ON THE FRAGILITY OF ASSOCIATIONAL LIFE: A CONSTITUTIVE LIBERAL’S RESPONSE TO PATRICK LENTA

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You wouldn’t want to live in a world where you can’t be conned, because if you were, you would be living in a world with no trust. That’s the price you pay for trust – being conned. (Ricky Jay and Errol Morris)

I INTRODUCTION

(a) The facts and the ‘new’ facts

With his customary wit, elan, and analytical rigor, Patrick Lenta’s article ‘Taking Diversity Seriously’ has (a) critiqued and reconstructed the Equality Court’s judgment in Strydom v Nederduits Gereformeerde Gemeente Moreleta Park, and, (b) in so doing, has put our equality/association jurisprudence on a somewhat more solid footing. Because Professor Lenta and I share a methodological predisposition towards the analysis of such cases, it should come as no surprise that we cover similar philosophical terrain and find ourselves roughly in agreement.2

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1 Case number 26926/05, decided on 27 August 2008 (as yet unreported). For a restatement of the facts and holding of this case, see P Lenta ‘Taking Diversity Seriously: Religious Associations and Work-related Discrimination’ (2009) 125 SALJ 828.

2 Professor Lenta states that the primary ‘purpose [of his article] is to determine the appropriate domain of anti-discrimination law insofar as government wishes to prevent work-related discrimination by, and within, religious associations. Claims by religious associations that they should be permitted to engage in work-related discrimination on otherwise illegal grounds give rise to a clash of rights: the rights to freedom of association and freedom of religion on the one hand, and the right to equality on the other. My aim is to ascertain, with reference to Strydom, the circumstances in which it is acceptable to privilege the rights to religious liberty and freedom of association over the right to equality: circumstances, that is, in which religious associations should be permitted to engage in work-related discrimination on otherwise prohibited grounds’. Lenta (note 1 above) 831. His conclusion runs, in brief, that ‘the Equality Court’s reasoning in Strydom – including, principally, its privileging of equality over freedom of religion and associational liberty, and its trivialising of the burden placed on the church by continuing with Strydom’s services – reflects a failure to take diversity sufficiently seriously, even if its conclusion is correct. Taking diversity seriously entails that the state does not have the right to abolish unfair discrimination in all its forms wherever it might appear: the right of a liberal state to enforce public principles such as non-discrimination is limited by the rights to freedom of association and freedom of religion. Latitude should be accorded to religious associations to allow them to govern their internal affairs and that includes accommodating their otherwise illegal work-related discrimination. At the same time, a religious association does not have the right to discriminate on otherwise prohibited grounds in respect of all activities performed by its employees and contract workers … Religious bodies
Did I say roughly? Yes, roughly.
For reasons that I will make immediately clear, rough agreement is the best that we are going to do with respect to the various arguments in this matter brought to bear by the parties to Strydom, the Equality Court, Professor Lenta and me. The problem, however, is not with the arguments in Strydom. It is with the facts. For what seems at first, second and third blush to be a conflict between equality rights, on one hand, and associational rights, religious rights and community rights, on the other, is actually nothing of the sort.
I believe that in our haste to prepare papers for our colloquy, Professor Lenta and I failed to realise the actual nature of the matter that seized the High Court. As a result, I am now inclined to say that nothing of genuine constitutional import was at stake in Strydom.
Here are the facts of Strydom, as Professor Lenta pithily puts them:

"The Equality Court had to determine whether a religious association should be granted an exemption from the Promotion of Equality and Prevention of Unfair Discrimination Act to permit it to engage in work-related discrimination on the basis of sexual orientation with respect to a music teacher. The issue confronting the court was whether a religious association’s right to discriminate on prohibited grounds should extend beyond religious leaders to include a music teacher in a faith school not involved in religious instruction."

The Equality Court held that it should not and that the actions of the church constituted unfair discrimination in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA). You can see the problem, can’t you? On the facts of the matter, the Strydom Court reduced religious, associational and community rights regarding ‘membership, voice and exit’ to the ability to hire and to fire a ‘religious leader’. Strydom’s facts, on closer inspection, suggest that:

should not be permitted to engage in work-related discrimination where the activity to be performed by the employee or contract worker or prospective employee or contract worker bears no significant relationship to the settled religious convictions of the organisation. Religious associations claiming the right to discriminate on otherwise illegal grounds should be required to show a connection between the position in respect of which they wish to discriminate and their beliefs and convictions. [C]ourts ... should scrutinise the religious basis of claims to be permitted to discriminate on a case-by-case basis’. Lenta (note 1 above) 860–1. I had previously described this article as an ‘amplification’ of Professor Lenta’s work. And that it is – to the extent that Professor Lenta does not press down hard enough in attempting to describe the appropriate and the inappropriate domains for fair discrimination in religious associations. His casuistic approach – a case-by-case basis for analysis – does not do the subject matter justice nor give readers sufficient guidance. Yet I remain steadfast in my conviction that Professor Lenta and I occupy quite proximate positions within the very catholic ‘liberal’ political tradition of constitutional lawyers – in direct opposition to referees who would depict our respective ‘liberalisms’ otherwise. Admittedly, while our proximity actually gives our differences in approach their bite, it might lead some readers to view the exchange as a ‘dust-up’. I think, to the contrary, that our colloquy is best described as an opportunity to learn aggressively from one another.

4 Lenta (note 1 above) 830–1.
5 Act 4 of 2000.
(a) Nothing that rises to the level of constitutional solicitude for religious belief or religious communal practice was at stake for the community;
(b) Nothing that rises to the level of constitutional solicitude for religious belief or religious communal practice was at stake for the music teacher;  
(c) The music teacher could well have taught elsewhere since the religious character of the school was not an essential part of the job; and because the religious character was not an essential part of the job for her and she could have sought work elsewhere, then her dignity was not impaired.

If Strydom’s facts are so, then the dispute is not about religious, associational or community constitutional rights and how they ‘man up’ against rights to dignity and equality. Strydom is a straight up and down PEPUDA dispute that rightly rejects sexual orientation as a legitimate ground for termination of employment where no persuasive justification can be offered in rebuttal. The point that I wish to make appears in the formulation of Professor Lenta’s proposition 8 – namely that the nexus between the work of this organist and the ‘specific’ tenets of this church alone are not sufficiently close. Well then, if the respective interests are not sufficiently close, then there is, to put it mildly, no conflict of constitutional rights and no truly interesting constitutional question engaged in Strydom.

Now, to make matters more interesting, let us alter the facts slightly so that we might in fact learn something about how rights to religious practice, rights to association and rights to community ‘man up’ against rights to dignity and equality. In short, let us construct a hypothetical case (a) in which something is truly and palpably at stake and (b) our respective liberal views regarding how such conflicts ought to be resolved actually do some work.

Here are the facts of a high stakes constitutional matter:

(a) Choir participation or organ playing at Catholic mass requires membership in the community – and the taking of communion;
(b) It was clear from any voluntary or commercial arrangement struck that the church organist understood the rules of the religious community and accepted that adherence to those rules was essential for any ongoing voluntary or commercial transaction that involved religious rites;
(c) The organist played mass on Saturday night and Sunday knowing full well that her sexual orientation conflicted with basic tenets of the religious community. (Indeed, under the church’s ‘don’t ask, don’t tell policy’, the priest, the organist and many members of the community aware of her orientation decided to keep quiet);
(d) Only once the organist’s sexual orientation was brought to the attention of the church elders, and a formal inquiry was undertaken by a properly constituted church board, did the church take the painful, but what it deemed religiously requisite act, of discharging the organist;

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6 Even if it is obvious, on the facts, that the music teacher’s associational rights or religious rights were not at issue, it is worth emphasising this fact. Why? Cases with genuine purchase generally pit conflicting associational and religious rights against one another.
(e) However, let us first acknowledge that the church board first contacted the local bishop, who, sympathetic to the situation, contacted a cardinal in Rome; the cardinal, somewhat vexed by the problem, decided that he did not have the authority to take a final decision; he, in turn, contacted the Pope;
(f) The Pope, after contacting counsel, decided that while one could remain silent about one’s sexuality within the church and still belong to and participate in the community, church scripture and doctrine made it clear that membership within the community turned on adherence to clearly delineated rules that made public acknowledgment of lesbianism and homosexual activity a grounds for removal from any church office or from participation in the rights of any parish;
(g) The Pope noted that this conclusion greatly pained him and that he hoped that the organist would reconsider her sexual orientation and return to the church as a fully practicing member of the parish.

Now we have an argument that liberals – of varying stripes – should find worth fighting about: the (largely infallible) doctrinal pronouncements of the Pope and the potentially conflicting dictates of a basic law committed to the rights to dignity, equality, association and religious belief and practice.

(b) The holding and the ‘new’ holding

It should come as no surprise that I’m not so certain that Strydom is correctly decided (even when reconstructed by Professor Lenta). Indeed, had the church provided a well-constructed argument grounded in (1) freedom of association (s 18); (2) freedom of religion (s 15); and (3) freedom of religious community practice (s 31), I would, given the absence of a compelling countervailing dignity claim by Strydom, have held in favour of Nederduitse Gereformeerde Gemeente Moreleta Park. For as morally repugnant as I think that their beliefs and practices may be, it is important to remember that moral repugnance is not the same thing as, and does not always map directly onto, a finding of constitutional infirmity.

(c) Structure of the argument

This reply to Professor Lenta takes the following form. After acknowledging that we are both liberals of slightly different stripes, I go about demonstrating exactly what kind of liberal I am. To the extent that (my) liberalism, like any other liberal political theory, requires a foundation, I ground my version in a constellation of related notions: the constitutive nature of the self and the social; the need to protect the literal and the figurative property of associations from capture in a liberal society; and the social capital that makes virtually every setting for meaningful action possible. Having set out the foundation for constitutive liberalism, I turn to the question at hand: what must my kind of liberal do when confronted by competing constitutional claims by an individual excluded from meaningful participation in a religious community because
of non-compliance with that community’s rules, on the one hand, and by a community that contends that the ability to live by and to enforce the rules that define it is the only manner in which that community qua community can survive. By answering this question, I can then offer an assessment of the outcome in Strydom and my own, more difficult, hypothetical matter.7

II CONSTITUTIVE ATTACHMENTS, CAPTURE AND SOCIAL CAPITAL

(a) Constitutive attachments

For my kind of liberal: ‘Meaning makes us’. That bumper sticker flows from one basic proposition. There’s rarely a thought in your head or an ‘intentional’ or unintentional action that you undertake that is not directly sourced in or arising from pre-existing cognitive routines, dispositional states or collective practices. Let’s break that complex proposition into two smaller parts.

(i) The self and the constitutive

We, as a species, but also within the Western philosophical tradition (and I’m not knocking either), tend to overemphasise dramatically the actual space for self-defining choices. In truth, our experience of personhood, of self, is a function of a complex set of narratives over which we exercise little in the way of (self) control. Our notion of ‘selfness’ is a function, a very useful by-product, of a complex array of semi-independent neural networks that control the body’s journey through life. This complex set of dispositional states is a function of both the deep grammar of our brains and the social endowments that have evolved over time to determine various patterns of behaviour. It should be apparent from this brief account that the self is a valuable abstraction and not an entity that stands back from experience and then dictates to the body what it does in response to various stimuli. Each self then is just a centre

7 Before I press on, I want to pause to note that, while Professor Lenta and I work within the same broad church – the Anglo-American political-constitutional tradition, we do not work that tradition in exactly the same way. Professor Lenta and I both agree that the Anglo-American political-constitutional tradition truly begins with John Locke’s A Letter of Toleration (1689). But the meaning of that ‘letter’ is not altogether clear. Locke’s primary concern – on my reading – was finding a political-philosophical basis for a negotiated settlement that would prevent England from being continually riven by religious strife. The primary reason the 1st Amendment (1791) is the first amendment to the US Constitution is freedom of religion – and not, as might be commonly thought, freedom of expression. Most Americans of European dissent had fled their native lands in order to escape religious persecution. Alighting on American soil, many of the denizens of the 13 colonies set about producing powerful local and colonial governments committed to advancing their particular comprehensive vision of the good (as reflected by the tenets of their particular Christian faith). The genius of the 1st Amendment of the US Constitution lies not in some desiccated negative liberal theory of the polity that many attribute to it. Its radical break with any previous founding political document is reflected in a uniquely American solution to the problem of how communities with vastly different conceptions of the good could live peaceably amongst each other via a document that provided a ‘theory’ of a just political order that satisfied all 13 states. It is this notion that a liberal constitutional order – as we have in South Africa – is primarily committed to enabling communities with vastly different conceptions of the good to live peaceably amongst one another is what drives this article. Here we have, on full display, in both the South African Constitution and the US Constitution, the genius of liberalism: the ability to negotiate between the right and the good.
of narrative gravity. Each self is, without question, unique. (That uniqueness flows from obvious differences in biological make-up and social construction.) The variety of narratives that make up ‘me’ is different in a sufficiently large number of respects to allow me to differentiate my ‘self’ from any other ‘self’. This ‘self’ is relatively stable. Though my narratives and dispositional states are always changing, my self-representations enable me to see my ‘self’ as remaining relatively consistent over time. But again, keep in mind that the self, and its various narratives, is thoroughly a function of physical capacities and social practices over which I have little control or choice.

(ii) The social and the constitutive

We also tend to over-emphasise dramatically the actual space for rational collective deliberation. We often speak of the associations that give our lives meaning and content as if we were largely free to choose them or to make them up as we go along. I have suggested why such a notion of choice is not true of us as individual selves. It is also largely not true of associational life generally. As Michael Walzer has argued, there is a ‘radical givenness to our associational life’. What he means, in short, is that most of the associations that make up our associational life are involuntary associations. We don’t choose our family. We generally don’t choose our race or religion or ethnicity or nationality or class or citizenship. Moreover, even when we appear to have the space to exercise choice, we rarely create the associations available to us. The vast majority of our associations are already there, culturally determined entities that pre-date our existence or, at the very least, our recognition of the need for them. Finally, even when we overcome inertia and do create some new association (and let me not be understood to underestimate the value of such overcoming), the very structure and style of the association is almost invariably based upon an existing rubric. Corporations, marriages, co-edited and co-authored publications are modelled upon existing associational forms. So gay marriages may be a relatively new legal construct – but marriage itself is a publicly recognised and sanctioned institution for carrying on intimate or familial relationships. Even in times of transformation and revolution – reiteration and mimicry of existing associational forms are the norm.

Professor Lenta tries out a different angle on the problem of associational freedom:

Another way to capture the significance of freedom of association is to frame it as a matter of diversity. As William Galston has argued, ‘properly understood, liberalism is about the protection of diversity’.

8 For more on the self as a centre of narrative gravity, see D Dennett Consciousness Explained (1991) 167–71.
contrasting conceptions of the good life and differing views on what constitute worthy goals. As Brennan J puts it in *Jaycees*, associations ‘foster diversity’.

However, Galston, Brennan and Lenta all beg the question as to why we should value diversity – especially where it runs counter to claims made by historically disadvantaged groups. The answer to that question does not lie in some intrinsic feature of ‘diversity’ but in two quite important facets of a truly ‘diverse’ polity: (a) a person must actually have the ability to exit the traditional (and sometimes quite closed and repressive) community (within the polity) into which they were born or raised; and (b) we, as members of various communities and non-members of others, must have the ability to experiment and to see what communities ‘fit’ or ‘work’ best for us.

(iii) Constitutive attachments and the setting for meaningful action

But before we proceed to ‘exit’ and ‘fit’, it is important to remember that a constitutive liberal, such as myself, emphasises rights to religious freedom, freedom of association and rights to religious practice because various forms of human association provide goods in some sense independent of their dominant feature (religion, trade culture, etc). Again: (1) associations, such as religious communities, are integral to self-understanding, and that there can be no self without the host of associations that give the self content; and (2) associations, such as religious communities, enhance social cohesion, and are the indispensable settings for meaningful action. This two-fold recognition must be recast as two important questions for courts that evaluate the importance of associational rules and religious practices that bump up against other important constitutional considerations: (a) Is the association in question important for individual and group identity? (b) Is the association the setting for meaningful action? Here, the deep background considerations that a court should keep in mind when considering challenges to associational freedom are two-fold. First, the court should be quite wary of supplanting an association’s preferred vision of the good with one of its own or that of a democratically-elected majority (or even a powerful, wealthy, legally savvy minority). Second, and perhaps more importantly, a court must take great care before it opens up, interferes with or dismantles existing associations. Such interventions must be carefully calibrated to preserve existing social capital at the same time that the imperative of transformation grants access to that capital and its concomitant opportunities.

Professor Lenta appears to agree – at least partially – with the aforementioned position when he writes that:

‘[O]ne cannot conceive of meaningful individual religious freedom unless religious institutions are protected from government encroachment.’

Indeed, once the interests protected by the right to freedom of religion are added to those protected by the right to associational liberty

it may be that, as Kent Greenawalt contends, claims by religious associations for exemption from anti-discrimination laws ‘will often have more force than claims deriving from other associations’.\textsuperscript{13} Neither freedom of religion nor associational liberty, however, are absolute rights nor is the right to equality an absolute right. Freedom of association and religious liberty will sometimes have to give way to the right to freedom from discrimination.\textsuperscript{14}

However, that last sentence gives him away: at least in so far as what separates us. I want to claim that rights to be free from discrimination often must give way to freedom of religion and freedom of association if we are to maintain innumerable social settings for meaningful action.

(b) Capture

Concerns about what I call ‘capture’ lie, like ‘constitutive attachments’, at the very heart of associational life. Indeed, concerns about capture are, essentially, a function of – one might even say a necessary and logical consequence of – the very structure of associational life.

In short, ‘capture’ refers to and justifies the ability of associations to control their association through selective membership policies, the manner in which they order their internal affairs and the discharge of members or users. Without the capacity to police their membership policies, as well as their internal affairs, associations would face two related threats. First, an association would be at risk of having its aims substantially altered. To the extent the original or the current raison d’être of the association matters to the extant members of the association, the association must possess the ability to regulate the entrance, voice and exit of members. Without built-in limitations on the process of determining the ends of the association, new members, existing members and even outside parties could easily distort the purpose, the character and the function of the association. Second, an association’s very existence could be at risk. Individuals, other groups or a state inimical to the beliefs and practices of a given association could use ease of entrance into and the exercise of voice in an association to put that same association out of business. In sum, by ‘capture’, I mean that in order for most associations to function as associations, they must possess a substantial degree of control over who belongs to the association and some degree of control over the ends the association pursues. So long as the association, and its members, as currently constituted possesses a figurative and/or real sense of ownership, so long as there is real social capital at stake, a court (and the state) must cede to the religious association a significant level of control over entrance, voice and exit.

Does Professor Lenta ever seriously grapple with capture? I don’t think so. And to the extent that he does, he certainly does not give it much credence:

In \textit{Bob Jones University}, the Supreme Court does not rule that a private, religious university may be forced to abandon its internal, racially discriminatory policy on pain of civil


\textsuperscript{14} Lenta (note 1 above) 834–5.
or criminal sanction. Such a step, as Galston observes, ‘would have implicated basic rights of freedom of association and free exercise of religion that the court has long defined and protected, and it would have called for an entirely different legal analysis. Even employing the line of reasoning it used to settle Bob Jones, the court would almost certainly have found that unlike the mere revocation of tax exemption, a direct order to change the discriminatory policy would have failed the balancing test by imposing an “undue burden” on petitioners’ free exercise’. So the approach followed in Bob Jones University is on closer inspection hardly supportive of the approach taken in Strydom. Extending the precedent of Bob Jones University to the facts of Strydom would mean not invalidating the church’s discrimination on a prohibited ground, but burdening the church by removing all forms of otherwise applicable public encouragement.

Professor Lenta fails to acknowledge the extent to which the elimination of state subsidies or exemptions may work the same black magic on a religion as direct assaults on the citadel.

(c) Social capital

One can identify a third, golden, thread running through the two previous justifications for associational freedom and collective religious practice. This leitmotif might best be described as social capital. Social capital is – and is a function of – our collective effort to build and to fortify the things that matter. It is our collective grit and elbow grease, our relationships and their constantly re-affirmed vows. Social capital emphasises the extent to which our capacity to do anything is contingent upon the creation and the maintenance of forms of association which provide both the tools and the setting for meaningful action. Social capital is often treated as ephemera. That makes sense. It is so hard to see. In fact, it is this elusive quality that makes social capital so fragile. It is made up, after all, not of bricks and mortar, but of relationships and commitments, and the trust, respect and loyalty upon which they are dependent.

Lin characterises social capital as follows:

[S]ocial capital may be defined operationally as the resources embedded in social networks accessed and used by actors for actions. Thus, the concept has two important components: (1) it represents resources embedded in social relations rather than individuals, and (2) access and use of such resources reside with actors. The first characterization, socially embedded resources, allows a parallel analysis between social capital and other forms of capital … For example, human capital, as envisioned by economists, represents investment on the part of individuals to acquire certain skills … that are useful in certain markets … The second component of social capital … must reflect that [the] ego is cognitively aware of the presence of such resources in her or his relations and networks and makes a choice in invoking the particular resources.

15 Galston (note 10 above) 183.
16 Lenta (note 1 above) 842.
17 N Lin Social Capital A Theory of Social Structure and Action (2002) 24–5. Social capital’s more famous expositors began writing about the phenomenon over two decades ago – and often attributed different meanings to the term. Pierre Bourdieu defines ‘social capital’ as made up of social obligations or connections … [and the aggregation of] actual or potential resources which are linked to possession of a durable network of institutionalised relationships of mutual acquaintance and recognition. See P Bourdieu ‘Forms of Capital’ in JG Richards (ed) Handbook of Theory and Research...
In somewhat simpler prose, Halpern offers the following gloss:

So what is social capital comprised of? Most forms … consist of a network; a cluster of norms, values and expectancies that are shared by group members; and sanctions – punishments and rewards – that help to maintain the norms and the networks … The first component is the social network … in some cases the small rural village. The network can be further characterized by its density … and its closure … The second component is the social norms. These are the rules, values and expectancies that characterize the community of network members … Many of these rules are unwritten. The third component is sanctions. Sanctions are not just formal – such as punishments for breaking the law. Most are very informal, but are nonetheless effective in maintaining social norms … The sanction may be through someone being told directly … More commonly, however, the sanction is indirect and subtle, such as through gossip and reputation.18

The efforts of Halpern, Lin and Putnam have led the avatar of capitalism, the World Bank, to acknowledge the centrality of social capital:

Social capital refers to the institutions, relationships, and norms that shape the quality … of a society’s … interactions. Increasing evidence shows that social cohesion is critical for societies to prosper and for development to be sustainable. Social capital is not just the sums of the institutions that underpin a society – it is the glue that holds them together.19

In light of Putnam, Lin and Halpern’s definitions, social capital can be understood to link together my primary justifications for the protection of associational life and religious practice in the following manner. Social capital is what keeps our intimate, economic, political, cultural, traditional, reformist and religious associations going. Without it, nothing works. Social capital explains at least part of what is at stake for both individual identity and social cohesion: the constitutive. Social capital recognises that we store the better part of our meaning in fundamentally involuntary associations. Squander that social capital, nothing that truly matters will continue to exist. Social capital recognises the dominant rationales for ceding control over membership and purpose to the association. Social capital recognises both the real and the figurative sense of ownership that animates associational life. If anyone and everyone can claim ownership of and in an association, then no one owns it. Social capital takes seriously the threat of various kinds of compelled association. Trust, respect and loyalty have no meaning where the association is

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coerced. These several virtues can be earned, but never commanded. No trust, respect or loyalty: no social capital.\textsuperscript{20} No social capital: none but the most debased association.

\textit{(i) Social capital: bonding networks and bridging networks}

But just as not all associations are alike – not all forms of social capital are fungible. For the purposes of this article, two forms of social capital networks are of particular import: bonding and bridging. Putnam puts the difference between these two distinct forms of social capital or social networks as follows:

Some forms of capital are, by choice or necessity, inward looking and tend to reinforce exclusive identities and homogeneous groups. Examples of bonding social capital include ethnic fraternal organizations, church-based women’s reading groups, and fashionable country clubs. Other networks are outward looking and encompass people across diverse social cleavages. Examples of bridging social capital include the civil rights movement, many youth service groups, and ecumenical religious organizations … Bonding social capital provides a kind of sociological superglue whereas bridging social capital provides a sociological WD-40.\textsuperscript{21}

One way to distinguish further between the two networks would be to ‘contrast the strong bonds of reciprocity and care that are found inside families and small communities (what we might call normative bonding social capital) with the … self-interested norms that tend to predominate between relative strangers … and through which relative strangers can cooperate successfully (what we might call ‘normative bridging’ social capital)’.\textsuperscript{22} But that’s just a start. High bonding communities tend to feature well-established, historically entrenched belief sets, shared assets and rather rigid rules regarding membership, voice and exit (and enforcement mechanisms regarding those rules). Bridging networks are often extra-communal and bring together rather diverse groups of individuals in the pursuit of singular, generally self-interested ends. Membership, voice and exit tend to be both more flexible and more formal in bridging networks.

However distinct these two kinds of social capital networks may appear on the surface, I would argue that the success of a developmental state such as South Africa depends upon: (a) respect for the significant public goods created by private bonding networks (schools, hospitals, charities); (b) leveraging, where possible, admission into bonding networks for persons (and groups of persons) who would otherwise not have access to the goods made available within those networks; and (c) the use of state resources to build linking or bridging networks that, over time, produce social capital that is comparable in nature and quality to that social capital produced in bonding networks.

\textsuperscript{21} Putnam \textit{Bowling Alone} (note 17 above) 22–3.
\textsuperscript{22} Halpern (note 18 above) 20.
(ii) Social capital: the fragility of associational life in South Africa

As de Tocqueville was first to note, medium to large scale democracies only flourish in an environment with a rich associational life.23 Social theorists have come to recognise that there is a direct correlation between (a) the availability (or the lack of availability) of social capital, (b) the presence (or absence) of bonding networks and bridging networks and (c) the virility (or the sterility) of political life. This syllogism is not the product of armchair philosophers. As David Halpern and colleagues have demonstrated, Nordic countries – such as Sweden, Norway and Denmark – often possess social capital or mutual trust ratios of over 65 per cent.24 That means, in short, that two-thirds of the citizens of these countries tend to ‘trust’ ‘strangers’ in their midst. Such trust enables them to work effectively with their fellow citizens. Even the US, the land of the free, autonomous (fragmented) individual, boasts social capital or mutual trust ratios of over 50 per cent. South Africa posts a dismal 15 per cent.25 Brazil – with an even longer history of social strife – is one of the few democracies to advertise a lower mark: two per cent.26

South African political scientist Ivor Chipkin has recently argued that social cohesion is essential for long-term economic stability in South Africa.27 Building on recent debates about the importance of various kinds of social capital (especially bridging networks), Chipkin contends that state institutions – especially in a developing democracy such as South Africa – have an essential role to play in building social capital and promoting social cohesion:

There are several ways in which such linking is achieved. It may be that churches and other religious organisations, working on the basis of charity, are the key linking mechanisms between poor and resource rich(er) communities. Various civil-society bodies, including Non-Governmental Organisations, may play similar roles. Yet the most important institution, in this regard, is the State. This is true for several reasons. In the first place, democratic State institutions, like local governments, are able to realise benefits, not simply for members of ascriptive groups, but for communities of citizens – irrespective of religious affiliation or culture or ethnicity. What matters is the degree to which their operations are inclusive and participatory and the degree to which they are able to invest in and/or leverage resources for poor communities … In the second place, the democratic State builds networks and creates linkages on the basis of democratic values. In other words, they encourage a culture of democratic citizenship in the country.28

In sum, the state has a critical role to play in ensuring that the associational life of our extremely heterogeneous society buttresses the egalitarian goals, the utilitarian interests and the democratic ends of our polity. It can do so through economic policies – micro-financing or black economic empowerment (BEE). It can do so through school admission and funding policies as

23 A de Tocqueville Democracy in America (1835).
24 Halpern (note 18 above) 216.
26 Ibid.
28 Chipkin (note 27above) 3.
well as the composition of school governing bodies. It can do so by ensuring that citizens are given a meaningful opportunity to participate in the decision-making processes that have a direct impact on their lives.  

III THE OVER-VALORISATION OF EQUALITY

One clearly justifiable form of state interference with associations and networks is the requirement that certain associations open themselves up to a wider potential membership because they control access to important (and otherwise unavailable) social goods. PEPUDA does just that.

But the Act goes further. The Act makes equality per se a trump. The Act presents a particularly difficult question for Professor Lenta and me: when, if ever, does the freedom to associate or the right to religious practice secure a legitimate right to discriminate?

The US Supreme Court employs a set of doctrines that rests upon distinctions between ‘expressive associations’ and ‘intimate associations’ on the one hand, and those associations which are neither expressive nor intimate, on the other. Where an association is neither expressive nor intimate, the right to disassociate and discriminate may fall before some other important state interest.

These doctrines are articulated in a trio of cases: Roberts v United States Jaycees; Board of Directors of Rotary International v Rotary Club of Duarte; and New York State Club Association v City of New York. In all three public accommodation cases, constitutional associational interests fell before egalitarian concerns reflected in state statutes. But they only tell one side of the story. The other side is told in Boy Scouts of America v Dale.

In Dale, the Boy Scouts of America have had their desire to exclude homosexuals vindicated by the US Supreme Court. A majority of the US Supreme Court justices found a relatively clear nexus between the right of the Boy Scouts of America to represent themselves as standing for a particular set of values (whether they actually expressed them or not) and the right to exclude individuals whose behaviour apparently subverts those stated values. Although not employed by the Court, the following three-part analysis suggested herein does some work in explaining what was at stake in Boy Scouts of America v Dale.

The Boy Scouts of America (a very large and powerful bonding and bridging network) offers a suitably complex setting to test some of my interim conclusions about bonding, bridging and association analysis. The Boy Scouts of America pursues particular goals – the pursuit of certain virtues by young men. It distributes various goods – opportunities to learn skills, to participate in organised events and to secure a certain status within the broader com-

29 Doctors for Life International v Speaker of the National Assembly 2006 (6) SA 416 (CC); Matatiele Municipality & Others v President of South Africa & Others 2007 (6) SA 477 (CC).

30 Note 5 above.


munity. Given these goals and goods, should the Boy Scouts of America be free to include and exclude whomever they like? As our ‘functional’ analysis suggests, the Scouts’ freedom to exclude individuals raises three-related concerns. First, such rules may discriminate against individuals and groups in ways wholly unrelated to the ends of the association. Second, such rules may discriminate against individuals and groups in ways that offend the rules to which the larger polity is committed. Third, a rigid adherence to existing articles or by-laws of an association may preclude the association from a natural or spontaneous evolution into an organisation that pursued a somewhat modified or a dramatically different set of ends. The first concern links the gay Scoutmaster’s exclusion to the association’s ends. The second concern engages the issue of privileging the constitutive nature (and meaning) of the Scouts to (a majority of) its members over egalitarian concerns of the society in general. The third concern determines the extent to which the Scouts’ governing authority may declare, through fiat, exclusionary criteria and what the ends of the association are.

While the US Supreme Court has been forced to grasp the nettle of membership practices, it is relatively clear from the outcome in Dale that it has not been willing to press down particularly hard on the Boy Scout’s stated justifications for exclusion. It is not clear how, if at all, the sexual orientation of a Scoutmaster (and former Eagle Scout) runs counter to the general ethos of the Scouts. Likewise, it is not clear that the vast majority of members believe that the virtues promoted by the Boy Scouts are in any manner undermined by the sexual orientation of a Scout or a Scoutmaster. It is difficult to understand why homosexual status simpliciter should be understood to constitute expression or advocacy. To suggest that it does possess such expressive content, and then to find the status/expression to be of secondary constitutional import, is to suggest that the label ‘homosexual’ ‘is tantamount to a constitutionally prescribed symbol of inferiority’. 33

This ‘functional analysis’ – and the conclusions it generates about Dale – dovetails with Professor Lenta’s conclusions about and the decision of the Equality Court in Strydom. As with the gay Scoutmaster in Dale, it is not clear how the sexual orientation of the organist in Strydom (a) runs counter to the general ethos of the church (as opposed to allegedly biblically proscribed basic tenets of the faith); (b) offends the majority of the members of the community; or (c) constitutes an express endorsement of a particular kind of sexual orientation that might influence the behaviour of another member of the community.

But while those questions about the justification of the discrimination cause Professor Lenta to pull up short, I believe – for reasons already identified above – that the discrimination in Strydom (as opposed to Dale), even if morally repugnant from some vantage point, is constitutionally permissible. What is the difference that makes a difference between Strydom and Dale? The Boy Scouts – the voluntary association whose membership policies were at

33 See D Hermann ‘Homosexuality and the High Court’ (2001) 51 De Paul LR 1215, 1223.
issue in Dale – simply do not rely on a relatively static belief set that gives its associational setting meaning. To wit: (1) the Boy Scout troops around the United States split, almost evenly, as to whether the gay Eagle Scout who became Scoutmaster should remain in his post: nothing in the Boy Scout manual addressed anything but the virtues exemplified by Dale; (2) as to sex and sexual orientation, it is now, and was then, common knowledge that many Scout organisations (around the world and in South Africa) had eliminated the gender divide without any attendant loss of meaning or purpose – girls and boys, young women and young men, were viewed as possessing the same capacity for achievement and for the demonstration of outstanding character.

Like it or not, religion is different. Time – sacred time – for religion is circular, not linear. Linear time – human time – is profane. Religion returns through holiday and ritual to the beginning: when God – of one stripe or another – made the world and laid down the law. Others – non-members – may find the religious beliefs and practices of a faith perverse. But rational distinctions – or the absence of rational distinctions – is hardly the point when an organised faith is put in the position of defending God's law – not their own. It is God's law that provides the setting for meaningful action for the members of the Nederduitse Gereformeerde Gemeente Moreleta Park. The notion that they could alter God's law is akin to idolatry. It confuses the sacred and the profane.

Because the membership policies and the organisation of internal affairs are often critical to an association's identity, one must be aware that laws which force a change in these policies may alter the essential character of that association. So if one believes that political pluralism, cultural diversity, individual autonomy and social upliftment may be threatened by forced changes in an association's membership criteria – and one is committed as Professor Lenta is, to 'taking diversity seriously' – then one might want to give associations the power to police their boundaries and thereby prevent the capture of the association by individuals or groups who might wish to change the association's aims. That is, one may wish to give the individuals and groups whose lives are substantially shaped by the associations of which they are a part, or who invest significant resources and effort in the maintenance and the creation of particular kinds of enterprises, the power to police the membership of the organisation in order to ensure that it remains true to its founding tenets.

The acid test then is: When, or under what conditions, is an association entitled to exercise its right to determine its membership criteria (largely) free from external intervention?

IV THE CASE FOR FAIR DISCRIMINATION IN RELIGIOUS ASSOCIATIONS

Given that Professor Lenta and I share so many common articles of liberal faith (and thus would likely reach similar conclusions even in hard cases), it is important here to set out, again, those areas of divergence that might result in different outcomes.

Professor Lenta promotes diversity as an archetypal, or even the most basic liberal value. And if we liberals were to begin and end our commitment to
liberalism with a restatement of Locke’s *A Letter on Toleration*, then I might be inclined to agree that a strong commitment to diversity – designed to keep religious civil wars under wraps – would be the primary justification for a liberal conception of the state and the manner in which it parses the right and the good.

However, I believe that account is too thin – and indeed too inaccurate with regard to the human condition – to justify liberalism. What makes liberalism truly formidable as a political, moral and constitutional ideology is that it takes not diversity, but associational life, seriously.

(a) **The easy question dispatched**

I don’t for a moment wish to suggest that Professor Lenta and I differ substantially upon the core tenets of a liberal constitutional order. That said, there exist extremely important points of difference (of departure and arrival) that flow in large part from the manner in which Professor Lenta has chosen to frame questions of associational freedom and discrimination.

As a result, the set of questions this article is obliged to answer concerns the extent to which religious associations ought to be able to discriminate fairly – across a range of domains – in furtherance of their faith and communal practices. Professor Lenta first narrows the domain of inquiry (along with the *Strydom* Court) as to whether or not the rights of individuals who suffer work-related discrimination on prohibited grounds should always trump the interest of religious associations in discriminating in accordance with their religious beliefs? That question is a ‘red herring’. For the answer is ‘surely not’ – as Professor Lenta notes – lest we wish the state to re-write scripture however it so wishes. That kind of political power surely has no place in an open and democratic society based on human dignity, equality and freedom, especially one expressly committed to freedom of religion and religious practice. No. The question that Professor Lenta sets for himself is whether such associations may legitimately discriminate in the ‘religious workplace’, when the nature of the discrimination appears rather weakly connected to basic tenets of a faith. Again, that question too appears to be something of a ‘red herring’. For by building in the notion of a ‘weak’ relationship to the basic tenets of a faith, to the question of whether a religious association’s right to discriminate on prohibited grounds should extend beyond the ‘protection’ of religious leaders to include a music teacher in a faith school not involved in religious instruction, Professor Lenta has already put a thumb on the scale in favour of virtually any claim of discrimination – no matter how superficial – and causes us to lose sight of the questions about associational freedom and equality that truly matter. But before we turn to the hard question I set out at the beginning – what ought the courts to do when religious beliefs of some moment engage genuine concerns about the dignity of a member of the same community – let’s take Professor Lenta’s concerns seriously.

Professor Lenta is certainly alive to the independent importance of freedom of association in a liberal constitutional order:
Why is freedom of association so important? One reason is that groups and association contribute to their members' wellbeing. Freedom of association enables individuals to ‘create and maintain intimate relationships of love and friendship’ and is ‘increasingly essential as a means of engaging in charity, commerce, industry, education, health care, residential life [and] religious practice’. Associational freedom is an essential part of individual freedom: associations represent the choices of their members about how to live. The value placed on freedom of association also reflects the importance of civil society, ‘that network of intimate, expressive, and associational institutions that stand between the individual and the state’, discussion of which in the US political tradition goes back to Alexis de Tocqueville.\textsuperscript{34} The existence of associations serves as a counterweight to potentially overweening state power.\textsuperscript{35}

Note the difference of emphasis here. For Professor Lenta, it is all about how associations service (or ‘represent’ (his word)) individuals – individual ‘wellbeing’, individual ‘choice’ and a buffer between the state and the individual. Such justifications are standard – and I accept them myself. But, on my account, the order of priority is reversed. Community comes first as the bearer of meaning. The difference is a standard part of liberal discourse. Let me just remark that it is the apparent ‘voluntariness’ of these associations (‘you can always find another’) that results in the lack of seriousness with which the right to freedom of association is often taken. Can you name a Constitutional Court decision that takes freedom of association seriously – let alone a decision that expressly decides the matter on associational grounds? No: You can’t. In 15 years, the Constitutional Court has never decided a case solely, or even largely, in terms of freedom of association. And that says quite a lot about where, in our hierarchy of rights, freedom of association is located.

Professor Lenta supplements the ‘buffer argument’ with another rather modern liberal justification for associational freedom: diversity. Professor Lenta writes:

Another way to capture the significance of freedom of association is to frame it as a matter of diversity. As Brennan J puts it in \textit{Jaycees}, associations ‘foster diversity’. He expands on this point as follows: ‘An individual’s freedom to speak [and] to worship … could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed. According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity’.\textsuperscript{36}

We all ‘love’ diversity. Or do we? Frankly, I could care less if a plethora of associations or religious, cultural or linguistic ‘forms of life’ disappeared tomorrow. They do nothing for me today – and they shall do nothing for me over the course of a lifetime. Why should a host of alien ways of being in the world make diversity important to me? (The question has an answer – but it has nothing to do with rainbow nations or melting pots or cultural mosaics. Hint: it has everything to do with how we derive better answers as to how we should or can lead a ‘good’ life. Answer: sometimes other ‘ways of being in

\textsuperscript{34}Galston (note 10 above) 531.
\textsuperscript{35}Lenta (note 1 above) 757.
\textsuperscript{36}Ibid 833.
the world’ – rather than the ways of being into which we are born – actually provide a better fit for who we are as individuals.)

Professor Lenta flirts with taking association seriously when he writes: ‘Indeed, once the interests protected by the right to freedom of religion are added to those protected by the right to associational liberty it may be that, as Kent Greenawalt contends, claims by religious associations for exemption from anti-discrimination laws ‘will often have more force than claims deriving from other associations’. But Professor Lenta never quite buys Greenawalt’s point. Indeed Lenta’s very next paragraph suggests that the mutual reinforcement of the two rights provides neither right – nor his argument – with any greater purchase:

Neither freedom of religion nor associational liberty, however, are absolute rights. Nor is the right to equality an absolute right. Freedom of association and religious liberty will sometimes have to give way to the right to freedom from discrimination.

One can hardly count that as an endorsement of Greenawalt’s position – or any position that gives religious associations a leg up in any dispute which involves discrimination on the basis of communal relations. However, it is Professor Lenta’s subsequent treatment of *Amos v Corporation of the Presiding Bishop* that makes it patently clear that he has little patience for line-drawing that might tip the balance of a discrimination dispute in favour of a religious association. Professor Lenta writes:

In *Amos*, a janitor employed for sixteen years at a Mormon-run gymnasium was dismissed for his failure to meet the requirements for a certificate of eligibility for attendance at Mormon temples. The dismissal clearly constituted job discrimination on the basis of religious affiliation, prohibited under Title VII. The janitor challenged the constitutionality of section 702 exemption inasmuch as it permitted religious associations to discriminate on religious grounds in hiring for non-religious positions, into which category his own job fell. The District Court ruled that the amendment to the Title VII exemption was unconstitutional because it enhanced the ability of religious associations to further their beliefs in situations where ‘people’s opportunity to earn a living is at stake’. … The District Court’s ruling is consistent with Basson J’s holding in *Strydom* that certain jobs (typists, for example) are so distant from the doctrinal core of the church’s activities as to render an exemption from anti-discrimination legislation unwarranted. A unanimous US Supreme Court, however, declined to follow the District Court. In his concurring judgement, Brennan J observed that ‘religious organizations have an interest in autonomy in ordering their religious affairs’. Brennan J … decided that … [it] would be inappropriate since it would involve ‘ongoing government entanglement in religious affairs’ which could result in a religious organization being ‘chilled in its free exercise activity’. He expands on this point as follows: ‘While a church may regard the conduct of certain functions as integral to its mission, a court may disagree. A religious organization therefore would have an incentive to characterize as religious only those activities about which there likely would be no dispute, even if it genuinely believed that religious commitment was important in performing other tasks as well. As a result, the community’s
process of self-definition would be shaped in part by the prospects of litigation. Brennan J concluded that the ‘categorical exemption’ contained in section 702 (as amended) covering all types of church employee, no matter what the job, appropriately balances the right of employees to religious liberty and the autonomy of religious organizations. In contradistinction to the District Court, the Supreme Court upheld the constitutionality of section 702.

Professor Lenta contends that the Amos Court is incorrect. And here we – he and I – definitively part company. Professor Lenta apparently believes that it is okay for courts to delve (carefully) into questions of core tenets of belief – and decide which beliefs are trumps and which beliefs are not. Brennan is alive to that problem, and alerts his readers to the dangers of according the courts such powers. The first question is whether there is a real cost imposed on the party challenging the religious association’s criteria for entrance or employment. Where children are involved, the courts are entitled to intervene – because children lack the power to stand up to parents or to other authorities. I would say that the same might be true of adults who lack the requisite power to stand up to authorities or, more importantly, lack the ability to exit from a community on largely their own terms. With children or adults who lack the capacity to defend their interests, I can understand a dignity claim being asserted on their behalf. But where the interest of the claimant is purely pecuniary, as is the janitor’s interest, I can see no countervailing constitutional interest to buttress his claim. Indeed, that is exactly why the US Supreme Court finds as it does in Amos: the constitutional right to free exercise of religion – buttressed by the freedom to associate – is rightly deemed stronger than a right to a particular form of employment. Our Constitutional Court has followed a largely similar route.

Now let’s put the real problem properly on the table. The question is not one of religious discrimination. (Neither the janitor nor the organist is interested in religious inclusion.) It is a question of whether a religious association can control its own real and figurative property. Here’s a partial answer: the link between religious associations, constitutive attachments, social capital and hard capital throws up a most complex set of problems. Religious communi-

43 Ibid 345–6.
44 Lenta (note 1 above) 843.
45 Christian Education of South Africa v Minister of Education 2000 (4) SA 757 (CC) (dignity interests of children trump religious beliefs in virtue of corporal punishment); Bhe v Magistrate, Khayelitsha & Others 2005 (1) SA 580 (CC) (dignity and equality interests of female children trump interest of traditional communities in rule of male primogeniture).
46 Ex Parte Gauteng Provincial Legislature In Re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1993 1996 (3) SA 165 (CC). (The Court held that s 32(c) of the Interim Constitution permitted communities to create schools based upon common culture, language and religion. It further held that IC s 32(c) provided a defensive right to persons who sought to establish such educational institutions and that it protected that right from invasion by the state.) As the High Court in Wittmann v Deutscher Shulverein, Pretoria & Others 1998 (4) SA 423, 451 (T) 451 reasoned, the right to maintain a private German school educational institution based upon culture, language and religion is predicated upon the capacity to exclude non-speakers, non-believers or non-participants. (‘Freedom of association entails the right with others to exclude nonconformists. It also includes the right to require those who join the association to conform with its principles and rules’.) See also Taylor v Kurstag 2005 (1) SA 362 (W) para 38.
ties often support financially other members of their community: often with employment. (Should they be able to do so at the expense of other non-members? Yes: the favourable treatment strengthens the bonds of trust, loyalty and mutual respect that successful associational life requires.) Quite often the access to capital comes with terms extraordinarily favourable to the borrower. How should we treat these compacts? Such economic arrangements are easily subject to charges of bias. That goes without saying. The question is: what can we do about it? Neither outlawing such funds nor opening them up is likely to have the desired outcome. The fund either goes underground or out-of-existence. The aim of such funds is the strengthening of community life. To the extent that the fund continues to serve such an aim (one that ultimately promotes religious life), the grounds for overriding its discriminatory and exclusionary policies and aims are limited.  

Several possible approaches exist to test the constitutionality of the accretion of economic capital in religious collectives. First, one could permit the accumulation and re-distribution of such capital within a particular community subject to the proviso that such capital could not be used by community members to achieve either dominance or monopoly power with respect to the distribution of social goods – say political power – in non-economic domains. Second, according to Amy Gutmann’s civic equality principle, the test for such religiously based economic decisions would be whether they still permitted the state to discharge its obligation to provide for: (1) equal citizenship or political participation; (2) equal liberty; and (3) equal, basic opportunity to live a preferred vision of the good. Neither the janitor in Amos nor the organist in Strydom is being denied any of these goods. I would be far more alive to constitutional challenges to traditional and religious practices (say female genital mutilation) that objectively diminish the life opportunities and experiences of many South Africans.

(b) Answering the hard question

At the outset, I noted that Professor Lenta set what he believed to be a relatively easy question for a liberal to answer. I hope that the foregoing pages have demonstrated that the easy question is not so easy, and that the answer given by Professor Lenta and the Strydom Court may well be wrong. Now I want to turn our attention to the harder question – where a claim for religious belief and community practice exists on both sides, and where the individual plaintiff can plausibly maintain that the association has engaged in a prima facie impairment to her right to dignity.

The hard question turns, I contend, on a rift in liberal thought that would not – could not – have been apparent to John Locke when he wrote A Letter on Toleration. What did Locke miss? What he missed is the difference between

47 Here is the flaw in Lenta’s crystal bowl: he does not take sufficient account of the communitarian dimensions of our basic law.
48 See for example M Walzer Spheres of Justice (1981).
a politics of respect that issues from claims grounded in human dignity and a politics of difference that issues from claims grounded in equal recognition.

It may well be that, in many societies, individual liberty, multicultural recognition and nation-building are incompatible. Indeed, for a society in transition, multicultural recognition and national identity formation appear to pull in opposite directions. For even if individual identities are formed in open dialogue, these identities are largely shaped and limited by a pre-determined set of scripts. Collective recognition becomes important, in large part, because the body politic has denied the members of some group the ability to form – on an individual basis – a positive identity. In a perfect world, the elimination of group-based barriers to social goods would free individuals to be whatever they wanted to be. But even in a perfect world, claims for group recognition do not dissipate so readily.

What is the basis for the demand for group recognition? In any multicultural society, two different kinds of claims for equal respect and two different senses of identity sit uncomfortably alongside one another. The first emerges from what Charles Taylor calls a politics of equal dignity. It is based on the idea that each individual human being is equally worthy of respect. That version of equal respect is what Professor Lenta admirably defends. The second issues from a politics of difference. This form of politics tends to revolve primarily around the claim that every group of people ought to have the right to form and to maintain its own – equally respected – community and its own equally respected vision of the good.

The important distinction between the two is this. The first focuses on what is the same in all of us – that we all have lives and hopes and dreams that we should all be allowed to pursue. The second focuses on a specific aspect of our identity – our membership in a group – and says that the purpose of our politics ought to be, ultimately, the nurturing or the fostering of that particularity. The power of this second form of liberal politics springs largely from its involuntary character – the sense that we have no capacity to choose this aspect of our identity. As I have argued earlier: this source of meaning chooses us; it makes us.

One of the problems South Africa faces today is that it is difficult, if not impossible, to accommodate both claims. As Taylor himself notes, while ‘it makes sense to demand as a matter of right that we approach … certain cultures with a presumption of their value … it can’t make sense to demand as a matter of right that we come up with a final concluding judgment that their value is great or equal to others’. But the demand for political recognition of distinct religious communities often amounts to that second demand. Moreover, such recognition often reinforces a narcissism of minor difference that, in turn, provokes anxiety about the extent to which members of other groups secure access to the most important goods in a polity. Such anxiety about a just distribution of goods – and the manner in which group affiliation distorts that distribution – necessarily interferes with national identity formation. The African National Congress has, for both historical reasons and for reasons associated with its vision of transformation, refused to lend signifi-
cant support to group politics. The Constitutional Court is also predisposed towards claims of equal respect (for individuals and, occasionally, groups) grounded in a politics of equal dignity.

Does that mean that we should be group identity sceptics? Amartga Sen contends that:

Our shared humanity gets savagely challenged when the manifold divisions in the world are unified into one allegedly dominant system of classification – in terms of religion, or community, or culture, or nation, or civilization … The uniquely partitioned world is much more divisive than the universe of plural and diverse categories that shape the world in which we live. It goes not only against the old-fashioned belief that ‘we human beings are all much the same’ … but also against the less discussed but much more plausible understanding that we are diversely different. The hope of harmony in the contemporary world lies to a great extent in a clearer understanding of the pluralities of human identity, and in the appreciation that they cut across each other and work against a sharp separation along one single hardened line of impenetrable division.\(^{50}\)

That much seems incontestable. Totalising views of identity (with their ostensibly comprehensive visions of the good) have led to a hardening of boundaries between groups. The hardening of boundaries has led, in turn, to a hardening of hearts that enables many nations (and many communities or groups with claims to nationhood) to pillage, bomb and plunder with increasingly greater abandon.

The more difficult question for group identity sceptics in South Africa is how to draw down on our constitutive attachments in a manner that both (a) protects the social capital that we require to build the many institutions that make us human; and (b) prevents specific religious, cultural, and linguistic communities from using that social capital to undermine our ‘more perfect union’. Here Sen knows he – or/we – are in trouble, but can only state the problem thus:

The sense of identity can make an important contribution to the strength and the warmth of our relations with others, such as our neighbours, or members of the same community, or fellow citizens, or followers of the same religion. Our focus on particular identities can enrich our bonds and make us do things for each other and can help us to take us beyond our self-centred lives … [But] [t]he well-integrated community in which residents do absolutely wonderful things for each other with great immediacy and solidarity can be the very same community in which bricks are thrown through the windows of immigrants who move into the region from elsewhere. The adversity of exclusion can be made to go hand in hand with the gifts of inclusion.\(^{51}\)

Sen’s last sentence is telling – ‘can be made to go hand in hand’. \emph{Not must, not inevitably}. Sen’s invocation of diverse difference (within individuals, as within nations) and his ringing defence of the freedom to think critically about our multiple identities does not do the hard work – the line-drawing and the rule-making – that constitutional law requires.

\(^{50}\) A Sen \emph{Identity and Violence: The Illusion of Destiny} (2006) xiv.

\(^{51}\) Ibid 2–3. For a substantially more optimistic view about our capacity to sustain political institutions, in heterogeneous societies, through rational discourse, see KA Appiah \emph{Cosmopolitanism: Ethics in a World of Strangers} (2006) 113, 144.
Here, at least, is one place where the Constitutional Court’s jurisprudence offers us useful guidance as to how the state ought to engage the religious, cultural and linguistic communities that make up the state and how those communities ought to engage one another. In *Fourie*, the Constitutional Court found that while the state could not continue to enforce common-law rules and statutory provisions that prevented same-sex life partners from entering civilly-sanctioned marriages, the Constitution of the Republic of South Africa, 1996 had nothing immediate to say about religious prohibitions on gay and lesbian marriage and could not be read to require religious officials to consecrate a marriage between members of a same-sex life partnership. The *Fourie* Court wrote:

[The amici’s] arguments raise important issues concerning the relationship foreshadowed by the Constitution between the sacred and the secular. They underline the fact that in the open and democratic society contemplated by the Constitution ... the religious beliefs held by the great majority of South Africans must be taken seriously ... For many believers, their relationship with God or creation is central to all their activities. It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community and their universe. For millions in all walks of life, religion provides support and nurture and a framework for individual and social stability and growth. Religious belief has the capacity to awaken concepts of self-worth and human dignity that form the cornerstone of human rights. Such belief affects the believer’s view of society and founds a distinction between right and wrong ... For believers, then, what is at stake is not merely a question of convenience or comfort, but an intensely held sense about what constitutes the good and proper life and their place in creation ... Religious bodies play a large and important part in public life, through schools, hospitals and poverty relief programmes. They command ethical behaviour from their members and bear witness to the exercise of power by State and private agencies; they promote music, art and theatre; they provide halls for community activities, and conduct a great variety of social activities for their members and the general public ... In the open and democratic society contemplated by the Constitution there must be mutually respectful coexistence between the secular and the sacred.

The *Fourie* Court commits itself to five propositions that are fundamental for associational rights, generally, and for religious community rights, in particular. First, religious communities are a critical source of meaning for the majority of South Africans. Second, religious communities create institutions that support the material, intellectual, ethical and spiritual well-being of many South Africans. Third, religious associations, as part of civil society, play an essential role in mediating the relationship between the state and its citizens. Fourth, while religious, cultural and linguistic associations are entitled to articulate their ‘intensely held world views’, they may not do so in a manner that unfairly discriminates against other members of South African society. Fifth, although the ‘intensely held world views’ and practices of various religious communities by necessity exclude other members of South African society from some forms of membership and participation, such exclusion does not necessarily constitute unfair discrimination. Indeed, the *Fourie* Court’s

52 Minister of Home Affairs v Fourie (Doctors for Life International & Others, amici curiae); Lesbian & Gay Equality Project & Others v Minister of Home Affairs 2006 (1) SA 524 (CC) paras 90–8.

53 Ibid.
decision makes it patently clear that, to the extent that exclusionary practices are designed to further the legitimate constitutional ends of religious associations, and do not have as their aim the denial of access to essential goods, the Constitution’s express recognition of religious pluralism commits us to a range of practices that the Constitutional Court will deem fair discrimination. The refusal of some religious officials to consecrate same-sex life partnerships as marriages under religious law is but one form of fair discrimination. If we accept the *Fourie* Court’s fifth proposition, then South Africans are obliged to ask a number of other questions about the ‘effects’ of exclusionary practices. The easy question is whether communities possess the power to exclude members who initially agree to follow the rules of the community, but then subsequently refuse to do so. Of course, they do. The hard question comes in two related forms: (a) would South African society be better off if it eliminated those exclusionary practices that removed ‘non-compliant’ individuals from the religious community; and (b) would South African society be better off if it prevented other individuals – who begin as outsiders – from ever gaining entrance into the religious community they wish to join?

The answer to these hard questions turns primarily on access to those goods which individuals require in order to flourish. In 21st-century democratic constitutional states, there are no hard and fast lines between the public sphere and the private sphere (and the various goods they provide to individuals.) The Constitution affords no easy answers about what remains in the private domain and thus subject to some constitutional pre-commitment to non-interference. Instead, the Constitution is primarily concerned with questions about individual and group access to the kind of goods that enable us to lead lives worth living.

Thus, the hard question for the immediate purpose of this article is when does religious discrimination constitute a justifiable impairment of the dignity of some of our fellow South Africans? That, I argued at the outset, was the question that we needed to answer: The hypothetical scenario adumbrated in the introduction offers a better opportunity – than *Strydom* does – to construct a cogent reply.

Before we answer the ‘hard question’, let us briefly rehearse the philosophical foundations for the kind of ‘constitutive liberalism’ that I have built up over the preceding pages. We began with the simple proposition that ‘meaning makes us’ – as individuals and as communities our social endowments largely determine who we are and what gives our lives meaning. In turning to concerns about ‘capture’, we recognised that freedom of religion, freedom of association and the right to communal religious practice are meant to protect the various well-springs of meaning that ‘make us’. They do so by granting religious associations – amongst other associations – the right to determine the rules of membership, voice, exit that govern a community. At the same time, we recognised that associations of various kinds – religious associations included – enable us to create bridging and bonding networks that generate ‘social capital’. This social capital – predicated as it is on trust, respect and loyalty – allows us to (a) maintain the practices and institutions that give our lives meaning; (b) create new practices and institutions that lead, potentially,
for even greater flourishing; and (c) use these stores of real and figurative capital to transform ‘exclusive’ practices and institutions into non-exclusive practices and institutions that enable ‘new’ and perhaps ‘historically disadvantaged members’ of our society to benefit from the various goods these institutions distribute.

Given the above precepts of ‘constitutive liberalism’, it is easy to conclude that golf clubs that have been the bastion of white male Christian privilege must open their doors to persons of all colours, all sexes and all religions. But what of religious secondary schools that discriminate on the basis of an applicant’s willingness to accept a prescribed religious curriculum and, at the same time, offer a better education than that generally available in our public schools? It would be foolish to dismantle such institutions solely on the grounds that either some form of exclusion takes place or that some re-inscription of privilege occurs. Almost all meaningful human labour occurs within the context of self-perpetuating social networks of various kinds. Taking a sledgehammer to social institutions that create and maintain large stores of real and figurative capital is a recipe for a very impoverished polity. The hard question thus turns on the extent to which religious communities can engage in justifiable forms of discrimination in the furtherance of constitutionally legitimate ends and the extent to which the state and other social actors can make equally legitimate claims on the kinds of goods made available in these communal formations that cannot be accessed elsewhere.

Now the ‘hard’ question: Can the Pope legitimately discharge a Catholic organist from a Catholic Church on the grounds that her sexual orientation as practiced is inconsistent with the tenets of the faith even though she (unlike Strydom) desires religious inclusion AND can make out a prima facie case that her dignity has been impaired? The answer must be ‘yes’.

Why? The Catholic Church is the literal and figurative home to a billion people across the planet and millions across South Africa. It provides the setting for which so much of the meaningful action in the lives of its parishioners takes place. Moreover, the bonding networks and the bridging networks created by the church – for example, schools, churches, hospitals, charities, universities, non-governmental organisations – enrich the communities of believers, and, more importantly, non-believers in which they are situated. Finally, it is one thing to allow the members of the church to carry out debates regarding the basic tenets of Catholicism. It is quite another to allow a state to smash open the doors of sanctuary and dictate – to the Pope – who may belong to the church and what rules they must follow. However outré one might believe the tenets of Catholicism to be, one cannot claim to be a defender of liberal ‘constitutive’ constitutionalism and simultaneously claim that the church must alter its belief set and practices so that they are consistent with the secular belief and practice sets of atheists like me who find the church’s stances on reproductive rights, sexual orientation and stem cell research morally repugnant. Yes, a cost attaches to defending such a liberal constitutional order. However, if we wish to maintain meaningful settings for social action and, more importantly, leverage the social capital to be found in
various associations and religious communities (by opening them up without destroying them), then we will have to tolerate beliefs and practices anathema to many of us. So long as church rules clearly preclude openly gay and lesbian members of the church from participating in public practices in the church, neither our courts nor our state has any business using such blunt cudgels as the right to dignity to reinstate an openly lesbian organist so that she might teach in a faith-based school and be remunerated for her efforts.