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On The Freedom To Associate or Not To Associate with Others

Thomas Kleven*

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In casual conversation, it is commonly asserted that there is, or should be, a right to associate or not to associate with whom one chooses. Societies, however, frequently induce associations people do not want and deter those they do. This article addresses the types of situations that give

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rise to associational issues and the considerations relevant to their resolution. It does not attempt to develop a general theory of free association because, given the unresolvable value disputes underlying all associational issues, I am skeptical about the possibility of developing such a general theory. Unpacking how differing associational issues are resolved in practice within and among societies should, however, shed some light on those values.

Part A outlines the types of situations in which associational issues arise. How associational issues are resolved greatly depends on whether a more individualistic or collective perspective is brought to bear. Part B develops this point in general through a discussion of both Locke and Aristotle. Part C illustrates the point through a brief excursion into the institution of marriage. Part D analyzes in more detail how the process plays out regarding conflicts among society's members. Part E then analyzes the process when society itself is a party.[1]

I. Types of Associational Issues

Associational conflicts abound in social life. Within a society Party A may wish to associate with Party B, who, in turn, may not wish to associate with Party A. Examples of this include: A's desire, not shared by B, to be friends with, to marry or to remain married to B, A's desire to go to school with or live in the same neighborhood as B, to belong to the same club or professional association as B, and many more.[2] To resolve these conflicts, society could

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[1] For other treatments of free association, *see, e.g.*, FREEDOM OF ASSOCIATION (Amy Gutman ed., 1998) (articles discussing the importance of free association within a society and factors relevant to the resolution of conflicts over free association).

[2] Even situations as seemingly impersonal as taxation, when society seeks to compel those who do not want to participate to financially support public programs that benefit others, entail associational

empower A to force the association on B, empower B to avoid the association, or resolve the matter itself by taking into account the wishes of the parties and other considerations it deems relevant.

On the other hand, Party A and Party B may wish to have an association that society finds objectionable or, conversely, to avoid an association that society desires. Under such circumstances, society must decide whether to abide by the wishes of the parties or to prevent or compel the association despite the parties' wishes. Examples of preventing associations that parties wish to have include the regulation of sexual behavior and criminalizing conspiracies in restraint of trade. Examples of compelling associations parties do not wish to have include the draft and forced integration.

Moreover, society itself may be a party to an associational conflict. Examples include when someone wants to leave or enter a society against society's wishes, or when people occupying part of a society wish unilaterally to secede. In these instances, society must decide whether to accede to the other party or attempt to impose its will on that party. At times, all the parties involved in an associational conflict may be societies. Examples include territorial disputes and treaty withdrawal. Here, the international community may try to intervene in a way similar to a society's resolution of conflicts among its members. In the absence of such intervention, societies have to work it out amo ng themselves.

In all these associational contexts, some individual or entity ultimately must control whether an association exists. Parties cannot simultaneously be both friends and not friends, be married and not married, attend integrated and segregated schools, participate together in some

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conflicts. A relationship between parties on a purely financial level is still a type of association and poses questions that resemble those arising in more intimate associations.

societal venture and not participate together, be a member and not be a member of society, be a party and not be a party to a treaty. All societies have methods—through law, custom, and at times brute force—for allocating the power to control the outcome in such associational contexts and to compel or induce the adherence of their members and others. The purpose of this paper is to examine the ways in which that power is allocated in order to identify and evaluate the considerations that underlie differing resolutions of associational conflicts in divergent social contexts.[3]

II. Who Should Control: Individual and Collective Perspectives

One's view of the appropriate resolution of associational conflicts and who should control the outcome depends to a great degree on one's view of the nature of social life. In particular, it depends upon the extent to which one takes an individualistic or communal view of social life.

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[3] This is not the place to attempt a thorough explanation of the meaning of the concept "society," which involves such factors as interdependence, common values and culture, authoritative institutions, territoriality, and the perception of its members. Generally, I use society to refer to something on the order of a country or nation. Depending on which factors are emphasized, however, the concept is flexible enough to include associations from those as small as a nuclear family to the world community as a whole. Consequently, it is possible for someone to be a member of many societies at the same time, both public and private and with or without a formal governmental structure. Each society may have its particular method of resolving associational issues, although the types of considerations that come into play may correspond. On the nuances in meaning of the concepts of society, community and nation, and on their constitutive factors, *see generally*, KARL W. DEUTSCH, NATIONALISM AND SOCIAL COMMUNICATION: AN INQUIRY INTO THE FOUNDATIONS OF NATIONALITY (1966); ANTHONY D. SMITH, NATIONAL IDENTITY (1991).

The extreme individualistic view posits the primacy of the individual.[4] The individual precedes society and all relationships. Society and any relationship is only justifiable or consistent with the rights of the individual when people freely choose to enter society or form relationships.

The extreme communal view posits the primacy of the collective over the individual.[5] People are inevitably and unavoidably enmeshed in relationships because they are, by nature, social animals born into relationships not only with their parents but on some level with all others. Their fates are inescapably intertwined with the fates of all others, their welfare inescapably interdependent with the welfare of all others, and in some way, all of their actions affect all others and the actions of all others affect them.[6]

Consequently, many relationships that may seem to be freely chosen or rejected are, in fact, highly conditioned by the social circumstances in which people find themselves. And society at large has a legitimate interest in preventing and imposing relationships in the name of the common good. Even those relationships that are left to private choice entail a collective decision that society is better off by treating them as such.

The reality of social life in all modern, and perhaps all historical, societies is some blend of individualistic and communal thinking. Some types of relationships are more

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[4] As expressed, for example, in the philosophies of John Locke and Robert Nozick. *See* JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT (Thomas P. Peardon ed., Liberal Arts Press 1952) (1690); ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974).

[5] As expressed, for example, in the philosophies of Aristotle and Michael J. Sandel. *See* ARISTOTLE, THE POLITICS (Stephen Everson ed., Cambridge University Press 1988); MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982).

[6] Even death does not fully avoid relationships, which may continue in the form of obligations imposed on one's estate or of the influence one continues to have on others after death.

or less freely chosen, while others are more or less involuntary or imposed. Often the line between free choice, involuntariness, and imposition is blurry. Moreover, the treatment of particular relationships as more open to choice or as more subject to imposition is a function of both individualistic and collective considerations that may cut both ways. In most instances, it is possible to advance both types of considerations for or against treating relationships as open to choice or subject to imposition.

This interplay between the individual and the collective is found in even the most individualistic and communal thinkers. Consider, for example, Locke and Aristotle, who certainly represent thinkers close to the opposite ends of the spectrum. For Locke, political—and by extension social—life begins when people in "a state of perfect freedom . . . by their own consents . . . make themselves members of some body politic."[7] Within given societies, people then "by compact and agreement" establish rules regarding the control and distribution of property and other resources,[8] and "by common consent" states do the same as among themselves.[9] Locke's emphasis on consent, which is at the heart of contemporary libertarianism, [10] is a highly individualistic view that at first blush would seem to make it difficult to ever justify imposing a political or any other relationship on someone.

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[7] LOCKE, *supra* note 4, at 4, 11. "Men being, as has been said, by nature all free, equal, and independent, no one can be put out of this estate without his own consent." *Id.* at 54.

[8] LOCKE, *supra* note 4, at 27.

[9] *Id.*

[10] *See* NOZICK, *supra* note 4, at 334 ("Voluntary consent opens the border for crossings . . . . Treating us with respect by respecting our rights, [the minimal state] allows us, individually or with whom we choose, to choose our life and to realize our ends and our conception of ourselves, in so far as we can, aided by the voluntary cooperation of other individuals possessing the same dignity.").

Yet several qualifications bring collective considerations into play. First is the obligation Locke imposes on people not to use their freedom so as "to harm another,"[11] and the related limitation on their right to freely appropriate the common resources of the state of nature that they leave "enough and as good . . . in common for others."[12] These qualifications force people into relationships with others in three ways: by having to take the interests of others into account in planning one's own behavior; by having to respond to the complaints of others that one has violated the qualifications; or by having to bargain and coordinate with others so as to minimize conflict over and prevent overexploitation of resources. Such necessities help explain why Nozick describes the development of his Lockean Minimal State less as a voluntary coming together than as a spontaneous, almost automatic process.[13]

Second, even with regard to voluntary political relationships, once someone "by actual agreement and any express declaration" consents thereto, the person becomes "subject to the government and dominion of that commonwealth as long as it has a being . . . and can never again be in the liberty of the state of nature."[14] Moreover, once someone becomes a member of a society "he authorizes the society . . . to make laws for him as the

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[11] LOCKE, *supra* note 4, at 5.
[12] *Id.* at 17.
[13] NOZICK, *supra* note 4, at 10-25, 108-19 (describing the "invisible-hand" process by which a "minimal state" arises out of the anarchic state of nature as a means of people's protecting their rights and interests). "Out of anarchy, pressed by spontaneous groupings, mutual-protection associations, division of labor, market pressures, economies of scale, and rational self-interest, there arises something very much resembling a minimal state or a group of geographically distinct minimal states." *Id.* at 16-17.
[14] LOCKE, *supra* note 4, at 69.

public good of the society shall require,"[15] and within the society, "the majority have a right to act and conclude the rest."[16] In short, by consensually entering into a societal relationship, one may not withdraw from that relationship and is then subject to, or is deemed to have consented to, many other types of relationships imposed upon the party pursuant to collective considerations.

Locke must, of course, deal with the question of people who are born into already existing societies, which is to say most people throughout history. If after a society's initial consensual founding everyone born into it automatically and irrevocably became members of it, this would be the end of the consensual nature of political relationships. Consequently, Locke propounds that "a child is born subject to no country or government,"[17] and upon becoming an adult is "at liberty what government he will put himself under."[18]

As a practical matter, however, the exercise of that liberty is often highly constrained and subtle. Thus, "the son cannot ordinarily enjoy the possessions of his father but under the same terms his father did, by becoming a member of the society."[19] Moreover, the socialization process and a multitude of economic and emotional bonds that exist in all societies inhibit most people from choosing to join a society other than their own. Thus, the process of consent is such that "people take no notice of it and, thinking it not done at all, or not necessary, conclude they are naturally subjects as they are men."[20] Finally, unlike in Locke's time, the world is now divided into nation-states that strictly regulate entry, thereby creating significant legal

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[15] *Id.* at 50.
[16] *Id.* at 55.
[17] *Id.* at 67.
[18] *Id.* at 68.
[19] *Id.* at 67.
[20] *Id.*

obstacles to expatriation. It is only a short step to a general view that, in reality, many relationships are far from voluntary, and that the appearance of consent is often illusory and masks the largely socially constructed nature of relationships.

This view readily comports with Aristotle's. Aristotle's starting point, unlike Locke's "state of perfect freedom," is that "man is by nature a political animal."[21] Rather than arising from consent, the state is a "creation of nature,"[22] and is "clearly prior to the family and to the individual."[23] Social life is an involuntary relationship because "a social instinct is implanted in all men by nature" and "the individual, when isolated, is not self-sufficing."[24]

From this starting point, Aristotle posits a variety of involuntary relationships in social life. One is the relationship of ruler and ruled: "For that someone should rule and others be ruled is a thing not only necessary, but expedient; from the hour of their birth, some are marked out for subjection, others for rule."[25] For Aristotle this extends to gender relationships, in that "the male is by nature superior, and the female inferior; and the one rules, and the other is ruled; this principle, of necessity, entails to

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[21] ARISTOTLE, *supra* note 5, at 3.
[22] *Id.*
[23] *Id.* at 4.
[24] *Id.* *Compare* SANDEL, *supra* note 5, at 150:

> To say that the members of a society are bound by a sense of community is not simply to say that a great many of them profess communitarian sentiments and pursue communitarian aims, but rather that they conceive their identity . . . as defined to some extent by the community of which they are a part. For them, community describes . . . not a relationship they choose (as in a voluntary association) but an attachment they discover, not merely an attribute but a constituent of their identity.

[25] ARISTOTLE, *supra* note 5, at 6.

all mankind."[26] It is possible to reject Aristotle's view of class and gender roles and still find a case for the non-consensual nature of many social relationships.

Yet, bearing in mind that the notion of individual rights was not highly developed in his era, Aristotle's philosophy also contains the yin-yang of communal and individualistic thinking.[27] Thus, subject to its regulation for the common good, Aristotle supports private ownership of property[28]—the essence of which, as modern commentators have noted, is the owner's power to choose with whom to associate regarding its use.[29] Aristotle's reasons have both

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[26] *Id.* at 7.

[27] *See, e.g.*, ARISTOTLE, NICOMACHEAN ETHICS (Terence Irwin trans., Hackett Publishing Co. 1985). For Aristotle, one's ethical duties regarding how one should treat others derive from the pursuit of one's highest end, which is happiness. Happiness is properly sought through the development of one's excellences and virtues, which include the way one treats others. *See also* THE INDIVIDUAL AND THE STATE 1-24 (H. M. Currie ed., 1973) (discussing the roots of respect for the individual in ancient Greek and Roman democracies, and the maturation in Western civilization since the Renaissance and Reformation of "the essential dignity and sanctity of human life, freedom of thought and criticism, . . . popular government . . ., [and] the rule of law based on the impartial administration of justice" beginning with the Renaissance and Reformation periods (at 5)).

[28] "It is clearly better that property should be private, but the use of it common; and the special business of the legislature is to create in men this benevolent disposition." ARISTOTLE, *supra* note 5, at 26. "The true forms of government, therefore, are those in which the one, or the few, or the many govern with a view to the common interest." *Id.* at 61.

[29] *See, e.g.*, Thomas Kleven, *Private Property and Democratic Socialism*, 21 LEGAL STUD. F. 1, 12-21 (1997) ("Ownership confers decision making power over things, the right to determine how things are to be used and who may have access to them, which in turn means that others who do not have the right to share therein, i.e., who are not co-owners, have the duty not to interfere with the owner's control." (at 18)); Kenneth J. Vandevelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFF. L. REV. 325, 360 (1980) ("To say that one owned property was

collective and individualistic overtones. "[W]hen a man feels a thing to be his own," this contributes to personal pleasure and thereby to the development of one's excellence;[30] the greatest pleasure is "doing a kindness or service [to others], which can only be rendered when a man has private property."[31] Private property enables people to "set an example of liberality" or "liberal action," deriving from "the use which is made of property."[32] Finally, "there is much more quarreling among those who have all things in common,"[33] such that with private property "men will not complain of one another, and they will make more progress, because everyone will be attending to his own business."[34]

In addition, though people are naturally political animals, Aristotle acknowledges that "they are also brought together by their common interests,"[35] implying that free choice is at play in establishing political relationships. Furthermore, while Aristotle is not an unadulterated advocate of democracy, he does note as among its virtues that "a man should live as he likes,"[36] a further acknowledgement of freedom of choice in relationships.

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to say that the owner had some set of rights, privileges, powers and immunities. Moreover, one who did not own property had a set of no rights, duties, disabilities, and liabilities relative to the owner.") *But compare* State v. Shack, 277 A.2d 369, 374 (N.J. 1971) (overturning trespass conviction of legal services attorney and poverty worker assisting migrant farm workers on ground that a property owner does not have the right to prohibit visits with farm workers in on-premises living quarters so as to deny them "opportunity to enjoy associations customary among our citizens").

[30] ARISTOTLE, *supra* note 5, at 26.

[31] *Id.*

[32] *Id.* at 27.

[33] *Id.*

[34] *Id.* at 26.

[35] *Id.* at 60.

[36] *Id.* at 144.

To conclude this part of the discussion, I do not propose to try to resolve here which of the foregoing perspectives, the individualistic or the communal, is the more correct or appropriate for addressing associational issues. Indeed, the debate over that question probably cannot be resolved. In the real world, most or all societies have an ethos that incorporates some aspects of both approaches, albeit with differing emphases in different societies. Therefore, we should expect to find divergent societies resolving associational issues differently in keeping with the nuances of their mores. And within societies, we should expect to find associational issues resolved differently over time as mores evolve.

III. The Institution of Marriage

To illustrate how societies resolve associational issues differently from each other and over time, let us briefly consider the institution of marriage. In the United States, the establishment of a marital relationship is widely viewed as the choice of the two parties, both of whom must agree and either one of whom may block its establishment. In this context, the party who does not want an association prevails over the party who does and, therefore, controls the outcome.

Both individualistic and collective values, flowing from cultural notions of what marriage entails, would seem to underlie this arrangement. From an individualistic perspective, to force one to marry against one's will would violate human dignity and the fundamental right to control one's destiny with regard to such personal matters. The intimacy of marriage, ideally based on love and typically involving sexual relations, is one obvious element. More collective notions are also likely at work, such as the importance of marriage based on mutual choice to the success of the nuclear family and, in turn, the perceived

importance of the nuclear family to the successful functioning of society.

Underlying all these elements are debatable value judgments. A society in which the extended family is a more important institution than the nuclear family might well see marriage based on love and mutual choice as promoting the nuclear family at the expense of the extended family. This may help explain the practice in some societies of arranged marriages, perhaps more common in the past, though still found today.[37] Those societies may view marriage based on intense interpersonal intimacy and mutual choice as weakening the ties to other members of the extended family and leading couples to separate themselves from it. In marriages arranged by one's family or parents, on the other hand, it is common for the new couple to live with one of their families, thereby strengthening extended family ties.

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[37] *See, e.g.*, GWEN J. BROUDE, MARRIAGE, FAMILY, AND RELATIONSHIPS: A CROSS-CULTURAL ENCYCLOPEDIA 192-95 (1994) (comparing arranged marriage practices in various cultures); Xu Xiaohe & Martin King White, *Love Matches and Arranged Marriages*, NEXT OF KIN 420 (Lorne Tepperman & Susannah J. Wilson, eds. 1993) (comparing and contrasting arranged marriage practices in China and Japan). For articles on recent efforts at reform in societies with historical traditions of patriarchal marital practices, including arranged marriage, *see, e.g.*, Michele Brandt & Jeffrey A. Kaplan, *The Tension Between Women's Rights and Religious Rights: Reservations to CEDAW by Egypt, Bangladesh and Tunisia*, 12 J.L. & RELIGION 105 (1995-96); Mark Cammack et al., *Legislating Social Change in an Islamic Society - Indonesia's Marriage Law*, 44 AM. J. COMP. L. 45 (1996); Anna M. Han, *Holding Up More Than Half the Sky: Marketization and the Status of Women in China*, 11 J. CONTEMP. LEGAL ISSUES 791 (2001); Sherifa Zuhur, *Empowering Women or Dislodging Sectarianism: Civil Marriage in Lebanon*, 14 YALE J.L. & FEMINISM 177 (2002); Shirley L. Wang, Note, *The Maturation of Gender Equality Into Customary International Law*, 27 N.Y.U. J. INT'L L. & POL. 899 (1995).

Without question, arranged marriages have often taken into account the wishes of the parties. When it does not, arranged marriage is an example of an association that one or both of the parties may not want. While ultimately it may be difficult to force an adamantly unwilling party to marry, various social pressures may be applied to induce compliance. Threats of disinheritance and ostracism have frequently been used, even in societies as individualistic as the United States, to induce compliance with parental wishes, and some societies have condoned or accepted even the killing of a recalcitrant child.[38]

While mutual choice is the prevailing approach to the establishment of a marriage in this society, the right to freely choose to marry has been severely limited by requirements such as being unmarried and of different genders. Such requirements reflect societal concerns, like promoting procreation or perceived moral offensiveness, that are thought to trump the value of individual choice, even with regard to a matter as intimate as marriage. For example, anti-polygamy laws might be justified as protecting women and children from perceived oppression or ensuring that there are potential partners for everyone who wants to marry. Banning same-sex marriage might be justified as promoting procreation or preventing practices that violate societal mores. Nevertheless, polygamy has been widely practiced in other societies, and there are

[38] For reports on countries where "honor killings" of women are common for various reasons, including refusal to submit to arranged marriages, and on the indifference and complicity of the authorities, *see, e.g.*, Amnesty International, *Pakistan: Honor Killings of Girls and Women, at* http://www.amnesty.org/library(Doc.# ASA 33/018/1999); Gendercide Watch, *Case Study: "Honour Killings and Blood Feuds," at* http://www.gendercide.org/case_honour.html; Human Rights Watch, *Violence Against Women and "Honor" Crimes, at* http://www.hrw.org/press/2001/04/un_oral12_0405.htm.

strong individual rights claims for allowing it.[39] The same is true for same-sex marriage, for which movements exist here and elsewhere.[40]

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[39] For divergent views regarding polygamy, *see, e.g.*, Keith E. Sealing, *Polygamists Out of the Closet: Statutory and State Constitutional Provisions Against Polygamy Are Unconstitutional Under the Free Exercise Clause*, 17 GA. ST. U. L. REV. 691 (2001) (arguing that anti-polygamy laws intentionally discriminate against Mormons without a legitimate secular purpose); Maura I. Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage*, 75 N.C.L. REV. 1501 (1997) (arguing that anti-polygamy laws are justifiable per the contribution of polygamy to despotic and inegalitarian societies and of monogamy to the modern liberal-democratic state); Stephanie Forbes, Note, *Why Have Just One?: An Evaluation of the Anti-Polygamy Laws under the Establishment Clause*, 39 HOUS. L. REV. 1517 (2003) (arguing that laws banning polygamy violate the Establishment Clause of the First Amendment per promotion of particular religious views and absence of an overriding secular purpose); Richard A. Vasquez, Note, *The Practice of Polygamy: Legitimate Free Exercise of Religion or Legitimate Public Menace? Revisiting Reynolds in Light of Modern Constitutional Jurisprudence*, 5 N.Y.U. J. LEGIS. & PUB. & POL'Y, 225 (2001-2002) (arguing that harms of polygamy to women and children constitute a compelling government interest justifying its prohibition).

[40] *See, e.g.*, Goodridge v. Dep. of Pub. Health, 798 N.E.2d 941 (Mass. 2003) (finding that denial of benefits of civil marriage to same-sex partners infringes fundamental rights of individual liberty and equality in violation of Massachusetts Constitution); Baker v. State, 744 A.2d 864 (Vt. 1999) (holding that exclusion of same sex couples from benefits and protections of marriage violates Common Benefits Clause of Vermont Constitution); Clifford Krauss, *Gay Marriage Plan: Sign of Sweeping Social Change in Canada*, N.Y. TIMES, June 19, 2003, at 8A (reporting on Canada's decision to legalize same-sex marriage). For arguments in favor of same-sex marriage, *see, e.g.*, Elvia R. Arriola, *Law and the Family of Choice and Need*, 35 LOUISVILLE J. FAM. L. 691 (1996-1997); MARK STROSSER, LEGALLY WED 23-74 (1997) (arguing that bans on same sex marriages violate the Equal Protection and Due Process clauses); Cindy Tobisman, *Marriage vs. Domestic Partnership: Will We Ever Protect Lesbians' Families*, 12 BERKELEY WOMEN'S L.J. 112 (1997). For arguments against or counseling a gradual approach to the recognition of same-sex marriage, *see, e.g.*, George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 J.L. &

The free choice model is also not fully applicable to the termination of a marriage through divorce. In some societies, including the United States in earlier times, divorce has been nearly impossible to obtain, even when both parties desire it.[41] When divorce became generally permitted in the United States, it was ordinarily necessary to show a cause such as adultery, desertion, or cruelty.[42] This usually posed little problem when both parties wanted out since they could stipulate to, or fabricate, a cause.[43] But a requirement of cause could pose a substantial obstacle when one party wanted out and the other did not. In such instances, the party wanting the association to continue controlled if the party not wanting it was unable to

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POLITICS 581 (1999); Linda S. Eckols, *The Marriage Mirage: The Personal and Social Identity Implications of Same-Gender Matrimony*, 5 MICH. J. GENDER & L. 353 (1999).

[41] Most of Europe, prior to the 1800s, was largely influenced by religious doctrine proclaiming the indissolubility of marriage. Divorce was virtually unknown and annulment very hard to obtain. Couples who wanted out of marriage had to settle for living apart while remaining formally married. Likewise in colonial America, divorce was difficult to obtain and uncommon, especially in the South, although legislative divorces were occasionally granted. After independence, the situation in the South remained the same while largely restrictive judicial divorce laws were developed in some Northern states. By 1880, legislative divorce was dead and most states had general divorce laws of varying degrees of stringency. *See, e.g.*, LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 181-82, 436-40 (1973); MAX RHEINSTEIN, MARRIAGE STABILITY, DIVORCE, AND THE LAW 7-27 (1972).

[42] Comprehensive divorce laws began to arise in the United States in the mid-1800s. Although initially a few states established fairly permissive grounds for divorce, by the late 1800s restrictive divorce laws were the norm. *See, e.g.*, FRIEDMAN, *supra* note 41, at 436-40; RHEINSTEIN, *supra* note 41, at 28-55; Walter Wadlington, *Divorce Without Fault Without Perjury*, 52 VA. L. REV. 32, 35-44 (1966).

[43] *See, e.g.*, FRIEDMAN, *supra* note 41, at 439 ("collusion was a way of life"); RHEINSTEIN, *supra* note 41, at 55-63; Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 9, 15-16 (1990).

show cause. While the party wanting out might be able to physically leave, so that the parties were no longer living together as a married couple, the formality of the marriage and its attendant legal and social obligations would still remain.

It is possible to reconcile the requirement of cause with the mutual choice model. The choice to marry in the face of the cause requirement could be seen as akin to an agreement not to sever the association without cause. This rationale would seem more convincing if the parties could choose to marry under either a regime permitting unilateral divorce or a regime requiring cause, as is currently being tried or considered in some states.[44] When the only available option is divorce for cause, individuals who want the benefits of marriage are induced by society to have their ability to exit the relationship limited by the wishes of the other party. This empowers the party who wants the relationship to continue.

Currently in the United States, a marital relationship is fairly easily severed through divorce because most states either have no-fault divorce or impose easily proven standards, such as incompatibility or irreconcilable differences.[45] Consequently, when one party wants a

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[44] Both Arizona and Louisiana have recently adopted "covenant marriage" statutes enabling parties to choose to marry under a system requiring traditional fault grounds for divorce rather than the generally applicable no-fault system. ARIZ. REV. STAT. §25-901 *et seq.* (1998); LA. REV. STAT. ANN. §9:272-75, 307 (1997).

[45] *See* MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 64-81 (1987) (identifying eighteen states as having divorce on no-fault grounds only, two as requiring mutual consent for no-fault divorce, and thirty states as having mixed fault and no-fault systems that impose various waiting periods for contested unilateral no-fault divorce; and comparing the United States to Western Europe); HERBERT JACOB, SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES 1-2, 43-103 (1988) (detailing the history of the no-fault movement in the United States); Wadlington,

marriage to continue and the other wants out, the latter controls. Yet, although unilateral divorce is now fairly easy, society's requirement of support for ex-spouses and children impinges on one party's ability to terminate all aspects of the relationship against the will of the other party. Support requirements might be rationalized in a number of ways, involving both individualistic and collective concerns: on the basis of a party's having voluntarily undertaken such obligations by choosing to marry or have children; or of the perceived unfairness of allowing total exit when a less well-off spouse may have foregone opportunities for self-sufficiency in the interest of the marital or family relationship; or of a judgment that individuals should be responsible for providing for their offspring rather than leaving it entirely to the other parent or to society as a whole; or of the contribution of support requirements to the preservation of the nuclear family as an integral societal institution. In any event, support requirements depart, at least to some degree, from total freedom to exit an unwanted relationship that another party wants. In fact, support requirements may be imposed even against the wishes of both parties to a divorce, as through laws requiring divorcees to reimburse the state for welfare benefits paid to ex-spouses and children.[46]

In sum, despite the intimacy of the marital relationship, societies frequently intervene through law and social practice to prevent people who want to marry from doing so and to compel or induce people who do not want to marry or remain married to do so. Both individualistic and collective considerations govern the institution of marriage, and different balances are struck among and within societies.

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supra note 42, at 44-52 (discussing the operation of divorce laws based on incompatibility).

[46] *See* Paul K. Legler, *The Coming Revolution in Child Support Policy: Implications of the 1996 Welfare Act*, 30 FAM. L.Q. 519 (1996).

IV. Associational Considerations Among Parties Within a Society

In this section I intend to flesh out more thoroughly some of the considerations relevant to deciding who should control the existence or non-existence of associations among society's members.[47] Assume a society is deciding (i) whether to allow, prohibit or mandate particular relationships, and (ii) who should control the outcome in case of conflict over the existence of a relationship. Every such society will have a bias, derived from its culture and mores, about the relative significance of the decision of various individual and collective considerations.[48] Although these biases will often produce different outcomes in similar associational contexts, the considerations that come into play may yet be the same.

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[47] Like the concept of society, *supra* note 3, the concept of membership is complex and variable, depending on the emphasis placed on the various factors that might be thought relevant, such as formal citizenship, voluntarily joining and/or agreeing to be a member, and presence in a society and/or participation in its activities. Since members of a society frequently receive more favorable treatment than non-members, the issue of whether someone is a societal member may be hotly contested. *See infra* notes 115-16 and accompanying text regarding the lesser rights of prospective immigrants. *See also* Plyler v. Doe, 457 U.S. 202 (1982) (Equal Protection Clause applies to undocumented alien children present within state such that state must provide free public education to citizens and lawful aliens); Martinez v. Bynum, 461 U.S. 321 (1983) (finding no violation of the Equal Protection Clause where state denies free public education to children residing in district for primary purpose of attending public school).

[48] In this society, for example, when the law is silent, the presumption is that parties are free to mutually decide to have or not to have an association. An alternative approach is possible, at least with respect to the establishment of an association; namely that all associations require prior collective approval. That the former rather than the latter is the case reflects the society's individualistic bias.

A. Terminating an Existing Relationship

Since individual freedom is so highly valued in this society, let us assume that interpersonal relations are ordinarily up to the parties involved.[49] Also assume in case of conflict that the party not wanting a relationship ordinarily controls, unless there are sufficient countervailing considerations either to socialize the decision or to empower the other party to control. First, let us address a party desiring to terminate an existing relationship voluntarily entered into that the other party wants to continue.[50]

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[49] Like the concepts of society and membership, what it means to say that someone is involved in a relationship is subject to a variety of interpretations depending on such factors as whether they have agreed to the relationship and their degree of interdependence with others. With a common destiny, there is a sense in which everyone in the world is involved in a mutual relationship. However, the extent of the relationship may have legal significance. For example, laws requiring parental consent before a minor can obtain an abortion seem premised on the existence of a relationship with the child that warrants parental involvement in the decision, subject to the child's right to opt out of that aspect of the parent-child relationship if the child can demonstrate sufficient maturity to a judge who thereby becomes involved in the decision as a kind of surrogate parent. Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833 (1992). In contrast, holding that parents have the right to deny visitation privileges to grandparents seems premised on the absence of a sufficiently strong grandparent-child relationship to overcome the parent-child relationship. Troxel v. Granville, 530 U.S. 57 (2000). *See also, infra* notes 115-16 and accompanying text (regarding lesser rights of prospective immigrants as against societal members).

[50] Where one party wants out of an existing relationship and the other does not, several resolutions are possible. One is to allow unilateral termination. A second is to allow unilateral termination subject to the requirement that the party wanting out somehow compensate the other party. A third possible resolution is to allow the party wanting the relationship to continue to specifically enforce the agreement against unilateral termination. Finally, a fourth possible resolution is to allow specific performance subject to the requirement that the party wanting

As noted above with regard to marriage, individualistic considerations do not necessarily support the right of a party wanting out always to have the absolute privilege to completely terminate an existing relationship against the will of the other party. Suppose at the inception of a relationship the parties agree that the relationship may be terminated only by mutual agreement and that neither shall have the right to terminate it unilaterally. If one party later wants out, the other who does not want out might claim that the first party has thereby voluntarily waived whatever right not to have or continue an unwanted relationship it might otherwise have had. To reject such a claim, it is necessary to treat the unilateral right to terminate an unwanted relationship as inalienable, thereby making the stipulation against unilateral termination void.

A commitment to individualism may support viewing some individual rights as inalienable, as when parting with those rights would overly undermine what it means to be a person and pervert a commitment to

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in somehow compensate the party wanting out. *See* Guido Calabresi & Douglas Melamed, *Property Rules, Liability Rules, and Inalienabilty: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). Only the first alternative fully satisfies the individualistic claim of an absolute privilege to terminate an unwanted relationship over the other party's objection. The second alternative is next most favorable to the party wanting out, but it is inconsistent with an absolute privilege to terminate because having to compensate the other party impinges on the privilege and may at times be so costly as to induce someone to remain in an unwanted relationship. Furthermore, it entails a concession to the party wanting a relationship to continue, empowers that party in bargaining over the relationship's future, and requires that the relationship continue in the form of whatever the required compensation consists of. Still this second alternative, as well as the third and fourth which are even more favorable to the party wanting in, are all consistent with an individualistic approach to social life.

individualism.[51] For example, it might be claimed that people have an inalienable right to life and liberty, and thus should not be permitted to agree to allow others to kill or enslave them.[52] But, as the debate over physician assisted suicide shows, it is far from clear that a commitment to individualism supports making even these fundamental rights inalienable in all instances.[53] It is even possible to claim that inalienability itself is inconsistent with a commitment to individualism because people should be free to part with all their individual rights,[54] at least as long as they do so voluntarily and without coercion (assuming that to be a possible state of affairs — a point to be developed more fully below).[55]

The problem in the present context is that there are competing individual rights claims. Disallowing unilateral withdrawal from a relationship limits the freedom of the party wanting out, but allowing it also impacts the freedom

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[51] *See, e.g.*, Margaret J. Radin, *Market-Inalienability,* 100 HARV. L. REV. 1849 (1987) (arguing for the non-commodification of aspects of the self that are integral to personhood).

[52] *See, e.g.*, JOHN STUART MILL, ON LIBERTY 95 (W.W. Norton & Co. 1975) (1859) ("The principle of freedom cannot require that [someone] should be free not to be free. It is not freedom to be allowed to alienate [one's] freedom.").

[53] *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702 (1997) (assistance for terminally ill patients in committing suicide not a fundamental liberty interest protected by Due Process Clause); Raphael Cohen-Almagor & Monica G. Hartman, *The Oregon Death With Dignity Act: Review and Proposals for Improvement*, 27 J. LEGIS. 269 (2001); Neil M. Gorsuch, *The Right to Assisted Suicide and Euthanasia,* 23 HARV. J.L. & PUB. POL'Y 599 (2000); Christine N. O'Brien et al., *Oregon's Guidelines for Physician-Assisted Suicide: A Legal and Ethical Analysis*, 61 U. PITT. L. REV. 329 (2000); PHYSICIAN ASSISTED SUICIDE (Robert F. Weir ed., 1997); Melvin I. Urofsky, *Justifying Assisted Suicide: Comments on the Ongoing Debate*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 893 (2000).

[54] *See, e.g.*, NOZICK, *supra* note 4, at 58, 331 (arguing that a free society must allow someone to consent to being killed or enslaved).

[55] *See infra* notes 87-88 and accompanying text.

of the party wanting in. Thus, the assertion that a party has an inalienable right to unilaterally withdraw from any relationship, even after agreeing otherwise, must contend with the individual right claim of the party wanting the relationship to continue that it has changed its position and passed up other opportunities in reliance on the agreement. Arguing that the party wanting in has no legitimate claim of detrimental reliance, because that party should realize at the outset and thus assumes the risk that the other's right to withdraw is inalienable, is not sufficient to rebut this claim. The issue is whether individual rights considerations provide greater support for the recognition of an inalienable right of unilateral termination, or for a right to hold a party to an agreement not to unilaterally withdraw, or at least for a right to be compensated in the event thereof.

When conflicting individual rights are implicated, which will often if not always be the case, one must decide whose interests are weightier. This requires a contextual analysis of which side's interests seem stronger under the circumstances. For example, the claim for a right to unilaterally withdraw from a marriage seems stronger when, shortly after marrying, one party wants out and the other stands to suffer no more than a brief emotional hurt. The claim seems weaker, on the other hand, when one party has sacrificed a career in order to assist the other party's career and then years later, after achieving success, the other wants out and would leave the sacrificing party destitute. At a minimum, the sacrificing party would seem to have a strong claim for a right to receive support from the party wanting out of the relationship.

Now let us assume that there is no agreement not to terminate -- that the parties have voluntarily entered into a relationship without specifying whether there is a right of unilateral termination or not -- and that now one party wants out, whereas the other wants the relationship to continue. Again, it must be decided which side's interests

are weightier in context. Compare two situations: first, two parties establish a friendship, and later one party wants to end it while the other wants it to continue; second, two parties mutually undertake some joint economic venture, and later one party wants out. In American society, the right to unilaterally terminate a friendship is the norm, whereas measures are sometimes taken to induce the continued existence of business relationships, or at least to require compensation in the event of unilateral termination.[56]

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[56] For example, although courts have been unwilling to compel performance of personal service contracts, they will at times enjoin breaching parties such as entertainers and others with unique skills from working for competitors. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS §367 (1981); William L. Schaller, *Jumping Ship: Legal Issues Relating to Employee Mobility in High Technology Industries,* 17 LAB. LAW. 25, 33-34 (2001). Similarly, express and, at times, implied non-competition clauses and covenants not to disclose between employer and employee or in professional associations are enforced. This enforcement is subject to a reasonableness test that depends on whether there exists a legitimate protectable interest such as trade secrets or money invested in training, or whether the purpose is simply to tie someone to the firm or the effect is to overly undermine mobility. *See, e.g.*, Rachael S. Arnow-Richmon, *Bargaining for Loyalty in the Information Age: A Reconsideration of the Role of Substantive Fairness in Enforcing Employee Noncompetes*, 80 OR. L. REV. 1163 (2001); Gillian Lester, *Restrictive Covenants, Employee Training, and the Limits of Transaction-Cost Analysis*, 76 IND. L.J. 49 (2001); Suellen Lowry, *Inevitable Disclosure Trade Secret Disputes: Dissolutions of Concurrent Property Interests*, 40 STAN. L. REV. 519 (1988); Stewart E. Sterk, *Restraints on Alienation of Human Capital*, 79 VA. L. REV. 383 (1993); Katherine V.W. Stone, *Knowledge at Work: Disputes Over the Ownership of Human Capital in the Changing Workplace*, 34 CONN. L. REV. 721 (2002); Sela Stroud, *Non-Compete Agreements: Weighing the Interests of Profession and Firm*, 53 ALA. L. REV. 1023 (2002). When successful, such actions, although not specifically requiring the continuation of a business relationship, may induce its continuance by preventing people who want out from establishing alternative relationships.

The two situations cannot readily be distinguished on the notion that a friendship is inherently terminable at any party's will because it depends on an emotional commitment that cannot be imposed. In fact, by forcing people to associate, it may well be possible to induce emotional commitments that one or both parties would otherwise reject, as with the bonds that develop among soldiers drafted into military service or workers brought together in the workplace.[57] Moreover, a successful business relationship also requires a type of emotional commitment among its associates, a commitment that is in many ways as intimate as that of a friendship.[58] Nor can the situations readily be distinguished by the contractual nature of the economic venture, or by the reliance and opportunity costs associated with it. A friendship too is a type of agreement. Although ordinarily more tacit, perhaps, than the usual business relationship, friendships typically entail a mutual commitment to respond to the other when asked and when able to do so. In reliance on that commitment, and to one's detriment if the commitment

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[57] *See, e.g.*, CYNTHIA ESTLUND, WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY 3-29, 69-83 (2003); GERALD F. LINDERMAN, THE WORLD WITHIN WAR: AMERICA'S COMBAT EXPERIENCE IN WORLD WAR II 263-99 (1997); JOHN C. MCMANUS, THE DEADLY BROTHERHOOD 244-46, 273-90 (1998).

[58] *See, e.g.*, DON COHEN & LAURENCE PRUSAK, IN GOOD COMPANY: HOW SOCIAL CAPITAL MAKES ORGANIZATIONS WORK 4 (2001) (emphasizing the importance to an organization's success of "the trust, mutual understanding, and shared values and behaviors that bind the members of human networks and communities and make cooperative action possible"); W. EDWARDS DEMING, THE NEW ECONOMICS FOR INDUSTRY, GOVERNMENT, EDUCATION 28-29 (2d ed. 2000) (emphasizing the importance to an enterprise's success of "giv[ing] everyone a chance to take pride in his work," "informal dialogue," "comradeship," "study-groups and social gatherings," and generally developing a spirit of cooperation).

is withdrawn, friends frequently change position and pass up other opportunities.

Perhaps collective considerations distinguish friendship from business, like the centrality of business relations to the materialistic ethic that prevails in American society and the perceived dependence upon binding contracts for the successful functioning of the economic system. Absent such considerations, attempts to impose intimate relations like friendships might be thought to offend human dignity. Yet, a society is certainly conceivable in which friendship is perceived as so integral to its success that the unilateral termination of friendships, at least without good cause, is discouraged.[59] Even in this highly individualistic society, people are discouraged through social pressure from cavalierly ending friendships unilaterally, such as a bad reputation that makes it difficult to establish friendships in the future.

B. Establishing an Initial Relationship

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[59] *See, e.g.*, Joan G. Miller et al., *Perceptions of Social Responsibilities in India and in the United States: Moral Imperatives or Personal Decisions*, 58 J. OF PERSONALITY & SOC. PSYCHOL. 33 (1990) (finding that Indians tend to view responsibilities to others, especially to friends and strangers, more in terms of moral obligations, whereas Americans tend to view them as more a matter of personal choice); Niloufer Q. Madhi, *Pukhtunuali: Ostracism and Honor Among the Pathan Hill Tribes*, 7(3/4) ETHOLOGY & SOCIOBIOLOGY 295 (1986) (reporting on the practice of ostracism, including expulsion from the tribe, as a means of deterring behavior contrary to tribal norms and of unifying the group); Paras N. Singh et al., *A Comparative Study of Selected Attitudes, Values, and Personality Characteristics of American, Chinese, and Indian Students*, 57 J. OF SOC. PSYCHOL. 123, 130 (1962) ("The American culture gives more emphasis to personal autonomy and individuality. In contrast to this, Indian and Chinese students give more emphasis to sympathy, love, affection, mutual help and family bonding, resulting in sympathetic and sacrificing attitudes.").

Thus far the analysis has been skeptical of the right of a party not wanting an association to control the outcome in all instances, at least with regard to an already existing relationship.

Now, let us turn to the inception of three hypothetical proposed associations: one both parties want but which others find objectionable; one that one party wants and the other does not; and one that neither party wants while others do.

1. Relationships Both Parties Want

When both parties want to have a relationship in a society favoring the individual right of free association, preventing them from doing so would seem clearly to violate their rights, absent overriding collective considerations. Examples of such collective considerations are laws prohibiting conspiracies to overthrow the government or in restraint of trade. In other instances, however, assertions of collective considerations may not suffice to overcome the value of free association.

Consider the practice of forced separation of the races, as with mandatory segregation in the United States and South African apartheid, and as still practiced in some societies today.[60] Through the use of governmental power,

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[60] *See, e.g.*, YAAKOV KOP & ROBERT E. LITAN, STICKING TOGETHER: THE ISRAELI EXPERIMENT IN PLURALISM 20-21, 30-34, 74-75, 86, 98 (2002) (discussing various government practices promoting the segregation of Arab Israelis and their separation from mainstream life and characterizing the situation as "separate but not equal"); BRENDAN MURTAGH, THE POLITICS OF TERRITORY: POLICY AND SEGREGATION IN NORTHERN IRELAND 34-43, 46-49, 151, 163-67 (2002) (detailing extensive segregation in Northern Ireland along religious lines, but finding, despite the use of peace lines in Belfast to separate religious enclaves so as to avoid conflict, a lack of evidence to support the use of planning instruments to achieve ethno-political objectives and

forced separation imposes the preference of those who do not want interethnic relationships on those who do. In the United States, for example, anti-miscegenation laws and laws mandating school and residential segregation prevented those blacks and whites who wanted to marry, or go to school, or live together, from choosing to have those associations.[61]

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characterizing government policy more as one of "benign acceptance" of separation than of design); Tracy Wilkinson, *Bosnia's Ethnic Division Relocates to the Classroom*, L.A. TIMES, October 19, 1997, at A1 (reporting on the segregation of students in schools in the Muslim-Croat Federation with "separate-but-equal" programs for Bosniak Muslim and Roman Catholic Croatian children).

[61] *See* Loving v. Virginia, 388 U.S. 1 (1967) (prohibition against interracial marriage constitutes invidious discrimination based on race with respect to a fundamental individual liberty and therefore violates Equal Protection Clause); Buchanan v. Warley, 245 U.S. 60 (1917) (city ordinance prohibiting both blacks and whites from living in neighborhoods where other race is in the majority violates Equal Protection Clause); Harmon v. Tyler, 273 U.S. 668 (1927) (per curiam) (city ordinance prohibiting both blacks and whites from living in neighborhoods where other race is in the majority, except with consent of majority of other race, violates Equal Protection Clause); Shelley v. Kraemer, 334 U.S. 1 (1948) (judicial enforcement of racially restrictive covenants in deeds constitutes discriminatory state action in violation of Equal Protection Clause); Brown v. Bd. of Educ., 347 U.S. 483 (1954) (mandatory segregation of the races in public schools violates Equal Protection Clause). *Compare* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959) (viewing the issue posed by enforced segregation as one of "denying the association to those individuals who wish it and imposing it on those who would avoid it," and opining that there is no neutral constitutional basis for favoring one claim over the other); ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 57 (2d ed., 1986) (replying to Wechsler:

> What, on the score of generality and neutrality, is wrong with the principle that a legislative choice in favor of a freedom not to associate is forbidden, when the consequence of such a choice is to place one of the groups of which our society is constituted in a position of

In support of laws against race mixing, the right of groups to preserve their ethnic purity might be asserted. Evaluating the merit of the ethnic purity argument ultimately demands a value judgment about which there may be disagreement. To some, the pursuit of ethnic purity amounts to racism, whereas to believers it represents ethnic pride and group solidarity.[62] In the United States today, judging the worth of people on the basis of race is generally perceived as wrong and as contrary to society's ethos that people are to be judged on their individual merits, such as their character and actions,[63] and especially so when the government makes invidious race distinctions.[64] While in

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permanent, humiliating inferiority . . . .)

[62] Racism may take different forms, and what racism consists of is contestable. A helpful way to conceptualize racism is to view it on a continuum. On an individual level, the continuum might range from overt bigotry to unconscious bias. *See, e.g.*, Taunya Lovell Banks, *Exploring White Resistance to Racial Reconciliation in the United States*, 55 RUTGERS L. REV. 903, 949-50 (2003); Charles R. Lawrence, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317 (1987). On a societal level it might range from laws explicitly discriminating on the basis of race to institutional racism in the form of facially colorblind structures and practices that perpetuate racial inequalities deriving from past explicit discrimination. *See, e.g.*, JOE R. FEAGIN & CLAIRECE BOOKER FEAGIN, DISCRIMINATION AMERICAN STYLE: INSTITUTIONAL RACISM AND SEXISM (1978); Ian F. Haney Lopez, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1721, 1806-11, 1822-30 (2000).

[63] As most eloquently expressed by Martin Luther King, Jr. in his "I Have A Dream" speech: "I have a dream that my four children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character." MARTIN LUTHER KING JR., A CALL TO CONSCIENCE: THE LANDMARK SPEECHES OF DR. MARTIN LUTHER KING, JR. (Clayborne Carson & Kris Shepard eds., 2001).

[64] *See Loving, supra* note 61. The debate over the permissibility of affirmative action, *see infra* note 68, ultimately turns on one's view of whether all race distinctions are inherently, or at least presumptively, invidious in that affirmative action amounts to impermissible discrimination against whites by denying them benefits based on race

keeping with the society's individualistic ethic people may be entitled to their personal prejudices and even to practice them to some extent, they are not to use the government as a means of imposing their views and practices on society as a whole. Thus, if some community were to attempt to reinstate the forced separation of the races for the purpose of preserving ethnic purity, even if supported by a majority of both blacks and whites, that would be unacceptable today because it clearly violates society's prevailing mores. Nevertheless, a society is conceivable, and some may exist today, in which the preservation of the group is seen as more important than the rights of individual members.[65]

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rather than judging them on their merits, or whether race distinctions are more permissible when the purpose is benign and seeks to eradicate the effects of racial oppression. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (affirmative action in granting of government contracts must be judged under strict scrutiny standard); *Id.* at 239 (Scalia, J., concurring in part and concurring in judgment) ("In my view, government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction."); *Id.* at 241 (Thomas, J., concurring in part and concurring in judgment) ("[G]overnment-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice. . . ."); *Id.* at 243 (Stevens, J., dissenting) ("There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination.").

[65] This sentiment was reflected in the past generation in an intensification of ethnic conflict and an increased division of groups of people along ethnic lines in several parts of the world. Examples include the partition of colonial India into largely Hindu India and largely Muslim Pakistan, the creation of Israel as a religious state primarily for Jews and the resultant struggle for the establishment of a Palestinian state, the civil war in Lebanon between Arab Christians and Muslims, the Hutu genocide of the Tutsi in Rwanda, and the break-up of the Soviet Union and Yugoslavia into more ethnically homogeneous states. *See, e.g.*, SUZANNE M. BIRGERSON, AFTER THE BREAKUP OF A MULTI-ETHNIC EMPIRE: RUSSIA, SUCCESSOR STATES, AND EURASIAN SECURITY (2002); NOEL MALCOLM, BOSNIA: A SHORT HISTORY (1994); GÉRARD PRUNIER, THE RWANDA CRISIS 1959-1994: HISTORY

2. Relationships One Party Wants

Now, let us examine the appropriateness, in a society that generally favors free choice, of forcing on an unwanting party an association another party wants.[66] As

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OF A GENOCIDE (1995); EDWARD W. SAID, THE POLITICS OF DISPOSSESSION: THE STRUGGLE FOR PALESTINIAN SELF-DETERMINATION, 1969-1994 (1994); KAMAL SALIBI, A HOUSE OF MANY MANSIONS: THE HISTORY OF LEBANON RECONSIDERED (1988); IAN TALBOT, INDIA AND PAKISTAN (2000); YUGOSLAVIA AND AFTER: A STUDY IN FRAGMENTATION, DESPAIR AND REBIRTH 87-115, 138-54, 196-212, 232-47 (David A. Dyker & Ivan Vejvoda eds., 1996). In many of these areas the now-divided groups, while maintaining ethnic identity and varying degrees of insularity, intermingled and interacted for many years in relative harmony. Various historical factors, not all yet fully examined, may have contributed to the recent ethnic division. For example, historical ethnic identification and nationalism; the exploitation of ethnic differences for their o wn ends by colonial powers or indigenous actors; the imposition of nation states from without rather than spontaneous development from within; the collapse of or failure to develop unifying structures; population growth and scarcity of resources; and the uneven development of and increasing disparities among and within various regions of the world. That the entire situation may be socially constructed does not make the ethnic divisions and the emphasis on the group any less real, just less endemic and more readily subject to change under different - more humane - social conditions.

[66] Here the obverse of the four alternatives discussed above, *see supra* note 50, would be first, to allow the party wanting a relationship to impose it on the unwanting party; second, to allow the relationship to be imposed but require the party wanting the relationship to compensate the unwanting party; third, to allow the unwanting party to avoid the relationship but require compensation to the party wanting the relationship; and fourth, to allow the unwanting party to avoid the relationship entirely. Only the last alternative fully favors the party not wanting the relationship, whereas the first three all concede something to the party wanting the relationship. Even the third alternative, which of the first three is least favorable to the party wanting the relationship, imposes a relationship on the unwanting party since requiring the unwanting party to compensate the other party is in itself a type of

with already existing relationships, one problem with the initiation of a relationship when the parties are not in agreement is parallel individual rights claims. Allowing someone to impose a relationship impinges on the freedom of the party not wanting it, whereas enabling the party not wanting a relationship to avoid it impacts the freedom of the party wanting the relationship. So again, a balancing of interests is required. But here, the detrimental reliance argument of the party wanting in is unavailing, since it turns on the existence of an agreement that induces the reliance. Thus, the individual right claim of a party involved in a long-term marriage, that the other party should not be able to unilaterally terminate the relationship, seems stronger than the claim that a party wanting in should be able to force an unwanted marriage on another party in the first instance.

In other contexts, however, there may be sufficient reasons for empowering one party to initiate an unwanted relationship with another. To illustrate, let us revert to the race relations example and examine possible scenarios once the mandatory separation of the races has been outlawed. Let us first assume that whites prefer segregation while blacks prefer integration, or, in other words, that blacks want a relationship that whites do not.[67] One context might

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relationship. And it is inconsistent with an absolute privilege to avoid an unwanted relationship since having to compensate strengthens the bargaining position of the party wanting in and may induce the unwanting party to establish a relationship that would otherwise not come about.

[67] A divergence of opinion exists between the black and white communities over the desirability of integration versus separation. *See infra* notes 95, 98, and 102. Historically, the leadership of the black community has also been diverse, with some like Martin Luther King, Jr. and Thurgood Marshall pushing for integration, while others like Marcus Garvey and Malcolm X were more nationalistic. *See, e.g.*, ADAM FAIRCLOUGH, MARTIN LUTHER KING, JR. (1995); MODERN BLACK NATIONALISM: FROM MARCUS GARVEY TO LOUIS FARRAKHAN

be the desire of blacks for access to public employment or colleges previously reserved for whites. Integration might come about once public institutions begin to operate on a color blind basis and apply the same hiring and admissions criteria to both blacks and whites.[68]

One response to whites who object to integration in this context is that the relationship is not forced since they have willingly entered into it by accepting public employment or by choosing to attend public colleges. But since public institutions may, as a practical matter, be the only viable options for many people, there is a sense in which the relationship is less than fully voluntary. A stronger response, even acknowledging a degree of forced association, is that to satisfy white preferences for non-

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(William L. Van Deburg ed. 1997); JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY (1998).

[68] Achieving integration in public institutions may, on the other hand, require affirmative action that sets aside positions for blacks, or at least takes race into account in ways that promote integration. *See* Grutter v. Bollinger, 539 U.S. 306 (2003)(public law school may consider race or ethnicity as a factor in admissions process per compelling interest in attaining diverse student body provided it does not set aside slots or establish quotas for minority applicants and employs the same general standards for all applicants); Gratz v. Bollinger, 539 U.S. 244 (2003) (public university's consideration of race in admissions process not narrowly tailored to achieve compelling interest in diversity where all minority candidates received a bonus without making individualized determination of merit and per effect of bonus in making race the decisive factor such that amounts to virtual set-aside). *See also supra* note 64. One possible justification for affirmative action in this context is that without it, the advantage that whites have as a result of past racism that failed to judge blacks on their merits would become entrenched. *See, e.g.*, Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993). Another justification is that merely prohibiting discrimination against blacks is insufficient in practice to assure judgments based on merit because the lingering racism of the past is difficult to prove and often operates on a subconscious or unconscious level, even when people think they are and may appear to be judging based on merit. *See* Lawrence, *supra* note 62.

integration would require the government to reinstate mandatory segregation in violation of its obligation to treat people as equals and not to discriminate against them on the basis of race.

Moving from the public to the private arena, assume that various entities (schools, clubs, professional associations, political parties, housing, public accommodations, and the like) are discriminating against blacks in accordance with the preferences of their white clientele. Assume further that laws are proposed to ban those practices, and that whites object that such laws would violate their freedom of association by forcing them to associate with blacks. They might assert that in a society valuing individual freedom, people must be allowed the latitude to hold and practice beliefs that may be offensive to others, as long as they function in the private spheres of social life and do not attempt to use the power of government to impose their beliefs on others. As strong as these claims may be in the abstract, in context there are strong individual rights considerations to the contrary.

First, the equal freedom argument is strongest when, in practice, there is genuine mutuality. It becomes weaker when mutuality is absent and the exercise of freedoms by some adversely affects the exercise of freedoms by others. For example, the mutuality argument seems quite strong with regard to people's sexual preferences, particularly when they are practiced in the privacy of one's home so that others are not forcibly exposed to them and remain free to similarly pursue their own sexual preferences.[69] The mutuality argument

[69] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003) (state statute criminalizing sexual conduct between persons of the same sex violates rights of liberty and privacy protected by the Fourteenth Amendment). *Lawrence* overruled *Bowers v. Hardwick*, 478 U.S. 186 (1986) (sodomy statute as applied to consensual sex between gay men in

collapses, however, in a society where whites control the means of achieving success and use that control to maintain their dominance by denying access to others. Against the individual freedom to choose with whom to associate must be counterbalanced the value of the individual right to equal opportunity, which may at times outweigh associational considerations.[70]

Second, the free association argument is stronger in the private context and weaker in the public context. The free association claim asserts the right to do in private that which the government itself could not legitimately do or mandate. A society with a strong individualistic ethic requires a distinction between the public and the private spheres of social life because if everything were viewed as public, little or nothing of individual freedom remains.[71]

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bedroom of home does not violate fundamental right of privacy). *Compare id.* at 213 (Blackmun, J., dissenting):

> This case involves no real interference with the rights of others, for the mere knowledge that other individuals do not adhere to one's value system cannot be a legally cognizable interest,... let alone an interest that can justify invading the houses, hearts, and minds of citizens who choose to live their lives differently.

[70] *See Brown, supra* note 61, at 493:

> In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

[71] *See* Kleven, *supra* note 29, at 20-21:

> [A] democratic society in which people have no rights as individuals and groups, but only as members of society at large, . . . would be an undesirable state of affairs . . . because individuals and groups do have legitimate interests which any society worthy of

The distinction between the public and the private is, however, often blurred. For example, white dominance in the nominally private sphere of social life is to a great extent a byproduct of past racist action on the part of the government.[72] Furthermore, when racist practices in the nominally private sphere of social life become widespread, they take on a public character. There is little practical difference, for instance, between a law prohibiting blacks from living in white neighborhoods and the widespread practice of whites refusing to sell or rent to blacks.[73]

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being called democratic must recognize and accord.
See also Robert H. Mnookin, *The Public/Private Dichotomy: Political Disagreement and Academic Repudiation*, 130 U. PA. L.REV. 1429 (1982) (discussing the distinction between public and private spheres as a means of identifying when government regulation is and is not justified, and academic critiques of the meaningfulness of the distinction).

[72] *See, e.g.*, Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1849-57, 1860-78 (1994) (arguing that "even in the absence of racism, race-neutral policy could be expected to entrench segregation and socio-economic stratification in a society with a history of racism," (at 1852)); Harris, *supra* note 68, at 1715-21, 1737-57 (discussing slavery, segregation, and the racialization of the law in general in the United States); KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 195-203, 207-218, 225-30 (1985) (discussing "redlining" black and poorer neighborhoods following World War II); DESMOND KING, SEPARATE AND UNEQUAL: BLACK AMERICANS AND THE US FEDERAL GOVERNMENT (1995) (detailing the history of the U.S. government's involvement in fostering segregation of its workers and in federal programs through the mid 20th century, which "could not help but define in part the character of the American polity and ensure unequal treatment for Black American employees," (at 16)).

[73] *Compare Buchanan* and *Harmon, supra* note 61 (struck down city ordinances mandating racially separate neighborhoods) and *Shelley, supra* note 61 (invalidated judicial enforcement of racially restrictive covenants). Racially restrictive covenants are still a valid means of maintaining neighborhoods' ethnic purity, so long as they are informally adhered to and there is no outright refusal to sell to someone on account of race. *See id.*, at 13 ("So long as the purposes of [the

The balance between the individualistic values of free association, non-discrimination and equal opportunity depends on context and scope. To illustrate, let's compare race and religion. The freedom to practice one's religion is constitutionally protected in the United States because of the centrality of religious beliefs to people's world views, and because, historically, societies' dominant religions have used governmental power to oppress minorities and advance a single view.[74] Such domination is inconsistent with all of the values discussed above. Therefore, the purpose of protecting free exercise is to assure all religious groups an equal opportunity to associate freely and without discrimination, even though some of their beliefs and practices may be quite reprehensible to others.[75]

Furthermore, to ensure the government's neutrality toward differing religious and other world views, it may neither promote one religion over others nor religion in

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restrictive] agreements are effectuated by voluntary adherence to their terms, it would appear clear that there was no action by the State and the provisions of the [Fourteenth] Amendment were not violated."). *See also* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) (Civil Rights Act of 1866 bars private discrimination based on race in the sale or rental of property).

[74] *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 717-18 (2002) (Justice Breyer's dissent from Court's decision upholding parents' use of government-funded school vouchers to enroll children in religious schools).

[75] *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972) (free exercise rights of Amish entitle parents to remove their children from school after eighth grade without violating state's compulsory attendance law). *But compare* Bd. of Educ. of Kiryas Joel v. Grumet, 512 U.S. 687 (1994) (violates Establishment Clause for state to create special school district for religious group, overriding religion's free exercise claims); Oregon v. City of Rajneeshpuram, 598 F. Supp. 1208 (D.Or. 1984) (violates Establishment Clause for state to allow incorporation of city completely controlled by religious organization, overriding religion's free exercise claims).

general.[76] However, this separation between church and state does not prevent government, in order to promote the common good, from intervening in religious affairs when a religious practice contravenes important secular values[77] or from incidentally benefiting religion in the furtherance of legitimate secular objectives.[78] Thus, the overall picture is of a society where people in their private spheres of association enjoy a relative autonomy, which fluctuates as their private actions are perceived as more or less of public moment.

Analogously in the racial context, on the one hand we have whites who prefer to be with whites asserting the right to associate so as to practice beliefs that others find objectionable and to exclude blacks in order to do so, much like a religious group might confine membership to believers. On the other hand, we have the fundamental

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[76] *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578 (1987) (statute forbidding teaching of evolution unless accompanied by creationism violates Establishment Clause per purpose of promoting particular religious belief); Wallace v. Jaffree, 466 U.S. 924 (1984) (statute authorizing period of silence in public schools for meditation or voluntary prayer impermissibly endorses religion in violation of Establishment Clause); Abington School Dist. v. Schempp, 374 U.S. 203 (1963) (statute requiring Bible reading at beginning of school day violates Establishment Clause); Engel v. Vitale, 370 U.S. 421 (1962) (state prescribed non-sectarian prayer violates Establishment Clause).

[77] *See, e.g.*, Employment Div., Dept. of Human Res. of Oregon v. Smith, 494 U.S. 872 (1990) (denial of unemployment benefits due to termination for the use of peyote, a prohibited controlled substance, does not violate free exercise rights of Native Americans who use peyote in religious rituals); Prince v. Massachusetts, 321 U.S. 158 (1944) (upholding against free exercise claim prosecution of parent for violation of child labor laws for the use of child to distribute and sell religious literature).

[78] *See, e.g.* Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (state provision of educational vouchers used by parents to enroll children in religious schools does not violate Establishment Clause per secular purpose of improving educational opportunities and freedom of parents to select schools of their choice).

secular value that people should not be discriminated against on account of race. This value is as central to people's humanity as is the sanctity of their religious beliefs, and the need to protect it also arises from a history of oppression. If society is to accommodate both of these fundamental individual interests, then racial exclusivity can only be acceptable the narrower and more private its scope and is less acceptable the more it spills into the public arena and perpetuates historical oppression. Thus, for example, the case for racial exclusivity is far weaker for a political party or professional association than for a genuinely private club,[79] and is stronger when the preference is mutual and leaves avenues for those who prefer integration than when it undermines equal opportunity.[80]

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[79] *Compare* Terry v. Adams, 345 U.S. 461 (1953) (nominally private white voters' association's pre-primary selection of candidates, where primary and general elections ratify those selections, violates Fifteenth Amendment's prohibition against state abridgement of the right to vote on account of race per state entanglement in process) *and* Smith v. Allright, 321 U.S. 649 (1944) (exclusion of blacks from Democratic Party's primary elections violates the Fifteenth Amendment), *with* Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) (no state action in violation of Equal Protection Clause regarding the granting of a liquor license to private club that excludes blacks).

[80] A balancing test that takes into account the extent to which assertions of free association, if protected, would perpetuate historical oppression or undermine equal opportunity, as against the extent of the impact on associational interests of requiring unwanted associations, might help explain the divergent results in a series of Supreme Court cases dealing with exclusion based on race, gender and sexual orientation. *Compare* Runyon v. McCrary, 427 U.S. 160 (1976) (application of federal non-discrimination statute to prohibit private, commercially operated, non-sectarian school from denying admission based on race does not violate free association rights of school or parents) *and* Roberts v. U.S. Jaycees, 468 U.S. 1 (1984) (state requirement that Jaycees admit women does not violate male members' freedom of association); *with* Hurley v. Irish-American Gay, Lesbian and Bisexual Group, 515 U.S. 557 (1995) (application of state public accommodations law prohibiting discrimination on basis of sexual orientation so as to bar organizers of

To illustrate this point further, suppose that in the name of promoting ethnic identity, people of a common ethnic heritage congregate in a particular locale, and even take steps to preserve the ethnic character of the area and prevent outsiders from living there.[81] Consider two scenarios. In the first, while some people separate along ethnic lines others do not, such that there are ample communities available for people preferring ethnic homogeneity and for those preferring diversity. In the second, the vast majority of the major ethnic group in a society separate themselves, leaving those in the minority who prefer diversity no choice but to live in a minority community.

The first scenario seems less problematic than the second. In the first, some people may be deprived of the opportunity to enter some communities due to their ethnicity; for instance, people who disapprove of voluntary segregation and want into communities of a different ethnicity in order to promote integration. Yet, there are still available integrated communities that meet their associational preferences, whereas empowering them to force their way into the separate communities would

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St. Patrick's Day parade from disallowing Group to march as a group and to carry banner stating its purpose, although allowing members of Group to participate as individuals, violates organizers First Amendment right of expressive association by requiring inclusion of disfavored message) *and* Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000) (application of state law to prohibit Boy Scouts from expelling scout master who publicly declared his homosexuality violates First Amendment right of expressive association). Does the diversity of the results reflect less sensitivity to the interests of gays than of women and ethnic minorities?

[81] One approach might be the use of restrictive covenants limiting residency to members of that ethnic group, *see Shelley, supra* notes 61, 73; another might be the acquisition of a large tract of land to be collectively owned and occupied by an organization whose membership is limited to that ethnic group, *see City of Rajneeshpuram, supra* note 75.

undermine the associational preferences of those living there. In the second scenario, on the other hand, the associational preferences of most or all of the major ethnic group are met while the preferences of many minorities are not. By virtue of being deprived of the opportunity to associate with the majority, minorities may also be deprived of comparable life chances because, say, there is more money and therefore better education in majority communities, or because the majority have access in their communities to information and contacts that are unavailable in minority communities and are integral to success in life.[82] If so, that would contribute to the majority's perpetual dominance within the society as a whole, and thus strengthen the minority claim for being empowered to force an unwanted relationship on the majority.

3. Relationships Neither Party Wants

Finally, let us consider proposed associations that none of the parties want. As with associations that both parties want, in a society generally favoring free choice, the presumption would ordinarily be that the parties control when they are in agreement, unless there are overriding collective considerations. To illustrate, let's continue with the example of race relations and examine the appropriateness of imposing integration on blacks and whites when neither want it and both prefer separation.

Suppose that, following mandatory segregation, race-conscious desegregation plans--including such measures as forced busing--are proposed for the purpose of

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[82] *See, e.g.*, Sweatt v. Painter, 339 U.S. 629 (1950) ("The law school, the proving ground for legal training and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts").

promoting public school integration.[83] Suppose that both black and white parents oppose the plans, and prefer a freedom of choice approach that would enable parents to select the schools their children attend. Further suppose that, if implemented, the freedom of choice approach would result in substantially segregated schools.[84]

Both black and white parents might argue for freedom of choice on grounds of free association, so that everyone can decide for themselves with whom to attend school. They might also assert that just as mandatory segregation violates people's rights by preventing associations they want, conversely, so do integration plans that force people to associate who do not want to associate with each other.[85]

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[83] *See* Swann v. Charlotte Mechlenburg Board of Educ., 402 U.S. 1 (1971) (upholding forced busing as desegregation remedy in formerly de jure segregated system).

[84] *See* Green v. County School Board, 391 U.S. 430 (1968) (overthrowing freedom of choice desegregation plan in formerly de jure segregated system containing only two schools where all whites and 85% of blacks chose to attend former segregated schools).

[85] People may be forced together under non-race-conscious as well as race-conscious desegregation plans. For example, rather than freedom of choice or forced busing, a neighborhood school approach might be implemented and might force people who do not want to associate for racial or other reasons to be together. Indeed, where education is compulsory, even freedom of choice may force some to attend schools with others with whom they don't want to associate. However, a race-neutral neighborhood school approach that forces unwanting parties together might be thought preferable to a freedom of choice plan likely to result in a dispersal of students throughout a school district in that neighborhood schools enable greater parental involvement and expend less time and money on transportation, all of which may produce better educational outcomes. Assuming that individual rights claims do not always on principle trump collective considerations, relevant questions might be whether the evidence really supports the asserted collective concerns (bearing in mind that at times collective considerations are speculative and may require a period of experimentation to see if in fact they pan out), and whether some types of collective considerations are

One possible response is that a major purpose of public education is to help build a cohesive society through the development of widely shared basic values, like tolerance and understanding, which promote the cooperative behavior necessary for society to thrive as well as the respect for others that a society valuing individual freedom demands.[86] So it might be claimed that society is better off in the long run when people are forced to integrate against their wishes because forced integration reduces racial prejudice, thereby reducing the social turmoil that would otherwise occur and enhancing productivity through a greater willingness of racially diverse people to work cooperatively together.

A second response has to do with the way in which preferences are formed. Considered from the perspective of the current moment, it does appear that forced integration negates the preferences of those who prefer separation. But preferences develop over time, are the result of exposure and conditioning, can change over time and under different conditions, and might well be different

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on principle weightier than others when balanced against individual rights claims. For example, when stacked up against the freedom to associate, the benefits to society of reduced racial prejudice or of better educational performance might be thought weightier than efficiency considerations such as increased costs, although at some level the cost of protecting some individual rights might impinge on the ability to promote others or might become prohibitive as a practical matter.

[86] *See, e.g.*, JOHN DEWEY, DEMOCRACY AND EDUCATION 94-116 (1926) (developing "a democratic conception of education"); AMY GUTMAN, DEMOCRATIC EDUCATION 41-47 (1987) (discussing and favoring a "democratic state of education" where "all citizens must be educated so as to have a chance to share in self-consciously shaping the structure of their society," and that to accomplish this end must "aid children in developing the capacity to understand and to evaluate competing conceptions of the good life and the good society," and must "use education to inculcate those character traits, such as honesty, religious toleration, and mutual respect for persons, that serve as foundations for rational deliberation of differing ways of life").

in the present had past exposure and conditioning been otherwise.[87] Thus, the current separatist preferences of both blacks and whites might be the by-product of a history of past racism and of government participation therein, and the very same people who currently prefer separation might prefer integration had history been otherwise. In a sense, then, current separatist preferences may be imposed rather than freely chosen, or at least so highly conditioned as to be virtually involuntary. It could be argued, then, that a period of forced integration is needed in order to counteract past conditioning and put people in a position to more freely choose whether to integrate or separate.[88] Considered from

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[87] *See, e.g.*, PIERRE BOURDIEU, DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGEMENT OF TASTE 468 (Richard Nice, trans., 1984) (a study of how social life conditions people's tastes):

> The cognitive structures which social agents implement in the practical knowledge of the social world are internalized, 'embodied' social structures. The practical knowledge of the social world that is presupposed by 'reasonable' behavior within it implements classificatory schemes..., historical schemes of perception and appreciation which are the product of the objective division into classes (age groups, genders, social classes) and which function below the level of consciousness and discourse.

[88] *See, e.g.*, GROUPS IN CONTACT: THE PSYCHOLOGY OF DESEGREGATION (Norman Miller & Marjorie B. Brewer, eds. 1984) (containing studies in various societies and contexts of the conditions under which the "contact hypothesis," which posits that "one's behavior and attitudes toward members of a disliked social category will become more positive after direct interpersonal interaction with them," (at 2), holds true; identifying such factors as contact under egalitarian circumstances that minimize preexisting status differentials and enable cooperative behavior involving mutual interdependence and intimate interpersonal associations; but noting the absence of studies of the carryover of improved inter-ethnic relations in structured environments like schools to everyday life); Note, *Lessons in Transcendence: Forced Associations and the Military*, 117 HARV. L. REV. 1981, 1981 (2004) (arguing that forced racial association in the

this more long-term perspective, forced integration does not derogate from, but actually promotes, freedom of association.

This point is particularly significant in the case of young children who may be thought not yet capable of freely choosing with whom to associate or not, and who, due to their tender age, may be especially susceptible to conditioning by their parents. This poses a possible conflict between the individual rights of children and of parents, and raises the question of whether parents have the individual right to raise their children as they see fit even though to do so derogates from their children's individual rights.[89] An associational issue is at stake here because the claimed parental prerogative to control children's upbringing asserts the right to impose on children a relationship the child might not choose to have if the child were in a position to decide.

In response, it might be asserted that while some degree of parental prerogatives exist on individual rights grounds, society as a whole may intervene in the parent-child relationship so as to protect the individual rights of children as against parents.[90] Alternatively, it might be

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military has made it "the most successfully racially integrated institution in American society... with lasting effects on the individuals who pass through it").

[89] *See Casey, supra* note 49, at 899-900 (parental consent requirement for abortion by minor child valid provided accompanied by by-pass procedure enabling minor to obtain abortion upon judicial determination that minor is mature enough to give consent or that abortion would be in her best interests).

[90] For example, while the fundamental right to raise their children entitles parents to educate their children in private school as against state requirement to enroll them in public school, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), it is implicit in *Pierce* that compulsory education laws are valid and that the state may compel parents to educate their children in order to protect their best interests. *See also Prince, supra* note 77 (holding that parental prerogatives and free exercise of religion do not entitle parents to violate child labor laws).

asserted that society as a whole has a collective interest in raising children that is as strong as, or stronger than, the parental prerogative claim. Consequently, society has the right to intervene in, or supplant entirely, the parental upbringing of children when intervention serves the common good.[91]

Therefore, the fact that children are involved may strengthen the argument for the forced integration of schools. First, since children may not yet be in a position to freely choose with whom to associate, the collective interest in conditioning children to prefer integration may outweigh the parental interest in conditioning them to prefer segregation. Second, society as a whole may have a legitimate interest, as a surrogate for children, in protecting their right to receive an adequately balanced education so that they can more freely choose whether to factor race into their associational preferences as adults.[92]

Again, a contextual analysis is necessary in order to fully evaluate the strength of these competing considerations. In the real world, not only may current preferences be culturally conditioned, but blacks and whites

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[91] *Compare, e.g.*, GUTMAN, *supra* note 86, at 22-28 (considering and ultimately rejecting the "family state" model of education whose "defining feature...is that it claims exclusive educational authority as a means of establishing a harmony - one might say, a constitutive relation - between individual and social good based on knowledge,"); PAULA RAYMON, THE KIBBUTZ COMMUNITY AND NATION BUILDING 53-55, 233-36 (1981) (discussing the communal living arrangements of children in Israeli kibbutzim as based on the "socialist principle that the community should replace the family" and the tension this caused for mothers who desired a more family oriented approach to child-rearing).

[92] *See, e.g.*, GUTMAN, *supra* note 86; Smith v. Bd. of Sch. Comm'rs of Mobile County, 827 F.2d 684, 692 (11th Cir. 1987) (rejecting parental challenge to public school texts as teaching "religion of Humanism" in violation of Establishment Clause per the state's "indisputably non religious purpose...to instill in...public school children such values as independent thought, tolerance of diverse views, self-respect, maturity, self-reliance and logical decision making").

may be on unequal footing in asserting and realizing their preferences. For example, in some circumstances blacks may prefer integration but opt for separation due to social pressure from whites who control their access to a livelihood or whose outright hostility to integration poses risks of physical or emotional harm.[93] In addition, blacks who prefer integration may choose separation because so many whites opt for separation that integrated settings are unavailable, inaccessibly located, or prohibitively expensive.[94] Where either situation occurs, not only does it strengthen the arguments for forced integration just advanced, but it also implicates those raised in the

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[93] *See, e.g.*, ROBERT L. CRAIN, THE POLITICS OF SCHOOL DESEGREGATION (1968) (a study of school desegregation in 15 cities, some of which experienced resistance as hostile as mob violence and others a more cooperative response, and generally concluding that extent of actual conflict was overblown); NATIONAL URBAN LEAGUE, THE STATE OF BLACK AMERICA (2001) (reporting that 32% of blacks polled said they have chosen not to move somewhere because they felt unwelcome); GARY ORFIELD, HARVARD UNIVERSITY CIVIL RIGHTS PROJECT, HOUSING SEGREGATION: CAUSES, EFFECTS, POSSIBLE CAUSES, at note 25 (2001) *at* http://www.civilrightsproject.harvard.edu/research/metro/housing_gary.php ("Black fears of violence and intimidation in some white communities are still serious obstacles to housing choice"); R.A.V. v City of St. Paul, 505 U.S. 377 (1992) (overthrowing as violation of free speech Bias-Motivated Crime Ordinance as applied to burning of cross on lawn of black family in predominantly white neighborhood).

[94] Since whites are still economically better off than blacks, *see infra* note 99, they may use their greater wealth to isolate themselves in communities that are beyond the means of blacks and may use private deed restrictions or zoning to maintain the price of housing at levels too high for blacks to afford. *See, e.g.*, Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977) (rejecting race-based equal protection challenge to denial by suburb of Chicago with over 64,000 residents of whom only 27 were black of rezoning for low cost housing where center city blacks would likely reside absent showing of discriminatory intent or purpose).

discussion of forced integration where whites do not want it but blacks do.

On the other hand, after a period of experimentation, the result may be that forced integration does not improve, but in fact worsens, race relations and increases individual preferences for educational separation.[95] Or suppose blacks and whites continue to, or

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[95] Here the real-world data is mixed and subject to differing interpretations. *See, e.g.*, GARY ORFIELD, HARVARD UNIVERSITY CIVIL RIGHTS PROJECT, SCHOOLS MORE SEPARATE: CONSEQUENCES OF A DECADE OF RESEGREGATION 6-7 (2001) http://civilrightsproject.harvard.edu/research/deseg/Schools_More_Separate.pdf (Gallup polls during 1990s showed majority and growing belief among both blacks and whites that integration improves education for both groups, while at same time both groups favored neighborhood schools.); STEVE FARKAS & JEAN JOHNSON, PUB. AGENDA FOUND., TIME TO MOVE ON: AFRICAN-AMERICAN AND WHITE PARENTS SET AN AGENDA FOR PUBLIC (1998) (finding that 80% of black parents and 86% of whites believe improving educational quality is more important than integration). Measured over time, white support for the principle that blacks and whites should go to the same schools has increased substantially over the years, from 1956 when 50% supported separate schools to 1995 when 96% supported integrated schools. HOWARD SCHUMAN ET AL., RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATION 103 (1997) (reporting on and analyzing Gallup, National Opinion Research Council, and other attitudinal polls). When the issue is personalized, there has been a substantial increase in white willingness to send their children to school with blacks, although that willingness declines as the numbers change. With few black students, white willingness has been consistently high over the years; with half black students, whites were evenly divided in the late 1950s and early 1960s, but by the 1990s less than 20% voiced objections; with blacks in the majority, white objection was in the 70% range in the earlier years, whereas by the mid 1990s whites were about evenly divided. *Id.* at 140-41. On the other hand, whites have generally been unsupportive of forced integration. Whites consistently answered no more often than yes when asked whether the federal government should "see to it" that white and black children go to school together. Whites have consistently opposed forced busing, although opposition has declined somewhat from over 80% between the mid 1970s and mid 1980s to 67% opposed in 1996. *Id.* at 123-25.

increasingly, prefer separation even after the effects of historical conditioning have attenuated.[96] Suppose further that, as a result of governmental efforts to equalize opportunity in other areas of social life, white dominance diminishes and the economic and political power of blacks and whites becomes more equivalent. A society is certainly conceivable where ethnic groups freely choose to live and

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Black support over time for the principle of integrated schools has always been nearly unanimous, and blacks have expressed little opposition to attending school with whites no matter what the numbers. *Id.* at 240-41, 254-55. Yet black support for federal efforts to "see to it" consistently declined from over 80% in the mid 1960s to less than 60% in the mid 1990s. On the other hand, while blacks were about evenly divided between support for and opposition to forced busing when it first started in the mid to late 1970s, by the mid 1990s support for forced busing rose somewhat to about 60%. *Id.* at 248-49.

[96] The debate in recent years over whether previously *de jure* segregated schools should be relieved of their judicially supervised obligation to desegregate turns on differing perceptions of whether the vestiges of *de jure* segregation have in fact sufficiently attenuated, despite the persistence of de facto residential and school segregation, that school districts should not be held responsible for the on-going segregation. *See, e.g.*, Freeman v. Pitts, 503 U.S. 467, 495-96 (1992):

> Where resegregation is a product not of state action but of private choices, it does not have constitutional implications. As the *de jure* violation becomes more remote in time and these demographic changes intervene, it becomes less likely that a current racial imbalance in a school district is a vestige of the prior *de jure* system.

Bd. of Educ. of Okla. City Pub. Schs. v. Dowell, 498 U.S. 237, 249-50 (1991) (standard for determining whether desegregation decree should have been terminated is whether school board "had complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination had been eliminated to the extent practicable."); *Id.* at 251-52 (Marshall, J., dissenting) ("I believe a desegregation decree cannot be lifted so long as conditions likely to inflict the stigmatic injury condemned in *Brown I* persist and there remain feasible methods of eliminating such conditions.").

go to school separately in order to preserve their ethnic identity or because they just do not get along well in those arenas, while they interrelate on equal terms in other areas of social life. Under such circumstances, the justification for forced integration weakens and can be seen as violating the individual right to choose one's associations.

The United States seems somewhere in the middle. As a result of both voluntary and forced integration, school and neighborhood segregation decreased somewhat following the demise of mandatory segregation. However, most blacks and whites still continued to attend largely segregated schools and live in
largely segregated neighborhoods, and racial separation in those spheres has increased in recent years.[97] Overt racial prejudice has decreased somewhat,[98] and the avenues of opportunity have

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[97] Racial segregation in schools began to diminish in the late 1960s and early 1970s when courts began to vigorously enforce desegregation. The degree of racial separation of black children reached its lowest point in the mid to late 1980s, has been increasing since then, and has now returned to about the level of the earlier years. *See, e.g.*, ERICA BRANDENBURG & CHUNGMEI LEE, HARVARD UNIVERSITY CIVIL RIGHTS PROJECT, RACE IN AMERICAN PUBLIC SCHOOLS: RAPIDLY RESEGREGATING SCHOOL DISTRICTS (2002) *at* http://www.civilrightsproject.harvard.edu/research/deseg/Race_in_American_Public_Schools1.pdf; ORFIELD, *supra* note 95, at 11-12, 15-16, 23-26, 28-42. These studies attribute the increased school segregation of the 1990s to the movement of whites to suburbia, the increased concentration of minorities in central cities, and the Supreme Court's deemphasis on desegregation. *See supra* note 96. Orfield also reports on high and unchanging levels of residential segregation between 1980-2000. ORFIELD, *supra* note 93, at 39-40. Despite black preference for and increasingly favorable attitudes of whites toward residential integration, *see id.* at n. 25, 44-45, 50 and *infra* note 98, segregation may be high in fact due to the wide income differentials between blacks and whites. *See infra* note 99.

[98] Over the years there has been a substantial increase in white willingness to vote for a black presidential candidate (from 63% "no" in 1958 to 95% "yes" in 1997) and in favorable attitudes toward

interracial marriage (from 62% support for laws against intermarriage in 1963 to 87% opposition in 1996, and from 96% disapproval of intermarriage in 1958 to 67% approval in 1997). RACIAL ATTITUDES, *supra* note 95, at 106-07. White support for the principle of integrated education and willingness for their children to attend integrated schools have also increased substantially, although they have been generally unsupportive of forced integration. *See infra* note 95. Likewise, while still somewhat ambivalent, whites have become more supportive of residential integration. In 1963, 39% of whites strongly agreed and only 19% strongly disagreed that whites should have the right to keep blacks out of their neighborhoods; whereas by 1996, 65% strongly disagreed and only 6% strongly agreed. Similarly, white support for open housing laws grew from 34% in 1972 to 67% in 1996. RACIAL ATTITUDES, *supra* note 95, at 106-07, 123-25. And while in 1958, 45% of whites indicated they would definitely or might move if blacks moved next door and 79% if blacks moved into the neighborhood in great numbers, by 1997 the respective figures were 2% and 25%; similarly, 69% of whites preferred all or mostly white neighborhoods in 1972, whereas by 1995 the figure declined to 43%. *Id.* at 140-41. *See also* Maria Krysan, *Data Update to Racial Attitudes in America* (2002) *at* http://tigger.uic.edu/ ~krysan/racialattitudes.htm (reporting on polls showing a decline between 1990 and 2000 from 48% to 31% in the number of whites opposed or strongly opposed to living in neighborhoods more than half black). By way of caveat, however, surveys may not accurately reflect the extent of racial prejudice in light of evidence that at times people answer survey questions falsely, either intentionally so as to avoid responding in socially unacceptable ways or unintentionally due to non-recognition of the disconnect between their professed beliefs and their actual conduct. See, e.g., ROGER TOURANGEAU, LANCE J. RIPS & KENNETH RASINSKI, THE PSYCHOLOGY OF SURVEY RESPONSES 269-88 (2000).

opened a bit;[99] but blacks are still subjected to substantial racial discrimination,[100] and whites still disproportionately

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[99] The gap in high school graduation between whites and blacks has decreased substantially over the years: in 1978, 67.9% of whites and 47.6% of blacks 25 and over had completed four or more years of high school, whereas by 1998 the gap had decreased to 83.7% for whites versus 76.0% for blacks; and for 25-29 year olds, the completion rates for whites and blacks were virtually identical, 88.1% versus 87.6%. However, while the gap has decreased over the years, the annual graduation rate for blacks continues to lag behind that of whites (73.4% versus 81.6% in 1998), and the gap actually increased a bit between 1994 and 1998. WILLIAM B. HARVEY, AM. COUNCIL ON EDUC., MINORITIES IN HIGHER EDUCATION 2000-2001, Tables 1 & 3 (2001). On the other hand, while many more blacks attend college now than before, due to a substantially lower graduation rate the gap in completion rates has not improved over the years; between 1978 and 1998 the four-or-more-years-of-college completion rate for blacks 25 years or older increased from 7.2% to 14.7%, while the rate for whites actually increased a bit more from 16.4% to 25.0%. *Id.* at Tables 3, 4, 9. Likewise, the income gap between whites and blacks continues to be substantial, has remained about the same percentage-wise for the past 40 years or so, and in gross dollars has grown substantially over that time. In 1967 mean family income for whites was $9,116 and for blacks was $5,916, 65% of that for whites, whereas in 1998 the figure for whites was $62,384 and for blacks was $38,563, 62% of that for whites. JOINT CENTER DATA BANK, JOINT CENTER FOR POLITICAL AND ECONOMIC STUDIES INCOME AND WEALTH *at* http://www.jointcenter.org/DB/detail/income.htm#1(last updated Aug. 5, 2003).

[100] *See, e.g.*, Krysan, *supra* note 98 (reporting on 2000 survey showing 64% of blacks and 33% of whites believe discrimination is a cause of racial inequality; 1999 survey showing 59% of blacks believe they do not have as good a chance as whites to get jobs for which they are qualified; and 2001 survey showing 51% and 47% of blacks believe they do not have as good a chance as whites to get, respectively, either housing they can afford or a good education, whereas almost 90% of whites believe they do); NAT'L URBAN LEAGUE, *supra* note 93 (reporting that of those blacks polled who have tried to get a mortgage, 25% said they experienced discrimination); ORFIELD, *supra* note 93, at nn.42-43 (reporting on continuing and massive discrimination against blacks in housing); U.S. EQUAL OPPORTUNITY EMPLOYMENT COMM'N, RACE-BASED CHARGES *at* http://www.eeoc.gov/stats/race.html (last

dominate positions of power.[101] Meanwhile, the integrationist push following the end of mandatory segregation seems to have waned somewhat in recent years,[102] and there seems to be substantial support among

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modified Feb. 6, 2003)(reporting during fiscal years 1992-2001 an annual average of more than 29,000 complaints of race-based employment discrimination, of which roughly 12%-13% on the average and 19% in 2000/2001 received meritorious resolutions).

[101] African-Americans comprise about 12% of the population of the United States. U.S. CENSUS BUREAU, PROFILE OF GENERAL DEMOGRAPHIC CHARACTERISTICS: 2000 (2001). As of Jan. 31, 2000, the number of black elected officials, although at an all time high and almost seven times the number in 1970, represented less than 2% of all elected officials. DAVID A. BOSITIS, JOINT CTR. FOR POLITICAL AND ECON. STUDIES, BLACK ELECTED OFFICIALS: A STATISTICAL SUMMARY, 2000 (2002) *at* http://www.jointcenter.org/whatsnew/beo-2002/beo-map-charts/BEO-00.pdf. Additionally, blacks represent less than 5% of federal judges, less than 4% of lawyers, and own only about 4% and account for less than 1% of the profits of the nation's non-farm businesses. FED. JUDICIAL CTR. *at* http://air.fjc.gov/history/judges_frm.html; ABA COMM'N ON RACIAL AND ETHNIC DIVERSITY IN THE PROFESSION, MILES TO GO 2000: PROGRESS OF MINORITIES IN THE LEGAL PROFESSION 9 (2001) *at* http://www.abanet.org/minorities; U.S. CENSUS BUREAU, BLACK-OWNED BUSINESSES: 1997 (Oct. 2000).

[102] *See, e.g.*, FARKAS, *supra* note 95 (reporting that both black and white parents believe educational quality to be more important than integration); NAT'L URBAN LEAGUE, *supra* note 93 (reporting on 2001 survey of black adults showing 60% believing the primary focus of black organizations should be economic opportunity, 24% political leadership, and only 7% integration). *But compare id.* (also reporting that 80% of blacks polled prefer living in racially mixed neighborhoods); ORFIELD, *supra* note 93, at n.25 (reporting on a 1997 Gallup poll showing that blacks overwhelmingly prefer integrated to all black areas); ORFIELD, *supra* note 95, at 7, 9-11 (arguing that continuing efforts to desegregate schools is consistent with black support for quality education in light of evidence that integration improves opportunities for blacks).

both blacks and whites for school vouchers and other free choice options.[103]

At this juncture, it is an open question whether the considerations supporting efforts to promote school integration continue to outweigh those supporting freedom of choice, as once thought. If a shift to freedom of choice were to result in schools and communities available both for those blacks and whites preferring ethnic homogeneity and for those preferring diversity, and if it were to contribute to equalized opportunity for blacks, then freedom of choice would promote both associational and egalitarian values. However, freedom of choice would produce a stark conflict between these values and therefore be of more dubious merit if it were to result in an inferior education and fewer opportunities for blacks.

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[103] The degree of public support for vouchers may depend on the wording of the question. In a 2003 Kaiser/Pew poll, 37% of the respondents favored and 24% opposed government vouchers for private or public schools, while 40% reported they didn't know enough to have an opinion, *at* http://www.publicagenda.org/issues/major_proposals_detail.cfm?issue_type=education&list=14. In a 2003 Gallup/Phi Delta Kappa poll 38% favored and 60% opposed allowing the choice of private schools at public expense, while in a 2003 CBS News/New York Times poll 47% agreed with and 49% disagreed with tax-funded vouchers for private or religious schools, *at* http://www.publicagenda.org/issues/major_proposals_detail.cfm?issue_type=education&list=15. The support for vouchers appears to be somewhat greater among blacks than whites, although the support among both groups may be declining. In polls conducted by the Joint Center for Political and Economic Studies, in 1998, 48.1% of blacks and 41.3% of whites supported vouchers, whereas in 1997 the figures were 55.8% for blacks and 47.2% for whites. *See* JOINT CTR. DATA BANK, NATIONAL OPINION POLL 1996-2000 *at* www.jointcenter.org/DB/detail/NOP.htm#Education (last updated Aug. 5, 2004). And the NAT'L URBAN LEAGUE, *supra* note 93, reported that 41% of blacks polled in 2000 supported vouchers, but only 34% in 2001.

V. Associational Issues When Society Is a Party

Now let us address associational conflicts when society itself is a party. First, consider situations when some party wants out of an existing relationship with a society, using emigration and secession as examples. Currently, international law guarantees the right of people to freely leave their countries, and most countries adhere to this norm.[104] This right came about only after an intense international campaign and over the objections of countries (mostly underdeveloped or from the Communist bloc) who feared that free emigration would harm them by the loss of people whom they devote their resources to educate and train and who might contribute to national development.[105]

Individualistic considerations support the right to freely emigrate, which is tantamount to empowering people who do not want to associate with their countries to unilaterally terminate that relationship.[106] This is akin to allowing a party to a marriage to freely exit and is, in fact, more favorable than the common practice under permissive divorce laws that allow unilateral termination but often require the relationship to continue through the imposition of support obligations. Analogously, some countries allow people to emigrate only after completing military or other

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[104] See Thomas Kleven, *Why International Law Favors Emigration Over Immigration*, 33 U. MIAMI INTER-AMER. L. REV. 69, 71-73 (2002). The right to leave is guaranteed by the Universal Declaration of Human Rights, Art. 13, the International Covenant on Civil and Political Rights, Art. 12(1)(2), and various regional treaties.

[105] For a history of the international recognition of the right to freely emigrate, see ALAN DOWTY, CLOSED BORDERS: THE CONTEMPORARY ASSAULT ON FREEDOM OF MOVEMENT 111-41 (1987).

[106] For a more thorough discussion of the individualistic and collective considerations relating to freedom of movement in the international context, see Kleven, *supra* note 104, at 74-83.

mandatory public service and for professionals, like doctors, only after practicing for a time.[107]

Such limitations represent a balancing of interests between the claimed individual right to associate or not with whom one chooses and collective considerations like compensating society for the benefits one has received during the association. Looking at society as analogous to another person with whom a party might have an association, compensation might be justified in individualistic terms. The receipt of benefits from a society can be seen as giving rise to a tacit agreement to perform expected social obligations in return, or to an implied contract to do so lest the party otherwise be unjustly enriched at society's expense. As noted above, Locke comes surprisingly close to using such reasoning to posit that thereby someone becomes permanently tied to a society so that one cannot later sever the relationship without society's consent.[108] Furthermore, societies are certainly conceivable where people are seen, akin to Aristotle's view, as being irrevocably tied to their society by virtue of birth, much like a family.

Although current international practice regarding emigration is not so collectively tilted, such is not the case with secession. When a group of people occupying a particular portion of a country desire to withdraw and either form their own nation or join another, the current international standard and practice is that a nation's sovereignty over its territory entitles it to prevent secession

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[107] *See generally* BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, U.S. DEP'T OF STATE, 1999 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES Feb. 2000, *at* http://www.state.gov/g/drl/rls/hrrpt/1999. Cuba, for example, requires doctors and other professionals to practice 3 to 5 years before being eligible for an exit permit.

[108] LOCKE, *supra* note 4 and accompanying text.

without its consent.[109] There is, though, a free association claim here, analogous to that of an emigrant's claim not to have to remain in a society against one's will; or analogous to the claim of religious or other groups within a society to the right to a relatively autonomous sphere.

Again, the explanation for this divergence seems one of context and scope, based on factors that heighten the significance of collective considerations when a portion of a country secedes. In the case of secession, people, land, and other resources are lost, intensifying the harmful

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[109] I refer here to the ability of part of an established international state to freely secede without the consent of the State -- bearing in mind that since international law is still not very highly developed and is still heavily intertwined with power politics among nations, it is difficult to be definitive about it. That said, the principles of self-determination and non-intervention in the internal affairs of a State would seem to imply that a State's laws govern when parts of a State may withdraw. If a State's law permits withdrawal, even unilaterally, then there is consent. If not, then it would seem that a State ordinarily has the right to prevent a unilateral secession, by force if necessary, and that other states are ordinarily obliged not to intervene (except perhaps to prevent the excessive use of force or in those instances when there is a right to secede). *See* JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 84-106, 114-18, 215-18 (1979). While a part of a State might assert that unilateral secession is justified by its own right of self-determination, the State's right of self-determination would ordinarily seem to be overriding, except perhaps in the case of oppression or misgovernment of an area. *Id.* at 86, 100, 115-17 (referring to "the possibility that the principle [of self-determination] will apply to territories which are so badly misgoverned that they are in effect alienated from the metropolitan State," but suggesting that the concept is highly controversial and applicable, if at all in modern times, only to Bangladesh). *See also infra* notes 111, 119. Now as a practical matter part of a State may be strong enough to successfully secede without consent, to establish de facto self-governance and other incidents of statehood, and to receive recognition as a State by the international community. Here it would seem more appropriate to say not that the new State had a right to secede but that the international community has acknowledged practical reality and ratified the successful secession after the fact. *See* CRAWFORD, *supra*, at 248-66.

impact on the rest of society. While the cumulative effect of individual emigration can be substantial over time, secession may cause an immediate and tremendous impact with which society has more difficulty coping.[110] Unlike group autonomy within a society, secession entails a more complete departure from the association, whereas relatively autonomous groups within a society are still subject to its ultimate authority.

Still, if freedom of association is to be taken seriously as a fundamental individual and group right, the interests of territories that want to secede from a society must be considered. Here, the rationale for the secession is relevant. A portion of a society desiring secession because it is being oppressed by the rest of society would have a stronger claim than one that desires secession in an effort to gain control over the bulk of a society's resources or to engage in some practice like slavery that contravenes society's fundamental values.[111] If society is not willing to let a territory go, then it may have the obligation to accommodate the desire for separation by providing opportunities for relative autonomy, like decentralizing

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[110] Societies do at times suffer immediate mass emigrations in times of famine, war or internal strife, frequently resulting from oppression within the societies themselves. *See, e.g., infra* note 119 (regarding the mass migration of millions of Hindus and Moslems between India and Pakistan following partition); Susanne Schmeidl, *Conflict and Forced Migration: A Quantitative Review, in* GLOBAL MIGRANTS, GLOBAL REFUGEES 62 (Aristide R. Zolberg & Peter M. Benda, eds., 2001).

[111] For commentary on the right to secede, *see, e.g.*, Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 YALE J. INT'L L. 177 (1991)(arguing for right to secede when territory illegally annexed but not on grounds of nationality or group cohesiveness alone); Alan Buchanan, *Federalism, Secession, and the Morality of Inclusion*, 37 ARIZ. L. REV. 53 (1995)(arguing for right to secede of groups suffering severe injustices at the hands of the state but otherwise no general right to secede); Robert W. McGee, *The Theory of Secession and Emerging Democracies: A Constitutional Solution*, 28 STAN. J. INT'L L. 451 (1992)(arguing for a right to secede).

society into states or provinces with their own governments and powers.[112]

Now let us address situations when some party wants to establish an association with a society, using immigration and the merger of societies as examples. Current international practice regarding immigration is opposite from emigration. While a party is substantially free to leave and sever the relationship with one's country, there is no comparable right to enter and become a member of another society. Pursuant to the principle of national sovereignty, societies have the virtually unfettered right to refuse entry to outsiders.[113] Similarly, a society's national sovereignty entitles it to reject mergers sought by other societies.[114]

The principle of national sovereignty is analogous to an individual's absolute right to refuse associations with others. Just as there is reason to question the absoluteness of such a right when its exercise would oppress others or harm society, however, so the principle of national

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[112] *See, e.g.,* Hurst Hannum, *Rethinking Self-Determination*, 34 VA. J. INT'L L. 1, 66:

> In most instances, self-determination should come to mean not statehood or independence, but the exercise of what might be termed 'functional sovereignty.' This functional sovereignty will assign to sub-state groups the powers necessary to control political and economic matters of direct relevance to them, while bearing in mind the legitimate concerns of other segments of the population and the state itself.

[113] *See* Kleven, *supra* note 104, at 71.

[114] Before the world-wide extension of the nation-state system, a state's acquisition of territory by conquest or cession (typically under threat of force) from indigenous peoples not inhabiting a recognized state was commonplace. *See* CRAWFORD, *supra* note 109, at 173-74. In modern times, forcible annexation or consolidation would clearly seem to violate the principles of self-determination and non-intervention. *Id.* at 106-07, 112-13.

sovereignty may overly protect nations' self-determination against legitimate competing considerations. On the other hand, there may be situations when a society is justified in rejecting or limiting associations with outsiders in its pursuit of collective self-determination. Again, a balancing of interests is required, taking into account context and scope.

Consider several scenarios, beginning with immigration. Because it is virtually absolute, the principle of national sovereignty entitles nations to treat outsiders in ways that would violate the fundamental rights of its own members. In American society, for example, while the government may not discriminate on the basis of race against its members (i.e., citizens and those allowed to enter), it may indiscriminately do so, and did for much of the twentieth century, when dealing with prospective immigrants.[115] Members of this society have the right to travel and settle where they please, and states and localities may not refuse to accept them in their communities.[116] Yet with regard to immigration, a nation's right to collective self-determination overrides almost all competing considerations.[117]

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[115] *See* Kleven, *supra* note 104, at 86-87. Some commentators believe the U.S.'s immigration practices are still racist, if not as explicitly so as in the past. *See id.* at note 58.

[116] *See Saenz v. Roe*, 526 U.S. 489 (1999)(invalidating statute limiting welfare benefits during first year of residency); *Shapiro v. Thompson*, 394 U.S. 618 (1969)(invalidating statutes denying welfare assistance to residents of less than one year); *Edwards v. Cal.*, 314 U.S. 160 (1941) (invalidating statute prohibiting the transport of indigents into the state).

[117] The only exception is that if someone can find their way into a country, they may not be deported to another country where they would face persecution. U.N. Convention Relating to the Status of Refugees, Art. 31-33 (adopted July 28, 1951 and entered into force Apr. 22, 1954).

This leaves little room for individualistic values in situations where human dignity is at stake. Suppose a minority of the world's population occupies a disproportionate share of the available land, wherein is located a disproportionate share of the world's resources, and as a result enjoys a disproportionately high standard of living. And suppose people are suffering due to burgeoning overpopulation and other crises to which well-off societies may have contributed through colonial exploitation and environmental degradation.[118] Under

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[118] The world's population, now at about 6 billion, is expected to reach between 8 and 11 billion by 2050, and most of the population growth will be in the less developed parts of the world. *World Population Prospects: The 2000 Revision*, U.N. Population Div., at 5, *at* http://www.un.org/esa/population/publications/wpp2000/wpp2000_volume3.htm. The relationship between population growth and poverty is unclear due to the many variables. Does population growth in underdeveloped areas cause poverty, such that what is needed are efforts to control population growth to alleviate poverty? Or does poverty cause population growth, such that development is needed to reduce poverty which will lead to reduced population growth? The answer seems to be sometimes one, the other and both, and sometimes neither because other causal factors like environmental degradation are also at play. *See, e.g.*, Alain Marcoux, *Population and Environmental Change: from Linkages to Policy Issues*, Sustainable Dev. Dep't, Food & Agric. Org. of the U.N. (Jan. 1999), *at* http://www.fao.org/sd/WPdirect/WPre0089.htm; Geoffrey McNicoll, *Population and Poverty: The Policy Issues*, Sustainable Dev. Dep't, Food & Agric. Org. of the U.N. (Jan. 1999), *at* http://www.fao.org/sd/WPdirect/WPre0088.htm. Some argue that poorer countries should be responsible for solving their own developmental and poverty problems. However, to the extent that poverty does cause population growth and that the countries experiencing the greatest population growth are poor as a result of past and present exploitation by the richer nations, then the argument that the richer nations should somehow assist either through helping to relieve the population strain or with economic development and family planning becomes stronger. *See, e.g.*, ANDRE G. FRANK, CAPITALISM AND UNDERDEVELOPMENT IN LATIN AMERICA (1967); WALTER

these circumstances, according the well-off societies the absolute privilege to refuse admittance based on the right of national self-determination seems one-sided. Indeed, it seems unlikely that nations would be accorded such a right under a more highly developed international order, and its existence today demonstrates the dominant power of the world's wealthy nations over the rules of the game.

Similar considerations compete in the context of societal mergers. To illustrate, consider the following two hypotheticals: first, India proposes a reconsolidation with Pakistan into a single unified nation; second, Puerto Rico proposes that it be admitted to the United States as a state. Although under current international practice both Pakistan and the United States have the absolute right to reject these associations, there are competing considerations and arguable differences between the two situations.

One difference is that while India and Pakistan were unified under British colonialism, that relationship was severed;[119] whereas as a territory of the United States,

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RODNEY, HOW EUROPE UNDERDEVELOPED AFRICA (1981); Edward Goldsmith, *Development as Colonialism, in* THE CASE AGAINST THE GLOBAL ECONOMY 253 (Jerry Mander & Edward Goldsmith eds., 1996). Moreover, a more communal view of the world as an interdependent community might suggest that the world's richer nations have a duty to aid the less well-off, whatever the cause of the disparities. *See, e.g.*, MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 31-51 (1983)(discussing the "duty to aid").

[119] The division of the subcontinent into separate nation-states along largely religious/ethnic lines (India being largely Hindu and Pakistan largely Muslim) is an outgrowth of both the area's pre-colonial history and also the impact of British domination of the subcontinent between the middle of the 19th and 20th centuries. *See, e.g.*, TALBOT, *supra* note 65, at 1-133. Despite Indian efforts to bring about a unified, multi-ethnic, secular nation in which Hindus would be the substantial majority, Pakistani/Muslim separatism led to partition and the establishment of India and Pakistan (with a western and eastern portion on opposite sides of India) as separate nation-states in 1947,

Puerto Rico is arguably a member of the society[120] and is seeking the full-fledged statehood accorded to other members.[121] To analogize to interpersonal relationships,

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accompanied by the mass migration of millions of mostly Muslims from India to Pakistan and of mostly Hindus from Pakistan to India. *Id.* at 134-61. Both countries have experienced struggles among various minority religious and ethnic groups. In Pakistan, Bengali separatism led to the break away of Pakistan's eastern wing and the formation of Bangladesh as an independent nation in 1971. *Id.* at 252-59. India has experienced Sikh ethno-nationalism and demands for internal autonomy as well as secession in the Punjab region. *Id.* at 265-73. And India and Pakistan have been at loggerheads since independence. *See infra*, note 122.

[120] U.S. interest in Puerto Rico stems back to the earliest days of the nation. Following the Spanish-American War, Spain ceded Puerto Rico to the U.S. in 1899, and Puerto Rico was made and has since remained a dependent territory of the U.S. JOSÉ TRÍAS MONGE, PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD 21-29 (1997). In 1900, a civil government under the ultimate control of the U.S. was established. *Id.* at 36-43. In 1917, Puerto Ricans were granted American citizenship. *Id.* at 67-76. In 1951, following a referendum approving it and subject still to ultimate U.S. authority, Puerto Rico became self-governing and the Commonwealth of Puerto Rico was established; and in 1952, the citizenry adopted and Congress approved Puerto Rico's Constitution. *Id.* at 107-18. Throughout its history as a territory, Puerto Rico's economy has been integrated into and dependent on that of the U.S. James L. Dietz & Emilio Pantojas-García, *Puerto Rico's New Role in the Caribbean: The High-Finance/Maquiladora Strategy, in* COLONIAL DILEMMA: CRITICAL PERSPECTIVES ON CONTEMPORARY PUERTO RICO 103 (Edwin Melendez & Edgardo Meléndez eds., 1993); Edwin Meléndez, *Politics and Economic Reforms in Post-War Puerto Rico, Id.* at 79.

[121] Puerto Rico's status has been part of a long-standing debate. MONGE, *supra* note 120. Within Puerto Rico, there have been three non-binding plebiscites: in 1967, 1993 and 1998. In all three, there has been substantial support for statehood, ranging from 39% in 1967 to almost 47% in 1998. Independence has received minimal support, below 5%. In 1967 and 1993, commonwealth status outpolled statehood, although by a much larger margin in 1967 (60% to 39%) than in 1993 (49% to 46%). *See* 1998 Status Plebiscite Vote Summary, *available at* http:// electionspuertorico.org/1998/summary.html; Estado Libre Asociado de Puerto Rico, Escrutinio del Plebscito del 23 de Julio

one might say that India and Pakistan were at one time married, divorced, and are now independent parties deciding whether to renew the marriage; whereas, the United States and Puerto Rico are now *de facto* married as at common law, and Puerto Rico wants that status legitimized in order to receive all the benefits of a formal marriage.

A second difference is that the history of the relations between Pakistan and India differs from that of the United States and Puerto Rico, and the impact of a merger on Pakistan and the United States differs. India and Pakistan split primarily because of internal conflict between Hindus and Muslims, and there is on-going animosity between the two.[122] Pakistani Muslims would be a small and disfavored minority in a unified country, and even if India agreed to a relatively autonomous provincial status for Pakistanis, they would have a legitimate fear of oppression. On the other hand, Puerto Rico is arguably already part of this society, has many of the responsibilities

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de 1967, *available at* http://electionspuertorico.org/archivo/1967.html. Interpreting the results of the 1998 plebiscite is difficult because statehood and independence were competing with two commonwealth-like alternatives – one similar to the present status of subjection to the ultimate authority of Congress and the other consisting of full self-governance subject to undefined economic and defense ties to the U.S. and with U.S. citizenship only for those already having it and their descendents. Both alternatives received less than 1% support and neither received 50% of the vote. *See* Manuel Alvarez-Rivera, *Elections in Cuba, 1998 Plebiscite Status Definitions*, *at* http://eleccionespuertorico.org/home_en.html.

[122] The on-going animosity has resulted in four wars and several near wars, and has revolved largely around the Kashmir region of India, whose population is largely Muslim and which both countries claim. The causes of the conflict are varied and contested, and include not only the religious/ethnic factor but also both countries' efforts at nation-building and other geo-political factors as well. *See, e.g.*, SUMIT GANGULY, CONFLICT UNENDING: INDIA-PAKISTAN TENSIONS SINCE 1947 (2001).

(e.g., military service, subjection to U.S. law) but not all the benefits (e.g., seats in Congress, the right to vote for President) of statehood,[123] and may have lost other opportunities to flourish had it remained independent. Under these circumstances, Pakistan seems to have a stronger claim than the United States to avoid an unwanted relationship with the other party. Furthermore, if the United States were unwilling to admit Puerto Rico as a state, it would seem obligated, after forcing it into an unwanted relationship in the first place, to allow Puerto Rico to become an independent nation if it so chooses.

VI. Conclusion

While the casual remark that people should be free to choose with whom to associate or not to associate may often be an appropriate response, I have tried to show that in many contexts it is not. At times it may be appropriate for society to prevent associations harmful to a party or society as a whole, and at times it also may be appropriate to impose associations on parties, even highly intimate associations, when they have made commitments that others have relied on or when it serves the common good. Moreover, these considerations may be implicated when society itself is a party to a contested relationship.

Inevitably, when associational conflicts arise, there will be assertions of individual and group rights and of collective interests on all sides, and it will be necessary to assess the strength of the competing considerations in social context. Rather than attempting to thoroughly categorize the relevant contexts and considerations, I have tried to establish that the notion of free choice in

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[123] MONGE, *supra* note 120, at 162-64; *InfoPlease: Puerto Rico*, *at* http://infoplease.com/ipa/AO113949.

associations is overly simplistic and to show that associational conflicts are ubiquitous in social life and relate to issues, like marriage, race relations, and membership in society, that are central to human dignity and the well-being of society.

As always when there is conflict over such issues, there may be many perspectives and passionate disagreement over the appropriate outcome and who should be empowered to decide. The struggle for power in social life is on-going, and associational conflicts are at the heart of the struggle.