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*1 CO-OP MEMBERSHIP AND UTILITY SHUTOFFS: SERVICE PROTECTIONS THAT ARISE AS
AN INCIDENT OF REC "MEMBERSHIP"

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*2 PART I

INTRODUCTION

Rural Electric Cooperatives (RECs) arose in the populist agrarian movement early in this century, and flourished under the nurture of New Deal interventions. RECs were commonly formed when small groups of rural residents banded together to obtain electrical service in the face of investor-owned utilities reluctant to extend service to sparsely-settled areas, and which at the time held an intractable economic stranglehold on access to service. [\[FN1\]](#)

*3 RECs now serve about half of all inhabitants of rural areas in the United States, as well as a substantial proportion of nonrural communities. [\[FN2\]](#) With this growth, RECs have gained all the power, and consequently all the potential for abuse, of the investor-owned utilities in response to which RECs were born. [\[FN3\]](#)

A consumer of REC service at risk of losing service through an involuntary disconnection might be surprised to learn that she has no standing to challenge arbitrary termination before her state public utility commission. That consumer might further be surprised to find that she commonly enjoys few of the procedural or substantive statutory and regulatory protections which are offered to those who receive service from an investor-owned utility. [\[FN4\]](#)

This article, however, explores the possibility that REC member- customers may enjoy protections against arbitrary termination comparable to that which public utility commissions have required by regulation of those utilities within their jurisdiction. In particular, this article examines the legal rights of an REC member which arise out of her interest as a member- owner, as opposed to a customer, of the REC. Part I of this article examines the historical antecedents that have left the RECs, as well as municipal utilities, unregulated, and the impact from the creation of that regulatory gap. Part II explores the common law limits and statutory constraints imposed upon all voluntary associations, and economic cooperatives in particular, in the dealings such organizations have with their members. Finally, Part III of this article outlines a regime of heightened scrutiny applicable to certain associations holding a stranglehold on the economic interests of their members; this Part argues for the application of similar constraints on the action of an REC in its dealing with its members. Overall, this article finds that one source of the protections against the disconnection of utility services lies in the "membership" status of an REC "customer." Moreover, the fact that an REC is a voluntary association holding monopoly *4 control over an essential public resource gives additional weight to the protections available to members.

A. Unregulated REC Practices in Perspective

In recognition of the practical necessity of maintaining an ongoing connection to utility services in the context of modern life, most public utilities are extensively regulated by administrative agencies. [\[FN5\]](#) Administrative action controls access to service, ratemaking, service disconnections for nonpayment, collection of deposits and the imposition of late charges. [\[FN6\]](#)

RECs, no less than investor-owned public utilities, exert a direct and unyielding economic stranglehold on the lives, safety and well-being of their consumer-members, who include individuals, families, farms, small businesses and large commercial enterprises. [\[FN7\]](#) And the *5 population served is immense. More than 1,000 RECs [\[FN8\]](#) and 2,010 local public power agencies [\[FN9\]](#) exist in the United States today. These companies provide service to nearly 27.5 million customers. [\[FN10\]](#) By 1977, nearly 20 percent of all electric customers in the country were served either by public power agencies or by RECs. [\[FN11\]](#)

State regulation provides inadequate protections for these rural customers of RECs. Generally, RECs are simply

not within the jurisdiction of a state's public utility commission. [\[FN12\]](#) These RECs, however, provide essential public services, most often under monopoly circumstances, just as their investor-owned counterparts. In this instance, the courts have adequate grounds to take jurisdiction over disconnection disputes.

The original rationale for leaving RECs unregulated is no longer a sufficiently compelling justification for leaving rural service recipients unprotected against the threat of arbitrary action by an REC. The historic antecedents for freeing RECs from regulatory oversight arose in the context of utility regulations which served as barriers to the extension of service in remote areas. [\[FN13\]](#)

Today, however, RECs are no longer small groups of individuals who have voluntarily banded together to serve themselves. Instead, RECs are most often large, complex, hierarchical organizations that are often far removed--physically as well as in spirit--from the needs of their less fortunate members. There is thus a great need to gain formalized customer service regulations against arbitrary utility actions for those households served by RECs, at least approaching the protections offered by regulatory agencies to customers of investor-owned utilities.

As a result of their far-reaching presence, the nation's RECs are daily confronted with the plight of the rural poor, a plight which is both substantial and growing. The payment problems which invariably *6 accompany such poverty can threaten the health, the safety and perhaps even the life of low-income individuals. The availability of public utility services is essential not only to modern convenience, but to modern health and welfare as well. The U.S. Supreme Court noted in *Memphis Light, Gas and Water Division v. Craft*, [\[FN14\]](#) " u tility service is a necessity of modern life; indeed, the discontinuance of water or heating for even short periods of time may threaten health and safety." [\[FN15\]](#) Similarly, an Ohio Federal District Court has stated, " t he lack of heat in the winter time has very serious effects upon the physical health of human beings, and can easily be fatal." [\[FN16\]](#) The poor are particularly vulnerable to the loss of utility service. [\[FN17\]](#) This article suggests that one source for asserting REC member protections comparable to those enjoyed by customers of investor-owned utilities is to be found in an REC member's status as an owner and a member of the utility Coop which serves her, as well as a consumer of the REC's service. [\[FN18\]](#)

B. Membership Interests of REC Consumers

Members of an REC may be entitled to protections against unfair termination practices as an incident of membership in the REC as a nonprofit association. Such protections arise out of the contract of the member with the REC, as informed and limited by state statutes and the common law of voluntary economic associations. [\[FN19\]](#)

An REC's right to terminate the service of a member derives solely from any inherent powers it holds pursuant to its articles of incorporation, corporate bylaws and any other agreements contracted with the *7 REC's membership. State cooperative laws, also, may prescribe specific standards and procedures that an REC must incorporate into its contracts with its members as to service termination.

Lying behind this network of protections is the rather undeveloped common law of voluntary associations. This common law also provides some procedural and substantive protections against arbitrary REC actions, where corporate bylaws and state regulations are silent as to the means by which a membership interest may be terminated. Specific requirements may thus vary widely from jurisdiction to jurisdiction and among individual RECs.

This article examines the protections an REC member can expect as an incident of her membership. The recipient of an REC's services is ordinarily, but not universally, a member of the cooperative. As a member of the cooperative association, the customer/member stands in a distinctly different position from a customer of a public utility, or even a nonmember recipient of REC service. For the person standing in this dual capacity, separate bodies of law protect: (1) her interest as a Co-op customer, and (2) her interest as a Co-op member. [\[FN20\]](#)

Membership in the cooperative is typically initiated by an application for membership. [\[FN21\]](#) Acceptance into the cooperative requires that the member agree to participate in the running of the cooperative and pay a membership fee. Membership entitles recipients to a say in the running of the affairs of the cooperative on a one-person-one-vote basis. [\[FN22\]](#) At membership meetings, in addition to conducting the business affairs of the REC, education on issues of shared interest may be offered, and even entertainment and door prizes. [\[FN23\]](#) Significantly, the decision

to receive service from an REC involves a decision to trade off a *8 loss in efficiency against the benefits of democratic control [FN24] and a property interest in the capital of the REC. [FN25]

A question could be raised as to whether a termination of service is really an expulsion from the association at all. [FN26] However, cooperative bylaws, and state statutes, [FN27] generally require that all members of the cooperative be recipients of the REC's service.

In sum, the disconnection of utility service to a member of an REC not only deprives that person of utility service, it divests the person of her membership interest in the Co-op. As such, the person has specific legal entitlements not only to protect her utility service, but to protect her Co-op membership interest as well.

PART II

THE COMMON LAW OF VOLUNTARY ECONOMIC ASSOCIATIONS

A. Overview

Surprisingly little decisional law exists on the rights of cooperative members qua members to continued association with a cooperative. General treatises on the subject of cooperative associations devote little space or thought to the issue. Consumer and business cooperatives seem to have been more concerned with retaining rather than excluding members. [FN28]

*9 Courts forced to confront the issue of a cooperative member's right to continued membership have turned to the general law of voluntary associations for guidance rather than developing principles apt to a cooperative member's peculiar interest in the association. [FN29] An REC membership shares features that are analogous, in varying degrees, to membership in a social or fraternal group; to membership in a professional association, union or trade association; to holding shares in a corporation; and to ownership in a marketing or consumer cooperative. [FN30] The legal rights of persons holding these widely diverging interests differ only in degree, to the extent they may differ at all. Indeed, the same legal sources and principles are given homage in all cases, although it appears that the degree of strictness of adherence to these principles varies according to the value that the court perceives in the membership interest. [FN31]

The legal rights attaching to a number of voluntary associations as an incident of membership have not been treated extensively by either writers or appellate judges. [FN32] As these principles of law encompass the local flower club and the local boy scout troop, diocese and political party, as well as the local REC, it is not surprising that courts have been reluctant to intervene in the internal affairs of voluntary groups. [FN33] *10 Courts have been somewhat more generous, however, in placing limits on the arbitrary exclusion of members from groups in which an economic or property interest is involved than they have for purely social or political groups. [FN34]

B. Basis for Judicial Intervention

1. Property Theories

The property interest required to merit judicial intervention in the affairs of a nonprofit association is not a demanding standard; less is required than the property interest necessary to trigger Constitutional Due Process Clause protections [FN35] or protections under section 1982 of the United States Code. [FN36] Property interests, for example, have been found in the opportunity of a church member to become a trustee in a church, [FN37] the possibility of a member being elected to a salaried office, [FN38] even the mere fact of membership. [FN39]

It is not surprising that the principles enacted to protect such less-than-compelling interests have gone only so far as to avoid the perceived unfairness which led the court to extend the property interest *11 idea to the situation before it. But minimal protections alone may not be appropriate where the property interest held is real rather than imagined, palpable rather than tenuous. [FN40] A utility customer's interest in continued service is a legally protected property interest. [FN41] An REC member's interest, a fortiori bolstered by ownership and voting rights in

the REC, is entitled to the greatest protection by the courts. [\[FN42\]](#)

In addition to the property interest theory, courts traditionally have seized upon contract, tort and fiduciary theories as the bases to intervene in the internal affairs of voluntary associations, including the association's relationship with its members. [\[FN43\]](#) Increasingly, however, courts eschew reliance on tort, contract, property or fiduciary theories in favor of an individualized examination of the interests at stake in the dispute at issue. [\[FN44\]](#) Nevertheless, an examination of each theory is warranted, not only because many courts continue to be bogged down in such formality, [\[FN45\]](#) but because it provides an avenue to examine the reasons why traditional analysis of voluntary associations is an inappropriate vehicle, standing alone, to measure the rights of REC members.

2. Contract and Tort Theories

In addition to a property interest analysis, courts have sought means to remedy unwarranted expulsion from associations in contract and tort theories. Of the few academic discussions of the rights of a member upon expulsion from a voluntary association, much of the law review space has been devoted to proposing the appropriate source for such a right [\[FN46\]](#) rather than the content of the right at issue. Courts, for their part, often mix and match from assorted legal theories and jump to the question of whether relief should be granted without clearly articulating *12 the basis upon which they are acting. Part III of this article argues that a court faced with resolving a dispute between a member and the REC should look not to the general law of voluntary associations for guidance, but to the specialized law of associations holding a monopoly stranglehold on a scarce and necessary resource. [\[FN47\]](#)

The application of contract and tort theories to the termination of group membership interests is outlined briefly below. It is not provided to perfect a source of these rights, but rather to demonstrate that expulsions from voluntary associations generally are inapt analogies to an REC member's service termination, and hence a different analytic framework is called for.

a. Examination of Contract Theories

Expulsion from a voluntary association may be deemed a breach of an underlying agreement (express or implied) between the organization and its members. [\[FN48\]](#) This agreement may be found in the articles of incorporation or bylaws of the organization, [\[FN49\]](#) in stock equity or other formal agreements [\[FN50\]](#) or in general notions of the duty owed by an organization to its members. [\[FN51\]](#)

This contract is binding on both the REC and its members. Indeed, the bylaws at the time a person becomes a member of the Co-op create a contract. Thereafter, the Co-op may not amend its bylaws to destroy the substantive rights of the members. [\[FN52\]](#) One New Jersey court found that the rule that "a reserved right to amend the by-laws. . . may not affect basic rights," has found expression in a number of cases; interestingly, most of these deal with societies and associations which are similar to the defendant cooperative in that they were created to foster some kind of mutual benefit. [\[FN53\]](#)

*13 The contract is, however, not the sole source of law. For example, where no express procedures for expulsion are set out in the organizing documents, or where the prescribed procedures are inconsistent with notions of minimum due process, courts may infer hearing and notice requirements as the minimal procedures that justice will require. [\[FN54\]](#)

The principal problem commentators have had with a contract theory is conceptual: since an association is (often) not a legally distinct entity capable of contracting on behalf of its members, or capable of suing or being sued, the aggrieved member must complain of a contract she holds with each other member of the organization. [\[FN55\]](#) This hardly seems an insurmountable barrier which would require the abandonment of an otherwise viable legal theory. [\[FN56\]](#) And, in any event, it is inapplicable to the case of RECs, most of which are incorporated under state laws.

The second principal problem courts and commentators have proposed is that the member presumably has agreed to abide by the rules of the group, good or bad, and thus agreed to unfair and immediate dismissal so long as it is in compliance with the rules of the group. [\[FN57\]](#) However, courts in other contexts have found no obstacles to

implying articles of good faith and fair dealing into each contract, or to striking terms deemed to have been unconscionable, fundamentally unfair or contrary to public policy. [\[FN58\]](#)

*14 b. Examination of Tort Theories

The tort effected by expulsion from a voluntary organization is variously described: an unwarranted deprivation of a previously conferred benefit; [\[FN59\]](#) interference with advantageous economic situations; [\[FN60\]](#) interference with personal relationships; [\[FN61\]](#) or the simple and descriptive "wrongful expulsion." [\[FN62\]](#) The tort theory is the overwhelming favorite of commentators, students and academics alike. [\[FN63\]](#) However courts have resisted the vigorous urging for the tort theory, and have generally either passed over discussion of a tort or outright rejected it. [\[FN64\]](#)

3. Fiduciary Theories

An REC member may fashion an argument that she is owed a fiduciary duty based upon three discrete aspects of the relationship of an REC to its member.

a. Trust Theory

Where an association holds or controls property of its members, such as in the case of cooperatives, courts may impose a fiduciary duty upon the association in its dealings with its members. [\[FN65\]](#) Under this theory, the trust res is the property held by the group, the trustees are the decision making body of the association and the beneficiaries are the members of the group or the public-at-large. [\[FN66\]](#)

*15 b. Fiduciary Obligation

The management of the association, as with that of business corporations, is accountable as fiduciaries to the group as a whole. [\[FN67\]](#) The duty, in general, is to manage the affairs of the group consistent with the purposes for which the group was formed.

Under this theory, as well as the trust theory, however, the duty owed is to the membership as a whole, and not to individual members, and thus may rarely be applicable to a member expelled for any substantive reason. Where, however, the reason for the expulsion is motivated by personal animus, or is arbitrary and capricious, the management is not acting on behalf of the interests of the association. [\[FN68\]](#)

c. Monopoly

Where an organization holds a monopoly power over the necessities of life, health or well-being, courts often hold that the association has a fiduciary duty to be "substantively rational and procedurally fair" in its dealings with its members. [\[FN69\]](#) The presence of monopoly power over vital economic interests, itself, entails a duty to define and employ that power fairly. [\[FN70\]](#) Procedurally, this duty demands adherence to basic principles of fairness and due process. [\[FN71\]](#) Substantively, the duty implies that members may not be expelled for arbitrary, capricious or discriminatory reasons; [\[FN72\]](#) standards and procedures must be applied equally to all. [\[FN73\]](#)

*16 The economic stranglehold held by an REC over electric service entails the same interests, and is subject to the same abuses as monopolies which have been held subject to a fiduciary duty. [\[FN74\]](#)

C. Other Obstacles to Judicial Intervention

Judicial reluctance to rally to the cause of expelled members of voluntary associations arises from a reluctance to

impose upon associational autonomy to a far greater extent than it stems from any difficulty the court might find in attaching the proper label to the expelled member's cause of action. [\[FN75\]](#) This concern for the group's autonomy derives from sources which are not applicable to RECs. Accordingly, a court should be more easily coaxed to intervene on behalf of an expelled REC member than it would be to act on behalf of a disgruntled member of a social, church or political group.

1. Constitutional Limits on Impinging on Associational Autonomy

Lingering doubts as to the constitutional permissibility of judicial inquiry into the internal affairs of voluntary associations generates some reluctance on the part of courts to intervene in the affairs of voluntary associations. [\[FN76\]](#) These doubts are excised, however, when the subject of inquiry is not a small neighborhood social or political organization but a large, business-oriented electrical cooperative where the primary purpose is to supply a commodity, not to express a philosophy or to provide an opportunity for the association of like souls. [\[FN77\]](#)

*17 2. Protecting the Individual's Rights by Fostering Associational Autonomy

A second and related concern arises out of a belief that the greatest scope is given to the rights of individual members by fully respecting each association's autonomy. In this view, promoting diversity of groups allows individuals to join that group with which they share the most in terms of values, goals and social interactions. [\[FN78\]](#) Conversely, the remedy for one who is excluded is to join another group. [\[FN79\]](#)

While diversity is a laudable goal as applied to a neighborhood social club, such arguments are inapposite to RECs, because: (1) there is a tangible property interest which would be lost even if jumping ship were possible; (2) there is, in the general case, no alternative to REC service in any event; [\[FN80\]](#) and (3) the connection to electrical service is a necessity which a person can ill afford to be without today. [\[FN81\]](#) Succinctly, the member did not make a free choice to join a particular REC, nor is she free to start her own or attach herself to another REC where she will be more freely accepted. [\[FN82\]](#)

3. "Dismal Swamp Concerns"

Courts involving themselves in the internal affairs of private groups are confronted with the often nearly impossible task of interpreting a group's characteristics, terminology, rules, policies and procedures. This difficulty is inherent in a court's function but does not present a problem when a court is called upon to interpret and apply a business corporation's general bylaws or the rules of largely public organizations, such as political parties and accreditation societies. However, where a court delves into the internal workings of secret fraternal *18 societies or churches, it runs headlong into what Professor Chafee described as the "dismal swamp" problem. [\[FN83\]](#)

The court will not only be required to expend strained judicial resources in learning the peculiar terminology, rules and procedures of the group, [\[FN84\]](#) but it also runs the risk of interpreting rules contrary to the governing policies of the group or the wishes of its membership. [\[FN85\]](#) Moreover, the very act of judicial scrutiny destroys the values of autonomy, fraternity and tradition embodied by the seclusion of the association. [\[FN86\]](#)

Of course, these concerns are not implicated when the court's task is to construe and apply the rules of an REC. The workings of an REC are public, not secret. The general bylaws are familiar to the court as characteristic of those of large business concerns, and the court has a ready gauge by which to test its actions in the treatment of public utilities. [\[FN87\]](#)

4. Difficulty in Assessing Damages

A fourth reason for a judicial grant to associations of almost unfettered discretion over memberships is that judges seem uncomfortable in assessing the value of the injury incurred in being expelled from membership. Judicial opinions seem to go out of their way to demonstrate empathy with an expelled member, [\[FN88\]](#) but nevertheless are

pained to admit a lack of ability to evaluate the loss suffered by reason of expulsion, [\[FN89\]](#) or to fashion a remedy. [\[FN90\]](#)

Where a demonstrated tangible property loss is in evidence, a court will be more receptive to arguments from an expelled member, not only because the case more comfortably fits into established legal categories, but because a suitable basis upon which to premise a damage *19 award exists. [\[FN91\]](#) In the case of an expelled REC member, the preferred remedy--reinstatement with damages--will in most cases be available and adequate, since reinstatement both allows the aggrieved member to fully attain the benefits of membership and avoids interfering with any primary purpose of the REC. [\[FN92\]](#)

D. The Common Law Safety Net

Where state laws and corporate charters provide no relief, the common law provides a remedy of last resort to a person who has been expelled or excluded from an REC. Neither the procedural nor the substantive protections offered by the common law appear to depend upon the theory upon which plaintiff's case is premised--property, contract, tort or fiduciary relationship. Indeed, courts often fail to identify any distinct theory of relief. [\[FN93\]](#) The protections do vary, in degree, according to the nature of the interest at stake. Where some kinds of economic interests are jeopardized by the expulsion, more formality is required. [\[FN94\]](#)

1. An Association is Bound to Follow its Own Rules

An association will be required first to strictly follow its own substantive and procedural rules for dismissing a member. [\[FN95\]](#) Even a modest deviation from the organization's set procedures [\[FN96\]](#) may render the expulsion infirm. [\[FN97\]](#) Even where the organization closely adheres to its *20 own rules for expulsion, however, its actions will be measured against notions of fairness and due process. [\[FN98\]](#) For example, club rules providing for automatic termination upon a stated event--nonpayment of dues is one such instance--have been held not to obviate the need for a hearing. [\[FN99\]](#) As a standard against which organization rules will be measured, a hearing upon notice to the member in jeopardy is the bare minimum that justice requires. [\[FN100\]](#)

2. Heightened Standard

A somewhat different standard is applied where expulsion would jeopardize a tangible economic interest, or where the organization--RECs included--have a stranglehold on members' control of a resource that can ill be spared. [\[FN101\]](#) In these instances, the organization is often held to a more demanding procedural standard. [\[FN102\]](#) In addition to some sort of hearing upon notice to the accused, a court may require the right to confront and cross-examine witnesses, to present evidence *21 to a neutral decision maker and to employ the assistance of counsel. [\[FN103\]](#) More importantly, courts in such circumstances often apply greater scrutiny to the factual basis for the expulsion, [\[FN104\]](#) and may limit the grounds for expulsion to those specifically stated in the bylaws as calling for that remedy. [\[FN105\]](#)

Against the individual's interest at stake in the dismissal, courts have been advised to balance the organizational interest in group autonomy in light of any potential interference with the primary purpose of the organization threatened by judicial intervention. [\[FN106\]](#) An REC's interest in group autonomy, however, is practically nonexistent, while the injury confronting a member subject to expulsion is compelling. The loss of electrical service implicates the health and safety of the member household. [\[FN107\]](#) As explained in further detail below, a court scrupulously assessing these factors, as well as the various policies counseling for and against court intervention, would be forced to reach the merits of the REC member's dispute.

3. An Association is Bound to Provide Substantive Fairness

In addition to the procedural requirements of some type of hearing upon notice, courts hold organizations to substantive notions of fairness in expelling members. In this regard, the requirements resemble the minimal

protections often offered to an "at will" employee subject to a discharge: the expulsion will be upheld unless it is taken in bad faith or in contravention to public policy. [\[FN108\]](#) More specific constraints are imposed, however.

An expelled association member is usually required to exhaust the internal remedies of the association before seeking the aid of courts, *22 unless it is shown that resort to those remedies would be futile. [\[FN109\]](#) However, there is some authority to the contrary. [\[FN110\]](#)

a. Arbitrary and Capricious

First, the expulsion must not be taken in bad faith for arbitrary and capricious reasons or out of personal malice. [\[FN111\]](#) If the reason stated in the complaint is pretextual, the expulsion will be scrutinized. The expulsion must be bottomed on the grounds stated in the complaint, and such grounds must constitute a violation of the bylaws or policies of the organization. [\[FN112\]](#) Expulsion following set procedures may be subject to review if the violation condemned is so trivial as to suggest the action of the organization is capricious or corrupt. [\[FN113\]](#)

Where the functioning of the group affects vital economic interests, courts often require that the reasons for the discharge must rationally relate to the purposes for which the group was formed, [\[FN114\]](#) and that the rule be one that has been equally applied to all. [\[FN115\]](#)

*23 b. Public policy

Secondly, an action, even one undertaken in full compliance with the procedures and policies of the organization, will not be allowed by courts where the action contravenes some established public policy as evidenced in the state's statutes, constitution or common law. [\[FN116\]](#) Particularly in the case of an entity with the power of an REC, the established public policies of a state may be defeated indirectly by private actors with unique coercive powers over individuals. Thus, for example, a social organization would be prohibited from enforcing a rule restricting public statements by members which are contrary to the interests of the organization. [\[FN117\]](#)

In *Curran v. Mt. Diablo Council, Boy Scouts of America*, [\[FN118\]](#) a California Appellate Court struck down the expulsion of a member of a Boy Scout troop because he had openly admitted his homosexuality. The court found the expulsion impermissible as violating public policies favoring free expression and nondiscrimination regarding sexual preferences. [\[FN119\]](#) In *Zalenka v. Order of Elks*, [\[FN120\]](#) the court reversed the expulsion of a member of a fraternal organization who spoke out against the group's racially restrictive policies.

Retaliation against a utility member who has sought to organize customers or assert his rights or the rights of other customers to fair treatment, fair rates or nondiscrimination would violate similarly well established policies. [\[FN121\]](#)

Where the expulsion would implicate vital economic interests, courts have occasionally stretched the public policy exception to the general rule of nonintervention in the affairs of private associations. In *24 such situations, the courts have approached imposing a requirement of consistency with related governmental regulations. [\[FN122\]](#)

In sum, the limits placed on the actions of an organization toward its own members are not stringent: its procedures must accord with the most basic notions of due process, and the substantive effect of the action must not contravene some well established public policy. In addition, the actions of an association must not be arbitrary or capricious, the expulsion must be for the reasons stated and the basis for the expulsion must be reasonably related to the purposes for which the group was formed. [\[FN123\]](#)

E. Membership Rights Derived from the REC's Bylaws, State Statutes and Fundamental Precepts of Cooperative Associations

1. By-Laws

Where an organization controls a precious and essential resource, such as electric power, a court may be moved to

require additional procedural safeguards in the event that that organization seeks to expel a member. Courts are, however, reluctant to place limits on the substantive discretion of an organization in dealing with its internal affairs.

Courts feel that they are on far more solid ground when they are asked to construe an organization's bylaws, or to apply an organization's stated policies to particular situations. [FN124] The common law guaranteed, for the most part, rigid adherence to established practices and procedures of the organization and protection from arbitrary action contrary to the organization's stated policies or objectives. [FN125] Thus, the source of greatest protection for REC members will be the REC's articles of incorporation, bylaws and membership contracts, as informed, supplemented and limited by state corporation laws. [FN126] Indeed, some *25 courts have gone so far as to state that, absent specific authorization in the bylaws or articles, there is no power to expel members. Expulsions are authorized only if the articles confer such power on the membership or the Board of Directors, and then only on the terms expressed in the bylaws. [FN127]

Where there are insufficient grounds for expulsion, or where the expulsion was effected through improper procedures, it is appropriate to resort to a court to enforce the corporate bylaws. [FN128] The appropriate state statutes and regulations regarding corporations, voluntary associations and cooperative corporations, as well as the statutes and regulations specific to RECs, should be consulted.

The bylaws, themselves, must not be contrary to established public policies, [FN129] and the cooperative may not unfairly discriminate between members in good standing, [FN130] although it may establish reasonable classifications among members. Nondiscrimination among members is an incident to one of the fundamental precepts of cooperatives: member ownership subject to one-member-one-vote democratic control. [FN131] Courts occasionally uphold rules that clearly call for the immediate expulsion of a member upon the commission of some act, [FN132] but courts more often hold such provisions invalid, particularly where economic interests are at stake. In such circumstances, courts insist on notice and a hearing even when facts are uncontested. [FN133]

*26 2. State Statutes

State laws vary widely in the discretion granted cooperatives in expelling members. Absent a specific directive in the state's corporation laws, courts should resolve disputes with an eye to promoting the fundamental principles of the cooperative; nonprofit operation for the benefit of members, democratic control on a one-member-one-vote basis. [FN134] A sampling of typical state provisions follows.

Maine's cooperative corporation law provides that a member may be expelled by the vote of a majority of the cooperative members. The subject of the expulsion is entitled to ten days advance notice; may appear and present evidence; and is entitled to the assistance of counsel. [FN135]

Florida's Rural Electric Cooperative Act [FN136] instructs only that the bylaws of the cooperative may prescribe additional qualifications and limitations in respect to membership. [FN137]

By contrast, California provides that an expulsion, termination or suspension of membership not made in strict adherence to the terms of the [California Corporation Code, section 12431](#) is void and without effect. Procedurally, the Corporation Code provides that any suspension, expulsion or termination must be effected in good faith and in a fair and reasonable manner. Specifically required are 15 days prior notice of the pendency of termination proceedings, including the basis or reason for termination, [FN138] and an opportunity to be heard at least five days before the decision to terminate is made. [FN139] Significantly, the Corporation Code specifically endorses a private cause of action to challenge an adverse action by the cooperative. [FN140] Substantively, the rights of the member are those found in her corporate contract and the established public policy of California. Even strict adherence to procedural niceties will not cure an action objectionable on these grounds. [FN141]

*27 Under Minnesota law, cooperative bylaws may prescribe the manner of admission, withdrawal, suspension or expulsion of members. [FN142] It may be, however, that a cooperative cannot expel a member absent "knowing, intentional or repeated" violations of the bylaws. [FN143]

Similarly, Iowa limits expulsion to two particular situations: (1) where a member attempts to transfer his interest in

violation of bylaws; or (2) where the member has willfully violated any article of the bylaws which provides for expulsion as a remedy. [\[FN144\]](#)

North Carolina limits only the substantive basis for termination of members: expulsion must be based upon noncompliance with a reasonable condition of membership contained in the bylaws, [\[FN145\]](#) and discrimination among members as to rates or services is prohibited. [\[FN146\]](#)

In sum, state statutes, like the cooperatives' bylaws they supplement, vary from very specific protections for members facing expulsion, to broad statements of policy, to grants of wide discretion to a cooperative's management in dealing with its members.

PART III

REC MEMBERSHIP AS AN INTEREST ENTITLED TO HEIGHTENED SCRUTINY

A. Economic Entities

Expulsions generated by certain types of groups are commonly subjected to heightened scrutiny. [\[FN147\]](#) The factors considered generally track those proposed by Professor Chafee and his progeny. [\[FN148\]](#) However, the match is by no means exact. Membership groups seeming to meet the criteria for heightened scrutiny are not always provided additional protections. Less often, groups which do not seem to demand heightened scrutiny are nevertheless subjected to it. Most commonly, courts *28 fail to acknowledge the existence of a different standard, even in those instances where they seem to apply one. Still, Professor Chafee's proposal, suggested over a half century ago, provides a useful analytic model for assessing precedent in a particular jurisdiction. [\[FN149\]](#)

Professor Chafee suggested that courts should balance the seriousness of injury caused by expulsion and the state's policies threatened by the expulsion against the group's interest in autonomy, and societal policies favoring pluralistic values. This balancing should occur in light of the organization's purpose and various policies arguing for and against intervention. [\[FN150\]](#)

The policies contending for a group's claim to heightened scrutiny were identified as: (1) the extent to which the group holds a stranglehold on an essential resource; [\[FN151\]](#) (2) the "dismal swamp" dilemma described above; [\[FN152\]](#) and (3) the degree to which outside intervention would affect the group's principal purposes. [\[FN153\]](#) To those considerations, later courts and commentators have added detail: the adequacy of available judicial remedies; [\[FN154\]](#) the availability of familiar judicial landmarks, especially state statutes and regulations; [\[FN155\]](#) the degree to which solidarity and secluded relationships are required by the group's purpose; [\[FN156\]](#) the alternatives available to the excluded member; [\[FN157\]](#) and the degree to which the decision to expell actually represents the interests of the membership as a whole. [\[FN158\]](#)

*29 Applying these principles to particular groups, intervention will be most often justified where the group is a quasi-public entity with monopolistic control over a scarce natural resource. [\[FN159\]](#) In practice, reliance on these considerations has favored judicial intervention in the affairs of labor unions, professional and certain trade associations and private accreditation societies, [\[FN160\]](#) but not social, recreational, church or political groups. [\[FN161\]](#)

As suggested above, an REC shares with labor unions, professional and certain trade associations the attributes upon which courts have relied to justify heightened scrutiny. Succinctly, REC membership implicates few social or political interests, but instead an entitlement to resources that are basic necessities of health and safety, the control of which is held in stranglehold by an impersonal corporate hierarchy. An expelled REC member generally is neither drawn to join the REC because of a perceived identity of interests with the organization and its unique social or political character, nor could she replicate the benefits of membership by recreating an organization of like purposes and structure. [\[FN162\]](#)

Perhaps most importantly, an easily applicable remedy is possible without undue damage to the REC's organizing purposes--reinstatement, with or without damages. [\[FN163\]](#) Reinstatement of an *30 REC member would not affect

the basic purposes of the organization, nor is the reinstated member likely to be rendered a pariah.

Relatedly, a court has a readily available enforcement structure against which to assess the internal workings of an REC: the standards applied to public utilities. [\[FN164\]](#) Thus the court is neither required to create an elaborate framework by which to judge disputes nor required to substitute its own untutored judgement for that of the organization's hierarchy. [\[FN165\]](#) In analogous situations where the courts could rely upon some guiding statute or regulations, they have not hesitated to tackle the dispute. [\[FN166\]](#)

Accordingly, a court could assess the REC action using state Public Utility Commission regulations as a guideline, and place the burden on the REC to argue that the regulations are not appropriate to its particular objectives. [\[FN167\]](#)

None of the types of groups that have been accorded special treatment can make the claim for heightened scrutiny as strongly as an REC. Professional societies and, to a lesser extent, trade unions and *31 trade associations, involve specialized knowledge to interpret rules and assess group judgments. Unions and trade associations require fidelity and submission to the needs of the group to accomplish group purposes. Accreditation societies and professional associations rely upon their members selectivity, as well as control over scarce resources, to justify their status and to increase their power: a central purpose of such organizations is the reduction of search costs for patrons of the members by rigidly controlling the quality of members. Only the REC has an absolute claim to judicial intervention in that membership involves all the interests calling for heightened scrutiny and none of the dangers counseling against judicial intervention. What this means for the member at risk is the subject of the next two sections.

B. What's the Difference?

Courts generally appeal to the same indeterminate legal platitudes in testing the actions of professional associations, trade associations and unions that are turned to in dealing with the actions of social, fraternal or religious groups. Indeed, except in rare instances, cases are cited as support interchangeably without regard to the type of organization, or its size, structure or purpose. [\[FN168\]](#)

Nevertheless, courts seem to require more exacting application of these principles when dealing with trade or professional associations and unions. Thus, a court may restate the general rule that it will not assess the merits of an internal dispute; however, in the case of these groups, it will often proceed to do precisely that. [\[FN169\]](#)

This more exacting standard may take several forms, often depending on the needs of the instant case. For instance, the differential standard may be seen in the way in which a court will judge an expulsion not based on a specific rule of the association calling for that penalty. Courts may state that there is no power to exclude members *32 absent a specific bylaw; [\[FN170\]](#) that there is inherent power to exclude, but only if the violation alleged is contrary to state laws or the organizing purpose of the organization; [\[FN171\]](#) or that the group has inherent power to expel members on reasonable grounds, with judicial review being limited to "reasonableness." [\[FN172\]](#)

In contrast, where the court is forced into a dispute involving membership in a social or fraternal organization, it is likely to state that the organization has wide discretion with regard to its own membership, limited only by a requirement that any action be in good faith and not contravene any established public policy. [\[FN173\]](#)

Similarly, courts often salute the principle that a court will not review the merits of an association's decision, but, in fact, in the case of particular organizations, undertake an exhaustive review of the basis for the organization's decision. [\[FN174\]](#)

*33 Commentators have ascribed a complex weighing of factors to explain the sub silentio reasoning of decisions treating widely varying types of organizations. [\[FN175\]](#) This analysis places a gloss on judicial analysis which does not reflect completely the ad hoc nature of these decisions. In dealing with an expulsion or exclusion from a voluntary association, judges are often called upon to resolve a compelling dispute without the benefit of guiding standards, history or applicable principles.

C. Persuasive Factors

Where an REC member has had her service disconnected with inadequate protections having been afforded, the advocate should touch upon the following in telling the REC member's story to the court. In addition, the advocate should describe the particular hardship the expulsion has caused to the member.

1. The Size and Structure of the Organization

The size and structure of the organization is relevant to the degree to which formal procedural requirements should be imposed. These factors are relevant, as well, to limit the organization's reliance on group autonomy and associational values as a defense to judicial interdiction. [FN176] While in a small organization the tribunal may have direct knowledge of the nature of the dispute, or at least background facts, in a large organization, particular knowledge is unlikely and procedural regularity is required. [FN177] Moreover, formality imposes costs which are more easily absorbed by a large organization.

The structure of the organization is as important as its size. An organization may be structured as open or closed membership; membership may be governed on either a hierarchical or a democratic basis; [FN178] proceedings and rules may be open or secret. Where a decision to *34 expel is exercised by administrative personnel, or by a committee, rather than by the entire membership, the action may be suspect. Indeed, unless the bylaws expressly give a committee the power to expel, an expulsion without the consent of the full membership may be invalid. [FN179] An REC, however, does not operate by the secret rules and procedures of the Masons and like groups, nor is there a peculiar terminology for the court to learn. [FN180]

Moreover, where the expulsion is effected by the corporate hierarchy, it is less likely that a court will be moved by arguments that the action is an expression of the entire organization, or that it is necessary in furtherance of the group's organizational principles. This is an especially telling argument where an REC member's expulsion is at issue, as democratic control of the organization is a principal characteristic of cooperative corporations. Where the decision to expel is made by less than the full membership, or at least a committee delegated to represent the members, it cannot be said to be a decision of the organization entitled to judicial deference. [FN181]

2. The Organizing Purposes and Principles of the Association

Absent specific directives in applicable statutes or regulations, a court will resolve internal disputes of associations with reference to the organizing principles of the association and the purpose for which the association was formed. The court is likely to inquire first into the bylaws and articles of the association, and then into more general indications of the association's policies and purposes. Where RECs are concerned, the inquiry will focus on the foundation of the rural electrification movement and the basic principles of cooperatives. [FN182]

The motivation behind the origins of RECs was principally to extend electrical service on a nondiscriminatory basis to those in rural *35 areas. [FN183] The motivating principles of cooperative associations that are relevant are: (1) service at cost to all eligible households on a nondiscriminatory basis; (2) limited return on capital; and (3) democratic control on a one-person-one-vote basis. [FN184]

3. The Function of the Association

The function of the association determines the degree to which judicial intervention would disrupt the group or interfere with group autonomy and associational values. REC membership principally entails the receipt of electrical service. Any interest in group autonomy or associational values is incidental to receipt of that utility service. Moreover, the functioning of the REC depends neither on its status as a selective distributor of its benefits nor on the solidarity of its membership. [FN185]

Relatedly, the function--as well as the size, structure and purpose--of the association affects the degree to which judicial intervention is workable. There must be, in other words, an availability of external standards for judging

group actions and resolving disputes without destroying the fundamental character of the group. RECs present a hierarchical administrative system familiar both to judges and the retail electric power industry. With an elaborate and well-tested system for assessing the appropriateness of utility action vis a vis its customers at her disposal, a judge need not fear the "dismal swamp" that confronts one entering into the internal decisions of a religious, social or fraternal organization. [FN186]

It may appear, however, that these same arguments would cut against the member's argument that she is a member of an REC entitled, by virtue of that membership alone, to treatment different in degree from a customer of an unregulated utility having only "customers" and not "members." However, for reasons explained above, the membership interests in an REC are real. The fact that membership in the REC is compelled, as it is in some labor unions, professional associations *36 and trade associations, [FN187] by the association's monopoly control of a scarce resource does not render that interest illusory.

Indeed, the compulsion to membership further favors judicial intervention, as the court is not permitted to assume a continuity of interest between the group and the member, nor can it assume that the aggrieved member's remedy lies in her ability simply to leave the organization. An REC member cannot replicate the benefits of membership by forming her own association or by joining an organization in which she feels she will be accepted, nor is electrical service a benefit of group membership that one could do without.

D. Particular Application to RECs

There is no litany of procedural protections which courts universally require of all voluntary associations. [FN188] Instead, courts have crafted a floor of minimum protections appropriate to the needs of the organization and the member in context. [FN189] The nature of an REC as a voluntary association and the critical importance of the membership interest involved calls for the highest level of procedural protections a court will require. [FN190] But the interrelationship of an REC and its members requires a procedural floor fitted to that peculiar relationship.

Clearly, the central tenet of the common law right to fair procedure is notice and an adequate opportunity to respond. [FN191] The severe and immediate consequences of a termination of REC membership *37 cannot be fully ameliorated by reinstatement, placing a premium on prior notice and fairness in the initial hearing. [FN192] In addition, the size and fact-based nature of disputes calls for a detailed notice. In analogous circumstances, courts have required the notice to clearly note: (1) time, place and subject of hearing; (2) right to-counsel; (3) names of witnesses; (4) descriptions of documents in evidence; and (5) detailed factual allegations. [FN193]

Fair procedure also requires a neutral fact-finder. An inherent conflict of interest may exist when the same staff that seeks to effect the disconnection of service (and thus the termination of membership interest) would sit as the hearing officer. [FN194] This conflict calls for an outside factfinder. Many labor unions and similar organizations faced with a similar conflict have appointed a committee of nonmembers to resolve membership disputes. [FN195]

On the other hand, a member of an REC is entitled to examine the books and records of the cooperative as a matter of right, [FN196] and thus a premium on discovery techniques may not be essential, although an opportunity for discovery certainly should be prescribed. [FN197] At the hearing, the right to confront and cross-examine witnesses, to dispute evidence and to present evidence is an incident of the common law requirement of fair procedure as well. [FN198]

Courts are divided as to whether the right to counsel is a necessary incident of fair procedure. [FN199] In the case of an REC, right to counsel is essential because of the complicated nature of the issues involved, because of the severity of the sanction threatened and because reference to state Public Utility Commission regulations and decisions may well *38 be a useful guidepost to the determination. This is especially so when the REC, itself, acts through or on the advice of an attorney.

In analogous contexts, courts have also required that the sources of information be disclosed, the validity of the accusation corroborated, and that a decision not be founded solely on hearsay. Moreover, an REC member should be accorded a presumption of innocence. [FN200]

Substantively, the REC should be rigidly held to its own bylaws, and expulsion should not be based on any rule not clearly calling for that penalty. Again, the severe and irremediable consequences of expulsion require that members be on notice of the exact circumstances which could lead to expulsion. The REC will be limited to asserting that sanction on terms equally applicable to all of its members.

Further, the significant public policies represented by a state's public utility laws should be the standard against which REC action is tested. REC rules which are inconsistent with these standards should be rendered unenforceable. Moreover, REC action is limited when not in furtherance of the goals and premises of the rural electrification movement, especially extending service to outlying areas on a nondiscriminatory basis, providing service at cost for the benefit of all members and exhibiting democratic control on a one-person-one-vote basis.

Finally, the courts should review the findings of the tribunal and assure itself that the tribunal's findings are grounded on substantial evidence. [\[FN201\]](#)

PART IV

CONCLUSION

An REC member is both a customer of a utility and a member of an association with a real stake in the REC as an organization. The termination of service entails a divestiture of this membership interest. Accordingly, even in those instances where an REC's disconnection and other customer service practices are not regulated by the state Public Utility Commission, customer service protections may be obtained by reference to the common law of voluntary associations.

As an incident of membership, a member of any organization is entitled to fundamentally fair procedures before she can be divested of her membership interest. Such procedural fairness requires, at least, that the grounds for expulsion may not be arbitrary, pretextual or contrary *39 to public policy; that the member be provided adequate notice and an opportunity to respond; and that the organization rigidly adhere to its own rules for expelling a member.

These constitute the minimum protections with which any organization must comply in order to expel one of its members. They do not, however, prescribe an upper limit on the process which is due to a member.

The peculiar nature of REC membership calls for a higher standard against which an expulsion should be tested. First, an REC membership involves none of the incidents which have caused courts to hesitate before becoming involved in the internal disputes of associations. In particular, an REC is a large, open membership organization formed to facilitate the distribution of an essential commodity, not to express a particular point of view or to provide an opportunity for individual association. Moreover, a court has a ready standard by which to test the actions of an REC in the standard applied to public utilities; a court has, as well, an available remedy for wrongful expulsion, a remedy which does not impinge upon the purposes for which the REC was formed: reinstatement with or without damages.

Finally, an REC shares with certain trade associations, labor unions and professional associations characteristics which courts have determined entitle members to greater protections against expulsion or exclusion. The most important of these shared characteristics is a stranglehold on a scarce resource which is essential to health, safety or livelihood. Because of this power, an individual's association with such an organization is not strictly voluntary, nor is the organization's hold on its membership an indication of shared goals or values. Members of organizations sharing these characteristics are entitled to greater substantive and procedural protection from expulsion, but the extent of heightened protections is not uniformly defined.

At a minimum, courts have required that members of associations holding monopoly power over essential resources be offered more formal procedural protections prior to expulsions, and have critically examined the evidentiary basis of the expulsion. In addition, courts may require the association to demonstrate that the grounds it presses in support of expulsion are specifically stated in the bylaws, or that those grounds constitute a violation of

the organizing purpose of the association.

As REC membership entails none of the factors cautioning hesitancy in intervening in the internal affairs of organizations and all of the characteristics justifying intervention. Because of the inarguably severe consequences of termination of service, an REC expulsion should be subject to the most searching scrutiny and the greatest possible procedural and substantive protections available.

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[FN1]. RICHARD HEFLEBOWER, COOPERATIVES AND MUTUALS IN THE MARKET SYSTEM 131-34 (1980); HORACE VOORHIS, AMERICAN COOPERATIVES 53-66 (1961); See, [State v. Sho-Me Power Co-op.](#), 191 S.W.2d 971, 972-73 (Mo. 1946); [Byrd v. Blue Ridge Rural Elec. Co-op.](#), 215 F.2d 542, 546-47 (4th Cir.1954), cert. denied, 348 U.S. 915 (1955). For an interesting first-hand account by an early participant in the rural electrification movement, see MURRAY LINCOLN, VICE PRESIDENT IN CHARGE OF REVOLUTION 131-48 and 163 (1960).

[FN2]. HEFLEBOWER, supra note 1, at 4, 132.

[FN3]. John J. Schneider, Will Co-operatively Owned Utilities Go Unregulated by State Commissions? 1939 WIS.L.REV. 409, 410-11 (1939); see [Western Colo. Power Co. v. Public Utilities Comm'n.](#), 411 P.2d 785, 795 (Colo. 1966) ("[A] consumer located in an area exclusively served by [an REC] must take its service if indeed service is to be received at all. The form of organization delivering [the] service makes no difference to these consumers . . .").

[FN4]. Cf. [Arkansas Elec. Coop. Corp. v. Arkansas Public Serv. Comm'n.](#), 461 U.S. 375 (1983) (states may regulate rates of RECs).

[FN5]. See generally, National Association of Regulatory Utility Commissioners, SURVEY OF ELECTRIC AND NATURAL GAS UTILITY UNCOLLECTIBLE ACCOUNTS FOR SERVICES DISCONNECTIONS FOR 1990 (1992).

[FN6]. See generally, ROBERT CUSHMAN, THE INDEPENDENT REGULATORY COMMISSIONS 311. (1941). In addition, customer service regulations often constrain the timing and procedure for disconnection of service, establish pre-disconnection notice requirements and require the offer of deferred payment plans. For a discussion of the substantive law of utility shutoffs, see generally, NATIONAL CONSUMER LAW CENTER, MODEL RESIDENTIAL UTILITY SERVICE REGULATIONS (1984).

[FN7]. Indeed, it may well be that RECs exert a demonstrably more powerful influence on those it serves than typical investor-owned companies because of the remoteness of much of the REC customer base and because

patrons in those rural areas served by RECs more likely tend to be elderly or infirm than customers in non-rural areas. Hoyt Gimlin, *The Continuing Decline of Rural America*, 1 EDITORIAL RES. REP. 417 (July 20, 1990) (rural inhabitants disproportionately poor and elderly, and rural inhabitants of all ages experience an undue share of nation's poverty); see also, DEPT. OF AGRIC., *RESIDENTS OF FARMS AND RURAL AREAS*, 1989, Series P-20, No. 446 (October 1990); Catherine Norton and Margaret McManus, *Background Tables on Demographic Characteristics, Health Status and Health Services Utilization*, 23 HEALTH SERVICE RES. 744 (1989).

This admittedly bleak picture may inadequately describe the predicament of poor members of RECs. Overall, rural statistics comprehend some of the most wealthy areas in the country. Gimlin, *supra*, at 417. These figures also include the most intense pockets of intractable poverty in America: in Appalachia, the Mississippi Delta, the Ozarks, the Upper Midwest, the northern reaches of New England and the deep Southwest. *Id.* Moreover, Hispanics, blacks and women in rural areas face even harsher circumstances than rural residents in general.

BUREAU OF THE CENSUS, *THE SOCIAL AND ECONOMIC STATUS OF BLACK POPULATION IN THE U.S.*, Series P-23, No. 48 (July 1974); see e.g., **ROGER COLTON**, *ENERGY AND POVERTY IN NORTH CAROLINA* 8-39 (May 1991).

[FN8]. As of August 1991, there were 1053 RECs which have borrowed funds from the REA. RURAL ELECTRIFICATION ADMIN., 1990 STATISTICAL REPORT, RURAL ELECTRIC BORROWERS, Table 6, at xix (Aug. 1991).

[FN9]. American Public Power Association, 50 PUB. POWER 57 (Jan./Feb. 1992).

[FN10]. RECs serve roughly 11 million customers, of which 9.961 million are residential. RURAL ELECTRIFICATION ADMIN., *supra* note 8, Table 1, at ix. Public power agencies provide electric service to roughly 16.321 million ultimate customers (i.e., those not involving sales for resale). American Public Power Association, *supra* note 9, at 56.

[FN11]. James F. Fairman and John C. Scott, *Transmission, Power Pools, and Competition in the Electric Utility Industry*, 28 HASTINGS L.J. 1159, 1162, n.18 (1977). Note, also, that roughly 50 percent of all rural consumers are served by RECs. See *supra* note 2 and accompanying text.

[FN12]. CHARLES PHILLIPS, *THE REGULATION OF PUBLIC UTILITIES*, 561, n.114 (1984).

[FN13]. See, LINCOLN, *supra* note 1, at 1131-48.

[FN14]. 436 U.S. 1 (1978).

[FN15]. *Id.* at 18.

[FN16]. [Palmer v. Columbia Gas Co. of Ohio](#), 342 F.Supp. 241, 244 (N.D. Ohio 1972) (citations omitted); see also, [Stanford v. Gas Service Co.](#), 346 F.Supp. 717, 721 (D.Kan. 1972). An excellent canvass of cases is found in [Montalvo v. Consolidated Edison Co. of New York](#), 441 N.Y.S.2d 768, 776 (1981).

[FN17]. Comment, *Cash Deposits--Burdens and Barriers in Access to Utility Services*, 7 HARV. C.R.-C.L. L.REV. 630 (1972); Comment, *The Shutoff of Utility Services for Nonpayment. A Plight of the Poor*, 46 WASH.L.REV. 745 (1971); Comment, *Public Utilities and the Poor: The Requirement of Cash Deposits from Domestic Consumers*, 78 YALE L.J. 448 (1969).

[FN18]. [Lamar Electric Membership Corp. v. Carroll, 79 S.E.2d 832, 841 \(Ga. Ct. App. 1953\).](#)

[FN19]. See, [Whitney v. Farmers' Grain Co-op, 193 N.W. 103, 104-05 \(Neb. 1923\)](#); see, Charles E. Nieman, Multiple Contractual Aspects of Co-op. By-laws, 39 MINN.L.REV. 135, 138 (1955). A unique feature of membership in cooperative associations is that the right given members to withdraw at any time does not give the association a comparable right to terminate the membership agreement at will. [Benson Co-op. Creamery Ass'n v. First Dist. Ass'n, 170 N.W.2d 425, 427 \(Minn. 1969\).](#)

[FN20]. [Lamar Elec. Membership Co-op. v. Carroll, 79 S.E.2d 832, 841 \(Ga. Ct. App. 1953\)](#); see, [Byrd v. Blue Ridge Rural Elec. Co-op., 215 F.2d 542 \(4th Cir.1954\)](#), cert denied, [348 U.S. 915 \(1955\)](#); see generally, Nieman, supra note 19, at 138.

[FN21]. These provisions may be set out in documents labeled articles of incorporation, corporate bylaws, member handbook or membership contract.

[FN22]. Democratic control on a one-person-one-vote basis, along with non-profit operation for the benefit of the members, are two of the principal characteristics of cooperative associations. HEFLEBOWER, supra note 1, at 193; see generally, ISRAEL PACKEL, THE LAW OF THE ORGANIZATION OF COOPERATIVES (1940); see also, John C. Satterfield, The Cooperative in Our Free Enterprise System, 33 MISS. L.J. 14, 15-17 (1961).

[FN23]. NORTH CENTRAL MISSOURI ELECTRIC COOPERATIVE, MEMBER HANDBOOK 25 (undated).

[FN24]. To the extent that a decision, in the sense of voluntary choice, is available at all. Of course, in most cases, there is no viable alternative to joining the cooperative. See, [Western Colo. Power Co. v. Public Util. Comm'n, 411 P.2d 785, 795 \(Colo. 1966\).](#)

[FN25]. PACKEL, supra note 22, at 285; see also, Philip K. Porter and Gerald W. Scully, Economic Efficiency of Cooperatives, 30 J.L. & ECON. 489 (1978); but see, HOWARD H. TURNER, CASE STUDIES OF CONSUMERS' COOPERATIVES 291- 94 (1941). Turner and others find that cooperative ownership brings efficiencies in that the cooperative's hold on the trust of its members brings reduced costs of promotion; moreover, the satisfaction members gain in working for the Co-op results in lesser labor costs. However, neither of these cost savings are likely to accrue to RECs.

[FN26]. Even here, there is little doubt that the "member" would have been divested of the primary incident of membership and thus termination would work a "kind of constructive expulsion." [Berrien v. Pollitzer, 165 F.2d 21, 23 \(D.C. Cir.1947\)](#); see, [Aspell v. American Contract Bridge League, 595 P.2d 191 \(Ariz. Ct. App. 1979\)](#); [Jackson v. American Yorkshire Club, 340 F.Supp. 628 \(N.D. Iowa 1971\).](#)

[FN27]. See e.g., [N.C. GEN. STAT. § § 117-16 \(1989\).](#)

[FN28]. HEFLEBOWER, supra note 1, at 200; see generally, Neil D. Hamilton, Cooperative Member Relations and Member's Rights in Retained Equity--Setoffs and Other Approaches," 6 J. AGRIC. TAX & L. 603, 613 (1984); VOORHIS, supra note 1; PACKEL, supra note 22; JOSEPH G. KNAPP, THE RISE OF AMERICAN COOPERATIVE ENTERPRISE 1620 1920 (1969); RAY F. MARSHALL ET AL., COOPERATIVES AND

RURAL POVERTY IN THE SOUTH (1971); Merlin Miller, Organizing the Consumer Cooperative, in LAW AND THE LOW-INCOME CONSUMER 392 (Carol H. Katz ed., 1968).

[FN29]. See, [Gottlieb v. Economy Stores](#), 102 S.E.2d 345, 352 (Va. 1958); [Collie v. Little River Co-op.](#), 370 S.W.2d 62, 65 (Ark. 1963); see generally, Sydney Berde, Overview of Legal Problems Affecting Cooperatives, 2 AGRIC. L.J. 40, 47 (1980).

[FN30]. See generally, Nieman, supra note 19, at 135-51; [Lamar Elec. Membership v. Carroll](#), 79 S.E.2d 832, 840-41 (Ga. Ct. App. 1953) (REC members are at once owners and customers of a privately-owned utility).

[FN31]. See infra notes 169-76, and accompanying text; see also, Zechariah Chafee Jr., The Internal Affairs of Associations Not for Profit, 43 HARV.L.REV. 993, 1021 (1930) ("The relations of a person to a club, a trade union, a church and a state university, are very different from each other. This fact is so obvious that it may seem absurd to mention it, but it deserves emphasis because it has received so little elaboration in the cases. The courts have tended to imply that the only decision difference was the presence or absence of a property right, and that when this existed the requirements for granting relief were the same for all kinds of associations.") See also, Note, Exclusion from Private Associations, 74 YALE L.J. 1313, 1315 (1965); [Vanderbilt Museum v. American Ass'n of Museums](#), 449 N.Y.S.2d 399, 405 (Sup. Ct. 1982).

[FN32]. The leading article today is still Chafee, supra note 31. Later articles, following both the form and substance of Professor Chafee's analysis, are useful Shepardization of his seminal work. See e.g., Comment, The Ability of Voluntary Associations to Control Membership Through Expulsion from Private Associations, 7 ST. LOUIS U. PUB.L.REV. 209 (1988).

[FN33]. Note, Developments, Judicial Control of Actions of Private Associations, 76 HARV.L.REV. 983, 985 (1963) [hereinafter Developments] (the number of decided cases is enormous, but the discussion and analysis is meager and treatment of associational disputes as a discrete subject of law has been almost entirely neglected); see also, Note, Judicial Intervention in the Conduct of Private Associations: Bases for the Emerging Trend of Judicial Activism, 4 N.Y.U. REV. L. SOC. CHANGE 61, 63 (1974) [hereinafter Note].

[FN34]. See [Automotive Elec. Ser. v. Association of Auto Distrib.](#), 747 F.Supp. 1483, 1513 (E.D.N.Y. 1990); Chafee, supra note 31, at 1022; [Silver v. New York Stock Exch.](#), 373 U.S. 341, 364-67 (1963); [Elgin v. Montgomery County Farm Bureau](#), 549 So. 2d 486 (Ala. 1989). Professor Pound attributes this deference to property interest to difficulties in fashioning a remedy: in an association without property, a court cannot compel people to associate together. However, a court can assume access to shared property. Roscoe Pound, Equitable Relief Against Defamation and Injuries to Personality, 29 HARV. L.REV. 640, 678 (1916).

[FN35]. See generally [Memphis Light, Gas and Water Div. v. Craft](#), 436 U.S. 1 (1978).

[FN36]. 42 U.S.C. § 1982 (1988). See e.g., [White v. Walnut Hill Tel. Co.](#), 84 F.R.D. 138 (W.D. Ark. 1979); [Occhino v. Northwestern Bell Tel. Co.](#), 675 F.2d 220, 224 (8th Cir.1982).

[FN37]. Note, Judicial Review of Expulsion Actions in Voluntary Associations, 6 WASHBURN L.J. 160, 163 (1966); Comment, supra note 32, at 211.

[FN38]. [Holcombe v. Leavitt](#), 124 N.Y.S. 980 (1910); see, [Aspell v. American Contract Bridge League](#), 595 P.2d

[191, 193-94 \(Ariz. Ct. App. 1979\)](#); see generally, Comment, supra note 32, at 211. Courts have seized upon any available economic foothold to justify intervention. Note, supra note 37, at 163. Several commentators have complained that the courts' creation of fictional property interests has obscured the real issues involved and has led to the denial of relief that may have been warranted. See Chafee, supra note 31, at 1020-22; Developments, supra note 33, at 994.

[FN39]. See [Youngblood v. Wilcox, 255 Cal. Rptr. 527 \(Ct. App. 1989\)](#); [Curran v. Mt. Diablo Council, Boy Scouts of Am., 195 Cal. Rptr. 325 \(Ct. App. 1983\)](#).

[FN40]. See [Harris v. Aiken, 92 P. 537, 538-39 \(Kan. 1907\)](#) (discussing greater procedural protections attaching to certain property interests); compare, Pound, supra note 34, at 677 ("expulsion from a [social] club may, indeed, be the highest form of injury without involving any interest of substance in the least.").

[FN41]. See [Memphis Light, Gas and Water Div. v. Craft, 436 U.S. 1, 10 \(1978\)](#).

[FN42]. See infra notes 178-89 and accompanying text.

[FN43]. See Comment, supra note 32, at 209-16; Chafee, supra note 31, at 1012-24.

[FN44]. See [Automotive Elec. Ser. v. Association of Auto. Aftermarket Distrib., 747 F.Supp. 1483, 1509 \(E.D.N.Y. 1990\)](#); see also, [Virgin v. American College of Surgeons, 192 N.E.2d 414, 422 \(Ill. App. Ct. 1963\)](#); [Rutledge v. Gulian, 459 A.2d 680, 683 \(N.J. 1983\)](#); [Berrien v. Pollitzer, 165 F.2d 21, 21-23 \(D.C. Cir.1947\)](#).

[FN45]. See [Aspell v. American Contract Bridge League, 595 P.2d 191, 193- 95 \(Ariz. Ct. App. 1979\)](#); Developments, supra note 33, at 998 (much confusion in area caused by courts' and commentators' tendency to rely on inapt theories and need to classify).

[FN46]. See e.g., Comment, supra note 32, at 210-16; Developments, supra note 33, at 998-1005; Note, supra note 33, at 61-62; see also, [Aspell, 595 P.2d at 193-95](#).

[FN47]. See infra notes 101-07 and accompanying text.

[FN48]. Comment, supra note 32, at 212; Chafee, supra note 31, at 1001-07.

[FN49]. See [Moran v. Vincent, 588 S.W.2d 867 \(Tenn. Ct. App. 1979\)](#); accord, [Young v. Westark Prod. Credit Ass'n 257 S.W.2d 274 \(Ark. 1953\)](#); [Clarke County Co-op \(AAL\) v. Read, 139 So. 2d 639, 642 \(Miss. 1962\)](#) (with citations).

[FN50]. Comment, supra note 32, at 212.

[FN51]. See [Aspell v. American Contract Bridge League, 595 P.2d 191, 195 \(Ariz. Ct. App. 1979\)](#).

[FN52]. See e.g., [Lambert v. Fishermen's Dock Co-op.](#), 297 A.2d 566 (N.J. 1972); accord, [Loch v. Paola Farmers' Union Co-op Creamery & Store Ass'n](#), 285 P. 523, reh'g denied, 287 P. 269 (Kan. 1930); see generally, Dag E. Ytreberg, [Co-operative Associations: Validity and Enforceability of Bylaw Amendments Reducing Benefits Available to Members](#), 61 A.L.R.3D 976 (1975).

[FN53]. [Lambert](#), 297 A.2d at 568-69 (citations omitted).

[FN54]. Chafee, supra note 31, at 1005; see also, [Vanderbilt Museum v. American Ass'n of Museums](#), 449 N.Y.S.2d 399, 404 (Sup. Ct. 1982) (even courts rigidly adhering to contract theory impose external standards when the rules of the association do not provide sufficient procedural protection).

[FN55]. Chafee, supra note 31, at 1002-03 (finding that in an organization of 600 members, 179,700 contract permutations would be required). See also, Comment, supra note 32, at 212; Note, supra note 37, at 167.

[FN56]. Each individual member could be deemed to hold a contract with the organization or its representative Board. See [Aspell v. American Contract Bridge League](#), 595 P.2d 191, 194 (Ariz. Ct. App. 1979).

[FN57]. See [Rutledge v. Gulian](#), 459 A.2d 680, 685 (N.J. 1983); see also, Comment, supra note 32, at 213.

[FN58]. [Campbell Soup Co. v. Wentz](#), 172 F.2d 80 (2d Cir.1948); see also, Developments, supra note 33, at 1001; see also, U.C.C., § 2-309(3). The majority view is that U.C.C. Article 2 does apply to consumer purchases of utilities. See generally, Gary D. Spivey, [Electricity, Gas or Water Furnished by Public Utility as 'Goods' with Provisions of Uniform Commercial Code, Article 2 on Sales](#), 48 A.L.R.3D 1060 (1973); see also Jane P. Mallor, Utility 'Services' Under the Uniform Commercial Code: Are Public Utilities In for a Shock?, 56 NOTRE DAME L.REV. 89 (1980). The courts have found that a utility's provision of water, [Zepp v. Mayor & Council of Athens](#), 348 S.E.2d 673 (Ga. Ct. App. 1986). But see [Coast Laundry v. Lincoln City](#), 497 P.2d 1224 (Or. Ct. App. 1972); electricity, [Hedges v. Public Serv. Co. of Ind.](#), 396 N.E.2d 933 (Ind. Ct. App. 1979); [Helvey v. Wabash County REMC](#), 278 N.E.2d 608 (Ind. Ct. App. 1972); [Cincinnati Gas & Elec. Co. v. Goebel](#), 502 N.E.2d 713 (Ohio Mun. Ct. 1986); [Bellotti v. Duquesne Light Co.](#), (Pa. C.P. 1987); but see, [Buckeye Union Fire Ins. Co. v. Detroit Edison Co.](#), 196 N.W.2d 316 (Mich. Ct. App. 1972); and gas, [Gardiner v. Philadelphia Gas Works](#), 197 A.2d 612 (Pa. 1964); [University of Pittsburg v. Equitable Gas Co.](#), 5 Pa. D. & C.3d 303 (C.P. 1978); in metered amounts to customers involves the sale of "goods" covered by Article 2.

[FN59]. [Higgins v. American Soc'y of Clinical Pathologists](#), 238 A.2d 665, 669 aff'd, 251 A.2d 760 (N.J. 1969).

[FN60]. See [Cason v. Glass Bottle Blowers Ass'n](#), 231 P.2d 6 (Cal. 1951).

[FN61]. Note, supra note 37, at 164.

[FN62]. Comment, supra note 32, at 213.

[FN63]. See generally Developments, supra note 33, at 1005; Comment, supra note 32, at 209.

[FN64]. See e.g., [Aspell v. American Contract Bridge League](#), 595 P.2d 191, 194-95 (Ariz. Ct. App. 1979).

[FN65]. Developments, supra note 33, at 1002-04; see, Miller, supra note 28, at 399; SYDNEY R. WRIGHTINGTON, UNINCORPORATED ASSOCIATIONS AND BUSINESS TRUSTS, § § 60, 61 (2d ed. 1923).

[FN66]. Developments, supra note 33, at 1003; see also, Meyer v. First District Ass'n, 170 N.W.2d 429 (Minn. 1969); see generally, Harold J. Laski, The Personality of Associations, 29 HARV.L.REV. 404, 408 (1916).

[FN67]. Developments, supra note 33, at 1003; see, [Gottlieb v. Economy Stores](#), 102 S.E.2d 345, 352 (Va. 1958).

[FN68]. Moreover, a disconnection of service can leave the REC and its members in financially worse shape than it would have been in had the disconnection not occurred. See, **ROGER COLTON**, DETERMINING THE COST-EFFECTIVENESS OF CREDIT AND COLLECTION PRACTICES at 5-27 (1990); see also TURNER, supra note 25, at 294.

[FN69]. [Hackenthal v. California Medical Ass'n](#), 187 Cal. Rptr. 811, 815 (Ct. App. 1982); see also, [Trigg v. Middle Tenn. Elec. Membership Corp.](#), 533 S.W.2d 730, 734 (Tenn. Ct. App. 1975); see e.g., [Dietz v. American Dental Ass'n](#), 479 F.Supp. 554, 557 (E.D. Mich. 1979); [Wilson v. Newspaper Union](#), 197 A. 720, 722 (N.J. Ch. 1938); [Carroll v. Local No. 269, Int'l Bhd Elec. Wrks.](#), 31 A.2d 223, 224-25 (N.J. Ch. 1943).

[FN70]. [McCreery Angus Farms v. American Angus Ass'n](#), 379 F.Supp. 1008, 1010 (D. Ill.), aff'd, 506 F.2d 1404 (7th Cir.1974); see [Silver v. New York Stock Exch.](#), 373 U.S. 341, 367 (1963); [Trigg](#), 533 S.W.2d at 734.

[FN71]. See [James v. Maranship Corp.](#), 155 P.2d 329, 335 (Cal. 1944); [Silver](#), 373 U.S. at 364-67.

[FN72]. [Dietz v. American Dental Ass'n](#), 479 F.Supp. 554, 557 (E.D. Mich. 1979); see also [Trigg](#), 533 S.W.2d at 734.

[FN73]. [Dietz](#), 479 F.Supp. at 559.

[FN74]. See generally Note, Government Regulation and Monopoly Power in the Electric Utility Industry, 33 CASE W. RES. L.REV. 240 (1983); see also, [Tyson and Brokers v. Banton](#), 273 U.S. 418, 434-35 (1927) (monopoly affected with public interest where public has a right to demand and receive service, as with the furnishing of gas, water and electricity); [Trigg](#), 533 S.W.2d at 734.

[FN75]. See generally Note, supra note 33, at 62-64, 68-72.

[FN76]. See Comment, supra note 32; Note, [State Power and Discriminatory Private Clubs: First Amendment Protection for Non-Expressive Associations](#), 104 HARV.L.REV. 1835, 1839 (1991).

[FN77]. Compare, [Roberts v. United States Jaycees](#), 468 U.S. 609, 620 (1984); with [New York City State Club Ass'n, Inc. v. City of New York](#), 487 U.S. 1 (1988). In contrast, as no expressive or religious implications attach to REC membership, no constitutional association right is implicated. It is questionable whether any associational

rights apart from First Amendment activity still enjoy constitutional protection. [Bowers v. Hardwicke](#), 478 U.S. 186 (1986); [Village of Belle Terre v. Boraas](#), 416 U.S. 1 (1974). To the extent such protections survive, they would be limited to small limited membership associations with a high degree of seclusion from others in critical aspects of the associational relationship, and which have no trade or business purpose and which were formed with some degree of expressional activity in mind. [New York City State Club](#), 487 U.S. at 11-13, 18-20. Quite clearly, an REC shares none of these characteristics.

[FN78]. Note, supra note 33, at 62-63; Chafee, supra note 31, at 1017-18, 1021, 1027-28; ALEXIS DETOCQUEVILLE, *DEMOCRACY IN AMERICA* 485 (1966 ed.); see JILL NORGREN AND SERENA NANDA, *AMERICAN CULTURAL PLURALISM AND THE LAW* 222-23 (1988); MEIR DAN-COHEN, *RIGHTS, PERSONS AND ORGANIZATIONS*, 60-78 (1986).

[FN79]. Hence, reluctance disappears when an individual must give up some property interest upon leaving the group.

[FN80]. None of the alternatives commonly available to an aggrieved member of a group offer relief to a member of an REC: joining a similar group in the area, starting a splinter group or doing without.

[FN81]. See supra notes 14-17 and accompanying text.

[FN82]. See [Western Colo. Power Co. v. Public Util. Comm'n](#), 411 P.2d 785 (Colo. 1966). The Colorado court noted: "a[n electric consumer] located in an area exclusively served by such co-operative must take [the Co-op's] service, if indeed service is to be received at all." [Id.](#) at 795.

[FN83]. Chafee, supra note 31, at 1023-26; see also Pound, supra note 34, at 680.

[FN84]. Chafee, supra note 31, at 1023; Pound, supra note 34, at 681.

[FN85]. Chafee, supra note 31, at 1023; see also Note, supra note 31, at 1321 (the lack of applicable standards is the most serious obstacle to judicial intervention).

[FN86]. Chafee, supra note 31, at 1028; see also [Rutledge v. Gulian](#), 459 A.2d 680, 685-86. (N.J. 1983); DAN-COHEN, supra note 78, at 60-78.

[FN87]. See supra notes 5, 6 and 17 and accompanying text.

[FN88]. See [Aspell v. American Contract Bridge League](#), 595 P.2d 191, 194- 95 (Ariz. Ct. App. 1979); see also Pound's discussion of the decision in *Baird v. Wells*, 44 Ch.D. 661 (no date available), infra note 164.

[FN89]. [Aspell](#), 595 P.2d at 194-95.

[FN90]. The only "suitable" remedy is often reinstatement, which is often impracticable. The very act of forced association strips the value of voluntary attachment to a group. Note, supra note 31, at 1321 (describing standards

for review and remedy as the most serious obstacle to judicial intervention).

[FN91]. See *infra* notes 164-67 and accompanying text; see also Pound, *supra* note 34, at 678-81.

[FN92]. Developments, *supra* note 33, at 1010; Chafee, *supra* note 31, at 1026. See *infra* note 163 and accompanying text for a discussion of damages available in REC expulsion cases; injunctive relief to prevent expulsion is available in a proper case, as well as, is reinstatement. See also [Berrien v. Pollitzer, 165 F.2d 21, 23 \(D.C. Cir.1947\)](#); [Van Daele v. Vinci, 282 N.E.2d 728, 732 \(Ill. 1972\)](#).

[FN93]. See *supra* notes 43-45 and accompanying text.

[FN94]. Note, *supra* note 37, at 167; see [Harris v. Aiken, 92 P. 537, 538- 39 \(Kan. 1907\)](#). HOWARD L. OLECK, *NONPROFIT CORPORATIONS, ORGANIZATIONS AND ASSOCIATIONS* 742-745 (4th ed. 1980). However, courts may not explicitly identify the interest as the source of their decision. WRIGHTINGTON, *supra* note 65, at 311.

[FN95]. Rules regarding expulsion in particular may be strictly construed against the association as being penal in nature. See [Medical and Surgical Soc'y. v. Weatherby, 75 Ala. 248, 256 \(1883\)](#).

[FN96]. This deviation does not reference the instance where a Co-op seeks to change the rules after a member has joined. That situation is governed by different principles of law. See *supra* notes 52-53 and accompanying text for a discussion of those principles.

[FN97]. [Lawrence v. Ridgewood Country Club, 635 S.W.2d 665, 666-67 \(Tex. Ct. App. 1982\)](#); [Jackson v. American Yorkshire Club, 340 F.Supp. 628, 631 \(N.D. Iowa 1971\)](#); [Cunningham v. Independent Soap and Chemical Workers, 486 P.2d 1316, 1320-22 \(Kan. 1971\)](#), cert. denied, [404 U.S. 985 \(1971\)](#); see also [Moran v. Vincent, 588 S.W.2d 867, 870 \(Tenn. Ct. App. 1979\)](#); Chafee, *supra* note 31, at 1023-24.

[FN98]. [Automotive Elec. Serv. v. Ass'n of Auto. Aftermarket Distrib., 747 F.Supp. 1483, 1510 \(E.D.N.Y. 1990\)](#); [Vanderbilt Museum v. American Ass'n of Museums, 449 N.Y.S.2d 399, 404 \(Sup. Ct. 1982\)](#).

[FN99]. WRIGHTINGTON, *supra* note 65, at 307; see also [Briggs v. Technocracy, Inc., 85 N.Y.S.2d 735, 737 \(Sup. Ct. 1948\)](#); [Burmester v. Alwin, 165 N.W. 135 \(Minn. 1917\)](#); [Brooks v. Petroleum Club of Wichita, 484 P.2d 1026, 1031 \(Kan. 1971\)](#); [Vanderbilt Museum, 449 N.Y.S.2d at 404](#); see also [Stiefel v. Amalgamated S.M.W.L.U. No. 73, 208 Ill. App. 121, 123-24 \(1917\)](#); [Quaker City Yacht Club v. Williams, 429 A.2d 1204 \(Pa. Commw. Ct. 1981\)](#). However, "there is some authority to the contrary." 7 C.J.S., *Associations* § 24 (1980); [Evans v. Supreme Judicial Council, 120 N.E. 93 \(N.Y. 1918\)](#); see [Williams v. Inglewood Board of Realtors, 33 Cal. Rptr. 289 \(Ct. App. 1963\)](#); Note, *supra* note 37, at 161. Even here, it is clear that the association must notify members of the rule and of the penalty that its violation entails. See [Espinola v. Club Liberdade, 97 N.E.2d 202, 203-04 \(Mass. 1950\)](#); [American Hungarian Fed'n. v. Nadas, 519 N.E.2d 677, 680-81 \(Ohio Ct. App. 1987\)](#).

[FN100]. Note, *supra* note 37, at 166; [Youngblood v. Wilcox, 255 Cal. Rptr. 527, 531 \(Ct. App. 1989\)](#); [Van Daele v. Vinci, 282 N.E.2d 728, 731-32 \(Ill. 1972\)](#).

[FN101]. See Chafee, *supra* note 31, at 1022; Cf. [Moran, 588 S.W.2d at 870](#) (where no economic interest was at risk

and the court said "it is well established that the Courts will not interfere with the internal affairs of voluntary associations, except in cases involving fraud, lack of jurisdiction, or the invasion of property rights"). Heightened scrutiny is most dramatically demonstrated in cases in which an exclusion, as opposed to an expulsion, from a voluntary association is challenged. The general rule is that exclusions are not reviewable, however, exclusions from groups with an economic stranglehold over its members are often rigidly scrutinized. See generally Note, *supra* note 31. A different standard is also apparent in expulsion cases. *Id.* See WRIGHTINGTON, *supra* note 65, at 311.

[FN102]. Note, *supra* note 37, at 167.

[FN103]. *Id.* See generally [Hackenthal v. California Medical Ass'n](#), 187 Cal. Rptr. 811 (Ct. App. 1982); Cf. [Parsons College v. North Central Ass'n of Colleges](#), 271 F.Supp. 65, 73. (D. Ill. 1967) (no right to counsel). See generally, Richard I. Braemer, Disciplinary Procedures for Trade and Professional Associations 23 BUS. LAW. 959 (1968).

[FN104]. See *infra* notes 151-68 and 170-73 and accompanying text.

[FN105]. See [Blake v. North Shore Multiple Listing Serv.](#), 367 N.Y.S.2d 440, 446-49 (Sup. Ct. 1975); [Armstrong v. Duffy](#), 103 N.E.2d 760, 766-68 (Ohio Ct. App. 1951).

[FN106]. Chafee, *supra* note 31, at 1018.

[FN107]. See *supra* note 81 and accompanying text.

[FN108]. [Curran v. Mt. Diablo Council, Boy Scouts of Am.](#), 195 Cal. Rptr. 325, 330 (Ct. App. 1983) (expulsion violates common law where substantively unreasonable, internally irregular or procedurally unfair; rules cannot be capricious or contrary to public policy.). Cf. [Petermann v. International Bhd. of Teamsters](#), 174 Cal. App. 2d 184 (1959); [DeRose v. Putnam Mgt. Co.](#), 398 Mass. 205, 209-10 (1988) and cases cited therein.

[FN109]. [Shapiro v. Gehlman](#), 272 N.Y.S. 624, 626 (1934). This exception includes organizations which fail to offer sufficient procedural fairness as well as where the decision is a foregone conclusion. See Note, *supra* note 37, at 164-65 for a discussion of the general rule and its exceptions. See also [Westheimer v. Commodity Exch.](#), 651 F.Supp. 364, 367 (S.D.N.Y. 1987).

[FN110]. [Terrell v. Palomino Horse Breeders of Am.](#), 414 N.E.2d 332, 335 (Ind. Ct. App. 1980); [Reale v. Patrolmen's Benevolent Ass'n.](#), 441 N.Y.S.2d 202, 205 (Sup. Ct. 1981), *rev'd* on other grounds, 456 N.Y.S.2d 56 (App. Div. 1982); see generally OLECK, *supra* note 94, at 754.

[FN111]. Comment, *supra* note 32, at 218; see [Brooks v. Petroleum Club of Wichita](#), 484 P.2d 1026, 1031 (Kan. 1971); [Bloch v. Veteran Corps of Artillery](#), 402 N.Y.S.2d 200, 202 (App. Div. 1978); Chafee, *supra* note 31, at 1014.

[FN112]. Note, *supra* note 37, at 161; see also [Benson Co-op. Creamery Ass'n v. First Dist. Ass'n](#), 170 N.W.2d 425, 427 (Minn. 1969).

[FN113]. [Veteran Corps of Artillery](#), 402 N.Y.S.2d at 202; Comment, Protection of Membership in Voluntary

Associations, 37 YALE L.J. 368 (1927).

[FN114]. [Falcone v. Medical Soc'y.](#), 170 A.2d 791, 799 (N.J. 1961); [Gaenslen v. Board of Directors, St. Mary's Hosp. & Med. Center](#), 232 Cal. Rptr. 239 (Ct. App. 1985); Cf. [Purpura v. Richmond County Country Club](#), 494 N.Y.S.2d 371, 372 (App. Div. 1985). It has been held that it is inherent in the purposes for which RECs were formed that there is a duty not to exclude customers on an arbitrary or unreasonable basis. [Ohio Power Co. v. Village of Attica](#), 261 N.E.2d 123, 127 (Ohio 1970); [Capital Electric Power Ass'n v. McGuffee](#), 83 So. 2d 837, 841-43 (Miss. 1955).

[FN115]. [Developments](#), supra note 33, at 1020. (Judicial enforcement of substantive limits on association includes ascertaining grounds for association's conduct and determining if circumstances justified action taken.) See [Capital Elec. v. McGuffee](#), 83 So. 2d 837, 840 (Miss. 1955). Relatedly, an organization may be held to have waived its discretion to terminate service based on a violation of its rules or bylaws if it has countenanced similar violations by the subject members, or by others, in the past. See OLECK, supra note 94, at 752; [Spiegelman v. Engineers County Club, Inc.](#), 316 N.Y.S.2d 358, 358-59 (Sup. Ct. 1970).

[FN116]. [Zelenka v. Order of Elks](#), 324 A.2d 35, 37-39 (N.J. 1974); [Curran v. Mt. Diablo Council, Boy Scouts of Am.](#), 195 Cal Rptr. 325, 332 (Ct. App. 1983); [Rutledge v. Gulian](#), 459 A.2d 680, 683 (N.J. 1983).

[FN117]. [Zelenka](#), 324 A.2d at 37-39; [Higgins v. American Soc'y of Clinical Pathologists](#), 238 A.2d 665, 671-72 (N.J. 1969); [Thomason v. Clark County Farm Bureau Tobacco Coop.](#), 259 S.W.2d 64, 66 (Ky. 1953).

[FN118]. [195 Cal. Rptr. 325 \(Ct. App. 1983\)](#).

[FN119]. [Curran](#), 195 Cal. Rptr. at 331-33; see also [Rutledge](#), 459 A.2d at 683.

[FN120]. [324 A.2d 35 \(N.J. 1974\)](#).

[FN121]. Cf. [15 U.S.C. § 1691\(a\)\(3\)](#) (1989 and Supp.1991), REG. Z, 12 C.F.R. § 202.2(z) (1991) (Equal Credit Opportunity Act prohibits discrimination based on consumer's good faith exercise of rights under the federal Consumer Protection Act). Moreover, most states ban retaliatory evictions of tenants who make good faith complaints regarding housing code violations. See [MASS. GEN. LAWS ANN. ch. 186, § 18](#) (West 1985).

[FN122]. In [Falcone v. Medical Soc'y.](#), 170 A.2d 791, 797-800 (N.J. 1961), for instance, the court held that a private medical society could not exclude a physician on a basis not stated in state rules for admission to practice. See also [Higgins v. American Soc'y of Clinical Pathologists](#), 238 A.2d 665, 671- 72, aff'd, 251 A.2d 760 (N.J. 1969).

[FN123]. [Gaenslen v. Board of Directors of St. Mary's Hosp. & Med. Ctr.](#), 232 Cal. Rptr. 233, 243-44 (Ct. App. 1985); [Miller v. Eisenhower Med. Ctr.](#), 614 P.2d 258, 269-70 (Cal. 1980).

[FN124]. [Developments](#), supra note 33, at 995; see also Note, supra note 31, at 1321-22. For characteristic bylaws provisions, see [5A AM. JUR. LEGAL FORMS 2d, Co-operative Associations Forms, § § 71:52 - 71:53, 71-80](#) (Rev. Ed).

[FN125]. See supra notes 95-100 and accompanying text.

[FN126]. Rights of membership in a cooperative are defined by statutes, charter, bylaws, association agreements, the rules of business organizations and sometimes stock certificates. [Thomason v. Clarke County Tobacco Co-op.](#), 259 S.W.2d 64, 66 (Ky. 1953); [Adams v. Sanford Growers Credit Corp.](#), 186 So. 239 (Fla. 1938); [Bessette v. St. Albans Co-op. Creamery](#), 176 A. 307 (Vt. 1935). But see [Bertram v. Danish Creamery Ass'n](#), 261 P.2d 349, 351 (Cal. Ct. App. 1953).

[FN127]. [Boldt v. St. Cloud Milk Producers' Ass'n](#), 273 N.W. 603, 608 (Minn. 1937); [Benson Co-op. Creamery Ass'n v. First Dist. Ass'n](#), 170 N.W.2d 425, 427 (Minn. 1969). But see [Bertram](#), 261 P.2d at 349 (absent express term to contrary, cooperative's board free to deal with members on any reasonable basis); see generally, Laski, supra note 66.

[FN128]. [Whitney v. Farmers' Co-op Grain Co.](#), 193 N.W. 103, 104-05 (Neb. 1923); see generally PACKEL, supra note 22, at 82; [Adams v. Sanford Growers' Credit Corp.](#), 186 So. 239, 240-41 (Fla. 1938).

[FN129]. See [Curran v. Mt. Diablo Council, Boy Scouts of Am.](#), 195 Cal. Rptr. 325, 329-31, 331-33 (Ct. App. 1983).

[FN130]. [Bertram](#), 261 P.2d at 351; [Benson Cooperative Creamery Ass'n](#), 170 N.W.2d at 427-28.

[FN131]. [Benson Co-op. Creamery Ass'n](#), 170 N.W.2d at 428; HEFLEBOWER, supra note 1, at 134.

[FN132]. See [Espinola v. Club Liberdade](#), 97 N.E.2d 202, 203-04 (Mass. 1950); see also [American Hungarian Fed'n v. Nadas](#), 519 N.E.2d 677, 680 (Ohio Ct. App. 1987).

[FN133]. Developments, supra note 33, at 1029; [Curran](#), 195 Cal. Rptr. at 330-31; [Vanderbilt Museum v. American Ass'n of Museums](#), 449 N.Y.S.2d 399, 404 (Sup. Ct. 1982); [Brooks v. Petroleum Club of Wichita](#), 484 P.2d 1026, 1031 (Kan. 1971); [Youngblood v. Wilcox](#), 255 Cal. Rptr. 527, 531 (Ct. App. 1989); [Briggs v. Technocracy, Inc.](#), 85 N.Y.S.2d 735, 737 (Sup. Ct. 1948); [Burmester v. Alwin](#), 165 N.W. 135, 135 (Minn. 1917); see also [Quaker City Yacht Club v. Williams](#), 429 A.2d 1204, 1206 (Pa. 1981); [Needelman v. Dade County Medical Ass'n](#), 205 So. 2d 17, 18-20 (Fla. Ct. App. 1967).

[FN134]. Hamilton, supra note 28, at 604-05.

[FN135]. [ME. REV. STAT. ANN., tit. 13, § 1644](#) (West 1981).

[FN136]. FLA. STAT. ch. 425 (1986).

[FN137]. FLA. STAT. ch. 425.09(1) (1986); see also, FLA. STAT. ch. 619.06(3) (1986).

[FN138]. [CAL. CORP. CODE § 12431\(a\)-\(c\)](#) (West's Supp.1991).

[FN139]. [CAL. CORP. CODE § 12431\(c\)\(3\)](#). Texas similarly requires 10 days notice and an opportunity to be heard. [TEX. REV. CIV. STAT. ANN. art. 1396- 50.01, § 33 \(West Supp.1991\)](#). While the more specific Electric Corporation Act would ordinarily control, see, [TEX. REV. CIV. STAT. ANN. art. 1528b, § 36](#), the latter is silent and the former should apply at least by analogy.

[FN140]. [CAL. CORP. CODE § 12431\(e\) \(West Supp.1991\)](#).

[FN141]. Id. [§ 12431\(f\)](#).

[FN142]. [MINN. STAT. ANN., § 308A.165](#), Sub. 3(3) (West Supp.1991).

[FN143]. Id. [§ 308A.605](#), Sub. 2.

[FN144]. [IOWA CODE ANN., § 499.18](#) (West 1991) (emphasis added).

[FN145]. [N.C. GEN. STAT. § 117-16 \(1989\)](#) (emphasis added); see also Id. [§ 117-14\(1\)](#); see also [Sternier v. Saugatuck Harbor Yacht Club, 450 A.2d 369, 371-72 \(Conn. 1982\)](#) (where bylaws required by Connecticut statute to be reasonable, expulsion of member in an arbitrary manner is invalid).

[FN146]. [N.C. GEN. STAT. § 117-16.1](#).

[FN147]. Cf. [Everglades Protective Syndicate v. McKinney, 391 So. 2d 262, 265 \(Fla. Ct. App. 1981\)](#) (almost any reason is a sufficient ground for expulsion of membership if not related to an income interest); see also Chafee, supra note 31, at 1018 and 1022.

[FN148]. See also Developments, supra note 33, at 1008; see generally Note, supra note 31; Note, supra note 37, at 167; compare [Vanderbilt Museum v. American Ass'n of Museums, 449 N.Y.S.2d 399, 407 \(Sup. Ct. 1982\)](#) with [Purpura v. Richmond County Country Club, 494 N.Y.S.2d 371, 372 \(App. Div. 1985\)](#).

[FN149]. Many courts expressly adhere to Professor Chafee's formulation. See e.g., [Rutledge v. Gulian, 459 A.2d 680, 685 \(N.J. 1983\)](#); [Aspell v. American Contract Bridge League, 595 P.2d 191, 195 \(Ariz. Ct. App. 1979\)](#).

[FN150]. Chafee, supra note 31, at 1018; see also, [Falcone v. Middlesex County Medical Soc'y, 170 A.2d 791, 798-99 \(N.J. 1961\)](#).

[FN151]. Chafee, supra note 31, at 1022-23; [Van Daele v. Vinci, 282 N.E.2d 728, 731 \(Ill. 1972\)](#); [National Ass'n of Sporting Goods Wholesalers v. F.T.L. Marketing Corp., 779 F.2d 1281, 1285 \(7th Cir.1985\)](#).

[FN152]. See supra notes 83-87 and accompanying text. Chafee, supra note 31, at 1022-24; see supra notes 83-86 and accompanying text; see also, [Rutledge, 459 A.2d at 686](#).

[FN153]. Chafee, supra note 31, at 1026-28; see also Note, supra note 31, at 1316; [Van Daele, 282 N.E.2d at 731-32.](#)

[FN154]. Developments, supra note 33, at 1010; Pound, supra note 34, at 678- 79.

[FN155]. Developments, supra note 33, at 1010; see also, Note, supra note 31, at 1320; [Higgins v. American Soc'y of Clinical Pathologists, 238 A.2d 665, 671-72 \(N.J. 1969\).](#)

[FN156]. Developments, supra note 33, at 1010; [Rutledge, 459 A.2d at 685.](#)

[FN157]. [Falcone v. Medical Soc'y, 170 A.2d 791, 799 \(N.J. 1961\).](#)

[FN158]. See infra note 182 and accompanying text; see also [Certified Grocers of Cal. v. State Bd. of Equalization, 223 P.2d 291 \(Cal. Ct. App. 1950\).](#) In addition, some courts speak of a consideration that the group is affected with "a public purpose." The definition of "public purpose" in this context is broad, encompassing trade and marketing cooperatives, and professional groups. See e.g., [United Multiple Listing Serv. v. Bernstein, 184 Cal. Rptr. 465 \(Ct. App. 1982\)](#); [Salkind v. Cal. Dental Ass'n, 224 Cal. Rptr. 352 \(Ct. App. 1986\)](#); [Automotive Elec. Serv. v. Association of Auto. Aftermarket Distrib., 747 F.Supp. 1483, 1510 \(E.D.N.Y. 1990\).](#) It is unclear whether a group meeting the policies discussed supra text accompanying notes 152-154, could ever fail to qualify for heightened scrutiny on the grounds that it is not affected with a public purpose. In any event, an REC, as a publicly- funded creature of statute, would certainly qualify.

[FN159]. See [Dietz v. American Dental Ass'n, 479 F.Supp. 554, 557 \(E.D. Mich. 1979\)](#); [Falcone, 170 A.2d at 791](#) (distinguishing cases establishing a general rule against scrutinizing member practices as dealing with social, fraternal or religious organizations, from cases in which the association has monopoly control of essential resources); [McCreery Angus Farms v. American Angus Ass'n, 379 F.Supp. 1008, 1019 \(D. Ill. 1974\)](#), aff'd, [506 F.2d 1404 \(7th Cir.1974\)](#); [National Ass'n of Sporting Goods Wholesalers v. F.T.L. Marketing Corp., 779 F.2d 1281, 1285 \(7th Cir.1985\)](#) (where the association holds monopoly power over an economic benefit, courts will step in to evaluate the association's actions; otherwise, courts leave control of economic associations to market forces).

[FN160]. See e.g., [Majorie Webster Jr. College v. Middle States Ass'n of Colleges, 432 F.2d 650, 655-56 \(D.C. Cir.1970\)](#); OLECK, supra note 94, at 742- 43.

[FN161]. See supra Developments, note 33, at 1008; Comment, supra note 32, at 222-25

[FN162]. [Western Colo. Power Co. v. Public Util. Comm'n., 411 P.2d 785, 795 \(Colo. 1966\)](#); see Developments, supra note 33, at 994-98 and 1036-37; [Falcone, 170 A.2d at 798-99](#); [Van Daele v. Vinci, 282 N.E.2d 728, 731 \(Ill. 1972\).](#)

[FN163]. The difficulty of fashioning an appropriate remedy has been described as the primary reason courts have shied from internal disputes of organizations. Developments, supra note 33, at 1010. The ideal remedy would generally be reinstatement. Chafee, supra note 31, at 1012. The fact of litigation, however, means that forced reinstatement will divest the advantages of voluntary association in a group. Id. Professor Pound explains this dilemma by reference to the English case of *Baird v. Wells*, 44 Ch.D. 661 (no date available). In that case, the court first found that the plaintiff had been wrongfully expelled. It then went on to determine itself to be without power to do anything about it. Thus, "plaintiff was given the very thing he really wanted (in the form of a declaration that he

had been wronged) although it was solemnly explained to him that the court could do nothing to help him." Pound, supra note 34, at 679. Where, as in the REC context, termination effects a loss of an economic benefit as well as personal humiliation, reinstatement and damages are called for. Damages here include loss of service and any other privileges of membership as well as conventional damages resulting from the service interruption and mental suffering caused by the fact of and the manner of expulsion. WRIGHTINGTON, supra note 65, at 311.

The award of damages for wrongful utility conduct is well-accepted. See generally **Roger Colton**, *Utility Disconnections as a Tort: Gaining Compensation for the Harms of Unlawful Utility Shutoffs*, 22 CLEARINGHOUSE REV. 609 (1989); see also, Annotation, *Measure and Amount of Damages for Breach of Duty to Furnish Water, Gas, Light or Power Service*, 108 A.L.R. 1174 (1937); see also Steven R. Pitcher, [Wrongful Termination of Electric Service](#), 15 AM. JUR. PROOF OF FACTS (2D) 125, 147 (1978).

[FN164]. See e.g. supra note 87 and accompanying text.

[FN165]. Note, supra note 31, at 1321 (the problem of what standard should be applied in testing the validity of an association's action is seen by many as the most serious obstacle to judicial intervention). See also Pound, supra note 34, at 678-79.

[FN166]. Note, supra note 31, at 1321; see [Falcone v. Medical Soc'y](#), 170 A.2d 791, 800 (N.J. 1961). In Falcone, the court found an exclusion from membership in a medical professional organization impermissible. The court relied heavily on the fact that state regulations allowed the person to practice medicine within the state. Id.

[FN167]. See Note, supra note 31, at 1322. (Courts should accept analogous state standards as a baseline, placing the burden on the association to prove that those state standards are not appropriate to its objectives.).

[FN168]. WRIGHTINGTON, supra note 65, at 311, n.33; Developments, supra note 33, at 1010-11; see also Chafee, supra note 31, at 996; [Vanderbilt Museum v. American Ass'n of Museums](#), 449 N.Y.S.2d 399, 405 (Sup. Ct. 1982) (some rules apply irrespective of the type of organization at issue).

[FN169]. In Falcone, for instance, while the court stated it would not judge the merits of an organization's exclusion, it went on to scrutinize the basis for the exclusion, and found the asserted reasons for the discharge factually infirm. [Falcone](#), 170 A.2d at 799-800; see Note, supra note 31, at 1321-24; see also [Harmon v. Matthews](#), 27 N.Y.S.2d 656 (Sup. Ct. 1941); [James v. Marinsnip Corp.](#), 155 P.2d 329, 335 (Cal. 1944); compare, [Rosenberg v. American Bowling Congress](#), 589 F.Supp. 547 (M.D. Fla. 1984); see WRIGHTINGTON, supra note 65, at 320.

[FN170]. [Blake v. North Shore Multiple Listing Service](#), 367 N.Y.S.2d 440, 446-48 (Sup. Ct. 1975); [Cunningham v. Independent Soap & Chem. Workers of Kansas City](#), 486 P.2d 1316 1320-22 (Kan. 1971).

[FN171]. [Needelman v. Dade County Medical Ass'n](#), 205 So. 2d 17 (Fla. Ct. App. 1967); [Vanderbilt Museum](#), 449 N.Y.S.2d at 404.

[FN172]. [Bradley v. Wilson](#), 123 S.E. 273, 275 (Va. 1924); see also [Espinola v. Club Liberdade](#), 97 N.E.2d 202, 204 (Mass. 1950).

[FN173]. [State ex rel. Barfield v. Florida Yacht Club](#), 106 So. 2d 207 (Fla. Ct. App. 1958); [Zelenka v. Order of Elks](#), 324 A.2d 35 37-39 (N.J. 1974); see generally Developments, supra note 33, at 1012-36 (nature, size and purpose of organization often determine the degree to which a court will scrutinize an organization's substantive

rules and procedures. Thus, courts look to the organization's structure and purpose in determining how much process is "due," *id.* at 1020; in determining how closely to hold the organizational hierarchy to its own rules and procedures, *id.* at 1030; and in assessing the quantum of evidence necessary to support an organization finding on the merits. *Id.* at 1036); [Aspell v. American Contract Bridge League, 595 P.2d 191, 194-95 \(Ariz. Ct. App. 1979\)](#).

[FN174]. See *supra* note 170 and accompanying text; compare, [Dannhausen v. Business Publications Audit, 797 F.2d 548, 551 \(7th Cir.1986\)](#) with [Van Daele v. Vinci, 282 N.E.2d 728 \(Ill. 1972\)](#). In the latter case, the court stated:

Although the courts . . . have traditionally been reluctant to interfere in the internal operations of associations, this strong possibility that an important economic interest of the plaintiffs was affected by an improper administrative proceeding gives the court power and the duty to act. We agree with the view expressed by the Supreme Court of New Jersey that said: "We are here concerned with and therefore deal solely with an organization, membership in which may here, in the language of [[Trautwein v. Harbourt, 40 N.J. Super. 247, 123, A.2d 30](#)] be viewed as 'an economic necessity'; in dealing with such an organization, the court must be particularly alert to the need for truly protecting the public welfare and advancing the interests of justice by reasonably safeguarding the individual's opportunity for earning a livelihood while not impairing the proper standards and objective of the organization. [citations omitted except as indicated]."

[Van Daele, 282 N.E.2d at 731.](#)

[FN175]. Developments, *supra* note 33, at 997, 1028-32 and 1036-37.

[FN176]. Chafee, *supra* note 31, at 1021 (exclusiveness of club directly related to its interest in controlling membership); cf. [Roberts v. Jaycees, 468 U.S. 609, 620 \(1984\)](#). Unlike a professional association or an accreditation organization, an REC has no interest in controlling its membership in order to maintain the status of the organization (and increase its members income by reducing each patron's information costs). An REC is bound, in fact, to serve all within its service area on a nondiscriminatory basis. See [Ohio Power Co. v. Village of Attica, 261 N.E.2d 123, 127 \(Ohio 1970\)](#); see also Satterfield, *supra* note 22, at 17.

[FN177]. Developments, *supra* note 33, at 1037.

[FN178]. Note that despite programs and incentives to push members to vote, only a small percentage of REC members tend to do so. See HEFLEBOWER, *supra* note 1, at 199 (some differential is common in most large Co-ops).

[FN179]. [State ex rel. Boldt v. St. Cloud Milk Producers' Ass'n, 273 N.W. 603, 608 \(Minn. 1937\)](#).

[FN180]. Compare an REC to [Rutledge v. Gulian, 459 A.2d 680, 685-86 \(N.J. 1983\)](#).

[FN181]. Compare, [Boldt, 273 N.W. at 608](#); see also HEFLEBOWER, *supra* note 1, at 205 (In RECs, as in many large Co-ops, leadership tends to pass into the hands of a managerial group. However, members of RECs, unlike those of other Co-ops, cannot vote with their feet; that is, withdraw their patronage as an avenue to express their dissatisfaction). Cf., TURNER, *supra* note 25, at 297 (large part of cooperative's membership, even in large Co-ops, participates in direction of Co-op on a democratic basis) and DAN-COHEN, *supra* note 78, at 76 (sub-units of organization are likely to rely upon [and stretch] organizing principles of group for their own purposes).

[FN182]. See Hamilton, *supra* note 28, at 604-05; see also [Capital Elec. Power Ass'n v. McGuffee, 83 So. 2d 837, 842-43 \(Miss. 1955\)](#) (holding that the denial of service before the court was unreasonable and inconsistent with the

purposes stated in the REC Act).

[FN183]. See HEFLEBOWER, *supra* note 1, at 134; VOORHIS, *supra* note 1, 53-66 (1961); [State v. Sho-Me Power Co-op](#), 191 S.W.2d 971, 977 (Mo. 1946).

[FN184]. See Satterfield, *supra* note 22, at 17; PACKEL, *supra* note 22, at 12.

[FN185]. Courts sometimes also speak of the "public purpose" of the association, but it is unclear how this consideration differs from the economic stranglehold of a necessary resource which is the predicate for heightened scrutiny. In any event, RECs, as associations that are publicly subsidized for the purpose of improving rural areas, would surely qualify under such a "public purpose" doctrine. Compare [Van Daele v. Vinci](#), 282 N.E.2d 728, 732 (Ill. 1972) with [National Ass'n of Sporting Goods Wholesalers v. F.T.L. Marketing](#), 779 F.2d 1281, 1285 (7th Cir.1985).

[FN186]. Chafee, *supra* note 31, at 1023-26.

[FN187]. Note, *supra* note 37, at 161.

[FN188]. Developments, *supra* note 33, at 1023-26, 1029. (Although size, structure and type of organization, together with harms to the expelled member, seem to affect decisions, no clear formula has emerged.).

[FN189]. Developments, *supra* note 33, at 1012-18; see [Sywak v. O'Connor Hosp.](#), 244 Cal. Rptr. 753, 758 (Ct. App. 1988) (right to fair procedure of common law, like constitutional due process, is a fluid concept). See [Memphis Light, Gas and Water Div. v. Craft](#) 436 U.S. 1 (1978), for a discussion of the constitutional requirements of procedural due process as applied in the utility service termination context. Some courts have imposed due process requirements upon voluntary associations. See e.g., [Elgin v. Montgomery County Farm Bureau](#), 549 So. 2d 486, 487 (Ala. 1989); [Aspell v. American Contract Bridge League](#), 595 P.2d 191, 195 (Ariz. Ct. App. 1979); [Moran v. Vincent](#), 588 S.W.2d 867, 869-70 (Tenn. Ct. App. 1979). However, other courts reject this notion. See [Head v. Lutheran Hosp.](#), 516 N.E.2d 921, 928 (Ill. App. Ct. 1987).

[FN190]. See *supra* notes 151-62 and accompanying text. Cf., [Jackson v. American Yorkshire Club](#), 340 F.Supp. 628, 633 (N.D. Iowa) (procedure requiring member at risk to request hearing is unconscionable).

[FN191]. [Tulsa Prof. Collection Servs. v. Pope](#), 485 U.S. 478, 484-85 (1988), [Cleveland Bd. of Educ. v. Loudermill](#), 470 U.S. 532 (1985); see [Curran v. Mt. Diablo Council Boy Scouts of Am.](#), 195 Cal. Rptr. 325, 328 (Ct. App. 1983); [Youngblood v. Wilcox](#), 255 Cal. Rptr. 527, 531 (Ct. App. 1989).

[FN192]. Cf., [Hackenthal v. California Medical Ass'n](#), 187 Cal. Rptr. 811, 817 (Ct. App. 1982) (deficiencies at hearing stage not cured by availability of appeal).

[FN193]. See [Reale v. Patrolmen's Benevolent Ass'n](#), 441 N.Y.S.2d 202, 205 (Sup. Ct. 1981), *rev'd* on other grounds, 456 N.Y.S.2d 56 (App. Div. 1982); see also [Kirk v. Jefferson County Medical Soc'y](#), 577 S.W.2d 419, 422-23 (Ky. Ct. App. 1978); see generally Braemer, *supra* note 103, at 961-69.

[FN194]. See *supra* notes 66-68 and accompanying text; see also Braemer, *supra* note 103, at 961.

[FN195]. [Developments](#), supra note 33, at 993.

[FN196]. [State ex rel. Boldt v. St. Cloud Milk Producers' Ass'n](#), 273 N.W. 603, 605-08 (Minn. 1937).

[FN197]. Cf., [Hackenthal v. California Medical Ass'n](#), 187 Cal. Rptr. 811, 815 (Ct. App. 1982) (right to examine and refute evidence as part of common law right of fair procedure).

[FN198]. *Id.*; Braemer, supra note 103, at 963-64.

[FN199]. Cf., [Reale v. Patrolmen's Benevolent Ass'n](#), 441 N.Y.S.2d 202, 205 (Sup. Ct. 1981), rev'd on other grounds, [456 N.Y.S.2d 56 \(App. Div. 1982\)](#) with discussion in Braemer, supra note 103, at 967-68.

[FN200]. See also [Harmon v. Matthews](#), 27 N.Y.S.2d 656, 665 (1941). However, strict adherence to rules of evidence is not a requirement. Braemer, supra note 103, at 967.

[FN201]. [Harmon](#), 27 N.Y.S.2d at 665. This suggests that a transcription of the hearing be kept and that the tribunal issue a written decision. See Braemer, supra note 103, at 965.