — needed to make meaningfully 'free' decisions about where they want to be, what they want to do and who they want to do it with: even if such decisions often simply re-affirm the associations that such persons have already entered.

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(iv) Social Capital, Fragility, Switching Costs and Transaction Costs

The foregoing discussion should make clear why we care about forestalling the capture of associations — and the concomitant ability of associations to retain their autonomy through control of entrance, voice and exit. In a world of insignificant transaction and switching costs, one might be inclined to answer that we would not. Individuals and groups would be literally free to leave, join, dissolve and reform associations without any of the time, effort, and money that the creation and maintenance of associations require. But we do not live in such a world. Nor is it really possible to understand what it is to be human in a world of completely 'free association'. Human beings are only human, only become human, through a

53 See, eg, *Cronje v United Cricket Board of South Africa* 2001 (4) SA 1361 (T) ('Cronje'); *Ward v Cape Peninsula Ice Skating Club* 1998 (2) SA 487 (C) ('Ward') and *Wittmann v Deutscher Schulverein, Pretoria, and Others* 1998 (4) SA 423 (T), 1999 (1) BCLR 92 (T) ('Wittmann') and discussion of these cases at § 44.3(c)(ix) infra. Again, the complex nature of associational life requires a caveat. With respect to membership in many tertiary associations — where, say, a R50 annual fee to belong to the World Wildlife Fund is the sum total of the relationship — membership would seem sufficiently attenuated that fair hearings are generally unwarranted and undesirable. (The issue again is less the kind of association and more the ability of members to participate in its affairs.) With respect to membership in religious and traditional forms of association, the imposition of fair hearings — unless part of the accepted practice — would be a rather gratuitous imposition. To the extent that an expulsion would be about a matter of faith — and not access to property — a member should be expected to understand and to have accepted the conditions for remaining within the fold as well as the conditions for being asked to leave.

54 It should go without saying that not all ascriptive associations — race and ethnicity — are themselves constitutionally protected association. Such a definition would most certainly be overly broad. Rather the point is to draw attention to the circumstances in which the state intervention in 'involuntary associations' is justified. See § 44.1(d) — Association and Dissociation — and § 44.2(d) — Coercion — infra.

complex engagement of physically and socially constructed dispositions. (This treatment ignores, it goes without saying, the manner in which the physical and the social influence one another over time). And each set of such dispositions is significantly, if not entirely, a function of processes of replication over which we have only a modicum of control.

But what if we were to start acting as if we were creatures capable of 'free association'? What would an approach that failed to take the protection of existing associations seriously be likely to yield? My sense is that even with enormous sums of economic capital, the fragility of associations would make large scale intervention a failure. Most associations are built on trust and respect. Conditions that undermine the tenuous bonds of trust and respect between individuals and groups are likely to make many forms of association quite difficult to maintain.⁵⁵

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One can view the market, which places a premium on efficiency, fungibility and mobility, as a kind of large-scale intervention that can, without adequate brakes,

55 The jurisprudential argument developed herein is simple. A robust associational life is a necessary pre-condition for a well-ordered and just society. Trust is both a necessary pre-condition for a robust associational life and a product of that associational life. A well-ordered society is one that does not allow trust to attrite. See, eg, Sisela Bok, 'Truthfulness, Deceit and Trust' in *Lying* (1978) 31 ('Whatever matters to human beings, trust is the atmosphere in which it thrives.') This chapter can be read as an extended meditation — grounded in constitutional theory — on the primacy of this virtue and the political conditions necessary to sustain it. Put another way, trust's ubiquity and necessity only become apparent to us upon its destruction, much as we 'notice air only when it becomes scarce or polluted.' Annette Baier 'Trust and Antitrust' in *Moral Prejudices* (1995) 95, 129. This chapter sounds a cautionary note on taking trust and associational life — much as we take air — for granted.

Likewise, the pre-conditions for trust are such that they do not lend themselves to demands for clearly articulated rules of distributive justice (or clearly articulated rules period) that a well-ordered society is often said to require. The reasons for this are three-fold.

First, unlike rules of distributive justice, which require fairly rigorous institutions designed to facilitate the transparency, accountability and openness of social interactions (eg, courts, legislatures, newspapers, universities), trust is 'a fragile plant, which may not endure inspection of its roots, even when they were, before the inspection, quite healthy.' Baier (*supra*) at 130. For example, a marriage is not likely to survive for long, if, at the nightly repast, the first question is 'so were you faithful today dear?'

Second, and for reasons already assayed, trust cannot be commanded. A system of distributive justice — say that portion of Rawls' second principle that requires that all economic arrangements must provide some benefit to the least well-off — generates a fairly abstract set of rules to be followed by the governors and the governed. The instantiation of these rules is parasitic upon existing forms of inarticulate and indeterminate social coordination such as trust.

When I say inarticulate, think of what it means when someone says 'Trust me'. While it may be superfluous where you are already likely to heed the advice or guidance of a friend, it is, in fact, more often a danger signal, a thinly veiled threat or, even when sincere, a potential overestimation of the trustee's capacity to make good. Think of what the words 'Trust me' would add to a provision of a contract. Nothing. On the one hand, the clause would be meaningless because there could be no expectation of performance: it is based upon trust and it just goes with the territory that the truster may be let down by the trustee. On the other hand, the prefatory imperative — 'Trust me' — must be read out of the provision in order for the remainder of the clause to be understood by both parties to be binding.

When I say indeterminate, the nature of trust is such that the trustee must grant wide 'discretionary powers to the trusted, to let the trusted decide how, in a given manner, one's welfare is best advanced, to delay the accounting for a while, to be willing to wait and see how the trusted has advanced one's welfare.' Annette Baier, 'Trust and Its Vulnerabilities' in *Moral Prejudices* (1995) 131, 136. While rule-governed systems may rely, in part, upon discretion, discretion is at the very heart of trust.

eviscerate bonds of trust and respect. This view of markets holds equally for intervention by the state. No one with even a passing familiarity with the abuses of Apartheid can fail to appreciate the destruction wrecked on the better part of South African society. Moreover, the constant presence of the state in many areas of social life made the continuation of all but the most non-threatening forms of associational life difficult if not impossible.

The fragility of associational life and the difficulty of deploying social capital to new ends under conditions of constant change or interference underscores a

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conservative tack towards associational life and intervention therein.⁵⁶ That does not mean intervention is never justified. The examples of legitimate intervention offered thus far suggest otherwise. But if we place make efficiency or equality the basis for

When I say a system of rules is parasitic on trust, the formation of rules — or a system of rules — is based upon the ability to exercise good judgment. This good judgment, in turn, is contingent upon the capacity to make determinations about the kinds of situations in which trust is to be extended or withheld. (This capacity to make such determinations is predicated upon such 'primitive' practices as noting that shifty eyes elicit suspicion or that a shoulder shrug reflects acquiescence.)

The conclusion to be drawn from this brief meditation has two-parts.

First, where there is 'little or no mutual trust . . . it is hard to see how trust could get started without the help of some third party. Only if trust is there in some form can we increase it by using what is there to contrive conditions in which it can spread to new areas.' Annette Baier, 'Sustaining Trust' in *Moral Prejudices* (1995) 152, 176. (Parents employ this model with their children all the time. It goes without saying that they can likewise build up large reservoirs of distrust that make coordination impossible.) Moreover, it is impossible to simply supplant the enormous reservoirs of trust created and reinforced by associational life with rules designed to rupture and reorganize social life along radically different lines without incurring substantial costs in social capital and cohesion. (How one strikes the proper balance between conservation and transformation is at least part of what this chapter aims to answer).

Second, Jurgen Habermas has noted that securing agreement in modern societies subject to both perpetual pluralization and disenchantment with the world puts enormous strain on collective democratic deliberation. See *Theory of Communicative Action* (1984) and *Between Facts and Norms: Contributions towards a Discourse Theory of Law and Democracy* (1996). As William Rehg writes:

reaching agreement communicatively [and constructively] requires a large background consensus on matters that are unproblematic for group members. The implicit agreement represented by such a lifeworld background stabilizes a communicatively integrated group insofar as it removes a large body of assumptions from challenge — as it were fusing validity with facticity of a given cultural background. This is because the background not only provides its members with shared resources for managing conflict; as a source of shared identities it lessens the number of issues that are likely to be contested at any given time, so that large numbers of social action rest on a stable basis of unquestioned consensus.

'Introduction' *Between Facts and Norms: Contributions towards a Discourse Theory of Law and Democracy* (1996) xvi. Given the limits of 'unquestioned consensus' in the South African polity, and the need for consensus to transform society, reinforcing and extending the implicit understandings that perpetuate trust and associational life is an absolutely necessary, if not sufficient, condition for the success of the South African political project.

56 The argument is hardly inimical to transformation. It simply sounds a cautionary note as to the kinds of intervention in associational life that are likely to be successful. For example, various attempts at Black Economic Empowerment ('BEE') are entirely consistent with this account. BEE recognizes existing stocks of social capital and creates incentives for new relationships of trust and respect that extend the access to those stocks to persons heretofore excluded from them. Whether BEE is the best possible engine for transformation is not something upon which this chapter need take a view.

all of our social planning, then it seems relatively obvious that we place certain aspects of and kinds of associational life at risk. How we come up with a method of analysis that helps us to decide what kinds of state intervention in associational life are justified — and may actually improve associational life — is a project begun in the following two subsections.

(v) Permeability, Flexibility, Contestability and the Problem of Shifting Boundaries

The choice of the Reproductive Rights Alliance as one of our primary examples for capture analysis is apt to occlude some very important characteristics of associations. First, entrance criteria may expand or contract. The Alliance itself only appears to have a relatively static voice. What counts as paradigmatic conditions for reproductive choice are bound to change over time. What the Alliance members or the board of trustees valued in 1993 may not be what they value now in 2003. Second, associations possess varying degrees of flexibility. The Alliance has a certain amount of flexibility: within the parameters of promoting reproductive rights quite a number of different messages may be conveyed. The African National Congress, on the other hand, would appear to have the potential for an even more varied content. As it stands, the ANC is home to various strains of nationalism, neo-liberal politics and the invidiously characterized 'ultra-left'. In addition to the varied ends of its eclectic membership, the ANC as a political party has as a *raison d'être* the continued control of the levers of power. The combination of differing optimal visions and the need to secure the support of the electorate means that the ANC's entrance criteria and its voice criteria are going to be *flexible* and *contestable*. Third, associations will vary in terms of their *permeability*. A housing association may be as permeable as the geographical location, and the resultant housing units, it intends to cover. A water access movement in Alexandria must have a narrow brief, but be open to as many residents of Alexandria as are interested in access. A marriage seems relatively impermeable. It is a quite classically a union of two — one woman and one man — and two only. Or is it? We now know marriages can move from the monogamous to the polygamous; from heterosexual to homosexual; from common law to customary to religious to secular. Likewise, some religious institutions have been historically averse to homosexual leaders. However, as the recent elevation of a homosexual clergyman in the Anglican Church points up, even the most hide-bound associations can change, can shift their boundaries.

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How then is a court to decide when it should intervene on behalf of an association seeking to enforce some pre-determined vision of what the association means and represents? One answer would be the kind of functional response I have begun to outline in this introductory section. One could attempt to identify a correlative right that supports the particular kind of association in question. One could attempt to determine the relative weight an association might have in the lives of its members (taking care that such weights will vary from person to person). One could attempt to determine whether the attempts at controlling the entrance to and voice of the association are consistent with the express or objective meanings of the association (attentive to the fact that such ascriptions of value are as flexible and contestable as the boundaries of the association are permeable and shifting). Against such valuations of the existing membership of the association in question one would then have to assess how compelling the justification would be for overriding the association's exclusionary criteria. As we shall see, one overriding interest, though by no means the only one, is the state's interest in ending discriminatory practices. It is trite that all efforts at exclusion are discriminatory. The real questions for us in

South Africa are two-fold: (1) Does the discrimination in question impair the dignity of the person or persons being excluded? (2) Even if the dignity of the person is so impaired, does the impairment warrant compelling the members of the association to alter its criteria for entrance and thereby changing, if the intervention would in fact do so, its voice.

(vi) Problems with Capture Analysis

As the discussion in subsections (i)–(v) above suggests, controlling entrance, voice and exit is not without its difficulties. The Boy Scouts, as we have already begun to suggest, offers a suitably complex setting to test some of our interim conclusions about association analysis. It pursues particular goals – the pursuit of certain virtues by young men. It distributes various goods — opportunities to learn skills, to participate in organized events and to secure a certain status within the broader community. Given these goals and goods, should the Boy Scouts of America be free to include and exclude whomever they like? As our 'functional' analysis suggests, the Scouts' freedom to exclude individuals raises three-related concerns. First, such rules may discriminate against individuals and groups in ways wholly unrelated to the ends of the association. Second, such rules may discriminate against individuals and groups in ways that offend the rules to which a society is committed. Third, a rigid adherence to existing articles or by-laws of an association may preclude the association from a natural or spontaneous evolution into an organization that pursued a somewhat modified or a dramatically different set of ends.

In recent litigation, the Boy Scouts have had their desire to exclude homosexuals vindicated by the United States Supreme Court.⁵⁷ The US Supreme Court believed there to be a relatively clear nexus between the right of the Boy Scouts of America to represent themselves as a standing for a particular set of values

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(whether they actually expressed them or not) and the right to exclude individuals whose behaviour apparently subverts those stated values. Although not employed by the Court, the three-part analysis suggested in the paragraph above does some work in explaining what was at stake in *Boy Scouts of America v Dale*.⁵⁸ The first concern links the Gay scoutmaster's exclusion to the association's ends. The second concern engages the issue of privileging the constitutive nature (and meaning) of the Scouts to (a majority of) its members over egalitarian concerns of the society in general. The third concern determines the extent to which the Scouts' governing authority may declare — albeit through fiat — what all affiliates of the Scouts may declare to be both the exclusionary criteria and the ends of the association.⁵⁹

While the US Supreme Court has been forced to grasp the nettle of membership practices, it is relatively clear from the outcome in *Dale* that it has not been willing to press down particularly hard on the Boy Scout's stated justifications for exclusion. It is not clear how, if at all, the sexual orientation of a Scoutmaster (and former

57 *Boy Scouts of America v Dale* 530 US 640, 120 SCt 2446 (2000) ('*Dale*').

58 The US Supreme Court, however, employs a set of doctrines that rests upon distinctions between 'expressive associations', 'intimate associations' and those associations which are neither expressive nor intimate. These doctrines are articulated in a quartet of public accommodation cases beginning with *Roberts v United States Jaycees* 468 US 609, 615, 104 SCt 3244 (1984) ('*Roberts*') and extending through *Board of Directors of Rotary International v Rotary Club of Duarte* 481 US 537, 107 SCt 1940 (1987) ('*Rotary Club*'), *New York State Club Association v City of New York* 487 US 1, 108 SCt 2225 (1988) ('*City of New York*') and *Dale* (supra).

Eagle Scout) runs counter to the general ethos of the Scouts. Likewise, it is not clear that the vast majority of members believe that the virtues promoted

by the Boy Scouts are in any manner undermined by the sexual orientation of a Scout or a Scoutmaster.⁶⁰

Perhaps a better example of fit between exclusionary practices and associational ends is on display in *Royal Society for the Prevention of Cruelty to Animals* ['RSPCA'] *v Attorney-General*.⁶¹ The RSPCA sought vindication of (1) a membership policy designed to remove and exclude members who wished to change the association's policy on hunting; and (2) a convenient administrative scheme for enforcing this policy. The Court held that the policy was not inconsistent with the Human Rights Act of 1998. In short, the charity retained the freedom under Article 11 of the European Convention on Human Rights to exclude from the association those persons who it believed might ultimately damage its interests. The court's decision is consistent with the three-part test adumbrated above. First, the humane treatment of animals — the clear and unequivocal purpose of the RSPCA — is squarely at odds with the adoption of a policy designed to support blood sport. To prevent the 'capture' of the

59 Four points need to be made about the *Dale* litigation. First, the stakes were deemed to be so high for associational rights generally that sixty-three associations and 18 states filed amicus briefs with the court. Second, the amicus briefs filed by various Boy Scout affiliates and sponsors could be found on both sides of the case. For example, some Methodist church sponsors saw no conflict between the presence of a Gay assistant Scoutmaster and the basic values the Boy Scouts are said to espouse. Some Methodist Church sponsors did. Third, in terms of US jurisprudence, the Boy Scouts had to rely on the 'expressive' content of their association in order to find protection under the First Amendment. That the Boy Scouts had not expressed clear views on homosexuality as part of their broader social message did not detain the Court. Expression was deemed to be an ineluctable consequence of the association. The need to force association into the parameters of existing constitutional doctrine around expression points up the limits of US associational jurisprudence. Moreover, it should put South African courts on notice that what is truly at stake is not expression but 'capture': the ability of associations to control both their membership (entrance and exit) and their member's behaviour (voice). Fourth, as a matter of New Jersey constitutional law, the New Jersey Supreme Court found that Mr. Dale could rely upon New Jersey's Anti-Discrimination laws and that the State's constitutional commitment to equality took precedence over the expressive (if any) interests of the Boy Scouts and their (purely associative) interests in having the ability to exclude Mr. Dale from participation. Since it could not supplant its own assessment of what the New Jersey Constitution requires, the US Supreme Court was thus forced to hold that the US Constitution's 1st Amendment protection of expressive association trumped the State's interest in public accommodation anti-discrimination laws. South African Courts, on the other hand, will have to decide solely on the fit between membership practices, the Promotion of Equality and Prevention of Unfair Discrimination Act, and ss 9 and 18 of the Constitution.

60 It is difficult to understand why homosexual status *simpliciter* should be understood to constitute expression or advocacy. To suggest that it does possess such expressive content, and then to find the status/expression to be of secondary constitutional import, is to suggest that the label 'homosexual' 'is tantamount to a constitutionally prescribed symbol of inferiority.' See Donald Hermann 'Homosexuality and the High Court' 51 *De Paul LR* 1215, 1223. See also *Dale* (supra) at 696 (Stevens J dissenting). The US Supreme Court has, in *Lawrence v Texas* - US —, 123 SCt 2472, 156 LE2d 508 (2003) ('*Lawrence*'), found that the right to privacy now protects intimate homosexual relationships. Though there is no necessary consequence of this new-found right to privacy for associational rights, it may mark a shift in the Court's willingness to interrogate more vigorously the rationales behind public and private rules that result in the exclusion of gays and lesbians. Moreover, despite assurances from the *Lawrence* majority that its decision would not have any necessary consequences for its treatment of other claims by gays and lesbians for equal treatment, at the very least it must go some distance towards eradicating the constitutionally mandated badge of inferiority re-inforced by *Dale*.

61 [2002] 1 WLR 448. See also 'Current Survey — Freedom of Speech' [2002] *Public Law* 355-6.

RSPCA by individuals — and even members — inimical to the associations' core concerns, the RSPCA had little choice but to adopt its chosen exclusionary mechanisms. Second, it seems relatively clear that individuals who wished to press for changes in hunting laws were not prevented from doing so simply because they were not permitted to use the RSPCA as a vehicle for such change. Thus, the exclusion policies are not an affront to any basic principles of justice. Third, it would render the freedom to associate absolutely meaningless if an association founded to ensure the humane treatment of animals was compelled to adopt a policy most often associated with the inhumane treatment of animals.⁶²

To the extent that a South African court has engaged the substance of control over membership policies, it has failed to employ a similarly complex set of

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criteria. In *Cronje v United Cricket Board of South Africa* ['UCB']⁶³, the court concluded, simply, that an association 'has the same right as anybody else to resolve not to associate with a third party.' The court was not at all vexed by such questions as whether the grounds for exclusion served a basic policy of the association or whether the membership policy of the association offended basic principles of justice to which our society is now committed. Instead, the court relied upon rather tried, tired and true commitments of the common law to 'freedom of contract'. Harking back to the turn of the last century, the court quoted with approval the holding of the Witwatersrand Local Division in *Johnson v Jockey Club of South Africa*:

'(N)o member of the public has any claim against the Jockey Club for damages merely because the club refuses to admit him to any of its privileges or refuses to have anything to do with him. That is also the reason why such an association is entitled, when it receives an application from a non-member, with whom it has no contractual relationship, for membership or permission to use facilities, simply to refuse the application.'⁶⁴

Of course, the South African court could have employed, without fear, a more nuanced approach to the analysis of membership policies on display in *Cronje*. First, the exclusion policies were connected directly to the goals of the association. The UCB has a direct interest in making certain that its members abide by the rules of the game: throwing games is just not cricket. Second, these exclusion policies are not an affront to any basic principles of justice and certainly not to any reasonably new commitment to equality. Third, the exclusion policies with regard to corruption are not contested aspects of what it means to be a member of the UCB.⁶⁵

South African courts are not likely to be able to simply fall back on the common law in the near future. The Promotion of Equality and Prevention of Unfair

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62 That said, shifts in policy that identified the culling of herds for the benefit of the wildlife concerned with the putting down of animals in order to spare them pain might fall within the domain of contestable policies consistent with the over-arching purpose of the RSPCA.

63 *Cronje v United Cricket Board of South Africa* 2001 (4) SA 1361 (T) ('Cronje').

64 1910 WLD 136, 140. See also *Ricardo v Jockey Club of South Africa* 1953 (3) SA 351 (W), 357; *Marlin v Jockey Club of South Africa* 1951 (4) SA 638 (T), 649; *Carr v Jockey Club of South Africa* 1976 (2) SA 717 (W), 721.

Discrimination Act ('PEPUDA')⁶⁶ has as its stated aim 'the eradication of social and economic inequalities, especially those that are systemic in nature, which were generated in our history by colonialism, apartheid and patriarchy, and which brought pain and suffering to the great majority of our people.'⁶⁷ No one escapes the grand sweep of the Act. It binds state actor and private actor alike. All associations — from political to business to social to religious to recreational — fall expressly within its purview. Moreover, should a complainant be able to make a *prima facie* showing that an association has discriminated on any one of the prohibited grounds stated in the Constitution and the Act, then that association will have the burden of demonstrating that the discrimination is justifiable.⁶⁸ The Act goes even further. It presumes that any discrimination on grounds analogous to those found in section 9 of the Constitution is unfair. Associations are now on notice. The time when a right to exclude was presumed to be legal is over.

(d) Association and Dissociation

For reasons already assayed under the headings of 'the correlative', 'the constitutive' and 'capture', the right to associate must include the right not to associate with third parties.⁶⁹ The right to dissociate — as a specific feature of the more general right to associate — tends to be asserted in three primary settings.

In the first setting, an association with a clear *raison d'etre* — i.e., collective bargaining or professional oversight⁷⁰ — also takes up a more controversial agenda — political mobilization around issues unrelated to the association's organizing

65 But see *Ward* (supra) and *Wittmann* (supra). Though neither case raises constitutional freedom of association issues directly, both cases uphold the rights of members of an association to challenge their expulsion from a voluntary association. However, in both cases the grounds for reversing the expulsion have more to do with the procedural failure to grant the member a fair hearing, than with some substantive measure of whether the expulsion occurred for some politically or morally reprehensible reason. Indeed to the extent that *Wittmann* weighs in on the power of an association to terminate membership when the member acts in a manner contrary to the decisions of the association's board and engages in expressive conduct that leads to criticism of the association, it decides that the association does possess such power. While both cases appear to move away from the anachronistic stance of *Cronje*, one might simply read these two cases as standing for the proposition that a member has vested interests in the club that, at a minimum, require a fair termination hearing. A non-member, on the other hand, possesses no such rights. Read this way, *Wittmann*, *Ward* and *Cronje* seem of a piece. See § 44.3(c)(ix) infra.

66 Act 4 of 2000 (Act 52 of 2002 as amended).

67 Ibid at Preamble.

68 For more on the content of the Act and its interplay with s9, Equality, and s10, Dignity, of the Constitution of the Republic of South Africa Act 108 of 1996 ('Final Constitution' or 'FC') see Cathi Albertyn, Beth Goldblatt and Chris Roederer (eds) *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (2001); Gretchen Carpenter 'Equality and Non-Discrimination in the New South African Order' (2002) 65 *THRHR* 177,183-185; Anton Kok 'Motor Vehicle Insurance, The Constitution and the Promotion of Equality and Prevention of Unfair Discrimination Act' (2002) 18 *SAJHR* 59; Anton Kok 'The Promotion of Equality and Prevention of Unfair Discrimination Act: Why the Controversy?' (2001) *TSAR* 294; Grete Vogt 'Non-Discrimination on the Grounds of Race in South Africa — With Special Reference to the Promotion of Equality and Prevention of Unfair Discrimination Act' (2001) 45 *J of African Law* 196; Marius Pieterse 'The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: Final Nail in the Customary Law Coffin?' (2000) 117 *SALJ* 627. See also § 44.2(b) infra.

69 See *Law Society of the Transvaal v Tloubatla* 1999 (11) BCLR 1275, 1280-1281, [1999] 4 All SA 59, 66-67 (T)

principle. A union may decide that its members not only have an interest in legislation related directly to workers' rights but also to a whole host of other social issues. Some courts may recognize a right to dissociate with respect to

'ideological union expenditures not directly related to collective bargaining.'⁷¹ Other courts might find ideological union expenditures unrelated to collective bargaining to be justified on the grounds that it promotes internal union democracy as well as a fostering of union participation in broader political debates.⁷² Similarly, a professional regulatory body — a law society or a medical association — may elect to conduct political activities not directly related to its regulatory function. Again, a court could take the view that fees for activities unrelated to the associations primary purpose may not be mandatory. Or a court might just as well conclude that as long as the compulsory membership in a regulatory association does not restrict the membership from disagreeing with the association's views, then neither the right to associate (or to dissociate) nor the right to expression is being infringed.⁷³

In a second setting, an association, as a creature of statute, may force individuals to engage in activities in which they would prefer not to participate. In *Chassagnou v*

70 See *Society of Advocates of Natal v De Freitas and Another* 1997 (4) SA 1134 (N); *De Freitas and Another v Society of Advocates of Natal* 2001 (3) SA 750 (SCA), 2001 (6) BCLR 531 (SCA); *De Freitas and Another v Society of Advocates of Natal* 1998 (11) BCLR 1345 (CC); *General Bar Council of South Africa v Van der Spuy* 1999 (1) SA 577 (T). These cases reflect, by my lights, uncontroversial examples of compelled association of members of regulatory bodies. See discussion at § 44.3(c)(iv) infra.

71 See, eg, *Abood v Detroit Board of Education* (1977) 431 US 209, 97 Sct 1782. This 'fair share' doctrine is articulated in a long line of cases beginning with *International Associational Machinists v Street* (1961) 367 US 740, 81 Sct 1784; *Ellis v Brotherhood of Railway, Airline and Steamship Clerks* 466 US 435, 104 Sct 1883 (1984); *Chicago Teachers Union v Hudson* (1986) 475 US 292, 106 Sct 1066; *Communications Workers of America v Beck* (1986) 487 US 735, 108 Sct 364; *Lehnert v Ferris Faculty Association* 500 US 507, 111 Sct 1950 (1991). Cf *Brotherhood of Railroad Trainmen v Virginia* (1963) 377 US 1, 84 Sct 1113; *United Mine Workers v Illinois Bar Association* 389 US 217, 88 Sct 353 (1967); *United Transportation Union v State Bar of Michigan* 401 US 576, 91 Sct 1076(1971). These three cases stand for the principle that associations have the right to litigate in the interests of itself and individual members even where the primary aims of the association are not at stake.

For a current overview of US federal and state case law engaging forced association, as well as federal and state anti-discrimination statutes, see Kevin Francart 'No Dogs Allowed: Freedom of Association v Forced Inclusion: Anti-Discrimination Statutes and Their Applicability to Private Organizations' (2000) 17 *Thomas Cooley LR* 273. For a nuanced account of dissociation, see William Marshall 'Discrimination and the Right of Association' (1986) 81 *Northwestern University LR* 68. Few commentators argue that the freedom of association embraces an absolute right to dissociate. But see Thomas McGee 'The Right to Not Associate: The Case for an Absolute Freedom of Negative Association' (1992) 23 *University of Western Los Angeles LR* 123.

72 See, eg, *Lavigne v OPSEU* (1986) 33 DLR (4th) 174. Three judges in *Lavigne* held that the right to associate does not include the right to dissociate. Another judge held that non-collective bargaining political positions do not implicate the right to dissociate because there is too attenuated a relationship between the union dues paid by the member and political positions ultimately adopted by the unions. The dues could not, on this reading, be accurately characterized as coerced association. See also *Association of Professional Engineers of Saskatchewan v SGEU* (1992) 91 DLR (4th) 694 (Compulsory dues not compelled association, merely condition of employment, and employment not coerced). For more on the Canadian rejection of the fair share doctrine, see Steven Thorncroft 'Compulsory Payment of Union Dues — Use for Collective Bargaining and Non-Bargaining Purposes' (1992) 71 *Canadian Bar Rev* 153.

73 *Morrow v State Bar of California* (1999) 188 F3d 1174.

France, farmers with relatively small holdings were forced by law to become members of municipal hunting associations and to transfer hunting rights over their land to these hunting associations and their members.⁷⁴ The European Court of Human Rights held that the forced association contemplated by French law violated the right not to belong to an association and the right not to be compelled to join an association fundamentally at odds with a person's convictions.

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In a third setting, political entities may attempt to coerce participation or agreement. Indeed, political entities may attempt to use the language of voluntary association in order to mask repressive politics. In *Communist Party of India (Marxist) v Bharat Khumar*, the Indian Supreme Court held that the calling of a bundh inevitably violated the constitutional rights of community members who did not wish to participate in a political event, while the calling of a hartal – peaceful mass action based on the principles of passive resistance – did not.⁷⁵ The predictable result was that instead of calling for a bundh, political organizations began calling for a hartal. In *Kerala Vyapari Vavasayi Ekopana Samithi v State of Kerela*, the Court found that the Communist Party's call for a hartal was simply a call for a bundh by another name and thus an unconstitutional infringement of the associational rights (including the right not to participate in political activities) of the citizens of Kerela.⁷⁶ Closer to home, *Commercial Farmers Union v Minister of Lands, Agriculture And Resettlement, Zimbabwe and Others* supports the recognition of a constitutional right to disassociate in the context of coerced political participation.⁷⁷ The Zimbabwe Supreme Court held that the forced attendance of farmers and farm-workers at meetings organised by the local ZANU (PF) branch violated the right of freedom of association guaranteed by s 21 of Zimbabwe's Constitution.

44.2 Grounds for and models of infringement

As some of the aforementioned cases suggest, associational freedom is not an unalloyed good. Associations have their dark sides. They may pursue ends that threaten the well-being of society or some of the individuals therein. They may gain a monopoly of power over an area of social life that enables them to dictate the distribution of goods associated with that sphere of social life and preclude others from the pursuit and receipt of such goods. They may be sufficiently insular and exclusive that their mere existence reinforces prevailing prejudices. The state may wish, in such circumstances, to interfere with the freedom to associate in order (a) to secure the safety of society, (b) to realize substantive equality, (c) to promote tolerance, and (d) to facilitate greater political participation.⁷⁸

74 *Chassagnou v France* (2000) 29 EHRR 615 (*Application Nos 25088/94*).

75 1998 AIR 184 (SC).

76 2000 AIR 389 (SC) ('Kerela').

77 2001 (2) SA 925 (ZS), 2001 (3) BCLR 197 (ZS).

78 As it happens, these four ends are largely of a piece with the civic equality principle recently articulated by Amy Gutmann in *Identity in Democracy* (2003).

State intervention in the service of these three ends is likely to take one of four forms: (1) an outright banning of the association on the grounds that its professed aims and current practice threaten a well-ordered society, or more profoundly, the continued existence of the free, democratic and constitutional order itself; (2) a requirement that the association open up its membership to include all interested members of society on the grounds that membership exclusivity is inconsistent with the overridingly important goal of equality; (3) a requirement that the internal organization of certain associations must conform to basic democratic principles; and (4) a requirement that an association refrain from coercion.

(a) Banning

The banning of certain criminal associations *per se* is unlikely to generate controversy.⁷⁹ Controversy is only likely to be aroused when the government seeks to ban political or expressive associations.⁸⁰ Certain democratic states — fighting democracies such as Germany — believe that banning is a legitimate response to associations that aim to undermine or destroy the state's free and democratic constitutional order.⁸¹ However, even these fighting democracies are highly circumspect in employing such a drastic measure. They generally require very clear evidence of a concerted effort to destroy the constitutional order before they will impose a ban.⁸² Such an evidentiary requirement is rarely satisfied in well-ordered and stable democracies.

79 But see below, § 44.3(b), for a lengthier account of the argument that most criminal associations are *per se* unconstitutional, Professor Haysom's critique of my position and my reply.

80 I am not suggesting that bannings of non-political associations should not engage the court. Given this country's history, all laws criminalizing association should be carefully scrutinized. Apartheid legislation clearly infringed everyone's general freedom to associate. See, eg, the Group Areas Act 41 of 1950 (compelling black, white, Indian and coloured South Africans to live separately); Separate Amenities Act 49 of 1953 (required aforementioned groups to use separate public facilities); Prohibition of Mixed Marriages Act 55 of 1949 (denying individuals the freedom to choose a sexual partner or spouse). The abuse of law to proscribe political association was particularly profound in the Apartheid era. In 1950 the National Party Parliament passed its first major piece of anti-political association legislation—the Suppression of Communism Act 44 of 1950. This Act was successfully employed for more than twenty-five years to suppress almost all opposition to Apartheid. Over the next thirty years Parliament passed numerous pieces of legislation delegating to the executive relatively unfettered powers to silence any association deemed a threat to the State. See, eg, Unlawful Organisations Act 34 of 1960 (ANC and PAC were banned on the grounds that 'they seriously endangered the safety of the public [and] the maintenance of the public order'); Prohibition of Foreign Financing of Political Parties Act 51 of 1968 (Act prevented new opposition from forming by cutting off foreign funding); Internal Security Act 74 of 1982 (in terms of the emergency regulations passed under the Act, the Minister could, without giving notice or hearing to anyone, prohibit all the activities of an association). In light of this repressive history, great caution should be exercised before resort is had to the banning of any political entity.

81 Article 9(2) of the Basic Law (Grundgesetz) reads: 'Associations, the purposes of which conflict with criminal laws or which are directed against the constitutional order . . . are prohibited.' See *BVerwG* 1954 *NJW* 1947 (prohibition of FDJ—communist youth movement—declared constitutional). Cf *Brandenburg v Ohio* 395 US 444, 89 S Ct 1827 (1969) (First Amendment values—and by implication association—permit Ku Klux Klan to articulate virulently racist and anti-semitic beliefs and do not allow the state to proscribe advocacy of force to effect political, social or economic change save where advocacy will produce imminent lawless action.)

(b) Equality and the Promotion of Equality and Prevention of Unfair Discrimination Act ('PEPUDA')⁸³

A more likely form of state interference is the requirement that certain associations open themselves up to a wider potential membership because they control

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access to important social goods. As we noted above, PEPUDA does just that. But the Act goes further. The Act makes equality *per se* an overridingly important goal. A requirement of equality because an association provides access to a particular set of social goods and a requirement of equality because a society believes all individuals and groups are entitled to substantively equal treatment will likely generate different outcomes.⁸⁴ PEPUDA makes equality a trump and the distribution of social goods a subsidiary concern.

This conflation of instrumental and ideological grounds for egalitarian intervention is only one reason that PEPUDA is likely to meet resistance and inspire a host of challenges based upon associational freedom. It will meet such resistance because, as I have argued above, control over membership policies and internal affairs goes directly to the heart of associational freedom.⁸⁵ Membership policies

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and internal affairs are, after all, about how the association chooses to constitute itself.

82 For a discussion of this question in relation to the status of subversive advocacy, see Gilbert Marcus & Derek Spitz 'Expression' in Matthew Chaskalson, Janet Kentridge, Jonathan Klaaren, Gilbert Marcus, Derek Spitz and Stu Woolman (eds) *Constitutional Law of South Africa* (1st Edition RS5 1999) Chapter 20 ('*Constitutional Law of South Africa*(1st Edition)').

83 Act 4 of 2000 ('PEPUDA').

84 For example, a group of Xhosa gay and lesbian activists might wish to participate in a Xhosa Heritage Day Parade. The organizers may balk — on the alleged ground that homosexuality is not part of Xhosa heritage. It may be hard to identify a clear set of social goods to be secured through participation in a parade. If so, then equality *per se* is the only grounds for state intervention to ensure Xhosa gay and lesbian participation as gays and lesbians. Should it be sufficient? It is a close call. After all, it is likely that the only thing motivating the exclusion of these activists is prejudice. If there is no clear connection between the purpose of the parade and the basis for the exclusion, then the exclusion seems harder to sustain. What if it were an Easter Sunday parade? The connection of religious belief to the parade would place religious belief — as it currently stands — squarely at odds with a basic political commitment to equality. The Act does not seem to recognize (1) the distinction between wanting equality for instrumental reasons — the access to social goods — and (2) wanting equality for purely ideological reasons — wanting equality for equality's sake. In the US, anti-discrimination laws reach deep into the private realm but not in so all-encompassing, so totalizing a manner as PEPUDA. Thus, when the US Supreme Court heard *Hurly v Irish-American Gay, Lesbian and Bisexual Group of Boston* ['GLIB'] (1995) 515 US 557, 115 SCt 2338 ('*Hurly*') and had to adjudicate the claim by GLIB to allow them to be included in Boston's annual St. Patrick's day parade, it faced a bit of a quandary. The Court had to decide whether a largely recreational associational activity with largely recreational benefits could justifiably exclude any group it so desired. Instead of facing squarely the legitimate ends of recreational activity for associational life or the value of GLIB's egalitarian claims, the US Supreme Court hid behind the alleged expressive content of the parade and the alleged fit of that expressive conduct with the parade organizer's exclusionary practices. GLIB was the only such group excluded. A rightly decided *Hurley* might have held that where no link could be established between the association's purpose and its practice, then the State might exercise a presumption in favour of intervention on the grounds of equal treatment and respect.

Because the membership policies and the organization of internal affairs are often critical — though not necessarily essential — to an association's identity, one must be aware that laws which force a change in these policies may alter the essential character of that association. If one believes that political pluralism, cultural diversity, individual autonomy and social upliftment may be threatened by forced changes in associations' membership criteria, then one might want to give some associations the power to police their boundaries and thereby prevent the capture of the association by individuals or groups who might wish to change the association's aims. That is, one may wish to give the individuals and groups whose lives are substantially shaped by the associations of which they are a part, or who invest significant resources and effort in the maintenance and creation of particular kinds of enterprises, the power to police the membership of the organization in order to ensure that it remains true to its founding tenets. The question then is: When, or under what conditions, is an association entitled to exercise its right to determine its membership criteria free from external intervention? Or conversely: When might society's commitment to equality trump an association's control over its membership criteria?

PEPUDA would appear not to engage directly the complicated cluster of issues raised by conflicts between equality and association. Associations are mentioned briefly in the schedule to s 29: an illustrative list of unfair practices in certain sectors.⁸⁶ They would also seem to be engaged in s 27. This section requires that companies, partnerships and clubs develop 'equality plans'.⁸⁷

85 To the extent that membership policies are about exclusion, the freedom of association must be understood include a correlative freedom not to associate. The US Supreme Court has recognized the freedom not to associate or to dissociate. See *Abood v Detroit Board of Education* 431 US 209, 97 Sct 1782 (1977) (dissenting employees possess a right to refuse to associate with respect to ideological expenditures not directly related to collective bargaining). A more difficult question is when, if ever, the freedom to dissociate implies a right to discriminate. See *Norwood v Harrison* 413 US 455, 93 Sct 2804 (1973) ('Invidious discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment . . . [but] it has never been accorded affirmative constitutional protection'). The US case law seems to suggest that two general classes of association may discriminate: expressive associations and intimate associations. See *NAACP v Alabama* 357 US 449, 78 Sct 1163 (1958) (expressive associations protected); *Griswold v Connecticut* 381 US 479, 85 Sct 1678 (1965) (right to privacy and intimate associations protected). However, where association is neither expressive nor intimate, the right to dissociate and discriminate may fall before some important state interest. See *Roberts* (supra) at 615; *Rotary Club* (supra); *City of New York* (supra). The Canadian Supreme Court appears split on whether the freedom to associate includes a freedom to not to associate. *Lavigne v OPSEU* [1991] 2 SCR 211, 81 DLR (4th) 545. It has, however, never endorsed a right to discriminate. European Convention of Human Rights jurisprudence appears equally divided on the subject. See *Young, James & Webster v UK* (1982) 4 EHRR 38.

86 See the schedule for s 29 of PEPUDA, especially Item 10. It reads, in pertinent part, as follows:
Clubs, Sport and Associations:

(a) Unfairly refusing to consider a person's application for membership of the association or club on any of the prohibited grounds.

(b) Unfairly denying a member access to or limiting a member's access to any benefit provided by the association or club . . .

It doesn't take an especially discerning eye to see how little intrinsic merit associations are believed to possess by the drafters of PEPUDA when they are lumped together with — and indeed follow — clubs and sport. Of course, the mention of both clubs and associations may have been intended to ensure that PEPUDA is understood to cover all associations — and, in particular, such notoriously discriminatory entities such as business clubs or golf clubs. See also Item 9 of the Schedule: Provision of Goods, Services and Facilities.

Despite the paucity of express references, PEPUDA poses an imminent threat to associational freedom.⁸⁸ That it does so is especially evident from Sections 13, 14(2) and 14(3). Section 13 reverses the evidentiary burden. Once the complainant makes out a *prima facie* case, the evidentiary burden shifts to the respondent to show that its discriminatory actions are fair.⁸⁹ Section 14(2) and (3) set out the conditions that must be met by the respondent in order to show that the discrimination is fair. Section 14(2) states the test a respondent must meet to discharge his, her, their or its burden. It reads:

In determining whether the respondent has proved that the discrimination is fair, the following must be taken into account:

- (a) The context;
- (b) The factors referred to in subsection (3);
- (c) Whether the discrimination reasonably and justifiably discriminates between persons according to objectively determinable criteria, intrinsic to the activity concerned.

Section 14(3) lists a host of factors to be considered by the Court when making its determination. They are:

- (a) Whether the discrimination impairs or is likely to impair human dignity;
- (b) The impact or likely impact of the discrimination on the complainant;
- (c) The position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns;
- (d) The nature and the extent of the discrimination;
- (e) Whether the discrimination is systemic in nature;
- (f) Whether the discrimination has a legitimate purpose;
- (g) Whether, and to what extent, the discrimination achieves its purpose;
- (h) Whether there are less restrictive means and less disadvantageous means to achieve the purpose;
- (i) Whether or to what extent the respondent has taken such steps as being reasonable in the circumstances to —

87 See s 27(2) of PEPUDA. These 'equality plans' must be fleshed out in the regulations to the Act. Section 25(4)(b) reads, in relevant part, that 'preparing equality plans [must take place] in the prescribed manner.' These regulations remain to be promulgated. Section 26 does not contain this qualifier. Courts could step in and decide what an 'appropriate' (section 26(a)) equality plan would be.

88 PEPUDA will be dealt with at length in C Albertyn and B Goldblatt 'Equality' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 35. See Albertyn, Goldblatt and Roederer (*supra*) for an extensive commentary on the Act and C Albertyn, 'Equality' in Cheadle et al (*supra*) ('Equality') §4, 118 - 121 for a brief discussion of the Act.

89 I am grateful to David Zeffertt for his patient explanation of PEPUDA's evidentiary burdens. Any remaining errors in analysis are mine alone. It must be said that the burden reversal is largely of a piece with our constitutional equality jurisprudence.

- (i) address the disadvantage which arises from or is related to one or more of the prohibited grounds or
- (ii) accommodates diversity.

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For those who might wish away all traces of discrimination violently re-inscribed by Apartheid *and* subtly re-inforced by traditional ways of life⁹⁰, nothing could appear more reasonable than the tests laid out in ss 14(2) and (3). But some of the most obvious constructions of the tests are not reasonable. Section 14(2) may appear to provide the kind of ill-defined and gymnast-like flexibility of a standard South African constitutional balancing test — context, factors, reasonableness and justifiability. Section 14(2)(b), however, takes us to s 14(3). Subsections 14(3) *a-e* and *h-i* are read by some commentators to load the dice in favour of the complainant. The alleged discrimination can simply detrimentally affect the complainant personally — *b* — and need not impair the complainant's dignity. The actual position of the complainant may actually be of less importance than some set of ascriptive features of the complainant — *c*. The inquiries in *h* and *i* place the burden squarely on all associations to find less restrictive and disadvantageous means of realizing their ends and further require all associations to address historical disadvantage and to accommodate diversity. Failure by an association to take factors *a-e* or *h-i* seriously, in advance of litigation, could lead to changes in an association's structure that go well beyond the kinds of actions that might have justified the discrimination in question.

Although, on this construction of the Act, the analysis in ss 14(2)(b) and 14(3) may tilt sharply in favour of the complainant, some solace would appear to be on offer from s 14(2)(c). Section 14(2)(c) looks a bit like a limitations test. It relies upon the respondent's capacity to explain the discrimination in terms of objectively identifiable criteria linked clearly to the association's purpose. Reasonable enough. But that is not how Professors Albertyn, Goldblatt, Roederer and their collaborators read s 14(3).⁹¹ 'Objectively identifiable criteria' is another way of saying that the differentiation may not be on 'prohibited grounds' of discrimination under the Act. 'Intrinsic to the activity concerned' means that the respondent 'must demonstrate an *indispensable causal link* between the 'objectively identifiable criteria' and the activity.⁹² Consider the authors' example:

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90 Apartheid is the rightful punching bag for much of South Africa's current ills. Apartheid is the unabated source of untold suffering. Apartheid squandered the enormous wealth of this country. But to ascribe to Apartheid all patterns of disadvantage must be false. What it certainly did do — and still does do — is arrest South Africa's development. Of course, one could argue that from the perspective of the pursuit of an egalitarian society, it does not matter what the starting point is, only that we get there. That may be true. But that level of abstraction is not the primary departure point for most justifications of egalitarian measures. It is the history of radical inequality that justifies the current pursuit of equality.

91 Albertyn, Goldblatt and Roederer (*supra*) at 46 — 48. This subsection was added to the Act in order to meet some of the concerns of the insurance and the banking industry. These industries were concerned that 'commercial differentiation' would fall foul of the Act. Earlier drafts of the Bill attempted to distinguish between discrimination and differentiation. Insurance companies wanted a complete defence. Human rights groups did not want any defence at all. The subsection is perhaps best read as an inelegant attempt to ensure that 'commercial discrimination' is more likely to be found fair than unfair.

92 *Ibid* at 47 (emphasis added).

Assume that a black waiter, with twenty years experience, is turned down in favour of a waiter of Chinese origin (with two years experience) for a job at a Chinese restaurant.⁹³

Given the relatively equal experience and the potentially pertinent difference in origin (and one is led to assume language), one could be forgiven for reaching the conclusion that is just the kind of situation in which discrimination may be fair.⁹⁴ Not so. Or not so fast. First, the mere fact that race plays a role – and objectively identifiable criteria means no prohibited grounds such as race may 'feature' in the differentiation — makes it look like unfair discrimination. Second, since 'intrinsic to the activity concerned' means 'must demonstrate an indispensable causal link between the "objectively identifiable criteria" and the activity',⁹⁵ the respondent is placed in the position of having to demonstrate that choosing the Chinese waiter is a necessary pre-condition for the restaurant's continued existence. That is simply impossible. Thus, what looks at first blush like a mechanism for taking into account the interests of the association turns out to be anything but.

In fairness to the authors, they make an effort to drag s 14(2)(c) back from the brink by holding that this subsection's requirement of reasonableness and justifiability means that all the factors in s 14(3) — they say s 14(2)(b) which is just to say s 14(3) — come back into play. That is to say that we can count the factors twice if we so choose.⁹⁶ This double counting is supposed to save the Chinese waiter. Somehow, the alleged need to maintain the illusion of authenticity — in the face of *de jure* discrimination and a very dispensable causal link — may be a factor that tips the analysis back in favour of 'fair discrimination'. But as I have argued above, it hard to see how an authenticity predicated upon the prejudices of the non-Chinese world can be used to save bias that is not an absolutely necessary

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pre-condition for the restaurant's survival. The only real arguments ought to be the need of the restaurant to draw on Chinese staff in order to run the restaurant effectively. Unfortunately, the authors have so narrowly construed the meaning of s 14(3)'s other components that this argument becomes impossible to make.⁹⁷

93 Albertyn, Goldblatt and Roedeveer (*supra*) at 46.

94 The authors employ a very faulty set of intuition pumps. Ostensibly, 20 years of experience invariably trumps 2 years of experience. With respect to waiters everywhere, and as a former member of the fraternity/sorority, I am not convinced that the learning curve remains all that steep after two years. Secondly, the choice of a Chinese waiter for a Chinese restaurant draws on an odd sociological/psychological phenomenon. It is designed to get us to buy some 'Sandton Square is really a Tuscan piazza' sort of authenticity. (Which, perversely, is exactly how the authors find their way to justifying the discrimination.) One would think that the only legitimate grounds for choosing the Chinese waiter would be actual use of a common language in the restaurant – knowledge of the language being an integral part of communicating with the kitchen and/or other staff – or that the waiter comes from the community — here or elsewhere – of which the owners and the other employees are a part — links to the community being one of the ways in which the restaurant sustains itself. Otherwise, the grounds for justification are our pre-existing prejudices based upon race.

95 *Ibid* at 47.

96 Though this approach may lack analytical precision, it does echo the Constitutional Court's equality jurisprudence. See *President of the Republic of South Africa and another v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) at para 41; *Harksen v Lane NO and others* 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC).

The difficulties with the construction of s 14 proffered by Professors Albertyn, Goldblatt and Roederer only reinforce more general concerns about the consequences of PEPUDA for associational life.⁹⁸ But suppose we bracket the discussion of the conflict between equality and association as it plays itself out in PEPUDA. That does not mean we give associations, and any attendant discriminatory policies, a free ride.

At a minimum, any association wishing to justify exclusion on grounds expressly recognized as discriminatory, or grounds analogous to those expressly recognized as such, will have to engage the tests of discrimination already built up by the Constitutional Court.⁹⁹ An association is likely to have to discharge the burden of showing: (1) a rational connection between its discriminatory policy and the association's ends and (2) that where such a rational connection exists, that the ends of the association are worth maintaining despite the discrimination inherent in its membership policies.

(c) Democracy

A third form of government interference will involve attempts to require political associations — and perhaps other associations — to structure their internal

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affairs in a more democratic and egalitarian fashion.¹⁰⁰ Here the basic question is to what extent the state's interest in the integrity of a democratic process and a democratic society justifies the infringement of a political party's associational right to order its affairs as it wishes. If you start from the premise that political parties and associations are largely 'private orderings' created to pursue private ends, then the state will have to go some distance to demonstrate its need to meddle.¹⁰¹ If, on the other hand, your departure point is that political parties and associations are

97 More desirable constructions of s14 are available. As the Constitutional Court has recently pointed out in *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and others*, an apparent statutory imperative that a Court *must* consider the factors laid out in a statute does not mean that they must do so in a mechanical fashion or that they may not take other considerations into account. CCT5/03 (15 October 2003). This canon of statutory construction could result in a PEPUDA test for discrimination that achieves a nuanced assessment of associational and egalitarian concerns. For example, s14(2)(c) could accord great weight to an association's ability to demonstrate how a discriminatory practice serves the association's purpose. Even the inevitable double counting of factors has a potentially benign explication. The Constitutional Court determines the impairment of the complainant's fundamental human dignity and whether it ultimately amounts to an impairment of a sufficiently serious nature in much the same manner. See *President of the Republic of South Africa and another v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) at para 41. See also Arthur Chaskalson 'Human Dignity as a Foundational Value of our Constitutional Order' (2000) 16 SAJHR 193.

98 These concerns about PEPUDA are bolstered by the Act's treatment of hate speech. The Act goes far beyond the Final Constitution's prohibition on the advocacy of hate speech to proscribe any speech act 'that could reasonably be construed to demonstrate a clear intention — (a) to be hurtful; (b) to be harmful' on any one of the seventeen prohibited grounds or analogous grounds. PEPUDA, s10.

99 For the test for discrimination generally see, eg, *Harksen v Lane NO* 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC); *Pretoria City Council v Walker* 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC). For excellent general discussions of the requirements of equality analysis see Cathi Albertyn, 'Equality' in Cheadle et al *SA Constitutional Law: The Bill of Rights* (supra) § 4; J De Waal, I Currie and G Erasmus, 'Equality' in *The Bill of Rights Handbook* (2001) § 9; C Albertyn and B Goldblatt 'Equality' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* supra.

essential for a functioning representative democracy, then you would argue that party structures must be democratic in order to serve democracy and that any deviation from democratic principles in the party's internal affairs must themselves be justified.¹⁰²

A party must likewise refrain from commandeering the apparatus of the state in order to discipline members of the party. It seems especially critical that where, as in South Africa, a single party controls the most important levers of power, that the same party must not be able to use that power in order to further the interests of a faction within the party. What justifies the state's intervention within party politics to ensure democratic processes also justifies the prevention of the state's interference with party politics in order to undermine democratic processes.

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Finally, the state's interest in opening up political associations flows from considerations of involuntariness. If our citizenship or membership in a given state is largely involuntary and exit is difficult if not impossible, then our capacity to leave a given set of political institutions is by necessity limited. The involuntariness of our political associations makes its incumbent upon the state to create meaningful avenues for political participation. Without such avenues — and the franchise is insufficient — the citizenry are no better than hostages (however benign their caretakers).

100 Efforts at democratization of associational structures need not be limited to political parties. One can equally imagine legislative attempts to democratize shop floors and corporate boardrooms. See C Cooper 'Labour Relations' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* supra § 30. See also Catherine O'Regan 'Possibilities for Worker Participation in Corporate Decision Making' 1990 *Acta Juridica* 113. However, as noted at § 44.1(c)(iv) supra, the entrance to and voice of an association may not be democratic simply because democracy may be inconsistent with the very goals and values of the association. Should religious associations be democratised? To what end? On the other hand, a national chess federation that distributes public goods in a game of skill might be susceptible to intervention that requires both non-discrimination and some form of democratic rule by those who possess a sufficient familiarity and proficiency in the game.

101 US case law tends to support a 'liberal' view of political parties. *Tashjian v Republican Party of Connecticut* 479 US 208, 107 S Ct 544 (1986) (statute barring independent voters from participating in Republican Party primaries violated the Party's 'First Amendment right to enter into political associations with individuals of its own choosing'); *Democratic Party of the United States v Wisconsin* 450 US 107, 101 S Ct 1010 (1981) (Wisconsin law requiring delegates to vote in compliance with results of the state's open primary violates the Party's associational right to choose its delegates as it sees fit). See also *Eu v San Francisco County Democratic Central Committee* 489 US 214, 109 S Ct 1013 (1989); *Cousins v Wigoda* 419 US 477, 95 S Ct 541 (1975). But see *Marchioro v Chaney* 442 US 191, 196, 99 S Ct 2243 (1979) (upholding Washington law requiring that the major parties have a state committee with two representatives from each county on grounds that a state's interests in conducting elections in a 'fair and orderly fashion is unquestionably legitimate').

102 The German Basic Law expressly recognizes that the integrity of political parties and the integrity of the democracy of which they are a part are inextricably linked. Article 21(1) states, in relevant part: 'The political parties shall participate in the forming of the will of the people. They may be freely established. Their internal organization must conform to democratic principles.' The rules which govern the internal order must meet the democracy requirement in the following ways: (1) rules must specify that party issues are reserved for resolution at membership meetings; (2) members must be able to participate actively and on an equal basis in the decision-making process; (3) free expression of opinion must be possible at membership meetings; (4) the will of the majority must prevail; (5) the party rules must provide for the formation of the party structures from the bottom up; (6) the executive must answer to the general membership at general meetings; (7) exclusions from the party may not be arbitrary.

The state's interest in the democratic process may also take the form of exclusionary rules. The state may prevent members of the police force, the security forces, the civil service and other government employees from direct participation in the affairs of political parties and electoral politics.¹⁰³ The reason for such exclusion is two-fold. First, in countries such as South Africa, the police and security forces have, historically, been actively involved in the suppression of political activity at the behest of the state. A newly formed democratic state may, therefore, have a substantial interest in demonstrating that the police and security forces are no longer tools of repression nor vehicles for the realization of state policy by untoward means. Exclusion of police and security force members from politics demonstrates the commitment of the state to the impartial enforcement of the law, the willingness of politicians to bow to the electorate's desire for democratic change and the recognition that the de-politicization of the security forces fosters a culture in which the military does not see itself as having an interest in particular political outcomes. Second, the exclusion of civil servants and other government employees from direct political activity — running for office and canvassing for votes — serves the state's interest in not having the electorate view the government as serving the narrow interests of a given political party.¹⁰⁴ Moreover, it prevents individuals and groups from using the apparatus of the state — say the postal system — to serve the ends of a particular political party.

(d) Coercion

It would seem relatively uncontroversial to argue that the State will be entitled to interfere in associational life where members of an association are clearly coerced into participation. The difficulty with coercion as a justification for the infringement of associational freedom lies not with those actions that constitute physical abuse. It is rather with those situations in which even the most limited choice

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appears impossible, but necessary, to exercise. With children, one difficulty with such intervention is that we generally give parents a great deal of autonomy with respect to the manner in which they raise their children.¹⁰⁵ With adults, one difficulty is the paternalistic presumption that government can substitute its judgment of what is best for that of its citizenry. Inquiries into non-physical coercion of children and adults are united by considerations of exit.¹⁰⁶ One must take great care, however, when we interfere in associational life that we are not too quick to allow attributions of 'false consciousness' to masquerade as concerns about the inability of children or adults to vote with their feet.

44.3 Association analysis

(a) Determining the content of the right¹⁰⁷

103 See FC s199(7); South African Police Force Act 68 of 1995, s 46. The Act's and the Constitution's limitations on political association by members of the police force are assayed in § 44.3(c)(vii) *infra* in the context of *Van Dyk v Minister van Veiligheid en Sekuriteit*, Case No. 4268/2002 (TPD 29 April 2003, Du Plessis J).

104 But see, eg, *Vogt v Germany* (1996) 21 EHRR 205 (ECHR held that the State had a legitimate interest in ensuring an unbiased civil service. However, the dismissal of a civil servant — in this case a secondary school teacher — for her refusal to resign from the German Communist Party (DKP) constituted a violation of her right to association and a sanction disproportionate to the aim pursued).

(i) Within the Ambit

This chapter has identified four basic grounds for associational freedom: the correlative, the constitutive, capture and dissociation.¹⁰⁸ It has also identified a unifying theme: social capital. The question at this stage is: how does each of these underlying justifications enable us to determine the content of the right and those associations that might thereby claim its protection?

By the correlative, we mean that that though there exist independent justifications for the freedom, associational freedom is often most powerfully justified by

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reference to other constitutional guarantees.¹⁰⁹ With respect to some kinds of association — newspapers, parties and black empowerment entities — the

105 See *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC), 2000 (10) BCLR 1051 (CC) ('*Christian Education*'). The Constitutional Court said that parents had no constitutional right to raise their children however they might like. However, the judgment, while denying the right of teachers to dole out corporal punishment in schools, assures parents that they still possess that same privilege within the home. Another example, as suggested to me by Danie Brand, makes the problem — and the resolution — of non-physical coercion of children a bit clearer. Imagine a summer camp established for white children only. Racist beliefs are inculcated by their adult counsellors as a matter of course. Imagine also that all South African children have access to summer camps so that no child is denied access to this particular good. The reason that the state would be justified in interfering in the voice, if not the entrance, of this camp is that the state has an interest in the creation of citizens who treat other citizens with equal concern and respect. This problem raises invariably a related problem of inculcating exclusive religious beliefs in children. A potentially acceptable justification for a difference in outcome is that the Constitution clearly contemplates religious freedom and religious education. A failure to treat discriminatory religious doctrines differently from racial supremacist doctrines would have the inevitable consequence that the state could interfere with the construction of the most basic tenets of many religions. It might mean that the state would be free to police public and private schools, as well as religious institutions, to ensure that children were not exposed to doctrines that gave clear preference to one set of religious practices because one deity is to be preferred over another. However, while the grounds for interfering with the non-physical doctrinal coercion of children are the same for both religion and race, the centrality of religious life in South Africa makes any significant state interference in the inculcation of religious supremacy unlikely. See the discussion of religious associations at § 44.3(c)(viii) infra.

106 See *S v Jordan (Sex Workers Education and Advocacy Task Force and others as Amici Curiae)* 2002 (6) SA 642 (CC) ('*Jordan*').

107 FC s 18 reads: Everyone has the right to freedom of association.

108 See § 44.1 supra.

109 See the discussion at § 44.1(a) supra. That associational rights are often buttressed by reference to other rights is evident in *South African National Defence Union v Minister of Defence* 1999 (4) SA 469 (CC), 1999 (6) BCLR 615 (CC). The Constitutional Court was asked to determine the constitutionality of a provision of the Defence Act 44 of 1957 which prohibits members of the armed forces from participating in public protest action and from joining trade unions. The court held that prohibiting participation in acts of public protest infringed the right to freedom of expression of SA National Defence Force members and that prohibiting SANDF members from joining a trade union infringed the constitutional right of 'every worker' 'to form and join a trade union'. As Justice Sachs noted in his concurring judgment, implicit in the court's decision was the conviction that freedom of association entitled SANDU members to form a body that could publicly articulate their collective concerns and that would look after their collective economic interests. See also Mohamed Chicktay 'Mission Impossible: Trade Union and Protest Action Rights in the Military: *South African National Defence Union v Minister of Defence*' (2000) 16 SAJHR 324.

correlative rights — expression, political rights and equality — may be deemed so foundational for our constitutional politics that no recourse need be had to the right of association itself. However, other associations — churches, corporations, traditional communities — may be sufficiently peripheral to our constitutional politics that the correlative rights — religion, trade, property and cultural rights — might be strengthened or reinforced by reference to association.¹¹⁰ Of course, this second correlative position assumes that associations actually provide goods in

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some sense independent of their dominant feature. As I have argued, they clearly do. Social capital. If the associations in question do not provide social capital, or do not serve constitutive attachments, or do not create either real or figurative senses of ownership, then they probably are not worth protecting. But then again if they are not worth protecting, the likelihood is that no one will be fighting for them.

By the *constitutive*, we mean that: (1) associations are integral to self-understanding, and there can be no self without the host of associations that give the self content; (2) associations are necessary for social cohesion, and are the indispensable settings for meaningful action. This two-fold recognition is meant to give us pause before we decline to grant *any* association some minimal level of constitutional protection.¹¹¹ For the purposes of associational rights analysis, the two

110 The Constitutional Court often deploys rights simultaneously in the service of its arguments — and it often describes rights as interdependent and symbiotic. In *Khumalo v Holomisa*, the Court twinned privacy and dignity in support of personality rights in a suit for defamation. 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC). In *Christian Education* (supra), the mutually reinforcing rights of religion and culture were deemed to be in conflict with, and ultimately subordinate to a constellation of equality, dignity, freedom and security of the person and children's rights considerations. In *National Coalition for Gay and Lesbian Equality v Minister of Justice* the Court, in finding the common law criminalization of sodomy a violation of the right to dignity, wrote: '[I]t is clear that the constitutional protection of dignity requires us to acknowledge the value and the worth of all individuals as members of society.' Moreover, the court argued, 'the rights of equality and dignity are closely related, as are the rights of dignity and privacy'. 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC) ('*NCGLE I*') at paras 28-30. The language echoes Justice Ackermann's emphasis in *Ferreira v Levin*, on the inextricable link between *dignity* and the need for individual *freedom* from state intervention: 'Human dignity cannot be fully valued or respected unless individuals are able to develop their humanity, their 'humanness' to the full extent of its potential. Each human being is uniquely talented. Part of the dignity of every human being is the fact and awareness of this uniqueness. An individual's human dignity cannot be fully respected or valued unless the individual is permitted to develop his or her unique talents optimally. Human dignity has little value without freedom; for without freedom personal development and fulfilment are not possible. Without freedom, human dignity is little more than an abstraction. Freedom and dignity are inseparably linked. To deny people their freedom is to deny them their dignity.' 1996 (1) SA 984 (CC), 1013-1014, 1996 (1) BCLR 1 (CC). Individual freedom — negative liberty — thus becomes the foundation for dignity. Dignity, in turn, becomes the basis for equality. As the Court writes in *Prinsloo v Van der Linde*: 'In our view unfair discrimination [the linchpin of equality analysis] principally means treating people differently in a way which impairs their fundamental *dignity* as human beings, who are inherently equal in *dignity*'. 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC). And if the interdependence of and reinforcement between individual freedom and dignity and then equality is still not clear, the Court, in *President of the Republic of South Africa v Hugo* writes: '[D]ignity is at the heart of individual rights in a free and democratic society. . . [E]quality means nothing if it does not represent a commitment to each person's equal worth as a human being, regardless of their differences. Equality means that our society cannot tolerate legislative distinctions that treat certain people as second class citizens' 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) For further analysis of the relationship between equality and dignity see C Albertyn 'Equality' (supra); S Cowan 'Can Dignity Guide Our Equality Jurisprudence?' (2001) 17 *SAJHR* 34; S Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, A Stain, M Chaskalson, M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS December 2005) Chapter 36.

111 See the discussion at § 44.1 (b) supra. Some exceptions to that rule are discussed at § 44.3 (a) (ii) infra.

dimensions of the constitutive prompt two obvious questions: Is the association in question important for individual and group identity? Is the association the setting for meaningful action? Most associations — certainly any worth trying to get into or remaining a part of — must be so. The deep background considerations that a court should keep in mind when considering challenges to associational freedom are two-fold. First, the court should be quite wary of supplanting an association's preferred vision of the good life with one of its own or that of a democratically-elected majority. Second, and perhaps more importantly, a court must be take great care before it opens up, interferes with or dismantles existing associations. Such interventions must be carefully calibrated to preserve existing social capital at the same time that the imperative of transformation grants access to that capital and its concomitant opportunities.¹¹²

By *capture*, we mean that in order for most associations to function as associations, they must possess some degree of control over who belongs to the association and some degree of control over the ends the association pursues.¹¹³ So long as the association as currently constituted possesses a figurative and/or real sense of ownership, so long as there is real social capital at stake, a court must cede to the association some significant level of control over entrance, voice and exit.¹¹⁴

By *dissociation*, we mean that individuals must also be free to not to associate with others: whether it be through forced acceptance, forced membership, or

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forced financial and ideological support.¹¹⁵ Courts may be less inclined to find that negative associational freedom mirrors positive associational freedom. Compelled political association is clearly out of bounds. No one may be forced to participate in a political activity or a cause in which they do not believe. However, a court may find that obligatory membership in a union or law society does not mean that political or social action taken by such an entity — against the wishes of a member — constitutes the kind of coercion that merits constitutional intervention. How much coercion a court may be willing to tolerate will likely vary according to a court's assessment of the association's contribution to the vibrancy of our democracy or the necessity of the forced association for some compelling public interest.

(ii) Without the ambit

The eclectic grounds for associational freedom should strongly suggest that there are few kinds of association which enjoy no constitutional protection.¹¹⁶ Given the freedom's wide protective ambit, it is perhaps more appropriate to ask what kinds of associations clearly do not serve the values which animate the freedom and should

112 This defence of associational freedom might strike some as a conservative brake on transformation. It is not. This chapter is, rather, a simple attempt to point out what is at stake in association cases.

113 See the discussion at § 44.1 (c) *supra*.

114 Again, this is not a license to discriminate. While the demonstration by an association of some link between its exclusionary policies and its varied purposes may be sufficient for *prima facie* constitutional protection, the state may still have compelling reasons to alter those policies and thus justify intervention in the association's internal affairs.

115 See the discussion at § 44.1(b) *supra*.

not, therefore, enjoy any constitutional protection. Two candidates suggest themselves: criminal associations and associations which directly threaten the constitutional order.

Criminal associations arguably fall outside the clause's protective ambit because they do not help to realize a rich and varied civil society or any of the macro-social ends which flow from such a society. While one should not wish to underestimate the positive contributions of some subversion for social growth and social capital, or even for personal identity, we would be on safer ground arguing that criminal associations actively undermine the open and democratic society to which the Constitution aspires.¹¹⁷ Similarly, while criminal associations may aid certain subversive forms of self-realization, these forms of self-realization cannot be safeguarded without threatening the rule of law and a democratic constitutional order. Thus, the failure to realize either positive social ends or acceptable forms of self-realization justify the categorical exclusion of criminal associations from the freedom's protective ambit.

This approach is open to the criticism that by excluding criminal associations from the protection of the freedom we suppress artificially the very sort of question the Constitution requires the court to ask, namely: is the criminal statute in

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question unconstitutional on the grounds that it violates the freedom to associate? There are four possible responses to the problem.

The first is the most compelling. One obvious distinction is between those associations that advocate a change in the criminal law and those associations whose aim is the pursuit of criminal ends. It should be uncontroversial to claim that associations that simply seek to alter the law through the political process in order to de-criminalize a certain form of behaviour are entitled to constitutional protection. It should be equally uncontroversial to claim that associations whose aim is the pursuit of criminal ends are not — as a general matter — entitled to such protection.

Our analysis of *per se* excluded criminal associations could stop there. And nothing much would be lost. That said, the threshold test for criminal associations need not always entail a mechanistic application of the existing criminal law to the association in question. What counts as a criminal association excluded from the protection of the freedom may be the subject of a more subtle discrimination by the court as to which criminal associations definitely do not and cannot serve the values underlying the freedom and which criminal associations might just serve those values.

Even if the criminal association which we wish to see protected did not survive under a more subtle threshold test, it is more than likely that the association in question could find solace elsewhere. The associations which warrant constitutional protection are almost invariably protected by some other constitutional right.

116 Of course, it goes without saying that every action, including my writing alone in a room in anticipation of you reading this text, involves a form of association. It would however be absurd to conclude that every such association warrants some level of constitutional protection.

117 It is one thing to admit that a certain type of crime is desirable or necessary, because the costs of any attempt at perfect enforcement are both too high and highly likely to be over-inclusive. It is quite another, and quite wrong, to argue that criminal associations are therefore entitled to any constitutional protection.

Finally, we could, quite mistakenly, reject a wholesale categorical exclusion for criminal associations. Under this last and least desirable option, we would then be faced with the choice of excluding criminal associations from the ambit of the freedom on an ad hoc basis or affording all criminal associations *prima facie* protection and then deciding whether restrictions on the association's freedom are justified under the limitation clause.¹¹⁸

Failure to effect acceptable forms of self-realization, the furtherance of group identity or the accretion of social capital also justifies the categorical exclusion of associations that directly threaten the constitutional order. Our judicious approach to exclusions suggests that only those organizations which possess the military capacity to subvert that order and which have demonstrated clearly their intent to use that capacity ought not to enjoy constitutional protection.¹¹⁹ This rule draws a distinction between associations that merely advocate the government's overthrow — which deserve at least *prima facie* protection — and associations that demonstrate through military preparation and action that they are bent on non-peaceable governmental change. The former deserve at least *prima facie* protection under both freedom of expression and freedom of association. If these associations are going to be restricted, then the government must be able to justify the restriction under the limitation clause.

(b) Limitations on the right

(i) The Complex Character of the Analysis

If many associational rights are buttressed by other constitutional rights, then the nature of the limitations review they receive will, in substantial part, be contingent

118 In his otherwise very generous account of my previously articulated position on associational freedom, Nicholas Haysom accuses me of adopting a loose definition of criminality that forecloses 'any examination of the type of criminality or the reasons why the type of limitation or violation of the right is justified' (presumably by some law). Nicholas Haysom, 'Association' in Cheadle et al *South African Bill of Rights* (supra) at 255. Professor Haysom's objections are just those recognized in the second and third responses to excluding criminal associations from the protected ambit of the right. As I argue in this text, as well as the text to which Professor Haysom has referred, where it is difficult to identify in advance those criminal associations which should not receive *prima facie* judicial solicitude, then the state may rely on the limitation clause to vindicate its claims. However, for reasons that have to do with maintaining a meaningful distinction between rights analysis and limitations analysis, we should be wary about collapsing all 'ambit of the right' examinations into the justificatory framework of the limitation clause. Professor Haysom also worries that I have somehow collapsed the distinction between the criminal association and the individuals engaged in the criminal association. With respect, I fail to see the sting — or the fruit — in this line of criticism. For example, Professor Haysom wonders about the ability of members of a banned organization to meet — and therefore to associate — in order to contest the banning of their association. Without splitting too many logical hairs, the purpose of the two associations is different. The first set of members of the banned associations are pursuing the ends of the banned association. The second set of members of the banned association are simply pursuing a legal case or a political strategy regarding the status of the association. Though the members of the two sets might well be identical, the ends of the two associations are not. Thus, the latter 'association' is protected while the 'former' is not. Indeed, Professor Haysom's point about the common law and its control of criminal conspiracies makes this very point. Ibid at 255.

119 Article 9(2) of the German Basic Law provides that an association may be dissolved if it threatens the democratic constitutional order of the state. However, as Gerrit Pienaar has suggested: 'This does not mean that organizations may not criticize the government or constitutional order, but that violent aggressive negation of and attempts to destroy the democratic, constitutional order are factors which may lead to the prohibition of the organization.' 'Freedom of Political Association in South Africa, Germany and USA' 1993 *TSAR* 233, 238.

upon the level of constitutional importance accorded the buttressing right. As a result, varying degrees of protection will exist for different kinds of associations. Political associations will receive a high level of judicial solicitude. But intimate associations, if buttressed by dignity, or cultural associations, if buttressed by religion, might also receive equally significant constitutional protection. Economic associations may not receive the highest level of protection, buttressed as they are by property rights or economic activity rights. However, the mere fact that other constitutional imperatives support economic associations suggests that they will receive greater judicial solicitude than associations that lack such correlative support.

Even this rendering of the scrutiny afforded associational rights does not capture the truly complex character of the analysis. On closer inspection we see that

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the success of the state in providing justifications for its interference may not necessarily correlate with the level of protection afforded the association by reference to some other provision in the Bill of Rights. Some highly protected associations may be very susceptible to state intervention. On the other hand, some associations that receive little express judicial solicitude may be less likely to be interfered with justifiably.

At first blush this result seems counter-intuitive, if not contradictory. However, the result begins to make sense when one recalls that the proportionality of a limitation does not depend solely upon the value of the associational interest asserted, but also depends upon the importance, intensity or weight of the interest offered as justification for the limitation. Thus, the public nature of the functions fulfilled by political associations not only legitimises the higher level of protection offered to them but also serves as the justification for significant state interference with such associations. Conversely, although associations which serve few if any public or quasi-public functions may not be deserving of any special degree of constitutional protection, they are less apt to be the object of state interference because the state possesses fewer compelling reasons to interfere in their affairs. The more public goods distributed by an association or the more public its function, the more likely it is to be subject to legitimate state intervention.¹²⁰

(ii) Grounds for Limitation

Many of the grounds for limiting the right to associate have been covered in § 44.2. None is without controversy. Banning a political association in a state committed to openness and democracy must be reserved for only the clearest and most imminent threats. Altering the internal affairs of an association in order to make them more democratic can be justified most readily when the association serves quite directly the ends of our democratic state. Intervention in an association's affairs to prevent coercion is warranted when the coercion of a member is physical. It is less clearly so when the coercion straddles the line between false consciousness and a sense that the person in question may have nowhere else to go. Egalitarian concerns raise the most complex and contentious set of issues. At a minimum, a court should show

120 But as I suggested above in § 44.1, a crude public/private distinction fails to account for the array of goods any given association might distribute. Though one might associate political parties or universities with public goods, we would be missing a large part of the picture if we failed to account for the many different kinds of good such an association provides. Likewise, classically intimate associations — such as the family — may be the setting for a similar range of goods. Children, for example, as future citizens are a public good and the state has an interest in their preservation and their education.

limited tolerance for membership criteria that both discriminate against individuals and groups in ways *wholly* unrelated to the ends of the association and offend the basic rules to which a society is committed.

Where appropriate, a court might likewise be on solid ground in rejecting claims of associational autonomy where existing by-laws of an association both discriminate unfairly against individuals and groups and preclude the association from a natural or spontaneous evolution into an organization that pursued a somewhat modified set of ends.¹²¹ It would be one thing — and potentially a good thing — for the courts (or the state) to use such egalitarian concerns to intervene in the affairs of an entity that controls the distribution of important public goods — a business, a university or a political party. It would be quite another thing — often a bad thing — for the courts to intrude on those associations where such goods are not the primary goods at stake — a religious institution, a small social club or a family gathering.

The pertinent grounds for enforcing the right and limiting the right will vary from associational context to associational context. The discussion below looks at how the competing justifications play out in different settings and in the constitutional case law already on the books.

(c) Analysis in context

(i) Political associations

There are at least two likely situations in which the interest behind the restriction a political organization's associational freedom.

The first situation is one in which the state wishes to alter the internal affairs of political parties. Generally, the state will attempt to justify its interference by arguing that the close nexus between political parties and the state requires intervention in the party's internal affairs to ensure that the party serves its representative function in a representative democracy. For example, in some jurisdictions representative democratic politics demands that the members of political parties elect the candidates of their political party to represent them in elections.¹²²

121 This three-fold analysis works in the opposite direction as well. Associations with a tight fit between purpose and exclusion, which do not offend our basic political commitments and which create space for dissent and change go some distance towards the potential burden of state intervention.

122 In Germany, for example, Article 21 of the Federal Electoral Act requires that candidates for federal elections be elected by a meeting of the members, or a representative group of such a meeting, or the permanent representation of such meeting.

The Constitutional Court has yet to be drawn into a discussion of what democracy actually requires. In *United Democratic Movement v President of the RSA and Others* 2003 (1) SA 495 (CC), 2002 (11) BCLR 1179 (CC) ('UDM'), the Court held that while floor-crossing legislation must comply with constitutional requirements, it was not unconstitutional *per se*. Cf *De Lille v Speaker of the National Assembly* 1998 (3) SA 430 (C), 1998 (7) BCLR 916 (C) (High Court held that a suspension of a member of Parliament for contempt constituted a denial of democratic rights to participation). To the extent that the floor-crossing legislation did not clearly violate rights of participation and association, the Court was quite right not to interfere with minor changes to the political edifice. However, as I have argued above, given the involuntariness of our basic political associations, it is quite fair to hold the state to a much higher standard in ensuring that the capacity for political association is real and the capacity of such associations to be heard is meaningful.

The second situation is one in which the state attempts to open up restrictive party membership policies. The state might argue that democracy requires that political demands are made by representative groups of interested individuals. On this account, political parties or associations which excluded individuals on the basis of race, creed, colour, sex, sexual orientation or some other invidious characteristic would not be representative.¹²³ The compelling counter-argument is that in cases where the discrimination and exclusion actually serves the expressive ends of the association — and where state intervention would alter those expressive ends — then we may wish to permit expression to trump the state's interest in representivity and equality.¹²⁴ Though perhaps unpalatable, this position is entirely consistent with the notion that associational freedom demands that we give associations the power to police their membership in order to ensure that the association remains true to its founding tenets.

The Promotion of Equality and Prevention of Unfair Discrimination Act might be understood to require a commitment, by all those exercising state or public power, to realize the ends of substantive equality and articulate policies designed to redress discrimination.¹²⁵ Such a statutory imperative could be used to ensure that persons who have historically been denied access to the levers of political power be able to belong to the political party of their choice and to participate meaningfully in that party's deliberations.¹²⁶

The crisp question is: does the Constitution permit racially exclusive parties? The answer this analysis suggests is a qualified yes: to the extent that all citizens can still participate meaningfully in the affairs of state. However, where racially exclusive political practices actually impair democratic deliberation and participation, the answer should be no.

(ii) Intimate associations

123 See *Smith v Allwright* 321 US 649, 64 S Ct 757 (1944) (Democratic Party rule barring blacks from participating in primaries declared unconstitutional on grounds that election of Democratic candidate would legitimate the racially discriminatory and unrepresentative practices of the party); *Terry v Adams* 345 US 461, 73 S Ct 809 (1953) (political association which determined Democratic Party nominations and discriminated against blacks violates right to vote).

124 See William Marshall 'Discrimination and the Right of Association' (1986) 81 *Northwestern University LR* 68.

125 See ss 25, 26 and 27 of PEPUDA.

126 How far the Constitutional Court will go in this area is unclear. The decision in *UDM* can be read as a demonstration of a reasonable reluctance by the Court to interfere in the co-ordinate branches considered judgment about what counts as multi-party politics and representative, participatory democracy. Or it can be read as a very technical judgment that abjured any unnecessary judgments about matters not squarely before the Court. However, the US Supreme Court, in an opinion that could reflect meaningfully on the extent to which the courts should intervene in party politics, held that state laws that prohibited 'fusion candidates' (candidates running under the banner of more than one party) could not be said to unduly burden third party candidates. *Timmons v Twin Cities Area New Party* (1997) 520 US 351, 117 S Ct 1364. The effectiveness of fusion candidates is an empirical matter — and it is not clear if or how they help third parties — but the Court's decision demonstrated a marked deference to the state's choice to limit how parties are organized, who they choose to represent them and, effectively, to stack the electoral odds in favour of the two major parties.

With associations that are supported by some other constitutional right or imperative, distinctions are rarely made between state regulation of the association's goals and state regulation of the association's a means of achieving those goals. Consequently, the degree of protection afforded the association is often derived from the constitutional protection for the association's objective. This conflation of goal and means is hardly problematic with respect to intimate associations. The intimate associational goal and its means are inextricably linked. As a result, intimate associations normally receive the strong constitutional protections that flow from rights to privacy, human dignity and equality.

If we take sexual congress or traditional partnerships as the paradigmatic examples of intimate association, there appear to exist few good reasons for state regulation or interference.¹²⁷ Few public goods seem to be at stake. Moreover, considerations of identity, constitutive attachment, capture and social capital strongly militate against interference. Where equality is an issue, it usually cuts against, and not in favour of, traditional forms of state intervention. As *NCGLE I* and *NCGLE II* illustrate, the Constitution is committed to sexual orientation equality.¹²⁸ In *NCGLE II*, the Constitutional Court found that failure of the Aliens Control Act to include permanent same sex life partners in its definition of married person violated s 9(3) of the Constitution.¹²⁹ In *NCGLE I*, the Constitutional Court found that the common law offenses of sodomy and statutory provisions criminalizing homosexual acts violated both the right to equality and the right to privacy.¹³⁰ These express commitments to equality and to privacy

127 US case law on state interference with intimate association has been inconsistent, if not incoherent. Compare *Griswold v Connecticut* 381 US 479, 85 SCt 1678 (1965) (striking down law impairing private heterosexual relations) with *Bowers v Hardwick* 478 US 186, 106 SCt 2841 (1986) (upholding law impairing private homosexual relations). However, in the recent case of *Lawrence v Texas* — US —, 123 SCt 2472, 156 LEd 2d 508 (2003) ('*Lawrence*'), the US Supreme Court has now found that homosexuals possess the same rights to privacy as heterosexuals. In addition, the US Supreme Court has, in *Roberts v United States Jaycees* 468 US 609, 104 SCt 3244 (1984) ('*Roberts*'), and its progeny, identified four relatively useful criteria for determining whether an association qualifies as an intimate association: (1) small size, (2) private purpose, (3) selectivity of membership, and (4) insularity of the group. Read together *Lawrence* and *Roberts* should buttress the claim that homosexuals and heterosexuals possess the same kind of intimate associational rights. But see *Shahar v Bowers* (1997) 114 F3rd 1097 (11th Cir. 1997)(Allowing state attorney to withdraw offer of employment upon learning that offeree intended to enter into a homosexual union.) For a general discussion of this case see Shane Wetmore '*Shahar v Bowers*: The Eleventh Circuit's One Step Forward, Two Steps Back' 30 *U Toledo LR* 159. The express protection for sexual orientation under s 9 of the South African Constitution should trump any arguments from state-enforced morality that homosexuals are not entitled to make use of the same legal institutions as non-homosexuals.

128 *NCGLE I* (supra) (Common law offence of sodomy and statute criminalizes homosexual acts found unconstitutional). *National Coalition for Gay And Lesbian Equality And Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC), 2000(1) BCLR 39 (CC) ('*NCGLE II*') (Failure of definition of married person in terms of s 25 of Aliens Control Act 96 of 1991 to include same sex life partners found unconstitutional); For more on the incoherence of the Court's jurisprudence on sexual associations, see § 44.3(c)(x). See, especially, *S v Jordan and Others (Sex Workers Education And Advocacy Task Force And Others As Amici Curiae)* 2002 (6) SA 642 (CC) ('*Jordan*').

129 *NCGLE II* (supra).

130 *NCGLE I* (supra).

undermines directly the state's attempt to restrict intimate homosexual relationships.¹³¹ Moreover, they suggest that little, if any, room exists for denying homosexuals use of the same legal institutions and arrangements on offer to non-homosexuals.

However, not all intimate associations are partnerships based upon sexual union. Many intimate associations are nuclear and extended family structures.¹³² Despite the constitutive nature of intimate familial attachments and such buttressing rights as privacy, religion or language and culture, plenty of potentially good reasons exist for state intervention.¹³³ First, children are usually not in any position to protect their interests or even determine those interests. Second, the state has an interest in making certain that its future citizens are in a position to discharge their responsibilities to the state and to others. At a minimum, the state has a clear interest in making certain that the protection of the intimate association of the family is not a cover for abuse or neglect.

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The knottier question is whether the state is entitled to ensure that children receive the best possible outcome.¹³⁴ Both the minimalist and maximalist approach recognize that children are not the sole property of their parents. The minimalist

131 See *S v H* 1995 (1) SA 120 (C) and *S v Kampher* 1997 (4) SA 460 (C), 1997 (9) BCLR 1283 (C) (Common-law or statutory offences which proscribe private homosexual acts between consenting adult males cannot survive constitutional scrutiny). Although the court's view in *Kampher* was grounded on the prohibition against discrimination on the basis of sexual orientation contained in the equality provision of the Interim Constitution, the protection of intimate association entrenched in the right to privacy also applied. The application of these other provisions of the Bill of Rights to an intimate association underscores the argument that associational rights are frequently buttressed by other constitutional rights.

132 The US Supreme Court is inclined to protect intimate family household structures against state intervention, but permit state intervention where a household does not possess the requisite level of insularity and selectivity. Compare *Moore v City of Cleveland* (1976) 431 US 494 (Striking down zoning laws because they struck too deeply into well-protected sphere of domestic autonomy) with *Village of Belle Terre v Boraas* (1973) 416 US 1 (Upholding zoning laws because rationally related to legitimate state interest and household of college friends did not constitute an intimate arrangement deemed worthy of constitutional protection).

133 The Constitutional Court has demonstrated a willingness to extend the definition of the family in order to protect basic constitutive attachments. See *Du Toit v Minister of Welfare and Population Development* 2003 (2) SA 198 (CC) ('*Du Toit*') (Court held that lesbian partners in a long-standing relationship had successfully challenged the constitutional validity of various sections of the Child Care Act 74 of 1983 and the Guardianship Act 192 of 1993 on the ground that the Acts only provided for the joint adoption and guardianship of children by married persons only); *Booyesen and others v Minister of Home Affairs and another* 2001 (4) SA 485 (CC), 2001 (7) BCLR 645 (CC) ('*Booyesen*') (Foreign national spouses seeking to work in South Africa successfully challenged statutory provision requiring that they apply for a work permit while outside the country and barring them from re-entry until permit issued); *Dawood, Shalabi and Thomas v Minister of Home Affairs* 2000(3) SA 936 (CC), 2000 (8) BCLR 837 (CC) ('*Dawood*') (Constitutional Court found constitutionally infirm provisions of the Aliens Control Act that regulated the circumstances in which foreign spouses — especially the poor — of South African residents were allowed to reside temporarily in South Africa pending the outcome of their applications for immigration permits.) All three cases turned on a finding that the dignity of the family unit was impaired. As O'Regan J writes in *Dawood*: 'It cannot be said that there is a more specific right that protects individuals who wish to enter into and sustain permanent intimate relationship than the right to dignity in s 10. There is no specific provision protecting family life as there is in other constitutions and in many international human rights instruments.' *Ibid* at paras 35 – 37. The learned judge is wrong in two respects. First, association must, in fact, be that more specific provision of the two provisions. It possesses a much more circumscribed ambit than dignity. Second, many other jurisdictions do rely upon freedom of association to protect intimate associations.

approach seems to recognize actual harm, perhaps only actual physical harm, as grounds for intervention. The 'best interest of the child' test, as manifest in the Constitution and the case law, would seem to demand more. But how much more? The maximalist approach, while taking children very seriously, runs the risk of not being able to find a suitable environment for children outside a family structure. The Constitutional Court has recognized both the importance of the family structure and its limits. It has intervened to support parental relationships with children born out of wedlock and the adoption of children by non-citizens.¹³⁵ On the other hand, it has suggested that corporal punishment within the home is constitutionally permissible and that families with children are not entitled to any special treatment vis-a-vis emergency housing.¹³⁶ Its decisions have thus far steered a path between minimalism and maximalism.¹³⁷

(iii) Cultural associations

To the extent that cultural associations confine themselves to bona fide cultural activities, they should be relatively immune to state intervention.¹³⁸ By permitting

134 See *Troxel v Granville* (2000) 530 US 57, 120 S Ct 2054; *In re Custody of Smith*, 969 P2d 21 (Wash. 1998). The US Supreme Court affirmed the Washington Supreme Court declaration that the statute that enabled non-custodial relatives to secure visitation rights was unconstitutional as a violation of the custodial parents right to be free from state intrusion so long as the children were not subject to actual harm. See also David Herring, 'Troxel and the Rhetoric of Associational Respect' (2001) 62 *U. Pitt. LR* 649.

135 See *Fraser v Children's Court, Pretoria North* 1997 (2) SA 261 (CC), 1997 (2) BCLR 153 (CC)(Court finds that unwed fathers in non-Christian marriages entitled to same rights of access as other fathers); *Minister of Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC), 2000 (7) BCLR 713 (CC).

136 Compare *Christian Education* (supra) (Children may not be subject to corporal punishment in private schools; but Court finds that same such punishment may occur within the sanctity of the home) with *Government of the Republic of South Africa and others v Grootboom and others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC) reversing in part *Grootboom v Oostenberg Municipality and Others* 2000 (3) BCLR 277 (C)(High Court held that vulnerability of children supports — in terms of s 28(1)(c) — decision to put municipality on terms to produce shelter for those families in desperate need; Constitutional Court reverses, in part, and finds no independent claim under s 28(1)(c), only a general claim to housing under s 26.) See also A Friedman and A Pantazis 'Children's Rights' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 47.

137 As I have already discussed at § 44.2(d) supra, coercion in the context of intimate familial associations is not the sole province of children. It seems trite, but still worth noting, that when faced with physical coercion, the rights of women to freedom and security of the person, to freedom from servitude, to equality and to dignity all trump any and all benefits that might accrue from sustaining traditional ways of life that re-inscribe such abuse. Female genital mutilation and forced labour are obvious candidates for the trash-heap of history. But polygamy and lobolo? It is easy — and in most cases quite right — to identify such practices with the continued subordination of women. Women are chattel. The more difficult question is whether such practices can be reconfigured so as to sustain legitimately both intimate familial associations and cultural practices.

138 *Ex Parte Gauteng Provincial Legislature: In Re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill Of 1995* 1996 (3) SA 165 (CC), 1996 (4) BCLR 537 (CC). The Court held that s 32(c) of the Interim Constitution permitted communities to create schools based upon common culture, language and religion. It further held that IC 32(c) provided a defensive right to persons who sought to establish such educational institutions and that it protected that right from invasion by the State. It did not, however, confer on the State an obligation to establish such educational institutions. *Ibid* at para 7.

communities to create schools based upon a common culture, language or religion, the Constitutional Court in *Gauteng School Education Bill* expressly recognized the importance of such constitutive attachments and associations for both individual and group identity (and implicitly endorsed their importance for maintaining social cohesion and conserving social capital). However, the High Court in *Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys* has quite correctly added the corollary that the right to single-medium public schools does not and cannot automatically trump the right of all public school students to education in the official language of their choice.¹³⁹

If a cultural association can demonstrate that its discriminatory membership policies legitimately help to preserve a community's cultural life, then the associational right to determine membership should trump most other interests.¹⁴⁰ As the High Court in *Wittmann v Deutscher Shulverein, Pretoria and Others* reasoned, the right

139 But see *Laerskool Middelburg en 'n ander v Departementshoof, Mpumalanga Departement van Onderwys, en andere* 2003 (4) SA 160 (T). The Court was clearly troubled by the conflict between the right to a single- medium school and the right to be educated in the official language of one's choice. In deciding that the 'minority' students must be accommodated, the Court correctly concluded that the right to a single-medium public educational institution is clearly subordinate to the right which every South African has to education in a similar institution and to a clearly proven need to share education facilities with other cultural societies. The Court seems to be on far shakier grounds when it suggests that it is an open question as to whether the exercise of one's own language and culture was better furthered where provision was made in a school for the exclusion of other cultural societies or not. Moreover, it quite wrongly argued that a claim to a single-medium institution was probably best defined as a claim to emotional, cultural, religious and social-psychological security. This trivializes the desire to maintain basic, constitutive attachments. It seems clear that the desire to sustain a given culture — especially a minority culture, as Afrikaaner culture now is — is best served by single medium institutions that reinforces implicitly and expressly the importance of sustaining the integrity of that community. As a result, the Court must also be wrong, if not terribly confused, when it claims that the conversion of a single-medium public institution to a dual-medium school cannot *per se* diminish the force of each ethnic, cultural and linguistic communities claim to a school organized around its language and culture. *Ibid* at 173A/B - F/G. That is, with respect, exactly what the conversion to a single medium *per se* does.

140 Three of the *Roberts* (supra) intimate association criteria could help to identify protected cultural groups: (1) cultural purpose, (2) selectivity of membership, and (3) insularity of the group. The last criterion is, however, somewhat problematic. The US Supreme Court's thinking seems to have been driven by successful litigation undertaken by Amish and Native American groups. The peripheral contact of mainstream society with these groups leads the Court to the conclusion that group insularity itself is what warrants protection. But it is hard to see why withdrawal ought to animate our thinking about which cultural groups are entitled to protection. Cultural groups are entitled to protection whether they participate actively in the affairs of the commonweal or not. First, the South African polity takes great pride in its diversity. It would be perverse to penalize direct contributions to South Africa's rich cultural tapestry. Second, most cultural groups are sufficiently small that their control over their own cultural destiny is relatively limited. Thus, whether the group is insular or not is unlikely to affect their control over the levers of political power.

At least part of what underwrites cultural autonomy claims is the belief that cultures themselves have a right to survive. See, eg, Charles Taylor 'The Politics of Recognition' in Gutmann (ed) *Multiculturalism and the Politics of Recognition* (1996) 57, 61. ('More societies today are turning out to be multicultural, in the sense of including more than one culture that wants to survive'). With regard to the force of such claims in South Africa, the injustices of Apartheid and colonial rule are so legion as to make them impossible to ignore. However, righting the wrongs of a long legacy of violence, theft, forced removal and the often all too real cutting out of the mother tongue does not give cultural autonomy claims an automatic trump over other claims in a democratic society.

to maintain a private German school educational institutions based upon culture, language or religion is predicated upon the capacity to exclude non-speakers, non-believers or non-participants.¹⁴¹ This rationale is entirely consistent with justifications for associational freedom based upon constitutive attachments and capture. One cannot maintain either group identity or the institutions that support that identity if everyone has access to, a claim upon and some control over the property and workings of an association. Moreover, the state's interest — and anyone else's interest — in equality here is rather weak. The goods provided by such associations are far less public than those provided by political and economic associations and that are legitimately subject to far greater state control.¹⁴²

Occasionally, however, the Constitution's compelling interest in equality may justifiably outweigh the values served by particular intimate and cultural associations. The status of polygamous unions raises such a conflict.¹⁴³

That said, the link between culture, social capital and hard capital throws up a most complex set of problems. Communities often support financially other members of their community. Quite often the access to capital comes with terms extraordinarily favourable to the borrower. How should we treat such standing cultural compacts? Such culturally-based economic arrangements are easily subject to charges of bias. That goes without saying. The question is: what can we do about it? Neither outlawing such funds nor opening them up is likely to have the desired outcome. In either case, the fund goes underground or out-of-existence. Unlike banks, whose aim is the bottom line and who profess to serve the broader public, these rotating capital funds are designed, most often, to support members of the

Two points need be made here. First, cultures are not entities that remain static over time. (They evolve both spontaneously and self-consciously.) A defense of cultural autonomy then is a call to support key features of a culture — say language — that makes the culture's survival *in some form* possible. Second, the spontaneous growth of culture suggests that what we, in democratic societies, wish to protect is not culture *per se*, but the rights of individuals qua members of a community to participate in various cultural practices. Only if individuals wish to continue to participate in cultural practices — with the requisite state support — does it even begin to make sense to talk of cultural survival. If no one wants to continue to speak Sepedi, it would certainly count as a loss. But it could hardly be said to amount to an injustice.

- 141 1998 (4) SA 423 (T), 1999 (1) BCLR 92 (T). But see *Matukane and others v Laerskool Potgietersrus* 1996 (3) SA 223 (T) (Court found that discriminatory entrance policies based upon language and culture (read race) violated the right to equality of the complainants and could not be justified on the grounds of cultural, minority or associational rights).
- 142 See *Wisconsin v Yoder* 406 US 205, 92 Sct 1526 (1972) (Amish parents permitted to educate their children at home); *Pierce v Society of Sisters* 268 US 510, 45 Sct 571 (1925) (Catholics allowed to educate their children in private school); *Santa Clara Pueblo v Martinez* 436 US 49, 98 Sct 1670 (1978) (prohibiting undue state interference with Native American tribal autonomy). *Santa Clara Pueblo* is a perfect example of the double-edged sword of cultural autonomy. Pueblo women contested the traditional and quite discriminatory manner of treatment they endured under the governing Pueblo political council. The Court upheld the autonomy of the council against the equality claims of the female petitioners on the grounds of Pueblo political sovereignty.
- 143 See, eg, *Kalla & another v The Master & others* 1995 (1) SA 261 (T), 1994 (4) BCLR 79 (T). In *Kalla* the issue raised, but not decided, was whether the freedom of religion guaranteed by s 14(1) of the Interim Constitution afforded recognition to potentially polygamous unions according to Muslim rites. The issues raised by the case pertain, however, not only to religious freedom but also to freedom of association. In the absence of PEPUDA, one might have argued that such unions ought to enjoy *prima facie* constitutional protection. Whether PEPUDA reverses the 'burden' and grants *prima facie* protection to the party alleging discrimination, the substantive constitutional analysis of such unions, and any potential justification for them, should remain the same.

community in need or in need of backing to start a business. The aim is the strengthening of community life. To the extent that the

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fund continues to serve such an aim — one that ultimately promotes cultural life and social capital — the grounds for overriding its discriminatory and exclusionary policies and aims are limited.¹⁴⁴

(iv) Economic associations

Quite a different set of considerations apply to business associations. In most constitutional jurisdictions the state is entitled to place substantial burdens upon economic association.¹⁴⁵ The primary reason is that business associations control the distribution of important social (public) goods and must be subject to rules of

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144 But see s 31 of the Final Constitution, Cultural, religious and linguistic communities. It reads as follows: (1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community — (a) to enjoy their culture, practise their religion and use their language; and (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society; (2) The rights in ss (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.' Section 31(2) could be construed to preclude all exclusionary and discriminatory policies. But that assumes that all such practices are inconsistent with various provisions in the Bill of Rights, in particular, equality and dignity. The Constitutional Court has made it quite clear that not all discrimination is unfair discrimination. See, eg, *Pretoria City Council v Walker* 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC).

Several possible approaches exist to test the constitutionality of the accretion and distribution of economic capital in cultural collectives.

First, one could permit the accumulation and re-distribution of such capital within the particular community subject to the proviso that such capital could not be used by community members to achieve either dominance or monopoly power with respect to the distribution of social goods — say political power — in non-economic domains. See, eg, Michael Walzer *Spheres of Justice* (1981). Of course, the policing of the mechanisms for distribution of goods across different spheres is difficult when, in fact, it is possible to identify different criteria for the distribution of such goods and when the spheres themselves overlap.

Second, according to Amy Gutmann's civic equality principle, the acid test for such cultural community-based funds would be whether they still permitted the state to discharge its obligation to provide for: (1) equal citizenship or political participation; (2) equal liberty and (3) equal, basic opportunity to live a preferred vision of the good life. Amy Gutmann *Identity in Democracy* (2003) 26-27.

Third, one could talk about the entitlements of such cultural collectives in terms of protection or parity, rather than privilege. See Laurence Sanger 'The Free Exercise of Culture: Some Doubts and Distinctions' *Daedalus* (Fall 2000) 193. Sanger offers a number of justifications for this approach. First, protection rests on the settled judgments of the modern political community. (Sanger's analysis here seems of a piece with Rawls' thesis that an overlapping consensus must underwrite any given liberal democratic society. John Rawls *Political Liberalism* (1993)). Second, protection or parity avoids the 'normal objection that cultural impulses are being indefensibly privileged over other human concerns.' *Ibid* at 203. Though Sanger is not particularly clear as to the nature of the indefensible advantage, he appears to be suggesting that cultural formations and practices are often not rationally defensible. That claim cannot be gainsaid. The real question is to what extent cultural practices — and the funds here under scrutiny — can be both immune from rational scrutiny and benefit from constitutional protection. At a minimum, we might agree that moral practices that are morally repugnant independent of the cultural predilections of the majority and which cannot offer independent grounds for the continuation — other than 'this is just what we do' — are not entitled to constitutional solicitude. This is quite a minimalist position. The cultural practices that a community under attack is apt to defend is likely to be morally repugnant to the majority, but still capable of justification by reference to widely shared values such as freedom, equality, social cohesion, community, order, virtue, spirituality and tradition.

fair play. In addition, where existing regulations strike far into the heart of an association's membership policies or limit the associational choices of an individual, a constitutional attack is more likely to be based upon infringements of the rights to trade, profession or occupation or the right to property.¹⁴⁶

Two kinds of power exercised by economic associations — practice requirements by legal regulatory bodies and restraints of trade by private businesses — have attracted recent judicial scrutiny. The courts have largely resisted direct constitutional engagement.¹⁴⁷

Attempts by advocates to gain direct access to the market for legal services have occupied the courts on a number of occasions.¹⁴⁸ In all three *De Freitas* decisions — in the High Court¹⁴⁹, the Supreme Court of Appeal¹⁵⁰ and the Constitutional Court¹⁵¹ — the courts gave constitutional challenges to rules barring direct access 'short shrift'.¹⁵² The High Court relies heavily on the traditional rationales for the distinction between the bar and side-bar and holds that the distinction between attorneys and advocates remains manifestly rationale because clients were indemnified with regard to loss of trust money by attorneys but not by advocates. Neither the economic activity rights in s 26 of the Interim Constitution nor some notion of the right to associate with clients of one's own choosing on terms of one's own choosing (or not to associate with the Law Society) features in the High Court judgment. The Supreme Court of Appeal judgment likewise does not engage in any serious analysis of either the economic rights or the associational rights raised in *De Freitas*. Judge Cameron, in a concurring judgment, merely points out that the rules of such regulatory bodies must comply with the constitutional requirements of rationality and non-arbitrariness.¹⁵³

145 See, for example, *Oostelike Gauteng Diensteraad v Transvaal Munisipale Pensioenfonds en 'n ander* 1997 (8) BCLR 1066, 1077G-H (T), where Cameron J rejected an associational challenge under IC s 17 to compulsory membership of a pension fund: '[Ek is van mening] dat die applikant geen aanspraak uiteengesit het wat gekoppel kan word aan 'n krenking van enige reg wat deur artikel 17 omvat word nie. Dit blyk intendeel uit die stukke dat die assosiasie- kwessie in die huidige geval suiwer 'n finansiële kwessie is, sonder enige verdere dimensie.'

146 See D Davis 'Freedom of Trade, Occupation and Profession' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 54.

147 For an excellent as well as comprehensive discussion of both constitutional challenges to professional regulatory bodies and to restraints of trade, see Robert LaGrange 'Economic Activity Rights' in H Cheadle et al *South African Bill of Rights* (supra) at 337, 344-359.

148 Ibid at 345.

149 *Society of Advocates of Natal v De Freitas and Another* 1997 (4) SA 1134 (N) ('*De Freitas I*').

150 *De Freitas and Another v Society of Advocates of Natal* 2001 (3) SA 750 (SCA), 2001 (6) BCLR 531 (SCA) ('*De Freitas III*').

151 *De Freitas and Another v Society of Advocates of Natal* 1998 (11) BCLR 1345 (CC) ('*De Freitas II*').

152 LaGrange (supra) at 345.

Despite the limited constitutional value of the *De Freitas* judgments, two High Court cases have recognized at least some of the implications of legal regulatory bodies for freedom of association. In *General Council of the Bar of South Africa v Van der Spuy*,¹⁵⁴ the High Court contrived a three-part test to measure the compatibility of practice rules with constitutional dictates.¹⁵⁵ The last leg of the test — that

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regulations may not really be barriers to entry masquerading as qualifications — engages the substance of commercial association. In *Law Society of the Transvaal v Tloubatla*,¹⁵⁶ the High Court concluded the freedom of association includes the right to dissociate. However, because the High Court chose to read the internal limitation of FC s 22(2) into FC s 18, the requirement that a member of the Law Society must possess a fidelity fund certificate to practice did not even amount to a *prima facie* infringement of the right to associate.¹⁵⁷ The limited scope of the courts' rulings in *Van der Spuy* and *Tloubatla* signal that regulations of commercial association, in particular professional association, need only satisfy some minimal level of rationality to pass constitutional muster.

The majority of cases in the area of restraint of trade have largely followed the same form. That is, they have failed to engage directly the Constitution. Where they have done so, they have primarily held that the common law tradition of 'sanctity of contract' reflected in restraint of trade clauses trumps any countervailing economic activity rights or associational rights.¹⁵⁸ Only in *Coetzee v Comitis* has a court proved bold enough to suggest that a restraint of trade clause must give adequate content to the public policy requirements made manifest in the Constitution.¹⁵⁹ *Coetzee* echoes *Van der Spuy* by holding that contractual provisions that act as barriers to entry will be treated as rebuttably unconstitutional. In general, however, for economic associations to engage constitutional imperatives, the economic

153 *De Freitas III* (supra) at 762-763, citing, with approval *S v Lawrence*; *S v Negal*; *S v Solberg* 1997 (4) SA 1176 (CC), 1997 (10) BCLR 1348 (CC) at paras 34-35.

154 1999 (1) SA 577 (T) ('*Van der Spuy*')

155 The three part test holds that: (1) minimum standards of integrity will be presumed rational; (2) qualification standards must serve the public interest and must be fairly enforced; (3) qualification regulations may not in reality be barriers to entry which prevent a person from practicing in the desired profession.

156 1999 (11) BCLR 1275, [1999] 4 All SA 59 (T) ('*Tloubatla*').

157 I say 'would appear' because it is not clear whether the Court believes that there has been an infringement of the right and because the Court writes that 'one need not consider whether under s 36(1) of the Constitution a limitation of s 18 to provide for the matters in the Attorneys Act is warranted.' *Ibid* at 66. All the Court does say is that a fidelity fund certificate, like rules regarding admission, conduct, contribution and the like, is deemed to be a normal and acceptable limitation of the right to dissociate in the foreign jurisdictions surveyed by the Court.

158 See, eg, *Waltons Stationary v Fourie* 1994 (4) SA 507 (O), 1994 (1) BCLR 50 (O); *Kotze v Potgeiter* 1995 (3) SA 783 (C), 1995 (3) BCLR 349 (C); *Knox D'Arcy v Shaw* 1996 (2) SA 651 (W), 1995 (12) BCLR 1702 (W); *Gero v Linder* 1995 (2) SA 132 (O); *Reeves v Marfield Insurance Brokers* 1996 (3) SA 766 (A).

159 2001 (1) SA 1254 (C), 2001 (4) BCLR 323 (C) ('*Coetzee*').

regulation in question will have to make the desired economic association all but impossible.

(v) Empowering associations

Associations that aim to empower historically disadvantaged groups support the Constitution's commitment to affirmative action and substantive equality. These associations may need to have discriminatory membership policies if they are to be able to police their resources and be in a position to achieve their constitutionally protected objective. When faced with such an association, the state may be hard pressed to show that it has an interest in regulating the membership policies and internal affairs of such an association on racial or gender equality grounds. After all, it is the constitutionally protected goal of realizing real racial

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and gender equality through affirmative action that justifies the exclusion in the first place.¹⁶⁰

However, to pass constitutional muster, the exclusive empowering association should have to demonstrate two things.¹⁶¹ First, it should have to show that its membership is historically disadvantaged and continues to be disadvantaged. Secondly, it should have to show that the exclusive membership policy promotes the goal of substantive equality.

Neither inquiry is simple. The first question may beg questions of both ongoing disadvantage as well as relative historical disadvantage. Excluded parties could well wind up competing with an exclusive empowering association in an attempt to demonstrate in whose favor the weight of historical disadvantage actually falls. The second question throws up the problem of what counts as an association of historically disadvantaged persons designed to redress various forms of inequality. Is any association of such historically disadvantaged persons insulated from attempts by excluded parties to secure access? Would a black South African only club committed to black nationalism, but not to any clear remedial efforts to eliminate vestiges of apartheid, be entitled to exclude non-black applicants?¹⁶² It might be.¹⁶³ But the only acceptable grounds for its exclusionary practices would be those related to expression and not to the constitutionally or statutorily mandated goal of equality. The reason for reliance on expression — and not equality — is clear. The club in

160 See Cathi Albertyn, Beth Goldblatt and Chris Roederer (eds) *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (2001) 132 (Alluding to the possibility that a similar justification of discriminatory practices by historically disadvantaged groups will place such associations beyond the reach of the Act.)

161 See Deborah Rhode 'Association and Assimilation' (1986) 81 *Northwestern University LR* 106, 108 (exclusionary practices justified only where association actually challenges existing disadvantage.)

162 See Shawn M. Larsen 'For Blacks Only: The Freedom of Association of Private Minority Clubs' (1999) 49 *Case Western L Rev.* 359.

163 See *New York City Commission on Human Rights v United African Movement*, No. MPA95-0851/PA95-0031 (NYCCHR June 30, 1997) (The Commission held that the exclusion and the harassment of a white woman at a public event sponsored by the UAM amounted to discrimination, warranted compensation, and required that all future UAM events either meet the definition of 'private event' or announce clearly in the media that such events are limited to UAM members. This case stands for the principle that historically disadvantaged groups are not, ipso facto, entitled to discriminate.)

question has a primarily expressive purpose. It is not engaged, directly, in empowerment.

(vi) Small social associations

Small social associations, despite the absence of additional direct constitutional support, are unlikely targets for state interference. Empirically, they are unlikely to attract state attention because the state has limited resources and will generally have much larger fish to fry. Secondly, even if the state, or applicants using a civil rights act¹⁶⁴, did wish to challenge such an association, there are few good substantive reasons for the interference. In most instances the small social club will not control the *distribution* of any important shared, social good. It will simply be

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the setting for friendly human relations. Where the small association serves the 'purely' local and social ends of its members, the state's interest in opening up the membership is 'purely' ideological. Unless we wish to grant the state the power to enforce its ideology at every turn — thus truly raising the spectre of totalitarianism — such purely ideological grounds for interfering in an association's affairs should be rejected.¹⁶⁵

That a small social club or an informal gathering may not *control* the distribution of any important shared social good does not mean that it is not the setting for the creation and perpetuation of important social goods. A small neighbourhood chess club informally created by a group of eight year old girls most certainly does enable these girls to build friendships and hone their chess skills. Even if such a club is of limited duration, it is a crucible in which the girls learn about the loyalty such kinship creates and the trust sustained bonds require.¹⁶⁶ Much the same might be said of the 'dinner party' that features so often in discussions about association and exclusion. It must be the case that such arrangements between friends (and acquaintances) allow us to develop the kinds of qualities critical to more general, and more public, social relationships. And lest we think that all associations must either work to achieve justice or provide the setting for the development and refinement of character, sometimes girls just want to have fun. It is an impoverished jurisprudence (of association) that forgets that.

(vii) Security forces

164 For example, The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

165 See *West Virginia State Board of Education v Barnette* 319 US 624 at 642, 63 S Ct 1178 (1943) ('If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein'). See also Note 'State Power and Discrimination by Private Clubs: First Amendment Protection for Non-expressive Associations' (1991) 104 *Harvard LR* 1835.

166 As I have argued above, this kind of loyalty and trust are the pre-conditions for more sophisticated relationships of loyalty and trust as well as the formation and conservation of social capital. Such clubs also provide the constitutive attachments critical for identity formation and social cohesion.

Of course, if this small girls only chess club grew into a large provincial federation — still supported privately — that ran nationally sanctioned tournaments that enabled participants to secure internationally recognized grandmaster points, then some good grounds for state intervention — to ensure equal opportunity — would exist.

In *South African National Defence Union v Minister of Defence ('SANDU I')*¹⁶⁷ the Constitutional Court held that a provision of the Defence Act¹⁶⁸ prohibiting members of the armed forces from participating in public protest action and from joining trade unions violated the members' right to freedom of expression and their right 'to form and join a trade union'. Implicit in the majority's decision — and explicit in Justice Sachs' concurrence — was the notion that SANDU members' freedom of association had been infringed. The question for the court was whether these infringements were justifiable. With respect to the soldier's right to freedom of expression, the court found the provisions' limitations a grave incursion on the soldiers' expressive rights and patently unjustifiable. With respect to

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the soldiers' 'right to form and join a trade union', the court rejected the Minister's contention that an infringement of the right was justified by the constitutional imperative to structure and manage the South African National Defence Force ['SANDF'] as a 'disciplined military force'.¹⁶⁹ As the current provision of the Act stood, it was a constitutionally unjustifiable limitation. However, while deciding that the requirement of strict discipline would not necessarily be undermined by permitting SANDF members to join a trade union, the court did note that the structure of a trade union might well differ in a military environment and that appropriate legislation might justifiably limit the scope of a soldier's trade union rights.¹⁷⁰

In *South African National Defence Union v Minister of Defence ('SANDU II')*¹⁷¹, the High Court was asked to assess the constitutionality of a subsequent set of regulations.¹⁷² The *SANDU II* Court found that the regulations that specified conditions for peaceful demonstration, prohibited union affiliation or closed shop agreements, barred members from securing union-sponsored legal representation and allowed for withdrawal of union recognition without notice violated SANDU's and SANDF members' rights to collective bargaining (s 23), assembly (FC s 17) and association (FC s 18).¹⁷³

In *Van Dyk v Minister van Veiligheid en Sekuriteit*, the High Court held that a police officer was legitimately terminated from his employment because he stood for

167 1999 (4) SA 469 (CC), 1999 (6) BCLR 615 (CC).

168 Act 44 of 1957, s 126.

169 See FC s 199 (7). It reads, in pertinent part: 'Neither the security forces, nor any of its members, may, in the performance of their functions — (a) prejudice a political party interest that is legitimate in terms of the Constitution; (b) further, in a partisan manner, any interest of a political party.'

170 With that difference clearly in mind, the order of invalidity was suspended for 3 months in order to give the Minister of Defence the opportunity to devise an appropriate regulatory framework for military trade unions.

171 2003 (9) BCLR 1055 (T).

172 Government Gazette Number 998 (20 August 1999).

173 At the time of writing, the *SANDU II* High Court's orders of invalidity awaited confirmation by the Constitutional Court.

election as a member of the Democratic Alliance.¹⁷⁴ The officer argued that because his position in the police force — that of a budget analyst — did not require him to engage the public directly, the officer's candidacy could not prejudice the administration of justice or give the appearance of such impropriety.¹⁷⁵

The Court found that the purpose of the South African Police Force Act 68 of

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1995 was to eliminate any perception on the part of the public that the administration and enforcement of the law advanced the fortunes of any political party or undermined the claims of members of other parties to justice.¹⁷⁶ The Court found that the elimination of any taint of political party bias in the police force in order to instil greater public confidence in government justified the limitation of the political and associational rights of the particular officer in question.¹⁷⁷ Such a finding is consistent with the needs of a nascent democracy committed to the principle that all are equal before the law and that all can be expected to be treated without favour or prejudice.¹⁷⁸

(viii) Religious associations

174 Case No. 4268/2002 (TPD 29 April 2003, Du Plessis J). While on the police force from 1995 to 1999, Van Dyk had represented the Freedom Front on the Greater Pretoria Metropolitan Council (GPMC). In 2000, Van Dyk switched to the Democratic Alliance and openly ran for a seat on the GPMC as a DA candidate.

175 Van Dyk also argued that while the South African Police Force Act 68 of 1995, s 46, and the Final Constitution, s 199(7), set identifiable limits on party political activity, those limits should be read, and if necessary modified, by the political rights found in the Final Constitution, s 19. The Court found that even if section 46(1) was deemed to have infringed FC s 19, the infringement was patently reasonable and justifiable under s 36.

176 Section 46 of the South African Police Force Act reads as follows:

(1) No member must not

(a) exhibit support or swear allegiance openly or associate himself or herself with a political party, organization, movement or body,

(b) hold any position or office in a political party, organization, movement or body,

(c) carry any symbol or any means of identification in respect of any party, organization, movement or body,

(d) promote or denigrate party political interests,

(2) Subsection (1) does not mean that a member is prohibited from

(a) joining a party, organization, movement or body or his or her choice,

(b) attending a meeting of a political party, organization, movement or body: on the understanding that no member may attend such a meeting in uniform; or

(c) exercising his or her right to vote.

(My translation). Section 46(1)(a) replaced section 35(1)(a) of the Police Act 7 of 1958. The Police Act stated that no member of the Police Force, while still a member of the Police Force, may engage in political activity, stand for election or participate in a municipal council.

177 See *Van Dyk* (supra) at 10 ('The need for a police force that is seen to be impartial speaks for itself.')

Despite the correlative right to freedom of religion and the profoundly constitutive nature of religious attachments, religious associations have not fared particularly well in the few cases to reach the Constitutional Court.

In *Prince v President, Cape Law Society*, a sharply divided Constitutional Court held that although a Rastafarian's right to freedom of religion in terms of s 15(1) of the Final Constitution of the permitted him to engage in Rastafarian rituals, the state was justified in proscribing the ritual use of cannabis.¹⁷⁹ In reaching its conclusions about the requirements of general welfare and international obligation, the majority relied heavily on the state's evidence that even limited dagga smoking could lead to broader drug use and greater narcotics trafficking. In large part, this assessment relied upon an under-interrogated assumption that no meaningful exemption to existing laws could be carved out for ritual dagga use.

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When viewed through the lens of association analysis, the rationale for the majority judgment seems rather opaque. On the basis of little more than assertion by the state, the majority is willing to bar a member of a religious association from engaging in practices that the association's members deems central to their way of being in the world. There is no issue of an exclusionary practice. There is no issue of discrimination. There is little question about the import of the ritual for the association in question. At best, the Court's discourse pits a vague sense of danger to the commonweal against the very real commitments of a discrete and insular religious minority. Given that the state's interest is an abstraction in the very worst sense of the term, it is difficult to escape the conclusion that had a more mainstream entity sought protection for an 'illegal' ritual, a creative solution might have been found.

The minority judgment offers some solace. As Justice Ncgobo writes:

Apart from this, as a general matter, the Court should not be concerned with questions whether, as a matter of religious doctrine, a particular practice is central to the religion. Religion is a matter of faith and belief. The beliefs that believers hold sacred and thus central to their religious faith may strike non-believers as bizarre, illogical or irrational. Human beings may freely believe in what they cannot prove. Yet that their beliefs are bizarre, illogical or irrational to others, or are incapable of scientific proof, does not detract from the fact that these are religious beliefs for the purposes of enjoying the protection guaranteed by the right to freedom of religion. The believers should not be put to the proof of their beliefs or faith. For this reason, it is undesirable for courts to enter into the debate whether a particular practice is central to a religion unless there is a genuine dispute as to the centrality of the practice.¹⁸⁰

For the purposes of association analysis the above paragraph is important in several respects. While Justice Ncgobo uses the term 'irrational' to describe how outsiders may perceive a religious belief or practice, he may just as well have used the word

178 See § 44.2(c) *supra* for various democratic rationales for the limitation of associational rights. A number of eastern European nations have placed similar laws on the books in order to diminish the public's understandable reluctance to trust a security apparatus that had all too recently used all manner of surveillance and violation of bodily integrity to enforce the repressive policies of the state. Of course, as South Africa's history of overt politicization of the security services recedes into the past, the rationale for barring party political activity will lose at least some of its force.

179 2002 (2) SA 794 (CC), 2002 (3) BCLR 231 (CC) ('*Prince*').

180 *Prince* (*supra*) at 813.

arational. He goes on to note that however irrational — or arational — a religious belief or practice might be, the centrality of that belief in the life of its holder is what secures the religious belief, practice or association, constitutional protection. Thus, the minority judgment recognizes: (1) how associations are constitutive of the beliefs and practices of individuals; and (2) how the fact of their being constitutive entitles them to constitutional protection. The minority judgment is remarkable in that it does not rely upon a model of rational moral agency to describe the beliefs entitled to judicial solicitude.¹⁸¹

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The Constitutional Court's decision in *Christian Education South Africa v Minister of Education* would appear to be of greater use vis-a-vis the vindication of associational rights.¹⁸² The judgment contains valuable language about how equality jurisprudence tolerates legal asymmetries. The essence of equality under the South African Constitution, so says the judgment, is that it does not require that we treat everyone the same way, but that we treat everyone with equal concern and respect.¹⁸³ And that's just a fancy way of saying that we need not all act the same way in order to enjoy the benefits — including the associational benefits — of a liberal constitution.

Unfortunately, the Court does not extend the benefit of this understanding of equality to religious or cultural associations. It refuses to give ss 15 or 31 of the Final Constitution any meaningful content. The judgment assumes that for the purposes of analysing the constitutionality of s 10 of the South African Schools Act¹⁸⁴ — which bars the use of corporal punishment by teachers — ss 15 and 31 of the Constitution have been infringed. Upon moving to the limitations analysis under s 36, the Court explains why the state is justified in barring corporal punishment in schools and why the court is justified in not crafting an order creating an exemption for such punishment.

The problem with the judgment is not its result. It is perfectly reasonable to override religious dictates and to bar the corporal punishment of children in schools. Children are in no position to determine the desirability of a set of religious practices that may result in harm to themselves. The problem is with the distinction between the practice of religion in schools and the practice of religion elsewhere, i.e., the

181 Of course, one might argue that religious associations are unique for reasons that even the minority judgment suggests: namely that religion is the realm of faith and not reason. As such, it goes without saying that for both the majority and the minority that the beliefs or practices will be arational. However, the ascription of arationality to constitutive beliefs that merit constitutional protection is important: because it is the centrality of the belief — and its concomitant association — to the adherents' lives that warrants its protection and not some basic assumption of rationality (or reasonableness).

That said, one must take care not to give adherents to any religious faith a free pass (an exemption) simply because a deity allegedly stands behind their deeply held convictions. Either a deeply held conviction that fits into a community's comprehensive vision of the good life warrants an exemption or it does not. The presence of a deity itself adds nothing to the analysis. For a similar view vis-à-vis cultural association exemptions see Sanger (supra) at 193, 204-6.

182 *Christian Education* (supra).

183 *Ibid* at para 42.

184 Act 84 of 1996.

home. If children lack the capacity to decide for themselves whether religious practices will prove deleterious to their health — and it therefore becomes incumbent upon the state to intervene on their behalf — then it would seem reasonable to conclude that barring religion sanctioned corporal punishment at home should be no different than barring religion sanctioned corporal punishment at school. But that is not what the Court concludes. Instead, it rather sanctimoniously argues that the parents 'were not being obliged to make an absolute and strenuous choice between obeying a law of the land or following their conscience. They could do both simultaneously.'¹⁸⁵ That is, parents could follow their conscience at home — and beat their children — but still obey the law of the land by having their children attend school free from corporal punishment. Moreover, save for the imposition of corporal punishment, says the Court, the religious schools were not prevented from maintaining their

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specific Christian ethos. The Court cannot have it both ways. Either the scope for religious autonomy and the religious community's constitutive attachments is sufficient to justify corporal punishment in school and at home or a child's right to dignity is of such paramount importance for the state to bar it when deployed at school or at home. To say that the crux of the matter is the use of a teacher as the instrument of religious discipline is pure sophistry. If the teacher was the parent or the school was at home, then the court's basis for enabling the parents' 'to do both simultaneously' would evaporate. Thus, whereas the minority judgment in *Prince* leaves a reader with a sense that just less than half the court takes religious associations seriously, the *Christian Education* judgment leaves one with a sense that both the parents and the children in question and the public at large are not being taken seriously.

These two decisions also seem to drive one to the conclusion that the courts have not made a meaningful distinction between largely ascriptive associations such as a religious association and voluntary associations such as a cricket board. The notion, underlying both *Prince* and *Christian Education*, is that these religious associations could, if they wanted to, jettison a doctrine or two in order to comply with broader social and political norms. Certainly we might expect the United Cricket Board to align itself with these broader social and political norms (though not without difficulty), because the team it sends out represents the nation. But we cannot have such expectations of a religious denomination in a liberal society. Quite often to belong to such an ascriptive association is to have one's identity and life shaped in a manner that does not readily permit the alteration of either belief or act.¹⁸⁶ To be a

185 *Christian Education* (supra) at para 51.

186 It goes without saying that not all religions will provide nor will all believers adhere to a comprehensive view of the good life that warrants political or legal deference. First, religions are so varied in their doctrine — and their comprehensiveness and adherents so varied in their level of commitment — that one cannot presume that religious participation *simpliciter* justifies violation of laws that bind every citizen. Second, while many religions are ennobling, religious doctrine underwrites quite a lot of bigotry and hatred. See Sanger (supra) at 194, 205-206 ('Religiously motivated conduct is far too vast and far too varied a category to be a plausible candidate for a presumptive exemption from the laws that bind the rest of us.') Cf P Farlam 'Freedom of Religion, Belief and Opinion' in in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 41 (Advocate Farlam is inclined to give sincere believers a presumptive right to an exemption. Although he does not say as much, perhaps Advocate Farlam's inclination in this regard is buttressed by the notion that a Court can always find that the state's prima facie infringement of s 16's freedom of religion is reasonable and justifiable under s 36.)

member of a liberal society is to live in a state committed to not so readily dictating the ends of its citizens. That is not to say that the state cannot intervene in the affairs of a church. Only that it must have regard for the unique character of such associations as well as for the fairly high threshold for such intervention.

(ix) Voluntary Associations and Fair Hearings

South African Courts have engaged associational rights and fair hearings in three relatively recent cases. In all three cases —*Cronje v United Cricket Board of South*

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*Africa*¹⁸⁷, *Ward v Cape Peninsula Ice Skating Club*¹⁸⁸, and *Wittmann v Deutscher Schulverein, Pretoria, and Others*¹⁸⁹ — the courts have upheld the rights of associations to control the grounds for expulsion so long as they met basic standards of procedural fairness. In *Cronje*, the court deferred to the United Cricket Board when it came to deciding how and whether to deal with Hansie Cronje once he had been expelled from the association. In *Ward* and *Wittmann*, the courts reversed the expulsion. They did not do so on the ground that the expulsion occurred for some politically or morally reprehensible reason. The associations were simply found to have failed to comply with the dictates of procedural fairness. To the extent that *Wittmann* weighs in on the power of an association to terminate membership when the member acts in a manner contrary to the decisions of the association's board and engages in expressive conduct that leads to criticism of the association, it decides that the association does possess such power. All three cases can be read as standing for the proposition that a member has vested interests in the association that, at a minimum, require a fair termination hearing. A non-member, on the other hand, possesses no such rights. Read this way, *Wittmann*, *Ward* and *Cronje* seem of a piece. Indeed, what ties them together at a theoretical level is the notion that once a person has been granted entry into an association, he or she accepts the basic principles upon which the association operates and thus the principles that may lead to his or her exclusion. The potential for exclusion is part of the consideration the member offers in return for admittance.¹⁹⁰

(x) Sexual Associations

All sexual associations involve an exchange of some sort. Love, pleasure, rage, humiliation, and, yes, even wealth, all form part of the currency of sexual association.

In *NCGLE I* and *NCGLE II*,¹⁹¹ the Constitutional Court held that the Constitution's express commitment to equality with regard to sexual orientation meant that the

187 2001 (4) SA 1361 (T).

188 1998 (2) SA 487 (C)

189 1998 (4) SA 423 (T), 1999 (1) BCLR 92 (T).

190 The ability of these kinds of voluntary associations to exclude members whose behaviour is at odds with the basic tenets of the association is consistent with my belief that concerns about 'capture' stand at the heart of associational freedom.

191 *NCGLE II* (supra); *NCGLE I* (supra).

statutory and common law rules that invidiously distinguished homosexuals from heterosexuals were constitutionally infirm. In short, the two judgments place these sexual associations — and the correlative rights to equality, dignity and privacy as well as the constitutive attachment of homosexual intercourse — at the centre of protected associational activity.

But in another recent judgment, *S v Jordan*,¹⁹² the Court withheld constitutional

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protection for consensual sexual associations. The apparently critical difference between *NCGLE I* and *II* and *Jordan* is that the latter turns on the presence of a monetary exchange and the traditionally despised occupation of prostitution. Upon closer analysis, none of the Court's distinctions between the various kinds of sexual association hold up. At least part of the rationale for the rejection of the equality arguments raised in *Jordan* rests on both the prostitute and the john being subject to criminal sanction — albeit very different sanctions in kind and degree.¹⁹³ But were different legal sanctions for the same kind of sexual act visited upon homosexuals and heterosexuals, it would be hard to imagine the post-*NCGLE I* and *II* Court sustaining this 'separate but equal' treatment. Similarly, the Court holds that sexual association of a prostitute and a john — or between any two persons involving some pecuniary exchange — lies at the periphery of the right to privacy and not at its core. But this distinction between core and periphery is illusory. Aside from its invidious characterization of prostitution, the Court makes no effort to describe those kinds of heterosexual and homosexual sexual association that belong at the core and those kinds that fall at the periphery.¹⁹⁴ The Court neither weighs in on the various kinds of indiscriminate sexual behaviour that heterosexuals and homosexuals engage in for the sheer fun of it nor does it take a view about the many kinds of intimate sexual intercourse where some other kind of bargain has clearly been reached.¹⁹⁵ But it is hard to imagine the Court describing such 'private' relationships as lying at the periphery of the right to privacy. Likewise, the Court's judgment that the criminalization of prostitution could not be said to impair the dignity of the prostitute because 'the diminution arose from the character of prostitution itself' — the commodification of one's body — is difficult to understand in a liberal, market-based society such as ours.¹⁹⁶ So much of what we do involves the commodification of our bodies. A day-labourer is entitled to some level of constitutional protection of his dignity despite the fact that he has chosen to sell his body for the wages needed to pay for food and shelter. A Constitutional Court judge, while commodifying her body in the natural course of listening to arguments and writing opinions, is likewise entitled to some level of constitutional solicitude. It

192 *S v Jordan and Others (Sex Workers Education And Advocacy Task Force And Others As Amici Curiae)* 2002 (6) SA 642 (CC) ('*Jordan*').

193 *Jordan* (supra) at paras 15 and 18.

194 The majority simply asserts, without argument, this distinction. Ibid at para 29. The minority does not contest the assertion. Ibid at para 117.

195 See Narnia Bohler-Muller 'Drucilla Cornell's 'Imaginary Domain': Equality, Freedom and the Ethic of Alterity in South Africa' (2002) 65 *THRHR* 166. See also Max Du Plessis 'Between Apology and Utopia' (2002) 18 *SAJHR* 1, 19-21.

196 *Jordan* (supra) at para 74.

cannot be that the commodification of one's body *per se* bothers the Court. All of us gainfully employed do just that.

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It must be a particular form of commodification — or the commodification of a particular body part — that provokes the Court. But when the offending commodification just happens to be a form of behaviour that attracts the censor of many South Africans, then it is hard not to conclude that the Court has confused commodification with moralization.¹⁹⁷

197 From the general perspective of associational freedom, the Court fails to give the correlative rights of an intimate association to equality, dignity and privacy, equal weight in these three cases. It fails to take seriously the variety of sexual association necessary for identity formation, and dare I say, social cohesion. See, eg, Kate Weston *Families We Choose: Lesbians, Gays and Kinships* (1991) 103–136. Only those traditional models of biological union — or those made easily analogous to them — secure the Court's approval.