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# One Small Step for Courts, One Giant Leap for Group Rights: Accommodating the Associational Role of Intimate Government Entities

Kevin J. Worthen

# ONE SMALL STEP FOR COURTS, ONE GIANT LEAP FOR GROUP RIGHTS: ACCOMMODATING THE ASSOCIATIONAL ROLE OF "INTIMATE" GOVERNMENT ENTITIES

KEVIN J WORTHEN*

*African-Americans and Native Americans are detached from mainstream American society. As individuals, they suffer from this detachment; no less damaging is the suffering of society caused by the loss of individuals from a democracy that depends on the "civic virtue" and participation of its members.*

*In this Article, Professor Kevin Worthen argues that African-American and Native American youth would benefit greatly from access to "intimate associations": groups that instill a sense of belonging and societal values. Certain governmental entities—in the case of African-Americans, the inner-city public schools, and, in the case of Native Americans, the tribe—could fill this associational role if allowed to by the courts. Professor Worthen believes that, with only a slight rethinking of existing doctrines, the constitutional protection already afforded private associations logically can extend to such governmental intimate associations. This "small step" by the judiciary would allow public schools and tribes to form associations that may exclude some, but will fill the associational void for others and benefit both individuals and society by helping prepare the "Native Sons" to live productive lives.*

## I. INTRODUCTION

The dreary statistics are all too familiar. Over 50% of the male prisoners in America's prisons are African-Americans even though African-American men constitute only 12% of the country's male population.[1] One in four African-American males between the ages of fifteen

* Professor of Law, J. Reuben Clark Law School, Brigham Young University. B.A. 1979, J.D. 1982, Brigham Young University. This Article would not have been possible without the research, analysis, critical evaluation, and enthusiastic promptings of Ken Kuykendall and Carl Hernandez, nor without the able research of Joe Zeidner and Roy Montclair. The author also expresses appreciation to Bill Bryner and Steve Baldridge for reviewing earlier drafts of this Article.

1. Robert Staples, *Black Male Genocide: A Final Solution to the Race Problem in*

and twenty-four is either in prison, on probation, or on parole.[2] Homicide is the leading cause of death for African-American male teenagers and young adults.[3] African-American males between the ages of fifteen and twenty-four are more than three times as likely to die from homicide or suicide than their white counterparts.[4] Over 35% of all African-American males are drug and alcohol abusers.[5] For African-American men in Harlem, life expectancy is shorter than that for men in Bangladesh.[6] In short, as one sociologist observed, "[y]oung black males are continuing to kill, maim, or narcotize themselves faster than they could be annihilated through wars or natural disasters."[7]

Clearly, America is in danger of losing what some have called its "Native Sons."[8] Furthermore, African-American males are not the only contemporary group whose agonizing statistics reveal both American society's past failures and the group members' present state of woe. A similar picture is painted by demographic data concerning America's other Native Children—Native American youth. Their statistical profile, while not as familiar to most Americans, is equally dreary. The suicide rate among Native American youth between the ages of fifteen and

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*America*, *in* BLACK MALE ADOLESCENTS: PARENTING AND EDUCATION IN COMMUNITY CONTEXT 39, 41 (Benjamin P. Bowser ed., 1991) (citing ROBERT STAPLES, BLACK MASCULINITY: THE BLACK MALE'S ROLE IN AMERICAN SOCIETY (1982)).

2. Daniel Goleman, *Black Scientists Study the "Pose" of the Inner City*, N.Y. TIMES, April 21, 1992, at C1.

3. Jewelle T. Gibbs, *Young Black Males in America: Endangered, Embittered, and Embattled*, *in* YOUNG, BLACK, AND MALE IN AMERICA: AN ENDANGERED SPECIES 1, 15 (Jewelle T. Gibbs et al. eds., 1988) [hereinafter YOUNG, BLACK, AND MALE IN AMERICA].

4. The death rate from homicide and suicide among African-American males in that age group is 75.2 per 100,000; the homicide and suicide death rate among whites between the ages of 15 and 24 is 22.3 per 100,000. U.S. DEP'T OF HEALTH AND HUMAN SERVS., HEALTH UNITED STATES 1991 AND PREVENTION PROFILE 155 (1991); *see also* Goleman, *supra* note 2, at C1 (noting that "48 percent of black males between 15 and 19 who died were shot, while the figure for white males was just 18 percent").

5. Staples, *supra* note 1, at 41.

6. Goleman, *supra* note 2, at C1.

7. Jewelle T. Gibbs, *The New Morbidity: Homicide, Suicide, Accidents, and Life-Threatening Behaviors*, *in* YOUNG, BLACK, AND MALE IN AMERICA, *supra* note 3, at 258, 281-82. This statement is in some ways literally true. In 1977 alone, more young African-American males (5,734) died from homicide than were killed from 1963 to 1972 in the Vietnam War (5,640). *Id.*

8. The term *Native Son* was first used by Richard Wright as the title of a novel in which the main character represented many disaffected African-American males of the 1930s and 1940s. RICHARD WRIGHT, NATIVE SON xxxi (1940). Wright explained his selection of the title by observing that persons like the main character were "an American product, a native son of this land." *Id.* Essayist James Baldwin used the same term as the title of his 1955 collection of fiery essays about life among African-American males of that time period. JAMES BALDWIN, NOTES OF A NATIVE SON (1955).

nineteen is more than twice that of the rest of American youth.[9] Among Native Americans between the ages of twenty-five and forty-four, death from suicide, homicide, or liver disease (usually the result of over-consumption of alcohol) is more than twice as likely as for non-Native Americans.[10] Native Americans are nearly four times as likely to die between the ages of fifteen and twenty-four as are their contemporaries of other races.[11]

Most young African-American males and Native Americans of both genders share little in common in their day-to-day lives, yet they obviously share the dubious distinction of being part of America's most disadvantaged. Members of these two groups are not being mainstreamed into American society. The search for remedies for the problems suffered by these two seemingly disparate groups has been as unsuccessful as it has been unrelenting. Billions of dollars have been spent in the effort, as wave after wave of federal and state programs have attempted to bring order to this chaos, without effect. Private efforts, although not as well-funded, have been just as innovative and, unfortunately, just as unavailing.

This Article suggests that some of the problems faced by these two groups, as well as similar problems faced by others in American society, can be resolved by focusing on the potential role of a hybrid public-private entity—the intimate government association.[12] Courts traditionally

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9. OFFICE OF TECHNOLOGY ASSESSMENT, INDIAN ADOLESCENT MENTAL HEALTH 16 (1990). The suicide rate for Native American youth in this age group for 1986 was 26.3 per 100,000. Among youth of all other races in the United States the rate was 10.0 per 100,000. *Id.* Suicide rates among 10 to 14 year-old Native Americans are approximately four times higher than for Americans of other races of that age. *Id.*

The suicide rate among 15 to 24 year-old Native Americans is 24.0 per 100,000, as compared to 13.1 per 100,000 among the same age groups for other Americans. U.S. DEP'T OF HEALTH AND HUMAN SERVICES, TRENDS IN INDIAN HEALTH 1990, at 28 [hereinafter TRENDS IN INDIAN HEALTH 1990]. Among other non-white races, the suicide rate for 15 to 24 year-olds is only 7.7 per 100,000, *id.* at 42 (less than one-third of the rate among Native Americans)—a difference not quite made up for in the disparate homicide rate among the two groups, *id.* at 44 (the homicide rate among Native Americans ages 15 to 24 equals 20.1 per 100,000; among other non-white groups of the same age it is 40.8 per 100,000). Apparently, Native American youths kill themselves; African-American males kill each other.

10. The death rate for Native Americans between the ages of 25 and 44 from liver disease is 28.7 per 100,000, from suicide 25.0 per 100,000, and from homicide 25.2 per 100,000 (a total of 78.9 per 100,000). Among the same age groups in all other races, the rates are 5.7 per 100,000 from liver disease, 15.5 per 100,000 from suicide, and 14.1 per 100,000 from homicide (a total of 35.3 per 100,000). TRENDS IN INDIAN HEALTH 1990, *supra* note 9, at 29.

11. TRENDS IN INDIAN HEALTH 1990, *supra* note 9, at 37. Of the deaths among Native Americans, 7.4% occur among youths between the ages of 15 and 24. *Id.* Deaths among 15 to 24 year-olds in the rest of the American population account for only 1.9% of total deaths. *Id.*

12. The term "intimate government association" refers to those government entities which are capable of performing the role traditionally performed by intimate private associa-

have given wide latitude and, more recently, increased constitutional protection from outside interference, to choices made by members of private intimate associations.[13] At the same time, whenever any government has engaged in the same kinds of activities, the weight of the constitutional scales has tipped dramatically in the opposite direction, in response to outraged cries of invasion of individual rights.[14] This differential treatment for private and government associations is not without justification. An overly formalistic approach to the problem, however, has led courts to overlook the possibility that under *some* circumstances government associations of *some* kinds can provide the benefits of private intimate associations without incurring all the risks inherent in allowing a large centralized government to become the sole purveyor of all moral and social values. Although classified as state actors under current law, these entities function at times like private associations.

Courts have adopted a functional test for identifying those private intimate associations entitled to constitutional protection.[15] They also have readily acknowledged in other contexts that some local government entities perform these functions.[16] Blind adherence to abstract formalisms concerning the distinction between private and public entities, however, has prevented courts from adding the two concepts together to provide local government entities with the breathing space they need to perform their associational roles. Unfortunately, while judges continue to fiddle to the tune of these anachronistic melodies, South Central Los Angeles burns.[17]

This Article will demonstrate that the elements for defining a legitimate associational role of intimate governments have already been recognized, both by social theorists and by the courts.[18] The Article then illustrates how formal legal recognition of the associational role of intimate governments can resolve some of the problems currently plaguing

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tions. *See infra* text accompanying notes 22-63. This Article focuses on two such governmental entities, local school districts, *see infra* section III, and Native American tribes, *see infra* section IV.

13. As used in this Article, private intimate associations include non-governmental groups of persons sharing highly personal relationships, such as families. *See, e.g.*, Roberts v. United States Jaycees, 468 U.S. 609, 618-19 (1984). The Supreme Court has generally focused on the family when discussing private intimate associations, *id.* at 619-20, but has indicated that the class is not "restricted to relationships among family members." Board of Directors of Rotary Int'l v. Rotary Club, 481 U.S. 537, 545 (1987).

14. Kathleen M. Sullivan, *Rainbow Republicanism*, 97 YALE L.J. 1713, 1715 (1988).

15. *See infra* text accompanying notes 65-67.

16. *See infra* text accompanying notes 86-93.

17. *See* David Ellis, *L.A. Lawless*, TIME, May 11, 1992, at 26 (describing rioting in South Central Los Angeles following acquittal of policemen charged with beating Rodney King).

18. *See infra* section II.

both inner-city minority males and isolated Native Americans.[19] Using previously recognized doctrines, courts can, with little effort, make a profound difference in the lives of many Americans by allowing them to experience the freedom and security currently enjoyed only by those with access to traditional intimate associations. This one small step by the courts can enable disadvantaged groups to take a giant leap forward.

## II. THE BENEFITS OF INTIMATE ASSOCIATIONS TO AMERICAN DEMOCRACY: A FUNCTIONAL ANALYSIS

> The right of association is almost as inalienable as the right of personal liberty. No legislator can attack it without impairing the very foundations of society.[20]

While current courts are quick to recognize the critical contribution of intimate associations to individual liberty,[21] they often overlook the *societal* benefits these associations provide in a democratic society. The societal benefits of intimate associations have been articulated for centuries by political theorists, and constitutional theory has recently recognized the concept in a very generalized form. A brief examination of this history of political and legal recognition of the societal benefits of intimate associations reveals that the tools are in place to construct a functional test for protecting intimate associations from undue outside interference. By considering intimate associations and governments in more functional and less formalistic terms, courts can begin to help more American citizens, including inner-city African-American males and reservation Native American youth, enjoy the benefits provided by intimate associations.

### *A. The Political and Social Theorists' View of the Contribution of Intimate Associations to Society*

Political theorists long have recognized the societal value of associations positioned between the individual and the State.[22] Aristotle, for

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19. *See infra* sections III, IV.

20. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 222 (Henry Reeve trans., 1961).

21. *See, e.g.*, Roberts v. United States Jaycees, 468 U.S. 609, 619 (1984) (discussing contribution of intimate associations to individual liberty); Trade Waste Management Ass'n v. Hughey, 780 F.2d 221, 236-37 (3d Cir. 1985) (stating that right of intimate association protects individual autonomy).

22. As one political theorist explained, the genealogy of this affinity for voluntary associations can be traced back to ancient Greece:

> Solon recognized and confirmed the Greek instinct for freedom of association, and Aristotle . . . incorporated this freedom in his political philosophy. St. Augustine, more sensitive even than Aristotle to the voluntary aspect of human association, de-

example, argued that society benefitted from these intermediate associations because they functioned as a protection against universal conformity.[23] Other philosophers from Augustine to Aquinas to Locke reiterated this theme.[24] De Tocqueville, of course, most clearly articulated the position that associations are essential to the success of American democracy: If those who live in a democracy "never acquired the habit of forming associations in ordinary life, civilization itself would be endangered."[25]

Modern political and social theorists have articulated more specifically how associations serve not only individual ends but those of society as well. Two main themes have emerged. First, theorists have connected associations with the perpetuation and transmission of a common value system—a value system essential to the preservation of democracy. Because democratic society is based on the concept of self-government, its citizens must be educated in certain ways. They must be taught to be concerned with more than self, to be restrained by some inner values from the unfettered pursuit of selfish interest.[26] In short, they must possess what the constitutional framers called public or civic virtue.[27]

The connection between civic virtue and the republican form of gov-

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fined a political organization as "a group of rational beings, associated on the basis of a common tie in respect of those things which they love."

John W. Chapman, *Voluntary Association and the Political Theory of Pluralism*, *in* VOLUNTARY ASSOCIATIONS 87, 89 (J. Roland Pennock & John W. Chapman eds., 1969).

23. CHARLES E. RICE, FREEDOM OF ASSOCIATION 3 (1962) (citing POLITICS VIII, at 1). Aristotle rejected Plato's notion that no organization should exist between the State and the individual, *id.* (citing POLITICS II, at 5), and advocated the right of citizens to join "partial limited associations." *Id.* (citing POLITICS VIII, at I).

24. *Id.* at 3-5, 9-13.

25. 2 DE TOCQUEVILLE, *supra* note 20, at 130.

26. As one political theorist noted, "The conviction that . . . action *controlled by inner authority*, leads to an harmonious social and political world forms an important condition of modern democracy." Chapman, *supra* note 22, at 93 (quoting ZEVEDEI BARBU, DEMOCRACY AND DICTATORSHIP: THEIR PSYCHOLOGY AND PATTERNS OF LIFE 73 (1956)) (emphasis added). George Washington framed the same sentiment this way: "It is substantially true that virtue or morality is a necessary spring of popular government." 2 GEORGE DE HUSZR ET AL., BASIC AMERICAN DOCUMENTS 108-09 (1953), *quoted in* RICHARD VETTERLI & GARY BRYNER, IN SEARCH OF THE REPUBLIC: PUBLIC VIRTUE AND THE ROOTS OF AMERICAN GOVERNMENT 70 (1987).

27. As historian Gordon S. Wood observed:

> In a monarchy each man's desire to do what was right in his own eyes could be restrained by fear or force. In a republic, however, each man must somehow be persuaded to submerge his personal wants into the greater good of the whole. This willingness of the individual to sacrifice his private interests for the good of the community—such patriotism or love of country—the eighteenth century termed "public virtue."

GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 68 (1969).

ernment created by the United States Constitution was well recognized by those involved in the document's adoption. Madison asserted in *The Federalist* that "Republican government presupposes the existence of th[o]se qualities [of human nature "which justify a certain portion of esteem and confidence"] in a higher degree than any other form."[28] Similarly, writing in 1775, Samuel Williams argued that while despots could maintain order by the use of fear, "a *free government* . . . cannot be supported without virtue."[29] Indeed, as Gordon Wood observed, "[t]hat the . . . very existence of a republic depended upon the people's virtue was 'a maxim' established by the 'universal consent' and the 'experience of all ages.' "[30]

Intimate associations often provide the setting for this critical education for civic virtue,[31] education not just of the mind, but of the soul and heart.[32] The social interaction experienced by members of intimate associations presents them with opportunities to learn social norms essential to civic virtue, such as concern for more than self and respect for group norms that may differ from individual predilection.[33] As a result, intimate associations often serve to integrate individuals from minority groups into larger society by cultivating civic virtue. They also offer a

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28. THE FEDERALIST No. 55, at 379 (James Madison) (Jacob E. Cooke ed., 1961).

29. SAMUEL WILLIAMS, A DISCOURSE ON THE LOVE OF OUR COUNTRY 13-14 (1775), *quoted in* VETTERLI & BRYNER, *supra* note 26, at 74.

30. WOOD, *supra* note 27, at 92; *see also* VETTERLI & BRYNER, *supra* note 26, at 73-75 (stating that virtue is a "necessity to popular Government").

31. One scholar traces the link between private associational life and civic virtue back to Aristotle. David W. Brown, *Civic Virtue in America*, 67 NAT'L F. 39, 39 (1987).

32. Even Rousseau, who opposed many kinds of voluntary associations, recognized their role in generating and maintaining the standards of behavior and the elements of civic virtue essential to the perpetuation of good government. Maure L. Goldschmidt, *Rousseau on Intermediate Associations*, *in* VOLUNTARY ASSOCIATIONS, *supra* note 22, at 119, 124-27. For example, he condemned proposals that he believed would weaken "circles" or clubs organized for amusement. Such circles contributed to "the tone of good sense and judgment" that existed in Geneva at the time by preserving republican morals among their members and " 'combin[ing] everything which can contribute to making friends, citizens, and soldiers out of the same men, and in consequence, everything which is most appropriate to a free people.' " *Id.* at 125 (quoting Jean J. Rousseau, *Letter to M. d'Alembert on the Theatre* 100, 105 (Allan Bloom trans., 1960)).

33. CONSTANCE SMITH & ANNE FREEDMAN, VOLUNTARY ASSOCIATIONS: PERSPECTIVES ON THE LITERATURE 14 (1972). In the words of one political scientist, the proliferation of voluntary associations offers the "promise of order and stability."

> In what would otherwise be a condition of rulelessness save what is given by the impersonal, hostile, and commanding laws of the general society, the private associations build norms and patterns of behavior which are those naturally chosen by the members themselves and to which they gladly give obedience, since these are no more than the commands that a man gives himself.

Grant McConnell, *The Public Values of Private Association*, *in* VOLUNTARY ASSOCIATIONS, *supra* note 22, at 147, 149.

"legitimate locus for the affirmation and expression of values."[34]

In some ways, intimate associations are the only entities that can teach the norms of civic virtue.[35] The manner in which this critical education occurs in intimate associations is perhaps best illustrated by the quintessential intimate association: the family.[36] "American society has relied to a considerable extent on the family not only to nurture the young but also to instill the habits required by citizenship in a self-governing community. We have relied on the family to teach us to care for others, [and] to moderate . . . self-interest . . . ."[37] In the family, children are compelled to learn to deal with authority, responsibility, and duty in an atmosphere of love that permits these lessons to be learned effectively. As one scholar noted, "[s]omething about the combined permanence, authority, and love that characterize the formal family uniquely makes possible the . . . teaching [of moral and civic duty]."[38]

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34. David Sills, *Voluntary Associations, in* 16 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 372-76 (David Sills ed., 1968).

35. As De Tocqueville noted:

> Feelings and opinions are recruited, the heart is enlarged, and the human mind is developed by no other means than by the reciprocal influence of men upon each other. I have shown that these influences are almost null in democratic countries; they must therefore be artificially created, and this can only be accomplished by associations.

2 DE TOCQUEVILLE, *supra* note 20, at 131.

36. As the Supreme Court has observed, "Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life." Roberts v. United States Jaycees, 468 U.S. 609, 619-20 (1984). Thus, the traditional familial relationship has been the intimate association that has consistently received the highest constitutional protection from state interference. *See, e.g.*, Moore v. City of East Cleveland, 431 U.S. 494, 503-04 (1977) (plurality opinion) (stating that the relationship between grandmother and grandchild prevails over zoning ordinance prohibiting them from living in same house); Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) (stating that the relationship between parent and child justifies exemption from compulsory school attendance law); Trujillo v. Board of County Comm'rs, 768 F.2d 1186, 1188-89 (10th Cir. 1985) (finding that the constitutional right of familial association includes right of parent and sibling not to be deprived of relationship with child and brother through intentional state action resulting in the death of the child and brother). The Supreme Court has noted, however, that "we have not held that constitutional protection is restricted to relationships among family members." Board of Directors of Rotary Int'l v. Rotary Club, 481 U.S. 537, 545 (1987).

37. WALTER BERNS, THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY 222 (1976), *quoted in* Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 477 (1983).

38. Hafen, *supra* note 37, at 477; *see also* Bruce C. Hafen, *Individualism and Autonomy in Family Law: The Waning of Belonging*, 1991 B.Y.U. L. REV. 1, 41 (stating that "families are . . . mediating institutions that prepare not only children but adults for the democratic interaction that literally depends upon a rational willingness to obey the unenforceable").

Public Management teacher David Brown has noted the connection between the family

Associations other than the family also can teach some of these same lessons.[39] Thus, once the drafters of the Northwest Ordinance of 1787 had concluded that "morality . . . [is] necessary to good government," they provided that "schools and the means of education shall forever be encouraged."[40] De Tocqueville touted the ability of townships—local *government* entities—to engender the critical feelings of civic virtue in the hearts and minds of democratic citizens: "[M]unicipal institutions constitute the strength of free nations. Town-meetings are to liberty what primary schools are to science; they bring it within the people's reach, they teach men how to use and how to enjoy it."[41] The greater control over local affairs resulting from democratic local governments engenders feelings of civic virtue among residents because the citizens more readily perceive the connection between their private interests and the interests of the general public.[42] Thus, the role of associations, both

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and the development of civic virtue, explaining that "we first learn about the nature of obligation from our parents by the degree to which they remain lovingly obliged to each other and to the institution of marriage, lovingly obliged to their children and to the family as an institution." Brown, *supra* note 31, at 39, 40.

39. In discussing Justice Brennan's comments concerning the societal benefits of intimate associations in Roberts v. United States Jaycees, 468 U.S. 609, 618-20 (1984), Professor Douglas Linder observed, "Brennan was writing about personal relationships (especially the family), but his observation has validity as well when applied to somewhat less personal, larger associations such as churches and political parties." Douglas O. Linder, *Freedom of Association After* Roberts v. United States Jaycees, 82 MICH. L. REV. 1878, 1882 (1984).

40. Northwest Ordinance of 1787, art. III, 1 Stat. 50, 52 (1789).

41. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 76 (Francis Bowen ed., 1863).

42. De Tocqueville admired the genius behind the American decision to place considerable authority in local governments and noted the relationship between this scheme and the development of feelings of civic virtue:

> The general affairs of a country only engage the attention of leading politicians, who assemble from time to time in the same places; and as they often lose sight of each other afterwards, no lasting ties are established between them. But if the object be to have the local affairs of a district conducted by the men who reside there, the same persons are always in contact, and they are, in a manner, forced to be acquainted, and to adapt themselves to one another.
>
> It is difficult to draw a man out of his own circle to interest him in the destiny of the state, because he does not clearly understand what influence the destiny of the state can have upon his own lot. But if it be proposed to make a road cross the end of his estate, he will see at a glance that there is a connection between this small public affair and his greatest private affairs; and he will discover, without its being shown to him, the close tie which unites private to general interest.

2 DE TOCQUEVILLE, *supra* note 20, at 125. De Tocqueville argued that local governments were, therefore, essential to the creation and preservation of civic virtue because the lack of interest in local affairs resulting from the absence of local governmental authority creates a situation in which citizens are so reliant upon the far-away central government that "if his own safety or that of his children is endangered, instead of trying to avert the peril, he will fold his arms, and wait till the nation comes to his assistance." 1 DE TOCQUEVILLE, *supra* note 20, at 94. When that happens, De Tocqueville theorized, the nation "must either change its customs

private and governmental, in perpetuating and transmitting the values of civic virtue—the lifeblood of democracy—has been widely recognized by social and political theorists, ancient and modern.

The second societal benefit of intimate associations commonly espoused by theorists focuses on the pluralism benefits these associations provide. Political theorists have asserted that intimate associations serve as the principal building blocks of diversity and pluralism.[43] Intimate associations provide the setting for transmitting diverse cultural ideas from generation to generation. They also protect diverse cultures by providing the strength of the group as a counterweight against the often uniformizing wishes of majoritarian governments.[44] This perpetuation of cultural diversity is essential to societal enjoyment of the benefits of pluralism: "greater respect for others, greater awareness of the meaning of one's own values, and refinement of overall value systems from comparison with others."[45] Moreover, voluntary associations reflecting diverse views often contribute to orderly and stable change in society by providing positive outlets and directions for these views, rather than allowing them to foment below the surface until revolution occurs.[46]

Thus, political and social theorists consistently have recognized the key role that intimate associations play in a democracy.[47] Some have also concluded that in American society portions of this role can be played by intimate or localized governments.[48] Intimate associations provide the environment for inculcating in new generations the habits of civic virtue on which the success of any democratic government ultimately rests. They also facilitate the preservation of social diversity and orderly change. Without such associations, democratic society would be

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and its laws, or perish: the source of public virtue is dry; and though it may contain subjects, the race of citizens is extinct." *Id.*

43. *See* JACQUES MARITAIN, MAN AND THE STATE 11 (1951) (asserting the necessity for intermediate associations in modern pluralistic society). *See generally* Linder, *supra* note 39, at 1881 (stating that "the right of an association to define its own membership, is fundamental to a conception of a pluralistic free society"); Note, *State Power and Discrimination by Private Clubs: First Amendment Protection for Nonexpressive Associations*, 104 HARV. L. REV. 1835, 1839 (1991) (stating that "private associations are the principal building blocks of societal diversity and pluralism").

44. Kevin J Worthen, *Two Sides of the Same Coin: The Potential Normative Power of American Cities and Indian Tribes*, 44 VAND. L. REV. 1273, 1300 (1991).

45. *Id.* at 1301.

46. McConnell, *supra* note 33, at 154-57.

47. Of course, other philosophers, including such luminaries as Plato, Hobbes, and Rousseau, have viewed associations between the state and the individual with much less favor. *See generally* RICE, *supra* note 23, at 2-3, 6-8, 13-15. Even some of these skeptics, however, recognized the positive societal benefits that these associations could provide under appropriate circumstances. *See supra* note 32 (discussing Rousseau's defense of "circles").

48. *See supra* text accompanying notes 41-42.

radically altered, and quite possibly would cease to exist in any meaningful sense. Moreover, those who lack access to these associations will often fail to learn the critical lessons of heart and mind or acquire the positive direction needed to help them become productive, fulfilled citizens of a democratic society.

### *B. The Constitutional Role of Intimate Associations*

While recognition of the importance of intimate associations does not have the same long tradition in constitutional law that it does in social and political theory, some form of constitutional protection against government intrusion in the "formation and preservation of certain kinds of highly personal relationships" has been recognized for at least sixty years.[49] The United States Supreme Court in *Roberts v. United States Jaycees*[50] identified two distinct constitutionally protected roles for intimate associations. The Court first observed that "certain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the State."[51] This focuses on the benefit such associations provide to society. The Court then noted that intimate associations also serve individual interests, reflecting the "realization that individuals draw much of their emotional enrichment from close ties with others" and that this "ability independently to define one's identity . . . is central

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49. Roberts v. United States Jaycees, 468 U.S. 609, 618 (1984). The earliest judicial recognition cited by the *Roberts* Court was Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

The textual source of the constitutional right of intimate association is not entirely clear. The word "association" is not mentioned in the Constitution. Nonetheless, in *Roberts*, the Court observed that its prior decisions had "referred to constitutionally protected 'freedom of association' in two distinct senses." *Roberts*, 468 U.S. at 617. The first has come to be known as intimate association because it "protects against unjustified government interference with an individual's choice to enter into and maintain certain intimate or private relationships." Board of Directors of Rotary Int'l v. Rotary Club, 481 U.S. 537, 544 (1987). The Court has indicated that the constitutional source of this right is the First Amendment, *id.* at 545, but some lower courts continue to assert that it is an element of substantive due process. Swank v. Smart, 898 F.2d 1247, 1251-52 (7th Cir.), *cert. denied*, 111 S. Ct. 147 (1990).

The second right, now known as the right of "expressive association," is more clearly tied to the First Amendment since it protects the "right to associate for the purpose of engaging in those activities protected by the First Amendment." *Roberts*, 468 U.S. at 618.

This Article focuses on the right of intimate association. It does not address the issue of whether the protection afforded intimate associations by the current Court is properly located in the First, Fourteenth, or even any amendment. That issue has, and will continue, to provide fertile ground for legal debate. The points advanced by this Article are, however, premised on the existence of a constitutional right of intimate association.

50. 468 U.S. 609 (1984).

51. *Id.* at 618-19.

to any concept of liberty."[52]

The individual liberty rationale for protecting intimate associations has been the focus of most post-*Roberts* discussion of the issue.[53] Although the societal benefits of intimate associations have, by and large, been ignored since *Roberts*,[54] use of societal benefits to justify constitutional protection for intimate associations has considerable support in pre-*Roberts* case law. By shifting the focus to the societal benefits of intimate associations, current courts would not be charting a new course, but merely taking a few small steps down a path outlined in prior opinions.

One of the earliest recognitions of the constitutional status of intimate associations emphasized the societal benefits that such associations can provide. In 1925, upholding the right of parents to send their children to private schools, the Supreme Court concluded that parents and guardians had the constitutional right to direct the education of their children because "those who nurture [the child] and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[55] Presumably, these obligations include the duty to participate in democratic government in a productive way. More recently, in *Moore v. City of East Cleveland*,[56] the Court indicated that

52. *Id.* at 619.

53. *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186, 204-06 (1986) (Blackmun, J., dissenting) (asserting that "*individuals* define themselves in a significant way through their intimate sexual relationships" and that one of the primary benefits of liberty comes "from the freedom an *individual has to choose* the form and nature of these intensely personal bonds") (all emphasis except "choose" added); Trade Waste Management Ass'n v. Hughey, 780 F.2d 221, 236-37 (3d Cir. 1985) (stating that the right of intimate association recognizes "a zone of *individual autonomy* with respect to *individual* human relationships that must be secured against undue intrusion by the state") (emphasis added); Republican Party v. Tashjian, 770 F.2d 265, 277 (2d Cir. 1985) (referring to intimate association as an "individualistic aspect of associational rights"), *aff'd*, 479 U.S. 208 (1986).

This focus on the individual value of intimate associations is not surprising when one realizes that in his seminal article on intimate associations, Kenneth Karst listed as "values" of intimate associations only individualistic values. Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 630-37 (1980) (listing society, caring and commitment, intimacy, and self-identification as values of intimate association). Karst did not mention any of the societal benefits of intimate associations.

54. The only Supreme Court elaboration on the societal-benefits prong of *Roberts* came in rejecting a claim that a law regulating the use of motel rooms for short periods of time violated the patrons' right of intimate association. The Court curtly observed: "Any 'personal bonds' that are formed from the use of a motel room for fewer than 10 hours are not those that have 'played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs.' " FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 237 (1990) (quoting *Roberts*, 468 U.S. at 618-19).

55. Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925).

56. 431 U.S. 494 (1977) (plurality opinion).

familial association received constitutional protection because "[i]t is through the family that we inculcate and pass down many of our most cherished social values, moral and cultural."[57] Again, although the Court did not elaborate on this theme, "cherished values" would seem to include those essential to civic virtue on which the republic was founded. Similar references to the fundamental role of familial associations in our society can be found in other cases.[58] The Court also has noted that intimate associations serve societal ends by fostering diversity in a productive way. By providing a positive means for cultivating and perpetuating diverse viewpoints, intimate associations produce the kind of diversity "that oils the machinery of democratic government and insures peaceful, orderly change."[59]

Thus, pre-*Roberts* case law identified at least two constitutionally protected societal functions performed by intimate associations: first, educating youth in unenumerated essential social values, thereby preparing them for their future obligations as citizens of a democracy; second, fostering the development of diverse ideas in a way that permits pluralistic society to exist and change in an orderly manner. The *Roberts* Court's recognition of these societal benefits of intimate association, therefore, was not novel. It was a continuation of a consistent thread of twentieth-century constitutional law. Moreover, as noted above, theorists recognized these societal benefits long before the Court articulated them.[60]

Under a purely functionalist approach, any association that serves either of these two functions deserves some constitutional protection, at least to the extent that protection is needed to further those ends. From a functional standpoint, whether the association fits into some preconceived traditional category is relatively unimportant.[61] That is not to say, however, that the manner in which the association traditionally has performed its role is completely irrelevant. Fearful of rendering the identification process open-ended and unprincipled, the Court has extended constitutional protection only to those associations which have some tra-

57. *Id.* at 503-04 (1977) (plurality opinion).

58. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) (concluding that parental control reflects a "strong tradition" founded on "[t]he history and culture of Western civilization" and that it "is now established beyond debate as an enduring American tradition"); Ginsberg v. New York, 390 U.S. 629, 639 (1968) (stating that right of parents to make decisions without undue interference from the state is "basic in the structure of our society").

59. Gilmore v. City of Montgomery, 417 U.S. 556, 575 (1974), *cited in Roberts*, 468 U.S. at 619.

60. *See supra* text accompanying notes 22-48.

61. As Justice Harlan explained, "it is the purposes of those guarantees and not their text, the reasons for their statement by the Framers and not the statement itself which have led to their present status in the compendious notion of 'liberty' embraced in the Fourteenth Amendment." Poe v. Ullman, 367 U.S. 497, 544 (1961) (Harlan, J., dissenting) (citations omitted).

dition of performing the socially beneficial roles of intimate associations.[62] This emphasis on tradition, however, does not preclude the extension of constitutional protection to intimate associations for which the protection has not previously been legally recognized. If an association has demonstrated an ability to make the kinds of contributions to American society that have entitled other intimate associations to that protection, it should be entitled to protection even if it is a new kind of association or one not previously acknowledged by the courts.[63]

Accordingly, although post-*Roberts* decisions have focused almost exclusively on the individual-benefits rather than the societal-benefits rationale for providing constitutional protection to intimate associations,[64] extending some form of constitutional protection to any association that can perform these socially beneficial functions is warranted by both political theory and Supreme Court precedent.

Use of this functional analysis would not constitute a radical departure from the test for identifying intimate associations outlined by the Court in *Roberts* and its progeny. That test focuses on four main factors: the "[1] size, [2] purpose, [3] selectivity [of the group], and [4] whether others are excluded from critical aspects of the relationship."[65] Each of these factors relates in some way to the association's ability to transmit shared values and promote diverse, stable cultures. For example, the association's ability to transmit core values (either shared or diverse) obviously diminishes with the size of the group in which the transmission occurs. Transmission of such values also generally is facilitated by con-

62. *See, e.g.*, Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) ("Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition.") (footnote omitted); *Yoder*, 406 U.S. at 232 ("The history . . . of Western civilization reflect[s] a strong tradition of parental concern for the nurture and upbringing of their children.").

63. As Justice Harlan explained, while it is important to consult the teachings of history when deciding what interests deserve constitutional protection, "tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound." *Poe*, 367 U.S. at 542 (Harlan, J., dissenting).

64. *See, e.g.*, Kraft v. Jacka, 872 F.2d 862, 871 (9th Cir. 1989) (describing intimate association as essential to "individual freedom"); Fleisher v. City of Signal Hill, 829 F.2d 1491, 1500 (9th Cir. 1987) (concluding that "the freedom of intimate association is coextensive with the right of privacy"); Trade Waste Management Ass'n v. Hughey, 780 F.2d 221, 236-37 (3d Cir. 1985) (asserting that freedom of intimate association "recognizes our status as autonomous human beings protected from governmental interference that denigrates our personality and prevents our full self fulfillment"); Trujillo v. Board of County Comm'rs, 768 F.2d 1187, 1186 n.7 (10th Cir. 1985) (noting that the freedom of intimate association "draws support from the . . . values of self-expression and identification").

65. Board of Directors of Rotary Int'l v. Rotary Club, 481 U.S. 537, 546 (1987); *see also* Roberts v. United States Jaycees, 468 U.S. 609, 620 (1984) (substantially the same factors).

trol over the criteria for membership in the association (the third factor—selectivity) and over the exclusion of nonmembers at critical times (the fourth factor).[66] Finally, examination of the purpose of the association is by its very nature functional. If the primary function of the association is to facilitate commercial transactions or provide eating facilities, it is unlikely to be classified as an intimate association.[67] If, by contrast, one of the association's principal functions is to instruct its members in civic virtue (by precept or experience) or maintain a diverse culture, the association is obviously more likely to be granted constitutional protection under a functional approach. The multi-factored inquiry outlined by the *Roberts* Court can, therefore, easily be adapted to an approach that focuses on the association's ability to perform the socially-beneficial functions of intimate associations.

Under this functional analysis, an association would receive constitutional protection from state or federal intervention to the extent that the association has demonstrated the ability either to cultivate and transmit the shared ideals and beliefs essential to the preservation of democracy or to foster diversity and act as a critical buffer between the individual and the power of the State.[68] Although few governmental entities would satisfy this test,[69] public schools could qualify under the first prong. Native American tribes could qualify under the second.

## III. CULTIVATING AND TRANSMITTING SHARED IDEALS AND BELIEFS: THE ASSOCIATIONAL ROLE OF PUBLIC SCHOOLS

> To be attached to the subdivision, to love the little platoon we belong to in society, is the first principle (the germ as it were) of public affections.[70]

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66. Secrecy in fundamental religious ceremonies where critical learning occurs is fairly common. For example, The Church of Jesus Christ of Latter-day Saints limits temple attendance to those deemed worthy by church officials. Bruce Buursma, *Mormons Open Monument to the 'Worthy,'* CHI. TRIB., July 14, 1985, at C10. Participation in sweat lodge ceremonies by Native Americans is also generally restricted. *See infra* note 180 and accompanying text.

67. In New York State Club Ass'n v. City of New York, 487 U.S. 1 (1988), the Court rejected an attempt to extend intimate association protection to all the clubs covered by New York City's anti-discrimination ordinance, in part because the clubs provided regular meal service to both members and nonmembers and because the city had found them to be largely " 'commercial' in nature, 'where business deals are often made and personal contacts valuable for business purposes, employment and professional advancement are formed.' " *Id.* at 12. Similarly, Justice O'Connor's concurrence in *Roberts* emphasized the predominantly commercial nature of the Jaycees. *See Roberts*, 468 U.S. at 638-40 (O'Connor, J., concurring).

68. *Roberts*, 468 U.S. at 618-19.

69. *See infra* text accompanying notes 232-33 (discussing limited situations in which government entities would qualify as intimate associations).

70. PETER L. BERGER & RICHARD J. NEUHAUS, TO EMPOWER PEOPLE: THE ROLE OF MEDIATING STRUCTURES IN PUBLIC POLICY 4 (1977) (quoting Edmund Burke).

> May there not be in human nature a deep hunger to form a bond of union with one's fellows which runs deeper than that of legally defined duty and counterduty?
>
> . . . .
>
> Has the frigid legal atmosphere of our basic associations driven some of us, in search of a richer bond of union with our fellows, into becoming Mods or Rockers, Hell's Angels, and shouters of filthy words?[71]

The desire to belong to some group or society seems to be innate in most humans.[72] In our nation, this desire traditionally has been satisfied by families, religious groups, and various voluntary associations. For many inner-city youth, however, these traditional associations do not exist or function in any meaningful way. As a result, the essential values of civic virtue are not passed on, and the individual becomes alienated from society. In the words of sociologist Jewelle Taylor Gibbs:

> With the breakdown or weakening of . . . traditional institutions within inner-city communities, there has been a parallel breakdown of the traditional black community values of the importance of family, religion, education, self-improvement, and social cohesion through extensive social support networks. Many blacks in inner cities no longer seem to feel connected to each other, responsible for each other, or concerned about each other. Rather than a sense of shared community and a common purpose, which once characterized black neighborhoods, these inner cities now reflect a sense of hopelessness, alienation, and frustration.[73]

Recognizing this phenomenon among "urbanites" more than forty years ago,[74] sociologist Louis Wirth predicted that the urban resident

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71. Lon L. Fuller, *Two Principles of Human Association*, *in* VOLUNTARY ASSOCIATIONS, *supra* note 22, at 3, 21.

72. That is in part the thrust of Aristotle's observation that "man is by nature a political animal." ARISTOTLE, POLITICS (Benjamin Jowett trans.), *in* GREAT BOOKS OF THE WESTERN WORLD, 2 THE WORKS OF ARISTOTLE 446 (Encyclopedia Brittanica, Inc. 1952). That observation has not gone unchallenged, however. *See generally* Worthen, *supra* note 44, at 1296 n.113 (noting the ongoing debate on the issue between liberal and communitarian political theorists).

73. Gibbs, *supra* note 3, at 19. Gibbs concluded that "[i]t is exactly this kind of frustration that exploded in the urban riots of the 1960s." *Id.*

74. Wirth asserted that urban residents would be "reduced to a stage of virtual impotence as an individual," observing that urban life is characterized by the "substitution of secondary for primary contacts, the weakening of bonds of kinship, and the declining social significance of the family, the disappearance of the neighborhood, and the undermining of the traditional basis of social solidarity." Louis Wirth, *Urbanism as a Way of Life*, *in* READER IN URBAN SOCIOLOGY 32, 46-47 (Paul K. Hatt & Albert J. Reiss, Jr. eds., 1951), *cited in* SMITH & FREEDMAN, *supra* note 33, at 15.

would combat these trends by "joining with others of similar interest into organized groups to obtain his ends."[75] Wirth probably had in mind groups such as the Rotary Club or the local unit of the Boy Scouts. For increasing numbers of inner-city African-American males, however, the groups that fill this function have names like "Crips" or "Bloods." Longing to belong to some group and finding none more readily available, these youths turn to the one group that will mainstream them into some kind of larger society.[76] Unfortunately, the society into which they are integrated contains cells and guards.

In looking for positive associational alternatives to gangs, primary emphasis has been placed on other private associations, such as the family or local boys' clubs. While associations with such groups should be encouraged, the growing crisis in the cities suggests that new alternatives must be explored. One of the most promising alternatives may be public schools. With innovation, public schools could be structured to meet the associational needs of the inner-city youth and perform the mainstreaming function traditionally performed by private intimate associations.

Because discussion concerning public schools among contemporary Americans generally focuses on standardized test scores or other measures of the amount of factual information conveyed from teacher to pupil, an effort to evaluate such an institution in terms of its ability to function as an intimate association will undoubtedly strike many as strange. Such an evaluation may not seem so foreign, however, when viewed in light of the history of public education in America.[77]

Schools have long been linked in American thought to one of the

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75. Wirth, *supra* note 74, at 47.

76. One former gang member articulated the appeal of gangs for many inner-city African-American males in the following manner: "A gang is a family, no doubt about it . . . . The thing is not to stop the gangs; it is to stop the negativity of the gangs. . . . The great unity that black people have is gangs . . . ." Robert Allen, *Gangs Cannot be Abolished, in* INNER CITY VIOLENCE 58, 59 (Gary E. McCuen ed., 1990) (quoting testimony before the House Select Committee on Children, Youth, and Families, March 9, 1988).

Another observer explained:

> [A] persistent reason for joining gangs is the sense of absolute belonging and unsurpassed social love that results from gang membership. Especially for young black men whose lives are at a low premium in America, gangs have fulfilled a primal need to possess a sense of social cohesion through group identity.

Michael Dyson, *The Plight of the Black Men, in* ZETA, Feb. 1989, *quoted in* Allen, *supra*, at 60.

77. De Tocqueville observed firsthand the early connection between schools and voluntary associations. "Americans of all ages, all conditions, and all dispositions, constantly form associations. . . . The Americans make associations to give entertainments, to found establishments *for education*, to build inns, to construct churches . . . ; and in this manner they found hospitals, prisons, and *schools*." 2 DE TOCQUEVILLE, *supra* note 20, at 128 (emphasis added).

best-recognized intimate associations: the family.[78] The belief that schools stand *in loco parentis* had real meaning for most early Americans;[79] "schools in the early days of the Republic were almost literally extensions of the home."[80] Schools were to aid parents in cultivating and transmitting to the new generation of students the values of the family. Because the exact content of those values would vary in a pluralistic society such as America, the need for, and desirability of, local control over education was recognized early and repeatedly reaffirmed.[81] The supportive role of schools in accomplishing the tasks of the fundamental intimate association of family is thus well established.[82]

This congruence between the role of schools and intimate associations is strengthened when one focuses on the function of intimate associations in cultivating and transmitting shared ideals and beliefs essential to the preservation of our Nation.[83] The arguments of Thomas Jefferson, Benjamin Rush, Horace Mann, and others that a public school system could greatly aid in education for citizenship led to the sweeping advance of free compulsory public education systems throughout the states in the nineteenth century.[84] Similarly, modern sociologists and ed-

78. As Bruce Hafen has observed, "Both chronologically and conceptually, the education of American children was originally viewed as a natural extension of family life and parental interests." Bruce C. Hafen, *Developing Student Expression Through Institutional Authority: Public Schools as Mediating Structures*, 48 OHIO ST. L.J. 663, 671 (1987). Hafen traces the link between families and schools from Ancient Greece and Rome, through England, into the colonies. *Id.*

79. The Supreme Court at times has indicated that both parents and teachers traditionally have played a role in preparing children to assume their obligations in society. *See, e.g.*, Ginsberg v. New York, 390 U.S. 629, 639 (1968) (stating that "[t]he legislature could properly conclude that parents and others, teachers for example, who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility").

80. Hafen, *supra* note 78, at 667.

81. *Id.* at 672-73; *see, e.g.*, Freeman v. Pitts, 112 S. Ct. 1430, 1445 (1992) ("Returning schools to the control of local authorities at the earliest practicable date is essential to restore their true accountability in our governmental system."); Board of Educ. v. Dowell, 111 S. Ct. 630, 637 (1991) ("Local control over the education of children allows citizens to participate in decisionmaking, and allows innovation so that school programs can fit local needs."); Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 410 (1977) (recognizing that "local autonomy of school districts is a vital national tradition").

82. Some have asserted that the connection between the role of the family and that of the school is especially strong among African-American students. *See* JACQUELINE J. IRVINE, BLACK STUDENTS AND SCHOOL FAILURE: POLICIES, PRACTICES AND PRESCRIPTIONS 47 (1990) (asserting that for African-American students the relationship between teacher and student is closely related to the parent-child relationship).

83. *See* Roberts v. United States Jaycees, 468 U.S. 609, 618-19 (1984).

84. Hafen, *supra* note 78, at 674-75. Modern scholars continue to emphasize this role of schools as educators of civic virtue:

> [T]he public school tradition, reflected in everything from the copybook headings to

ucators have confirmed that "American public schools socialize youth to common norms and values."[85]

More importantly, the Supreme Court itself has repeatedly emphasized schools' role in preparing students to live meaningfully in a democratic society. "We have . . . acknowledged," the Court stated in 1982, "that public schools are vitally important 'in the preparation of individuals for participation as citizens.' "[86] Similar pronouncements appear in other Court decisions.[87]

This "process of educating our youth for citizenship" is not limited to the formal teaching process.[88] It extends to the ways in which the school is organized and the methods by which concepts are taught.[89] Thus, public school officials have an interest, and considerable leeway, in deciding what kinds of individuals teach in public schools,[90] the content

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> the pledge of allegiance, . . . includes a commitment to both personal character and public virtue. The idea that education was essential to the theory of democracy depended in no small part on the assumption that education would aid the development of these general abilities and attitudes as universally shared matters of value.

*Id.* at 668 n.21.

85. Adam Gamoran, *Civil Religion in American Schools*, 51 SOC. ANALYSIS 235, 247 (1990). Others have asserted the socializing impact of schools from a normative viewpoint. *See* Molefi K. Asante, *The Afrocentric Idea in Education*, 60 J. NEGRO EDUC. 170, 170 (1991) ("Education is fundamentally a social phenomenon whose ultimate purpose is to socialize the learner; to send a child to school is to prepare the child to become part of a social group.").

86. Board of Educ. v. Pico, 457 U.S. 853, 864 (1982) (quoting Ambach v. Norwick, 441 U.S. 68, 76 (1979)).

87. For example, one of the reasons unequal educational facilities for African-Americans were constitutionally unacceptable was that education "is a principal instrument in awakening the child to cultural values . . . and in helping him to adjust normally to his environment." Brown v. Board of Educ., 347 U.S. 483, 493 (1954); *see also* Keyes v. School Dist. No. 1, 413 U.S. 189, 246 (1973) (Powell, J., concurring in part and dissenting in part) (stating that public schools have been a traditional source of strength for America); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 30 (1973) (recognizing that the grave significance of education to the individual and to our society cannot be doubted); Wisconsin v. Yoder, 406 U.S. 205, 213 (1972) ("[P]roviding public schools ranks at the very apex of the function of a state."); Abington Sch. Dist. v. Schempp, 374 U.S. 203, 230 (1963) (Brennan, J., concurring) (regarding public schools as "a most vital civic institution for the preservation of a democratic system of government"); Adler v. Board of Educ., 342 U.S. 485, 493 (1952) (recognizing that teachers shape the attitudes of young minds toward the society in which they live).

88. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986). As the Court explained, "The process of educating our youth for citizenship" is "not confined to books, the curriculum, and the civics class." *Id.*

89. One sociologist has outlined the pervasive ways in which "American Civil Religion" is taught in public elementary schools, including through rituals such as the pledge of allegiance, discussion of national holidays, art projects, assemblies, and social studies. Gamoran, *supra* note 85, at 238-47.

90. Ambach v. Norwick, 441 U.S. 68, 75-81 (1979) (maintaining that a state can constitutionally exclude aliens from school teaching positions).

of the curriculum,[91] and the manner in which students and teachers conduct themselves while in school.[92] In short, the Court explicitly and repeatedly has recognized that public schools serve to "inculcat[e] fundamental values necessary to the maintenance of a democratic political system" and act "as an 'assimilative force' by which diverse and conflicting elements in our society are brought together on a broad but common ground."[93]

Given the Court's recognition that public schools can and ought to teach the values of civic virtue, and its acknowledgement that constitutional protection should be extended to intimate associations *because* they perform this role, it is only a small step to conclude that public schools are entitled to some constitutional deference when performing this function. Clearly, public schools meet the generalized functional test outlined above in that they have traditionally performed the function of transmitting and cultivating values, such as civic virtue, to new generations of students. Moreover, application of the four-prong *Roberts* test demonstrates that the leap is more of a small step than might at first appear.

First, the size of the key component of the public school—the individual class[94]—fits comfortably within the judicial guidance provided for this factor. The average public school classroom contains 17.4 students.[95] This is small enough to be considered intimate, especially in light of the Supreme Court's recognition that groups of more than 400

91. *See, e.g.*, Cary v. Board of Educ., 598 F.2d 535, 542-44 (10th Cir. 1979) (holding that a school board may remove books from a reading list); President's Council, Dist. 25 v. Community Sch. Bd. No. 25, 457 F.2d 289, 291-93 (2d Cir.) (upholding school board decision to remove a library book), *cert. denied*, 409 U.S. 998 (1972). *But see* Minarcini v. Strongsville City Sch. Dist., 541 F.2d 577, 580-83 (6th Cir. 1976) (invalidating on constitutional grounds school board decision to remove certain volumes from school library).

92. *Fraser*, 478 U.S. at 685 (stating that school may prohibit lewd, indecent, or offensive student speech).

93. *Ambach*, 441 U.S. at 77; *see also Fraser*, 478 U.S. at 681 (observing that "public education must prepare pupils for citizenship in the Republic. . . . It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation") (quoting CHARLES A. BEARD & MARY R. BEARD, NEW BASIC HISTORY OF THE UNITED STATES 228 (1968)).

The link between the Court's conclusion that schools prepare pupils for citizenship and the sociological studies that it cited in *Ambach* has been questioned. Tyll van Geel, *The Search for Constitutional Limits on Governmental Authority to Inculcate Youth*, 62 TEX. L. REV. 197, 264-71 (1983). Van Geel at most raises questions about whether public schools *have been successful* at performing the assimilative and educational functions attributed to them by the Court. He does not provide evidence that schools *cannot* perform this role.

94. It is more appropriate to consider the class, rather than the entire school, because most teaching occurs at the class rather than the school level.

95. U.S. DEP'T OF EDUC., STATE EDUCATION PERFORMANCE CHART, 1982 AND 1989.

might qualify as intimate associations.[96]

The second factor of the *Roberts* test—the purpose of the association—clearly is met by the public schools' mandate to educate common citizens and prepare them to be productive members of a democratic society. This type of education is one of the primary purposes for which constitutional protection is given to intimate associations.

The third *Roberts* requirement, seclusion, would seem at first glance not to be met here. By definition, public schools are not private or secluded institutions. Nonetheless, school officials traditionally have asserted authority to exclude non-students from the classroom during school hours. This is done primarily to create the kind of atmosphere in which learning (including the inculcation of values such as civic virtue) can take place effectively. Thus, unlike business clubs, public schools do not routinely invite the participation of strangers in the teaching process, nor do strangers play a crucial role in schools' ordinary existence.[97] When outsiders are allowed to attend, it is usually in the capacity of silent observers or participants under the strict control of the teacher. Certainly, individual class members cannot invite strangers off the street to come in and participate.

The forth *Roberts* criterion, selectivity, also appears problematic at first glance. Public schools traditionally have been open to any persons of the requisite ages who reside within a certain geographic area. An organization whose exclusionary criteria are limited to residency and age is not tremendously selective. Indeed, the political and social attractiveness of public education results from it being open to all.[98] Yet in some

96. In discussing the possible success of as-applied challenges to a New York City anti-discrimination ordinance, Justices O'Connor and Kennedy expressly observed that "in such a large city a club with over 400 members may still be relatively intimate in nature, so that a constitutional right to control membership takes precedence." New York State Club Ass'n v. City of New York, 487 U.S. 1, 19 (1988) (O'Connor, J., concurring). The majority implicitly recognized the same possibility when it stated that "there may be clubs that would be entitled to constitutional protection" despite the fact that the law applied only to clubs with at least 400 members. *Id.* at 12.

In *Board of Directors of Rotary International v. Rotary Club*, the Court refused to grant intimate association protection to clubs with fewer than 20 members, but the key size factor appeared to be that there was "no upper limit on the membership of any local Rotary Club." 481 U.S. 537, 546 (1987). Thus, some clubs had more than 900 members, *id.*, a number much larger than any public school class. *See* U.S. DEP'T OF EDUC., *supra* note 95 (largest average class size in U.S. in 1989 was 24.5 in Utah).

97. In rejecting the claims of the Rotary Clubs, the Jaycees, and the New York State Club Association, the Supreme Court emphasized "the kind of role that strangers play in their ordinary existence [and] the regular participation of strangers at meetings." *New York State Club Ass'n*, 487 U.S. at 12 (citing *Rotary*, 481 U.S. at 547; Roberts v. United States Jaycees, 468 U.S. 609, 621 (1984)).

98. Many state constitutions include the goal that public education be provided to all.

respects public education is highly selective. Public schools commonly exercise the authority to select which students will participate in which classes based on their intellectual, athletic, and artistic abilities.[99] Such selectivity is justified because it facilitates effective educating in certain areas. Information and skills can be taught more effectively to persons of similar aptitude in that area.[100] Courts should allow a similar degree of selectivity by a school seeking to perform its function of inculcating youth for citizenship. Thus, public schools could meet the selectivity criterion for intimate associations.

On a functional level the gap between public schools and judicially-recognized intimate associations is not great. This is not to suggest that the distinction between public schools and traditionally-recognized private intimate associations be eliminated[101] or that local public schools

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*See, e.g.*, ILL. CONST. art. X, § 1 ("A fundamental goal of the People of the State is the educational development of all persons to the limits of their capacities."); N.J. CONST. art. VIII, § 4, para. 1 ("The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State . . . ."); N.Y. CONST. art. XI, § 1 ("The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated."); UTAH CONST. art. X, § 1 ("The Legislature shall provide for the establishment and maintenance of the state's education systems including . . . a public education system, which shall be open to all children of the state . . . .").

99. For example, public schools in the state of Iowa have gifted and talented classes for persons with extraordinary (1) general intellectual ability, (2) specific academic aptitude, (3) creative or productive thinking, (4) leadership ability, (5) visual and performing arts skills, and (6) psychomotor ability. Joan Breiter, Gifted Education in a Midwest State: Focus on Inservice 2-3 (Nov. 9, 1988) (paper presented at the Convention of the National Association for Gifted Children, Orlando, Fla.).

100. Francis Lawrenz, *Aptitude Treatment Effects of Laboratory Grouping Method for Students of Differing Reasoning Ability*, 22 J. RES. SCI. TEACHING 279, 286 (1985); John Newfield & Virginia B. McElyea, *Achievement and Attitudinal Differences Among Students in Regular, Remedial, and Advanced Classes*, 52 J. EXPERIMENTAL EDUC. 47, 47 (1983). *But see* Len Unsworth, *Meeting Individual Needs Through Flexible Within-Class Grouping of Pupils*, 38 READING TCHR. 298, 298 (1984).

101. Professor Deborah Rhode has argued that the unfavorable treatment extended governmental associations ought to be expanded to include some private associations (the reverse of the position asserted in this Article). Deborah L. Rhode, *Association and Assimilation*, 81 NW. U. L. REV. 106, 125-27 (1986). Professor Rhode agrees that court decisions have "blurred" the line between private and public entities, *id.* at 109, and, like this Article, argues for a more functional analysis of the role and protected sphere of associations. *Id.* at 124-28 ("We need not only a better set of rules but also a better understanding of the capacity of those rules to express our underlying social aspirations.").

The strikingly different outcome that Professor Rhode advocates is, in part, a result of her focusing almost exclusively on the individualistic benefits of intimate associations rather than the societal benefits. *See, e.g., id.* at 118 ("Such associations preserve opportunities for self-expression and mutual commitment, as well as constraints on governmental power."); *id.* at 124-25 (stating that the values of single-sex associations are "choice and intimacy" and "male cohesiveness"). Although Professor Rhode asserts that associations promote both private and public values, *id.* at 125, it is clear that the public values she refers to are the public values of

are constitutionally entitled to the same protection from outside interference as are families.[102] That public schools are public and governmental is significant,[103] and courts should never overlook that fundamental fact. That schools are vehicles for educating and shaping the youth of America is an equally significant fact that should not be ignored, however. When a local school board affects individual rights by decisions made in furtherance of the school's role as an educational institution, courts need not, and have not, felt compelled to treat schools as they would federal or state governments. Thus, the Supreme Court has observed that the First Amendment rights of public school students are "not automatically coextensive with the rights of adults in other settings"[104] and that they must be "applied in light of the special characteristics of the school environment."[105] The Court has drawn similar distinctions when applying the Fourth Amendment in public school settings.[106]

The Court has, therefore, recognized that not all governmental units need be treated identically under the Constitution. Recognizing the unique role performed by local public schools, the Court has used a more functional approach in applying constitutional limitations when public schools are the governmental actors than when state or federal legislation is involved. In keeping with this functional approach, while public

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*expressive* associations, such as collective expression, rather than the societal value of intimate associations that can transmit essential shared beliefs and mainstream individuals into society. *See, e.g., id.* at 118 (explaining that associations present opportunities for "self-expression and collective exploration"); *id.* at 120 ("[S]exual integration need not impair an organization's *expressive* activities.") (emphasis added).

102. The *Roberts* Court recognized that different intimate associations might well merit different constitutional protection depending on their ability to carry out a constitutionally-protected role:

> Between these poles [of family relationships and a large business enterprise] lies a broad range of human relationships that may make greater or lesser claims to constitutional protection from particular incursions by the State. Determining the limits of state authority over an individual's freedom to enter into a particular association therefore unavoidably entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments.

Roberts v. United States Jaycees, 468 U.S. 609, 620 (1984).

103. *See infra* notes 215-33 and accompanying text.

104. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988) (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986)).

105. *Id.* (quoting Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 506 (1969)).

106. *See* New Jersey v. T.L.O., 469 U.S. 325, 340 (1985) (balancing privacy interest of students against "school's equally legitimate need to maintain an environment in which learning can take place" and concluding that "the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject").

schools may not be entitled to the same constitutional *protection* as intimate associations, their ability to perform an associational role should entitle them to some constitutional *deference* when their actions are challenged on other constitutional grounds.[107] For example, even though constitutional challenges may arise, courts should give schools as much leeway to assign students to classes in a manner that carries out their associational role of teaching civic virtue as is given to similar decisions schools make in order to teach physics, calculus, or remedial reading effectively.

Recognition of the associational role of public schools would alter the reasoning, and perhaps the outcome, of a recent federal district court decision prohibiting all-male public elementary school academies.[108]

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107. This Article does not assert that local public schools are entitled to the same constitutional protection from state and federal legislative interference as that currently provided to private intimate associations. Indeed, it does not assert that such entities are entitled to any constitutional protection from *legislative* actions of the federal or state government. Instead, it advocates that *courts* should adopt a slightly different approach when evaluating constitutional challenges to decisions made by local schools in performing their associational roles. *See infra* notes 108-26 and accompanying text. Thus, the emphasis is on *judicial deference* to the local decisionmaker, rather than constitutional protection from legislative interference.

In contrast, this Article does maintain that Native American tribes are entitled to constitutional *protection* from some forms of state and federal *legislative* intrusions in tribal matters. *See infra* notes 197-209 and accompanying text. This protection for tribes is justified by both theoretical and practical differences between tribes and local government entities like school districts. The primary theoretical difference between the two entities is that tribes existed long before the state and federal governments were formed. *See* Carol L. Bagley & JoAnn Ruckmann, *Iroquois Contributions to Modern Democracy and Communism*, 7 AM. INDIAN CULTURE RES. J. 53, 53 (1983) (noting "persuasive evidence that North American democracy began between 330 to 500 years [before the American Revolution] with the Iroquois Law of the Great Peace"). As a result, tribes, unlike local governments, have inherent authority to govern; they need not rely on outside legislative power to give them authority to act. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 149 (1982); Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89, 94 (8th Cir. 1956). Therefore, granting tribes greater freedom from outside legislative inference than that granted local schools (which, in legal theory, are mere creations of state legislation) is conceptually justifiable.

Equally important is the practical reality that, in many instances, tribes have long been the primary entity performing the associational role for Native Americans. RUSSEL L. BARSH & JAMES Y. HENDERSON, THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY vii ("Tribalism has always been *the Road*, that is, the heart and spirit of the Indian people."). In contrast, public schools usually have been viewed, at best, as a supplement to primary associations like families. This reality is reflected in the deep attachment many Native Americans form with their tribes. *See infra* notes 159-62 and accompanying text. Thus, constitutional protection for tribes is not only more justifiable, it is also more essential to the proper functioning of the primary association in that society.

108. *See* Garrett v. Board of Educ., 775 F. Supp. 1004, 1014 (E.D. Mich. 1991). After the district court issued a preliminary injunction, the school district backed away from its plan, concluding that the chances of winning the case were so slim that the additional expenditure of funds was not justified. Ron Russell, *All-Male Schools Plans Dropped by Detroit Board*, DETROIT NEWS, Nov. 7, 1991.

That decision, *Garrett v. Board of Education*, focused on the Detroit City School District's plan to open three voluntary all-male academies for boys in preschool through fifth grade. The school district proposed the academies in response to the high dropout, unemployment, and homicide rates of African-American males.[109] The academies' curricula was to be altered to include emphasis on male responsibility, a class entitled "Rites of Passage," and futuristic lessons in preparation for twenty-first century careers.[110] In short, the academies were intended to provide remedial associational help to those who needed it most.

The district court acknowledged that inner city males in Detroit were an "endangered species" and conceded that "the purpose for which the Academies came into being [was] an important one."[111] Nonetheless, the court concluded that this purpose was "insufficient to override the rights of females to equal opportunities" and enjoined the school district from proceeding.[112] Although the school district's failure adequately to establish the link between the absence of females in the classroom and the achievement of its goals[113] was a critical factor in the court's deci-

109. The academies were not limited to "at-risk" males (those who through use of a seven-variable formula were most likely to have one or more of the identified problems). One-third of the student body was to be made up of "high-need" students, one-third of "mid-level" students, and one-third of "low need" students. *Garrett*, 775 F. Supp. at 1006 n.3.

110. *Id.* The school district planned to use an Afrocentric curriculum and to provide mentors, Saturday classes, individualized counseling, extended classroom hours, and student uniforms. *Id*; *see* Sonia R. Jarvis, Brown *and the Afrocentric Curriculum*, 101 YALE L.J. 1285, 1294-95 (1992) (describing Afrocentric curriculum).

111. 775 F. Supp. at 1014.

112. *Id.*

113. Whether such a showing could have been made is not entirely clear. Some experts have concluded, however, that segregation by sex can and does make a difference in a school's ability to teach certain subjects. Increasing evidence that males and females process some information differently and that female students react differently than male students to the traditional classroom setting has led some to advocate sex-segregated math and science classes. Richard N. Ostling, *Is School Unfair to Girls?*, TIME, Feb. 24, 1992, at 62. *See generally* United States v. Virginia, 976 F.2d 890, 898 (4th Cir. 1992) (upholding district court finding that there is a "pedagogical justification for a single-sex education"). Similar reasoning might well justify sex-segregated classes for associational purposes. One informal study in New Orleans found that by fifth grade, nearly all African-American males felt alienated from school (as do many female students in traditional math and science classes). Having an all-male school would "force them to participate in school at every level. You force them to be in the student government. You force them to take part in the photography club. You force them to be in the band and not just wind up on the football team and the baseball team." *MacNeil/Lehrer NewsHour: Separate Equals Better?* (PBS television broadcast, May 1, 1991) (comments of Dwight McKenna) (transcript on file with author).

All-male academies also would allow the school to make adjustments in response to specific inner-city male youth needs, adjustments that are not always feasible or fair in a co-ed setting. Because male children are typically more aggressive than females, co-educational schools find it difficult to meet the needs of both groups. *Id.* (comments of Alvin Poussaint). An all-male school, however, could implement "more recess periods, more activity focus types

sion, the overall tenor of the decision suggests that establishing such a link might not have been enough.[114] More importantly, by adhering to the traditional uniformistic view of governments, the court was overly formalistic and completely failed to consider the associational role of the academies and the societal interest in having that role performed. Application of the associational right outlined above could, therefore, alter the outcome of such a case. It would certainly alter the reasoning.

The district court focused on the ability of all-male academies to solve specific problems (high dropout, unemployment, and homicide rates among African-American males). It then balanced the state's interest in achieving these non-constitutional public policies against the female student's constitutional right of equal protection,[115] using the intermediate scrutiny typically applied to gender-based equal protection challenges to state policies.[116] This approach is clearly the correct one when one challenges *state* statutory policies such as different legal drinking ages for men and women.[117] It may not be appropriate, however, when the governmental decision is a local school board decision to create an association that serves not merely a legitimate police power interest of

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of periods." *Id.* Moreover, all-male schools could respond more directly to the need of young black males, particularly those from single parent households, to form positive peer groups. *Id. See generally* Pamela J. Smith, Comment, *All-Male Black Schools and the Equal Protection Clause: A Step Forward Toward Education*, 66 TUL. L. REV. 2003, 2036-48 (1992) (asserting that the classification in education between African-American males and females is permissible because it is based on real differences between the two groups that warrant different treatment in the education context).

114. Although the court indicated in one portion of the opinion that the school district had failed to establish the necessary substantial relationship between the exclusion of girls and the achievement of the school's purpose, 775 F. Supp. at 1008, it later expressed doubt about the sufficiency of the purpose: "This court views the purpose for which the Academies came into being as an important one. It acknowledges the status of urban males as an 'endangered species.' *The purpose, however, is insufficient to override the rights of females to equal opportunities.*" *Id.* at 1014 (emphasis added).

115. The *Garrett* court did not limit its decision to the constitutional issue. It also found that the academies would likely violate various federal and state statutory provisions. *Id.* at 1008-12. This Article, however, focuses only on the constitutional claim.

116. There is some indication that the district court used something closer to the strict scrutiny standard. While the court at one point stated that the school district would have to show that gender-based discrimination was "substantially related" to the achievement of its goals, it later noted the school district's failure to show how exclusion of females "*is necessary*" to combat the identified problems. *Id.* at 1008 (emphasis added). The requirement that the discrimination be "necessary" to the achievement of the state's purpose is one usually reserved for strict scrutiny. *See, e.g.*, Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 627 (1969) (stating that discrimination in voting rights is valid only if "*necessary* to promote a compelling state interest") (emphasis added); Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (finding durational residency requirement valid only if it is "shown to be *necessary* to promote a *compelling* governmental interest") (emphasis added and in original).

117. Craig v. Boren, 429 U.S. 190, 199-204 (1976).

the state but also provides a constitutionally protected social benefit. When the decision involves the balancing of two opposing constitutional interests, the balance will surely tip more often in favor of the governmental interest than when the balance involves a constitutional right against a non-constitutional right.[118]

Thus, if the associational role of public schools were recognized, a court might adopt an approach similar to that used by the Supreme Court in resolving the conflict between students' First Amendment right of free expression and a school's interest in serving as an educational institution. When such rights conflict, the Court uses a two-step approach.[119] It first determines whether the student's expression arises in an educational context,[120] thereby implicating the school's educational mission.[121] If the answer to that inquiry is affirmative, the Court then applies a rational basis test to determine whether the limitation will be upheld.[122] If, on the other hand, the expression does not involve the school's educational mission, such as when the student's expression merely happens to occur on the school premises, a higher standard of scrutiny is used.[123] School officials are given more leeway in the former

118. While a government does not technically have any constitutional rights under the Bill of Rights or the Fourteenth Amendment, its interest in advancing the constitutional rights of its citizens is something more than a legitimate governmental interest. Thus, if a government infringes on the constitutional rights of some of its citizens when it is seeking to enhance a different constitutional right of another set of its citizens, it is granted more leeway than when it infringes on the same right while attempting to advance merely a legitimate governmental interest. *Compare* Bob Jones Univ. v. United States, 461 U.S. 574, 602-04 (1983) (finding government's compelling interest in eradicating racial discrimination in education—in advancing its citizens equal protection rights—to outweigh school's free exercise right) *with* Wisconsin v. Yoder, 406 U.S. 205, 221-29 (1972) (finding government's legitimate interest in ensuring education of children through compulsory attendance law insufficient to justify infringement on parent's free exercise and associational rights).

119. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 268-73 (1988). Bruce Hafen has more carefully evaluated and explained this two-step inquiry in his writings. *See* Bruce C. Hafen, Hazelwood School District *and the Role of First Amendment Institutions*, 1988 DUKE L.J. 685, 693-94.

120. For example, in *Hazelwood*, the Court found it significant that the student newspaper "was to be part of the educational curriculum and a 'regular classroom activit[y].' " 484 U.S. at 268. The Court also emphasized that the school sponsored the newspaper as "a supervised learning experience for journalism students" and not as a forum for the free exchange of ideas. *Id.* at 270. Similarly, in Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986), the Court noted that the assembly at which the speech occurred "was part of a school-sponsored educational program in self-government." *Id.* at 677.

121. Hafen, *supra* note 119, at 693.

122. *Hazelwood*, 484 U.S. at 270 ("[S]chool officials [are] entitled to regulate the contents of [the newspaper] in any reasonable manner."); *id.* at 273 ("[E]ducators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.").

123. Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 513 (1969) (hold-

situation, in part "to assure that participants learn whatever lessons the activity is designed to teach."[124] Without such leeway, the Court has concluded, "the schools would be unduly constrained from fulfilling their role as 'a principal instrument in awakening the child to cultural values . . . and in helping him to adjust normally to his environment.' "[125]

Recognition of the associational role of public schools could justify the use of a similar two-step process by a court evaluating an equal protection challenge to a school's actions. Initially, the court would have to determine whether the challenged discrimination was implemented to advance the associational role of the school: to transmit the shared ideals and beliefs of the Nation or cultivate civic virtue. If the answer to this inquiry were affirmative, the court would reject the challenge as long as the school could establish a rational connection—rather than a substantial relationship—to the accomplishment of that end. If the challenged discrimination were implemented to achieve some other, non-constitutional purpose, the court would apply a higher level of scrutiny.

While a lower court might be hesitant to alter the equal protection analysis in this manner, recognition of the constitutional nature of the school's interest, when it exists, should cause greater judicial deference to the local board's decision. Moreover, the "substantial relationship" test normally applied in cases of gender discrimination is vague enough to accommodate some leeway in cases involving genuine clashes between equal protection and associational rights.[126]

Again, this is not to suggest that local school boards may discriminate arbitrarily without justification or judicial accountability. It merely means that courts should be more sensitive in recognizing the social benefits of intimate associations and the possibility that intimate governments can perform this role in appropriate circumstances.

Some may object that the example of the all-male academies runs head on into the Court's pronouncement in *Roberts* and *Board of Directors of Rotary International v. Rotary Club* that the State has a "compel-

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ing that public school limitation on student speech is unconstitutional unless the speech "materially disrupts classwork or involves substantial disorder or invasion of the rights of others"). The Court in *Hazelwood* expressly rejected the argument that the higher standard of scrutiny outlined in *Tinker* controlled all school situations in which speech might occur. *Hazelwood*, 484 U.S. at 270, 272-73.

124. *Hazelwood*, 484 U.S. at 271.

125. *Id.* at 272 (quoting Brown v. Board of Educ., 347 U.S. 483, 493 (1954)).

126. *See* Craig v. Boren, 429 U.S. 190, 221 (1976) (Rehnquist, J., dissenting) (criticizing substantial relationship test as "so diaphanous and elastic as to invite subjective judicial preferences or prejudices relating to particular types of legislation, masquerading as judgments whether such legislation is directed at 'important' objectives or, whether the relationship to those objectives is 'substantial' enough").

ling interest" of "the highest order" in eliminating gender-based discrimination.[127] Even if some constitutional deference were granted to public school association, these cases at first glance seem to compel the conclusion that whatever public schools can do in their associational role, they cannot discriminate on the basis of gender.

Careful analysis of *Roberts* and *Rotary*, however, reveals that the Court's language should not be interpreted so broadly.[128] The specific governmental interest recognized as compelling in those two cases was the State's interest in assuring women "equal access . . . to the acquisition of leadership skills and business contacts."[129] That specific interest is not directly impaired by a scheme that permits some male students to have access to all-male schools. Female students still have access to public schools—the schools they currently attend. They are not being deprived of equal access to schools or to leadership skills or business contacts.[130]

Moreover, the *Roberts* and *Rotary* holdings, that the states' compelling interest in eliminating the barriers to equal access outweighed the

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127. Board of Directors of Rotary Int'l v. Rotary Club, 481 U.S. 537, 549 (1987); Roberts v. United States Jaycees, 468 U.S. 609, 624 (1984).

128. Justice O'Connor has noted that judicial balancing of two important interests such as the right of an association to control its membership and the state's goal of ensuring nondiscriminatory access to commercial opportunities requires "sensitive tools." New York State Club Ass'n v. City of New York, 487 U.S. 1, 18 (1988) (O'Connor, J., concurring). Overgeneralized application of broad interests would seem to be rather like using the proverbial cannon to shoot a fly.

129. *Rotary*, 481 U.S. at 549 (citing *Roberts*, 468 U.S. at 626).

130. If anything, the female students' opportunity to develop leadership skills may be enhanced by the scheme. Because there will be fewer male students in the non-experimental schools, female students may not have as much trouble assuming the leadership roles traditionally dominated by male students in public schools. *See* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 738 (1982) (Powell, J., dissenting) (noting that studies showed that women in single-sex colleges "generally . . . speak up more in their classes [and] hold more positions of leadership on campus") (quoting CARNEGIE COMM'N ON HIGHER EDUC., OPPORTUNITIES FOR WOMEN IN HIGHER EDUCATION (1973), *in* KENNETH M. DAVIDSON ET AL., SEX-BASED DISCRIMINATION 814 (1975)).

There is evidence that some inner-city female students face problems related to the lack of positive associations in their lives similar to those of males. *See, e.g.*, Garrett v. Board of Educ., 775 F. Supp. 1004, 1007 (E.D. Mich. 1991) (noting Detroit School District's acknowledgment of an "equally urgent and unique crisis facing . . . female students"); Susan Chira, *Educators Ask if All-Girl Schools Would Make a Difference in Inner Cities*, N.Y. TIMES, Oct. 23, 1991, at B5 (discussing problems of young inner-city females and potential help from all-female schools). If female students would benefit as much from the associational benefits of single-sex schools as would male students, the Equal Protection Clause would seem to require all-female schools if all-male schools are permitted, an issue not faced by the *Garrett* court. 775 F. Supp. at 1006 n.4; *see* United States v. Virginia, 976 F.2d 890, 899-900 (4th Cir. 1992) (holding that while state has a legitimate interest in maintaining a single-sex college for males—the Virginia Military Institute—the Equal Protection Clause required that a similar opportunity be provided to female students because the state had not shown why the benefits of single-sex higher education should be provided only to males).

groups' associational freedom, applied only to the clubs' right of *expressive* association.[131] The Court gave no indication that the same state interest would be sufficient to overcome a valid claim of *intimate* association, and it seems highly unlikely that it would in all cases. If a woman, for example, stated that she would not consider marrying another woman, the chances that the Court would invalidate a state law forbidding gender discrimination in such choices (as improbable as such a law would seem) would appear to be extremely low, if not non-existent.

Some also will assert that the Supreme Court in *Runyon v. McCrary*[132] already expressly rejected efforts to protect discriminatory actions by schools under the rubric of associational freedom. *Runyon* held that the associational rights of *private* schools were not violated by application of a federal statute prohibiting discrimination;[133] this would seem to eliminate any possibility that discrimination by *public* schools would be upheld. This argument fails to survive careful scrutiny, however.

First, *Runyon* involved racial, rather than gender, discrimination.[134] While many continue to advocate the elimination of any distinctions be-

131. *Rotary*, 481 U.S. at 549; *Roberts*, 468 U.S. at 628. The clubs' expressive associational right was not particularly strong in either case. The *Roberts* Court first concluded that the Jaycees had failed to provide sufficient evidence that the admission of women would change the content of the organization's speech, *Roberts*, 468 U.S. at 627-28, and then went on to note that "even if enforcement of the Act causes some *incidental* abridgment of the Jaycees' protected speech" it was justified by the state's compelling interest. *Id.* at 628 (emphasis added). Similarly, the Court in *Rotary* expressed skepticism concerning any adverse impact women members would have on the clubs' expression and then observed that "[e]ven if the . . . Act does work *some slight* infringement on Rotary members' right of expressive association," it was justified by the state's compelling interest. *Rotary*, 481 U.S. at 549 (emphasis added).

132. 427 U.S. 160 (1976).

133. *Id.* at 175-79.

134. Whether the associational interest of the school district would be sufficient to justify racial discrimination is not addressed in this Article. In many situations, it may not be necessary to address that issue because the demographics of many inner-city areas make exclusion of non-African-Americans from local schools a moot issue: Few, if any, such students live in inner-city school districts. *See* Smith, *supra* note 113, at 2014-15 (arguing that all-male African-American schools do not involve racial classifications because "racial separateness in the inner city is a fact"). Given the heightened scrutiny historically afforded racial classifications as opposed to gender classifications, see *infra* notes 136-39 and accompanying text, the test proposed in this Article might have to be adjusted should a school attempt to exclude on the basis of race, rather than gender. The most appropriate adjustment would be to increase the level of certainty required with respect to the need to discriminate to perform an associational role. The school would have to show that the discrimination was implemented to advance the associational role of the school (as it would in the gender context) in order to justify a departure from the traditional strict-scrutiny inquiry applied to racial discrimination. *See supra* notes 120-26 and accompanying text. Instead of requiring only that the proposed discrimination reasonably relate to the associational role of the school, however, the inquiry in a racial context might be whether it was substantially related to that end. This would require the school to show a greater connection between achieving the associational goal and the racial classification than would be required under the proposed test for gender discrimination. *Id.*

tween the two forms of discrimination,[135] the Supreme Court has not yet adopted that position. The widespread acceptance of public schools' dividing physical education and other activities on the basis of gender[136] is evidence that the distinction between the two forms of discrimination is not meaningless in the public school context. Surely, similar divisions based on race would not be tolerated. Indeed, more than twenty years after it unanimously struck down racial segregation in public schools,[137] an equally divided Court affirmed a lower court decision rejecting an equal protection challenge by a woman excluded from an all-male public high school.[138] While it is far from clear that the Court would reach the same result if it directly addressed the issue today, it is clear that American society and the Supreme Court are more willing to accept public school discrimination based on gender than similar differentiations based on race.[139]

Second, the associational claim advanced in *Runyon* was an expressive associational claim.[140] As outlined above,[141] the right of expressive association may not be as absolute as the right of intimate association in some situations. That the former does not protect the school's actions, therefore, is not conclusive evidence that the latter does not.

Furthermore, the segregation that occurred in *Runyon* purportedly was intended to send the message "that racial segregation is desirable."[142] The purpose of the all-male academies is not to send some message about the desirability of same-sex education, but to provide a

135. *See, e.g.*, Christine Kirwin Krackeler, Comment, *Gender-Based Discrimination and the Supreme Court: A Time for Strict Scrutiny*, 47 ALB. L. REV. 908, 939-44 (1983).

136. *See, e.g.*, Clark v. Arizona Interscholastic Ass'n, 695 F.2d 1126, 1131 (9th Cir. 1982) (rejecting male student's constitutional challenge to all-female volleyball team), *cert. denied*, 464 U.S. 818 (1983); Petrie v. Illinois High Sch. Ass'n, 75 Ill. App. 3d 980, 990-92, 394 N.E.2d 855, 863-64 (1979) (rejecting similar challenge to all-female volleyball team when no male team is available); B.C. v. Board of Educ., 220 N.J. Super. 214, 221-28, 531 A.2d 1059, 1063-67 (App. Div. 1987) (rejecting similar challenge to all-female field hockey team).

137. Brown v. Board of Educ., 347 U.S. 483, 495 (1954).

138. Vorchheimer v. School Dist., 430 U.S. 703 (1977) (mem.), *aff'g by an equally divided Court* 532 F.2d 880 (3d Cir. 1976). Justice Rehnquist did not participate in the decision.

139. *See* Caren Dubnoff, *Does Gender Equality Always Imply Gender Blindness? The Status of Single-Sex Education for Women*, 86 W. VA. L. REV. 295, 306 (1983-84) ("The position with respect to racial discrimination in education is, in short, clear. The same cannot be said with respect to single-sex education. Neither Congress nor the Court has taken a consistent position on this question.").

140. Because *Runyon* antedated *Roberts*, the Court did not specifically state that the defendants were relying on a right of expressive, rather than intimate, association. The parents' claim that application of the statute interfered with their ability to "promote the belief that racial segregation is desirable," Runyon v. McCrary, 427 U.S. 160, 176 (1976), seems to fit into the expressive category, however.

141. *See supra* note 131 and accompanying text.

142. *Runyon*, 427 U.S. at 176.

disadvantaged group with a positive mediating structure currently unavailable to it. The nature of the end sought to be achieved clearly makes a difference when determining the constitutionality of the means employed.[143]

Finally, the associational claim in *Runyon* failed as much for lack of proof as for lack of constitutional coherence. The school was unable to show that integration would in any way interfere with its ability to convey its desired message.[144] The inability of a claimant to prove that application of a statute interferes with the exercise of his constitutional rights does not preclude another claimant from making a similar claim upon a different and adequate showing. The connection between the exclusion of females and the ability of the schools to achieve their goal of providing students with a positive associational experience may not be incontrovertible, but it is far from insupportable.[145] Those wanting to obtain the protection would have to make the requisite showing, but *Runyon* is not an insurmountable barrier to their doing so. Thus, recognition of the associational role of public schools would result in greater flexibility for school administrators to structure the make-up of the class in order to carry out an associational function.

Finally, because the associational role of public schools requires them to transmit shared values and traditions, some may object to judicial deference to their performance of that role on the grounds that public schools should not openly engage in the teaching of any values, not even those of civic virtue.[146] While there may be almost uniform national support for teaching such things as responsibility, respect for others, and honesty, application of these concepts to specific situations

143. For example, discrimination on the basis of gender would clearly be impermissible if it is effectuated solely to send the message that women are inferior. Discrimination on the same basis is permissible to achieve other, more substantial ends, however. *See, e.g.*, Rostker v. Goldberg, 453 U.S. 57, 70 (1981) (rejecting constitutional challenge to Act requiring draft registration for males but not females in part because the "Government's interest in raising and supporting armies is an 'important governmental interest' ").

144. In language that could be construed as rendering its prior discussion of the balance between associational rights and the right to be free from discrimination dictum, the *Runyon* Court observed: "In any event, as the Court of Appeals noted, 'there is no showing that discontinuance of [the] discriminatory admission practices would inhibit in any way the teaching in these schools of any ideas or dogma.' " 427 U.S. at 176 (quoting Runyon v. McCrary, 515 F.2d 1082, 1087 (4th Cir. 1975)).

145. *See supra* note 113. Indeed, one commentator has argued that the gender discrimination contemplated by all-male schools can be justified under the current intermediate-scrutiny test traditionally applied to gender discrimination. Smith, *supra* note 113, at 2028-48.

146. Others have suggested that schools teach the kind of civic values found in the Constitution and Declaration of Independence, such as honesty, responsibility, equality, and the rule of law. Jim Castelli, *Morality Without Theology: How to Teach Values in Public Schools*, CRISIS, Sept. 1990, at 37, 39.

will result in strikingly different viewpoints.[147] Some may assert that, in the absence of consensus, public schools should refrain from engaging in the debate. National consensus on the exact application of the concepts of civic virtue to specific situations is not essential to the legitimacy of teaching the general principles in public schools, however. Local control over the specific curriculum content exists in large part to allow experimentation and diversity. Local authorities, including individual teachers, are in the best position to determine the exact manner in which students can best comprehend and internalize the general concepts, as well as the settings in which they are best taught. If national consensus exists that the general concepts of responsibility, tolerance, and unselfishness are desirable and essential to the perpetuation of democratic rule, nothing more is required. If national consensus about such generalities cannot be achieved, one must wonder whether a true nation exists.

Of course, all-male public schools and education in civic virtues are not a panacea for the multitude of problems facing today's inner-city African-American males; indeed, they may not even be the best answer. It is entirely possible that the best answer will vary from city to city and school to school. Fortunately, as noted above, the concept of local control over school matters is so well enshrined in American legal thought[148] that there is some room for experimentation. Unfortunately, the concept of public schools as associations is so novel to modern American legal thinking that constitutional rules constraining the actions of the federal and state government are often blindly applied to public schools without any consideration of the associational roles of such institutions. The potentially beneficial uses of such school associations are, therefore, generally ignored by courts and other law-making institutions, and the contribution of public schools to the resolution of problems facing inner-city African-Americans remains almost nil.

Every American, especially those on the fringe of society, should have the opportunity to reap the benefits of membership in a positive

147. Responding to Castelli's article, *see id.*, the Reverend Charles Fink articulated this position:

> Yes, we will all resonate to words like honesty, truthfulness, responsibility, self-respect, respect for others, etc., but when it comes time to apply these civic virtues to concrete cases, I think it will be found that [we] disagree sharply on what responsibility means in terms of sexual conduct, or what respect for others entails as it relates to abortion and euthanasia, or what self-respect implies when it comes to smoking pot.

Ben Wildavsky, *Can You Not Teach Morality in Public Schools*, 2 RESPONSIVE COMMUNITY 46, 49 (1991-92) (quoting Charles Fink).

148. Courts have traditionally reserved decisions concerning the "daily operation of school systems" to the states and to local school boards. Epperson v. Arkansas, 393 U.S. 97, 104 (1968).

intimate association. For a variety of cultural, economic, social, and other reasons, the traditional intimate associations on which American society has depended are unavailable to many of today's young African-American males. Too often, the only intimate association open to them is the neighborhood gang.[149] Although government may not be constitutionally compelled to offer some meaningful, positive alternative, courts should be more cautious in concluding that public schools are constitutionally precluded from acting in an associational role merely because they can be labelled as governmental actors. Such overly formalistic reasoning deprives young African-American males of the benefits of the only positive intimate association they may ever encounter. It also precludes society from reaping the benefits of having those individuals as productive, caring members of society, leaving instead angry individuals who are so alienated from society and its values that acts wholly inimical to that society, such as riots and destruction, seem natural.

## IV. FOSTERING DIVERSITY: TRIBAL GOVERNMENTS AS BUFFERS BETWEEN THE INDIVIDUAL AND THE STATE

> I believe that the Indian nations of North American are doomed to perish. . . . The Indians had only the two alternatives of war or civilization; in other words, they must either have destroyed the Europeans or become their equals.[150]

Most Native American youth, like most young African-American males, want to belong to a larger society. For Native American youth, however, being mainstreamed into American society carries a price not exacted of individuals from other ethnic groups in America. Native Americans who wholly integrate into American society not only lessen their individual ties to a different culture, they also contribute to the destruction of that culture. The cultural roots of other ethnic Americans can be preserved by those back in the homeland without their participa-

149. One former gang member explained the connection between the breakdown of families and schools, and the increase in gang membership, in the following manner:

> [T]he majority [of gang members] are just misguided kids looking for attention, trying to fill the empty spaces . . . . As I look around for alternatives, there really aren't that many for our youth. There used to be a time when kids came from two-parent homes, had a school that gave them personal attention, and had activities that kept them out of trouble. A lot of our youth now come from single-parent homes, and those who do not come from a family of two-working parents. Schools have very little time for the gang-involved youth, and would rather kick the youth out of school . . . than solve the youth's problem.

Marianne Diaz-Parton, *Prevention is the Key, in* INNER CITY VIOLENCE, *supra* note 76, at 53 (excerpted from testimony before the House Select Committee on Children, Youth, and Families, March 9, 1988).

150. 1 DE TOCQUEVILLE, *supra* note 20, at 406.

tion, but for indigenous Americans "[t]here is no 'old world' homeland where the culture remains alive."[151] If Native American culture is to be kept alive, Native Americans—who daily face assimilationist pressures to blend into the American melting pot—must keep it alive. Efforts by Native Americans to become mainstream Americans, therefore, involve an element not present in the same decision by Americans of other ethnic backgrounds. The resulting additional strain placed on Native American youth facing these decisions often manifests itself in the form of the self-destructive behavior described in the first section of this Article.[152]

A natural response to this dilemma is to eliminate one of the options. Native Americans, one might postulate, should either be left completely alone to define and perpetuate their culture independent of outside pressure or be forced to assimilate completely into mainstream American society. This country throughout the past two hundred years has adopted both extremes without much success. Indeed, one of the most striking characteristics of formal[153] federal policy toward Native Americans since the Revolutionary War has been its inconsistency. Massive swings between assimilationist and separationist attitudes, goals, and means have been the norm.[154] Unfortunately, the other most striking characteristic of formal federal Native American policy has been its lack of success.

The inconsistency in federal policy and its abysmal failure have been largely the result of the "plenary power" doctrine under which Congress has complete authority to legislate with respect to Native American tribes.[155] While some constitutional protection has been extended to in-

151. Williamson B. Chang, *The "Wasteland" in the Western Exploitation of "Race" and the Environment*, U. COLO. L. REV. 849, 865 (1992). Although Professor Chang was referring to Native Hawaiians, his point applies equally to those Native Americans commonly referred to as American Indians.

152. *See supra* notes 9-11 and accompanying text.

153. "Formal" federal policy refers to the written formal position adopted by the federal government with respect to Native American tribes. Those actually implementing the policy, of course, do not always adhere to these formal policies. *See, e.g.*, Philip S. Deloria, *The Era of Indian Self-Determination: An Overview*, *in* INDIAN SELF-RULE: FIRST-HAND ACCOUNTS OF INDIAN-WHITE RELATIONS FROM ROOSEVELT TO REAGAN 191, 192 (Kenneth R. Philp ed., 1985) ("Termination is out of fashion and dead as an announced policy, but termination with a small 't' is not. For tactical purposes other names might be used, but the long range goal will not change.").

154. As one scholar has observed: "If there is one eternal verity which emerges from Indian law, history, and policy, it is that, like little Alice [in Wonderland], we are never certain of the 'Rules of Battle.'... Consistently, the rules have changed, often for reasons that have little to do with Indian concerns or needs." Rennard Strickland, *The Absurd Ballet of American Indian Policy or American Indian Struggling With Ape on Tropical Landscape: An Afterword*, 31 ME. L. REV. 213, 218 (1979).

155. *See, e.g.*, Escondido Mut. Water Co. v. La Jolla Band of Mission Indians, 466 U.S.

dividual Native Americans, tribes as tribes have been left to the often less-than-benevolent whims of Congress.[156] The result has been a situation in which Native American defeats in the policy arena have been frequent, with tribal victories marked by an asterisk because they are subject to future legislative override. The uncertainty inherent in such a state of affairs has prevented the federal government from adopting a stable, long-term policy toward Native Americans. It also has hindered tribal planning and development. More importantly, it has left many individual Native Americans with a profound sense of vulnerability concerning their role in society.

If constitutional protection could be provided to the tribes, the massive policy swings could be eliminated, and Native Americans could go about the delicate task of determining their individual and collective future with greater confidence and efficacy. The right of intimate association, based on a functional analysis, could provide that constitutional protection.[157]

Conceptualizing the tribe as an intimate association is not difficult at

765, 788 n.30 (1984) ("[A]ll aspects of Indian sovereignty are subject to defeasance by Congress."); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978) ("Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess."). *See generally* Nell Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 199-236 (1984) (describing history of congressional power to regulate Native American affairs).

156. *See* Kevin J Worthen, *Sword or Shield: The Past and Future Impact of Western Legal Thought on American Indian Sovereignty*, 104 HARV. L. REV. 1372, 1384-85 (1991) (book review).

157. I have suggested elsewhere that tribes might profitably assert the First Amendment right of expressive association to protect themselves against certain kinds of federal intrusions into tribal affairs. *Id.* at 1384-92. At the same time I expressed some pessimism about tribal use of the related constitutional protection for intimate associations. *Id.* at 1386. Further analysis has convinced me that many tribes could qualify for intimate association protection, especially under a functional analysis that focuses on the role of associations in preserving cultural diversity. When intimate associational protection is provided to associations that perform this role, it overlaps substantially with the right of expressive association, which serves, in part, to preserve "political and cultural diversity." Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984); *see* Board of Directors of Rotary Int'l v. Rotary Club, 481 U.S. 537, 544 (1987) ("In many cases, government interference with one form of protected association will also burden the other form of association."). Some may object that the constitutional protection afforded private intimate associations should not be extended to tribes because tribes possess general governmental authority over their members. As the Supreme Court has observed, tribes "are a good deal more than 'private voluntary organizations.'" United States v. Mazurie, 419 U.S. 544, 557 (1975). At the same time, however, tribes are much more intimate and have much more of a private face than do the state or federal governments. Tribes, therefore, are "unique aggregations," *id.*, entitled to unique protection. Although granting constitutional protection to government associations carries risks, *see infra* notes 215-16 and accompanying text, the fact that tribes are more than mere private organizations should not automatically render them ineligible for constitutional protection. *See infra* notes 217-33 and accompanying text.

a functional level since many tribes have developed and continue to exist because of common ancestry and deep-seated common beliefs.[158] The intimate nature of the relationship between the tribe and its members is not readily appreciated by many non-Native Americans, however. The tribe is "not an association of interest but a form of consciousness which faithfully reflects the experience of Indians."[159] As scholars have observed, membership in a tribe involves "a warm, deep and lasting communal bond among all things in nature in a common vision of their proper relationship. . . . Among members of the community it assumes the form of an interpersonal spiritual communion which has never been and may never be destroyed by outside forces."[160]

Thus, membership in a tribe is much different from citizenship in a state. When one proclaims oneself a Navajo, Hopi, or Sioux, it means more than when one identifies oneself as a Virginian or Arizonan. Membership in a tribe usually implies a distinct point of view on basic matters that is shared with other members of the tribe. The existence of an alternate world view that accompanies tribal membership is underscored by tribal members' frequent communication with one another in their native language. The use of this native language "determines not only the way [Native Americans] build sentences but also the way [they] view nature and break up the kaleidoscope of experience into objects and entities about which to make sentences."[161] Thus, the linguistic bond that generally accompanies tribal membership tends to "foster the continuity of a highly uniform personality structure" among tribal members.[162] For this and other reasons, the relationship between tribal members is much more akin to that found in intimate associations than that between fellow citizens of other governments. Conceptualizing the tribe as an intimate association is, accordingly, much easier than for most other governmental relationships.

More importantly from a functional standpoint, the unique nature of the relationship among tribal members and the unique setting of tribes

158. Worthen, *supra* note 44, at 1283-84.

159. BARSH & HENDERSON, *supra* note 107, at viii.

160. *Id.* at vii.

161. John W. Ragsdale, Jr., *The Institutions, Laws and Values of the Hopi Indians: A Stable State Society*, 55 UMKC L. REV. 335, 360 (1987) (quoting LAURA THOMPSON, CULTURE IN CRISIS: A STUDY OF THE HOPI INDIANS 153 (1950)). For example, "The Hopi use some verbs without subjects which, according to the linguist Benjamin Whorf, facilitates a holistic view of the universe and a superior comprehension of states of being." *Id.* at 361 (citing THOMPSON, *supra*, at 155).

162. EDWARD P. DOZIER, THE PUEBLO INDIANS OF NORTH AMERICA 27 (1970). Dozier attributes "the persistence of a set of essentially indigenous values and moral concepts" in part to "the continuity of the native languages." *Id.*

in American society provide Native American tribes with the ability to perform the second of the key societal functions of intimate associations: "foster[ing] diversity and act[ing] as critical buffers between the individual and the power of the State."[163]

Native American tribes have proved themselves remarkably able to preserve their distinctive culture despite numerous assimilative forces. The diversity of the various tribal cultures and the impact of each culture on its membership is demonstrated by continued adherence to non-Anglo views on many basic matters.[164] Distinctive legal concepts still used by many contemporary tribes to resolve internal disputes also evidence the tribes' ability to foster diverse culture in the face of assimilative forces. The Navajo Supreme Court has relied increasingly on traditional Navajo legal principles, rather than Anglo-American common law in reaching its decisions,[165] with results occasionally deviating from those that would have occurred under traditional Anglo-American law. For example, the Navajo Supreme Court has ruled that because "[p]rivate ownership of land, as by fee simple in the Anglo legal system is unknown in the Navajo Nation," ownership always remains in the tribe[166] and title cannot be acquired by adverse possession or prescription.[167] Tribes, therefore, tra-

163. Roberts v. United States Jaycees, 468 U.S. 609, 619 (1984).

164. For example, while Western industrial societies conceive of time as a "series of identical units moving inexorably in the same direction" and therefore place a "high value on saving time, and on speed and efficiency," the Hopi view time as a "rhythmic, cyclical matrix for cosmic processes" and "distinguish less among past, present, and future than between the manifest [which includes all that has been, including the past, and is accessible to the present] and the manifesting [which includes both the mental (and therefore much of the present), as well as the future]." Ragsdale, *supra* note 161, at 344-45 (citing JOSEPH BROWN, THE SPIRITUAL LEGACY OF THE AMERICAN INDIAN 118-19 (1982); BENJAMIN WHORF, LANGUAGE, THOUGHT AND REALITY 59-60 (1956)). The impact of this alternate view of time on the Hopi way of doing things is indeed profound. As one scholar has observed, because of their alternative concept of time, "The Hopi have been little concerned with speed and efficiency," *id.* at 345, in marked contrast to contemporary American society.

165. *See, e.g.*, Hood v. Bordy, 18 Indian L. Rep. 6061, 6062-63 (Navajo Sup. Ct. 1991); Bennett v. Navajo Bd. of Election Supervisors, 18 Indian L. Rep. 6009, 6011-12 (Navajo Sup. Ct. 1990); *In re* Estate of Wauneka, Sr., 13 Indian L. Rep. 6049, 6050-51 (Navajo Sup. Ct. 1986); Estate of Benally, 5 Navajo Rptr. 174, 179 (1987); *In re* Estate of Belone, 5 Navajo Rptr. 161, 165 (1987). Indeed, the Navajo Tribal Code was amended in 1985 to require tribal courts to apply the law or customs of the Navajo Nation that are not prohibited by federal law. NAVAJO TRIB. CODE tit. 7, § 204(a) (Cum. Supp. 1984-85). See Tom Tso, *The Process of Decision Making in Tribal Courts*, 31 ARIZ. L. REV. 225, 229-34 (1989) for a general discussion of the law applied in Navajo courts.

166. *Hood*, 18 Indian L. Rep. at 6063 (citing *Benally*, 5 Navajo Rptr. at 179).

167. Yazzie v. Jumbo, 5 Navajo Rptr. 75, 77 (1986). A tribal member can, however, acquire a possessory interest in the use and occupancy of land traditionally inhabited by his ancestors under the concept of "customary use ownership." *Hood*, 18 Indian L. Rep. at 6063 (citing *Wauneka Sr.*, 13 Indian L. Rep. at 6050 (Navajo Sup. Ct. 1986)). Customary use ownership also extends to improvements made on the land. *Id.*

ditionally have kept alive their diverse cultures despite continued assimilative pressures.

Of course, there must be some limit on the extent to which an intimate association is empowered to foster diversity if its members are to remain part of the larger society. Tribes can perform the role of mediating institution meaningfully only if they in turn have some connection to the larger society. If the tribe has complete, independent governmental authority over the lives of its members, it becomes the State, rather than a critical buffer between the individual and the power of the State. In this respect, the tribes' current status as "domestic dependent nations"[168] is conducive to their role as constitutionally protected intimate associations.[169] At the same time, because of its trust relationship with the tribes and its direct contribution to many of the conditions creating the current problems, the federal government should furnish adequate resources and other incentives to provide the tribes enough of a permanent stake in the present system to foster the necessary connection between the mediating institution and the national government.

It seems clear, in any event, that under appropriate circumstances Native American tribal governments can and have performed the diversity-fostering role of intimate associations without severing their connection to the larger American society. Tribes, therefore, can satisfy the functional test of intimate association status; furthermore, many tribes could also meet the more rigid four-factor test of *Roberts*.

For example, tribes are highly selective in their choice of tribal members. Membership generally is granted only to those related by

168. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831). The tribes' status as domestic dependent nations has been invoked to justify various federal common-law limits on their authority, including limitations on their ability to alienate tribal land, Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 574 (1823), enter into direct diplomatic or commercial relations with foreign nations, *Cherokee Nation*, 30 U.S. (5 Pet.) at 17, and exercise criminal and, to some extent, civil jurisdiction over non-Native Americans. *See* Montana v. United States, 450 U.S. 544, 559 (1981) (holding tribe lacks authority to prohibit non-Native American hunting and fishing on reservation lands owned by non-Native Americans); Oliphant v. Suquamish Indian Tribe 435 U.S. 191, 206-12 (1978) (holding that tribal court lacks jurisdiction over criminal trial of non-Native American).

169. Thus, in order to qualify for constitutional protection as intimate associations, tribes might have to recognize the superior sovereignty of the federal government in some situations, such as federal court review of some tribal actions with, of course, appropriate deference to tribal interests. *See* Worthen, *supra* note 44, at 1299 n.130, 1302-04. While many tribal advocates undoubtedly will balk at the suggestion that federal superiority be recognized explicitly, their concern is more formalistic than realistic, since the superior authority of the federal government is already well recognized legally. Moreover, under the present plenary power scheme, any more benign view would be subject to the shifting winds of popular opinion, which do not always blow in the tribes' favor.

blood to other tribal members.[170] The tribal relationship is closely akin to the family relationship in this respect. One can become part of the association only by being born into it.

Similarly, the tribal relationship satisfies the *Roberts* purpose requirement. Unlike many other American governments, a tribe does not exist solely to provide its citizens with tangible public services like paved streets or police protection. Tribes exist, in large part, to perpetuate a way of life. Mainstream American society long has recognized this fact, which explains why past efforts to eliminate Native American culture and assimilate Native Americans have been aimed directly at the tribes themselves. For example, the 1879 General Allotment Act,[171] the first formal federal effort to assimilate Native Americans, was intended, in the words of Theodore Roosevelt, to be "a mighty pulverizing engine to break up the tribal mass."[172] The most recent assimilation effort came in the form of legislation that completely eliminated or "terminated" numerous tribes.[173] These efforts impliedly testify to the powerful role of the tribe in preserving Native American culture and thought. Congress' decision to omit the "Establishment Clause" from the Indian Civil Rights Act of 1967, which statutorily imposed on tribal governments many of the same limitations imposed on the federal and state governments by the Bill of Rights and the Fourteenth Amendment,[174] similarly implies a recognition that one of the principal functions of many tribal governments is to preserve and administer the tribal religion as an essential part of tribal culture,[175] a function clearly satisfying the *Roberts* pur-

170. Although the blood quantum requirement for membership varies from tribe to tribe (ranging from 1/16 to 1/2), most federally-recognized tribes have some blood quantum requirement. *See* C. MATTHEW SNIPP, AMERICAN INDIANS: THE FIRST OF THIS LAND 361-65 (App. 4) (1989). A small number of tribes, however, "permit any descendant of a tribal member to be enrolled regardless of blood quantum." FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 23 (1982).

171. Ch. 119, 24 Stat. 388 (codified as amended in scattered sections of 25 U.S.C.). The Act was designed to allot parcels of land to individual tribal members, rather than the tribe, with surplus lands then being made available to non-Native Americans. *See generally* CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 19-20 (1987) (describing policy of the Allotment Act).

172. A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1914, at 6674 (James D. Richardson ed., 1896-1917).

173. During the "Termination Era" of the 1950s, 109 tribes were terminated. Charles F. Wilkinson & Eric R. Biggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN L. REV. 139, 151 (1977). Termination of a tribe involved ending the federal trusteeship over the tribe, distributing tribal assets to individual tribal members, and, in some cases, disbanding the tribe. Robert N. Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 STAN. L. REV. 979, 1025 (1981).

174. Pub. L. No. 90-284, 82 Stat. 77 (1968) (codified at 25 U.S.C. §§ 1301-1303 (1988)).

175. The initial version of the statute would have imposed the Establishment Clause restrictions on all tribes. Witnesses at committee hearings pointed out that "the Indian political

pose criterion.

Many tribes also exclude non-members from important aspects of the association, particularly those dealing with the preservation and perpetuation of tribal culture. While the degree to which outsiders are excluded varies from tribe to tribe[176] and has lessened to some extent in almost all modern tribes,[177] some tribes continue to exclude non-members from important tribal ceremonies. For example, as of 1970, one anthropologist could assert that no non-Native had ever been permitted to see the sacred ceremonial rites of the Rio Grande Pueblos[178] and that information about sacred religious customs and practices among all the Pueblos was "closely guarded."[179] Likewise, access to participation in and information concerning the sweat lodge ceremonies of the Sioux and other tribes is also generally quite limited.[180] Thus, many tribes continue

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system in many tribes is deeply rooted in their religious system" and that imposition of these restrictions would, therefore, "result in the probable destruction of tribal government in some cases." *Constitutional Rights of the American Indian, Hearings on S. 961, S. 962, S. 964, S. 965, S. 966, S. 967, S. 968, and S.J. Res. 40 Before the Subcomm. on Constitutional Rights of the Senate Judiciary Comm.*, 89th Cong., 1st Sess. 21 (1965) (statement of Frank J. Barry); *see also id.* at 221 (statement of Lawrence Speiser) ("The establishment clause . . . would create problems because many of the Indian tribes have a combined theocratic and governmental structure and many of the things they now do would be barred by the [F]irst [A]mendment."). Responding to these concerns, the committee changed the bill to omit the provision. Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 HARV. L. REV. 1343, 1359 (1969).

176. The Navajo Tribe, for example, generally has not been as secretive in its religious ceremonies as has its Pueblo neighbors, such as the Hopi, as evidenced by detailed, first-hand accounts of the most sacred of Navajo rites reported by non-Native scholars. *See* CLYDE KLUCKHOHN & DOROTHEA LEIGHTON, THE NAVAHO 207-23 (1974).

177. Even when ceremonies are opened up to the public, a degree of exclusion often remains. Thus, even though "almost every Hopi ceremony has been reported with painstaking accuracy by a host of professional observers," the true "meanings and functions of the ceremonies themselves have remained virtually unknown," due in part to "traditional Hopi secrecy." FRANK WATERS, BOOK OF THE HOPI xiii (1963). Similarly, although ceremonial dances among the Pueblo Tribes have become lucrative tourist attractions in recent years, the paying public actually is seeing "ceremonial celebrations," held away from Native American communities. DOZIER, *supra* note 162, at 11. While authentic, these public presentations reveal only secular and recreational dances to outsiders. *Id.*

178. DOZIER, *supra* note 162, at 182.

179. *Id.* at 5; *see also* Ragsdale, *supra* note 161, at 369 (stating that tribal initiation rites for young males "are among the most closely guarded of all Hopi secrets, and [that] the ceremonies cannot be observed by non-Hopi").

180. The traditionally private nature of ceremonies such as the sweat lodge is illustrated by the criticisms aimed at recent efforts to open up sweat lodge ceremonies to non-Native Americans willing to pay a sufficient fee for the privilege. *See* Paige St. John, *Native Americans Say They Are Being Edged Out of Indian Art*, DETROIT NEWS, April 12, 1992, at 18 ("One non-Indian religious group charged $1,200 for weekend Indian sweat lodge workshops. And an Arizona healer served caviar, wine and cheese after his $250-a-head sweat ceremony."). Traditional Native Americans have accused those who have liberalized the admission criteria to such ceremonies of " 'bastardizing our spirituality.' " Dirk Johnson, *Paper Gives a Voice to*

to exclude outsiders from critical aspects of their relationship with tribal members.

The *Roberts* size factor is the most difficult to meet for many tribes. The membership of some tribes, such as the Navajo and Sioux, measures in the tens of thousands.[181] Such large groups hardly seem conducive to intimacy, even under the most liberal meaning of the term. The concept of intimacy, however, may be viewed differently by Native Americans from large tribes, who might consider their relationship with other tribal members to be intimate notwithstanding the size of the tribal population.[182] This is particularly true if the focus shifts to the tribal clan. Just as individual classes are the functional units of the public school, the clan is often the fundamental grouping unit of tribes.[183] Members of these clans think of each other as relatives,[184] even though they may not be

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*Plains Indians*, N.Y. TIMES, Sept. 19, 1991, at A20 (quoting Tim Giago, the Sioux publisher of the Lakota Times Newspaper). Others have characterized such efforts as being "akin to inviting non-Christians to dabble in sacred Christian rituals—to hold Communion services or 'play with the Eucharist.'" *Indian Religions Drawing Increased Interest*, L.A. TIMES, Nov. 23, 1991, at F18 (quoting Reverend Jon Magnuson).

181. The Bureau of Indian Affairs estimated in 1985 that the population (both on and off the reservation) of the Navajo Tribe was 166,000, the population of the Pine Ridge Sioux Tribe was 18,191, and the population of the Rosebud Sioux Tribe was 11,685. DAVID H. GETCHES & CHARLES F. WILKINSON, CASES AND MATERIALS ON FEDERAL INDIAN LAW 6 (2d ed. 1986) (citing BUREAU OF INDIAN AFFAIRS, LOCAL ESTIMATES OF RESIDENT INDIAN POPULATION AND LABOR FORCE STATISTICS (1985)). In 1980, more than 60 reservations contained in excess of 1,000 Native American residents. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, AMERICAN INDIAN AREAS AND ALASKA NATIVE VILLAGES: 1980 SUPPLEMENTARY REPORT 35 (1980).

182. Worthen, *supra* note 156, at 1386 n.62.

183. *See* ARRELL M. GIBSON, THE AMERICAN INDIAN: PREHISTORY TO THE PRESENT 54 (noting that in "elaborately organized, complex" tribes "families clustered into clans"); Ragsdale, *supra* note 161, at 363 ("The clan is the fundamental grouping in Pueblo societies, including that of the Hopi . . . ."); ALVIN M. JOSEPHY, JR., THE INDIAN HERITAGE OF AMERICA 24 (1973) (noting that the "social organization of many American Indians was based on family and clan units" and that "[c]lan relationships and activities were usually important parts of a group's daily existence").

The importance of the clan has diminished somewhat among some contemporary tribes. *See, e.g.*, KLUCKHOHN & LEIGHTON, *supra* note 176, at 112-13 (noting that while the clan in the past was "an important agency of social control . . . [g]overnment imposition of a law-and-order organization based on white patterns has tended to destroy this aspect of the native social system"). Even among these tribes, however, clan membership continues to be a critical unifying concept. *Id.* at 123. Moreover, recent efforts have been made to strengthen the significance of the clan. *See* REGINA H. LYNCH, A HISTORY OF NAVAJO CLANS vi (1987) (stating that the goal of book produced by the Navajo Curriculum Center of the Rough Rock School Board is to "instill the values of Navajo history, culture, kinship and clanship" in Navajo children).

184. Thus, intermarriage among clan members has traditionally been viewed as incest among both the Hopi and Navajo. RICHARD B. BRANDT, HOPI ETHICS: A THEORETICAL ANALYSIS 207 (1974); KLUCKHOHN & LEIGHTON, *supra* note 176, at 112. This limitation on marriage has apparently lessened somewhat in modern times for some Hopi. *See* SHUICHI

biologically linked in a strict sense.[185] These clans are numerous[186] and therefore substantially smaller than the tribe itself,[187] but their vitality depends in large degree on the continued existence of the tribe, much as a class is functionally dependent on the existence of a school. When the focus is shifted to the clan, satisfying the *Roberts* size criterion becomes much less problematic for many tribes.

In any event, failure to meet the size factor is not necessarily fatal to an association seeking constitutional protection.[188] Indeed, the majority

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NAGATA, MODERN TRANSFORMATIONS OF MOENKOPI PUEBLO 235-36 (1970) (stating that while clans still have social significance in marriage decisions, intraclan marriage is not considered tantamount to incest and no criminal or religious sanctions follow such a union). *But see* DOZIER, *supra* note 162, at 140 (stating that among Hopi and other Western Pueblos, "the rule that forbids marriage with a member of one's own clan is rarely violated").

185. *See* DOZIER, *supra* note 162, at 213 (noting that among Pueblo Indians, including the Hopi, "[k]nowledge of actual consanguineal (blood) ties are unknown—the basis of affiliation is a common clan name"); KLUCKHOHN & LEIGHTON, *supra* note 176, at 111 (noting that Navajos do not limit their relatives along strictly biological lines, but include all members of their clan).

186. Among the Navajo, "[t]here are, or have been, sixty or more . . . clans." KLUCKHOHN & LEIGHTON, *supra* note 176, at 111. The number of clans in a tribe typically varies with the population. "Tribes with small populations had perhaps seven, the more populous ones twelve to twenty or more." GIBSON, *supra* note 183, at 54; *see, e.g.*, Edmund J. Ladd, *Zuni Social and Political Organization*, *in* 9 SMITHSONIAN INSTITUTION, HANDBOOK OF NORTH AMERICAN INDIANS: SOUTHWEST 482, 485 (Alfonso Ortiz ed., 1979) (14 clans among the Zuni Pueblo).

187. For example, among the Hopi, the populations of two clans in one major village in 1944 numbered only 10 and 23. John C. Connelly, *Hopi Social Organization*, *in* SMITHSONIAN INSTITUTION, *supra* note 186, at 539, 544. Clan members among the Hopi tend to shift allegiances to compensate for loss of numbers. *Id.*

188. The Court has never faced a situation in which an organization satisfied all criteria except the size criterion. In *Roberts*, the Court held that the local chapters of the Jaycees did not qualify as intimate associations because they failed to meet three of the four critical factors. Local chapters were "neither small nor selective," and "much of the activity central to the formation and maintenance of the associations involves the participation of strangers to that relationship." Roberts v. United States Jaycees, 468 U.S. 609, 621 (1984).

The clubs in *Rotary Club* also failed to meet three of the criteria, although a different three. Some Rotary Clubs had more than 900 members, with "no upper limit on the membership"; the purpose of the club was to "undertake a variety of service projects, . . . to raise the standards of the members' businesses and professions, and to improve international relations"; and, "[m]any of the . . . Clubs' central activities are carried on in the presence of strangers." Board of Directors of Rotary Int'l v. Rotary Club, 481 U.S. 537, 546-47 (1987).

The facial challenge in *New York State Club Ass'n* was rejected because the clubs failed to meet three criteria: (1) the clubs had more than 400 members; (2) one of their purposes was to provide "regular meal service" and an atmosphere in which business deals and personal contact valuable for business purposes could be made, and (3) strangers regularly participated in the meetings and had other roles to play in the ordinary existence of the clubs. New York State Club Ass'n v. City of New York, 487 U.S. 1, 12 (1988).

In its other two post-*Roberts* decisions, the Court used a much more functionalistic (and conclusory) approach, focusing on the ability of the organizations to perform the traditional role of intimate associations, rather than on their ability to fit within the four-factor test. *See,*

and concurring opinions in *New York State Club Ass'n v. City of New York* indicated that an organization with over 400 members could qualify for constitutional protection in appropriate situations.[189] Thus, more populous tribes might satisfy the four-factor analysis despite their larger size, and some smaller tribes could easily satisfy the size criteria,[190] thereby making the fit with the mechanical *Roberts* factors complete.

There is strong evidence that increasing the tribes' ability to provide a close and meaningful culture for their members will alleviate some of the problems faced by Native American youth. The pressures giving rise to suicidal behavior are often the result of the absence of any meaningful mediating structure in the lives of Native American youth.[191] Too often there is no organization to which they can relate other than mainstream American society, which in many ways is foreign to them. When tribal culture is strong and readily available to perform this mediating role, suicide is less prevalent. Studies show that "[s]uicide victims more typically belong to tribes with loose social integration—which emphasize a high degree of individuality—and that are undergoing rapid socioeconomic change."[192] Thus, "tribes which emphasize a high degree of individuality generally exhibit higher rates of suicide than those which emphasize conformity."[193] This correlation suggests some link between

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*e.g.*, FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 237 (1990) ("Any 'personal bonds' that are formed from the use of a motel room for less than 10 hours are not those that have 'played a critical role in the culture and traditions of the Nation . . . .' ") (quoting *Roberts*, 468 U.S. at 618-19); City of Dallas v. Stanglin, 490 U.S. 19, 24 (1989) ("It is clear beyond cavil that dancehall patrons, who may number 1,000 on any given night, are not engaged in the sort of 'intimate human relationships' referred to in *Roberts* . . . .").

189. *New York State Club Ass'n*, 487 U.S. at 12; *see also id.* at 19 (O'Connor, J., concurring) (noting that an organization is permitted to demonstrate that it qualifies for constitutional protection despite its size).

190. For example, five New Mexico Pueblo Tribes have less total membership than the Jaycees club at issue in *Roberts*: Nambe—188 members; Picuris—125 members; Pojoaque—94 members; Sandia—227 members; and Tesque—236 members. U.S. DEP'T OF COMMERCE, BUREAU OF CENSUS, AMERICAN INDIAN AREAS AND ALASKA NATIVE VILLAGES: SUPPLEMENTAL REPORT 11 (1980). The largest Pueblo Tribe, the Hopi, has about 6,600 reservation members. Most tribal residents, however, reside in one of twelve autonomous villages, whose average size is less than 1,000. Ragsdale, *supra* note 161, at 376.

191. Social disintegration and acculturation also have captured a great deal of attention as possible causes of suicide among Indian and native adolescents. Culture conflict and concomitant problems in identity formation are believed to produce a chronic dysphoria and anomie which render Indian youth vulnerable to suicidal behavior during periods of acute stress.

U.S. OFFICE OF TECHNOLOGY ASSESSMENT, INDIAN ADOLESCENT MENTAL HEALTH 19 (1990) (citations omitted).

192. *Id.* (citations omitted).

193. *Id.* "Classic comparisons include the Apache, Navajo, and Pueblo communities, with the former representing 'looser' social integration and the latter two representing 'tighter' integration." *Id.* at 19-20.

tribal cohesion and elimination of the individual despair leading to suicide among Native American youth.

Accordingly, freedom to create the kind of atmosphere in which the tribe's unique culture can be strengthened and made readily available could contribute significantly to the resolution of some of the problems facing Native American youth. While the exact manner in which this might occur will vary from community to community, one way in which increased tribal control over critical governmental decisions can positively contribute to the lives of Native American youth is illustrated by plans set forth for the Rough Rock School District on the Navajo reservation. Once control of the school was transferred from the Bureau of Indian Affairs to the local Navajo community, the new, all-Navajo school board based its educational philosophy in part on the assumption that "a school should be part of a process by which the way of life of a people is transmitted to the young—the school which is concerned with importing the culture of an alien society robs the community of its natural increase."[194] Responding to charges that more emphasis on traditional tribal values would prepare students only for the world of the past, one school board member observed: "We are not educating for today; we are educating for tomorrow. The way a person can live successfully in tomorrow's world is to have confidence in himself and have an inner strength which comes only from a positive picture of himself."[195] Legal protection for the tribes' associational role would strengthen their ability to instill this positive self-image in Native American youth through the perpetuation and inculcation of traditional tribal values. Greater tribal and less federal control over matters such as education, land use, and the substantive content of criminal law, would greatly facilitate the tribes' power to perform their associational role of perpetuating their unique cultures.[196]

The effects of extending intimate associational rights to tribes would be several. First, providing tribes constitutional protection from federal interference in matters critically affecting their ability to perpetuate their unique cultures would preclude Congress from repeating past, egregious abuses of its plenary power. Legislative efforts to terminate a tribal entity[197] would face legal objections similar to those that would be ad-

194. D'ARCY MCNICKLE, NATIVE AMERICAN TRIBALISM: INDIAN SURVIVALS AND RENEWALS 120 (1973).

195. *Id.* at 121.

196. *See* Worthen, *supra* note 156, at 1389-90 and nn.81-83 (1991) (describing ways in which lack of tribal control over various governmental activities can adversely impact tribal culture).

197. *See supra* note 173 and accompanying text.

vanced if Congress legislatively disbanded the NAACP or an even more intimate association like a family.

Moreover, some current federal policies, which now exist as matters of legislative largesse, could become constitutionally compelled. For example, the Indian Child Welfare Act of 1978,[198] which provides a prospective adoptive Native American child's extended family and tribe with a placement preference in state-court adoption proceedings,[199] could be viewed as implementing legislation recognizing the constitutional limitation on the state government's authority to break up the traditional Native American intimate association,[200] an association that extends beyond the traditional Anglo nuclear family.[201] If the tribe's relationship with its members is viewed as an intimate association akin to a family relationship, state efforts to interfere with that relationship would be subject to scrutiny similar to that applied when a state interferes with, or terminates, parental[202] or sibling[203] rights. Certainly, if the state-cre-

198. Pub. L. 95-608, 92 Stat. 3069 (1978) (codified at 25 U.S.C. §§ 1901-1963 (1988)).

199. The Act provides that when a Native American child covered by the Act is placed for adoption under state law, "a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." 25 U.S.C. § 1915(a) (1988).

200. "In 1980, . . . one of every four Indian children under one year of age was judicially removed from its family and tribe and placed under non-Indian foster care or in a non-Indian adoptive home." Stan Watts, Note, *Voluntary Adoptions Under the Indian Child Welfare Act of 1978: Balancing the Interests of Children, Families, and Tribes*, 63 S. CAL. L. REV. 213, 213 (1990) (citing *Oversight on the Implementation of the Indian Child Welfare Act of 1978: Hearing Before the Select Comm. on Indian Affairs, United States Senate*, 98th Cong., 2d Sess. 350 (1984) (statement of Save the Children Foundation)). The Act itself declares the congressional policy to "promote the stability and security of Indian tribes and families by the . . . placement of such children in . . . adoptive homes which will reflect the unique values of Indian culture." 25 U.S.C. § 1902 (1988).

201. For example, among the Pueblo Indians, the notion of family is not limited to the nuclear unit, but extends to the clan. BRANDT, *supra* note 184, at 18-19. The Hopi clans "are composed of one or more extended lineages, each of which includes persons who are related through matrilineal descent." Ragsdale, *supra* note 161, at 363.

Evidence of the strong, extended, and intimate ties typical among the Pueblo tribes is found in their living arrangements. Generations of relatives who trace their common heritage along a particular maternal line live in rooms and houses adjacent to one another. "Married men live with their wives, but look upon the households of their mothers and sisters as their 'real' homes. These men return frequently to their natal households to participate in ceremonial life and to exercise their authority over junior members of their own lineages." DOZIER, *supra* note 162, at 136-37. Further evidence of the close nature of this "extended" family relationship is the fact that clan members may not intermarry or have any type of sexual relations, for it is considered "reprehensible" and akin to incest. BRANDT, *supra* note 184, at 207.

202. In Trujillo v. Board of County Comm'rs, 768 F.2d 1186, 1189 (10th Cir. 1985), the Tenth Circuit held that the relationship between a mother and her son was protected against intentional state interference by the right of intimate association.

203. In Aristotle P. v. Johnson, 721 F. Supp. 1002, 1005 (N.D. Ill. 1989), the court held

ated relationship between foster parent and child is entitled to constitutional protection,[204] it is but a small conceptual leap to extend similar protection to the tribal relationship.

Finally, some current federal practices that unduly interfere with the tribes' ability to carry out their associational function might be rendered unconstitutional. For example, several reservations are populated by members of distinct tribes forced into one legal entity by the federal government.[205] In some instances, tribes that traditionally were enemies have been forced together.[206] Recently, two lawsuits have asserted the independence of some of the historical tribes from such federally created legal entities.[207] Recognition of a constitutionally protected associational

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that plaintiffs stated a cause of action when they challenged the state's practice of placing siblings in separate foster homes and denying them the opportunity to visit their brothers and sisters. The court concluded that "the children's relationships with their siblings are the sort of 'intimate human relationships' that are afforded 'a substantial measure of sanctuary from unjustified interference by the State.' " *Id.* at 1005 (quoting Roberts v. United States Jaycees, 468 U.S. 609, 618 (1984)); *see also Trujillo*, 768 F.2d at 1189 n.5 (recognizing that relationships between siblings "clearly fall within the protected range" established in *Roberts*).

204. Brown v. County of San Joaquin, 601 F. Supp. 653, 664-65 (E.D. Cal. 1985).

205. The Gila River Indian Community and the Salt River Pima-Maricopa Indian Community include members of both the Pima and Maricopa Tribes. U.S. DEP'T OF COMMERCE, FEDERAL AND STATE INDIAN RESERVATIONS AND INDIAN TRUST AREAS 51, 70 (1974). The Colorado River Indian Tribes include members of the Mohave and Chemehuevi Tribes, as well as some Navajo and Hopi. *Id.* at 43. Other examples of multi-ethnic tribal organizations include the "Cheyenne-Arapaho Tribes of Oklahoma, the Cherokee Nation of Oklahoma (in which the Cherokees, Delawares, Shawnees, and others were included), and the Confederated Salish and Kootenai Tribes of the Flathead Reservation." COHEN, *supra* note 170, at 6.

206. The Wind River Reservation in Wyoming is populated by both the Shoshone and their historical enemies, the Arapahoe. U.S. DEP'T OF COMMERCE, *supra* note 205, at 603. Each tribe maintains a separate business council, but the business of the reservation as a whole is carried out by a joint council. *Id.* at 604.

207. Western Shoshone Business Council v. Lujan, No. 90C-1020J, (D. Utah 1990); Uintah Band of Ute Indians v. United States, No. 92-427L (Cl. Ct. 1992). In *Western Shoshone*, plaintiffs asked the Bureau of Indian Affairs to approve a contract between the Western Shoshone Tribe and a law firm. The Secretary refused because the recognized tribal entity was the Shoshone-Paiute Tribal Council created under the Indian Reorganization Act of 1934. The first amended complaint alleged that the Western Shoshone Tribe was indigenous to the area covered by the reservation and that Paiutes who trespassed there in the late 1800s were eventually included in a "federated" constitution with the Shoshones at the behest of the Federal Bureau of Indian Affairs. Plaintiff's First Amended Complaint, paras. 7, 17, 22, 25. The complaint asserted that Congress had recognized the Western Shoshone as a separate tribe prior to and after the federated constitution, and that the BIA was now illegally refusing to recognize this separate tribal status. *Id.* paras. 31-32, 36.

In *Uintah Ute Indians*, the Uintah Band of the Ute Tribe brought suit against the United States alleging breach of trust in connection with an 1849 treaty with "the Utah" Indians. Complaint paras. 1-8. The band brought the suit in its own name rather than that of the tribal entity created by the Indian Reorganization Act—an entity that includes not only the Uintah Band, but also the Uncompahgre and Whiteriver Utes. The suit, therefore, is an effort by the band to assert some independence from the legal entity that encompasses other bands.

right would greatly advance the arguments of these tribes because "[f]reedom of association . . . plainly presupposes a freedom not to associate."[208] If a tribe were characterized as an intimate association, efforts by the federal government to consolidate tribes by force would be no more acceptable than other governmental efforts to compel private intimate associations to accept members against their will.[209]

Recognition of the associational role of tribes would not necessarily result in a broad policy extending full constitutional protection to all tribal relationships. Because of differences in their make-up, development, history, and size, some tribes are much better situated to carry out this associational role than others.[210] Moreover, not all acts of a tribe are essential to its associational role. Consistent with the functional approach advocated in this Article, tribal challenges to federal interference should be resolved on a case-by-case basis, with the court making a careful factual inquiry into the ability of the tribe to carry out its alleged intimate associational role and the exact impact of the federal interference on that role.

While this ad hoc approach may seem unwieldy, the *Roberts* Court contemplated that it would be necessary. Recognizing the "broad range of human relationships that may make greater or lesser claims to constitutional protection from particular incursions by the State," the Court observed that the resolution of intimate association claims "unavoidably entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments."[211] Thus, a particularized inquiry that varied from tribe to tribe and case to case would not demand more of courts and litigants than does the existing law. Again, a small step will suffice.

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208. Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984). The federal government has forced a tribe to accept members against its wishes on at least one occasion. Treaty with the Creek Indians, June 14, 1866, art. 2, 14 Stat. 785, 786 (compelling Creek Tribe to make its freedmen members of the tribe after the Civil War).

209. In speaking of the right of expressive association, the *Roberts* Court observed that "[t]here can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire." *Roberts*, 468 U.S. at 623.

210. Some mistakenly assume that all Native American tribes are identical. However, as one Native American anthropologist stated: "[I]t must be realized that Indians do not constitute a monolithic society. The ethnic boundaries which maintain group identity and functions are essentially tribal in nature." MCNICKLE, *supra* note 194, at 116. Thus, tribes often differ from one another in marked ways. For example, because of its larger size and looser system of social integration, the Navajo Tribe may be less able to act effectively as an intimate association than the small Pueblo Tribes of New Mexico.

211. *Roberts*, 468 U.S. at 620.

The desirability and legitimacy of extending associational protection to a tribe will likely vary from tribe to tribe, and situation to situation. Application of the concept in concrete settings will require further elaboration and consideration of the associational principles only briefly discussed here. Nonetheless, recognition that tribal entities have been performing and can continue to perform this role in the lives of their youth could open the way for new and effective solutions to the problems currently plaguing Native American youth. Given the consistent failure of the more traditional federal policies, little can be lost through the use of this new approach.

## V. THE DANGERS OF GOVERNMENT ASSOCIATIONS: IS THE REMEDY WORSE THAN THE CURE?

Because the concepts outlined above appear at first glance radically to reorder existing notions of intimate associations, critical objections undoubtedly will arise. Response to two of the more likely objections is therefore in order.

At the outset, some may assert that government or public associations by definition cannot be "intimate" because intimacy is synonymous with privacy.[212] This objection, however, is mainly semantic. As Kenneth Karst has pointed out, intimacy also refers to "a type of close and enduring association between people,"[213] some of which may be very public associations. It is this kind of intimacy that is at the core of the constitutionally protected right of intimate association;[214] this kind of relationship can exist between an intimate government and its citizens.

The second objection is far more serious. The scheme advocated in this Article contemplates that in certain situations the government will be teaching values to members of the government association. Whenever government, with its coercive powers, becomes the purveyor of values, grave dangers arise. Under traditional political theory, the generation of values by the state "is a hallmark of totalitarianism."[215] Thus, De Tocqueville warned that government could not be the sole generator of the

212. Some of the dictionary definitions of "intimate" are "private, closely personal," and "characterized by or suggesting privacy." THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1987) (unabridged).

213. Karst, *supra* note 53, at 634.

214. *Id.* This is not to imply that Professor Karst would agree with the general thrust of this Article, or with any specific part of it. Even within Karst's scheme, however, intimate associations are not limited to those that take place in private.

215. BERGER & NEUHAUS, *supra* note 70, at 6. The Supreme Court has expressed this concern with respect to the actions of public schools. Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 511 (1969) (expressing concern that public schools not be converted into "enclaves of totalitarianism").

values at the heart of civic virtue.[216] This criticism is powerful and demands some response. Fortunately, several are readily available.

First, in evaluating the totalitarian threat posed by governmental conveyance of values, one must keep in mind that not all governments are the same. The concern that governmental conveyance of values will lead to totalitarianism and tyranny is true only to the extent that the government is one of the "megastructures."[217] If the government at issue is a large central government, like a national or state government, the label is clearly apt. If, however, the entity labelled as "government" is in reality part public and part private and small enough to be controlled and to be responsive to value input from its members, it becomes a "mediating structure": one that has "a private face, giving private life a measure of stability, and . . . a public face, transferring meaning and value to the megastructures."[218] As noted above, both schools and tribes have to some extent evolved as extensions of the family.[219] They are "hybrids, imbued with the characteristics of both private and public organizations."[220]

Whatever the dangers of government associations, they are lessened when the sphere of government authority is limited to schools or tribes. Moreover, the associational benefits from such associations are greater than from other kinds of government associations, something American society has long recognized by its support of compulsory public

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216. A government can no more be competent to keep alive and to renew the circulation of opinions and feelings amongst a great people, than to manage all the speculations of productive industry. No sooner does a government attempt to go beyond its political sphere to enter upon this new track, than it exercises, even unintentionally, an insupportable tyranny. . . . Governments therefore should not be the only active powers: associations ought, in democratic nations, to stand in lieu of those powerful private individuals whom the equality of conditions has swept away.

2 DE TOCQUEVILLE, *supra* note 20, at 132.

217. BERGER & NEUHAUS, *supra* note 70, at 6. Megastructures are the "large institutions of public life," those institutions which order the public aspects of our lives. *Id.* at 2. These include "the large economic conglomerates of capitalist enterprise, big labor, and the growing bureaucracies that administer wide sectors of the society." *Id.* According to Berger and Neuhaus, "the most important large institution in the ordering of modern society is the modern state itself." *Id.*

218. *Id.* at 3. Mediating structures are "those institutions standing between the individual in his private life and the large institutions of public life [megastructures]." *Id.* at 2. Examples include families, churches, and voluntary associations. *Id.* at 3. Because they are quasi-private and quasi-public, these institutions help individuals mediate the tension between the public and the private aspects of their lives. *Id.* at 2-3.

219. *See supra* text accompanying notes 78-81, 158; *see also* Worthen, *supra* note 44, at 1283-84 (discussing evolution of tribal governments).

220. Worthen, *supra* note 44, at 1290 (referring to local governments and Native American tribes).

education.[221]

Recognition that public schools and tribes are not quintessential States can, therefore, provide some answer to the charge that granting these entities constitutional space to perform their associational roles will lead to totalitarianism. As Lon Fuller once contended: "The bonds that bind the member to a . . . school . . . may not be as intimate as those that unite husband and wife, but it does not follow that they are ready to be bent uncompromisingly" to the full demands of the Constitution.[222]

Second, membership in the kinds of government associations addressed in this Article is essentially voluntary.[223] If one does not wish to remain a member of the tribe, one need only ask for removal from the tribal roll.[224] The associational choice is likewise voluntary when attendance at experimental schools is voluntary, as it was for those proposed by the Detroit School District.

The voluntary nature of membership in these government associations is significant. Voluntary associations rightfully receive more moral approbation[225] and legal protection[226] than involuntary associations. Moreover, the voluntary nature of membership in these associations ensures that they will not supplant those traditional private intimate associations on which American society has successfully relied for so long.[227] If, for example, the head of the family determines that member-

221. As Bruce Hafen has noted: "Important paradoxes are inherent in the very idea of a state-operated school system in a democratic society, an idea Professor Franklin Zimring has described (as it prevailed during the first half of this century) as 'special case socialism at a time when socialism was a dirty word.' " Hafen, *supra* note 78, at 667 (quoting FRANKLIN E. ZIMRING, THE CHANGING LEGAL WORLD OF ADOLESCENCE 35 (1982)).

222. Fuller, *supra* note 71, at 19. Fuller was referring specifically to due process requirements in the formation of intimate associations. "[I]f the law of the state finds itself compelled to relax requirements of due process when it deals with the formation and dissolution of intimate associations, then we must view with some caution any gross extension of legal forms throughout our whole associational life." *Id.*

223. *See* Worthen, *supra* note 44, at 1284-86 (discussing "voluntary" nature of membership in cities and Native American tribes).

224. "A member of any Indian tribe is at liberty to terminate the tribal relationship whenever he or she so chooses." COHEN, *supra* note 170, at 22.

225. *See* MICHAEL WALZER, OBLIGATIONS: ESSAYS ON DISOBEDIENCE, WAR, AND CITIZENSHIP 10 (1970) (asserting that under social contract theory, "groups in which willfulness is heightened and maximized can rightfully impose greater obligations upon their members than can those catholic religious and political associations where membership is, for all practical purposes, inherited").

226. "[C]urrent constitutional law treats 'involuntary' and 'voluntary' groups quite differently. While classification on the basis of involuntary group affiliations is subject to attack in the name of equality, voluntary associations are protected in the name of liberty." Sullivan, *supra* note 14, at 1714-15.

227. The Supreme Court repeatedly has recognized the primary role of parents with respect to the rearing and education of children. *See, e.g.*, Ginsberg v. New York, 390 U.S. 629,

ship in these intimate government associations is inimical to the values that he wishes to perpetuate in the family, the family head has full power to withdraw any member of the family from that association, by either transferring him to a traditional school or withdrawing him from membership in the Tribe. Thus, there will be minimal interference with the autonomy of the primary purveyors of values.[228] The sole result will likely be merely to provide another option for those who feel that reinforcement of their teaching will be helpful.

Third, the solution outlined in this Article does not require the elimination of all competing private associations, something which truly would lead to totalitarianism.[229] Leeway for governments engaged in the performance of the roles outlined above would merely add new voices to the existing choir of diverse ideas and value systems. Just as government sponsorship of mass media through federal funding for public television does not raise the same concerns that would be created by government elimination of competing television stations, government sponsorship of a particular form of association on a voluntary basis does not raise the same concerns as governmental action prohibiting other kinds of associations.

Fourth, the limited nature (in terms of both geography and power) of these associational governmental entities ensures that they will never have the power to eliminate competing visions of truth generated by other, more traditional, intimate associations. A school board has limited power. It cannot control all aspects of a student's life. Non-students are not directly within its power at all, as long as they do not intrude on the physical school grounds.[230] Although tribal governing powers are

639 (1968) (stating that "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder") (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944)).

228. The Supreme Court has recognized in other contexts that a parent's ability to make choices for a child can make governmental actions that would otherwise be constitutionally suspect more acceptable. *See, e.g.*, *Ginsberg*, 390 U.S. at 639 (upholding law prohibiting sale of non-obscene pornography to minors in part because "the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children").

229. De Tocqueville's fear concerning the totalitarian result of governmental inculcation of values was directed at the situation in which governments were "the *only* active powers." 2 DE TOCQUEVILLE, *supra* note 20, at 132 (emphasis added).

230. School districts, of course, often are authorized to require non-students to pay property taxes. Even the districts' taxing authority is often quite limited, however. First, the districts do not have inherent taxing authority and must rely on the state legislature for permission to tax at all. *See, e.g.*, UTAH CONST. art. XIII, § 5. Second, state statutes or constitutional provisions often limit the amount the district can tax. *See, e.g.*, UTAH CODE ANN. § 53A-16-104 (1992) (authorizing local school boards to levy a tax for debt service and capital outlay, but "not to exceed .0024 per dollar of taxable value").

broader and more pervasive, a tribe's control over the lives of its members is also far from complete.[231]

Finally, this Article does not advocate complete abandonment of the distinction between government and private associations, nor does implementation of its suggestions require that all public schools and Native American tribes be granted the constitutional leeway traditionally afforded families and other intimate associations in their decision-making processes.[232] Courts should treat government entities as intimate associations only in limited circumstances. The two identified in this Article arise when the normal private intimate associations that traditionally have performed this critical mediating role are simply not available (as in the case of many inner-city African-American males), or when, for historical or other reasons, the contemporary governmental unit is in reality an extension or even alter ego of those types of intimate associations (as in the case of many tribes). There may be other situations in which "careful assessment . . . of [a] relationship's objective characteristics" locates it on the intimate side of the associational spectrum,[233] but courts should evaluate those cases in light of the very real concerns created by government control over value systems.

Thus, the admission that a government's authority and ability to act as an intimate association are limited and subject to abuse does not require that it be precluded from carrying out that function under all circumstances. While the fear of totalitarianism is not unfounded, recognition of the associational role of some governmental units will not automatically lead to a realization of George Orwell's *1984*. Failure to use the associational capacity of these institutions, however, may lead to further disaffection among large groups of American youth.

## VI. CONCLUSION

The transition from lonely individual to productive member of society has not taken place for many inner-city male minorities and for large portions of our Native American population. A major cause of this devastating failure is that the intimate associations that historically have facilitated that transition for most Americans are not available in any meaningful way to these segments of our society. The family, the

231. *See* Worthen, *supra* note 44, at 1278-88 (discussing limited authority of tribal and city governments).

232. As noted above, the reality recognized by both theorists and the Supreme Court is that associations can be placed on a continuum, which in turn determines the particular limits of the state's authority to interfere with the associational relationship. *See supra* text accompanying notes 102-211.

233. Roberts v. United States Jaycees, 468 U.S. 609, 620 (1984).

church, and other private associations that supplied these bonds have either been eliminated or allowed to disintegrate. The results of this failure are becoming increasingly apparent.[234] While enormous long-term progress can be made by rejuvenating these private intimate associations,[235] dramatic short-term help already is available in existing governmental structures, which, if viewed from the right perspective and properly limited in authority, can perform this mediating role despite their "governmental" nature. This suggestion may appear dramatic, but so is the crisis. At a minimum, we cannot justify our refusal to consider this potential palliative by blind adherence to formalistic labels. Courts should be willing to take the small steps necessary to ensure that disadvantaged groups can leap forward into productive membership in American society.

234. *See supra* text accompanying notes 1-11.

235. Research suggests a close link between success among African-American males and positive family relationships. Benjamin P. Bowser & Herbert Perkins, *Success Against the Odds: Young Black Men Tell What It Takes, in* BLACK MALE ADOLESCENTS, *supra* note 1, at 185. However, anecdotal evidence suggests that "[b]oth family and school involvement and encouragement are essential to student motivation to succeed." *Id.* at 197.