

**Problems with Presbyterians:**

**Prolegomena**

**To a Theory of Voluntary Associations and the Liberal State**

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An Anthology of Antique Epigraphs  
Comprising a Brief but Comprehensive History  
of the  
Problem with Presbyterians  
(And its Solution):

Render to Caesar the things that are Caesar's, and to God the things that are God's.

Joshua ben Joseph, also known as Jesus of Nazareth.

If it were a matter of wrongdoing or vicious crime, I should have reason to bear with you, O Jews; but since it is a matter of questions about words and names and your own law, see to it yourselves; I refuse to be a judge of these things.

Gallio, Roman Imperial Proconsul of Achaia.<sup>2</sup>

I am standing before Caesar's tribunal, where I ought to be tried; to the Jews I have done no wrong.... [I]f there is nothing in their charges against me, no one can give me up to them. I appeal to Caesar.

Saul of Tarsus, also known as the Apostle Paul.<sup>3</sup>

I am speaking all the while of private individuals. For if there are now any magistrates of the people, appointed to restrain the willfulness of kings (as in ancient times the ephors were set against the Spartan kings, or the tribunes of the people against the Roman consuls, or the demarchs against the senate of the Athenians; and perhaps, as things now are, such power as the three estates exercise in every realm

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<sup>2</sup> Acts 18: 14-15 (RSV).

<sup>3</sup> Acts 25: 10-12 (RSV).

when they hold their assemblies), I am so far from forbidding them to withstand, in accordance with their duty, the fierce licentiousness of kings, that, if they wink at kings who violently fall upon and assault the lowly common folk, that I declare that their dissimulation involves nefarious perfidy, because they dishonestly betray the freedom of the people, of which they know that they have been appointed protectors by God's ordinance.

John Calvin, *Institutes of the Christian Religion*.

We Noblemen, Barons, Knights, Gentlemen, Citizens, Burgesses, Ministers of the Gospel, and Commons of all sorts, in the kingdoms of Scotland, England, and Ireland, by the providence of God, living under one King, and being of one reformed religion, having before our eyes the glory of God, and the advancement of the kingdom of our Lord and Saviour Jesus Christ, the honour and happiness of the King's Majesty and his posterity, and the true publick liberty, safety, and peace of the kingdoms, wherein every one's private condition is included .... after mature deliberation, resolved and determined to enter into a mutual and solemn League and Covenant, wherein we all subscribe, and each one of us for himself... do swear.

Preamble, the Solemn League and Covenant.

The Solemn League and Covenant  
Now brings a smile, now brings a tear.  
But sacred Freedom, too, was theirs:  
If thou'rt a slave, indulge thy sneer.

Robert Burns, "The Solemn League and Covenant."<sup>4</sup>

New presbyter is but old priest writ large.

John Milton, in his sonnet "On the New Forcers of Conscience in Parliament."<sup>5</sup>

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<sup>4</sup> Robert Burns, The Solemn League and Covenant, in *Poems and Songs of Robert Burns* 361 (James Barke ed., 1955).

The light which we have gained was given us, not to be ever staring on, but by it to discover onward things more remote from our knowledge. It is not the unfrocking of a priest, the unmitering of a bishop, and the removing him off the Presbyterian shoulders, that will make us a happy nation. No, if other things as great in the church, and in the rule of life both economical and political, be not looked into and reformed, we have looked so long upon the blaze that Zwinglius and Calvin hath beaconed up to us, that we are stark blind.

John Milton, in Areopagitica: A Speech for the Liberty of Unlicensed Printing to the Parliament of England.<sup>6</sup>

Is it therefore infallibly agreeable to the Word of God, all that you say? I beseech you, in the bowels of Christ, think it possible you may be mistaken.

Oliver Cromwell, Letter to the General Assembly of the Kirk of Scotland, 3 August 1650.<sup>7</sup>

I was a good Christian; born and bred in the bosom of the infallible Presbyterian church. How then could I unite with this wild idolator in worshipping his piece of wood? But what is worship? thought I. Do you suppose, now, that the magnanimous God of heaven and earth -- pagans and all included -- can possibly be jealous of an insignificant bit of blackened wood? Impossible! But what is worship? -- to do the will of God -- that is worship. And what is the will of God? -- to do to my fellow man what I would have my fellow man do to me -- that is the will of God. Now, Queequeg is my fellow man. And what do I wish that this Queequeg would do to me? Why, unite with me in my particular Presbyterian form of worship. Consequently, I must unite

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<sup>5</sup> THE COMPLETE POETICAL WORKS OF JOHN MILTON 176 (Douglas Bush, ed., 1965).

<sup>6</sup> 3 Harvard Classics 221 (1937).

<sup>7</sup> Oliver Cromwell's Letters and Speeches, Part V, 168-69 (Thomas Carlyle ed., 1888) (original emphasis).

with him in his; ergo, I must turn idolator. So I kindled the shavings; helped prop up his innocent little idol; offered him burnt biscuit with Queequeg; salaamed before him twice or thrice; kissed his nose; and that done, we undressed and went to bed, at peace with our own consciences and all the world. But we did not go to sleep without some little chat.

Ishmael, *Moby-Dick*.<sup>8</sup>

Many more words I had with him; but people coming in, I drew a little back. As I was turning, he caught me by the hand, and with tears in his eyes said, "Come again to my house; for if thou and I were but an hour of a day together, we should be nearer one to the other"; adding that he wished we no more ill than he did to his own soul.

George Fox, founding Quaker, speaking of a visit with the Lord Protector Oliver Cromwell at Hampton Court palace.<sup>9</sup>

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<sup>8</sup> H. Melville, *Moby-Dick* 73 (New York, Alfred A. Knopf, Everyman's Library, 1988).

<sup>9</sup> George Fox, *Autobiography of George Fox*, Chapter VIII, "A Visit to Oliver Cromwell."



## Introduction

The principal theme of my paper is state intervention in the internal affairs of voluntary associations to resolve disputes among their members. I share the widely held belief that such interventions pose a serious threat not only to the very existence of voluntary associations, but also to the legitimacy of the liberal state itself. On the other hand, I believe that such interventions can be structured and restricted in ways that are both appropriate for the liberal state and consistent with the desirable degree of autonomy of voluntary associations. State intervention into disputes within such associations is fraught with risks on both sides, but those dangers can be contained and even turned to mutual advantage.

This thesis is subject to two important qualifications: first, not all voluntary associations warrant the same degree of autonomy in resolving their internal disputes, and, second, not all visions of the liberal state accord the same voluntary associations the same degree of autonomy. With respect to the first qualification, Part I first distinguishes voluntary associations from the governmental sector on the one hand and the for-profit sector on the other, then classifies voluntary associations according to their relative difference from the other two sectors. The voluntary associations that are most distinctive, in terms of their purpose and their member's interactions, pose the most problems for the liberal state.

To clarify the second qualification, Part II distinguishes among three different visions of the liberal state in its relations with voluntary associations. These are libertarian liberalism on the right, with its minimalist state; communitarian liberalism on the left, with its maximalist state; and sectarian liberalism more or less in the middle. This last, I shall argue, avoids serious deficiencies of the other

two and offers the greatest promise of giving voluntary organizations their due measure of autonomy. This is principally because sectarian liberalism alone adequately acknowledges that voluntary organizations provide two critical elements of human flourishing that the liberal state cannot provide: intimate friendship and fundamental beliefs about human excellence.

Part III applies the sectarian version of liberalism to what Part I identifies as the most difficult problem voluntary associations pose for the liberal state. These are doctrinal disputes within what I will call sects, associations of intimately related members devoted to a fundamental system of normative belief or, in a word, a faith. Taking as examples famous Presbyterian schisms in the United Kingdom and the United States, I argue that both the United Kingdom's traditional implied trust doctrine and the United States' alternative implied consent doctrine are deeply flawed. In their place, I recommend a principled version of the British Parliament's very practical solution in the Free Church of Scotland appeal: split the baby, over each faction's loud objections that its body is one, indivisible -- and theirs alone.

Against the background of these rather unseemly squabbles, Part IV looks for a sect to complement the sectarian state. This will be a sect that is tolerant toward outsiders, loving in the relations among its members, and clear on how the state is to handle appeals from its internal decisions without having to delve into matters of esoteric doctrine. That ideal complement is best described as a Religious Society of Friends of Truth. As we shall see in detail a bit later, each element of this name is important. But you may already have recognized that this is the formal name of those whom outsiders more frequently call the Quakers. I should, accordingly, hasten to point out that I am not now, nor have I ever been, a member of that Society. Rather, to quote Melville's Ishmael, "I was ... born and

bred in the bosom of the infallible Presbyterian church."

Familiarity aside, there are several reasons why the history of Presbyterianism offers useful insights into the relations between voluntary organizations and the state. As we have already seen, schisms within Presbyterian churches allow us to compare the approaches of the highest courts in the United Kingdom and the United States. These prominent Presbyterian cases in our respective countries provide a vehicle not only to raise fundamental problems about the relationship between voluntary associations and the liberal state, but also to examine different resolutions in what we all tend to think of as essentially similar liberal polities.

More fundamentally, the history of Presbyterianism reminds us of the scope of the trilateral relations between voluntary associations, the liberal state, and the market economy. In both time and space, Presbyterianism extends beyond the liberal state. We are accustomed, especially in a geographically large nation like the United States, to think of voluntary associations within the bounds of the state, though occasionally operating elsewhere, in the way of overseas relief organizations like CARE and Oxfam. The history of Presbyterianism reminds us that voluntary associations don't just operate overseas; some are truly international.

In historical terms, too, Presbyterianism transcends the liberal state. In essentially its present form, Presbyterianism flourished when the seeds of liberal political institutions in the English-speaking world, for all its precocious parliamentarianism, were barely recognizable. Indeed, in important respects, the liberal state is a response to the problems of religious strife that the Reformation unleashed on European civilization in the sixteenth and seventeenth centuries, strife that has continued unabated until little better than yesterday in Ulster. Early in its history, in Presbyterianism's first

generation, the international Calvinist movement was the original exporter of revolution, the prototypes of modern radical political parties. What Bolshevik Moscow was early in the twentieth century and Jacobin Paris was in the late eighteenth, so Calvinist Geneva was in the mid sixteenth. And the origin of Presbyterianism in the theology of John Calvin stands near the beginning of the modern market economy as well. Calvinism was arguably the first ideology sympathetic with capitalism, not just grudgingly tolerant of it.

In the course of its long history, Presbyterianism has held radically different views on the relation of the church and the state. The Scottish Covenants called, perhaps too insistently, for reform of state as well as church. The call came before the foundation of the liberal state, in terms and tones hardly compatible with such a state. Burns may have been right that, "sacred Freedom, too, was theirs," but they were none too eager to extent its benefits to others. Yet Presbyterianism in America, and to a very large extent in Britain as well, has abandoned its former insistence on religious establishment and state-enforced orthodoxy.

This evolution, furthermore, is but one instance of a fundamental tension within Presbyterianism, a tension found, though often to a much lesser extent, in other sects as well. This is the tension between the sect's dynamic and static tendencies, its internal conflict between fidelity to its past and the need to accommodate itself to the future. As we shall see in Part III, this is a tension that ultimately must be worked out within the organization itself, though the state may well insure that it is worked out through the structures and procedures agreed to by the disputing factions.

#### I. Sectoral Geography.

To appreciate the role of the liberal state in regulating the internal affairs of voluntary

associations, we must first sketch the place of both in the modern three sector economy. This includes, in addition to the public and nonprofit sectors, the for-profit, commercial sector. In this section we will examine each of these three sectors in terms of two critical factors, mode of inclusion and fundamental purpose.

This examination will reveal, at a high but nevertheless useful level of generality, that the nonprofit sector resembles each of the other sectors with respect to one of these factors and differs with respect to the other factor. Voluntary associations, like the public sector, are nonprofit, but, unlike the public sector, inclusion in them is voluntary. With respect to the commercial sector, the reverse is true. The mode of inclusion in voluntary associations, as in organizations in the commercial sector, is voluntary, but voluntary associations, unlike commercial organizations, are not for profit.

#### A. The Governmental Sector

##### 1. Distinguishing Factors

###### a. Mode of Inclusion

The governmental sector consists of the modern territorial state and its various political subdivisions and subordinate institutions. The mode of inclusion in the state is essentially involuntary. Citizenship, the general term for membership in the modern state, liberal or otherwise, is a matter of birth (either inside the country or to parents who are themselves its citizens) not choice. Whatever the merits of social compact theory as an account of the origins or legitimacy of the state, the fact remains that, as a practical matter, we as individuals do not make our states, or even merely find them: we find ourselves being made in them. As the laws of Athens long ago told Socrates, a state that is minimally

liberal lets us leave it if we can find another state to take us in.<sup>10</sup> But in modern times this is a very costly alternative and, even if citizens can ultimately opt out, the fact remains that they do not initially opt in. We are born in, and getting out is not easy.

b. Fundamental Purpose

The purpose of the state, of course, has been much debated, at least since Plato's *Republic* and Aristotle's *Politics*. We have already narrowed the scope of that discussion for our purposes to the liberal state, but even here there is notoriously great diversity of opinion. I want to focus first on areas of agreement, reserving for later divergences within the liberal school.

For the tightest and yet I think most telling summary of the general liberal position, I will borrow, if you will forgive me, from Thomas Jefferson's Declaration of Independence: the role of the state is to preserve and promote the fundamental human rights of life, liberty, and the pursuit of happiness.<sup>11</sup> The first right, life, implies a minimal requirement of all governments, ensuring the kind of public order that is prerequisite to preserving the basis of any human end, human existence itself. The latter two rights, liberty and the pursuit of happiness, are more complex, more peculiar to liberalism, and more problematic.

In the liberal vision, liberty is generally thought of as essentially individual, and essentially

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<sup>10</sup> Plato, *Crito* at 61-62 (F.J. Church trans., 1956).

<sup>11</sup> By taking these principles as shared by all liberals, and by limiting my discussion to an intra-mural liberal one, I avoid the need to examine the basis for these principles. My own view, elaborated elsewhere, is that the ultimate basis of such principles can be nothing more than the shared commitments of those who espouse them, and need not be more. See Rob Atkinson, "Beyond the New Role Morality for Lawyers," 51 *Md. L. Rev.* 853 (1992) (suggesting a fideist ethic founded on metaethical skepticism).

negative: liberal liberty is an endowment of each human being, and that liberty is primarily the absence of interference. Except as necessary to preserve the life and liberty of others, each citizen should be allowed the maximum latitude to pursue his or her own vision of happiness. Thus in classical liberalism the second basic right, liberty, is intimately linked with the third, the pursuit of happiness.

Taken together, they imply that the liberal state's role in promoting welfare is not to provide a collective vision of human flourishing, but to allow each citizen to pursue his or her own private vision, alone or with others of like mind. Any more positive statement of the liberal vision of human flourishing must be strictly formal and content-free: the human happiness the liberal state is to promote is the freedom of each citizen to pursue his or her own vision.

## 2. Implications for Internal Operation.

The governmental sector's essentially involuntary mode of inclusion and liberalism's commitment to fostering pursuit of individual life-plans significantly influence its mode of internal organization. Since inclusion is automatic and emigration difficult, allowing members to participate in governance, particularly the choice of substantive policy, becomes imperative. In the now-classic expression of Hirschman, meaningful "voice" is the answer to the absence of easy "exit."<sup>12</sup> That participation should be not only meaningful, but on an equal footing, follows both from the liberal state's neutrality toward ultimate ends and from its individualistic attitude toward liberty.

This egalitarian individualism implies not only an equal right to participate in the making of law, but also equal treatment under the laws once made. Finally, respect for the autonomy of individuals

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<sup>12</sup> See Albert O. Hirschman, Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States 96-98 (1970).

requires that the obligations and prohibitions of law be stated in clear, objective terms and applied in consistent, regular procedures by unbiased tribunals. Without these basic "rule of law" principles, individuals cannot know the legal limits of their liberty and thus cannot effectively exercise their basic rights of self determination.

## B. The For-Profit Sector

### 1. Distinguishing Factors.

In contrast to the governmental sector, the commercial or for-profit sector is, for all its internal complexity, marvelously simple with respect to the two factors we are considering here, mode of inclusion and fundamental purpose. Commercial organizations are voluntarily formed for the purpose of making money; they produce and distribute goods and service for profit. Their essential constituents are voluntary investors, joined together in a common for-profit enterprise.

### 2. Implications for State Intervention.

From these central features -- voluntary participation and profit motivation -- logically flows virtually everything about for-profits' internal organization and the state's role in their internal affairs. Since commercial associations are voluntary, the liberal state can allow wide variety in the terms and conditions of participation in them. Thus we have not only joint ventures, partnerships, and corporations, but also a myriad of subspecies and hybrids, and an almost infinite range of possible allocations of decision-making authority, operational control, profits, and risks. Indeed, to lower the cost of forming such associations, and thus to make them more profitable to their participants, the liberal state can and does provide statutory "form contracts" with boiler-plate provisions already in place.



The principal role of government, in dealing with internal disputes in such associations, is to make sure that the parties get what they bargained for, to enforce the contractual or quasi-contractual arrangements they made among themselves. There are, of course, problems with even that agreement-enforcing role: sometimes the participants will not have anticipated a particular problem; sometimes their intentions on a particular point will be unclear. In all such instances, however, the organization's essential profit-making function, and the participants' presumptive profit-making motivation, will provide a powerful interpretive touchstone.

At the most basic level, the very language in which these arrangements are written will be the lingua franca of the market-place. Beyond that, any ambiguities in particular arrangements among constituents, or between constituents and the organization, can be tested against the basic criterion of profit. Any position of the association that cannot be defended in terms of maximum stakeholder profit, long term or short, is deeply dubious; any interpretation of the terms of a particular stakeholder's participation inconsistent with that stakeholder's seeking maximum personal gain is highly unlikely. These canons of interpretation will not always give a single certain answer, since there are presumably many plausible ways to design, produce, and distribute a better mousetrap. But these canons certainly narrow the scope of acceptable answers, for in the commercial sector "better" will always mean more profitable, and each participant in a commercial association will presumably want more of that profit for him or herself.

### C. The Nonprofit Sector

#### 1. Distinguishing Factors

The mode of inclusion in nonprofit organizations is essentially voluntary; indeed, what

economists and tax theorists call nonprofit organizations are what I, following political theorists, have been calling voluntary associations. Economists, contrasting this third sector principally with the commercial sector, distinguish nonprofits from their for-profit counterparts; political theorists, thinking principally in terms of the state, focus on the voluntary mode of inclusion in third-sector organizations. But there the simplicity ends: "voluntary" in this context needs important qualification, and nonprofit purposes are almost infinitely plural.

a. Mode of Inclusion

The voluntariness of voluntary organizations is not so absolute as it might at first appear. Entry is not always as consciously willing, nor exit as easy, as the blanket term "voluntary" implies. As a matter of law if not of definition, voluntary associations cannot compel anyone to become or remain a member. In that respect, they are distinct from nation-states. And yet, as the example of Presbyterianism in Scotland should remind us, there is an interesting intermediate case: the national or established church. Of course today, in the United Kingdom as in other liberal states, essentially full citizenship is possible without being a member of any church, established or otherwise. But virtually the opposite was almost universally true in the two centuries after the Reformation. Indeed, with respect to non-Christians, full citizenship required membership in the established church in Western Europe from the time of the Emperor Constantine's adoption of Christianity as the religion of the Empire.

Partly as a result of this history, partly as a result of their present practice, even many non-established churches committed to the disestablishment of all churches retain vestiges of involuntary inclusion. Take, again, the example of Presbyterianism. In the ancient rite of infant baptism, adult members of the church place their infant children into a kind of provisional church membership, to be

consummated as full membership when they become old enough to decide such matters for themselves.<sup>13</sup> It hardly need be said that infant baptism is not a uniquely Presbyterian rite. Indeed, in the Lutheran, Anglican, and Roman Catholic communions, the connection between infant baptism and adult membership is even clearer. The consummation of the former in the latter is formally known as confirmation, reflecting the belief that it is not a mere joining afresh, but the mature affirmation of a relationship that began in infancy.

The provisional church membership of infants is obviously not voluntarily assumed on their part. Yet, for our purposes, it is important to note that the later, adult induction is not entirely unconditioned, even if it is legally unconstrained. For one thing, confirmees are traditionally very young; the tender years that may have amounted to full adulthood in medieval Europe would hardly support a binding commercial contract, much less the right to cast a ballot, anywhere in the western world today.

And, of course, between baptism and confirmation, much may be committed to Providence, but little is left to chance. In the traditional Presbyterian baptism, both the child's parents and the parents' local congregation solemnly pledge to "raise up the child in the way which is right, that when it is old, it will not depart from it." Thus, when a child of practicing Presbyterian parents assumes full membership, he or she is the product of thoroughly Presbyterian catechizing. The lad or lass's will may be unconstrained, but it will not be unshaped, and the shaping may well last a lifetime. That, of course,

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<sup>13</sup> See Westminster Confession of Faith, Ch. 28, "Of Baptism," esp. Paragraph IV: "Not only those that do actually profess faith in and obedience unto Christ, but also the infants of one, or both, believing parents, are to be baptized."); see also Calvin, *Institutes of the Christian Religion*, supra, Book IV, Chapter 16, "Infant Baptism Best Accords with Christ's Institution and the Nature of the Sign."

is the purpose, though the effects can sometimes be peculiar. Thus, as C.S. Lewis wrote of his Oxford mentor, "An Ulster Scot may come to disbelieve in God, but not to wear his weekday clothes on the Sabbath."<sup>14</sup> In a way that liberal political theory sometimes fails fully to appreciate, voluntary organizations are thus our creators as well as our creatures; it is not always easy to tell which is the chicken and which the egg.

b. Fundamental Purpose.

If the mode of inclusion in third sector organizations is thus less simple than the term "voluntary association" implies, the identification of purpose in the term "nonprofit organization" is, if anything, even less helpful. Though the latter term may serve nicely to establish a border with the for-profit sector, it raises without answering a critical question within the third sector itself: "If not for profit, for what?"

The law, traditionally, has given not one answer, but two, thus dividing the nonprofit world into two hemispheres. Some nonprofits are said to exist principally for the benefit of their members; others, for the benefit of the public. In American tax law parlance, the former are "mutual benefit organizations"; the latter "public service organizations," or charities.<sup>15</sup> For tax purposes, these two distinctions may well suffice. But, alas, we shall have to draw further distinctions within the nonprofit sector to determine the appropriate degree of governmental intrusion and, conversely, organizational autonomy as to internal disputes.

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<sup>14</sup> C. S. Lewis, *Surprised by Joy* [Editors: My source for this quote is an anthology of Lewis's bon mots; I'll track down the original book and send you a proper cite as soon as possible. Rob.]

<sup>15</sup> Boris Bittker and George Rahtert, "The Exemption of Nonprofit Organizations from Federal Income Taxation," 85 *Yale L. J.* 299, 302 (1976).

## 2. Implications for State Intervention

To further distinguish among voluntary associations, we must again consider modes of inclusion and fundamental purposes. Here, however, we must refine these factors to admit gradations: previously, they told us simply that voluntary associations in general differ from organizations in the other sectors; now we need to know how and to what extent particular kinds of voluntary associations differ from the other two sectors.

### a. Distinctiveness of Purpose

With respect to the organization's fundamental purposes, we can distinguish three tiers of nonprofit distinctiveness, three levels of remove from the purposes of governmental and for-profit organizations. The first, least distinctive level is in the goods and services the organizations provide. The traditional theory of charity has long sought to find the essence of charity in either "especially good" goods charities provide, or in "especially deserving" people to whom they provide them. On this view, charities either provide "especially good" goods, even if only to ordinary people, or they assist especially deserving people, even if only by supplying mundane goods.

But traditional theory never got very clear on what the criteria of goodness and deservedness were, and modern economic theory, with its agnosticism on both points, has largely by-passed the quest. The most we can say with respect to most so-called charitable goods and services is that charities may provide them in a way that is somehow different from both for-profit firms and the state, more efficiently or more altruistically, for example. Thus the first level of distinctiveness is not what voluntary organizations provide, but how.

There are, however, two desirable<sup>16</sup> things that neither government nor for-profit firms can provide at all well, owing to features of the products on the one hand and the providers on the other. The provision of these two things marks our second and third levels of distinctiveness. The first of these is fellowship, being together with other people in a mutually meaningful way. Though fellowship is obviously deeply desired by most human beings, the very oddness of thinking of it as a "thing" produced or consumed points to the difficulty of acquiring it in the market. Friends are notoriously not for sale; indeed, the more intimate the relationship, the more dubiously we regard its for-profit provision. Our deep desire for fellowship combines with these profound reservations about its commercialization to make prostitution the oldest, but also the least honored, profession.

And if fellowship by its nature not readily bought and sold, neither is it easily requisitioned. The welfare state may care for your physical needs from cradle to grave, but it will never be your friend in anything but a loosely metaphorical way. The state itself is simply not a human person. And, given its obligation to act legally and democratically, by both objective and egalitarian criteria, the state will have a hard time providing fellowship chosen in the idiosyncratic, ad hoc way we all go about meeting

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<sup>16</sup> "Desirable" is an admittedly slippery modifier, merging as it does the descriptive, "what is desired," and the prescriptive, "what should be desired." See, e.g., John Stuart Mill, *Utilitarianism* at 44-45 (1861, Oscar Priest ed., 1957) (equating the normatively desirable with the descriptively desired). For my purposes, the descriptive meaning will suffice; as a matter of fact, most people, most of the time, really do desire the two desirata I identify. But I think the prescriptive meaning, at least in a weak sense, is also relevant; people who are committed to classically liberal values will find themselves necessarily committed to these two values. I call this a weak prescriptive sense because, of course, one need not be committed to liberalism at all. Thus the obligation to desire these two values liberalism entails is hypothetical, not categorical; even if, as I believe, they are necessary means to liberal ends, they are not necessarily good in themselves. See Immanuel Kant, *Foundations of the Metaphysics of Morals* at 31-34 (1785, Lewis White Beck trans. 1959) (distinguishing hypothetical from categorical imperatives).

our mates, whether they be spouses or drinking companions. The municipal government may well provide your neighborhood with a soccer field, but you'll want to choose your own goalie, not to mention manager, by processes that are probably distinctly lacking in bureaucratic nicety.

Beyond fellowship, there is a third thing that both the liberal state and for-profit firms are even less capable of providing, again, on account of both its nature and theirs; this, accordingly, gives us our third, most distinctive tier of nonprofit organizations. This quintessentially nonprofit product is "ideology" or "faith," a system of ultimate value and moral meaning.

For-profit firms cannot provide such systems of belief well because they have many features of a classic public good. In particular, those who produce them have difficulty excluding from their enjoyment those who do not pay for them. For the liberal state, the problem is even more serious. The liberal state is fundamentally committed to neutrality on precisely this point; its essential function, protecting (and perhaps enhancing) individuals' liberty to pursue their own ultimate ends, is at best in extreme tension with proffering ultimate ends of its own. This is near the core of the disestablishment clause of the American constitution. Religion is the traditional source of ultimate moral meaning, and the American federal government was forbidden at its inception from favoring one religion over others. Religious organizations, by contrast, are historically at the center of the nonprofit sector. As the case of Calvinism indicates, they provide distinctive world views with a zeal that sometimes becomes a literal vengeance.

b. Degree of Intimacy of Inclusion.

In initially distinguishing between voluntary associations and governmental and for-profit organizations, we focused on mode of inclusion as an external matter, how one becomes a member of

the organization. Here we need to focus on mode of inclusion as an internal matter, how members of the organization interact once inside, among themselves.<sup>17</sup> The critical factor is the members' degree of "intimacy" or "fellowship" or "mutuality" or "associativeness." As with voluntary associations' purposes in the last subsection, I want to identify three tiers or levels. This closely parallel Aristotle's analysis of *philia*, which is usually, if somewhat imperfectly, translated as "friendship."<sup>18</sup>

The first, and lowest, level of associativeness is purely functional, what is needed to get the organization's job done. At this level, the organization exists only to do a job better than its constituents can do on their own. As Aristotle puts it, "If they are friends for utility's sake, each likes the other not for what he is but only for some benefit he can supply."<sup>19</sup> These benefits are the advantages of firms and vertical integration generally. This is the level of associativeness captured in common wisdom like "two heads are better than one" and "many hands make light work."

Associativeness reaches its second level when it becomes not so much a means to an end, a better way to get a common job done, as an end in itself. Here the "going," not the "getting there," becomes paramount. This is the level of associativeness characteristic of social clubs and amateur sports organizations. In the latter, it is not so much whether you win or lose, or even how you play the game, as who you play the game with, and whether you have a good time. Similarly, in social clubs, what matters is less the fineness of the cuisine (or the liqueur or the cigars) than the company of those

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<sup>19</sup> *Nicomachean Ethics* Book VIII, Section iii. (Wheelwright, trans.); see also Alexander, "Dilemmas of Group Autonomy: Residential Associations and Community", 75 *Cornell L. J.* 1, 26 (1989) (describing minimally integrated groups the members of which come together "exclusively through contract" and solely "for instrumental purposes").



with whom you mutually enjoy that fineness.

The third level of associativeness -- and this is pure Aristotle now -- is friendship proper. It is marked by what his mentor once removed, Socrates, called concern for one another's souls.<sup>20</sup> In the Greek philosophical tradition that runs from Socrates through Plato and Aristotle and on down to us, friendship proper is the mutual pursuit of human excellence, or virtue. In the parallel and overlapping Judaeo-Christian religious tradition, it is salvation, membership in the body of those restored to fullest fellowship with each other and with God Himself. In that tradition, paradise was walking with God in a garden in the cool of the evening,<sup>21</sup> and the father of the faithful, Abraham, is called "the friend of God."<sup>22</sup> This is not altogether lost in what our Shorter Catechism teaches us Presbyterians as children, though it does seem something of an afterthought: "Man's chief end is to glorify God, and to enjoy him forever."<sup>23</sup>

To summarize, then, voluntary associations' can be classified by their degree of distinctiveness from governmental and for-profit organizations. Two factors are relevant here, one substantive, the other formal. As to the first, the question is how distinctive are their purposes; as to the second, how intimately associated are their constituents. The more distinctive the nonprofit purpose, the less likely that modes of judicial intrusion appropriate in the other sectors will be appropriate for nonprofits and, conversely, the more likely that the voluntary association will warrant special treatment. Similarly, the

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<sup>21</sup> See Genesis 3: 8 (original fellowship disrupted by sin).

<sup>22</sup> James 2: 23.

<sup>23</sup> Westminster Shorter Catechism, Answer 1.

more intimate the relations, the less helpful analogies to the other sectors will be, and the more appropriate will be some special dispensation. The hardest internal disputes for courts to resolve, accordingly, will be those where the organization's purpose is most distinctive, and where its constituents' relations among themselves are most intimate.

But to identify which kinds of nonprofits will present courts with the most difficult internal disputes, and to trace the source of that difficulty to the two related factors of distinctiveness of purpose and degree of intimacy, is still to leave open the largest question. Assuming that, in these cases, analogies to other sectors are less directly helpful, and thus that some special regime of judicial intervention may be necessary, it remains to be said what that regime should be. Here our analysis must turn from the descriptive to the normative, from the way things are to the way they should be. On this critical point, the proper mode of governmental intervention into voluntary associations' internal disputes, different schools of liberalism diverge, as we shall see in the next Part.

## II. Divergences in Liberal Theories of the State.

From the basic points of agreement we sketched above in Part I liberal opinion refracts widely across the familiar left-to-right spectrum. In this section we need to identify three critical bands of this spectrum, then to see how each colors the state's approach to internal disputes within voluntary associations.

### A. Three Liberal Positions.

#### 1. Libertarian Liberalism.

On the right of the spectrum is liberalism's libertarian band, with its vision of the minimalist, night-watchman state. That vision is, on the one hand, profoundly confident of the private, contractual

orderings of the capitalist market, and, on the other hand, profoundly skeptical of the public, regulatory orderings of the state. At its most skeptical and reductive, this view sees government as a kind of corrupt market of rent-seeking vote-traders intent upon reaping politically what they have not sown economically.

## 2. Communitarian Liberalism

At the left end of the spectrum is liberalism's communitarian band, with its competing vision of the interventionist, welfare state. In contrast to the libertarian viewpoint, the communitarian perspective sees much to fear in the individualistic transactions of the market, and much to gain from the collective decisions of a democratic polity. At its most skeptical and reductive, this view sees private property as a form of state power delegated to some citizens to exercise over others without the usual public safeguards.

## 3. Sectarian Liberalism

Between these poles, obviously stereotyped for heuristic purposes, lies a broad middle ground, with room for a wide range of liberal positions. I want to outline here, and elaborate incrementally below, one such position, which I will call "sectarian." This position stands roughly half-way between communitarian and libertarian liberals with respect to both government and the market. (The political spectrum metaphor has a serendipitous aspect here: if communitarians on the left are a scary "red" and libertarians on the right a chilly "blue," my sectarians in the middle should be a reassuringly cool "green.") Sectarian liberalism fears the abuse of both public and private power, yet it is confident that both the state and the market can contribute to human welfare. Not surprisingly, therefore, sectarian liberalism places its greatest confidence in neither the private, for-profit sector nor the public,

governmental sector, but in the sector that stands roughly between them as a kind of hybrid: the voluntary, nonprofit sector.

### B. The Three Liberal Positions and Voluntary Associations.

Against this background of their general features, we can now appreciate the position of each branch of liberalism toward nonprofits and their internal disputes. Here again, the sectarian position is the middle ground, and I think the better view, the view most consistent with liberalism's own commitments and most conducive to the kind of voluntary associations that liberalism itself needs to foster.

#### 1. Libertarian Liberalism.

Libertarianism tends to assimilate voluntary associations to the market, focussing on their voluntary mode of inclusion, the feature that they share with for-profit organizations. Viewing all private organizations, nonprofit and for-profit alike, as aggregates of individuals, libertarianism tends to overlook the relatively greater importance of the group with respect to some kinds of nonprofits, particularly those that, like Presbyterianism, are as much the creators as the creatures of their members. The reductio ad absurdum of libertarianism's individualist, voluntarist assumption is in this paradoxical aphorism: "Abraham Lincoln was born in a log cabin he built with his own hands."

As libertarianism assimilates voluntary associations to for-profit firms, so it tends to see the government's role in internal affairs in minimalist terms, in the nonprofit sector as in the for-profit. In both sectors, this produces a paradox: in seeking to protect individuals from public power in the form of the state, it exposes them to private power in the form of nonprofit and for-profit organizations. By refusing to acknowledge the power of groups to shape individuals, and the greater sophistication that

groups may bring to their dealings with individuals, libertarianism inadvertently abandons the individuals it purports to protect to private organizations that, if not monitored by the state, begin to exercise unreviewable, state-like powers over their members. From its commendably liberal normative commitment to individual autonomy and freedom of choice, it tends to draw the dubious descriptive conclusion that individuals are already autonomous, their choices in dealing with other private parties invariably free. To the extent that libertarianism assumes, rather than insures, that aggregations of individuals are freely entered into, on terms genuinely reflecting the agreement of each, it abandons its own principles.

The value-agnosticism of classical liberal economics, a principle source of libertarianism, tends to blind its adherents to the distinctions among voluntary associations identified in the preceding Part. Assuming that the only evaluative criteria are those of individuals in the market, libertarianism tends to treat all voluntary groups as essentially fungible, distinguishable only by their ability to attract members. This is a serious oversight. It is one thing to assume, as liberals must, that the state has to be neutral on the relative merits of, say, Presbyterianism and Judaism; it is quite another to ignore, as liberalism should not, the structural and functional differences between a church or synagogue and a polo or pinochle club.

In its tendency to conflate these latter differences, libertarianism fails to appreciate appropriately the importance of sects to both the liberal polity and the capitalist economy. The nightwatchman state may not produce its own nightwatchman statesmen; business enterprise may not produce business-like entrepreneurs. What the governmental and for-profit sectors respectively need to operate as libertarians suggest may be exogenous to these sectors, precisely because it is indigenous

to the voluntary, nonprofit sector.

## 2. Communitarian Liberalism

If libertarianism's over-emphasis on the individual paradoxically ends up enlisting the state on the side of the group at the individual's expense, communitarianism errs in almost precisely the opposite direction: focusing on the importance of the group, it tends to undermine the group by allowing excessive individual member appeal to the supposedly common values of the political community, enforced by the state. We need to unpack this paradox: how does emphasis on "groupness" undermine the group at the behest of its members?

The critical catalyst in this odd transmutation is communitarianism's confidence in the inclusive political community and its principal agency, the state. Communitarianism, as its name implies, centrally acknowledges the importance of groups to human flourishing. Indeed, in some of its forms, it so subordinates the individual to the group as to cease to be recognizable as a form of liberalism; those forms, furthermore, tend to be intensely hostile to groups less inclusive than the entire political community. Liberal communitarianism, by contrast, affirms liberalism's normative insistence on the value of individual autonomy, but maintains, as a descriptive matter, that individual self-realization requires a significant degree of initial socialization and continuing sociability.

In this essentially descriptive respect, communitarianism improves significantly on the individualistic picture of the relationships between groups and their members that libertarianism presents. It acknowledges that we belong to the voluntary associations we choose, but also insists that, to a greater or lesser extent, our range of choice is influenced by associations that we did not

voluntarily choose.<sup>24</sup> Communitarians recognize, in other words, the power of children's catechisms; they affirm, with America's First Lady, that "It Takes a Village."<sup>25</sup>

Their village, however, is a carefully chosen, and extremely pregnant and powerful, symbol. Villages, of course, are involuntary, political communities, territorial sub-states. Yet they symbolize an intense degree of belonging, for which communitarians deeply long; in the communitarian heart, if not on our common maps, these are places called "Hope." They embody "gemeinschaft" rather than "gesellschaft"; they elevate community over contract, love over law. And they are inclusive: everybody belongs; everyone has a proper place. Most importantly, everybody believes. Village values are communal values, shaped by the traditions of common life and unconsciously shared by all.

What I have sketched is, of course, a parody, a theoretician's Potemkin village. Real villages tend to run long in the workday and short in the consumer goods department. They're more about ploughing ankle-deep in the mud than playing barefoot around the May-pole; they're more accurately depicted in Monty Python parodies than in William Morris tapestries. Once real villagers have seen the modern liberal city, they are notoriously loath to return to the rural commune, however pleasingly pastoral it appears in the pastels of its mostly urban admirers.

Communitarian liberals, to their credit, are well aware of all this. What they seek is the best of both worlds, a way to combine the supposed virtues of traditional village life with the advantages of the modern, industrial state. Here they encounter two basic problems: community size and normative

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<sup>24</sup> See Alexander, "Group Autonomy," *supra*, at 41 ("What binds the group together is a shared characteristic that is unchosen, or is chosen only in a weak sense, such as cultural identity.").

<sup>25</sup> Hillary Rodham Clinton, *It Takes a Village* (1995).

skepticism. The first is a practical matter: how to create a meaningful community on the scale of a modern nation-state. The second is a matter of principle: how to find moral norms that legitimately bind dissenters? In the solution of each problem, voluntary associations play a crucial role. That role, on the other hand, largely determines the role of the state in their internal affairs.

The problem of size tellingly bedeviled the debates about the American constitution: if republican institutions require the face-to-face fraternity found in classical Athens and Rome and in Renaissance Italy, and to some extent even in Enlightenment Holland and Switzerland, how could a republican government work on a continental scale? In part, the American answer was to opt for a federal republic, a kind of big republic of little republics, more or less consciously on the Swiss and Dutch models. But, in larger part, the answer, in America and elsewhere in the West, has been to deny in effect the fraternity premise: in modern America, as in the modern United Kingdom, liberal institutions exist despite the radical erosion of all but the thinnest sense of fraternity among citizens. It has proved possible, perhaps all too easy, for citizens to love the liberal nation, even to die and kill on its behalf, without loving, or even knowing, their neighbors across the street, much less across the country.

But communitarian liberals dislike this loss of social solidarity, both as bad in itself and as the source of numerous social woes, particularly the widening gap between rich and poor, the decline of public institutions, and even the decay of basic civility. They see its tragedies in the triumph of libertarian political movements, Reaganism in my country, Thatcherism in yours. Most significantly, for our purposes, they see nonprofit organizations as one step toward bridging the gaps between citizens, of providing the meaningful interpersonal links that, as we have seen, may lie beyond the



capacity of the state itself.

Yet here communitarian liberals encounter their second problem, which is a problem of principle. What they admire about villages is not only their emotional closeness, their richness and depth of social relations, but also their shared value systems, their members' union in common purpose as well as mutual affection. But if they admire the formal unity of these traditional belief-systems, they abominate, in at least equal measure, their typical content: xenophobia, frequently to the point of violent anti-Semitism; homophobia; and paternalism. As antidotes to these, of course, communitarian liberals, like even the most libertarian of liberals, would substitute the essentially negative liberal virtues of tolerance and individual liberty of conscience, through the instrumentalities of the liberal state.

But communitarian liberals want more, a new, better system of positive public values to replace the old, benighted values of the village and to supplement the new but formal and negative values of the liberarian liberals' nightwatchman state. Here liberalism's essential value-skepticism poses a very serious problem: the liberal state, as we have seen, is deeply committed to neutrality toward different substantive visions of human flourishing. In particular, all liberals, including communitarian liberals, are loath to enforce matters of faith, fundamental beliefs about the ends of human existence, on dissenters.

Faced with this serious substantive problem, communitarian liberals explicitly propose a procedural solution that depends on an implicit and dubious descriptive assumption. The procedural solution is dialogue, or, as it is more frequently called, deliberation. Communitarian liberals concede that citizens cannot, consistent with liberalism's normative agnosticism, be forced to adopt a shared set of substantive values. But communitarian liberals insist that, consistent with liberalism's commitment to democratic process, citizens can be required to talk with each other about such values. And the

liberal state can legitimately encourage the kinds of procedural virtues that will make these deliberations genuine, mutually respectful conversations, not just window-dressings for the behind-the-scenes horse-trading of pluralist politics-as-usual.

For all this to produce a set of shared substantive values, however, communitarians must make two truly heroic empirical assumptions: that reasonable people can be made to take such conversations seriously and, even more heroically, that, at the end of such conversations, reasonable people will tend to agree, thus converging through deliberative processes on a shared substantive agenda and value system. Even in outline, the red and scary side of all this should be apparent: If the much-sought-after agreement is not forth-coming, it will be tempting to think, not that it was too much to hope that reasonable people would ultimately agree, but that those who are holding out are not being reasonable. Since "being reasonable" can be characterized as a procedural requirement, those who fail to meet it can be punished for their deficiency, arguably in accord with liberal principles. Perhaps, indeed, the unreasonable can be said to have forfeited their place, political or otherwise, in the Republic of (Conversation-Tending-Toward) Virtue.

In its search for a common substantive value system, communitarian liberalism is thus at risk of lapsing leftward, out of liberalism altogether and into various forms of radical communitarianism, Jacobinism and Bolshevism at the worst. Even if liberal communitarians' reddish vision never darkens into revolutionary terror, it may well shade into something very like the rosy monotony of a continuous PTA meeting. At its best, liberal communitarian's insistence on continual dialogue calls to mind Oscar Wilde's objection to his friends' Fabian socialism: "It takes too many evenings."

These problems with communitarian liberalism, from the truly terrible to the merely mind-

numbing, have been widely bemoaned, and need not further detain us. What we need to focus on here are the implications of the communitarian liberals' vision for voluntary associations. As we have seen, communitarians expect that such organizations will help their state deal with its size problem; membership in voluntary associations will increase, in a large territorial state, the opportunities for face-to-face communication among citizens, since members of each separate voluntary group are also citizens of the common republic.

Beyond that, voluntary associations can function as "schools for citizenship," accustoming their members to conduct their intra-group affairs in the deliberative way that communitarians hope will come to characterize their dealings as citizens with those outside their respective groups in the polity as a whole. Moreover, at a substantive level, just as deliberation among citizens is expected to produce shared values, so might deliberation among members of voluntary groups. Indeed, by combining these substantive and procedural aspects, one can imagine the communitarian liberal state as a new kind of confederation. As opposed to the classical confederation of smaller political sub-divisions, the state of states in which sterile social relations reproduce themselves on a larger scale, this new confederation would be a group of groups, in which the close, fraternal relations of small groups leaven relations among citizens of the entire polity.

For all this to work, however, two doubtful conditions must be met. First, groups need to reflect the same deliberative values that communitarians are looking to export from them into the polity as a whole. Second, groups need to produce substantive value-systems consistent with those of the larger, political dialogue. On communitarianism's empirical assumptions, to quote the ironic title of a Flannery O'Connor short story, "Everything that Rises Must Converge."

This produces parallel substantive and procedural pressures from the communitarian liberal state into the internal affairs of voluntary associations. Both non-deliberative procedures and substantively illiberal outcomes will be suspect. Since communitarianism is more attuned than libertarianism to the ways in which individual member's involvement may not be fully voluntary, the communitarian liberal state will be able to correct real instances of group over-reaching. But, since that state is anything but indifferent to both the process and the product of internal group decision-making, it will be tempted to fault even those internal arrangements that reflect fully voluntary assent of group members. Communitarian liberalism has an obviously deep need for these matters to go right, for reasons we have already seen; it also has a less obviously principled basis for correcting them when they do not, to which we must now turn.

Voluntary associations, as we have seen, are to serve the communitarian liberal's vision of the state by engaging in dialogue, both internally among their members and externally with other groups. Given the empirical reality that members do not enter all such groups entirely freely, and the further fact that exit is not always practically easy, communitarian liberals tend to insist that members enjoy "voice" within their organizations as well as the possibility of "exit" from them. "Voice" is, of course, the principal formal aspect of communitarian liberals' "deliberative democracy." To refuse to engage in it is, as we have seen, a substantial lapse of citizenly virtue. Accordingly, communitarian liberals, consistently with their own principles, need not be shy about forcing sects to justify their positions in public forums. Indeed, they see law suits by individual members as an entirely appropriate means of achieving this obligatory dialogue.

This dialogue, moreover, will have for communitarian liberals an aspect it lacks for libertarians.

Individual member appeals from internal group decisions to the state need not rest only on the group's violation of its side of any deals with its members. Members can also argue that the results of such deals frustrate substantive state policy unrelated to the keeping of individual bargains. This opens the group to charges that its structure, process, or substantive ends are not consistent with emerging or established community-wide ends.

We have already seen how libertarianism's overweening confidence in the reality, not just the ideal, of individual autonomy leads it to oppose judicial review even of internal group deals that the weaker, individual parties may well not have meaningfully agreed to. Thus, paradoxically, libertarian liberalism favors the group over the individual. Here we have the opposite paradox: communitarian liberalism favors the individual over the group. This is because its overweening confidence in the creation of shared public values permits the individual member to invoke those values to overturn internal group arrangements that the individual clearly understood and intended. Thus each wing of liberalism, communitarian on the left and libertarian on the right, reasons from a dubious descriptive assumption to a normative conclusion in considerable tension with its fundamental normative commitment. To avoid the dilemma of these paradoxes, we need a model that is more descriptively accurate and more normatively modest.

### 3. Sectarian Liberalism

My own preferred model, sectarian liberalism, is best seen as a middle way between libertarianism and communitarianism, both descriptively and normatively. On the descriptive side, sectarianism simply removes the more optimistic assumptions of both the right and the left. Unlike libertarianism to the right, sectarianism does not assume that individuals join groups entirely freely, or

that they stand on a footing entirely equal to that of the groups to which they belong. Rather, it recognizes real constraints on individual choice, short of outright coercion, and it acknowledges the importance of information asymmetries and other market failures and structural features that permit groups to take advantage of individual members. In particular, it sees a tendency of group power to concentrate toward the top, and it recognizes the practical difficulty of "exiting" even from groups that are legally and nominally voluntary.

On the other (left) hand, sectarianism rejects the communitarian assumption that mutually respectful dialogue among citizens will produce substantive agreement as to common ends, either within groups or within the larger state. In its more pluralistic moods, sectarianism accepts the possibility of multiple, equally valid visions of human flourishing.<sup>26</sup> In its more pessimistic moods, sectarianism affirms the irreducible reality of radical evil in the world: some, with open eyes, will forever oppose human flourishing. But in both moods, the pluralistic and the pessimistic, sectarianism recognizes the grave danger of empowering the state to police fundamental beliefs.

Even the element of skepticism is not, however, born of a cranky or doctrinaire cynicism, but of a chastened realism. The real history of voluntary associations and the liberal state not only counsels caution, but also offers hope. To say, against the libertarian assumption, that dealings between groups and their members are not always free and equal is not to say that they are never free or equal; many, manifestly, are often both. And to doubt, over against the communitarians, that all reasonable people can be expected to converge through dialogue on shared ends is not to say that none will. Many, again, manifestly have. Similarly, to despair of fraternity in matters of politics is not to lapse into social

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<sup>26</sup> See Kathleen Sullivan, "Rainbow Republicanism," 97 *Yale L. J.* 1713 (1988).

atomism at every level. Intensely close personal ties of mutual respect and even affection were not lost above the level of family and friendship with the passing of the traditional village; these intimate ties live on in contemporary voluntary groups. Finally, to dispute that voluntary associations can be expected to act as "schools" for liberal virtues is not to deny that the liberal state has very real need of them, to produce not only liberal visions of the good, but also good liberal citizens.

As what *can* be always conditions what *ought* to be, so these cautiously optimistic, or reluctantly pessimistic, descriptive views circumscribe sectarianism's normative outlook. In a sense, sectarianism shares the dreams of its brethren on both the left and the right, but believes they can only be realized, or safely sought, on a smaller scale. With libertarians, we affirm that individuals should be able to seek their own ends through voluntary associations of like-minded individuals, and that the state should require that those commitments be honored, in the nonprofit sector as in the market. But we also believe that the state will have, alas, to police these deals to ensure that their basic premise is met: that they are voluntary and knowing.

With communitarians, we affirm the value of deep affectionate ties between individual human beings; we seek fraternity, not just liberty and equality. But we deny that fraternity can be achieved any more successfully in the agora of politics than in the marketplace of economics. Accordingly, we seek it among members of voluntary groups. In part, to be sure, we seek it there because we have never found it elsewhere; in larger part, however, we seek it in such groups because we and others have often found it there before.

Similarly we, like communitarians, seek shared visions of human flourishing, and we seek those visions through dialogue with others. But we seek those visions as individuals and as members of

particular groups of like-minded individuals, not as political liberals, and thus not at the level of the entire political community. That is the ultimate meaning of sectarianism: it is not to despair of finding meaning in life, or even of sharing that meaning with others; it is merely to doubt that all will ever agree to share it, and thus that the state has any right to impose it.

What the state may do -- indeed, for sectarians, must do -- is almost exactly the opposite. Minimally, it must abjure the imposition of value systems of its own, and it must prevent any group from imposing its system on any other group or individual. Optimally, it should take affirmative steps to ensure that all citizens really have the kind of autonomy that libertarianism tends to assume so that they can engage in the kind of dialogical choosing and shaping of value systems that sectarianism and communitarianism affirm.

### III. Disputes over Sects' Doctrines in the Sectarian State's Courts

To appreciate the full implications of the last part, we would have to integrate it with the Part I. We would need, in other words, to apply the perspectives of all three schools of liberalism -- libertarian, communitarian, and sectarian -- to each of the various kinds voluntary organizations we identified in Part I according to the distinctiveness of their purpose and the degree of intimacy experienced by their members. But even that would seriously over-simplify, for the internal disputes that arise in voluntary organizations are themselves multi-faceted. Even at a very high level of generality, they can be seen to cover substance, jurisdiction, and procedure. Yet to try to address all this complexity -- to try to apply the perspectives of all three schools of liberalism to the full range of voluntary organizations as to even the most generalized categorization of their problems -- would take us well beyond our present scope.



Accordingly, I propose to take the perspective of a single liberal school, sectarianism, and apply it to a single kind of organization, sects, with respect to a single kind of problem, disputes about fundamental organizational purpose. This particular narrowing of focus has several advantages. First, sectarianism is, at least in this context, the least explored version of liberalism and, as we saw in Part II, it stands as something of a mediating position between the other two alternatives. Second, sects -- charities the principal purpose of which is to create and sustain moral worlds -- are arguably the most distinct of charities, from both government on the one hand and for-profit firms on the other. Moreover, as we saw in Part I, sects may involve the most intense forms of integration among their members. For both of these reasons, as we shall see more fully in this part, disputes over sectarian doctrine produce the hardest cases for civil courts to adjudicate. After examining these hardest cases, we may reasonably hope to interpolate answers to easier issues in less distinctive voluntary organizations. In that sense, this narrower focus should provide what our title promises: an appropriate prolegomena for broader inquiries.

We will take as our principal examples schisms within Presbyterian denominations in the United Kingdom and the United States. We shall identify deep flaws in the traditional approach of the United Kingdom courts, which looks for the faction loyal to the sect's original doctrine.<sup>27</sup> The principal flaw does not, however, lie quite where American courts have said, in the United Kingdom's courts' "little delicacy in grappling with the most abstruse problems of theological controversy."<sup>28</sup> The real reason lies closer to that articulated by English pluralists early in this century: ecclesiastical doctrine

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<sup>27</sup> See *Jones v. Wolf*, 443 U.S. 595, 599 (1979) ("This [implied trust theory] is sometimes referred to as the 'English approach' to resolving property disputes in hierarchical churches.").

<sup>28</sup> See *Watson v. Jones*, U.S. 679, 727-28 (1871) (citing United Kingdom approach as

almost inevitably evolves in all but the most static of sects. But the result of the pluralists' observation is not necessarily what they anticipated, victory for the church as an organic, evolving body over those of its members who insist on clinging to its past. On balance, by far the better approach, from the perspective of sectarian liberalism, is a Solomonic middle ground. This is the approach taken both by the United Kingdom Parliament in the watershed Free Church of Scotland Appeals<sup>29</sup> and by an English lower court in a recent schism in a Hindu sect.<sup>30</sup> Without declaring which faction is the true church, this mediating approach simply lets the two parties go their separate ways, each asserting its own version of truth and taking along the property it could have reasonably expected to retain.

#### A. Members' Challenges to the Sect's Doctrinal Change

In the classic departure-from-doctrine case, an assertedly orthodox party alleges that another faction has fundamentally departed from the sect's original purpose.<sup>31</sup> For all their variety, such disputes generally follow an identifiable declension into substantive, jurisdictional, and procedural issues. It will be useful to outline these issues here, then turn to the details of each in separate subsections.

In the most straightforward mode, the question is whether the sect has, as alleged, departed from its fundamental doctrine. In this substantive mode, the sect can respond in either of two ways.

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appropriate only for a state with an established church).

<sup>29</sup> Churches (Scotland) Act, 1905, 5 Edw. 7, c.12

<sup>30</sup> *Varsani v. Jesani*, 3 All ER 273 (Court of Appeal, Civil Division 1998)

<sup>31</sup> For the sake of convenience, I shall generally refer to the allegedly orthodox faction as "dissenters" and to the allegedly heterodox faction as "the sect." This reflects the fact that one faction typically dissents from an alleged deviation by those who purport to speak for the sect. But it obscures the fact that the dissidents' central position is that they themselves are not dissidents, but the true sect. We must thus bear in mind that who is really heterodox, and who really deserves to be called the true sect, is very much the issue in question.

First, they can deny any such departure. Their current doctrinal position, they will insist, is consistent with the sect's original position, properly understood. This approach essentially concedes that the issue is substantive, but denies the charge itself, that a substantive change has occurred. Alternatively, the alleged violators may admit the change in doctrine, but assert that fundamental doctrine is subject to change. They will, in effect, be arguing that the sect's fundamental doctrines are amendable, and that the allegedly improper departure is in fact just such a proper amendment.

Either side may attempt to pre-empt these substantive issues with a jurisdictional challenge. The dissenters may argue that the substantive decision, either as to compliance with doctrine or permitted change in doctrine, was not made at the proper level within the organization; typically, the dissenters will argue that the decision is one for a subordinate body, like the local congregation, not for the sect as a whole. On the other hand, the sect will typically insist that the decision was indeed made at the proper level, and that such decisions are not subject to review outside the organization itself.

Finally, either faction may charge that the decision, wherever made, violated the sect's prescribed procedures for making such decisions. These procedural irregularities will be said to have vitiated the substantive decision. Here, too, it is possible to raise a jurisdictional response, arguing that procedural issues are themselves within the purview of some internal body, not subject to external, judicial review.

Judicial intervention at any step in the process can resolve the dispute favorably to either the dissenters or the sect. Substantive resolutions are particularly thorny. But each step poses problems, as we shall see in the following subsections.

1. Substantive Issues and the (English) Implied Trust Theory

The substantive approach to doctrinal disputes, and the problems it poses, are nicely illustrated in the *Free Church of Scotland Appeals*.<sup>32</sup> To understand this case, a Holmesian page of history is essential. The congregations that formed the Free Church withdrew from the established Church of Scotland in 1843. A principal issue in this Great Disruption was the role of the state in ecclesiastical affairs. Even after its secession, the Free Church continued to espouse establishmentarianism. Although no longer itself part of the established church, it avowed the propriety of an established church and officially looked forward to the day when the Church of Scotland would return to the principles that only it, the Free Church, had faithfully followed. The Free Church, in other words, was a disestablished church that believed it should be the established church.

At the turn of this century, the Free Church's national body approved, by a wide margin, a union with the United Presbyterian Church, itself the product of earlier secessions from the established Church of Scotland. The United Presbyterians, unlike the Free Church, had officially disavowed establishmentarianism in favor of its antithesis, voluntarism. The United Presbyterians, in other words, were a disestablished church that believed no church should be established. As a condition of the two denominations' union, the Free Church agreed to a loosening of the new, consolidated denomination's commitment to the establishment principle. Establishmentarianism thus became, in effect, an optional belief in the new body.

A relatively small minority of the Free Church -- hence the "Wee Frees"-- objected to the union on the grounds that this compromise on the establishment principle departed from an essential doctrine of the Free Church. The House of Lords, in a divided opinion, agreed with the dissenters, awarding all

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<sup>32</sup> *General Assembly of Free Church of Scotland v. Overtoun*, A.C. 515 (Scot. 1904).

the property of the pre-union Free Church to the minority, establishmentarian faction. Parliament soon reversed this decision, ordering a division of the Free Church's property between the two factions,<sup>33</sup> what we must look at now is the reasoning of the majority of the law lords.

The majority of the law lords took a substantive approach to the problem. In their view, those who originally contributed to the Free Church gave on the implicit condition that the new body would continue to promote the doctrines on which it was founded. These, by everyone's admission, included the establishment principle. Accordingly, any substantial departure from that doctrine constituted a breach of trust, in effect an abandonment of the church's property to the loyal faction.

This approach, generally called the implied trust theory, has enjoyed wide popularity with courts in both the United Kingdom and the United States. Four critical steps in applying this reasoning need careful analysis. First, the court must determine the sect's original beliefs, as the touchstone for the alleged departure. Second, the court must determine whether, and to what extent, the sect has departed from the baseline of its original doctrinal position. Third, if it finds an essential doctrinal change, it must find whether that change was impermissible. And, finally, if it finds the change impermissible, it must decide its consequences in the case at hand.

(a) Determining Whether the Sect's Original Doctrine.

In the Free Church appeal, the first of these determinations did not come up on the point of the establishment doctrine, because the majority faction admitted its abandonment of that doctrine. It did come up, however, with respect to alleged deviations from the church's original doctrine of predestination. The dispute on this point was mooted by the court's finding of a fatal departure on the

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<sup>33</sup> Churches (Scotland) Act, 1905.

establishment point. For our purposes, however, it is interesting to see how the debate on the predestination point might have gone, and why the establishment point did not go the same way.

The establishment principle, as compared to predestination, is a marvel of simplicity: either the state gives official preference to one religion, or it doesn't. Though establishment admits of degrees -- one church only, one church whose members enjoy special political privileges, one church that is more or less heavily subsidized -- its core meaning, and the meaning of its gradations and permutations, are fairly clear. This is at least in part because ecclesiastical establishment is a political reality, a fact of this world, whatever its political or theological merits.

Predestination, by contrast, is notoriously other worldly. It occurs, by definition, in the eternal counsels of God's own mind, and its actual effects in the world are known only to Him -- indeed, to tighten the epistemological circle still further, He Himself is known only by those to whom He has chosen to reveal Himself. The mechanism of predestination is admittedly mysterious, even to its most avid proponents; Calvin himself cautioned repeatedly against presuming to understand too much too well.

To capture these difficulties better, consider an easier case than either establishmentarianism or predestination. In voluntary organizations that are not very distinct in their purposes from either governmental or for-profit firms, disputes over fundamental purpose are fairly easy to resolve, in principle if not always in practice. Take, for example, a charity that has been running a hospital for many years, but whose board decides to sell the hospital and use the proceeds to establish and operate local clinics. If a dissident director were to challenge this decision as an improper departure from the organization's purpose, the majority could respond that the original purpose was health care generally,

not specifically the operation of a hospital, and that the shift from one mode of health care delivery to another was well within the scope of the original purpose.

Which side had the better argument would very much turn on the facts, which could clearly favor one side or the other, or could be quite murky. The organizational document's language on fundamental purposes, and on changing those purposes, would be crucial, and that language could be more or less clear. But, whatever the facts, no great problems of principle need arise. Indeed, such cases would look very much like similar cases involving for-profit firms making the same shift, except that the easy metric of greatest profit would be lacking. This is because, in both the for-profit and non-profit world, the term "running a hospital" has a clearer referent than "believing in predestination" or even "being establishmentarian."

(b) Determining the Degree of the Departure from Essential Doctrine.

Even if the court can find a departure from doctrine, it must further determine if the doctrine is essential, if, that is, the departure is too great. "Essential" here could mean any one of three related things: what the founders explicitly said was essential, what the founders can be inferred to have believed was essential, and what in some non-subjective sense is really essential.

The law lords had little trouble with this phase of the Free Church case. In the majority's view, the founders had been clear, and indeed pretty explicit, about the importance of the establishment principle. It is important to note more generally, however, that this need not be the case. Just as the sect's original doctrinal position could be quite murky, so can its position on which original beliefs are essential. The latter, indeed, is if anything more likely. Even if the founders are quite explicit in expressing what they believe, they may well be completely silent as to whether that belief could ever

legitimately be revised. This would force the court to fall back to the second position on essential doctrine, what the sect can be inferred to have believed, a much more practically difficult inquiry.

That would still leave the third view on essential doctrine, but that is not a way that courts of the liberal state will see as open to them. Courts could, in principle, test the competing faction's understanding of a doctrine like predestination against the "real" meaning of that concept. In other words, rather than looking for what true Presbyterians mean by predestination, the court could adjudge as true Presbyterians those who hold the true understanding of predestination. The precedents on which the Lords' majority relied carefully abjured this third approach, insisting that courts were only to find what the sect had originally believed, not what was true.<sup>34</sup> To do otherwise would be to abandon the liberal state's agnosticism about matters of faith. On the facts before it, however, the Lord's majority, without too much difficulty, got past the first two substantive issues: that establishmentarianism was an essential doctrine of the Free Church at its founding, and that the Free Church majority had abandoned that doctrine.

(c) Determining Whether the Sect's Departure from Essential Doctrine Was Impermissible.

But they tripped up badly on the third element of the implied trust analysis: the determination of whether departure from the essential doctrine in question is impermissible. Here the Lords' majority ran afoul of a hidden, or at least overlooked, paradox. Stated most baldly, it is this: an arguably essential doctrine of historical Presbyterianism is that its essential doctrine is not static. The Calvinist tradition, in which Scottish Presbyterianism stands, does not see the church as

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<sup>34</sup> *Craigdallie v. Aiken*, 3 ER 601 (1813).



having been reformed once and for all. Rather, if the church is to be true to its essence, on this view, it must constantly be in the process of being reformed. Thus "reformed," a word that has come to be synonymous with, if not preferable to "Calvinistic," has both a static, or historical, element and a dynamic, or progressive, element. The Reformed Church is the church founded by the Genevan reformers and their allies; these Reformers conceived of their church as reforming -- purifying -- itself throughout its entire history. The Westminster Confession of Faith, the reformed creed to which the Free Church subscribed, carefully acknowledged this dynamic aspect.

The tension between these two aspects, the static and the dynamic, was the crux of the Free Church of Scotland appeals. The dissenters could not, consistent with an historically Reformed or Calvinistic understanding of the church, maintain that the Westminster Standards were inerrant. This opened the door for the majority to assert, as they in effect did, that their abandonment of the establishment principle (and, indeed, the original Westminster position on predestination) were proper reforms, the very kind of reforms the original Reformers, in their own day, had urged upon the Roman Church.

Had it squarely faced this paradox, the court would have found itself in an impossible bind. Courts can, albeit sometimes with difficulty, determine how Presbyterians have struck the balance between stasis and dynamism in the past. As we have seen, they can determine what Presbyterians have held to be the essential articles of their faith, pointing, for example, to their great creedal statements like the Westminster Confession. In this they would use the same methods as intellectual historians and theologians, Presbyterian and otherwise.

But courts cannot do the same prospectively; they cannot say which changes to the Reformed

creeds, all of which anticipate doctrinal change, will be doctrinally sound.<sup>35</sup> To do so would be to set themselves up as the ultimate arbiter, not of what Presbyterians have believed, or even believe now, but should believe. For what Presbyterians have traditionally believed they should believe is what is true, the revealed will of God for His own glory and the good of humanity. This, of course, is exactly the kind of fundamental moral issue on which the liberal state cannot, if true to itself, take a position.

Nor is this tension between static and dynamic tendencies peculiar to Presbyterianism. Rather, as the English pluralists pointed out, it is present in all churches and, I would suggest, the same is true of all organizations that promote fundamental value systems. Thus, as to the very kind of issue most important to such organizations, the implied trust theory is fundamentally unworkable.

(d) Consequences of the Sect's Improper Departure from Its Essential Doctrine.

There remains, however, the fourth issue, the consequences of the sect's improper change in an essential doctrine. In the Free Church appeal, that came down to what to do with the sect's property. As we have seen, the court, having found that the majority had departed from an essential doctrine, determined that the property belonged to the dissident minority, who were in effect held to be the true church. The pluralists, who saw the paradox of essential doctrinal evolution, apparently thought the opposite result appropriate: the property should have belonged to the majority, progressive faction. Yet this assumes that that faction itself was the ultimate arbiter of "true" Presbyterianism. That, we shall see in the next subsection section, is quite close to the United States Supreme Court's implied

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<sup>35</sup> Courts in liberal states with written constitutions face an analogous limitation. Even if, as in the United States, courts can declare legislative acts to be in violation of the fundamental law, they cannot do the same to properly enacted amendments to that law. The very point of constitutional amendments is to make constitutional in the future what was not constitutional in the past.

consent theory. But it was not the view of Parliament, which ordered the property divided on equitable principles between the two factions. Parliament's position made eminent political sense; we shall see in a bit that it may also -- though probably accidentally -- have been the most principled approach for the liberal state. First, however, we must examine jurisdictional moves, which promise to remove substantive doctrinal disputes from the courts altogether.

## 2. Jurisdictional Issues and the (American) Implied Consent Theory

These unavoidable problems with substantive resolutions in sectarian disputes understandably press civil courts toward formal solutions as a way of cutting the Gordian knots of sectarian doctrine. Though this preference is demonstrably more consistent with the limitations of the liberal state, it is not without problems of its own. Problems with formalist solutions are nicely illustrated by what might be called the American alternative for dealing with sects, the implied consent theory. The United States Supreme Court first articulated this theory in a case involving this country's greatest Presbyterian schism, the split between the denomination's northern and southern branches over slavery at the time of America's Civil War.

At the broadest level of generality, this approach is elegantly liberal: let the organization choose its own formal means of internal dispute resolution, to which the state, on contractarian principles, will defer. This approach works relatively well in the case of two classic ecclesiastical forms, the congregational and the episcopal. In the former, the local congregation has final say in all matters; in the latter, final authority rests with the church hierarchy. Even these pure paradigms can present problems, however. And Presbyterianism, which is something of a hybrid form, raises even greater difficulties.

For one thing, "pure" models themselves are seldom entirely pure. Rather, in sects with a generally congregational form, some matters may be committed to higher church authorities; management of denomination-wide colleges and seminaries, for example. Conversely, in sects with a generally hierarchical form, matters like local relief work may be committed to congregational decision.

This hybridized form, lying between the pure paradigms of congregationalism and episcopacy, is very much the model of presbyterianism. In its leading case dealing with that hybrid form, the US Supreme Court announced its deeply dubious doctrine of "implied consent." Under that doctrine, any congregation belonging to a hierarchical denomination is deemed to have submitted ultimate authority on all issues to the denominational hierarchy.

There are two related problems here. First, the assumption of complete local subordination may run counter to the actual arrangements within the sect itself. As we have seen, some matters may be reserved to the local body, some to the larger. To be sure, these arrangements may be vexingly difficult for a civil court to unravel. But to cut the Gordian knot with a counter-factual presumption systematically favoring one side -- and often the better-informed, stronger side at that -- is a dubious means of doing the job. Second, the parties may never have been clear on a particular question, like the disposition of congregational property in the event of a schism. In such a case, it is hardly appropriate to assume, without more, that the locals intended to empower the nationals.

If the implied consent rule is a dubious inference of the parties intent, it is an even more dubious as a default rule designed to implement public policy toward sects. Indeed, in the case of sectarian liberalism, very much the opposite seems to be appropriate default rule for one of the more

common and vexing problems, control of local congregation's property in the event of a fundamental disagreement between the local congregation and higher denominational authorities. To state the matter affirmatively, the policies underlying sectarian liberalism counsel in favor of a presumption of local control.

The principal reasons for this presumption are the various factors contributing, all else being equal, to concentration of power at upper levels of the denominational hierarchy. To paraphrase Milton, it is not so much that presbyters will become priests, as that permanent denominational bureaucrats install themselves as de facto papal curias. To British audiences (and American watchers of public television), this might be called the "Yes, Minister" problem; to those versed in Weberian sociology, it is the "iron law of oligarchy." The history of American protestantism is replete with repetitions of the Wee Frees case: denominational initiatives opposed by substantial majorities within local congregations which congregations are themselves minorities in the church at large. And often, as in the case of the Wee Frees, these are more remote, rural congregations, the very constituents likely to suffer from information asymmetries.

### 3. The Secession Alternative: Parliament's Solomonic Solution

In this situation, the British Parliament hit upon a brilliantly Solomonic, baby-splitting solution, its Free Church Act: let the locals secede, taking their congregational property with them. Curiously, this solution almost precisely parallels that proposed in the governmental sector by my illustrious co-religionist and compatriot, John Caldwell Calhoun, another Scot-Irish Presbyterian from South Carolina. In Calhoun's theory of nullification, any action of the federal union deemed by one of its constituent states to violate the union's fundamental law must be treated as an amendment of that law,

and thus must be passed by the appropriate amendment process. If the amendment passes over the state's objection, the state has a final recourse: secession from the union into its own original, independent sovereignty.

As a theory of American Constitutional law, Calhoun's model may be deeply flawed (though I doubt it); as a matter of fact, it lost on the battlefield, not in the courtroom. But many of its problems as a political structure do not apply in the realm of voluntary associations. For one thing, fissiparousness is more acceptable here, both as a matter of history and as a matter of principle. Virtually all sects are traceable back to some larger whole, and the whole notion of voluntary organization implies freedom to leave as well as to enter the common enterprise. What is being cut in the Solomonic approach is hardly a human baby nor, at least for the last half-millennium, a single body of believers, even within the Christian faith. (A faith which, after all, began as a dissident Jewish sect.)

For another, many voluntary organizations, especially religious denominations, have federal structures, as we have seen. The local levels of these structures, congregations, often exhibit a degree of integration lacking in Calhoun's ostensibly sovereign American states. The face-to-face, town-meeting mode of transacting institutional business at the congregational level gives them a measure of organic integrity arguably lacking in the mostly territorial definitions of Calhoun's proffered political sub-units, the American states.

Finally, strengthening potentially dissident constituencies within large denominations may well be in the long-run best interest of the denominations themselves. This is nicely illustrated in Hirschman's analysis of the way organization managers, be they for-profit, nonprofit, or governmental, respond to constituent complaints. In situations where "exit," severing ties with the organization, is

very costly to a constituency, they are likely to remain affiliated and register their perceptions of organizational decline through "voice," more or less direct communications with management. But management, at least in the short run, has perverse incentives not to encourage or heed constituent voice, even at the cost of long-term institutional decline. Moreover, voice tends to be less effective at getting management's attention when it is not accompanied by credible threats of exit.

Religious organizations, according to Hirschman, typically exhibit high exit costs. Allowing congregations to leave with their local property intact would significantly lower those costs. Consistently with Hirschmann's analysis, this lowering of exit costs would improve congregation's position vis-a-vis the hierarchy. Beyond that, it might also benefit the denomination as a whole. By forcing the hierarchy to attend more to constituent voicing of perceived institutional decline, increased opportunity for exit might well help avert such decline. That, in turn, might well make congregations less, rather than more, likely to secede. If so, the ultimate beneficiaries would be both the sect and the congregation; the only losers, current management, and only in terms of short-run interests.

The elegance of Parliament's Solomonic solution, whether explicitly adopted by a sect itself or used by the civil courts as a default rule, is subject to frustration by clever procedural moves on the part of higher denominational authorities. Accordingly, as we shall see in the next section, the sectarian state must also develop a sophisticated approach to procedural issues as well.

#### 4. Procedural Issues

Even if the alleged change is found to be substantively proper (or unreviewable) and made at the appropriate level within the organization, there is a final set of hurdles. As we have seen, either the sect or the dissenters may charge that the decision was not made in accord with the sect's internal

procedures. Procedural irregularities will be said to have viciated the decision. With respect to fundamental doctrinal matters, procedural problems take three basic forms: Attacks on the decision-making body's credentials, attacks on the process by which that body decided the matter before them, and assertions that a body within the sect has unreviewable authority to decide these and other procedural issues. We need to examine each of these avenues of attack in turn.

a. Credentials Challenges

Dissidents can argue, and have argued, that the decision they oppose, though made at the proper organizational level, was nevertheless made by individuals who had obtained their positions improperly.<sup>36</sup> To anti-popes, popes are always anti-popes; for the faithful, and for the courts, the problem is to tell which is which. Assuming the selection criteria are clear, the courts of a sectarian liberal state should be able to grant a limited hearing to such charges. Thus, for example, if the national governing body is, by the denomination's internal rules, to be elected by majority vote, and the dissidents allege fraud in the counting of ballots, courts could and should hear the charge, just as they would hear analogous charges about electoral irregularities in a political subdivision or for-profit corporation. To refuse to hear such cases would both deny the dissidents the benefit of their bargain with the organization and reward egregious misconduct on the part of the organization's management. Management, on the other hand, should have available the standard equitable defenses of laches and estoppel.

Credentials challenges can come from the other side as well. Suppose, for example, that local

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<sup>36</sup> See, e.g., *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952).



congregations have the authority by majority vote, either as a matter of denominational rules or local law, to withdraw from the denomination and take with them all property titled in the local congregation. Yet suppose, further, that final decisions in all other matters, including determination of membership in good standing, rest with the denominational hierarchy. The hierarchy could obviously undermine any local vote to secede by expelling the dissident majority or otherwise ruling those members ineligible to vote, thus leaving the loyalist rump in control of the congregation's property.<sup>37</sup> To protect the jurisdictional arrangement as to secession, courts must thus be able to police for such procedural manipulations of members' credentials.

b. Procedural Challenges Proper

More common than these credentials challenges will be challenges to the process by which the doctrinal change itself is made. These processes will often be straightforward. The sect's internal documents might provide, for example, for a majority vote by a designated body in a properly announced meeting conducted according to standard parliamentary procedures. Here again, the courts can review alleged procedural irregularities very much as they would in examining the pedigree of a legislative enactment or a corporate policy decision.

Sometimes, however, sects may officially proceed in ways that are not easily reviewed by liberal courts. The organization's foundational documents may, for example, direct that matters of basic doctrine be dealt with "prayerfully," "with the guidance of God," or "in a spirit of love." At the extreme, the sect may consciously eschew secular, liberal modes of group decision-making, as we shall

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<sup>37</sup> This was essentially the case in the US Supreme Court's latest Presbyterian case, *Jones v. Wolf*, 443 U.S. 595, 606 (1979).

see in the case of the Quaker meetings. Thus, in matters of process as in matters of substance, liberal courts may find themselves at the edge of Professor Chafee's "Dismal Swamp of obscure rules and doctrines." <sup>38</sup>

Faced with this prospect, liberal courts would best be served by the sect itself's providing an alternative, secular set of standards. Thus, for example, the sect's internal rules could provide that, in the event that its esoteric, internal procedures fail on a point like the entitlement to local congregations' property, a specified set of secular standards be applied.<sup>39</sup> These could be very hierarchy-favorable -- for example, letting the bishop decide unilaterally -- or very congregation-favorable -- for example, resting control with the majority of members on the roll at the time the dispute arose. In applying the sect's own secular default rules, the courts' principal concern, as always, would be to ensure fairness to the parties with the weaker bargaining position.

If the sect provides no such secular default rules, the courts will have to proceed as closely as possible to the way they would in other cases where the parties' intent is unclear. In the first instance, this would mean trying to infer the party's likely intent. Beyond that, the court will have to adopt default rules that best advance the general position of sects in a liberal state. In that regard, a preference for local voice, amplified by a presumed right to secede with congregational property, seems appropriate.

c. Jurisdiction to Resolve Procedural Issues

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<sup>38</sup> Z. Chafee, Jr., "The Internal Affairs of Associations Not for Profit", 43 *Harv. L. Rev.* 993, 1024 (1930).

<sup>39</sup> The United States Supreme Court explicitly asked for such anticipatory help from churches in Jones v. Wolf.

There is a final procedural problem that liberal courts must address. We have already seen how jurisdictional claims inside the sect can pre-empt substantive challenges to doctrinal disputes in the civil courts. Either faction can assert that the sect's fundamental rules unreviewably commit the substantive appropriateness of doctrinal change to a particular body within the sect. A structurally parallel claim can be made about procedure as well. It can be argued that all procedural issues, including charges of procedural irregularity, are committed by the sect's own rules to final review by an internal body.

It is extremely important to notice that the similarity of these jurisdictional claims, the one as to substantive issues, the other as to procedure, is structural only. The courts must treat them almost entirely differently. With respect to the substance of doctrinal disputes, as we have seen, the civil courts cannot, by their very nature, have any direct role. Issues of substance must be resolved within the sect, whether the sect's internal rules so provide or not, because the liberal state cannot take positions on the rightness of fundamental views of human flourishing.

With respect to the process by which doctrinal disputes are resolved, however, the civil courts can, and should, have a much larger role. Though they cannot say, even as a matter of default, what any of citizen should believe, they can say whether those citizens have gotten the process they agreed to, at least if that process has not been specified in esoteric terms. Moreover, even when the specified process is esoteric, courts can police whether particular constituencies of the sect willingly and knowingly submitted to such procedures.

Such submission should, of course, be allowed, as part of the citizen's right to join groups and freely determine the terms of membership in them. But the courts of the sectarian state should, on the other hand, be very wary of such claims, and should be open to challenges by the weaker party that

esoteric procedures were not freely and knowingly adopted. To do otherwise would be to succumb to the libertarian tendency to assume, rather than insure, that such individual concessions are what they purport to be, and thus to ignore the systemic biases in favor of institutions over against individuals.

B. Sect Charges of Member's Deviation on Essential Doctrine.

So far in this Part, we have focused on dissident challenges to changes in the sect's fundamental doctrines. As we have already seen, these disputes can, and often do, have another side: the sect may claim that it is not they, but the dissident members, who are falling into apostasy. In concluding our discussion of doctrinal disputes, we should, accordingly, examine the other side of the coin.

Sects, like voluntary organizations generally, must have the power to determine their own membership; the freedom to associate, as the United States Supreme Court has pointed out, necessarily includes the freedom not to associate.<sup>40</sup> Especially in the case of sects, the criteria of membership will be difficult to state in legally intelligible terms. This is partly because, as we have seen, the courts of the liberal state are inherently unfit to determine matters of fundamental doctrine, the substantive basis for sect membership. Who is a true Presbyterian is a question only Presbyterians can answer. The sectarian state is also unfit to resolve membership issues because the characteristics necessary for intimate association with other members of such a group, the formal aspect of sect membership, are hard to specify in objective terms. Stated most Socratically -- and also most problematically -- how could a sectarian court determine whether someone evinced an adequate concern for the souls of fellow sect members?

Accordingly, the substantive bases for expulsion from a sect are ultimately not susceptible to

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<sup>40</sup> *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1983).

judicial review. With respect to process, once again, the courts can and should insist that the member be given what the organization has promised. Ultimately, however, expulsions will come down to the merits, and on the merits the organization must have final say. Even if a member successfully challenges the process of his or her expulsion, the most that the courts can insure is that the organization proceed according to form in re-hearing the case.

The real problems with expulsions from sects have to do with ancillary effects, which are in effect penalties beyond the expulsion itself. In principle, an individual member, upon joining a sect, might agree to subject himself or herself to a very wide range of extremely severe penalties for doctrinal deviation. Beyond some point, these would become external, rather than internal, matters; the liberal state will not let prospective heretics bindingly agree in advance to being burned at the stake, branded with a scarlet "H," or relegated to slavery in the temple precincts.

But, short of these extremes, new members might agree to harsh penalties upon excommunication. They might, for example, agree to forfeit large initiation fees or capital contributions to the organization. Again, consistent with its policy of free association, and, even more basically, freedom of contract, the sectarian liberal state should stand ready to enforce these commitments at the behest of the organization against the individual. But, mindful of the relative bargaining advantages of the organization, the courts should also insure that not a single extra ounce of flesh or drop of blood is extracted. In particular, the state should be careful to insure that stigmatizing of the excommunicant outside the organization does not exceed ordinary civil restrictions on defamation, in the absence of very clear waivers.

The bottom line is this: a member's appeal to the state can very well be the basis for loss of

membership rights in a sect, but membership in a sect can never be the basis for the member's loss of the right to appeal to the state. The former is an internal matter, properly committed to the sect and its members for their own determination. But the latter is an inherently external matter; the liberal state cannot allow its citizens, even with their full and knowing assent, to anticipatorily bind themselves not to appeal to its courts. In the liberal state, the right to protect one's rights must be an inalienable right; any citizen may at any time decline to exercise that right, but none may ever lose it, voluntarily or otherwise. This degree of subservience to the will of others is perhaps the one form of happiness that the liberal state cannot consistently allow its citizens to pursue. The liberal state may have to tolerate masochism, but it cannot countenance slavery.

### C. Summary.

The sectarian liberal state, by its own terms, must give to its citizens the maximum latitude in forming and operating sects, charities with the central purpose of promoting visions of human flourishing. On the other hand, it must stand ready to see that its citizens get what they bargain for. When it comes to doctrinal matters, this produces a deep tension: sects and their members can mutually commit themselves to any vision of human flourishing they care to adopt, but the sectarian state cannot police compliance with any such commitments. In that respect, the law lords fundamentally erred in the Free Church of Scotland appeal.

Yet this does not mean, as the English pluralists and some American courts have inferred, that the courts of the sectarian state can have no proper role in such matters. If they cannot examine the substance of such commitments, they can nevertheless insure that such commitments are made and changed by the properly designated and constituted internal organs, by the agreed internal procedures.

Sometimes, to be sure, even these formal matters will be worded in unreviewable terms; sometimes, they will not have been addressed at all.

In such cases, the courts should be very careful to insist that any departure from liberal processes be very clear. This is especially true of the ultimate liberal process, judicial review of disputes among citizens over basic civil rights like property. In fashioning default rules, the courts must be aware of both the disadvantages of individuals in dealing with groups and the particular virtues of voluntary associations. These considerations counsel strongly in favor of the Parliamentary resolution of the Wee Frees case.

#### IV. Liberal Sects

From the sectarian perspective, as we have seen, the liberal state cannot provide all that its vision of human flourishing requires, nor can the market wholly make up the deficit. These missing elements are fraternity, close personal ties between biologically unrelated individuals, and faith, broadly speaking, fundamental commitments about the ultimate meaning and purpose of human life.

What the liberal state needs, accordingly, is a complement on the nonprofit side. That charitable counterpart, predictably, would have complementary views about the internal affairs of sects and about the state's intervention into those affairs. This section first outlines the likely contours of any such liberal sect, then focuses on the one that best complements sectarian liberalism. Finally, it considers the attitude of liberal sects, particularly this latter, ideal model, toward internal governance and state intervention.

Before turning to these particular aspects of liberal sects, a few general words about their relation to the sectarian liberal state are in order. The liberal sect would not aspire to be either a microcosm or a private sector twin of the liberal state. Its geographic scope, as we have seen, might even transcend that of the modern state. This is implicit in one of its two critical

provisions, which are faiths or, literally, worldviews. The other critical provision, fellowship, similarly implies a significant difference from the liberal state at its local levels of organization. These latter would be domains, for want of a better word, of love, not law.

If the liberal sect is not, for these reasons, the twin of the liberal state, neither would it be the state's spouse. The liberal sect would not accept, much less seek, special favors or privileged status from the liberal state. Rather, its only demand on the state would be that the state itself be liberal, which, as we have seen, implies official agnosticism toward competing worldviews. But this demand does have one positive implication that, if met, will put the liberal state at odds with some illiberal sects. That implication, which we will take up in detail at the very end of this section, is that the liberal state guarantee each of its citizens a liberal education. This guarantee will offend the most illiberal of sects, for it will empower their members to seek and assess alternative worldviews, and hence to find new spiritual homes. In summary, if we may continue the analogy to personal relations, the liberal sect would be to the liberal state neither sibling nor spouse, but friend; as such, it would simply insist that the liberal state be true to its ownmost self.

#### A. Liberal Sects in General

From the critical needs for human flourishing that the liberal state cannot supply, we can extrapolate the basics of the kind of group that would be its charitable complement. Indeed, to paraphrase Voltaire, if such groups didn't exist already, we could easily invent them: they would be Religious Societies of Friends of Truth. Each element in this description warrants attention.

Friendship, understood in the classical, Aristotelian sense, would be the members' basic form of interaction. They would structure and conduct their intramural affairs as befits those who have the deepest concern for each others' souls. To produce and sustain the kind of worldview that liberalism lacks, they would have to transcend the geographical and temporal limits of individual friendships; they would have to be a Society of Friends. Moreover, they would have to share more than just the formal ties of friendly intimacy; they must share a common substantive vision, a common view of what the good life is: in a word, a faith.

In that sense, their society would be religious, though not necessarily in the traditional sense of



having an other-worldly dimension or even a belief in God. Rather, it would be religious in the broader and more modern sense captured in the theologian Paul Tillich's understanding of faith: that with which one is most fundamentally concerned, the core of human commitment. Religion in this sense is any search for fundamental moral meaning. In a religious society, according, members share a common world-view, or ethos.

And that understanding of religion, finally, gives the sense of "truth" relevant to such organizations. They would seek truth not necessarily as a matter of objective, propositional knowledge to be found "out there" in the mind of God, the order of the universe, or the nature of human beings. Rather, the truth they seek could also be moral truth, as understood by American pragmatism, English analytic philosophy, and Continental existentialism. Minimally, such truth must be a viable way of living a human life in the world; optimally, it must be a way that free people would freely choose. As such, its proof would be in those who choose it, and in how they live. Truth in that sense, as fundamental moral meaning, is, of course, the one thing the liberal state, consistent with its own self-understanding, cannot provide.

At our present level of abstraction, we can say little about the content of any such group's particular substantive commitments. We can, however, make one important observation about the way in which these fundamental commitments are likely to be held. The beliefs of any sect that lasts for long will have both a dynamic and a static aspect. Such a sect need not adopt so radically dynamic a principle as Calvinism's "the church is constantly reforming itself." But even the most conservative of faiths must confront new situations to which the faith must be applied, even if the faith itself is never to change.

The obverse, the necessity of a static aspect, a retrospective perspective, is more obvious. Even in the most radically self-reforming of creeds, there must be a creed to reform, some beliefs that have been held by the community in the past, even if the community holds that those beliefs are to be held up to constant re-examination in the future. Even to proclaim, as some sects are wont to do, that they have no creed is, paradoxically, to announce at least a minimalist creed; their members are at least united in a common commitment, essentially negative though it may be.

The interaction of these two aspects, the static and the dynamic, means that sects will have a tradition, a shared history, however short, through which their community has developed. In the course of this history, much may have been abandoned, much preserved. Indeed, no single original belief may remain, even as, in the life-cycle of a biological organism, no cell present at its birth may remain at its death.

This process depends on the possibility that the friendships in a society of friends can transcend time, can extend beyond the lives of individual members alive at any particular time. Living members stand in a kind of dialogue with the ideas of those past, and expect those who come after them to take their own ideas seriously. They recognize that those who have previously belonged to their sect have a special claim on their attention: if these predecessors' faith is to survive, it will mostly be through their successors' efforts; on the other hand, the latter's very ability to engage in this dialogue is a bequest from the former.

Just as each sect must have a creed, with dynamic and static aspects, so it must have a policy, explicit or implicit, toward those outside the creed. For groups that are most complementary to sectarian liberalism, this policy will be universalistic; the group will see outsiders as potential insiders.

This is not to say that all such groups need actively proselytize; it is only to say that they will make some provision for outsiders to receive their message as true. Thus, for example, contemporary Anabaptists, who see themselves as essentially separate from society, make provision for outsiders to come in, albeit unbidden. Those who erect cities on hills for the instruction of the world generally assume that, however far below them the world may be, someone down there may see their light and, if successful in the climb, seek admittance at the gate.

This universalist perspective is important for sectarian liberalism because it assures that such groups will, at least minimally, engage in dialogue with others. They will be willing to try to explain their way, their "truth," to others in language the others can understand. In this way, they will thus contribute, at least when asked, to the dialogue about the meaning of life that the sectarian state most cherishes.

To better grasp this universalistic perspective and its significance for sectarian liberalism, consider what it would mean for an organization to lack it. Such a group would have to assume that no outsiders would be either willing or able to join. Its new members would presumably have to be the children of former members. Yet, if they alone were able to become members, there would have to be something very special about either their heredity or their environment. If the distinction were deemed hereditary, the group would have to be profoundly racist. Such groups could contribute to liberal society's dialogue about the meaning of life only in a negative way, by implicitly calling the legitimacy of that dialogue's universality into question. If the distinction were deemed environmental, the group would hardly seem voluntary. Such groups would seriously detract from liberal dialogue by rendering certain citizens, the children of its members, unable to enter that dialogue meaningfully.

To achieve a scope beyond the strictly local, and certainly to attain an international reach, the society of friends would have to have a federal structure. Within this structure, procedure would be governed by the aim of Aristotelian friendship, collaborative improvement of each others' souls. Love, not law, would be the regulatory ideal. Members would treat each other, not as the anonymous, abstract, and atomistic rights-bearers of liberal law, but as beloved fellow members with known needs, abilities, failures, and limitations. Policy decisions would have to be made deliberatively, as civic republicans understand that term.

This leaves room, of course, for immense institutional latitude. To borrow a metric calibrated in the Anglican Communion, such societies could range beyond the extremely High Church at the top right through the Oxford Movement to reunion with Rome in its post-Pious IX, papo-centric form. And it could run, in the other direction, below the Lowest Church evangelicals right out of the Establishment, into the most sectarian of sects, the Quakers. For purposes of our discussion, I want to move in this latter direction.

#### B. The Model Liberal Sect: An Ideal Society of Friends.

If, as I believe, the Cromwellian commonwealth was the prototypical sectarian state, the early Quakers were its nearly ideal complement. Indeed, Quakerism was born in the very era in which sectarianism flourished in England, the time of the Puritan Revolution. Quakers were, in a sense, the most Puritanical of Puritans, and the most sectarian of sects. Out-purifying the Puritans, they reduced their worship essentially to purification itself, to a regular, meditative conversation about how to live well.

In practice if not entirely in principle, the leaders of the Commonwealth and the Quakers each

seemed to realize this about the other. Cromwell accommodated, as much as his more orthodox subordinates would allow, the peculiar religious and even civil practices of the Quakers. Perhaps most importantly, he stayed in direct personal dialogue with their leaders. Indeed, according to the most prominent of these, George Fox, the Lord Protector said, "Come again to my house, for if thou and I were but an hour together we should be nearer one another."<sup>41</sup> Perhaps, of course, his comment was facetious, or even apocryphal; I rather suspect, however, that it was far-sighted.

In the remainder of this section, I want to sketch out the ideal Society of Friends' position on two related matters: its own handling of internal disputes, and the intervention of the state in those disputes. Both discussions will borrow heavily from the historical practice of the Quakers, particularly in their encounters with the liberal state. It should be borne in mind, however, that my ideal Society of Friends bears about the same relation to the historical Quakers as my sectarian liberal state does to existing liberal states.

#### 1. Internal Organization and Dispute Resolution

The fraternal, friendly mode of decision-making is the essence of the traditional Quaker voteless "business" meeting. Its process is deeply deliberative, not parliamentary. Efficiency is subordinate to rightness of outcome, and rightness of outcome, in turn, depends on "gathering the sense of the meeting." All members are encouraged to speak their minds, but only with a mind toward finding a position in which the meeting can unite. Individual members don't "stand against the sense of the meeting" unless deeply persuaded otherwise. On the other hand, the group defers as far as possible to strongly felt minority and even individual views. The individual does not have a formal veto, but his

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<sup>41</sup> George Fox, *Autobiography of George Fox*, *supra*.

or her voice is more than just a single vote, an increment toward a majority; the majority may indeed rule, but not before all dissent is respectfully heard.

The federal body will be a bottom-up rather than top-down hierarchy. Local bodies will send representatives to the higher bodies, where they will receive each other as friends of friends. Its meetings will, to the maximum extent possible among people who know each other less well, mirror the deliberative methodology of local meetings. But, since this reflection will be imperfect, higher levels must be viewed with a measure of suspicion. Matters of common interest may be delegated to them, but local meetings should remain the fundamental unit of organization.

Despite their commitment to harmony, the friends will occasionally reach an impasse at each level of organization. They will not be able to reach agreement and the dispute will be fundamental, in the sense that some will feel they must pursue a particular course, and some will feel equally strongly that they cannot. Such impasses should be extremely rare. But when they occur, secession will be an option, at all organizational levels, from the local to the international. This will always be viewed, on both sides, as tragic, without triumphalism.

The disagreeing groups will always strive to overcome it, and to continue co-operation on as many fronts as possible. Those who stay will do all they can to help those who leave, including offering them an equitable share of common goods. That share may well be more than a pro rata share, given the likely start-up costs of striking out on their own. The departing, for their part, will take no more than they need, particularly in view of the needs of those who remain behind, which may well increase with their departure. Indeed, the spirit on both sides will be as distinctly communistic at the point of their separation as at all other points of their common life: from each according to ability; to each

according to need. Though they may well doubt that this is a viable basis on which to run a state, they will remember that it has often, and with considerable success, formed the basis of religious societies of friends. Finally, both parties will stay in dialogue, remembering the fullness of their former communion and earnestly seeking its early and complete restoration, consistent with the good conscience of all.

The same attitude would prevail in individual disciplinary actions within the society. Such actions would begin in informal and reflective consideration of the "unfriendly" conduct. If several friends concur in their informal assessments that something is amiss, they should, after discussing it among themselves, approach the offending member about the problem. At that point, they may become convinced that they have been mistaken, or the offender may accept their admonition to reform, or they all may reach an accommodation somewhere in the middle. If the problem is not resolved at that informal level, it may have to be brought to the attention of the full local fellowship. Here again, the offending friend should be given full opportunity to discuss the problem, and all feasible means of resolution should be open for consideration. Only as a last resort should the fellowship apply the final and ultimate sanction, expulsion from the meeting's membership.

The expelling meeting will always experience this as a tragic loss. Expulsion's purpose will always be twofold: restorative, as a final effort to bring the erring member back into fellowship, and protective of the sect, as a way of minimizing further harm. To these ends it may in a sense be punitive, but it will never be retributive or vengeful. Indeed, it will always be provisional; always done with the hope, if not expectation, of eventual return to the fold.

## 2. Attitude Toward State Intervention

Against this background of how the ideal sect, the model society of friends, would run their

affairs internally, we can sketch their attitude toward state intervention into sects' affairs, first their own, then those of sects generally. With respect to the state's intervention into its own internal problems, the Friend's position would be one of deep sadness, but not of total renunciation. Because of their basic commitment to amicable resolution of internal disputes, the Friends would see any invocation of the state's authority as a failure, never more than a second-best solution to working things out among themselves. Friends would go to the state against each other only as a last resort; invoking the coercive power of the state would signal a fundamental breach of fellowship.

On the other hand, if litigation represents a fundamental breach of fellowship, then lawsuits almost automatically turn internal affairs into external affairs. Anyone who persists in suing the fellowship, after it has made appropriately generous offers of settlement, may have to be regarded as having renounced the fellowship, and thus as being no longer a friend, but an outsider (subject, of course, to the conditions, outlined above, on the restorative aspect of the society's internal discipline). Similarly, someone against whom the society can protect itself only by invoking the power of the state will almost certainly, by the same acts that gave rise to a civil cause of action, also have warranted severe internal discipline, ultimately resulting in expulsion.

Take, for example, the case of a local society's treasurer suspected of embezzling its funds. After confirming, through its normal internal procedures, that the embezzlement has indeed occurred, the society would try not only to have the funds returned, but also to have the embezzler him or herself restored to full, honest fellowship. But if the embezzler were unrepentant, the society might feel compelled to expel him or her. Even so, if the amount taken were relatively small, the society might choose, in light of a wide range of factors, including possible later reconciliation, not to sue to get the



funds back. But if the amount taken were relatively large – large enough, say, to threaten the society's continued mission, or an aspect of its mission that serves especially needy individuals – the society might, quite consistently with its own principles, feel compelled to sue for their recovery. This would be simply an instantiation of the Pauline principle: concede as much as possible to those of tender conscience; yield nothing to those who would trammel your liberty for unworthy ends.

All this presupposes that the individual has voluntarily assumed the obligation to submit to the organization's final say, and understands what that say involves. Indeed, in order for the organization to hold a member accountable for a fundamental breach of fellowship in going to court, it must have made that principle clear as a matter of acceptance into membership, in terms of universal intelligibility. This is critically important because, if the sect has been faithful to its own principles in thus informing its members of the scope of the jurisdiction they are submitting themselves to, it will, in the eyes of the sectarian state, be entitled to great deference in its decision-making.

There remains, however, a final complexity: disputes that are not between a single member and the group, but between factions within the group, each claiming to be the true group. For reasons we have seen in connection with the Free Church appeals, the state cannot be expected to make this determination on substantive grounds. For its part, the ideal liberal sect would not believe that the state could or should attempt this. The decision, accordingly, will have to rest on formal grounds, jurisdictional and procedural.

Yet, in the case of our ideal society of friends, this, too, will pose problems. Their internal problems, as we have seen, will only come into court if their internal dispute resolution system has radically failed. Yet this internal process will in its very nature not be readily replicable or reviewable

by a civil court. Its essence, as we have seen, is intimate, not abstract; particular, not general; in a word, loving, not lawful. By the Friend's own admission, then, the state cannot possibly solve their problem their way.

The members, anticipating this impasse, will have two choices. They can either adopt legalistic procedures as a default mode from their preferred mode of dispute resolution, or they can let the liberal state muddle through as best it can, applying its own default rules. Under the former approach, they could adopt either a majority rule default mode, or vest final decision, in cases of radical disputes, in a single officer or body of officers, themselves deciding by a prescribed, legally reviewable procedure. Any such default system should be triggered by a legally cognizable event, perhaps the filing of lawsuit by one faction against another.

Under the second, default approach, the members would place the state in the awkward position of having to break their deadlock for them, under policy considerations that are probably not entirely theirs. The liberal state would have difficulty, both in theory and in practice, inferring the default rule that best promotes the internal goals of the sect. It would, presumably, have to fall back to rules that are either most conducive to the health of sects in general, most in accord with the likely wishes of sect members in general, or most consistent with the values of the liberal state. The latter two, at least, would usually point to majoritarian modes of decision and equitable divisions of property according to source. As the Free Church appeal makes clear, these two principles are not entirely consistent, but they can usually be reconciled.

Faced with these alternatives -- choosing for itself a legal mode of dispute resolution or leaving that choice to the state -- the ideal friendly society should choose the former. It would, presumably, try

to establish that result closest to that which its own principles would produce: free departure of dissenters with need-based division of the assets of the formerly united society. It should be borne in mind that either side could, of course, be more generous to the other than the law requires and would, indeed, be required by its own principles at least to consider precisely that.

With respect to state intervention generally, the friendly society would be egalitarian. It would want no special treatment itself, but it would want like groups to be treated alike. Thus it would want the state to treat all sects, whether traditionally religious or not, according to the same principles, principles that take into account the special features of such organizations that we have already identified. Conversely, it would recognize the legitimacy of treating different kinds of organizations differently, and would thus accede to different treatment of voluntary groups that were less distinctive from governmental organizations on the one hand or for-profits on the other. From the Friendly perspective, accordingly, pinochle clubs need not be treated for all purposes as if they were the legal equivalent of Presbyterian Churches, or of any other sect. As Blake put it, "One law for the lion and the ox is oppression."

The basic rule of intervention would derive from the essential voluntariness of sects. Individuals would be held to those commitments they had voluntarily made to the sects they join, whether those commitments are substantive, jurisdictional, or procedural. But, owing to the various asymmetries we have seen that stack the deck against the individual, the Society of Friends would accept as appropriate a fairly high standard of proving that those commitments had been made by a fully informed, fully mature individual. The Society of Friends would further accept that these commitments would have to be worded in the common language, the language of both outsiders and

the law courts.

Any particular liberal sect has two basic motives for desiring the state's neutrality toward sects in general. One is essentially negative and skeptical; the other more positive and optimistic. On the negative side, sects might well be skeptical that, even if theirs is the one true way, the state will not have the capacity to recognize it as such. Unless the state itself is purged of unbelievers, these unbelievers are by definition not likely to be persuaded by the group's particular vision, and the hope of achieving such a purge has to be balanced against the fear of being persecuted. Something like this seems to have been the position of liberals all over Europe at the end of the exhausting religious wars of the mid-seventeenth century.

There is, however, a more positive perspective, the perspective likely to be taken by sects more compatible with the liberal state, particularly the ideal Society of Friends. These sects would see equality of treatment before the law as a positive good, as a condition of creating the "marketplace of ideas" in which their own version of the truth can be expected to win -- or lose -- on its merits alone. This, of course, is the thesis of Milton's classic plea for tolerance in *Areopagitica*, a plea from the perspective of the ecclesiastical independents to the state, beseeching the state to be liberal.

### 3. From Intervening in Internal Disputes to Advancing Common Ends

This last, positive aspect implies a single but essential affirmative role for the liberal state in matters of belief: the state must ensure that its citizens are truly free, in the sense of being able freely to choose among the alternative ways of human flourishing offered by competing, legally co-equal sects. The state, in other words, must provide its citizens with an education that equips them to participate not only in a market economy and a liberal polity, but also in a religious plurality. Thus the liberal

state may -- indeed must -- provide each individual citizen with a sense of history, a vantage-point from which to see the range of ways of being in the world, of being considered an excellent human being among one's peers. Optimally, such an education will show a wide range of ways, especially of those ways that have proved themselves by their ability to attract members without coercion. Minimally, it must show that there is not a single way. And, preferably, it should show that some groups' ways are destructive of freedom, and that members caught in such groups can escape, and have escaped, into freer and more fulfilling affiliations. The liberal state, from the perspective of liberal sects, is thus fundamentally obliged to provide a liberal -- a liberating -- education.

The Society of Friends will hope that liberal education will enable those who are not its members to join them in extra-mural dialogue, as Paul did the Athenians, even if they never actually join as members. Indeed, the Society would hope, not just to convert outsiders to its way, but also to learn from them, to join them in the search for a way of life consistent with, but more inclusive than, what had previously been theirs alone. For the failure of others to join freely may suggest, as nothing else can, that their own joining was not entirely free, and perhaps not entirely wise.

At the same time, the Society of Friends, like all liberal sects, would realize a painful paradox of liberal education: some traditional ways of life are very much endangered by it.<sup>42</sup> Sects that maintain that unthinking obedience to authority constituted by others is the appropriate mode for at least some

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<sup>42</sup> As the United States Supreme Court has observed, "In short, high school attendance with teachers who are not of the Amish faith -- and may even be hostile to it -- interposes a serious barrier to the integration of the Amish child into the Amish religious community." *Wisconsin v. Yoder*, 406 U.S. 205, 219 (1972). To their credit, the more critical proponents of communitarianism are troubled by this dilemma. See Unger, *Knowledge and Politics, supra*, at 287 ("The fourth major tension [within communitarian politics] opposes the demands of group cohesion to the ideal of a critical education that instructs in the past and present beliefs and creations of mankind in their richest and fullest variety.").

of their members will hardly find that liberal education enhances their position; sects that believe in limiting their members' exposure to alien ideas will find this principle very much at odds with a fundamental policy of the sectarian liberal state. Stated most starkly, freeing people to make their own choices is radically at odds with the goals of both authoritarian and obscurantist sects. Conversely, the ways of such sects radically challenge both sectarian liberal states and liberal sects.

This places the sectarian state in a paradoxical position: it cannot, on liberal principles, forbid the teaching of authoritarian or obscurantist principles; yet it must, on sectarian principles, give all its citizens the kind of education that minimizes their susceptibility to these same authoritarian and obscurantist principles. In the case of children of the members of such illiberal sects, this poses a truly tragic choice between the wishes of parents and the interests of their children. Even states that aspire to be most liberal have not always chosen the way that liberal sects and sectarian liberals must see as wise: freeing all children to make their own ultimate moral choices in light of a wide range of options, even if this enlightened freedom forever precludes choosing their parents' state of ignorant belief or blind obedience.<sup>43</sup>

Liberal sects would have to realize, of course, that their own children's beliefs are at risk in liberal education. Making such an education the right of all citizens allows liberal sects to reach outsiders, but only at the risk of exposing its own. But the cost of averting that risk is too great: from the perspective of liberal sects, it is nothing other than the precluding of true faith itself. As Milton said in the *Areopagitica*, "A man may be a heretic in the truth; if he believes things only because his pastor

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<sup>43</sup> See *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (affirming the right of Amish parents to terminate the formal education of their children beyond the age of fourteen).

says so, or the Assembly so determines, without knowing other reasons, though his belief be true, yet the very truth he holds, becomes his heresy."<sup>44</sup>

Liberal education offers not only to eliminate this "heresy in the truth," but also to produce its necessary positive concomitant. At least in the tradition of the English sectarians, knowing the most tempting vices is a necessary condition to achieving the truest virtue. To quote Milton again: "Since therefore the knowledge and survey of vice is in this world so necessary to the constituting of human virtue, and the scanning of error to the confirmation of truth, how can we more safely, and with less danger scout into the regions of sin and falsity than by reading all manner of tracts, and hearing all manner of reason?"<sup>45</sup>

This faith, in practice, led Melville's Ishmael, though thoroughly Presbyterian, to bow with Queequeg in his idolatry, and, far more importantly, to converse with him on equal and intimate terms about every aspect of their lives. And this faith, in principle, led Milton to challenge his own sect, the Puritans, to transcend themselves:

The light which we have gained was given us, not to be ever staring on, but by it to discover onward things more remote from our knowledge. It is not the unfrocking of a priest, the unmitering of a bishop, and the removing him off the Presbyterian shoulders, that will make us a happy nation. No, if other things as great in the church, and in the rule of life both economical and political, be not looked into and reformed, we have looked so long upon the blaze that Zwinglius and Calvin hath beaconed up to us, that we are stark blind.<sup>46</sup>

Amen.

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<sup>44</sup> 3 Harv. Classics at 217.

<sup>45</sup> Areopagitica, 3 Harv. Classics at 202.

<sup>46</sup> Areopagitica, *id.* at 221.

It is in that spirit -- a spirit no less universal for being quintessentially English, and no less liberal for being explicitly sectarian -- that I offer my observations and welcome your comments today. May our "little chat" go on -- as Ishmael's and Queequeg's did, and as Cromwell's and Fox's would have, but for the Protector's tragically untimely death -- until we become good Friends.

Conclusion (Or Anti-Climax)

In my title, I promised something of a theory of voluntary organizations and the liberal state. In my introduction, however, I narrowed our focus to state intervention in the internal affairs of voluntary associations, and in Part III, I further narrowed our scope to the hardest cases for internal intervention, doctrinal disputes within intimately associated sects. I promised that understanding the proper role of the sectarian state in these hardest cases would permit us to interpolate back into easier cases. Here now -- beyond the end of my paper proper -- I have to confess that that project is beyond us.

But I can scope out how that project might, consistent with what we have seen in this present paper, proceed. Recall what made our hard cases hard. They arose in the class of nonprofit sector groups least like groups in the other two sectors, the for-profit and the governmental. Both the purpose of these groups, pursuing fundamental views of human flourishing, and their mode of organization, members' loving mutual concern for each other's fullest well-being, require the liberal state to give them the maximum degree of autonomy consistent with the liberal state's protection of the freedom of its individual citizens. In considering nonprofit groups that are less distinct in either or both of these respects, purpose and form, I suspect that we will find the need for deference correspondingly smaller, and the state's interest in protecting its citizens correspondingly greater.



Something of this pattern can be seen in the way contemporary American courts approach such groups. To the extent that groups are engaging in ordinary market transactions, the production and sale of goods and services, the state tends to subject them to the same laws as their counterparts in the for-profit sector. On the other hand, to the extent that groups resemble public-sector organizations, either because they perform quasi-governmental functions, as do some bar associations, or because membership is mandatory, as it is in some trade unions, the courts apply standards analogous to those applicable to governmental units. My tentative thesis -- which will have to await another day's proof -- is that this pattern is generally consistent with the principles of sectarian liberalism we have identified.

That still leaves us, however, with fully half of our territory unexplored. We have said little, so far, about the state's role in the external, as opposed to internal, affairs of voluntary organizations. At the outset, we defined, in somewhat formal and conclusory terms, internal affairs as those of principal concern to the group and, correspondingly, external affairs are those of principal concern to the state. Now we are in a better position to understand and justify the content of those definitions. Internal affairs are those that are most distinctive to the nonprofit sector, developing world-views and forming associations with friends. In these matters the state, if it is to be a liberal state, must tread with extreme caution and maximum deference.

This understanding of internal affairs should shed useful light on the other side. External affairs of nonprofits would seem to those that most affect either the market or some governmental function. Guaranteeing a competitive market economy and a democratic, rule-of-law polity are essential functions of the liberal state; when voluntary associations enter these realms, they must properly accede to the state's sovereignty and play by its rules.

By focussing on sects' internal affairs, understood in this light, we can thus see how to proceed with an analysis of the internal affairs of other voluntary organizations. Similarly, with this understanding of what internal affairs of voluntary organizations are, we can proceed to explore the proper role of the state in their external affairs. If I'm right, this paper will have been, as advertised, a proper prolegomena to a more fully developed theory of voluntary organizations and the liberal state. If I'm wrong, I hope it will nevertheless be the occasion for a friendly exchange of views. That is the least one can hope for -- and perhaps also the most.

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