

On the Freedom To Associate Or Not To Associate With Others

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Abstract

This article discusses the freedom to associate or not to associate with others. Associational issues are pervasive in the law, and arise on both an individual and a societal level. Within societies one party may want to have an association with another who doesn't want the association, or parties may want to have an association that others find objectionable or may want not to have an association that others favor. In all of these situations society as a whole must decide whether to empower one party to impose an unwanted relationship on others, and whether to prohibit associations that parties want or impel associations that parties don't want. Similar issues arise among societies, where parties may resort to international law to resolve associational conflicts or in the absence thereof will have to work out associational conflicts among themselves. The thesis of the paper is that there is no general moral or legal principle for resolving such associational issues. Rather their resolution depends on historical and social context, and ultimately on societies' ever evolving values. In particular, associational issues will be affected by the extent to which a society's values are more individualistic or collective. By way of illustrating the point the article discusses the factors that might come in to play in a variety of associational contexts, including marriage, race relations, emigration and immigration, and others.

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**ON THE FREEDOM TO ASSOCIATE OR NOT TO
ASSOCIATE WITH OTHERS**

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It is commonly asserted in casual conversation that there is or should be a right to associate or not to associate with whom one chooses. In fact, however, societies frequently induce associations people don't want to have and deter those they do. This article addresses the types of situations that give rise to associational issues and the considerations relevant to their resolution. It does not attempt to develop a general theory of free association, about the possibility of which I am skeptical given the unresolvable value disputes underlying all associational issues. However, unpacking how differing associational issues are resolved in practice within and among societies should shed some light on what those values are.

Part A outlines the types of situations in which associational issues arise. How associational issues are resolved depends greatly on whether a more individualistic or collective perspective is brought to bear. Part B develops this point in general through a discussion of Locke and Aristotle, and Part C illustrates the point through a brief excursion into the institution of marriage. Part D then analyzes in more detail how the process plays out as regards conflicts among

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society's members, while Part E does the same when society itself is a party.¹

A. Types of Associational Issues

Associational conflicts abound in social life. Within a society Party A may wish to associate with Party B, who may not wish to associate with Party A. Examples include A's desire, not shared by B, to be friends with or to marry or to remain married to B, 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 empower A to force the association on B, empower B to avoid the association, or have society itself resolve the matter pursuant to criteria which may take into account the wishes of the parties and other considerations society deems relevant.

Or Party A and Party B may wish to have an association that society as a whole finds objectionable, or conversely may wish not to have an association that society desires. Here society must decide whether to abide by the wishes of the parties or to

¹ For other treatments of free association, see, e.g., FREEDOM OF ASSOCIATION (Amy Gutmann, ed., Princeton University Press 1998)(articles discussing from a variety of perspectives 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, as when society seeks to compel those who don't want to participate to financially support public programs that benefit others, entail associational conflicts. A relationship between parties on a purely financial level is still a type of association, and poses questions that quite resemble those arising in more intimate associations.

prevent or compel the association against the parties' wishes. Examples of preventing associations that parties wish to have include the regulation of sexual behavior or criminalizing conspiracies in restraint of trade. Examples of compelling associations parties do not wish to have include the draft or forced integration.

Or society itself may be involved as a party to an associational conflict, as 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. Here society must decide whether to accede to the other party or impose (or try to impose) its will. Or all the involved parties may be societies, as when nations have territorial disputes, or when nations wish to impose on or unilaterally withdraw from treaties with other nations. Here the international community may try to intervene similar to a society's resolution of conflicts among its members, in the absence of which societies have to work it out among themselves.

In all these associational contexts, someone or some entity must ultimately control the outcome of the existence or not of an association. Parties cannot at the same time both be and not be friends, be and not be married, attend integrated and segregated schools, participate together in some societal venture and not participate, be a member and not be a member of

society, be a party and not be a party to a treaty. And all societies have ways, through law and custom and at times brute force, of allocating the power to control the outcome in such associational contexts and of compelling or inducing the adherence of their members and others. The purpose of this paper is to examine the ways in which that power is allocated, toward the end of identifying and evaluating the considerations that underlie the differing resolutions of associational conflicts in divergent social contexts.³

B. Who Should Control: Individual and Collective Perspectives

One's view of the appropriate resolution of associational conflicts and of who should control the outcome is dependent to a great degree on one's view of the nature of social life, and in particular on the extent to which one has an individualistic or communal view of social life.

The extreme individualistic view posits the primacy of the

³ This is not the place to attempt a thorough explication of the meaning of the concept "society", which has to do with such factors as interdependence, common values and culture, authoritative institutions, territoriality, and the perception of its members. By and large herein I use society to refer to something on the order of a country or nation. But depending on which factors are emphasized, 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. And 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 (2d ed., M.I.T. Press 1966); ANTHONY D. SMITH, NATIONAL IDENTITY (University of Nevada Press 1991).

individual.⁴ The individual precedes society and all relationships; and 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, because their fates are inescapably intertwined with the fates of all others and their welfare inescapably interdependent with the welfare of all others, and because in some way all their actions affect all others and they are affected by the actions of all others.⁶ Consequently, many relationships which 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

⁴ As expressed, for example, in the philosophies of John Locke and Robert Nozick. See JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* (The Liberal Arts Press 1952) (originally published in 1690); ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (Basic Books 1974).

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

⁶ There is no exit. 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.

collective decision that society is better off by so treating them.

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 or less freely chosen, while others are more or less involuntary or imposed; and often the line between free choice, involuntariness and imposition is blurry. And 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 which may cut both ways. In many if not most instances it will be 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 can be found in even the most individualistic and communal thinkers; 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

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.

regarding the control and distribution of property and other resources,⁸ and "by common consent" states do the same thing 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 ever to justify imposing a political or any other relationship on someone.

But there are qualifications that bring collective considerations into play. One 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 whether they like it or not: by having to take the interests of others into account in planning one's own behavior, or having to respond to the complaints of others that one has violated the qualifications, or having to bargain and coordinate with others so as to minimize conflict over and prevent overexploitation of

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").

¹¹ LOCKE, *supra* note 4, at 5.

¹² *Id.* at 17.

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 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, through consensually entering into a societal relationship, one may not withdraw from that relationship and can then have (or is deemed to consent to have) many other types of relationships imposed on the party pursuant to collective considerations.

Locke must, of course, deal with the question of people who

¹³ NOZICK, *supra* note 4, at 10-25, 108-119 (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.

¹⁵ *Id.* at 50

¹⁶ *Id.* at 55.

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, that would be the end of the consensual nature of political relationships. So 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

But what constitutes the exercise of that liberty may be quite subtle indeed and highly constrained as a practical matter. Constrained because "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 Constrained because the socialization process and a multitude of economic and emotional bonds that exist in all societies make it difficult for most people to choose to belong to a society other than that which they are born into; and because unlike in Locke's time the entire world is now divided into nation states that strictly regulate entry, such that for most people there is no other alternative than where they are born. And subtle because due to the practical constraints the process of consenting is such that "people take no notice of it and,

¹⁷ *Id.* at 67

¹⁸ *Id.* at 68.

¹⁹ *Id.* at 67.

thinking it not done at all, or not necessary, conclude they are naturally subjects as they are men."²⁰ It is but a short step from here to the general view that in reality many relationships are far from freely chosen and that what may appear as consent often is an illusion masking the largely involuntary and socially constructed nature of relationships.

This is an easy move for Aristotle whose starting point, unlike Locke's "state of perfect freedom," is that "man is by nature a political animal";²¹ and that rather than arising from consent "the state is a creation of nature"²² and is "by nature 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"²⁴ and "the individual when isolated, is not self-sufficing."²⁵ From this starting point, a variety of involuntary relationships exist in society: "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

²⁰ *Id.*

²¹ ARISTOTLE, *supra* note 5, at 3.

²² *Id.*

²³ *Id.* at 4.

²⁴ *Id.*

²⁵ *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."

marked out for subjection, others for rule";²⁶ and "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 all mankind."²⁷ One can reject Aristotle's view of these particular relationships and still find there a case for the non-consensual nature of many relationships in social life.

Yet in Aristotle too we find the yin-yang of communal and individualistic thinking, bearing in mind that the notion of individual rights was not highly developed in that era of history.²⁸ Thus, subject to its regulation for the common good,²⁹ Aristotle supports private property -- the essence of which is to empower the owner to choose with whom to associate with regard to the property's use.³⁰ And this for a variety of

²⁶ ARISTOTLE, *supra* note 5, at 6.

²⁷ *Id.* at 7.

²⁸ See, e.g., ARISTOTLE, *NICOMACHEAN ETHICS* (Bobbs Merrill 1962). For Aristotle one's ethical duties, i.e., how one should treat others, derive from the pursuit of one's highest end, which is happiness, which comes about 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. MacL. Currie, ed., J.M. Dent & Sons 1973)(discussing the roots of the idea of respect for the individual in periods of ancient Greek and Roman democracy and its maturation -- "the essential dignity and sanctity of human life, freedom of thought and criticism,...popular government..., the rule of law based on the impartial administration of justice," at 5 -- in western civilization beginning with the Renaissance and Protestant Reformation).

²⁹ "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. "Clearly, then, the legislator ought not only to aim at the equalization of properties, but at moderation in their amount." *Id.* at 34. "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; but governments which rule with a view to the private interest, whether of the one, or of the few, or of the many, are perversions." *Id.* at 61.

³⁰ See, e.g., Thomas Kleven, *Private Property and Democratic Socialism*, 21 *LEG. STUD. FOR.* 1, 12-21 (1997)("Ownership confers decision making power over

reasons with both collective and individualistic overtones.

"When a man feels a thing to be his own," this contributes to personal pleasure and thereby to the development of one's excellence;³¹ and the greatest pleasure is "in doing a kindness or service...(to others), which can only be rendered when a man has private property."³² And private property enables people to "set an example of liberality" or "liberal action," deriving from "the use which is made of property."³³ And, finally, "there is much more quarreling among those who have all things in common,"³⁴ 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."³⁵

And, while people (alas only men to Aristotle) are naturally political animals, Aristotle acknowledges that "they

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. Vandavelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFF. L. REV. 325, 359 (1980) ("To say that one owned property was 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 of New Jersey v. Shack, 277 A.2d 369 (N.J. 1971) (overthrowing trespass conviction of field worker and attorney for organizations assisting migrant farm workers on ground that property owner does not have right to exclude them from visiting with workers in their on-premises living quarters so as to deny workers the "opportunity to enjoy associations customary among our citizens").

³¹ ARISTOTLE, *supra* note 5, at 26.

³² *Id.*

³³ *Id.* at 27.

³⁴ *Id.*

³⁵ *Id.* at 26.

are also brought together by their common interests,"³⁶ implying that free choice is at play in establishing political relationships. And, while Aristotle is not an unadulterated fan of democracy and sees advantages to other forms of government as well, he does note as among democracy's virtues that "a man should live as he likes,"³⁷ also implying freedom of choice in relationships.

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 is probably endless and unresolvable, and in the real world most or all societies have an ethos that incorporates some aspects of both approaches albeit with differing emphases in differing societies. Therefore, we should expect to find 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 their mores evolve.

C. The Institution of Marriage

To illustrate the point just made, let's briefly look at the institution of marriage. In the United States the establishment of a marital relationship is widely viewed as the

³⁶ *Id.* at 60.

³⁷ *Id.* at 144.

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 doesn't want an association prevails over the party who does, and therefore controls the outcome.

Individualistic values underlie this arrangement. To force someone to marry another against one's will would be seen as a violation of human dignity and of the fundamental individual right to control one's destiny with regard to such matters. This sentiment flows from cultural notions of what marriage entails. The intimacy of marriage, ideally based on love and typically involving sexual relations, is one obvious element. More collective notions are also likely at play, such as the perceived importance of the nuclear family to society's successful functioning and of the importance of marriage based on mutual choice to the success of the nuclear family.

Underlying all these elements are debatable value and empirical 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 the choice of the two parties as promoting the latter and undermining the former. This may help explain the practice in some societies, perhaps more so in the past though still found today, of arranged marriages.³⁸ It might

³⁸ See, e.g., GWEN J. BROUDE, *MARRIAGE, FAMILY, AND RELATIONSHIPS* 192-195 (ABC-CLIO 1994)(comparing arranged marriage practices in various cultures); Xu Xiaohu & Martin King White, *Love Matches and Arranged Marriages*, in *NEXT OF KIN* 420

be thought that marriage based on intense interpersonal intimacy and mutual choice will weaken the ties to other members of and lead couples to separate themselves from an extended family; and that marriages arranged by one's family or parents, with the new couple perhaps living with one of their families as is often the case in societies with arranged marriages, will strengthen extended family ties.

No doubt arranged marriages have often taken into account the wishes of the parties. When not, arranged marriage is an instance 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 can 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 in some societies even the killing of a

(Lorne Tepperman & Susannah J. Wilson, eds., Prentice Hall 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. Caplan, *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, Lawrence A. Young & Tim Heaton, *Legislating Social Change in an Islamic Society - Indonesia's Marriage Law*, 44 AM. J. COMP. L. 45 (1996); Anna M. Hann, *Holding Up More Than Half the Sky: Marketization and the Status of Women in China*, 11 J. CONTEMP. LEG. ISS. 791 (2001); Shirley L. Wang, *The Maturation of Gender Equality Into Customary International Law*, 27 N.Y.U. J. INT'L L. & POL. 899 (1995); Sherifa Zuhur, *Empowering Women or Dislodging Sectarianism: Civil Marriage in Lebanon*, 14 YALE J. L. & FEM. 177 (2002).

recalcitrant child has been condoned or accepted.³⁹

While mutual choice is the prevailing approach to the establishment of a marriage in this society, the right to make that choice has been severely limited by requirements such as not already being married to someone else or not being of the same gender. 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; and banning same-sex marriage might be justified as promoting procreation or preventing practices that violate societal mores. Nevertheless not only are there strong individual rights claims for allowing polygamy⁴⁰ and same-sex marriage, but polygamy has been widely if

³⁹ For reports on countries where "honor killings" of women for various reasons, including refusal to submit to arranged marriages, are common 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/ai.nsf/index/ASA330181999>; Gendercide Watch, *Case Study: Honor 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.

⁴⁰ For divergent views regarding polygamy, see, e.g., Stephanie Forbes, Note, *Why Have Just One?: An Evaluation of the Anti-Polygamy Laws under the Establishment Clause*, 39 *Hou. 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); 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

diminishingly practiced in other societies and there are movements here and elsewhere to legitimize same-sex unions.⁴¹

Nor is the free choice model fully applicable to the termination of a marriage, i.e., divorce. In some societies, including the United States in earlier times, divorce has been next to impossible to obtain even when both parties want it.⁴²

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); 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. 225 (2001-2002)(arguing that harms of polygamy to women and children constitute a compelling government interest justifying its prohibition).

⁴¹ See, e.g., *Goodridge v. Department of Public Health*, ___ Mass. ___ (2003)(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)(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*, New York Times, Section A, Page 8 (June 19, 2003)(reporting on Canada's decision to legalize same-sex marriage). For arguments in favor the right of same-sex marriage, see, e.g., Elvia R. Arriola, *Law and the Family of Choice and Need*, 35 LOUISVILLE J. FAM. L. 691 (1996-97); MARK STROSSER, *LEGALLY WED* 23-74 (Cornell University Press 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. & POL. 581 (1999); Linda S. Echols, *The Marriage Mirage: The Personal and Social Identity Implications of Same-Gender Matrimony*, 5 MICH. J. GENDER & L. 353 (1999).

⁴² Throughout most of Europe prior to the 1800s, largely influenced by religious doctrine proclaiming the indissolubility of marriage, divorce was virtually unknown and annulment very hard to obtain, such that 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 (Simon &

Once divorce was generally allowed in the United States, it was ordinarily necessary to show cause, such as adultery, desertion or cruelty.⁴³ This usually posed little problem when both parties wanted out, since they could stipulate to or fabricate cause.⁴⁴ But a requirement of cause could pose a substantial obstacle when one party wanted out and the other didn't. In such instances the party wanting the association to continue controlled if the party not wanting it was unable to show cause. True, the party wanting out might be able to physically leave so that the parties were no longer living together as a married couple, but the formality of the marriage and the attendant legal and even 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 had a choice of marrying under a regime permitting unilateral divorce or under one requiring

Schuster 1973); MAX RHEINSTEIN, *MARRIAGE STABILITY, DIVORCE, AND THE LAW* 7-27 (University of Chicago Press 1972)

⁴³ 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 42, at 436-40; REINSTEIN, *supra* note 42, at 28-55; Walter Wadlington, *Divorce Without Fault Without Perjury*, 52 VA. L. REV. 32, 35-44 (1966).

⁴⁴ See, e.g., FRIEDMAN, *supra* note 42, at 439 ("collusion was a way of life"); RHEINSTEIN, *supra* note 42, at 55-63; Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 9, 15-16 (1990).

cause, as is currently being tried or considered in some states.⁴⁵ When the only available option is divorce for cause, then society as a whole induces individuals who want the benefits of marriage to limit their ability to exit the relationship against the wishes of the other party, thereby empowering the party who wants the relationship to continue.

Currently in the United States it is fairly easy to sever a marital relationship through divorce, since most states either have no fault divorce or impose standards such as incompatibility or irreconcilable differences that are quite easily shown.⁴⁶ Consequently, when one party wants a marriage to continue and the other wants out, the latter controls. However, although unilateral divorce is now fairly easy, society's requirement of support for ex-spouses and of children impinges on one party's ability to totally end all aspects of the relationship against the will of the other party. Support

⁴⁵ 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. s.25-901 et seq. (1998); La Rev. Stat. s.9:272-275, 307 (1997).

⁴⁶ See MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 64-81 (Harvard University Press 1987)(identifying 18 states as having divorce on nonfault grounds only, 2 as requiring mutual consent for nonfault divorce, and 30 states as having mixed fault and nonfault systems that impose various waiting periods for contested unilateral nonfault divorce; and comparing the United States to Western Europe where only Sweden has a totally nonfault system, Ireland prohibits divorce, and most countries have nonfault or mixed systems with waiting periods and/or judicial discretion to deny a contested unilateral nonfault divorce against a faultless party on hardship grounds); HERBERT JACOB, SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES 1-2, 43-103 (The University of Chicago Press 1988)(detailing the history of the no-fault movement in the United States); Wadlington, *supra* note 43, at 44-52 (discussing the operation of divorce laws based on incompatibility).

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 virtue of choosing to marry or have children; or 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 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 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.⁴⁷

In sum, despite the intimacy of the marital relationship, this and other 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 don't want to marry or

⁴⁷ See Paul K. Legler, *The Coming Revolution in Child Support Policy: Implications of the 1996 Welfare Act*, 30 FAM. L.Q. 519 (1996).

remain married to do so. Both individualistic and collective considerations govern the institution of marriage, and different balances are struck among societies and within societies over time.

D. Associational Considerations Among Parties Within a Society

In this section I want to try 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.⁴⁸ Let's assume a society deciding (i) whether to allow, prohibit or mandate particular relationships, and (ii) who should control the outcome in case of conflict over the existence or not of a relationship. Every society so deciding will have a bias, deriving from its culture and mores and likely changing over time, of the relative significance to the decision of various individual and collective considerations.⁴⁹ Yet

⁴⁸ 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, 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, re 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 a state such that the state must provide them free public education available to citizens and lawful aliens); *Martinez v. Bynum*, 461 U.S. 321 (1983) (no equal protection violation for state to deny free public education to children residing in district for primary purpose of attending public school).

⁴⁹ In this society, for example, the presumption when the law is silent 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 individualistic bias of the society.

although these biases will often produce different outcomes in similar associational contexts, the considerations that come into play may be the same.

1. Terminating an Existing Relationship.

Since individual freedom is so highly valued in this society, let's assume a society in which interpersonal relations are ordinarily up to the parties involved,⁵⁰ and 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. And let's address first a party desiring to terminate an existing relationship that the party voluntarily entered into and that the other party wants to continue.⁵¹

⁵⁰ 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, their degree of interdependence with others, or their feeling or being affected by what others do. Due to their common destiny, there is a sense in which everyone in the world is involved in a mutual relationship. Yet 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 kind of a surrogate parent. *Planned Parenthood of Southeastern Pennsylvania 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, re the lesser rights of prospective immigrants as against those who are already societal members.

⁵¹ Where one party wants out of an existing relationship and the other doesn't, several resolutions are possible. One is to allow unilateral

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 later one party wants out, the other who doesn't might claim that the first party has voluntarily parted with whatever right it may otherwise have had not to have or continue an unwanted relationship. To reject that claim it is necessary to treat the unilateral right to terminate an unwanted relationship as inalienable, thereby making the stipulation against unilateral termination void.

termination, a second to allow unilateral termination but subject to the requirement that the party wanting out somehow compensate the other party, a third to allow the party wanting the relationship to continue to specifically enforce the agreement against unilateral termination, and a fourth to allow specific performance but subject to the requirement that the party wanting in somehow compensate the party wanting out. (The possible resolutions are derived from the taxonomy of property and liability rules developed in the classic article, Guido Calabresi & Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: 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; and also because 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.

A commitment to individualism may at times 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 individualism.⁵² For example, it might be claimed that people have an inalienable right to life and liberty, and thus that they should not be permitted to agree to allow others to kill or enslave them.⁵³ 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.⁵⁴ It is even possible to claim that inalienability is inconsistent with a commitment to individualism, such that people should be free to part with all their individual rights,⁵⁵ at least so 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

⁵² See, e.g., Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987)(arguing for the non-commodification of aspects of the self that are integral to personhood).

⁵³ See, e.g., JOHN STUART MILL, ON LIBERTY 95 (W.W. Norton & Co. 1975)(originally published in 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.").

⁵⁴ 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. LEG. 269 (2001); Neil M. Gorsuch, *The Right to Assisted Suicide, and Euthenasia*, 23 HARV. J. L. & PUB. POL. 599 (2000); Christine Naylor O'Brien, Gerald A. Madek & Gerald R. Ferrera, *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., Indiana University Press 1997); Melvin I. Urofsky, *Justifying Assisted Suicide: Comments on the Ongoing Debate*, 14 NOTRE DAME J. L. ETH. & PUB. POL. 893 (2000).

⁵⁵ 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).

below).⁵⁶

The problem in the present context is that there are competing individual rights claims. Not to allow unilateral withdrawal from a relationship does limit the freedom of the party wanting out, but allowing it also impacts the freedom of the party wanting in. Thus the assertion that a party has the inalienable right to unilaterally and with impunity withdraw from any relationship, even after agreeing otherwise, must contend with the individual right claim of the party wanting the relationship to continue that to allow unilateral withdrawal would infringe its individual rights in light of the consequent harms the party might suffer after changing position and passing up other opportunities in reliance on the agreement. It is not sufficient to rebut this claim to argue that the party wanting in has no legitimate claim of detrimental reliance because the party should realize at the outset that the right to withdraw is inalienable and thus freely assumes the risk of the other party's unilateral withdrawal. The issue is whether individual rights considerations support more the recognition of an inalienable right of unilateral termination or of a right to hold a party to an agreement not to unilaterally withdraw or at least to be compensated in the event thereof.

In such situations, i.e., when individual rights

⁵⁶ See *infra* notes 88-89 and accompanying text.

considerations are implicated on both sides of an issue, which may often and perhaps always be the case, it must be decided which side's interests are weightier. This decision will frequently, if not always, require 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 perhaps than a brief emotional hurt, than 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, i.e., compensation, from the party wanting out.

Now let's assume that there is no agreement not to terminate, that the parties have voluntarily entered into a relationship without specifying either way whether there is a right of unilateral termination, and that now one party wants out and the other wants the relationship to continue. Again, it must be decided which side's interests are weightier in context. Let's compare two situations: first two parties establish a friendship and later one wants to end it while the other wants it to continue; second, two parties mutually undertake some

joint economic venture and later one wants out. In this society today the right to unilaterally terminate a friendship is the norm, whereas at times measures are taken to induce the continued existence of business relationships or at least to require compensation in the event of unilateral termination.⁵⁷

The two situations cannot readily be distinguished on the basis of a friendship's being inherently terminable at any party's will in that 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 when master and slave or

⁵⁷ 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 for working for competitors. See, e.g., Restatement (Second) of Contracts s.367 (1981); William Lynch Schaller, *Jumping Ship: Legal Issues Relating to Employee Mobility in High Technology*, 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, 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.

jailer and prisoner develop affection for one another.⁵⁸ And a successful business relationship also requires a type of emotional commitment among its associates, a commitment that is in many ways every bit as intimate as in a friendship.⁵⁹ 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, ordinarily more tacit perhaps than the usual business relationship but nevertheless typically entailing a mutual commitment to respond to the other when asked and when able to do so. And in reliance on that commitment, and to their detriment if the commitment is withdrawn, friends frequently change position and pass up other opportunities.

So perhaps what distinguishes friendship from business are collective considerations, like the centrality of business relations to the materialistic ethic that prevails in this society and the perceived dependence of the successful functioning of the economic system on binding contracts. Absent

⁵⁸ Re slavery, *see, e.g.*, NATHAN IRVIN HUGGINS, *BLACK ODYSSEY: THE AFRO-AMERICAN ORDEAL IN SLAVERY* 114-53 (Pantheon Books 1977); KENNETH M. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH* 322-31, 377-82 (Alfred A. Knopf 1956). Re prisons, *see, e.g.*, DANIEL GLASER, *THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM* 121-22, 141-46 (Bobbs-Merrill 1964); GRESHAM M. SYKES, *THE SOCIETY OF CAPTIVES: A STUDY OF A MAXIMUM SECURITY PRISON* 54-55 (Princeton University Press 1958); HANS TOCH, *LIVING IN PRISON: THE ECOLOGY OF SURVIVAL* 260-62 (American Psychological Assn. 1992).

⁵⁹ *See, e.g.*, W. EDWARDS DEMING, *THE NEW ECONOMICS FOR INDUSTRY, GOVERNMENT, EDUCATION* 28-29 (The MIT Press 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).

such considerations, attempting to impose on people intimate relations like friendships might be thought to offend human dignity. Yet a society is certainly conceivable where friendship is seen as so integral to its success that unilaterally terminating friendships, at least without good cause, is discouraged in various ways.⁶⁰ Even in this highly individualistic society people are discouraged from cavalierly ending friendships unilaterally through social pressure, like a bad reputation making it difficult to establish friendships in the future.

2. Establishing an Initial Relationship

So 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 as regards an already existing relationship. Now let's turn to the inception of a proposed association and consider in turn first one that both parties want and others

⁶⁰ See, e.g., Joan G. Miller, David M. Bersoff & Robin L. Harwood, *Perceptions of Social Responsibilities in India and in the United States: Moral Imperatives or Personal Decisions*, 58(1) J. OF PERSONALITY AND SOC. PSYCH. 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 Qasim Madhi, *Pukhtunwali: Ostracism and Honor Among the Pathan Hill Tribes*, 7(3/4) ETHOLOGY AND SOCIOBIOLOGY 295 (1986)(reporting on the practice of ostracism, including expulsion from the tribe, as means of deterring behavior contrary to tribal norms and of unifying the group); Paras Nath Singh, Sophia Chang Huang & George G. Thompson, *A Comparative Study of Selected Attitudes, Values, and Personality Characteristics of American, Chinese, and Indian Students*, 57 J. OF SOCIAL PSYCH. 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").

find objectionable, then one that one party wants and the other doesn't, and finally one that neither party wants while others do.

a. Relationships that 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 at least 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.

Take the practice of the 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.⁶¹ Forced separation imposes through the use of

⁶¹ See, e.g., YAAKOV KOP & ROBERT E. LITAN, *STICKING TOGETHER: THE ISRAELI EXPERIMENT IN PLURALISM* 20-21, 30-34, 74-75, 86, 98 (Brookings Institution Press 2002) (discussing various government practices promoting the segregation of Arab Israelis and their separation from mainstream life -- the expropriation of Arab lands, confining Arabs in their own towns for two decades under military rule, the requirement of permits to leave their towns, restrictions on the sale of land to Arabs and the allocation of land on the basis of ethnicity, the denial of government jobs and the exclusion of Arabs from military service, separate schools for Arab children with Hebrew taught as a secondary language -- and characterizing the situation as "separate but not equal"); BRENDAN MURTAGH, *THE POLITICS OF TERRITORY: POLICY AND SEGREGATION IN NORTHERN IRELAND* 34-43, 47-49, 151, 163-67 (Palgrave 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 ethnopolitical objectives and characterizing government policy more as one of "benign acceptance" of separation than of design); Tracy Wilkinson, *Bosnia's*

governmental power the preferences of those who don't 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.⁶²

In support of laws against race mixing might be asserted the right of groups to preserve their ethnic purity, which might become watered down over time if their members were allowed to cross the line. Evaluating the merit of the ethnic purity argument ultimately demands a value judgment about which there

Ethnic Division Relocates to the Classroom, Los Angeles Times, October 19, 1997, at 1 (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).

⁶² Re interracial marriage, 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). Re residential segregation, see *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) (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). Re schools, see *Brown v. Board of Education*, 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 (Yale University Press 1986, 2d. ed.) (replying to Wechsler: "What on the score of generality and neutrality, is wrong with the principle that the 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 permanent, humiliating inferiority)."

may be disagreement. To some the pursuit of ethnic purity amounts to racism, whereas to believers it represents ethnic pride and group solidarity. 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, i.e., by their character and actions,⁶³ and especially so when the government makes invidious race distinctions.⁶⁴ While in 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. So if some community should attempt to reinstate the forced separation of the races for the purpose of preserving ethnic purity, even if supported

⁶³ As most eloquently expressed by Martin Luther King 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." At <http://www.mecca.org/~crights/dream.html>.

⁶⁴ *Loving*, supra note 62. 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 invidious (or at least presumptively so), in that affirmative action amounts to impermissible discrimination against whites by denying them benefits based on race 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 letting 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 to 'make up' for past racial discrimination in the opposite direction"; *id.* at 240, 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 242, 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."

by a majority of both blacks and whites, that would be unacceptable today because so clearly violative of society's prevailing ethic. Nevertheless, a society is conceivable, and some may exist today, where the preservation of the group is seen as more important than the rights of individual members.⁶⁵

b. Relationships that One Party Wants - Now let's turn to associations that one party wants and another doesn't, and let's examine the appropriateness of forcing relationships on the unwanted party in a society that generally favors free choice.⁶⁶

⁶⁵ As 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: 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, the breakup of the Soviet Union and Yugoslavia into more ethnically homogeneous states. See, e.g., SUZANNE MICHELE BIRGERSON, *AFTER THE BREAKUP OF A MULTI-ETHNIC EMPIRE: RUSSIA, SUCCESSOR STATES, AND EURASIAN SECURITY* (Praeger 2002); NOEL MALCOLM, *BOSNIA: A SHORT HISTORY* (MacMillan 1994); GÉRARD PRUNIER, *THE RWANDA CRISIS: HISTORY OF A GENOCIDE* (Columbia University Press 1998); EDWARD W. SAID, *THE POLITICS OF DISPOSSESSION: THE STRUGGLE FOR PALESTINIAN SELF-DETERMINATION, 1969-1994* (Pantheon Books 1994); KAMAL SALIBI, *A HOUSE OF MANY MANSIONS: THE HISTORY OF LEBANON RECONSIDERED* (I.B. Taurus & Co. 1988); IAN TALBOT, *INDIA AND PAKISTAN* (Oxford University Press 2000); YUGOSLAVIA AND AFTER 87-115, 138-154, 196-212, 232-247 (David A. Dyker & Ivan Vejvoda, eds., Longman 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: historical ethnic identification and nationalism; the exploitation of ethnic differences for their own 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; 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 (shall we say more humane) social conditions.

⁶⁶ Here the obverse of the four alternatives discussed above, see *supra* note 48, would be first to allow the party wanting a relationship to impose it on the unwanted party, second to allow the relationship to be imposed but require the party wanting the relationship to compensate the unwanted party,

As with already existing relationships, an initial problem as regards the initiation of a relationship when the parties are not in agreement is that there are parallel individual rights claims. Allowing someone to impose a relationship impinges on the freedom of the party not wanting it, whereas enabling a party not wanting a relationship to avoid it impacts the freedom of the party wanting in. So, again, a balancing of interests is required. Here, however, 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 with impunity always to unilaterally terminate the relationship, seems stronger than the claim that the 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

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 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.

with another. To illustrate, let's revert to the race relations example and examine possible scenarios once the mandatory separation of the races has been outlawed. Let's first assume that whites prefer segregation while blacks prefer integration, or in other words that blacks want a relationship that whites don't.⁶⁷ One context might 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

⁶⁷ There has always been a divergence of opinion within and 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 and Thurgood Marshall pushing for integration, while others like Marcus Garvey and Malcolm X being more nationalistic. See, e.g., ADAM FAIRCLOUGH, MARTIN LUTHER KING, JR. University of Georgia Press 1995); WILLIAM L. VAN DEBURG, MODERN BLACK NATIONALISM: FROM MARCUS GARVEY TO LOUIS FARRAKHAN (New York University Press 1997); JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY (Times Books 1998).

⁶⁸ Or achieving integration in public institutions may 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*, 123 S.Ct. 2325 (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 same general standards to all applicants); *Gratz v. Bollinger*, 123 S.Ct. 2411 (2003)(public university's consideration of race in admissions process not narrowly tailored to achieve compelling interest in diversity per awarding all minority candidates 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 *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, and that rectification is needed to counteract that advantage. See, e.g. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709 (1993). Another 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, e.g., Charles R. Lawrence, *The Id*,

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 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. So a stronger response, even acknowledging a degree of forced association, is that to satisfy white preferences for non-integration would require the government to reinstate mandatory segregation in violation of its obligation to treat people as equals and not discriminate against them on the basis of race.

Now let's move from the public to the private arena and 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. And let's assume 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 further that in a society valuing individual freedom people must be allowed the latitude to hold and put into practice beliefs that may be offensive to others, so long at least as they

the Ego, and Equal Protection: Reckoning With Unconscious Racism, 39 STAN. L. REV. 317 (1987).

function in the private spheres of social life and do not attempt to use the power of government to impose their beliefs on others who are then equally free to practice their beliefs. But as strong as may be these claims 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, and becomes weaker when there isn't and when the exercise of their freedoms by some adversely affects the ability of others to exercise theirs. 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 But the mutuality argument collapses in a society where whites control the means of achieving success in life and use that control to maintain their dominance by denying access to others. As against the individual freedom to choose with whom and with whom not to

⁶⁹ See, e.g., *Lawrence v. Texas*, 123 S.Ct. 2472 (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 bedroom of home does not violate fundamental right of privacy). Compare *id.* at 199, 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."

associate must be counterbalanced the value of the individual right to equal opportunity, which is also a prominent ethic in this society and which may at times outweigh associational considerations.⁷⁰

Second, and related, the free association argument is stronger the more private the context and weaker the more public. The free association claim asserts the right to do in private that which the government itself could not legitimately do or mandate, i.e., the right to act on one's racial prejudices in ways that would violate people's individual right not to be discriminated against on the basis of race if the government were involved. A society with a strong individualistic ethic needs a distinction between the public and the private spheres of social life, since if everything were viewed as public there would be little or nothing left of individual freedom.⁷¹ But the distinction between the public and the private is often blurry. For example, white dominance in this society in the nominally

⁷⁰ See *Brown*, *supra* note 62, 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 30, at 12-21 ("(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 being called democratic must recognize and accord", at 20-21); Robert H. Mnookin, *The Public/Private Distinction: 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).

private spheres of social life is to a great extent a by-product of past racist action on the part of the government.⁷²

Furthermore, when racist practices in the nominally private spheres 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

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 in a society with a history of government fostered racism and which has since reformed, eliminating legal support for discrimination and even racist thinking but leaving behind the vestiges of its former racism, 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; and arguing that the formally race-neutral structure and practice of local government have done just that in the U.S.); 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 (Oxford University Press 1985) (discussing the development of the practice of "redlining" black and poorer neighborhoods by the New Deal Era's Home Owners Loan Corporation and the subsequent adoption of the practice by private lenders, the participation of the Federal Housing Authority in contributing to and promoting segregated housing patterns in the post Second World War suburbanization of the United States while the central city areas where many blacks lived deteriorated, and the contribution of the federal government's public housing program to the creation of urban ghettos through granting suburban communities the discretion to reject public housing and allowing cities that accepted it to concentrate public housing in the poorest neighborhoods); DESMOND KING, *SEPARATE AND UNEQUAL: BLACK AMERICANS AND THE US FEDERAL GOVERNMENT* (Clarendon Press 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 62, which struck down city ordinances mandating racially separate neighborhoods, and Shelley, *supra* note 62, which invalidated judicial enforcement of racially restrictive covenants. In fact, 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 restrictive) agreements are effectuated by voluntary adherence to their terms, it would

So the balance as 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 protected in the United States because historically, due to the sensitivity of religious beliefs and their centrality to people's world views, societies' dominant religions have often used the power of government to oppress minority religions and advance their religious views.⁷⁴ This is inconsistent with all of the above values. So the purpose of protecting free exercise is to assure all religious groups an equal opportunity to associate freely and without discrimination in order to pursue their religions, even though some of their beliefs and practices may be quite reprehensible to others.⁷⁵ Furthermore, to ensure its neutrality as between differing religious and other world views, the government may not promote one religion over others

appear clear that there has been no action by the State and the provisions of the (Fourteenth) Amendment have not been violated"); and *Jones v. Alfred H. Mayers*, 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*, 122 S. Ct. 2460, 2502 (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 Amish children from school after eighth grade and raise them in Amish life style without violating state's compulsory attendance law). *But compare* *Board of Education of Kiryas Joel Village School 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); *State of 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).

nor religion in 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 their practices contravene important secular values⁷⁷ or from incidentally benefiting religion in the furtherance of legitimate secular objectives.⁷⁸ So the overall picture is of a society where people in their private spheres of association enjoy a relative autonomy from the greater society, the degree of which autonomy fluctuates as their 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

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)(same re state prescribed non-sectarian prayer).

⁷⁷ See, e.g., *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990)(denial of unemployment benefits re firing for cause for 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 re use of child to distribute and sell religious literature).

⁷⁸ See, e.g. *Zelman v. Simmons-Harris*, 122 S.Ct. 2460 (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).

other hand, we have the fundamental 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 is more acceptable the narrower and more private its scope and less so the more it spills into the public arena and perpetuates historical oppression. Thus the case for racial exclusivity is far weaker, for example, for a political party or professional association than for a genuinely private club,⁷⁹ and is stronger when the preference for racial separation is mutual and leaves avenues for those who prefer integration than when it undermines equal opportunity.⁸⁰

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) (same re exclusion of blacks from Democratic Party's primary elections), with *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972) (no state action in violation of equal protection clause re granting of 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 per government's overriding interest in eliminating incidents of slavery and per school's presumed right to promote in its curriculum the desirability of racial segregation) and *Roberts v. U.S. Jaycees*, 468 U.S. 1 (1984) (state requirement pursuant to statute prohibiting

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 to prevent others from living there.⁸¹ And let's 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.

discrimination on basis of sex in places of public accommodation that Jaycees, a non-profit corporation that promotes young men's civic organization, admit women as members does not violate male members' freedom of intimate or expressive association per insufficient intimacy of the relationship involved and state's compelling interest in assuring equal access to public goods and services and in combating the stereotyping of women in ways that undermine individual dignity and deny equal opportunity to participate in political, economic and cultural life); with *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995) (application of state public accommodations law prohibiting discrimination on basis of sexual orientation so as to bar organizers of 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 America v. Dale*, 530 U.S. 640 (2000) (application of state public accommodations law to prohibit Boy Scouts from expelling scout master who publicly declared his homosexuality, which Boy Scouts claimed contravened the values it seeks to promote, violates First Amendment right of expressive association by significantly burdening its ability promote those values). Or 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 62 & 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.)

The first scenario seems less problematic than the second. In the first, while 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 -- there are still available communities that meet their associational preferences; whereas empowering them to force their way into the unavailable communities would 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. And 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.

⁸² See, e.g., *Sweatt v. Painter*, 339 U.S. 629 (1950) (law school segregated by law violates equal protection clause) ("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").

c. Relationships that Neither Party Wants - Finally, let's 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, for example, following mandatory segregation that race conscious desegregation plans, including such measures as forced busing, are proposed for the purpose of promoting integration in public schools.⁸³ And 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. And 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

⁸³ See *Swann v. Charlotte-Mecklenburg 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 of New Kent County*, 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).

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, so conversely do integration plans that force people who don't want to associate with each other to do so.⁸⁵

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, that 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

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 don't 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.) But a race-neutral neighborhood school approach that forces unwanted 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 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 (Macmillan 1926) (developing "a democratic conception of education"); AMY GUTMAN, *DEMOCRATIC EDUCATION* 41-47 (Princeton Univ. Press 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," at 46, and

claimed that society is better off in the long run when people are forced to integrate against their wishes in that forced integration reduces racial prejudice, thereby reducing the social turmoil that results therefrom and enhancing productivity through a greater willingness of people of different races to work cooperatively together.

A second response has to do with the way in which preferences are formed. Looked at 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 in the present had past exposure and conditioning been otherwise.⁸⁷ So it might be claimed that the current separatist preferences of both blacks and whites are the by-product in the United States of a history of past racism and of government participation therein, and that the very same

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," at 44, 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," at 44).

⁸⁷ Compare, e.g., PIERRE BOURDIEU, *DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGEMENT OF TASTE* 468 (tr., Richard Nice, Harvard University Press 1984) (a study of how social life conditions people's tastes (read preferences): "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").

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, and it might be claimed that at least a period of forced integration is needed so as to counteract past conditioning and put people in a position to more freely choose whether to integrate or separate.⁸⁸ From 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 being conditioned 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 that might derogate from

⁸⁸ See, e.g., *GROUPS IN CONTACT: THE PSYCHOLOGY OF DESEGREGATION* (Norman Miller & Marjorie B. Brewer, eds., Academic Press 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 every-day life, at 6).

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 they might not choose to have if they were in a position to decide, or might say when older they would not have chosen if they had been.

In response it might be asserted, while acknowledging some degree of parental prerogatives on individual rights grounds, that society as a whole may intervene in the parent-child relationship so as to protect the individual rights of children as against their parents.⁹⁰ Or it might be 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, and consequently that society has the right to intervene in or supplant entirely the parental raising of children when that serves the common good.⁹¹

⁸⁹ See *Casey*, *supra* note 50, 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.

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

So 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 be as strong or stronger than the parental interest in conditioning them to prefer segregation. Second, society as a whole may have a legitimate interest, as a surrogate for children, to protect 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 may not be on an equal footing in asserting and realizing their preferences. For example, in some circumstances blacks may prefer integration but

social good based on knowledge," at 23); PAULA RAYMON, *THE KIBBUTZ COMMUNITY AND NATION BUILDING* 53-55, 233-36 (Princeton University Press 1981)(discussing the communal living arrangements, later largely abandoned, of children in the early years of the Israeli kibbutzim as based on the "socialist principle that the community should replace the family" and that "(t)he kibbutz and not the parents would provide for the child," at 55, and the tension this caused particularly for mothers who desired a more family oriented approach to child-rearing).

⁹² See, e.g., *GUTMAN, supra* note 86; *Smith v. Board of School Commissioners 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").

opt for separation due to social pressure from whites who control their access to a livelihood or who express outright hostility to integration.⁹³ Or blacks who prefer integration may choose separation because so many whites opt for separation that integrated settings are not available or because the available integrated settings are inaccessibly located or prohibitively expensive.⁹⁴ Where those things occur, not only does it strengthen the arguments for forced integration just advanced, it also implicates those raised above in the discussion of forced integration where whites don't want it but blacks do.

On the other hand, after a period of experimentation it may turn out that forced integration does not improve but in fact worsens race relations and increases people's preferences for

⁹³ See, e.g., ROBERT L. CRAIN, *THE POLITICS OF SCHOOL DESEGREGATION* (Aldine Publishing Company 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* at <http://www.nul.org/soba2001/sobaresults.html> (reporting that 32% of blacks polled said they have chosen not to move somewhere because they felt unwelcome); Gary Orfield, *Housing Segregation: Causes, Effects, Possible Causes*, at note 25 (Harvard University Civil Rights Project 2001) at <http://www.law.harvard.edu/civilrights/publications/index2.html> ("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., *Village of Arlington Heights v. Metropolitan Housing Development 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).

educational separation.⁹⁵ Or it may be that blacks and whites continue to or increasingly prefer separation even after the effects of historic conditioning have attenuated.⁹⁶ And perhaps

⁹⁵ Here the real-world data is mixed and subject to differing interpretations. Orfield reports that Gallup polls during the 1990s showed majority and growing belief among both blacks and whites that integration improves education for both groups, while that at the same time both groups favored neighborhood schools. Gary Orfield, *Schools More Separate: Consequences of a Decade of Resegregation* 6-7 (Harvard University Civil Rights Project 2001) at <http://www.law.harvard.edu/civilrights/publications/index2.html>. And a Public Agenda Foundation Survey of 1998 found that 80% of black parents and 86% of whites believe improving educational quality is more important than integration. STEVE FARKAS & JEAN JOHNSON, *TIME TO MOVE ON: AFRICAN-AMERICAN AND WHITE PARENTS SET AN AGENDA FOR PUBLIC* (Public Agenda Foundation 1998). 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 half supported separate schools to 1995 when 96% supported integrated schools. HOWARD SCHUMAN, CHARLOTTE STEEH, LAWRENCE BOBO & MARIA KRYSAN, *RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATION* 103 (Harvard University Press 1997) [hereinafter *RACIAL ATTITUDES*] (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. As regards whether the federal government should "see to it" that white and black children go to school together, over the years whites consistently answered no more often than yes. And 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. 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

at the same time, 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 equal. A society is certainly conceivable where ethnic groups freely choose to live and go to school separately in order to preserve their ethnic identity or because they just don't 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 the more it can be seen as violating the individual right to choose one's associations.

Currently 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. But most blacks and whites still continued to attend largely segregated schools and live in largely segregated neighborhoods, and racial separation in those

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"); Board of Education of Oklahoma City Public Schools 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* persists and there remain feasible methods of eliminating such conditions").

spheres has increased in recent years.⁹⁷ Overt racial prejudice has decreased somewhat,⁹⁸ and the avenues of opportunity have opened a bit;⁹⁹ but blacks are still subjected to substantial

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, *Race in American Public Schools: Rapidly Resegregating School Districts* (Harvard University Civil Rights Project 2002) at <http://www.law.harvard.edu/civilrights/publications/index2.html>; 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 notes 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 in willingness for their children to attend integrated schools has 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).

⁹⁹ The gap in high school graduation as 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 was virtually identical, 88.1% versus 87.6%; however, while the gap has decreased

racial discrimination,¹⁰⁰ and whites still disproportionately dominate positions of power.¹⁰¹ Meanwhile the integrationist

over the years, the 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 1994-1998. WILLIAM B. HARVEY, MINORITIES IN HIGHER EDUCATION 2000-2001, Tables 1 & 3 (American Council on Education 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 1978-1998 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 or 65% of that for whites, whereas in 1998 the figure for whites was \$62,384 and for blacks was \$38,563 or 62% of that for whites. Joint Center for Political and Economic Studies, Joint Center Data Bank, Income and Wealth at <http://www.jointcenter.org>.

¹⁰⁰ See, e.g., Black/White Relations in the United States-1997 at <http://www.gallup.com/poll/specialreports/socialaudits/sa970610.asp> (1997 Gallup poll showing that between 25%-45% (depending on age and gender) of black respondents reported experiencing discrimination in the past 30 days while shopping, between 15%-32% while dining out, and between 10%-23% at work -- with the highest incidence in all categories reported by black men between 18-34, 34% of whom also reported experiencing discrimination by police); Krysan, *supra* note 94 (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 blacks do not have as good a chance as whites to get jobs for which they are qualified, and 2001 survey showing 51% of blacks believe blacks do not have as good a chance as whites to get housing they can afford and 47% of not having as good a chance as whites of getting a good education whereas almost 90% of whites who believe they do); National Urban League, *supra* note 89 (reporting that of those blacks polled who have tried to get a mortgage 25% said they had experienced discrimination); Orfield, *supra* note 93, at notes 42-43 (reporting on continuing and massive discrimination against blacks in housing); U.S. Equal Opportunity Employment Commission, Race-Based Charges at <http://www.eeoc.gov/stats/race.html> (reporting during fiscal years 1992-2001 an annual average of more than 29,000 complaints of race-based employment discrimination, roughly 12%-13% of which 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. Yet as of 1/31/00 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, *Black Elected Officials: A Statistical Summary, 2000* (Joint Center for Political and Economic Studies, 2002) at <http://www.jointcenter.org/whatsnew/beo-2000/index.html>. And blacks represent less than 5% of federal judges and 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. Federal Judicial Center at http://air.fjc.gov/history/judges_frm.html; ABA Commission on Racial and Ethnic Diversity in the Profession, *Miles to Go 2000: Progress of Minorities in the Legal Profession*

push following the end of mandatory segregation seems to have waned somewhat in recent years,¹⁰² and there seems to be substantial support among both blacks and whites for school vouchers and other free choice options.¹⁰³

At this juncture, therefore, it is an open question whether the considerations supporting efforts to promote school integration continue as once thought to outweigh those supporting freedom of choice. 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

9 at <http://www.abanet.org/minorities>; U.S. Census Bureau, Black-Owned Businesses: 1997 (October 2000).

¹⁰² See, e.g., FARKAS & JOHNSON, *supra* note 95 (reporting that both black and white parents believe educational quality to be more important than integration); National 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 note 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).

¹⁰³ In a Washington Post Survey of 2001, 45% of the respondents supported and 50% opposed vouchers. In an American Viewpoint poll of 1997, containing somewhat different wording from the Washington Post Survey, 67% supported and 28% opposed vouchers. In Gallup polls on allowing the choice of private schools at public expense, in 1999 41% supported and 55% opposed, whereas in 1993 24% supported and 74% opposed. See Public Agenda at www.publicagenda.org. 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 Center Data Bank, National Opinion Poll 1996-2000 at www.jointcenter.org. And the National Urban League, *supra* note 89, reported that 41% of blacks polled in 2000 supported vouchers, but only 34% in 2001.

promote both associational and egalitarian values. But 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 reduced life chances for blacks.

E. Associational Issues When Society is a Party

Now let's address associational conflicts when society itself is a party, and compare their resolution to how associational conflicts among the members of a society are handled.

First, let's address 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 against the objections of countries, mostly underdeveloped or from the Communist bloc, who feared that free emigration would hurt them through the loss of people whom they had devoted their resources to educate and train and who could contribute to their development. However, the objectors succumbed to the pressure

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.

of the more powerful Western nations.¹⁰⁵

Individualistic considerations support the right to freely emigrate, which is tantamount to empowering people who don't want to associate anymore 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 mandatory public service and for professionals like doctors only after practicing for a time.¹⁰⁷

Such limitations represent a balancing of interests as 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

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 (Yale University Press 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.

¹⁰⁷ See generally U.S. Department of State, 1999 Country Reports on Human Rights Practices (available on the Dept. of State's website). Cuba, for example, requires doctors and other professionals to practice 3 to 5 years before being eligible for an exit permit.

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 then sever the relationship without society's consent.¹⁰⁸ And societies are certainly conceivable where people are seen, a la Aristotle perhaps, as being irrevocably tied to their societies by virtue of being born into them -- much like family life is often viewed.

Although current international practice as regards emigration is not so collectively tilted, that 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 nations' sovereignty over their territory entitles them to prevent secession without their consent.¹⁰⁹

¹⁰⁸ LOCKE, *supra* note 14, and accompanying text.

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

There is, though, a free association claim here, analogous to that of an emigrant, 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 of the right to a relatively autonomous sphere within which to pursue their destinies.

Again, the explanation for this divergence seems one of context and scope, there being factors that heighten the significance of collective considerations when a portion of a country secedes. When that happens not only are people lost but land and other resources as well, so that the harmful impact on the rest of society intensifies. And while the cumulative effect of individual emigration can be substantial over time, secession may cause an immediate and tremendous impact that may be more difficult for a society to cope with.¹¹⁰ And unlike

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 (Clarendon Press 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 and 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.

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

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, areas that want to secede from a society have an interest that must be considered. This makes the reasons prompting secession relevant. Thus a portion of a society wanting to secede because it is being oppressed by the rest of society would seem to have a stronger claim than one that wants to secede so as to gain control over the bulk of a society's resources or engage in some practice like slavery that contravenes society's fundamental values.¹¹¹ And if society is not willing to let an area go, then it may have the obligation to accommodate the desire for separation by providing opportunities for relative autonomy, like decentralizing society into states or provinces with their own

following partition); Susanne Schmeidl, *Conflict and Forced Migration: A Quantitative Review in GLOBAL MIGRANTS, GLOBAL REFUGEES* 62 (Aristide R. Zolberg & Peter M. Benda, eds., Berghahn Books 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).

governments and powers.¹¹²

Now let's 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 as regards immigration is the 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. Rather, 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

This application of the principle of national sovereignty is akin within a society to a party's asserting the absolute right to refuse associations with others. But in that context we found reason to question the absoluteness of such a right, as when it would contribute to others' oppression or harm the

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

society as a whole. Consequently, so applied the principle of national sovereignty may overly protect nations' self-determination against legitimate competing considerations advanced by others wanting in. 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, as when it is not capable of providing for the newcomers or when the impact would so transform society that the opportunity for self-determination would be lost. So, again, a balancing of interests is required, taking into account context and scope.

Let's consider several scenarios, starting 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 members if done to them. In this society, for example, while the government may not discriminate against its members on the basis of race, it may indiscriminately do so and did for much of the twentieth century when dealing with outsiders wanting to immigrate.¹¹⁵ Moreover, members of this society have the right to travel and settle where they please, such that states and localities may

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 works cited at *id.*, note 58.

not refuse to accept them as members of their communities.¹¹⁶ Yet as regards immigration a nation's right to collective self-determination overrides almost all competing considerations. 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.¹¹⁷

This leaves very little play to individualistic values in other 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 higher standard of living. And suppose people in other parts of the world are suffering due to burgeoning overpopulation and other factors to which the well-off societies may have contributed, like colonial exploitation and environmental degradation.¹¹⁸ Under these circumstances,

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

¹¹⁷ United Nations Convention Relating to the Status of Refugees, Articles 31-33, adopted 28 July 1951 and entered into force 22 April 1954.

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. United Nations Population Division, *World Population Prospects: The 2000 Revision 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 multiplicity of variables that enter into the equation. Does population growth in underdeveloped areas cause poverty, such that what is needed are efforts to control population growth so as to alleviate poverty? Or does

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

Similar considerations compete in the context of societal mergers. To illustrate, let's consider 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

poverty cause population growth, such that what is needed is development to reduce poverty which will in turn lead to reduced population growth? The answer seems to be sometimes one, sometimes the other, sometimes both, and sometimes neither because other causal factors like environmental degradation are at play? See, e.g., Alain Marcoux, *Population and Environmental Change: from Linkages to Policy Issues* (Sustainable Development Dept., Food and Agricultural Org. of the United Nations Jan. 1999) at <http://www.fao.org/sd/WPdirect/WPre0089.htm>; Geoffrey McNicoll, *Population and Poverty: The Policy Issues* (Sustainable Development Dept., Food and Agricultural Org. of the United Nations Jan. 1999) at <http://www.fao.org/sd/WPdirect/WPre0088.htm>. Some argue along individualistic lines that the poorer countries should be responsible for solving their own developmental and poverty problems or suffer the consequences. 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 as recompense the richer nations should somehow assist through helping to relieve the population strain or with economic development and family planning becomes strong even in individualistic terms. See, e.g., ANDRE GUNDER FRANK, *CAPITALISM AND UNDERDEVELOPMENT IN LATIN AMERICA* (Monthly Review Press 1967); Edward Goldsmith, *Development as Colonialism*, in *THE CASE AGAINST THE GLOBAL ECONOMY* 253 (Jerry Mander and Edward Goldsmith, eds., Sierra Club Books 1996); WALTER RODNEY, *HOW EUROPE UNDERDEVELOPED AFRICA* (Howard University Press 1981). 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 causes of the disparities. See, e.g., MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* 31-51 (Basic Books 1983)(discussing the "duty to aid").

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 what is now India and Pakistan was unified under British colonialism, that relationship was severed and the two are now independent nations;¹¹⁹ whereas as a territory of the United States Puerto Rico is arguably already a member of the society,¹²⁰ and is seeking the full-fledged

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 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, 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 contain and 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 123.

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 (Yale University Press 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'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 103 (Edwin Melendez & Edgardo Meléndez, eds.,

statehood that other members have.¹²¹ To analogize to interpersonal relationships, one might say that India and Pakistan were at one time married, divorced, and are now independent parties deciding whether to renew the marriage; while the United States and Puerto Rico are now de facto married as at common law, and that Puerto Rico wants that status legitimized so that it can receive all the benefits of a formal marriage.

Secondly, the history of the relations between Pakistan and India differs from that between the United States and Puerto Rico, and the impact of a merger on Pakistan and the United States differs. India and Pakistan split in large part because of the internal conflict between Hindus and Muslims, and there is on-going animosity between the two.¹²² So if consolidated

South End Press 1993); Edwin Meléndez, *Politics and Economic Reforms in Post-War Puerto Rico*, *id.* at 79.

¹²¹ The issue of Puerto Rico's status has been debated since the beginning. See 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, well below 5%. In 1967 and 1993, commonwealth status outpolled statehood, although by a much larger margin in 1967 (60% to 39%) than in 1993 (48.6% to 46.3%). See <http://electionspuertorico.org/1998/summary.html>; <http://electionspuertorico.org/archivo/1967.html>. Interpreting the results of the 1998 plebiscite is difficult, due to the fact that 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 as yet undefined economic and defense ties to the U.S. and with U.S. citizenship only for those already having it and their descendants -- each of which received less than 1% support and with none of the above which received 50% of the vote. See 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

with India into a unified nation where they would be a small and disfavored minority, and even if India should commit to a relatively autonomous provincial status for Pakistan, Pakistani Muslims have a legitimate concern that they might be oppressed and unable to freely pursue group self-determination. Puerto Rico, on the other hand, is arguably already part of this society, has many of the responsibilities (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 been left alone. Under these circumstances Pakistan would seem on balance to have a stronger claim than the United States to avoid an unwanted relationship with the other party. And if the United States were unwilling to admit Puerto Rico as a state, at a minimum it would seem obligated, after arguably forcing it into an unwanted relationship in the first place, to allow Puerto Rico to become an independent nation if it so chooses.

F. Conclusion

While the casual remark that people should be free to

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* (Columbia University Press 2001).

¹²³ MONGE, *supra* note 120, at 162-64; InfoPlease, Puerto Rico at <http://info.please.com/ipa/A0113949.html>.

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 involved or to society as a whole. And at times it 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. And at times 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 associations is overly simplistic and to illustrate the point with enough examples to show that associational conflicts are ubiquitous in social life and relate to issues -- like marriage, race relations, membership in society, and others discussed herein -- 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.