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Implicit and Explicit Rights of Association

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IMPLICIT AND EXPLICIT RIGHTS OF ASSOCIATION

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Association with others is part of the liberty of a free people. Social, religious, civic, political, and economic associations are essential elements of our society. But where does the right of "association" come from? The First Amendment contains three collective rights: the freedom of the press (the exercise by groups of the freedom of written speech); the freedom of assembly (the exercise by groups of the right to petition for redress of grievances);[1] and the free exercise of religion (which frequently is defined by reference to the beliefs of a body of people). The entitlements to write and to petition in groups implies a right to associate for the purpose of speaking and conducting other expressive activity. This is the source of most rights of association.

Any more general right of association must come through the Due Process Clauses of the Fifth and Fourteenth Amendments. Association is liberty; liberty may not be reduced except by due process; no law that trammels association "too much" is tolerable. This is substantive due process, that ubiquitous oxymoron. When the Supreme Court identifies a source for rights of association—once it attributed the genisis of the right to Tocqueville![2]—it names the "liberty" of the Due Process Clauses. But these Clauses mention liberty without saying what it is, what its sources may be, who defines it, or how much it "weighs," all important problems once a court starts "balancing." Liberty includes association to run a farm or corporation and to drink whiskey in a club as much as it includes association to engage in sexual activities of one's choice. The Court does not see any problem in the government's regulating farmers' associations by preventing them from selling milk at the price they choose, or drinkers' associations, or the methods by which corporate associations choose their boards of directors. Curiously, however, certain rights, such as the right to learn

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1. *See* Presser v. Illinois, 116 U.S. 252, 264-68 (1886).
2. NAACP v. Claiborne Hardware Co., 458 U.S. 866, 933 n.80 (1982).

German[3] and to engage in sexual activities with birth control,[4] have been selected as "fundamental" rights, liberties that operate as trumps. Most of the constitutional law of association fits the fundamental rights-substantive due process pattern.[5]

The designation of liberties as "fundamental," and the assignment of "weights" for a grand balancing, has no constitutional warrant. Dean Ely has made the point with great panache, so I need not drone on.[6] The Supreme Court demonstrates every year why the reconciliation of the values of our society is a legislative rather than a judicial task. One need only contrast the abortion and sodomy cases of the 1985 Term.[7] The abortion cases took an exceptionally broad view of personal liberty, concluding that a woman's interest is so powerful that it trumps even a state's effort to provide her with truthful information; that might influence the choice, which the Court thought forbidden. The sodomy case took a confined view, concluding that the public's interest in private morals allowed it to invade a bedroom and place specified sexual activities off limits, even though they harmed no one other than the adult participants, if they harmed anyone.

In one sense this shows only the incoherence inevitable in the decisions of a multi-member court in which the majority rules.[8] Eight of the justices thought the cases presented the same problem and would have decided for (or against) the claim in each case. Justice Powell alone saw the cases as different. But he (and so the Court) got the difference backwards. Sodomy has few if any direct effects on third parties, even nosy ones. The basis for regulation is moral preferences about how strangers should behave. This is a sufficient justification for much legislation; laws may be valid even though they do not have instrumental objectives. But moral preferences are not as

3. *See* Meyer v. Nebraska, 262 U.S. 390 (1923).

4. *See* Carey v. Population Services Int'l, 431 U.S. 678 (1977).

5. *See* Roberts v. United States Jaycees, 468 U.S. 609, 618-22 (1984) (celebrating a "right of intimate association" as a branch of substantive due process).

6. *See* Ely, *The Supreme Court, 1977 Term—Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5 (1978). The elegance of Dean Ely's work has not stopped me, however, from taking a thwack at substantive due process and its contamination of the procedural variety in Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85. *See also* Gumz v. Morrissette, 772 F.2d 1395, 1405-09 (7th Cir. 1985) (concurring opinion), *cert. denied*, 106 S. Ct. 1644 (1986).

7. *Compare* Thornburgh v. American College of Obstetricians, 106 S. Ct. 2169 (1986) *with* Bowers v. Hardwick, 106 S. Ct. 2841 (1986).

8. *See* Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982).

powerful a basis as is a demonstration that conduct injures unconsenting parties. An abortion may have large effects on third parties—on the father, on siblings, on grandparents, most of all on the potential child. One need not think that the fetus is a "person," a moral rather than a legal question, to know that effects on third parties are the strongest basis for regulating "liberty" or associational interests. Fathers and siblings count. More, states that prevent cruelty to kittens even though some people may like to torture animals have no less interest in dealing with animate objects that have the potential to lead intelligent lives. The Court's conclusion that political society may not even try to persuade those whose acts injure third parties strikes me, no less than it did Chief Justice Burger, as "astonishing."[9] The FDA requires pharmaceutical houses to attach stern warnings to drugs, and judges impose million dollar awards against physicians who did not adequately warn patients about the dangers of doing beneficial things. Warnings are said to help people make informed decisions; they are made compulsory (despite the autonomy interests in not being forced to give or hear them) because of concern about the quality of the choice to be made and because of the belief that there is a right to decide against one's self-interest. These mandatory warnings, like those required by the securities laws and the statute at issue in the abortion case, are one-sided: They cover the dangers of a drug or stock or procedure while leaving the benefits unmentioned. (Perhaps legislatures, agencies, and judges count on the physicians to provide information about the benefits of their services.) While warnings about trivial risks have become mandatory, warnings that might influence an abortion have become interference with physicians' autonomy.[10] This sounds like nothing so much as the old claim that wage and hour laws interfered with the autonomy of bakers to work as long as they wanted for a pittance. It is hard to take seriously, especially from a Court that held that the state may influence abortions by refusing to subsidize them.[11]

9. *Thornburgh*, 106 S. Ct. at 2190 (Burger, C.J., dissenting).

10. *Id.* at 2178-80.

11. Harris v. McRae, 448 U.S. 297 (1980). Again, it's hard to criticize "the Court." The lineup was the same as in the sodomy case (with Justice O'Connor replacing Justice Stewart). Only Justice Powell sees differences among these cases. *See also* Block v. Meese, 793 F.2d 1303, 1312-15 (D.C. Cir. 1986) (Scalia, J.) (discussing the ways in which the government may use speech to influence private decisions).

Now all this may seem unfair. I am criticizing substantive due process, with or without its "fundamental rights" embellishment, which is an old whipping boy. Maybe the implied rights of association have a firmer base in the First Amendment. The right to speak and petition would be worth less if it did not include a right to associate with friends and business (or sexual) partners. Business talk and pillow talk are still talk. The corporation makes economic activity more efficient; so to association makes political activity and expression more effective. This is the sort of argument Justice Harlan used in *NAACP v. Alabama*,[12] the first case to recognize a constitutional right of association implied from one of the three rights listed in the First Amendment (or from the definition of a substantive right that necessarily requires cooperative activity). Alabama wanted to bust up the NAACP, which was speaking and petitioning all too effectively for the segregationists' tastes. The Court replied that association is protected as an implicit constitutional right to the extent it makes the explicit constitutional right more valuable, and that the Constitution forbids steps, such as finding out who belongs to an unpopular group, that reduce the effectiveness of the association.

Everyone applauds that decision. The government may not snatch away express constitutional rights by regulating to death the ancillary activity or preparatory steps. I am nervous when a case is so easy. The rights we all come to like are also apt to be protected by legislators. Not all the time; nothing works all the time (the judicial process misfires too); but often enough. If "everyone" endorses a particular aspect of liberty, it is easy for the Court to say in the aberrant case (the one when the legislature has not acted) that the judges are the true guardians of the "spirit" of the people and may produce what an "enlightened" legislature would have done. It is easy to slide from this to a conclusion that what the judge values is what "the people" value; then the judge knows the "aberrant case" by the inaction of the legislature when the judge's values are endangered. The process uses extreme hypotheticals, followed by a statement that the case at hand is the camel's nose.[13] We would be re-

12. 357 U.S. 449 (1958). *See also* Fellman, *Constitutional Rights of Association*, 1961 SUP. CT. REV. 74.

13. *See* Gewirtz & Johnson, *The Jurisprudence of Hypotheticals*, 32 J. LEGAL EDUC. 120 (1982).

pulsed by legislation restricting who we may befriend, invite to dinner, or marry; we would be terrified by legislation limiting political associations that are necessary to keep representative government healthy; therefore judges must ensure that legislators cannot get away with passing obnoxious laws restricting freedom of association.

To put this slightly differently, easy cases, popular and obviously right cases, may produce dangerous doctrines because they establish the *principle* that the Constitution allows the judges to do whatever the legislatures ought to have done. The court that sets off on this path may discover, as legislators through the ages have discovered, that it can assemble a powerful constituency out of minority groups. A political body that can satisfy an intense minority here and another intense minority there will be protected by its constituency even if time and again the body injures the majority's interests. This is the insight behind the new economics of regulation,[14] and what is true for elective political bodies is equally true for appointive political bodies.

The easy case allows judges to establish doctrines that collapse the judicial and legislative processes. Doctrines that look straight through the text, structure, and history of the Constitution to the "values" underlying that text—and that then use the "values" as the direct support for decisions—enlarge the power of the Court so greatly that it becomes a political body. These doctrines assume that the political and moral philosophy underlying the Constitution *is* the Constitution. The text, from this perspective, is but an imperfect expression of the governing political and moral premises. Now values in political and moral philosophy are indeterminate; what does each "weigh," and when must it yield to some other interest?[15] These questions, which have produced ceaseless contest among philosophers for as long as there have been philosophers, are also among the gravest questions confronting conscientious legislators. In *NAACP v. Alabama* the Court meant: "We protect association to the extent it protects constitutional values." The only

14. *See* Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGT. SCI. 3 (1971); Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211 (1976); Becker, *Public Policies, Pressure Groups, and Dead Weight Costs*, 28 J. PUB. ECON. 329 (1985).

15. For more in the same vein, see Easterbrook, *Legal Interpretation and the Power of the Judiciary*, 7 HARV. J.L. & PUB. POL'Y 87 (1984); Easterbrook, *Method, Result, and Authority*, 98 HARV. L. REV. 622 (1985).

way to carry out the program implied by this decision is to decide whether you like of the purposes of the association.

It is therefore no surprise that the NAACP wins, that people affiliating to influence political candidates win only in part,[16] that people whose associations exclude blacks and women lose,[17] and that until a change in public opinion led to strong legislation the Court cheerfully concluded that association by workers in unions was a conspiracy against the public weal.[18] In the case holding that the Jaycees' freedom of association did not allow them to associate only with men,[19] every justice assumed that there is an implied right to associate to make business friends and generate camaraderie and then essayed whether the Jaycees' exclusion of women helped its members realize their objective. The Court had to assess the importance of the Jaycees' objectives, to themselves and to outsiders, and the importance of the competing objectives and interests that led to the legislation requiring civic organizations to admit women. The result was a cross between the program Jeremy Bentham would set for a legislature and the program a consulting firm would set for the Jaycees themselves. The Court essentially concluded that a consultant would have told the Jaycees that the exclusion of women was not in their interest; therefore the government was free to interfere with their right to choose their associates. One passage even suggests that any aspect of an association's creed that is contary to the wishes of society may be treated like violence and suppressed without regard to its effects on associational freedoms.[20] If this is the Court's view, then association has constitutional protection whenever the legislature chooses to leave it alone—which is to say, it has

16. Buckley v. Valeo, 424 U.S. 1 (1976).

17. *See* Roberts v. United States Jaycees, 468 U.S. 609 (1984) (state may require a group to admit women); Bob Jones Univ. v. United States, 461 U.S. 574, 602-05 (1983) (government may penalize groups that exclude blacks by denying such groups tax exemptions, although other associations receive exemptions); Runyon v. McCrary, 427 U.S. 160, 175-76 (1976) (government may compel private schools to admit blacks).

18. *E.g.*, Bedford Cut Stone Co. v. Journeymen Stone Cutters Assoc., 274 U.S. 37 (1927); Lawlor v. Lowe, 235 U.S. 522 (1914). Associated Press v. NLRB, 301 U.S. 103 (1937), one of a series of cases that upheld the Wagner Act and marked the turnabout, is notable not only for its result but also for the dissent of Justice Sutherland, *id.* at 133-41, invoking freedom of speech and association as obstacles to the regulation of the employment relation.

19. *Roberts*, 468 U.S. 609 (1984).

20. *Id.* at 628-29.

none whenever the Court, speaking for "society," approves of the legislature's objectives.

The malleability of claims based on "association" is evident in cases dealing with the organization of political parties. On the one hand parties have been allowed, because of their associational interests, to conduct their internal affairs largely as they please, even if states want candidates nominated in some different way.[21] On the other hand, the Jaybirds, a private association formed to hold a pre-primary—a system that operated like a holding company and allowed a minority of the party to choose the party's candidate—were told that they must allow black voters to participate.[22] The Jaybirds wanted to make their speech and association more effective; their system did that; the Court used the effectiveness of their association as the hook to compel them to associate with people they wished to exclude. The changes in the effectiveness of the group and the ideas it would peddle in society were viewed as good reasons to abridge the group's implicit right of association. The upshot is that "normal" political activity—that is, activity that does not seem to carry out a strong or unpopular agenda—is protected as association, while forms of association that are unusual or have an unwelcome agenda are not protected at all. This comes closer to the outcome of a legislative process than to general rules protecting association.[23]

Perhaps this skepticism makes me the Grinch Who Stole Christmas. Association is popular and important. Private associations are more than refuges in which people may operate autonomously. They are centers of power, counterweights to Leviathan. Totalitarian states tear down or dominate private associations. But our Constitution not only does not "enact Mr. Herbert Spencer's Social Statics"[24] but also does not choose between capitalism and communism. States may decide that power should be held by collectives or the government rather than by private associations, be they called corporations or

21. *E.g.*, Democratic Party v. Wisconsin, 450 U.S. 107 (1981); Cousins v. Wigoda, 419 U.S. 477 (1975); San Francisco County Democratic Central Comm. v. March Fong Eu, 792 F.2d 802, 812-16 (9th Cir. 1986).

22. Terry v. Adams, 345 U.S. 461 (1953).

23. The same can be said for the "right of privacy," a close relative of the right of association. *See* Beaney, *The Constitutional Right to Privacy in the Supreme Court*, 1962 SUP. CT. REV. 212; Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 SUP. CT. REV. 173.

24. Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

clubs. For most people economic rights—where to work, at what price to buy milk or rent apartments—are more important than whether the Jaycees admit women or whether a political party must seat the delegates selected in a primary rather than a caucus. Economic rights are entitlements over resources, and through things one's surroundings and comfort; they are personal liberties to the same extent as other forms of freedom. People who cannot control inanimate objects, either at all or against competing claims by others (even if all affected people agree) are not in control of their destinies. Liberty in economic matters is an important ingredient of political liberties.[25] Judges no longer quarrel with the right of the legislature to decide economic entitlements. Why are other associational rights different? Perhaps it is that free association is especially important to the intellectual and economic groups from which judges are drawn. Intellectuals feel free to regulate the economic lives of others but resist the regulation of the most important elements of their own lives. The same people who would fight to the death to keep regulation off the back of Stanford University (unless Stanford holds stocks of corporations that do business in South Africa, or perhaps does a little defense research) would not hesitate to deny a liquor license to any Moose Lodge that excludes women.

There is no principled way to distinguish regulation of association for economic reasons from regulation of other forms of association. We have never had a principled theory of the appropriate scope of regulation of non-economic association. And we can't get such a theory from the text of the Constitution, which does not deal with the subject, or from its history. The Framers wanted to limit the influence of private associations (factions) through the separation of powers and indirect

25. Many of the Framers thought that preserving property and economic rights was *the* purpose of civil government. *E.g.*, FEDERALIST No. 10 (J. Madison); 1 RECORDS OF THE FEDERAL CONVENTION 533 (Farrand ed. 1911) (statement of Gouvernuer Morris); McConnell, Contract Rights, Property Rights, Factionalism and Faction (draft Sept. 1986) (collecting cites). The Court sometimes sees that personal and property rights are the same. *E.g.*, Lynch v. Household Finance Corp., 405 U.S. 538 (1972). One need not believe every argument in Milton Friedman's *Capitalism and Freedom* (1968) or Friederich Hayek's *The Constitution of Liberty* (1960) to conclude that political liberty depends on liberty in the associations and interactions we call "economic." *See also* R. NOZICK, ANARCHY, STATE, AND UTOPIA (1974); Director, *The Parity of the Economic Market Place*, 7 J.L. & ECON. 1 (1964); Coase, *Advertising and Free Speech*, 6 J. LEGAL STUD. 1 (1977).

elections.[26] None of the history in England or the colonies hints at a general protection for private associations. None of the colonial charters or constitutions addressed the subject. The Virginia Declaration of Rights does not preserve private associations. No state asked the First Congress to put anything about association in the Bill of Rights—although there was a proposal on almost everthing else one could imagine. Even the intellectual foundation of associational freedoms is weak. John Stewart Mill's *On Liberty*[27] was about the tyranny of private opinion, about the dangers arising from private associations more than the dangers of government. The climate in the Eighteenth and Nineteenth Centuries exalted individual rather than associational freedom.

Yet for all this *NAACP v. Alabama* cannot be escaped. To say that individual people have rights must mean that there are limits on the state's ability to interfere with steps, including collective steps, that lay the groundwork for the exercise of those rights. The government could not ban the publication of newspapers by corporations or the association of people to influence legislation. The problem, as I have emphasized, is not the first step but the successive steps—extensions in which the first step rather than the Constitution is the premise. We get a form of constitutional rumor chain, in which the conclusions bear no resemblance to the original rules. Implicit rights of association should be based directly on the three explicit rights in the First Amendment, not on undefined "liberties" mentioned in the Fifth and Fourteenth. Otherwise we have simply told judges to apply Jeremy Bentham's felicific calculus and to decide as wise legislators would. When the liberties and their values are stated at a sufficiently high level of generality, this approach transfers all of the hard decisions to judges. Much as the Federalist Society should like free association, much as all free people like association, we must accept as the price of representative

26. *See* THE FEDERALIST Nos. 10 & 51 (J. Madison). *See also* Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985); Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986). This does not mean that the courts are to undercut the work of legislatures dominated by faction; Professors Sunstein and Macey, who take this view, confuse a hoped-for result of the constitutional structure with a warrant for judicial action to thwart legislation that survives the constitutional obstacle course. But I agree with their position that the plan of the Constitution was to reduce rather than augment the power of private associations over governmental choices.

27. J. MILL, ON LIBERTY (London 1859).

government the risk that our representatives may not always value freedom as highly as they should.

The line I have been trying to draw is the one between the inference of rights from the constitutional structure and the creation of rights on the authority of the word "liberty." The Constitution has form as well as words, and that form may be a source of entitlements. That is why the First Amendment must protect the right to listen to a speech even though the language refers only to the speaker's rights; any reference to speaker's rights supposes that listeners, if willing, may get the benefit of the speaker's views. A judge's task is to find those fundamental suppositions in the structure of the document that reflect the assumptions of the time it was written. It is the method of *Marbury v. Madison*,[28] *Gibbons v. Ogden*,[29] and much else. This method vindicates the result in *NAACP v. Alabama* and many of the other cases involving claims of associational freedoms.

The problem for a judge asked to annul a legislative decision is one of justification, of the kind of reason that counts as a judicial reason. A judge whose answer rests on the text, structure, and history of the Constitution can give a good justification for views that differ from those of the legislature—text, structure, and history are external to the judge's preferences and bind legislators independently of the reasons the judges give. Decisions based on "liberty" cannot meet this criterion, for they require the judge to select among values and to resolve tension when values clash—more an exercise in moral philosophy than in interpretation. It is a subject for political choice. As the method of establishing an entitlement is removed from the text of the Constitution—as it comes to rest on undefined liberties and values rather than on rules laid down—the judge's claim to give the authoritative answer fades. A judge must invoke a decision external to his preferences; it is not enough to be wise. It is doubt about the authority of judges to have the last word, not doubt about the value of associational freedom, that leads me to ask whether there is much constitutional support for the "freedom of association" that is so important to us all.

28. 5 U.S. (1 Cranch) 137 (1803).
29. 22 U.S. (9 Wheat.) 1 (1824).