

REFLECTIONS ON THE ROLE OF NONPROFIT ASSOCIATIONS IN A REPRESENTATIVE DEMOCRACY

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*Dans les pays démocratiques, la science de la association est la science mère.*¹

INTRODUCTION

American media are awash in news items pertaining to the nonprofit sector.² Some of these articles relate stories of episodic scandals within this sector—the kind that recur with daunting regularity and chronicle the vagaries of human nature.³ However, much of the media coverage

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¹ ALEXIS DE TOCQUEVILLE, 2 DEMOCRACY IN AMERICA 517 (J. P. Mayer ed. & George Lawrence trans., Harper Perennial 1966) (1840) (“In democratic countries knowledge of how to combine is the mother of all other forms of knowledge. . . .” Tocqueville adds, “on its progress depends that of all the others.”).

² This sector is variously described as the “Independent Sector,” the “Third Sector”, the “Not-for-Profit Sector,” “nonprofit organizations” and “tax-exempt (or “exempt”) organizations.” They are generally encompassed by the Internal Revenue Code (I.R.C. or Code) at Title 26, Section 501(c), which exempts the listed organizations from federal income taxes if they meet the statutory criteria. As a broad-brush description, the listed organizations are considered “nonprofits” because they are organized for some purpose other than generating profits—a purpose which is deemed to confer some benefit on society. Any profit that may be generated is not distributed to, or for the benefit of, any member of the organization. Section 501(c) covers not only “charitable organizations.” § 501(c)(3). It also covers “corporations, and any community chest, fund, or foundation organized and operated exclusively for religious, charitable, scientific, testing for public safety, literacy or educational purposes, or to foster national or international amateur sports competition . . . or for the prevention of cruelty to children or animals . . .” as well as social clubs, labor unions, veterans’ organizations, trade associations, chambers of commerce, burial societies and cooperatives of various sorts—all of which promote social welfare or mutual benefit purposes. 26 U.S.C. §§ 501(c)(4)-(21) (1997).

³ The most widely publicized scandals in recent years are the United Way debacle and the New Era scam. The institutional integrity of United Way of America was called into question when William Aramony, former president of the organization, was convicted of purloining a substantial sum from the charity’s assets and diverting it to the satisfaction of his taste for luxury. See Karen W. Arenson, *Former United Way Chief Guilty in Theft of More than \$600,000*, N.Y. TIMES, Apr. 14, 1997, at A1. The New Era scandal involved a Ponzi scheme in which the founder of the Foundation for New Era Philanthropy, John G. Bennett, Jr., enticed investors to contribute more than \$354 million to his foundation on the strength of his assurance that their return on the investment would double within six months because of the contributions of anonymous benefactors. The Foundation is bankrupt; the SEC has

targets a spate of both federal and state legislative proposals, which are designed to change the way nonprofit organizations operate or are regulated. These legislative proposals are fueled—in part—by recent allegations by the roiling economic and political atmosphere in which the nonprofit sector operates.⁴ Not surprisingly, this turn of events has inspired a debate over the role of the nonprofit sector in our society. Commentators take it as an elementary proposition that the efficacy of legislative initiatives to change the playing field for the nonprofit sector should be measured against the roles these nonprofits have been assigned to play.⁵ However, recent scholarly work in the field has viewed those roles almost exclusively through the prism of neoclassical economic theory, which it has applied to the various tax benefits accorded qualifying nonprofit organizations.⁶

While this scholarship has added significantly to our understanding of nonprofit activity in the United States, any understanding of the roles that nonprofit organizations play in American society would be incomplete if it relied solely on an economic theoretical framework. Political theory also contributes significantly in developing a deeper understanding. In this article, I suggest a way of thinking about the roles of nonprofits that employs the perspective of Western political theory. This article concludes that the nonprofit sector makes a significant, probably pivotal, contribution to the American form of representative democracy in at least three respects. First, the nonprofit sector teaches the skills of self-government. Second, it inculcates the habits of tolerance and civility. Finally, it mediates the space between the individual and the other two sectors of society, that is, the “public” or governmental sector and the “private” or “entrepreneurial” or “proprietary” sector. Thus, the nonprofit sector acts as a counterpoise against excessive displays of power emanating from the public or private sectors. Consequently, any legislative attempt to change the way the nonprofit sector is regulated should preserve its capacity to play these three political roles effectively.

Part I of this article describes the universe of nonprofits and recapitulates their status in today’s society. I begin with a description and his-

claimed that the scheme violated federal securities laws. See Benjamin Welser, 4 *at Syracuse Finance Firm Indicted in Pyramid Scheme*, N.Y. TIMES, June 27, 1997, at C2; Joseph Slobodzin, *New Era Founder Says God Made Him Do It*, NAT’L L. J., Mar. 17, 1997, at A9 (Mr. Bennett has asserted that he was on a “mission from God.”).

⁴ The policy of downsizing the federal government has placed the nonprofit sector in a double-bind: it faces increased demands for the services it provides in order to take up the slack created by discontinued federal programs; simultaneously, it must compete for a shrinking federal grant dollar. Additionally, some industries in the nonprofit sector face special challenges pertinent to their discrete industries. In that regard, the ongoing evolution in the health care industry comes to mind.

⁵ See discussion *infra* Part II.B.

⁶ See discussion *infra* Part I.B.1.2.

torical overview of the development of the sector in American society. Then, Part I delineates the tax benefits available to nonprofit organizations under the current legal regime. Part II discusses the problem of defining the legislative intent of the legal regime for nonprofits. It identifies the economic theories currently deployed to explain and to critique the current regime. Part III begins with an explanation of the three-part role of nonprofits from the perspective of American political theory. It then broadens the perspective and tracks the evolution of the concept of civil society in the Western political tradition. Part IV contrasts the Western political heritage with the experience of Central Europe. By way of illustration, the analysis narrows its focus to Slovakia. Recent legislation relative to nonprofits in Slovakia so clearly exemplifies hostility toward nonprofits that it serves as a benchmark, an exemplar, of legislation intended to weaken the ability of the nonprofit sector in playing an active role in the development of this "emerging democracy." In this context, Part IV engages the critique of postmodern social scientists, harbingers of the end of the civil society in which the sector operates. The article concludes by suggesting that while a healthy skepticism is useful, postmodernist projections are premature at best.

I. THE NONPROFIT SECTOR AND AMERICAN LAW: AN OVERVIEW

A. HISTORICAL FRAMEWORK

1. *Description of the Sector*

"Americans of all ages, all conditions, and all dispositions constantly form associations . . . religious, moral, serious, futile, general or restricted, enormous or diminutive . . . if it is proposed to inculcate some truth or to foster some feeling by the encouragement of a great example, they form a society."⁷ Tocqueville's picturesque description of this heterogeneous and continuously expanding sector⁸ is as accurate today as it was in 1831 when he and his friend, Gustave de Beaumont, toured America "with the intention of examining, in detail as scientifically as possible, all the mechanism (*ressorts*) of . . . American society . . ."⁹

Beyond Tocqueville's expansive portrait of the sector, it can be said that the sector's diverse membership shares some characteristics in common. First, while nonprofits may, and occasionally do, make a profit, if

⁷ TOCQUEVILLE, *supra* note 1, at 513.

⁸ See Evelyn Brody, *International Dissonance in the Nonprofit Sector*, 41 VILL. L. REV. 433, 466 n.159, 471 n.185 ("the number of tax-exempt charities has grown 5% a year for the last eight years.") (citing VIRGINIA A. HODGKINSON ET AL., NONPROFIT ALMANAC: 1996-97: DIMENSIONS OF THE INDEPENDENT SECTOR 37 tbl.1.1, 219 (1996)).

⁹ GEORGE WILSON PIERSON, TOCQUEVILLE AND BEAUMONT IN AMERICA 32 (John Hopkins Univ. Press 1996) (1938).

they intend to qualify for tax-exempt status under the Internal Revenue Code (hereinafter Code or I.R.S.), that profit cannot inure to the personal benefit of any of their members. This "nondistribution constraint"¹⁰ is the *sine qua non* of nonprofits which qualify for tax-exempt status under the Code.¹¹ Second, the sector encompasses all voluntary associations that comprise what is generally called "civil society." The sector should be distinguished from governmental bodies (the public sector) on the one hand and proprietary organizations (the private sector) on the other. Furthermore, there are no, nor have there ever been, hermetic boundaries delimiting the activities of one sector from those of the other two. Rather, the history of the relationship between the three sectors is characterized by interaction and interdependence.¹² Finally, nonprofit organizations' purposes are various and diverse. Moreover, the kinds of purposes for which nonprofits form are typically divided into two general categories: "public benefit organizations" and "mutual benefit associations."

Public benefit organizations are those organizations that are said to confer a direct benefit on society in the form of charitable, religious, scientific or educational services.¹³ "Mutual benefit" societies, as the name implies, are formed for the express purpose of advancing some interest, cause or goal shared by their discrete membership and not by the

¹⁰ See Henry Hanson, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835, 838 (1980) (coining the phrase "nondistribution constraint").

¹¹ See text accompanying note 2.

¹² See Brody, *supra* note 8, at 468-76. Her analysis is profoundly pertinent to the protracted effort of some politicians and advocacy groups to defenestrate the current alliance between government and the nonprofit sector by significantly altering the tax-exemption and grant programs available to nonprofits. Historical record does not bear out the contention of these groups that a bifurcation of government and nonprofit efforts in the troublesome area of social services would return the country to a prior age of purely private philanthropy. See Vince Stehle, *Righting Philanthropy*, NATION, June 30, 1997, at 15. Stehle quotes Lester Salamon's forthcoming book, *Holding in Center: America's Nonprofit Sector at a Crossroads*, for the proposition that "'Despite a widespread belief in a mythical 'golden age' of purely voluntary involvement and wholly private philanthropic support, a rich, and largely productive, collaboration has existed between nonprofit organizations and government from the very beginning of this nation.'" *Id.* (quoting Lester Salamon, *HOLDING IN CENTER: AMERICA'S NONPROFIT SECTOR AT A CROSSROADS* (forthcoming)). Stehle goes on to assert that "by 1870 a survey of social service agencies operating in New York found that only 11 percent were entirely supported by private charity, while 60 percent received over half of their income from government sources." *Id.* The "subsidy" or income tax exemption for qualified nonprofits dates back to the colonial period. For example, Harvard was established under public charter with a government grant. See John D. Colombo, *Why is Harvard Tax-Exempt? (And Other Mysteries of Tax Exemption for Private Educational Institutions)*, 35 ARIZ. L. REV. 841, 845 (1993).

The term "civil society" may connote different configurations of the non-governmental sectors. Some commentators include the private entrepreneurial sector in "civil society." Others, including this author, divide society into three sectors: public (government); private (free market economy); and nonprofit ("civil society").

¹³ See WILLIAM G. BOWEN ET AL., *THE CHARITABLE NONPROFIT* 96 (1994).

public generally.¹⁴ Thus, whatever benefit these societies confer on the public as a whole must be—by definition—indirect. This basic distinction between the two kinds of association that comprise the nonprofit sector parallels the most basic division of the benefits conferred upon nonprofits by the Code.¹⁵ While the Code constitutes the modern framework for conferring tax benefits on nonprofits, the practice of according certain nonprofit associations governmental benefits pre-dates the Code.¹⁶ Indeed, it was initiated before nationhood in colonial America.

2. *Evolution of the Nonprofit Sector and Development of Nonprofit Law in America*

"Charity" is, of course, the core activity we recognize as "non-profit." The colonists brought with them the English tradition of conferring special status and benefits on associations dedicated to "charitable" causes.¹⁷ Whatever their differences, the colonists shared the Protestant creed of individual service to the community.¹⁸ That Protestant commitment to "charity" or "good works" was enhanced by the fact that the colonial period coincided with an era of philanthropic fervor in Europe.¹⁹ It also co-existed with the practical realities of establishing schools, hospitals and churches in the colonies.²⁰ Thus, colonial America was hospitable to charitable associations from its inception for several reasons and its hospitality was expressed through a variety of public and private partnerships and tax benefits.²¹

Following the Revolution, charitable associations followed the trend established by proprietary associations and organized, first, under the various state charter regimes, and then, under the evolving state corpo-

¹⁴ See JAMES J. FISHMAN & STEPHEN SCHWARZ, *NONPROFIT ORGANIZATIONS* 69 (1995).

¹⁵ See text accompanying note 2.

¹⁶ See Chauncey Belknap, *The Federal Income Tax Exemption of Charitable Organizations: Its History and Underlying Policy*, in IV RESEARCH PAPERS SPONSORED BY THE FILER COMMISSION ON PRIVATE PHILANTHROPY AND PUBLIC NEEDS 2025 (1977); Mark A. Hall & John D. Colombo, *The Charitable Status of Nonprofit Hospitals: Toward a Donative Theory of Tax Exemption*, 66 WASH. L. REV. 307 (1991).

¹⁷ The term "charitable" is historically a fluid one. The Statute of Charitable Uses, 43 Eliz. ch. 4, (1601) (Eng) includes, among other activities, "relief of aged, impotent and poor people . . . maintenance of sick and maimed soldiers . . . schools of learning . . . repair of bridges . . . churches and houses of correction" under its auspices. *Id.* For an interesting account of the evolution of Charitable Trust Law in England see Lars G. Gustafsson, *The Definition of 'Charitable' for Federal Income Tax Purposes: Defrocking the Old and Suggesting some New Fundamental Assumptions*, 33 Hous. L. REV. 587, 591 (1996).

¹⁸ See HOWARD S. MILLER, *THE LEGAL FOUNDATIONS OF AMERICAN PHILANTHROPY 1776-1844* (1961).

¹⁹ See ROBERT A. BREMNER, *AMERICAN PHILANTHROPY* 5-8 (2d ed. 1988).

²⁰ See MILLER, *supra* note 18, at xi.

²¹ See FISHMAN & SCHWARZ, *supra* note 14, at 825-46 (for a more complete discussion of the charities in colonial America).

rate governance laws.²² Thus, the nonprofit sector in this country developed under corporate law, as distinguished from the sector's progenitor in England which developed under trust law.²³ The states continued the colonial practice of conferring property tax exemptions on the core charitable organizations: churches, hospitals and schools.²⁴

The federal government initially enacted a statute exempting charitable associations from taxation in 1894 when it passed the first corporate income tax law.²⁵ The law expressly exempted organizations and trusts formed and operated "for charitable, religious or educational purposes."²⁶ Since that date, the tax law relative to the nonprofit sector has been expanded (as to class²⁷ and as to circumstances²⁸) and refined (to distinguish among various kinds of groups qualifying for special tax treatment²⁹).

B. THE MODERN FRAMEWORK FOR TAX TREATMENT OF NONPROFITS AND THE CONUNDRUM OF LEGISLATIVE INTENT

1. *The Federal Scheme*

Federal tax treatment of the nonprofit sector is best understood as dividing the sector into four distinct groups and tailoring tax benefits to address the distinct attributes of each group.³⁰ While all nonprofit organizations must honor the "nondistribution constraint" in order to qualify for the § 501 income tax exemption, a basic distinction is drawn in § 501 between *public* benefit organizations ("the charitables"), described in § 501(c)(3), and the *mutual* benefit organizations, described in §§ 501(c)(4)-(21).

Organizations that qualify for § 501(c)(3) treatment must serve "religious, charitable, scientific, testing for public safety, literary or educational purposes."³¹ In addition to the "nondistribution constraint,"

²² See *id.* at 34-38, 64; MILLER, *supra* note 18, at 15.

²³ See Fishman & Schwarz, *supra* note 14, at 34-38.

²⁴ See *id.* at 308.

²⁵ See *id.* at 34-38.

²⁶ Revenue Act of 1894, ch 349, §32, 28 Stat. 556 (repealed 1895); see *infra* note 38 and accompanying text.

²⁷ See, e.g., 26 U.S.C. § 501(c)(4) (added to extend the tax-exemption to mutual benefit associations).

²⁸ In 1917 the Code was amended to grant a tax deduction to charitable gifts. 26 U.S.C. §501(c). The unlimited deduction for charitable bequests was added to the Code in 1918. See *id.*

²⁹ Only donors to the "charitables" are entitled to the tax deduction. *Id.* The charitable organizations were subsequently subdivided under the Code and treated differently. See *id.*; text accompanying note 2.

³⁰ See John G. Simon, *The Tax Treatment of Nonprofit Organizations: A Review of Federal and State Policies*, in THE NONPROFIT SECTOR: A RESEARCH HANDBOOK 68-73 (Walter W. Powell ed., 1987).

³¹ 26 U.S.C. §501(c)(3).

these organizations are further proscribed from deploying a "substantial part" of their efforts to influence legislation (lobbying).³² Campaigning for any candidate for public office is entirely prohibited.³³ However, organizations entitled to § 501(c)(3) status enjoy not only the income tax exemption, shared by all § 501(c) organizations but several additional tax benefits. Donors to § 501(c)(3) organizations generally receive tax deductions for *inter vivos* gifts and bequests or legacies.³⁴ They may issue tax-exempt bonds to raise money for certain projects.³⁵ They are entitled to reduced postal rates³⁶ and are exempt from federal unemployment taxes.³⁷

Mutual benefit associations, including social clubs, consumer co-ops, labor unions, business clubs, cemetery associations and veterans organizations are entitled to some, but not all, of the benefits conferred on public benefit associations. They are tax exempt but their donors do not enjoy a tax deduction for contributions; they may not issue tax-exempt bonds and they are not eligible for the unemployment tax exemption.³⁸ However, they do not suffer the same constraints on political activity as do § 501(c)(3) organizations.³⁹

The second major division of nonprofits under the Code occurs within the § 501(c)(3) category: private foundations are distinguished from operating charities and are burdened with additional strictures on their behavior.⁴⁰ Finally, the sub-category of private foundations is divided into two groups: grant-making foundations and operating foundations. Grant-making foundations are subject to more restrictions than their operating counterparts.⁴¹

2. *State Taxation of Nonprofit Organizations*

Nonprofits that qualify for § 501(c)(3) status and often nonprofits that qualify for exempt status under other provisions of § 501 are entitled to exemptions from corporate and franchise taxes under various state

³² *Id.*

³³ *See id.*

³⁴ *See* 26 U.S.C. §§ 170, 2055, 2522.

³⁵ *See* 26 U.S.C. § 145.

³⁶ *See* 39 C.F.R. § 111.1 (1990).

³⁷ *See* 26 U.S.C. § 3306(c)(8); BAZIL FACCHINA ET AL., PRIVILEGES AND EXEMPTIONS ENJOYED BY NONPROFIT ORGANIZATIONS: A CATALOG AND SOME THOUGHTS ON NONPROFIT POLICYMAKING 37-40 (1993).

³⁸ *See* FISHMAN & SCHWARZ, *supra* note 14, at 682.

³⁹ *See id.* at 547-50, 682-724.

⁴⁰ *See id.* at 310-11.

⁴¹ *See id.*; *see, e.g.*, FRANCES R. HILL & BARBARA L. KIRSCHTEN, FEDERAL AND STATE TAXATION OF EXEMPT ORGANIZATIONS (1994).

laws.⁴² They are also generally exempt from property taxes and from sales taxes at the state and local levels.⁴³

3. *Summary and Interrogatory*

As a general proposition, then, we can say that nonprofit organizations are entitled to an array of tax benefits, or “breaks,” as long as they engage in their avowed not-for-profit purpose and eschew, or limit, political activities. It is important to see this legal landscape (“lawscape”) of the nonprofit territory as a backdrop for the current debate about nonprofits. The confluence of economic and social pressure placed on the sector as a result of the government-downsizing agenda, and of political pressure in the form of legislative proposals to change the legal framework within which the sector operates, gives rise to an inevitable and *narrow* question: What was the purpose (the legislative intent) of the existing legal framework?—and to a broader, but more fundamental, question: what roles do (and should) nonprofits play in American society?

II. LEGISLATIVE INTENT: HERMENEUTIC ATTEMPTS TO RATIONALIZE THE TAX-EXEMPT STATUS OF THE SECTOR

A. HISTORICAL OVERVIEW: LEGISLATIVE INTENT

Because the federal income tax exemption is the keystone of federal and state tax frameworks covering nonprofits, an understanding of the legislative purposes for which the exception it was enacted is of fundamental importance. However, from its inception in 1894,⁴⁴ the federal statute which exempts qualified nonprofits from income tax obligations has suffered from a paucity of legislative pronouncements concerning its purpose. While it is universally agreed⁴⁵ that the concept and special tax treatment of charities devolves from English law relative to charitable trusts (dating from the enactment of the Statute of Charitable Uses in 1601),⁴⁶ it was not until 1938 that a statement of the purpose of the exemption could be found in United States legislative history.⁴⁷ Congress asserted that the exemption was premised on the theory that government would be reimbursed for the loss of revenues occasioned by the exemp-

⁴² See generally FACCHINA ET AL., *supra* note 37, at 26.

⁴³ See *id.* at 30.

⁴⁴ See Act of 1894, ch. 349, §32, 28 Stat. 556 (repealed 1895); *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601, 637 (1895) (current version at ch. 16, 38 Stat. 114, 172 (1913)) (declaring the Act of 1894 unconstitutional).

⁴⁵ See, e.g., BRUCE R. HOPKINS, *THE LAW OF TAX-EXEMPT ORGANIZATIONS* 70 (6th ed. 1992).

⁴⁶ See FISHMAN & SCHWARZ, *supra* note 14, at 28.

⁴⁷ See *id.* at 336-39.

tion, in the form of services that promote the general welfare, and for which the government would otherwise be obliged to provide.⁴⁸

In the absence of a more definitive statement of the legislative purposes underlying the tax exemption, the courts have pieced together a loosely constructed analysis.⁴⁹ Core to judicial interpretations, however, are the dual concepts suggested in the House Report: that the charitable exemptions are justified by the benefit the public enjoys from the work of the exempt organizations and by the fact that any tax dollars foregone by the government are recompensed by the services provided, . . . services the government would be constrained to undertake.⁵⁰

Representative of the inferences drawn by the courts in attempting to divine the intent of the legislature relative to the tax exemption are the following cases. In a 1924 case, *Trinidad v. Sagrada Orden de Predicadores*,⁵¹ the court drew the following inference: "Evidently the exemption is made in recognition of the benefit which the public derives from corporate activities of the class named and is intended to aid them when not conducted for private gain."⁵² That case involved a challenge to the tax-exempt status of a corporation operated for eleemosynary purposes.⁵³ In a 1970 case, *Walz v. Tax Commission*,⁵⁴ the Court considered the issue of whether a religious organization qualified for exemption from state property tax and found that it did.⁵⁵ Concurring in the result and citing the 1938 House Report,⁵⁶ Justice Brennan opined that "private, nonprofit organizations contribute to the well-being of the community . . . and thereby bear burdens that would otherwise either have to be met by general taxation, or be left undone, to the detriment of the community."⁵⁷ Finally, in a 1983 case, *Bob Jones v. United States*,⁵⁸ the

⁴⁸ H.R. 1860, 75th Cong. (1938).

⁴⁹ See Gustafsson, *supra* note 17, at 609-17 (reviewing court decisions construing the terms "charity" and "charitable purposes").

⁵⁰ H.R. 1860, 75th Cong. (1938).

⁵¹ 263 U.S. 578 (1924).

⁵² See *id.* at 581.

⁵³ See *id.*; FISHMAN & SCHWARZ, *supra* note 14, at 358-65.

⁵⁴ 397 U.S. 664 (1970).

⁵⁵ See *id.* at 665-67.

⁵⁶ H.R. 1860, 75th Cong. (1938); 397 U.S. at 687 (Brennan, J., concurring).

⁵⁷ It is worth noting that Justice Brennan also suggested a much broader rationale for supporting the nonprofit sector. He stated that nonprofits "contribute to the diversity of association, viewpoint and enterprise essential to a vigorous pluralistic society . . ." 397 U.S. at 687. Tax-exemptions, he noted, "merely facilitate the existence of a broad range of private, nonprofit organizations . . ." *Id.* at 689. In *Walz*, Justice Harlan also reached beyond the narrow question of legislative intent to the broader issue of the role nonprofits play when he said that nonprofits engage in "activities devoted to cultural and moral improvement and the doing of 'good works' by performing certain social services in the community that might otherwise have to be assumed by government [activities which serve to further] moral and intellectual diversity . . ." *Id.* at 696-97.

⁵⁸ 461 U.S. 574 (1983).

Court found that nonprofit schools that enforce racially discriminatory admissions policies are not entitled to tax benefits.⁵⁹ In so ruling, the Court declared that the legislative intent of the federal tax exemption laws was to foster those nonprofit organizations "that serve a useful public purpose or supplement or take the place of public institutions of the same kind."⁶⁰

This, then, is the broad and amorphous judicial construction given the tax law benefitting nonprofits. Identified in scholarly parlance as a kind of "subsidy theory," a "government failure theory" or a "*quid pro quo* theory," it relies on the 1938 House report which suggests a "*quid pro quo*:" a tax benefit is conferred upon nonprofits that contribute to the public interest or welfare by providing services that, otherwise, the government would be required to perform.⁶¹ It offers no express standard for what activity qualifies as public interest welfare.⁶² Thus, judicial interpretation of the legislative intent behind the tax-exemption for the nonprofit sector remains as general and vague as the intent it attempts to divine.

B. THEORIES ABOUT THE ROLES OF NONPROFITS

The larger question of what roles the sector plays in society may inform the more narrow question of legislative intent relative to the tax-exemption statutes. An adequate evaluation of that larger issue implicates both Western political theory and Western economic theory. Perhaps the most comprehensive statement regarding the various roles the sector plays in American society is to be found in Lester M. Salamon's *America's Nonprofit Sector: A Primer*.⁶³

There, Salamon identifies five basic reasons for the existence of the sector: "historical," "market failure," "government failure," "pluralism/freedom" and "solidarity."⁶⁴ Historically, Salamon says that voluntary organizations performed important societal functions in pre-Revolutionary America.⁶⁵ Thus, such organizations were firmly entrenched even prior to the establishment of state and federal governments.⁶⁶ The nonprofit sector had the imprimatur of a pre-existing society.⁶⁷ Further,

⁵⁹ See *id.* at 575.

⁶⁰ *Id.* at 588.

⁶¹ See *infra* notes 84-99 and accompanying text.

⁶² But see 461 U.S. at 616 (Rehnquist, J., dissenting) (asserting that Congress described both the class and the circumstances covered by the exemption when it identified the eight categories of nonprofits entitled to the exemption).

⁶³ LESTER M. SALAMON, *AMERICA'S NONPROFIT SECTOR: A PRIMER* (1992).

⁶⁴ *Id.* at 7-10; see also Gustafsson, *supra* note 17, at 591 and accompanying text.

⁶⁵ See SALAMON, *supra* note 63, at 7.

⁶⁶ See *id.*

⁶⁷ See *id.*

Salamon explains that the "market failure" rationale for the sector has two distinct aspects: the "free-rider" problem and the "contract-failure" problem.⁶⁸

Both the "free-rider" and "contract-failure" problems result from "certain inherent limitations in the market system."⁶⁹ The "free-rider" situation occurs in the common arenas of the economy (the air, parks, and so forth), where an improvement made to a particular arena can be enjoyed by all, irrespective of payment or contribution.⁷⁰ No cost is imposed on the "free rider." Hence, the profit motive that fuels the private sector will not inspire it to provide these common or public goods.⁷¹

The "contract failure" problems occurs when there is no market check or monitoring device on the quality of the goods or services provided.⁷² Here, the recipients of the services do not pay for the goods or services, and therefore, have no pocketbook leverage against poor quality.⁷³ Since the free market private sector provides no mechanism for correcting this problem, consumers find the nonprofit sector a more trustworthy source of these kinds of goods and services.⁷⁴

Salamon explains that not only the private sector but also the public sector has certain "inherent limitations."⁷⁵ "Government failure" describes the cumbersome nature of government and its consequent inability to respond quickly to changed circumstances, to experiment, to serve isolated or discrete interests that lack public support.⁷⁶ The nonprofit sector is capable of compensating for government limitations in these respects.⁷⁷ Quoting John Stuart Mill for the proposition that while the public sector promotes uniformity, the nonprofit sector nourishes diversity, Salamon adds that "[m]ost of the major reforms in American Society . . . have originated in this nonprofit sector."⁷⁸ Thus, the nonprofit sector gives voice and succor to the individual and to minority groups, thereby serving the interests of "pluralism and freedom." Finally, quoting Tocqueville, Salamon concludes that the nonprofit sector promotes solidarity among individuals, and thereby empowers them to influence activities in the public sector.⁷⁹ Salamon's analysis sketches the con-

⁶⁸ *Id.*

⁶⁹ *Id.* at 7-8.

⁷⁰ *See id.*

⁷¹ *See id.*

⁷² *Id.* at 8.

⁷³ *See id.*

⁷⁴ *See id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 8-9.

⁷⁷ *See id.*

⁷⁸ *Id.* at 9.

⁷⁹ *Id.* at 10-11. Salamon quotes Tocqueville for the proposition that "among democratic nations . . . all citizens are independent and feeble. . . . They all, therefore, become powerless

tours of the nonprofit sector and provides a more descriptive analysis of its various roles in American society, rendering a more precise definition to the terms "public purpose," "public interest" or "public welfare"—terms that courts have regularly employed to explain the legislative intent of—or public policy reasons for—the preferential treatment accorded nonprofits under U.S. tax law.⁸⁰

Recent legal scholarship has given more focussed attention to the second rationale for nonprofits identified by Salamon: market failure.⁸¹ It has sought numerous ways to explain, to justify or to criticize the current legal regime from the vantage point of economic theory. Beginning with the publication of Boris Bittker and George Rahdert's defining article,⁸² the literature in this area has developed what has justifiably been called an "emerging orthodoxy."⁸³

Bittker and Rahdert's article argues that tax exemption for nonprofits was to be explained by the amorphous nature of nonprofit income and expenditure and the consequent difficulties in ascertaining the appropriate tax rate for a nonprofit.⁸⁴ In developing their argument, they especially considered the income of nonprofits derived from donations (arguably exempt gifts under § 102 of the I.R.C.).⁸⁵ They characterized nonprofit expenditures as outlays of monies and services to charitable beneficiaries (arguably taxable as trust income at the income tax rates of a disparate group of beneficiaries).⁸⁶

But, as Henry Hansmann noted, the Bittker and Rahdert thesis failed to encompass the entire universe of nonprofits.⁸⁷ He argued that their thesis omitted nonprofits that derive a substantial portion of their income not from donations but from goods and services they provide.⁸⁸ Income to these nonprofits is indistinguishable from income derived from propri-

if they do not learn voluntarily to help one another.'" *Id.* He also highlights Tocqueville's vivid contrast between American voluntarism and French problem-solving: "'wherever at the head of some new undertaking you see government in France . . . in the United States you will be sure to find an association.'" *Id.*; TOCQUEVILLE, *supra* note 1, at 513 ("In every case, at the head of any new undertaking, where in France you would find the government or in England some territorial magnate, in the United States you are sure to find an association.").

⁸⁰ See SALAMON, *supra* note 63, at 13-32.

⁸¹ Boris Bittker & George Rahdert, *The Exemption of Nonprofit Organizations from Federal Income Taxation*, 85 YALE L.J. 299 (1976). For an earlier research paper on the role the nonprofit sector plays in the economy see Burton A. Weisbrod, *Toward a Theory of the Voluntary Nonprofit Sector in a Three-Sector Economy*, reprinted in *THE NONPROFIT ORGANIZATION: ESSENTIAL READINGS* (David L. Giles et al. eds., 1990).

⁸² Bittker & Rahdert, *supra* note 81, at 299.

⁸³ See Rob Atkinson, *Altruism in Nonprofit Organizations*, 31 B.C. L. Rev. 501, 512 (1990).

⁸⁴ See Bittker & Rahdert, *supra* note 81, at 307.

⁸⁵ See *id.* at 307-14.

⁸⁶ See *id.* at 308.

⁸⁷ Hanson, *supra* note 10, at 835.

⁸⁸ See *id.* at 881.

etary enterprises in the private sector.⁸⁹ Hansmann's thesis, developed in two articles published in the early 1980s, became the second major contribution to an evolving economic theory deployed to critique the tax-exemption for nonprofits.⁹⁰

In Salamon's synopsis the nonprofit sector compensates for inadequacies in the two other sectors: the inability of democratic government to make timely response to new or marginalized public welfare issues and the inability of the profit-motivated sector to supply unprofitable public welfare goods.⁹¹ Hansmann's now orthodox view focuses primarily on the market failure prong of these "twin failures."⁹² In coming to this conclusion, Hansmann first observed the defining characteristic of all nonprofits: the "nondistribution constraint": that any profit derived from nonprofit activity may not inure to the benefit of any member of the organization.⁹³ Hansmann then identified four major types of nonprofits on the basis of how they are financed (donation verses commercial) and how they are controlled (by donors or "patrons" verses by the market).⁹⁴ He described how these four types compensate for the "market failure" or "contract failure" of the private sector in several respects.⁹⁵

The first contract failure occurs in those situations where the donor and the recipient of the services or goods are separated.⁹⁶ In the *private* sector, the donor has no assurance that the recipient actually benefits from the donation. However, in the *nonprofit* sector, the "nondistribution constraint" increases the likelihood that the donation benefits the intended recipient rather than the membership of the nonprofit.⁹⁷ Hence the nonprofit sector is the preferred vehicle for delivering goods and services in this arena.⁹⁸ A second, related problem arises when the mix of goods and services is so inherently complex and interrelated that, though the purchaser/donor and the consumer/recipient are identical, the leverage of private sector mechanisms to sanction the quality of goods or services provided fails.⁹⁹ Again, the "nondistribution constraint" imposed on the nonprofit sector diminishes the likelihood that quality will

⁸⁹ See *id.*

⁹⁰ See *id.* at 893; Henry Hansmann, *The Rationale for Exempting Nonprofit Organizations from Corporate Income Taxation*, 91 YALE L.J. 54, 58 (1981); Colombo, *supra* note 12, at 858; but see PETER L. SWORDS, CHARITABLE PROPERTY TAX EXEMPTIONS IN NEW YORK STATE 95 (1981).

⁹¹ SALAMON, *supra* note 63, at 34-52 and accompanying text.

⁹² See Hansmann, *supra* note 90, at 53-8.

⁹³ *Id.*

⁹⁴ *Id.* at 59.

⁹⁵ See *id.*

⁹⁶ See *id.* at 60.

⁹⁷ *Id.* at 73.

⁹⁸ See *id.* at 61.

⁹⁹ See *id.* at 68.

suffer in the face of a profit motive to shortchange the customer/recipient.¹⁰⁰ Another contract failure occurs in the "free-rider" context. Where the public good provided can be enjoyed without recompense from those who benefit from it, the for-profit sector has little incentive to provide the good. Conversely, the inability to maximize profits is not a disincentive for nonprofits, given their nondistribution constraint.¹⁰¹

The tax exemption compensates the nonprofit sector for the nondistribution and other constraints under which it operates.¹⁰² For example, nonprofits lack access to equity markets and to debt financing.¹⁰³ Hansmann concludes that the tax exemption should be available only to those nonprofits who suffer these constraints and compensate for the market failure of the private sector.¹⁰⁴ Hansmann's thesis provides an analytical framework of much greater sophistication and depth than the "*quid pro quo*" theory or "governmental failure" theory often employed by the courts in their efforts to explain tax-exemption.¹⁰⁵ It also has more universal application than Bittker and Rahdert's Income Measurement theory because it includes nonprofits whose income base goes beyond donations and includes commercial activity.

Hansmann's thesis was expanded and refined by Mark Hall and John Colombo.¹⁰⁶ Hall and Colombo added to the scholarship by asserting that the distinguishing attribute of nonprofits is their ability to attract voluntary donations; hence, the tax deduction should be available only to those nonprofits which garner significant donative support.¹⁰⁷ This theory is more comprehensive than Hansmann's in that it includes property tax exemptions as well as income tax exemptions.¹⁰⁸

The donative theory is tangentially related to another theory which contributed to and went beyond the orthodox rationale premised upon economic theory. Rob Atkinson's thesis is that, with the exception of "mutual commercial nonprofits" (like parent-run daycare centers), all

¹⁰⁰ *Id.* at 72.

¹⁰¹ *See id.* at 68-81; *see also* Colombo, *supra* note 12, at 515-19.

¹⁰² *See* Hansmann, *supra* note 90, at 72.

¹⁰³ *See id.* at 73.

¹⁰⁴ *Id.* at 75.

¹⁰⁵ *See, e.g., supra* notes 42-51 and accompanying text.

¹⁰⁶ Hall & Colombo, *supra* note 16, at 307.

¹⁰⁷ *See* Colombo, *supra* note 12, at 867; Evelyn Brody, *Agents without Principals: The Economic Convergence of the Nonprofit and For Profit Organizational Forms*, 40 N.Y.L. SCH. L. REV. 457 (1996) (arguing the exemption should be available only for charitable behavior rather than to a nonprofit organizational form); *see also* M. Gregg Bloche, *Health Policy Below the Waterline: Medical Care and the Charitable Exemption*, 80 MINN. L. REV. 299, 404 (1995) (arguing the exemption should be phased out); Nina J. Crimm, *Evolutionary Forces: Changes in For-Profit and Not-For-Profit Health Care Delivery Structures; A Regeneration of Tax Exemption Standards*, 37 B.C. L. REV. 1, 31 (1995) (arguing the tax-exemption should be extended to for-profits and nonprofits that engage in charitable activities).

¹⁰⁸ *See* Colombo, *supra* note 12, at 869-76.

nonprofits (including Hansmann's commercially-financed nonprofits as well as the donor-financed enterprises) are motivated by some form of altruism in that they forgo profits for their membership ("nondistribution constraint") in order to pursue a higher, "altruistic" purpose.¹⁰⁹ This behavior is, and should be, rewarded by society in the form of tax-exemptions.¹¹⁰

Atkinson's thesis has not emerged from the scholarly debate unscathed. As has been true of each of the theories developed within the economic orthodoxy, the shortcomings of this thesis have been documented. For example, Colombo observes that while Atkinson's theory has the advantage of "administrability," he questions whether the decision to elect the nonprofit form is indeed altruistically motivated and whether altruism itself is a sufficient justification for a tax-exemption.¹¹¹ Conversely, Atkinson has critiqued economic orthodoxy as a whole, and he found it wanting in certain important respects.¹¹² Significantly, he observes that by limiting the analysis to economic rationales, like market failure, orthodox scholars artificially exclude other extra-economic or "meta benefits" of the nonprofit sector.¹¹³

This artificial exclusion, Colombo argues, inadvertently but ineluctably gives succor to those who seek to constrain the reach of the nonprofit sector.¹¹⁴ For example, advocates of the private sector, fearing competition from the nonprofit sector where their markets overlap, currently seek legislative protection from nonprofit activity.¹¹⁵ They can find support from a theory that describes nonprofit activity as most appropriately occurring only where the market (private sector) fails.¹¹⁶ Indeed, that is the pre-eminent canon of the Hansmann thesis. Atkinson, therefore, seeks to broaden the analysis beyond economic justification to

¹⁰⁹ Atkinson, *supra* note 83, at 553.

¹¹⁰ *See id.* at 628-35.

¹¹¹ Colombo, *supra* note 12, at 871-73.

¹¹² While the major contributors to the economic orthodoxy are currently the Income Measures Theory, *see* Bittker & Rahder, *supra* note 81; the Capital Subsidy Theory, *see* Hansmann, *supra* note 90; and the Donative Theory, *see* Hall & Colombo, *supra* note 16, all of which expand upon the *quid pro quo* theory enunciated by the courts, some scholarly work goes beyond economic analysis and introduces different criteria for evaluating the tax-exempt status of nonprofits.

¹¹³ Atkinson, *supra* note 83, at 503-12. He states for example, that "[t]he emerging orthodox account . . . describes nonprofits as a response to social and economics challenges beyond the capabilities of for-profit firms on the one hand and government on the other. . . . It is, however, an incomplete account. Moreover, its omissions limit its utility as a tool for policy makers and make it a potentially dangerous instrument in the hands of those who would cut back government policies favoring nonprofits." *Id.* at 503.

¹¹⁴ Colombo, *supra* note 12, at 877.

¹¹⁵ *Id.* at 850.

¹¹⁶ *See id.* at 864.

describe another account of the justification for tax-exemption: the altruistic motivation of nonprofit activity.¹¹⁷

Atkinson's thesis opens the door to a more comprehensive rationale for the tax-exemption. Another rationale that reaches beyond economic analysis is the Community Benefit Theory.¹¹⁸ Recently, that theory has been developed and applied in the strand of the scholarship that evaluates the efficacy of the tax-exemption in the health care industry.¹¹⁹ Illustrative of this theory is an article entitled *Charity and Community: The Role of Nonprofit Ownership in a Managed Health Care System*,¹²⁰ in which the authors identify five discrete types of community benefit to be found in the nonprofit health care industry: (1) It extends benefits to those not covered by health care plans; (2) it disseminates health care information (a benefit that addresses the public good-market failure problem); (3) it reduces the problem of information asymmetries by making it less likely that a doctor's role as patient advocate would be compromised by the profit motive to use less expensive treatments in clinically "gray areas"; (4) it limits the cost shift to care providers; and (5) it encourages "community representation in the governance of managed care plans."¹²¹ Economically-inclined scholars have been quick to disparage the Community Benefit Theory as unworkable because its standards are unquantifiable.¹²² As a limiting standard for applying the tax exemption status it is as amorphous as the *quid pro quo* standard under which the courts and the Service labor today.¹²³ And like the *quid pro quo* standard, it fails to make a causal connection between the exemption and the nonprofit activity.¹²⁴

The economic scholar's view, however, that to be viable an exemption theory must be quantifiable, proves too much¹²⁵ and begs the larger

¹¹⁷ See *id.* at 873.

¹¹⁸ Mark Schlesinger et al., *Charity and Community: The Role of Nonprofit Ownership in a Managed Health Care System*, 21 J. HEALTH POL. POL'Y & L. 697, 700 (1996).

¹¹⁹ See Colombo, *supra* note 12, at 864.

¹²⁰ Schlesinger et al., *supra* note 118, at 700.

¹²¹ *Id.* at 700-01.

¹²² See *id.*

¹²³ See Colombo, *supra* note 12, at 865-68.

¹²⁴ See *id.* Colombo argues, by way of example, "If consumers prefer the special ethic in education provided by Harvard, why would they not continue to prefer Harvard even absent the exemption? Would Harvard really go out of business if it were not tax exempt? True, absent the exemption a Harvard education might cost more than it does now . . . [i]f this is a legitimate government concern, however, it can be addressed more directly . . . by . . . direct government grants or other financial aid." *Id.* at 867.

¹²⁵ While certainty is a consummation devoutly to be wished, it is not always availing. Development of an argument that legislatures, courts and agencies routinely apply standards that are not quantifiable is beyond the scope of this article. Atkinson observes "orthodox theory holds that, under the particular failures of the market economy that tend to give rise to nonprofit organizations, those organizations perform more efficiently than alternative for-profit suppliers. Unfortunately, however, their very nonprofit nature bars their access to equity

question: what roles do nonprofits play, not only in the economy, but in society at large? Surely, any attempt to evaluate the current tax-exemption regimes, or the inundation of recent legislative proposals designed to alter current law, should not be constrained by the parameters of economic analysis. Western political theory clearly has a great deal to add to the discussion. That issue is suggested by, but not synonymous with, factors four and five in Salamon's *Primer*¹²⁶ and by the more amorphous Community Benefit Theory. If we can identify important roles the nonprofit sector plays in sustaining our form of representative democracy, then certainly the merit of any legislative proposal or scheme to regulate nonprofits must be measured against the likelihood that it will impede the sector's performance of these vital roles.

III. THE ROLES NONPROFITS PLAY IN THE AMERICAN VERSION OF A REPRESENTATIVE DEMOCRACY

A. THEORETICAL UNDERPINNINGS

1. *Reciprocal Tolerance and the American "Civil Society"*

The notion that the division of power is an important vehicle for securing and maintaining democratic stability is older than the nation itself. Its most succinct and famous expression in American political philosophy can be found in Madison's advice that sovereignty be divided, first, between the federal government and the various states and, then, among the three branches of the federal government.¹²⁷ But it is in his concept of "ordered liberty" identified in *The Federalist* 51 that Madison describes as the bulwark against the tyranny of one group of citizens over another:

capital markets. . . . This inherent impediment is relieved . . . rather crudely, by exempting their net revenues from federal income taxation." Atkinson, *supra* note 83, at 508. The orthodox notion that the exemption should be available in the market failure context because it quantifiably enhances efficiencies in that venue could be used to expand the sector into markets they share with for-profits. There is evidence that nonprofit hospitals are more efficient in the health care industry than their for-profit brethren because their administrative costs are appreciably lower. See Robert Pear, *In Separate Studies, Costs of Hospitals Are Debated*, N.Y. TIMES, Mar. 13, 1997, at C2 ("Investor-owned hospitals have significantly higher administrative costs than nonprofit hospitals [A] separate study [indicates] that hospitals of all types had radically reduced the growth of their total costs. Taken together, the studies suggest that hospital costs have leveled off, but that administrative costs account for a growing share of the total."). The first study, published in *New England Journal of Medicine* found that "for-profit hospitals spend 23 per cent more on administration than do comparable private not-for-profit hospitals and 34 per cent more than public institutions." Brody, *supra* note 107, at 467 (observing that nonprofits operate more efficiently and for-profits less efficiently than generally believed).

¹²⁶ SALAMON, *supra* note 63, at 7-10.

¹²⁷ THE FEDERALIST NOS. 10, 46-50 (James Madison) (Clinton Rossiter ed., 1961).

It is of great importance in a republic, not only to guard the society against the oppression of its rulers; but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure. There are but two methods of providing against this evil: The one by creating a will in the community, independent of the majority, that is, of the society itself; *the other by comprehending in the society so many separate descriptions of citizens, as will render an unjust combination of a majority of the whole, very improbable, if not impracticable.* The first method prevails in all governments possessing an hereditary or self-appointed authority. . . . The second method will be exemplified in the federal republic of the United States. Whilst all authority in it will be derived from and dependent on the society, *the society itself will be broken into so many parts, interests and classes of citizens, that the rights of individuals or of the minority, will be in little danger from interested combinations of the majority.*"¹²⁸

This Madisonian precept finds expression not only in the way political power is apportioned in the American *public* sector, but also in the matrix of diverse, overlapping and interactive nonprofit associations that embody American "civil society,"¹²⁹ or the *nonprofit* sector. As Michael Walzer states in his insightful study *On Toleration*,¹³⁰ so vital is this matrix to American society that it constitutes an important part of our *common* identity, our "civil religion,"¹³¹ which "facilitates the toleration of partial differences—or it encourages us to think of difference as only partial."¹³² The focus of Professor Walzer's study was toleration, con-

¹²⁸ THE FEDERALIST No. 51 (James Madison) (emphasis added).

¹²⁹ The concept of a "civil society" is much maligned in contemporary postmodern circles. Commentary has degenerated from a "healthy skepticism" to a "new form of dogma," which declares untenable "the possibility that human beings have anything in common, and [aims] to silence efforts to explore this domain." Barbara Ehrenreich & Janet McIntosh, *The New Creationism: Biology Under Attack*, NATION, June 9, 1997, at 13 (rendering an account of some postmodern views on biological commonalities shared by the human species). For a discussion of the postmodern "take" on civil society see *supra* notes 118, 125 and accompanying text.

¹³⁰ MICHAEL WALZER, *ON TOLERATION* (1997).

¹³¹ *Id.* at 79.

¹³² Walzer is quick to point out, however, that the American form of toleration is far from perfect. Traditionally, minority groups "learned to be quiet." *Id.* at 95. And certain minority religious groups [he mentions the Amish and the Hasidim, in particular] were accommodated "in part by [their] marginality . . . and in part by their embrace of marginality. . . ." *Id.* at 68. Hence, the dominant culture felt no threat from them.

ceived of as the peaceful co-existence among groups which are to be distinguished by "cultural, religious or way-of-life differences,"¹³³ a distinct but important subset of the nonprofit sector. In this context, he notes:

... Toleration, remember, is not a formula for harmony: it legitimates previously repressed or invisible groups and so enables them to compete for available resources. But the presence of these groups, in force, will also increase the amount of political space and the number and range of institutional functions and, therefore, the opportunities for individual participation. And participating individuals, with a growing sense of their own effectiveness, are our best protection against the parochialism and intolerance of the groups in which they participate.

Engaged men and women tend to be widely engaged—active in many associations This is one of the most common findings of political scientists and sociologists It helps to explain why engagement works, in a pluralist society, to undercut racist or chauvinist political commitments and ideologies.¹³⁴

Professor Walzer concludes, therefore, that it makes good public policy to encourage the proliferation and strength of these associational ties that constitute American civil society.¹³⁵ As we negotiate the uncharted tundra from a modernist society of dichotomies to a postmodernist society of "ambiguously identified individuals,"¹³⁶ support of the sector that develops toleration by giving voice to individual concerns and developing the skills of negotiation and compromise to affect group action would seem to be beyond reproach. Indeed, in an earlier study, undertaken some twenty years ago, the researchers concluded that, among other attributes, support of diversity or pluralism is the very hallmark of American representative democracy.¹³⁷ "Pluralism means the lively interaction among inherited particularities and, through election [selection], the evolution of new particularities."¹³⁸ The goal of public policy in a pluralistic society is to sustain as many particularities as possible, in the hope that most people will accept, discover, or devise

¹³³ *Id.*

¹³⁴ *Id.* at 107.

¹³⁵ *Id.* at 93-112.

¹³⁶ *Id.* at 87.

¹³⁷ PETER L. BERGER & RICHARD J. NEUHAUS, *TO EMPOWER PEOPLE: THE ROLE OF MEDIATING STRUCTURE IN PUBLIC POLICY* (1977). Interestingly, the context in which the study occurred presages and parallels contemporary debate over dismantling the "modern welfare state" and the "strong animus against government." *Id.* at 1.

¹³⁸ *See id.* at 206.

one that fits.”¹³⁹ The researchers found that, properly conceived, “‘*E Pluribus Unum*’ is not a zero-sum game. . . . [T]he national purpose indicated by the *unum* is precisely to sustain the *plures*,”¹⁴⁰ and leads not to “balkanization” but to a stronger *unum* through the creation of “imaginative accommodations.”¹⁴¹

These twentieth-century scholars echo Tocqueville’s sentiments regarding “those association in civil life which have no political object.”¹⁴² America, Tocqueville discovered, “the most democratic country in the world now is that in which men have in our time carried to the highest perfection the art of pursuing in common the objects of common desires and have applied this new technique to the greatest number of purposes.”¹⁴³ Tocqueville queries, “Is that just an accident, or is there really some necessary connection between associations and equality.”¹⁴⁴ He finds that representative democracy is dependent upon a strong associational sector for several reasons. Chief among them is the stabilizing influence of voluntary associations: “Feelings and ideas are renewed, the heart enlarged, and the understanding developed only by the reciprocal action of men one upon another. I have show how these influences are reduced almost to nothing in democratic countries; they must therefore be articially created, and only associations can do that.”¹⁴⁵ Tocqueville concludes, “Among laws controlling human societies there is one more precise and clear, it seems to me, than all the others. If men are to remain civilized or to become civilized, the art of association must develop and improve among them at the same speed as equality of conditions spreads.”¹⁴⁶

This process of inculcating habits of toleration and civility through associational ties within the nonprofit sector is closely related to a second role the sector plays in a representative democracy, its unique ability to develop the democratic skills of self-rule.

2. *The Skills of Self-governance*

Tocqueville is usually credited as the first to observe the crucial role that associations play in the American form of representative democracy. Indeed, he found the phenomenon of a strong associational sector initially astounding:

¹³⁹ *Id.* at 44.

¹⁴⁰ *Id.* at 41.

¹⁴¹ *Id.* at 41-42.

¹⁴² TOCQUEVILLE, *supra* note 1, at 513.

¹⁴³ *Id.* at 514.

¹⁴⁴ *Id.* For Tocqueville, “equality” was synonymous with “democracy.” See PIERSON, *supra* note 9, at 23, 166.

¹⁴⁵ TOCQUEVILLE, *supra* note 1, at 515-16.

¹⁴⁶ *Id.* at 517.

As soon as several Americans have conceived a sentiment or an idea that they want to produce before the world, they seek each other out, and when found, they unite. Thenceforth they are no longer isolated individuals, but a power conspicuous from the distance whose actions serve as an example; when it speaks, men listen.

The first time that I heard in America that one hundred thousand men had publicly promised never to drink alcoholic liquor, I thought it more of a joke than a serious matter and for the moment did not see why these very abstemious citizens could not content themselves with drinking water by their own firesides.

In the end I came to understand that these hundred thousand Americans, frightened by the progress of drunkenness around them, wanted to support sobriety by their patronage. . . . One may fancy that if they had lived in France each of these hundred thousand would have made individual representations to the government asking it to supervise all the public houses throughout the realm. . . .

Americans combine to give fêtes, found seminaries, build churches, distribute books. . . . [I]f they want to proclaim a truth or propagate some feeling by the encouragement of a great example, they form an association. In every case, at the head of any new undertaking, where in France you would find the government in England some territorial magnate, in the United States you are sure to find an association.¹⁴⁷

Tocqueville's keen insights into the unselfconscious activities of the American nonprofit sector are, thus, not without humor. He also astutely observed a profound difference between the European tradition of government paternalism and the then fledgling American tradition of grass roots independence.¹⁴⁸ And it did not escape his discerning eye, nor should it ours, that this grass roots associational activity is an essential training ground for self-governance: the experience and practice of problem-solving and united action to achieve associational goals constitutes a primary educational vehicle for participating in a representative democ-

¹⁴⁷ *Id.* at 512-13; Tocqueville's adventure in the United States coincided with a burgeoning abolition crusade. See PIERSON, *supra* note 9, at 61.

¹⁴⁸ For a discussion of the differences between a tradition of paternalism exemplified by the political traditions of Eastern and Central Europe see *infra* discussion Part IV.

racy, for qualifying citizens to govern.¹⁴⁹ Thus, in Tocqueville's view, the nonprofit sector must be encouraged, not to *do* the work of the public sector (and, given the tenor of the contemporary debate on nonprofits, it is undoubtedly prudent to add that it *cannot* do the work of the public sector¹⁵⁰), but to *train* citizens to operate the public sector.¹⁵¹

Tocqueville's observations are shared by twentieth-century scholars from a variety of political and philosophical persuasions. For example, Robert Putnam argues that where the nonprofit sector is strong, participatory democracy is vibrant¹⁵² and Jürgen Habermas suggests that associational ties create "communicative interaction" from which emerge democratic action.¹⁵³ Professor Walzer makes the point even more succinctly.¹⁵⁴ Noting that the democratic process itself requires negotiation and compromise in order to reach effective agreement, he observes:

For it is only in the context of associational activity that individuals learn to deliberate, argue, make decisions, and take responsibility. . . . So we need to sustain and enhance associational ties, even if these ties connect some of us to some others and not everyone to everyone else.¹⁵⁵

Finally, associational activity not only teaches citizens the skills of government, but it protects citizens from overreaching by the government and its counterpart in the private sector: the large corporation.¹⁵⁶

¹⁴⁹ See PIERSON, *supra* note 9, at 770, 774; TOCQUEVILLE, *supra* note 1, at 514-15 ("But if [inhabitants of democratic countries] did not learn some habits of acting together in the affairs of daily life, civilization itself would be in peril. A people in which individuals had lost the power of carrying through great enterprises by themselves, without acquiring the faculty of doing them together, would soon fall back into barbarism.").

¹⁵⁰ But see Nicholas Lemann, *The Limits of Charity*, NEWSWEEK, Apr. 28, 1997, at 37 (arguing that charities that serve the poor cannot be a surrogate for public welfare because they lack sufficient resources).

¹⁵¹ See PIERSON, *supra* note 9, at 774.

¹⁵² See ROBERT D. PUTNAM, *MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY* (1993) (studying Bologna and the surrounding Emilia-Romagna region of Italy); see also Robert D. Putnam, *Bowling Alone: America's Declining Social Capital*, 6 J DEMOCRACY 65 (1995) (warning that America's social capital—features of social organizations such as networks, norms and social trust that facilitate coordination and cooperation for mutual benefit—is diminishing).

¹⁵³ Jürgen Habermas, *Justice and Solidarity: On the Discussion Concerning State "6"*, in HERMENEUTICS AND CRITICAL THEORY IN ETHICS AND POLITICS 32-51 (Michael Kelly ed., 1990); see also ADAM B. SELIGMAN, *THE IDEA OF CIVIL SOCIETY* 89 n.61 (1995).

¹⁵⁴ WALZER, *supra* note 130, at 97, 105.

¹⁵⁵ TOCQUEVILLE, *supra* note 1, at 516.

¹⁵⁶ See TOCQUEVILLE, *supra* note 1, at 513, 515 ("It is clear that unless each citizen learned to combine with his fellows to preserve his freedom at a time when he individually is becoming weaker and so less able to in isolation to defend it, tyranny would be bound to increase with equality. . . . The morals and intelligence of a democratic people would be in as much danger as its commerce and industry if ever a government wholly usurped the place of private associations.").

3. *The Nonprofit Sector as a Buttress Against Public and Private Sector Hegemony*

. . . among democratic peoples all the citizens are independent and weak. They can do hardly anything for themselves, and none of them is in a position to force his fellows to help him. They would all therefore find themselves helpless if they did not learn to help each other voluntarily.¹⁵⁷

Tocqueville's insight was developed by Berger and Neuhaus in their landmark study.¹⁵⁸ They describe the "mediating" function the nonprofit sector plays in "standing between the individual in his private life and the large institutions ["mega-structures"] of public life."¹⁵⁹ A strong nonprofit sector, with its ability to marshal grass roots support on an *ad hoc* basis, can fetter or impede the exercise of excessive power from any one of a number of mega-structures identified by Berger and Neuhaus.¹⁶⁰ It might be said that, in this context, the nonprofit sector acts as a ballast to prevent the ship of state from capsizing either to port (the *public* sector—reputedly favored by the political left) or to starboard (the *private* sector—reputedly favored by the political right). But Berger and Neuhaus go further and present a more sophisticated, less self-evident, argument. They opine that the nonprofit sector¹⁶¹ mediates between the individual and mega-structures by giving audible "voice" to individual concerns and, thereby, maintains the legitimacy of a democratic regime:

Without institutionally reliable processes of mediation, the political order becomes detached from the values and realities of individual life. Deprived of its moral foundation, the political order is "delegitimated." When that happens, the political order must be secured by coercion rather than by consent. And when that happens, democracy disappears That is why mediation is so crucial to democracy. Such mediation cannot be sporadic and occasional; it must be institutionalized in structures. The structures we have chosen to study have demonstrated a great capacity for adapting and innovating under chang-

¹⁵⁷ *Id.* at 514 (contrasting that "[i]n aristocratic societies men have no need to unite for action, since they are held firmly together").

¹⁵⁸ BERGER & NEUHAUS, *supra* note 137, at 1.

¹⁵⁹ *Id.* at 2.

¹⁶⁰ *Id.* at 51.

¹⁶¹ They include within their concept of mediating structures the neighborhood, family, church and voluntary associations. For purposes of this article, neighborhood and churches are conceptually subsumed within the category of voluntary associations, while family is considered a part of the individual's private life.

ing conditions. Most important, they exist where people are, and that is where sound public policy should always begin. . . . Public policy should protect and foster . . . [them;] . . . [they] are the value-generating and value-maintaining agencies in society. Without them, values become another function of the megastructures¹⁶²

This, then, describes the three-faceted role assigned to the nonprofit sector in American representative democracy. While it suggests the importance of the sector in these capacities, it fails fully to explicate how critical the sector is to a perduring democracy. Any teleological rendering of the nonprofit sector would be incomplete without some reference to the evolution of Western society and theories about society developed in the Western political tradition because that history manifests the necessarily complex and even dichotomous nature of the sector's role.

B. THE NONPROFIT SECTOR IN WESTERN AND POLITICAL THEORY AND HISTORY: A BRIEF RECAPITULATION

Charles Taylor's synopsis of the development of civil society and theories about civil society in the Western tradition is both illuminating and useful.¹⁶³ He begins with the ancient Greeks' and Romans' notion that the polity gave a society its exclusive identity: political sovereignty defined a society.¹⁶⁴ He shows that by the Middle Ages, society and polity were no longer identical: the political regime shared sovereignty with Christendom.¹⁶⁵ Christendom was an independent source of authority.¹⁶⁶ The State and the Church were subordinate to each other in certain arenas, dominant in others.¹⁶⁷ Another important facet of medieval society was the notion of reciprocal rights and duties between lord and subject within the feudal hierarchy. Taylor credits this arrangement as the progenitor of seventeenth- and eighteenth-century rights doctrine, and he describes it as contractual in nature: the lord owed duties to his vassal in exchange for the fealty and obligations owed him by his vassal.¹⁶⁸ This fragmentation of power was advanced by the rise of centers of commerce (cities), the development of commercial codes which furthered the feudal notion of reciprocity and accountability, and the development of a court system to enforce that accountability.¹⁶⁹

¹⁶² *Id.* at 3, 6.

¹⁶³ Charles Taylor, *Modes of Civil Society*, 3 PUB. CULTURE 95, 96-118 (1990).

¹⁶⁴ *See id.* at 96.

¹⁶⁵ *See id.* at 97.

¹⁶⁶ *See id.*

¹⁶⁷ *See id.*

¹⁶⁸ *Id.* at 103.

¹⁶⁹ *See* George Schöpfung, *The Political Traditions of Eastern Europe*, DAEDALUS 55 (1990).

Along with the commercial sphere, two other spheres of power and authority were gradually recognized: the scientific or university sphere and the sphere of municipal government.¹⁷⁰ "The upshot of this pattern of development in the West was to create a political ethos in which the right to participate was tacitly accepted in theory, even if denied in practice."¹⁷¹ The other characteristic that emerged from this pattern was not only the acceptance of the fragmentation of power and the resulting complexity of relationships among loci of power, but the recognition that this complexity itself was "a normal feature of life."¹⁷² Armed with these historical developments, by the seventeenth and eighteenth centuries Western countries were able to rid themselves of claims of absolutist authority by the Monarch and by the Church.¹⁷³ Along with these political changes, there emerged a body of political theory which justified and rationalized them.¹⁷⁴

Among theorists of the period, Taylor sees John Locke as perhaps the most emblematic: Locke's notion that human society pre-dates and is superior to the state that it constructs; his idea that the State is constrained by a contractual arrangement with its citizens of reciprocal rights and duties; and his insistence that God's law through operation of natural law is the ultimate sovereign to which the polity is beholden are directly related to the historical evolution of Western polities and of political theories that inform that evolution.¹⁷⁵ Above all, Locke's theory is illustrative of, and justifies, the fragmentation of power which characterizes the Western political tradition.¹⁷⁶ By contrast, Taylor views Montesquieu's theory as reminiscent of the ancient Greeks and Romans with his identification of society with the political authority.¹⁷⁷ But Montesquieu also presages another kind of fragmentation because he also views civil society as a separate force: "as an equilibrium between central power and a

¹⁷⁰ *Id.* at 59. Schöpfung says this about these four subsets of authority within Western societies: the relative autonomy of the law was reluctantly accepted by the ruler owing to the commercial demands for predictability and relative transparency; the Church was eventually forced to recognize an independent commercial sphere in spite of its ban on usury (and, by extension, on interest) because of the growing strength of the monied class and their network of transboundary trade. The universities were able to free themselves from the yoke of the Church when, by the thirteenth century, the concept of speculative thought (as opposed to rote memorization of religiously accepted facts) began to be recognized as an important intellectual discipline. This "shift from rote to conceptualism gradually resulted in the claim to an autonomous scientific sphere through the secularization of learning." *Id.* Finally, municipalities attained a significant degree of autonomy because the economic power and specialized learning there afforded municipalities a measure of political leverage. *See id.* 58-60.

¹⁷¹ *Id.* at 61.

¹⁷² *Id.* at 60.

¹⁷³ *See id.*; Taylor, *supra* note 163, at 103-04.

¹⁷⁴ *See* Schöpfung, *supra* note 169, at 57-61.

¹⁷⁵ Taylor, *supra* note 163, at 21-26, 29-30.

¹⁷⁶ *See id.* at 104.

¹⁷⁷ *Id.*

skein of entrenched rights.”¹⁷⁸ At this point Taylor develops a perspective of the evolving theories of civil society in Western thought that is critical to an understanding of the complex nature of the role nonprofits play in society.¹⁷⁹

Having described Montesquieu’s Janus-like theory which contains both the concept of the primacy of the political sphere and the notion of civil society as standing apart from the state and acting as a counterpoise or equilibrium between the state and “a skein of entrenched rights,” Taylor then identifies two divergent and competing models of civil society which have developed in Western thought.¹⁸⁰ The first he calls the “L-stream” (homologous to Lockeian theory), and within it he finds a view of civil society as “extra-political” and public.¹⁸¹ The second he dubs the “M-stream” (its philosophical antipode which rests on Montesquieu’s construct).¹⁸²

A major component of civil society in “L-stream” theory is the economy, the private sector, the authority of which is derived from its own free market rules (Adam Smith’s “invisible hand”) and not from the state.¹⁸³ Hence, it is extra-political, but it is also public in the sense that it operates outside the private sphere of the family. The eighteenth-century conception of a self-regulating free market economy was adopted by Karl Marx (interpreting and responding to Georg Wilhelm Friedrich Hegel) who considered civil society to be coterminous with this economy.¹⁸⁴ Another fragmentation of power occurred in the eighteenth century with the recognition of “public opinion” as an authority.¹⁸⁵ With the advent of printing technology “public opinion is elaborated entirely outside the channels and public spaces of the political structure.”¹⁸⁶ It, too, has been and will continue to be both extra-political and public.

These two eighteenth-century phenomena lent credence to the evolving idea in Western theory that civil society had an existence independent of the political authority which the political authority was constrained to recognize and to respect. This was fragmentation that differed in kind from prior limitations on political sovereignty. Political authority had previously been limited by loci of power, like the Church or the economy, with separate spheres of authority. But, before the advent of “public opinion,” the political sphere—the State’s bailiwick—was the

¹⁷⁸ *Id.* at 106.

¹⁷⁹ *See id.* at 107.

¹⁸⁰ *See id.*

¹⁸¹ *See id.*

¹⁸² *See id.*

¹⁸³ *See id.*

¹⁸⁴ *See id.*

¹⁸⁵ *See id.*

¹⁸⁶ *Id.* at 109.

exclusive province for disseminating secular social policies.¹⁸⁷ This notion of civil society, that it “has its own pre-political [public] life and unity, which the political structure must serve,” constitutes the L-stream version of civil society. As an example, the writings of Thomas Paine follow that model, and in the intervening centuries other radical thinkers have adopted the L-stream as a theoretical vehicle not only as a justification for self-determination (as did Paine: the people are entitled to overthrow an illegitimate government because civil society stands apart from and has ultimate authority over the state¹⁸⁸) but also to “marginalize” or eliminate government altogether.¹⁸⁹ This latter version of the L-stream was adopted by Jean Jacques Rousseau and later by Friedrich Engels.¹⁹⁰ Thus, the L-stream rationale of the civil society can lead to dangerous infringements on liberty and even to the destruction of civil society itself. The specters of the U.S.S.R. and Communist China are reminders of the terrible anomaly that tyranny can emerge from a theory premised upon liberation. Taylor points to another potential excess which inheres in the L-stream version of civil society:

But in a more subtle way, the politics of marginalizing politics has also been seen as posing a threat to freedom. This is particularly so when the sphere of society in the name of which the political is being marginalized is that of the self-regulating economy. For in this domain the disposition of things in society as a whole is seen as arising not out of any collective will or common decision, but by an “invisible hand.”¹⁹¹

This appeal to “blind,” and therefore, apparently objective economic forces is a trap for the unwary because it exalts the private pursuit of gain to the exclusion of all other values, and it rewards the victors in that competition to the detriment of other interests. Thus, the danger of the L-stream of civil society theory is that it can lead to a tyranny of the left or of the right.

Taylor turns, then, to the M-stream.¹⁹² It is premised upon Montesquieu’s rendering of the ancients’ view that society and the state are synonymous, but that excesses of the state are held in check by subdividing and apportioning power *within* the political sphere, and non-political as

¹⁸⁷ See *id.*

¹⁸⁸ Thomas Paine, *On First Principles of Government*, in THE THOMAS PAINE READER 452, 459 (Michael Foot & Isaac Kramnick eds., 1987) (1795).

¹⁸⁹ See Taylor, *supra* note 163, at 112.

¹⁹⁰ See *id.* at 112-13.

¹⁹¹ *Id.* at 113.

¹⁹² *Id.*

well as political purposes are pursued within the political system itself.¹⁹³ Representative of this version of civil society is Tocqueville's counsel that voluntary associations are to be encouraged by the state in a democracy because they teach the skills of self-governance.¹⁹⁴ But, as we have seen, at the very core of the tradition of Western democracy is the notion that fragmentation of authority and some degree of autonomy from the political sphere, from the state, is essential in securing liberties and maintaining representative democracies. And critics from the "New Social Movements" in Europe decry the partnership of the nonprofit sector and government as the worst sort of "corporatism."¹⁹⁵

Hence, our contemporary notion of what a civil society or the nonprofit sector is, or should be, lies within the tension created by two conflicting versions—what Taylor identifies as the "L-stream" (civil society is separate from the political sphere) and the "M-stream" (civil society is part of the political sphere). It is instructive to notice that because each version or "stream" acts as a check on the potential excesses of the other, it can be postulated that the most beneficial form of civil society, or nonprofit sector, will present a somewhat amorphous, dichotomous visage because it will be seen to act in tandem with the political sphere in some respects and to maintain an almost puritanical autonomy from government in other respects.

This is a fairly accurate description of the nonprofit sector in historical and in contemporary America.¹⁹⁶ Perhaps we should ask whether calls to reform the sector to restore it to its "original purity" (as entirely independent of government) are well-advised. Historically, the nonprofit sector has never been entirely autonomous; it has received support from, and supplemented the work of, the public sector since colonial times.¹⁹⁷ Further, the simplistic appeal of L-stream thought which envisions civil society as entirely autonomous belies the despotic dangers inherent in both of its versions: the Rousseau-Marxian notion of civil society as the supremacy of the common will and the free market version of civil society as the supremacy of objective and benign economic forces. Above all, it is essential that we clearly define the United States nonprofit sector as reflecting a hybrid of Western theory: a hybrid whose contradictory attributes find justification in historical experience. Understanding the

¹⁹³ See *id.*

¹⁹⁴ See TOCQUEVILLE, *supra* note 1, at 514.

¹⁹⁵ See *id.* at 97-101, 115.

¹⁹⁶ See Brody, *supra* note 107, at 457 (a somewhat different account that reaches the same conclusion: that the U.S. nonprofit sector is, perforce, a hybrid of amorphous and changing contours).

¹⁹⁷ See Peter Dobkin Hall, *A Historical Overview of the Private Nonprofit Sector*, in *THE NONPROFIT SECTOR: A RESEARCH HANDBOOK* 112 (Walter W. Powell ed., 1987).

justification for the amorphous contours of the sector better equips us to evaluate recent legislative proposals for reform.

There is one more perspective upon which we might draw to advance our understanding of how the nonprofit sector operates, what services it performs in a representative democracy. That is, the perspective that views the sector through the experiences of post-communist Central European countries as they struggle to develop democratic governments.

IV. THE NONPROFIT SECTOR: THE VIEW FOR CENTRAL EUROPE

A. A STUDY IN CONTRASTS: EVOLUTIONARY DIVERGENCE IN EASTERN EUROPEAN AND WESTERN POLITICAL TRADITIONS

While the Western tradition is characterized by the fragmentation of power, the Eastern tradition typifies concentrated, unified power. Eastern and Central Europe were influenced by both traditions, but the state has always been clearly dominant.¹⁹⁸ Even in the nineteenth and twentieth centuries these countries were unable to wrest sufficient political power from the sovereign to institute true parliamentary democracies.¹⁹⁹ An occasional overthrow of existing regimes represented not an expression of popular will but discord within the ruling elite.²⁰⁰ Any citizen autonomy permitted reflected either ancient custom or the political elite's hypocritical homage to international public opinion.²⁰¹ Between the late-Enlightenment and the mid-nineteenth century, the political elites in Eastern and Central Europe did make some attempt to emulate Western modernity, but they did so by adopting its form, not its substance.

The problem was that the substance of Western tradition required the fragmentation of loci of power: "the existence of comparably strong autonomous spheres and centers of power in Western Europe on which a new 'modern' political system relying on civil society could be based. . . ."²⁰² But in Eastern Europe and Central Europe an autonomous civil society had never developed. Thus, the elitist modernizers in these countries were "involved in a contradiction, that of having to construct civil society from above [T]his proved impossible, not surpris-

¹⁹⁸ See Schöpflin, *supra* note 169, at 62. Schöpflin describes Central Europe as less statist than Eastern Europe. However, in Central Europe historically the ruler shared power not with the citizens, generally, but only with the nobility. State power was maintained, in part, by the political principle that the ruler was free to dominate any field not expressly prohibited by law or custom (a variant of the royal prerogative) and society was never strong enough to limit the reach of state power with success. *See id.* at 63-67.

¹⁹⁹ *See id.*

²⁰⁰ *See id.* at 63.

²⁰¹ *See id.*

²⁰² *Id.* at 64.

ingly.”²⁰³ No independent free market sector was permitted to develop, as it had in the West.²⁰⁴ Old elites, faced with instituting economic modernity joined the state’s risk-free bureaucracy rather than the risk-intensive entrepreneurial class.²⁰⁵ “Only in the Czech lands of Bohemia and Moravia did anything like a native entrepreneurial class succeed in achieving a [viable] political position. . . .”²⁰⁶ Interestingly, the Czech experience bears witness to the fact that a relatively independent economic sector alone is insufficient leverage with which to achieve a representative democracy: “In all, the Czech experience suggests that even with patterns of development close to those of the West, especially industrialization and the existence of a native entrepreneurial class, these do not in themselves guarantee the evolution of a Western-style political system. . . .”²⁰⁷

Along with an autonomous commercial sphere, the development of municipalities with some autonomy was crucial in the fragmentation of political power in the West. The city was also the situs of the development of commercial codes that furthered the feudal idea of reciprocal rights and obligations and predictable legal results.²⁰⁸ The interaction of these three forces within the city created additional fragmentation—in the form of specialized expertise—and “continuous exchanges, economic and social, in which transactions of growing complexity could be played out.”²⁰⁹

In Eastern and Central Europe, by contrast, there were few cities of size, even by the eighteenth century.²¹⁰ Those cities that did develop urban density did not develop a similar complexity because they were either developed as the seats of government administration, like Vienna, and therefore dominated by the political elite and bureaucratic classes, or they were developed as enclaves of declining cultures.²¹¹ The municipalities that emerged in Eastern and Central Europe were not bastions of entrepreneurial activity.

By the end of World War I, while the countries of Eastern and Central Europe were almost universally democratic countries, they were only nominally democratic in the Western sense of representative democracies.²¹² In fact, these countries continued to be dominated by their tradi-

²⁰³ *Id.*

²⁰⁴ *See id.*

²⁰⁵ *See id.*

²⁰⁶ *Id.* at 66.

²⁰⁷ *Id.* at 67.

²⁰⁸ *See id.*

²⁰⁹ *Id.* at 68.

²¹⁰ *See id.*

²¹¹ *See id.*

²¹² *See id.*

tional political elites.²¹³ While the make-up of these elites differed from country to country they were all characterized by traditional authoritarianism in the form of a government party, administering a "pseudo-parliamentarian form of government with actual power residing in an elite bureaucracy. The dominant bureaucracies permitted some dissent within the parliaments but never enough to threaten their hegemony."²¹⁴

In sum, the World War II period was characterized by a continuation of the ancient régimes in Eastern and Central Europe, under whatever democratic nomenclature in which power was maintained by a political elite such that the political sphere dominated society and gave it its identity. The Second World War created massive upheavals and deep-rooted changes in attitudes within these countries, but any positive change wrought by these dislocations in the political development of the area was cut short by the Communist era.²¹⁵ That era, of course, continued the hegemonical primacy of a political elite which not only was dominant, but virtually obliterated any development of what might be called a "civil society."

B. POST-COMMUNISM AND THE EMERGING DEMOCRACIES OF EASTERN AND CENTRAL EUROPE

As Eastern and Central European countries seek to rid themselves of the vestiges of the Communist monolith and to institute viable democracies, the successful fragmentation of power has proved a daunting challenge. In these countries consideration of the role the nonprofit sector, or the "civil society" might play has received considerable attention.²¹⁶ Since the evidence is compelling that neither the forms of democracy (the franchise, political parties, and so forth), nor the dynamics of a free market economy alone, can effect a Western-style representative democracy,²¹⁷ scholars debate the efficacy of a strong civil society as providing the necessary counterweight to and fragmentation of political and private (market) power.²¹⁸ Democracy²¹⁹ has assumed normative, if not numinous proportions in the post-communist era:

²¹³ See *id.* at 70.

²¹⁴ *Id.* at 71.

²¹⁵ See *id.* at 87.

²¹⁶ See Taylor, *supra* note 163, at 95-99.

²¹⁷ See SELIGMAN, *supra* note 153, at 178. Seligman quotes a Hungarian survey in a forthcoming work by G. Csepeli & A. Örkeny, *The Twilight of State Socialism* (forthcoming) (manuscript on file with author). The data indicated no correlation between entrepreneurial activity and democratic values. Accord Schöpflin, *supra* note 169, at 64 (identifying Czech experience).

²¹⁸ See SELIGMAN, *supra* note 153, at 179.

²¹⁹ In this article, the term includes the various kinds of representative democracy that have proved successful in the West. No attempt is made to distinguish between or evaluate the relative merits of parliamentary verses presidential forms, with or without a written constitu-

Increasingly, governments recognize that their legitimacy depends on meeting a normative expectation of the community of states. This recognition has led to the emergence of a community expectation: that those who seek the validation of their empowerment may only govern with the consent of the governed. Democracy, thus, is on the way to becoming a global entitlement, one that increasingly will be promoted and protected by collective international processes.²²⁰

This impetus to institute a substantive form of representative democracy does not simply reflect a craving to be globally "p.c." In order to secure a market share in the burgeoning regional trade consortiums,²²¹ or to be a player in the real politik of regional geopolitics,²²² a nation's credentials must increasingly include viable democratic processes and enforceable human rights standards. The idea of an entitlement to democracy is also evidenced in the United Nations' formative documents.²²³ For countries in Eastern and Central Europe the *sine qua non* of regional association is the European Community, the membership requirements of which parallel in many respects these universally recognized United Nations (U.N.) norms.²²⁴ Thus, the new constitutions of

tion. Obviously, each nation-state must select, borrow, and fine-tune its own form to fit its own indigenous customs and institutions.

²²⁰ Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 56 (1992).

²²¹ See, e.g., Steven Kinzer, *Brussels Meeting Dims Turks' Hopes*, N.Y. TIMES INT'L, Mar. 11, 1997, at A7 (Turkey recently lost its bid to join the European Union because its "democratic" practices were deemed less than exemplary.); cf. Celestine Bohlen, *Europeans Celebrate Unity and Chafe at New Frictions*, N.Y. TIMES, Mar. 26, 1997, at A5; Stephen Kinzer, *Europeans Shut the Door on Turkey's Membership in Union*, N.Y. TIMES, Mar. 27, 1997, at A9.

²²² See, e.g., *Accord on a New NATO*, N.Y. TIMES, July 6, 1997, at A4. (reporting that Slovenia and Romania were refused membership in NATO, while Poland, Hungary, and the Czech Republic were admitted). For background on the geopolitics of the new NATO see generally PHILIP ZELIKOW & CONDOLEEZZA RICE, *GERMANY UNIFIED AND EUROPE TRANSFORMED: A STUDY IN STATECRAFT* (1997); ROBERT L. HUTCHINGS, *AMERICAN DIPLOMACY AND THE END OF THE COLD WAR: AN INSIDER'S ACCOUNT OF U.S. POLICY IN EUROPE, 1989-1992* (1997); JUAN J. LINZ & ALFRED STEPHAN, *PROBLEMS OF DEMOCRATIC TRANSITION AND CONSOLIDATION: SOUTHERN EUROPE, SOUTH AMERICA AND POST-COMMUNIST EUROPE* (1997); MICHAEL MANDELBAUM, *THE DAWN OF PEACE IN EUROPE* (1997).

²²³ See Franck, *supra* note 220, at 62. Franck identifies the following U.N. "democratizing" instruments: Article 76 of the U.N. Charter mandates the right of a people to determine their own collective political formation (the Right of Self-Determination); the right of free expression is mandated by the *Universal Declaration of Human Rights*, adopted by the General Assembly on December 10, 1948; the right of freedom of opinion, and expression and assembly and association are memorialized in Articles 18, 19, and 22 of the Charter; and the right to participate in the political process is mandated in Articles 21 and 25. See *id.*

²²⁴ For a sophisticated discussion of agreements between the European Community and Eastern and Central European countries see ANDREW EVANS, *THE INTEGRATION OF THE EUROPEAN COMMUNITY AND THIRD STATES IN EUROPE: A LEGAL ANALYSIS* (1996).

these "emerging democracies" consistently recognize the basic rights associated with and recognized by the U.N. community as requisite to democracy.²²⁵

Drawn by the economic benefits associated with membership in the European community, Eastern and Central European countries have pursued membership with varying degrees of commitment and success. The forty-year hiatus in trade relationships between Western Europe and these countries created by the Communist era, in addition to anomalies in economic infrastructures and political institutions, have obviously created significant impediments to post-communist alliances between the Western Europe, and Eastern and Central Europe.²²⁶ However, even in the twilight of Communist rule, tentative initiatives were advanced. The European Community signed trade agreements with Czechoslovakia and Hungary in 1988, followed by similar agreements with Poland in 1989.²²⁷ After the astonishing series of successful revolutions against Communism in 1989 and 1990, the European Community committed itself to assist the emerging democracies through various programs.²²⁸ These programs have served as a foundation from which the Central European countries have pursued full membership in the European Community.²²⁹ Initiatives in that respect have culminated in Agreements ("European Agreements") which confer on these countries the status of "Associates," with certain trade benefits and formats for political cooperation, but no firm promise that they will be granted full membership.²³⁰ However, in June, 1994, the Copenhagen European Council committed itself to confer membership on any associate that proved able to comply

²²⁵ The provisions of these new constitutions (including those of Bulgaria, Croatia, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, the Slovak Republic and Slovenia) are found in *THE REBIRTH OF DEMOCRACY: 12 CONSTITUTIONS OF CENTRAL AND EASTERN EUROPE* (2d ed., 1996). The introduction to the volume gives an overview of these constitutions, noting, *inter alia*, that they provide for free elections, grant legal status to dissenting parties, offer safeguards of human rights and uphold the principles of democratic pluralism. *Id.* at 5. Typically they are based on the German parliamentary model, rather than the American presidential model. *See id.* at 7.

²²⁶ For an overview of the relationships between Western Europe and Communist satellites during the Communist era see John Vincent, *The Visagrad Countries of Central Europe—Integration or Isolation?*, 2 MINN. J. GLOBAL TRADE 229 (1993).

²²⁷ *See id.* at 234.

²²⁸ The PHARE Program to assist Poland and Hungary, initially, was extended to include Czechoslovakia, Romania, and Bulgaria. It is administered by the European Commission. It not only provided aid but also lifted some of the trade restrictions imposed during the communist era. *See id.* at 235. The European Bank for Reconstruction and Development was formed to render assistance in developing a free market economy in the emerging democracies. *See id.* at 236.

²²⁹ For a discussion of the institutional framework of the Community see Ulrich Everling, *Reflections on the Structure of the European Union*, 29 COMMON MKT. L. REV. 1053 (1992).

²³⁰ *See* John F. Casalino, *Shaping Environmental Law and Policy of Central and Eastern Europe: The European Union's Critical Role*, 14 TEMP. ENVTL. L. & TECH. J. 227 (1995).

with membership requirements.²³¹ Moreover, the Essen European Council in December of that year developed a program to assist associates in securing membership.²³²

The program includes not only ongoing communications through ministerial meetings but also a *White Paper Preparation of the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the Union (White Paper)*,²³³ which identifies with some specificity the requirements for acceptance into the Internal Market, a precursor to full membership in the Community.²³⁴ The *White Paper* is designed to assist the emerging democracies in aligning their laws and policies with Community standards in the following major areas: "customs law, company [corporate or business association] law, banking law, accounting and taxation of businesses, intellectual property, protection of workers at the workplace, financial services, rules on competition, protection of health and life of humans, animals and plants, consumer protection, indirect rules and standards, transport and the environment."²³⁵ In addition, an annex to the *White Paper* sets forth key legislation in all sectors of society which must be implemented before an associate can gain admission to the Internal Market.²³⁶

Clearly the European Agreements and the *White Paper* are heavily freighted toward rules concerning the marketplace (the private sector) and the elimination of trans-boundary trade barriers. But the documents and the consultation process they institute also evince a concern for the political landscape in which the entrepreneurial game is played. The European Community's economic and political interest in encouraging stable democracies as well as prosperous economies is evident.²³⁷ Indeed, it is widely accepted that a principal reason for the acceptance of Spain, Greece and Portugal into the Community was to buttress the stability of their nascent democracies.²³⁸ Conversely, the Community has previously suspended trade with Greece when it temporarily rejected democratic principles.²³⁹ With regard to the *White Paper* covering the market accession strategy of Eastern and Central European countries, it specifically states, at § 6.1:

²³¹ See *id.* at 239-40.

²³² See *id.* at 240.

²³³ *Id.* at 243; see also *EU/East Europe: A White Paper Approved for Nine CEECs, European Information Services*, June 23, 1995, available in LEXIS, Nexis library, Euro-East file.

²³⁴ See Casalino, *supra* note 230, at 243.

²³⁵ *Id.* at 242.

²³⁶ *Id.* at 244-45; cf. Vincent, *supra* note 226, at 244.

²³⁷ See Vincent, *supra* note 226, at 255-56.

²³⁸ See *id.* at 261.

²³⁹ See *id.* at 265.

Transition in central and eastern Europe to political and economic systems compatible with those in the European Union is a complex process. It involves the strengthening of *democracy* and *civil society*, the implementation of sound macro-economic policies, privatization and industrial restructuring, legal and institutional changes and trade liberalization, aiming at free trade with the Union and with neighboring countries.²⁴⁰

Thus, even at this preliminary stage of guiding the associate countries into the Internal Market, the *White Paper* recognizes and makes accommodation for certain lessons drawn from the political traditions of both the East and the West. Tradition teaches that true democratizing reform requires more than mere "approximation of legislation" but must also entail substantive implementation in the form of enforceable laws, legal structures and processes.²⁴¹ It also shows that fragmentation of power protected by legal rules and processes is an important part of democratic reform.²⁴² Further, it shows that an autonomous free market forms a crucial part of that fragmentation, and that associational life in the broader sense (including not only private sector associations but civil society as well) should be protected by Company Law provisions.²⁴³ Driven by the exigencies of regional trade with their more prosperous Western neighbors, these emerging democracies have strong incentives to implement substantive democratic reforms which recognize the Western tradition of fragmentation of power. Even at the pre-accession level of consultation, *White Paper* guidelines with their principal focus on establishing a free market infrastructure, and privatization (private sector concern) maintenance of an autonomous civil society (the nonprofit associational sector) are recognized as an important aspect of democracy.²⁴⁴ Both from the historical perspective of Western tradition and from contemporary efforts to extend that tradition eastward, civil society is considered to play an important role. However, that concept is not universally accepted.

C. THE TENUOUS CIVIL SOCIETY—A POSTMODERN PERSPECTIVE

An interesting theory of civil society is advanced by Adam Seligman in his recent work, *The Idea of Civil Society*.²⁴⁵ Professor Seligman

²⁴⁰ See Casalino, *supra* note 230, at 243 (emphasis added).

²⁴¹ See *id.*

²⁴² Chapter 2 of the *White Paper* recognizes the principle of free movement of goods, persons, services and capital as essential. See *id.*

²⁴³ See *id.*

²⁴⁴ See *id.*

²⁴⁵ SELIGMAN, *supra* note 153, at 3.

acknowledges the importance of civil society within the Western tradition²⁴⁶ and he recognizes the centrality of the concept in the current debates about the development of democratic norms in Eastern and Central Europe (and their revival in the United States).²⁴⁷ But he believes the attention given to the concept is misplaced.²⁴⁸ Succinctly put, Seligman fears that the concept of civil society is incapable of fulfilling the roles to which it has been assigned because the “first principles” upon which it has traditionally rested in the West have been seriously undermined in this postmodern era.²⁴⁹ He labels those “first principles” as “revelation” (the appeal to natural law)²⁵⁰ and “reason” (the appeal to the Protestant Ethic).²⁵¹

Seligman begins his chronological rendition of the historical development of the ideal of civil society, as did Taylor,²⁵² with the ancients. But he views those ancient roots through a somewhat different prism. He begins with the internalization of natural law (“God is providence”) following the breakdown of the Greek city-state and its reconceptualization by the Stoics as “right reason”²⁵³—Cicero’s term for the internalization of God’s order in man’s mind by way of natural law.²⁵⁴ Hence, the immutable principles of natural law were accessible to and binding on man’s social order.²⁵⁵ “A set of fundamental or ultimate principles of justice—rooted in the cosmic order itself—is thus seen to stand at the basis of enacted law.”²⁵⁶ The Church Fathers reworked and modified these principles from the twelfth century to the sixteenth century, interjecting the Church as the principle intermediary between God and man in this hierarchy of received Truth.²⁵⁷

In the sixteenth century and early seventeenth century, natural law regained its stature during the Reformation, although the anti-absolutists still opposed to the concept of the divine right of kings.²⁵⁸ The writings of Hugo Grotius consolidated the ideas promulgated by this political metamorphosis and established the foundations for “modern natural law”—a return to the stoical idea of “right reason” as the internalization

²⁴⁶ *Id.* at ix, 3.

²⁴⁷ *Id.* at ix, 2-3.

²⁴⁸ *See id.* at 13.

²⁴⁹ *See id.* at 1.

²⁵⁰ *See id.* at 15-17.

²⁵¹ *See id.* at 1.

²⁵² *See* Taylor, *supra* note 163, at 96 and accompanying text.

²⁵³ *See* SELIGMAN, *supra* note 153, at 17.

²⁵⁴ *See id.*

²⁵⁵ *See id.*

²⁵⁶ *Id.*

²⁵⁷ *See id.* at 19.

²⁵⁸ *See id.*

of God's law through the good offices of natural law.²⁵⁹ This tradition of natural law became a cornerstone in Revolutionary America's rejection of the English Crown as sovereign and in Scottish Enlightenment thought upon which much of American Revolutionary thought was premised.²⁶⁰

Seligman identifies John Locke's work as being of fundamental importance to American Revolutionary thought.²⁶¹ It too relied heavily on Grotius's work but also, importantly, on Calvinist theology: that man's right to equality, liberty and democracy is not a license to the unbridled pursuit of pleasure, but rather an opportunity to perform God's works in the community.²⁶² "The different structures of political authority found in the world are all derived from the individual's own executive and legislative authority in the state of nature, which individuals hold in their 'capacity of agents of God.'"²⁶³ Locke's *a priori* construct of the theoretical basis of civil society became increasingly problematic as the homogeneity of an agrarian culture gave way to the heterogeneity created by urban, industrial, expansionist developments in the mid to late eighteenth century.²⁶⁴ Seligman shows how Locke's ontology was gradually undermined by the crisis of faith and community purpose that has finally come to characterize the postmodern world.²⁶⁵ In theoretical discourse, the supernal rationale of civil society gradually receded, and with it the notion of mutuality, of reciprocal validation, of commonality of concerns and—indeed—the concept of a common-weal.²⁶⁶ Seligman explores the development of America's iconic rendering of civil society, reiterating how the extension of citizenship undermined concepts of mutuality and universality.²⁶⁷ Finally, he extends his analysis to Eastern and Central Europe, noting that the pluralistic nature of the populations there makes the task of constituting a civil society daunting.²⁶⁸

In sum, Seligman concludes that "the problems of society—in the West as in Eastern and Central Europe—are, in essence, the problems of constituting trust in Society."²⁶⁹ Trust requires a sense of mutual regard and common concerns that simply do not abide in the postmodern contemporary world because that world lacks a universally acceptable ethi-

²⁵⁹ See *id.*

²⁶⁰ See *id.* at 22.

²⁶¹ See *id.*

²⁶² See *id.*

²⁶³ *Id.* at 23-24.

²⁶⁴ See *id.* at 30.

²⁶⁵ See *id.*

²⁶⁶ See *id.* at 31-58.

²⁶⁷ See *id.* at 59-144.

²⁶⁸ See *id.* at 145-98.

²⁶⁹ See *id.* at 13.

cal norm.²⁷⁰ It was the ethical norm that made the concept of civil society viable in the Western tradition.²⁷¹ In turn, such norms rested on the dual notions of "revelation" and "reason," which served to synthesize conflicting interests of the individual and the community: "We, however, live amid the debris of Reason. The 'Rights of Reason,' as final arbiters of ethical and moral dilemmas, have in this century increasingly been questioned, most recently by a plethora of postmodern philosophies."²⁷² Hence, we face the virtual demise of civil society—cut off from the roots that sustained it.

Professor Seligman's treatise is an important addition to the debate on the role of nonprofit associations—the civil society—in a representative democracy. Within the parameters he has drawn for the subject, his analysis has significant merit. Its problems lie not with the merits of his analysis but with its scope and its definitional limitations. A brief comparison between Taylor's²⁷³ and Seligman's thesis will serve to make the point.

Taylor describes civil society variously as a sector of society that "exists over and against the state, in partial independence from it,"²⁷⁴ and "a web of autonomous associations, independent of the state."²⁷⁵ And he adds that while there has been a tendency toward "corporatism" (the integration of these associations into the state or public sector—especially in modern industrial democracies like Germany and Japan),²⁷⁶ "there are lots of associations in Western societies which are not involved in corporatist-type negotiations. Some are capable of having an impact on policy by lobbying or public campaigns, while others are marginal and easy

²⁷⁰ See *id.* at 129 ("[T]he postmodern position challenges traditional belief in the accessibility of the 'good' to the workings of reason . . . stress[ing] the limits of language (reason) and its essential inability to articulate the *summum bonum*. The 'good' cannot be articulated and so cannot be subject to a discourse of reason."). He summarizes postmodern philosophy on this issue as follows:

The core of the postmodern position can in fact be presented in two central and related themes: (1) an attack on the existence of universals . . . and (2) an attack on the philosophy of the subject (best illustrated by Foucault's by now famous quip that 'man is an invention of recent date and one perhaps nearing its end [footnote omitted].') This position is, of course, in marked contrast to that of modernity, with its focus on the individual subject and belief in the accessibility of the 'good' and the 'true' (universals) to the workings of reason.

Id.

²⁷¹ See *id.*

²⁷² *Id.* at 1.

²⁷³ Taylor, *supra* note 163, at 95 and accompanying text.

²⁷⁴ *Id.*

²⁷⁵ *Id.* at 96.

²⁷⁶ See *id.*

to ignore.”²⁷⁷ Thus, the idea and the reality of civil society includes, says Taylor, both an “L-stream” and an “M-stream.”²⁷⁸

Recall that the M-stream reverts to the ancient notion of the polity and the society as co-terminous, so that civil society is but a subset of the public sector.²⁷⁹ Power is divided into the public (government), private (entrepreneurial) and civil (nonprofit) sectors which gives the representative democracy its stability through diversity and fragmentation of power.²⁸⁰ A modern example of M-stream thought is the corporatism alluded to above. In contrast, the L-stream views the civil society as separate from the polity—“an extra-political reality.” “One facet of . . . [L-stream thought] . . . is the view of civil society as an economy which operates apart from and under a separate set of rules from the public sector.”²⁸¹ The eighteenth-century development of an economy, and a public opinion separate from the public sector “are two ways in which society can come to some unity or co-ordination outside of political structures.”²⁸² This facet of L-stream thought leads to a marginalization of the public sphere. Civil society “has its own pre-political life and unity which the political structure must serve.”²⁸³ “The self-regulating economy and public opinion . . . give body to the Lockean idea, which in turn has medieval roots, that society has its own [pre-eminent] identity outside the political dimension.”²⁸⁴ A modern example of the marginalizing facet of L-stream thought is contemporary conservative political theory: the economy (private sector) should dominate public policy; the public sector is marginalized by and should serve the interests of the private sector.²⁸⁵

Another facet of L-stream thought seeks to obliterate the state and replace it with a pre-eminent popular will. A line of theorists from Rousseau through Marx²⁸⁶ have espoused this view and its modern incarnation was the dictatorship of the proletariat in the U.S.S.R. and China. There “[a] strange and horrifying reversal has taken place, whereby an idea whose roots lie in a pre-political conception of society can now justify the total subjection of life to an enterprise of political transformation.”²⁸⁷ The Western tradition, according to Taylor, is best understood as including both L-stream and M-stream considerations and the left and

²⁷⁷ *Id.* at 96-97.

²⁷⁸ *See id.*

²⁷⁹ *See id.*

²⁸⁰ *See id.* at 114.

²⁸¹ *Id.* at 107.

²⁸² *Id.* at 109.

²⁸³ *Id.* at 111.

²⁸⁴ *See id.* at 109.

²⁸⁵ *See id.*

²⁸⁶ *See id.* at 112-13.

²⁸⁷ *Id.* at 113.

right variants of L-stream thought.²⁸⁸ He also suggests that the best rendering of the idea of civil society will hold these contradictory views in balance so that each will act as a check on the excesses of the other.²⁸⁹

The all-inclusiveness of Taylor's approach has much to recommend it. The "biodiversity" of Taylor's conception of civil society differs markedly from Seligman's rendition.²⁹⁰ While Taylor avoids the dichotomies of the variants of Western theory by including them,²⁹¹ Seligman seems to become entrapped by the contradictions of L-stream thought and its consequent problems with the dualities of public verses individual or private concerns.²⁹² A related distinction between the two scholars is the pre-eminence of theory over historical fact in Seligman,²⁹³ while Taylor treats the same material through a prism which emphasizes historical reality over theory.²⁹⁴ The result is that Seligman is confronted with a two-fold problem.

First, the linearity of his theoretical chronology gives a primacy to postmodern thought (and before it, the now discredited Marxist version of L-stream theory) which can lead precipitously to a conclusion that civil society no longer has a viable role to play in representative democracy.²⁹⁵ Taylor's historical chronology of the way civil society actually developed in the West leaves him free to see any variant of theory as simply one among several that must be included in the mix in order to do justice to the concept and to retain an important balance among them.²⁹⁶ Second, the dominance of the theoretical justifications in Seligman's thesis creates an undue emphasis on the ethical component of civil society—a component which he believes has lost its theoretical underpinnings (revelation and reason).²⁹⁷ Again, by emphasizing historical reality over theory, Taylor is able to include far more than Christian and ancient ethical canon as foundation for the civil sector.²⁹⁸ Experientially the actual development of civil society had no apparent problem with including the full gamut of motives in the development of civil society—selfish and individualistic as well as philanthropic and charitable. Hence, on the one hand, Taylor's conception is much more open to an evolving or changing theoretical justification for the sector.²⁹⁹ Seligman,

²⁸⁸ See *id.*

²⁸⁹ See *id.* at 117.

²⁹⁰ *Id.*

²⁹¹ SELIGMAN, *supra* note 153, at 4.

²⁹² See *id.* at 61-66.

²⁹³ See *id.* at 86-91.

²⁹⁴ See Taylor, *supra* note 163, at 101.

²⁹⁵ See *id.* at 102.

²⁹⁶ See SELIGMAN, *supra* note 153, at 59-99.

²⁹⁷ See Taylor, *supra* note 163, at 105.

²⁹⁸ See SELIGMAN, *supra* note 153, at 59-71.

²⁹⁹ See Taylor, *supra* note 163, at 107.

on the other hand, sees "the core component of the classical idea of civil society as an ethical vision of social life."³⁰⁰ Because he sees this ethical vision as relying upon doctrines of natural law and "right reason"—doctrines which he believes no longer command the allegiance of the postmodern citizen—he is constrained to conclude that civil society is probably an untenable construct.³⁰¹

In his treatise, Seligman gives special attention to Eastern and Central Europe because there appears to be a real effort to develop civil society³⁰² in that region. Constituting civil society in those countries appears to face formidable obstacles, such as, a lack of civic tradition and a pluralism consisting of highly contentious ethnic, religious and naturalist groups.³⁰³ These special problems are endemic to those countries, as is the universal problem of the postmodern condition.³⁰⁴ With that in mind, it might prove useful to review the experience of one of these emerging democracies, the Slovak Republic, and to ask whether the lugubrious projections of postmodern thought necessarily signal the death-knell of civil society.

D. THE REPRESSION OF CIVIL SOCIETY: THE SLOVAKIAN EXPERIENCE

1. *Historical Synopsis*

Slovakia is considered to be the least westernized of the four Visegrad countries.³⁰⁵ Witness, for example, North Atlantic Treaty Organization's (N.A.T.O.) recent rejection of Slovakia's candidacy for membership.³⁰⁶ Slovakia's status both as a sovereign nation and as an emerging democracy, however, is of very recent vintage.

³⁰⁰ SELIGMAN, *supra* note 153, at 10.

³⁰¹ *See id.* at 7.

³⁰² *See id.*

³⁰³ *See id.* at 179.

³⁰⁴ *See* WALZER, *supra* note 130, at 88.

³⁰⁵ Evidence of that point is seen in its failure to gain membership in NATO this year, while the other three Visegrad countries—Poland, the Czech Republic, and Hungary—joined the alliance. Indeed, Slovakia was not even considered to be a finalist (France supported the candidacy of Slovenia and Romania, as well). *See* Craig R. Whitney, *3 Former Members of Eastern Bloc Invited into NATO*, N.Y. TIMES, July 9, 1997, at A1.

The Visegrad Countries (originally three in number—Czechoslovakia, Poland, and Hungary—were so named by the press ("the Visegrad Three" or the "Visegrad Trojka" or "Visegrad Triangle") when those three countries met in Visegrad, Hungary in 1991, following the overthrow of Communist regimes, to discuss joint efforts to join the European Community. Those efforts culminated in a joint statement of purpose: "Declaration of the Hungarian Republic, the Czech and Slovak Federative Republic, and the Polish Republic, on Cooperation Leading to European Integration." Lidiya Kosikova, *Eastern Europe: The Visegrad Triangle—A New Cooperation Structure in Europe*, REUTER TEXTLINE FOREIGN TRADE, Apr. 19, 1992, available in LEXIS, World Library, Allwld File. Since the separation of Czechoslovakia into the Czech and Slovak republics the group is typically called the Visegrad Four.

³⁰⁶ *See* Kosikova, *supra* note 305 and accompanying text.

For a thousand years, until the end of World War I, Slovakia was part of the Hungarian kingdom. . . . It was, for centuries, a part of the Austrian-Hungarian Empire. For seven decades of the twentieth century, Slovakia was part of the Czechoslovak state. . . . It existed within a Central European environment . . . [sharing with surrounding peoples] a heritage of authoritarianism and nationalism, provincialism and opportunism. . . . When Slovakia became a part of the Czechoslovak Republic in 1918, the smaller Slovak nation consisted mostly of a rural population and had reached a lower level of economic and educational development than the Czech nation.³⁰⁷

Thus, Slovakia is representative of the Eastern and Central European nations discussed by both Taylor and Seligman, sharing with other countries in the region traditions of paternalism, rather than Western individualism, and unified structures of power, rather than diverse structures which have fragmented power in the West. But Slovakia is also distinctive, in that its experience with statehood is limited.³⁰⁸ Slovakia only recently emerged as an autonomous nation in November, 1992, on the heels of the overthrow of Communism by Czechoslovakia in 1989.³⁰⁹

2. *Legal Framework of the Slovak Republic*

The representative democracy established in Slovakia is parliamentary in form, and structured by a written constitution.³¹⁰ The parliamentary system typically vests the executive power in a prime minister, who is dependent upon the confidence of parliament to retain executive control.³¹¹ The president has a symbolic role as head of state but he may act in his capacity as referee or mediator to resolve critical conflicts between the legislature and the executive.³¹² Thus, parliamentary democracies differ markedly from presidential democracies because the latter form

³⁰⁷ Martin Bútora, *Volunteerism as a Multidimensional Phenomenon*, in *NONPROFIT SECTOR AND VOLUNTEERING IN SLOVAKIA* 13 (1995).

³⁰⁸ Stanley N. Katz, *Constitutionalism in East-Central Europe: Some Negative Lessons from the American Experience*, in *CONSTITUTIONALISM AND POLITICS* 17 (Irena Grudzinska Gross ed., 1993) ("Slovakia had no history of national autonomy prior to the formation of Czechoslovakia in the aftermath of World War I. Slovakia's only prior history of independent statehood come during World War II, when the Nazis established a fascist Slovakian puppet regime.").

³⁰⁹ See Peter Kresák, *The Government Structure in the New Slovak Republic*, 4 *TULSA J. COMP. & INT'L L.* 1 (1996) (overview of the steps leading up to independent Slovak statehood).

³¹⁰ See *id.* at 8-12.

³¹¹ See *id.* at 8.

³¹² See *id.* at 10.

divides power horizontally among the branches of government while the former vests pre-eminent power in the parliament.³¹³

This tendency toward unifying power in one branch is exacerbated in the Slovak version of parliamentary democracy by the fact that the legislature, the Parliament, is unicameral rather than bicameral.³¹⁴ Hence, the checks and balances associated with the American form of presidential democracy and with other versions of the parliamentary form have been absent from the Slovakian four-year experience with democratic statehood.³¹⁵ This constitutional framework has served the purposes of the current Prime Minister in his efforts to curtail the development of the nonprofit sector in Slovakia because it unifies political power—hence legislative domination—under his control.³¹⁶

3. *The 1996 Slovak Law on Foundations—A Benchmark of Animus Toward the Nonprofit Sector*

The current Prime Minister of the Slovak Republic, Vladimir Meciar,³¹⁷ does not enjoy a reputation for devotion to democratic or human rights principles. As an ex-communist who maintains close ties with Russia,³¹⁸ who is reputed to take violent measures against his rivals³¹⁹ and who is blamed for Slovakia's diminished chances of joining both NATO and the European Union (E.U.),³²⁰ he is also credited with passage of recent legislation exhibiting substantial hostility to the development of a vigorous nonprofit sector.³²¹ This legislation, *A Law of the Slovak National Council from May, 1996, on Foundations* ("Foundation

³¹³ See *id.* at 12.

³¹⁴ See *id.*

³¹⁵ See *id.* at 13, 17, 32.

³¹⁶ See *infra* discussion Part IV.D.3.

³¹⁷ See Krésak, *supra* note 309, at 2. Mr. Meciar was also the first Prime Minister of the Slovak Republic and he has returned to that position after two brief hiatuses. See *id.*

³¹⁸ See *Slovakia's Chance of Joining E.U. Shrinking*, CZECH NEWS AGENCY, CTK National News Wire, Nov. 25, 1996; *Slovakia: Nice New Friends*, ECONOMIST, Dec. 21, 1996, at 64; The *Economist* article characterizes Meciar as Slovakia's "thuggish prime minister" and states that his actions against his opponent, Slovakia's president, Michel Kovac ("who is the last main bulwark between the prime minister and untrammelled power") constitute "a direct attack on Slovakian democracy." *Id.* The article also notes that the Prime Minister's policies promote close ties with Russia in terms of bilateral trade, internal support for "Russia's business mafia," and an alliance between the two countries' secret service. *Id.* The Czech News Agency story notes that Meciar has turned a deaf ear to E.U. and Council of Europe entreaties to "return to the path of democracy." *Id.* And it concludes "Western politicians have long believed that Slovakia's chances of joining the E.U. were smaller and smaller in spite of a credible record of economic growth." *Id.*

³¹⁹ See *id.*

³²⁰ See *id.*

³²¹ See *id.*

Law”),³²² restricts the development of the nonprofit sector, particularly small, marginalized, grass-roots organizations, in several important respects. For example, it not only requires a minimum initial endowment as start-up capital, but it also freezes that endowment floor by requiring that it be maintained throughout the life of the organization.³²³

Slovak law generally distinguishes between an association (an organization premised solely on membership) and a foundation (an entity that owns property).³²⁴ Thus, the Foundation Law defines a foundation as “the intentional assembly of property, money, securities, and other assets that can be valued in currency, . . . which was determined by the founder to serve a generally beneficial goal.”³²⁵ It states further that “[y]ields from the property of a foundation and other revenues of a foundation can be used only for support of the generally beneficial goals [‘generally beneficial goals’ is nowhere expressly defined] for which the foundation was established.”³²⁶

A foundation is established in particular for the purpose of development of spiritual values, for the realization and protection of human rights or other humanitarian goals, for the protection and creation of the environment, protection of natural and cultural values, and for the protection of health and support of education.³²⁷

Thus, the Slovak Foundation Law targets the full spectrum of nonprofit organizations formed for myriad public and mutual purposes that are familiar to the American nonprofit landscape. But notice that the investment capital (“basic assets”) floor and the freeze on those assets are requirements that can easily disadvantage the small, grass-roots organizations to the point of extinction. They literally cannot survive in this high-dollar legislative climate.

³²² See zákon č. 2-11/1996 S.b. (A copy of the legislation is available from the author.); JUDr. Zuzana Magurova, *Legislation Concerning NGOs in Slovak Republic*, PRAVNÝ OBZOR (1996) (English translation version on file with the author).

³²³ See zákon č. 4(2) & (4)/1996 S.b.:

(2) The basic assets . . . of a foundation are the property invested at the establishment of a foundation must be at least 10,000 Slovak Crowns [about \$300] and within the period of 6 months it must be increased to at least 100,000 Slovak Crowns [about \$3,000].

(4) The activity of a foundation must not reduce its basic assets.

Id. (Copy on file with author).

³²⁴ The author is indebted to JUDr. Zuzana Magurova for her understanding of the legal framework for nonprofit organizations in Slovakia. See Magurova, *supra* note 277.

³²⁵ Zákon č. 2.1/1996 S.b.

³²⁶ *Id.* at 2.3/1996 S.b.

³²⁷ *Id.* at 3/1996 S.b.

Another set of provisions in the Foundation Law establishes draconian registration³²⁸ and administration³²⁹ requirements. Again, these onerous administrative burdens fall most heavily on small, underfunded grass-roots organizations. The Foundation Law did several things. First, it countermanded the existing legal framework which had been generally favorable to nonprofit organizations.³³⁰ Second, it elicited significant internal and international criticism.³³¹ Internally, the Gremium of the Third Sector, an umbrella organization representing the nonprofit sector in Slovakia, submitted its own counterproposal (*The Civil Bill on Foundations*)³³² which diluted the capital investment provisions and simplified the registration and administration requirements.³³³ The International Center for Not-for-Profit Law ("ICNL," headquartered in Washington, D.C.) also submitted its critique of the Foundation Law³³⁴ which paralleled, in many respects, the Gremium's concerns. The Slovak and international press also weighed in with their own critical assessments.³³⁵ Significantly, the European Commission which has oversight duties with regard to the associate status of Eastern and Central Countries for admission to the E.U.,³³⁶ commissioned the European Centre to submit a report of its assessment of the Foundation Law.³³⁷

³²⁸ See *id.* at 11/1996 S.b.

³²⁹ See *id.* at 10/1996 S.b.

³³⁰ See Magurova, *supra* note 322, at 86 and accompanying text; JUDr. Magurova notes that there is no general statute covering all nonprofit organizations. Thus, while the Constitution of the Slovak Republic guarantees the right to associate (Article 28), different types of nonprofit associations are treated under separate provisions of the Slovak Code. The basic divisions are: associations (entities comprised of members); foundations (entities which also own property) formed for generally beneficent purposes; religious organizations; and political parties.

Thus, the Civil Code at article 18 generally regulates associations and foundations including trade unions but expressly excludes coverage of political parties, religious organizations and for-profit associations. Proprietary associations are regulated pursuant to the provisions of the Commercial Code (copy on file with the author). Some organizations have quasi-governmental status and are regulated separately. Tax law also treats nonprofit organizations according to the type of tax and type of organization. There is no across-the-board exempt status for qualified nonprofit organizations. See *id.* A comparative study of Slovak tax law and U.S. tax law with regard to nonprofits is beyond the scope of this article. Suffice it to say that in many respects they extend comparable tax breaks. See *id.*

³³¹ See *id.* at 86-87.

³³² A copy of the counterproposal is on file with the author.

³³³ See Richard Lewis, *Parliament Passes Foundation Bill, Third Sector Still Not Satisfied*, THE SLOVAK SPECTATOR, June 5, 1996, at 3.

³³⁴ A copy of this critique is on file with the author.

³³⁵ See, e.g., Tom Reynolds, *Some Foundations May Founder from the New Law*, THE SLOVAK SPECTATOR, June 5, 1996, at 3.

³³⁶ See *supra* notes 198-215 and accompanying text.

³³⁷ *Review and Recommendations: Proposed Slovak Law on Foundations*, prepared for the European Commission by Bradley D. Gallop & Eric Kemp for the European Foundation Centre (copy on file with author).

Generally, the Centre advised the Slovak parliament to reconsider the Law with a view to bringing it in line with the spirit and structure of E.U. law regarding nonprofit associations and foundations.³³⁸ In particular, it recommended deletion of the minimum initial endowment requirement and restrictions on the use of initial endowments, and it called for simplification and liberalization of administrative and regulation requirements.³³⁹ It counseled the Slovak Parliament to "recognize the considerable potential of foundations in building social economy [what is now called 'social capital'], the bedrock of the European Union's pluralistic democracy."³⁴⁰ In some detail, it chronicled the "role of social economy in building civil society."³⁴¹ It noted that the nonprofit sector has burgeoned in Member States of the European Union (E.U.), now representing five percent of Gross National Product (GNP) in those states and employing ten million professionals throughout the E.U.³⁴² Increasingly, said the Report, the nonprofit sector is recognized as enabling citizens to play important roles in public life along with the government (public sector) and business (private sector) communities.³⁴³ As a consequence, it stated that the European Commission—in conjunction with other E.U. institutions and non-governmental organizations (N.G.O.)—is committed to developing legal environments in member and associate states where the nonprofit sector can thrive.³⁴⁴ Reaction to the Slovak Foundation Law was uniformly critical within E.U. and nonprofit circles.

Passage of the Foundation Law is strong evidence that the nonprofit sector (in all its manifold aspects, but especially the small grass-roots groups) is viewed as a threat to the hegemony of this authoritarian regime. The fact that Prime Minister Meciar believed that Foundation Law's passage was important enough to risk international opprobrium and possible exclusion from the Community, which is in his nation's economic interests to join, demonstrates the importance of the nonprofit sector.³⁴⁵ In that respect the four-year experience of statehood in Slovakia mirrors the historical lessons of the Western tradition. A vigorous nonprofit sector challenges hegemony by creating alternative sources of power which can serve as checks on excessive exercises of power in the private and public sectors.³⁴⁶

³³⁸ See *id.* at 1.

³³⁹ See *id.* at 1, 3.

³⁴⁰ *Id.* at 1.

³⁴¹ *Id.*

³⁴² See *id.* at 2.

³⁴³ See *id.*

³⁴⁴ See *id.* at 2.

³⁴⁵ See *id.*

³⁴⁶ See *id.*

In fact, the vitality of the nonprofit sector in Slovakia is palpable and notable. The fact that the nonprofit sector in Slovakia "virtually did not exist . . . just a few years ago" makes its vigor today remarkable.³⁴⁷ The sector, however, does have historical antecedents. During the second half of the nineteenth century and the early years of the twentieth century the proliferation of nonprofit associations in Czechoslovakia was significant. "'Associational life was speeded up by the industrial revolution . . . and it especially flourished in towns and cities.'"³⁴⁸ "The associations served as tools for social identification [on the community, group or professional level]; they promoted social communication" and cohesion.³⁴⁹ "[They] provided space for political participation and through their educational function they contributed to a general rise in civilization and democracy."³⁵⁰ The experience of a burgeoning nonprofit sector, however, was subsequently overshadowed by the two totalitarian regimes that ruled the region sequentially. Under Nazism, one party had a monopoly of public power.³⁵¹ The nonprofit sector was obliterated as an autonomous source of power.³⁵² Similarly, the Communist regime suppressed not only entrepreneurial association, but all forms of nonprofit association and networks that sought independence from state control.³⁵³ Power was once again unified within a paternalistic state. The "ethos of co-participation, co-responsibility [and] altruism . . . [were replaced by] the spread of apathy."³⁵⁴

With the success of the Czechoslovak ("Velvet") Revolution and the subsequent division of Czechoslovakia into two separate nation-states, the proliferation of nonprofit organizations in Slovakia has resumed. The growth of the sector is indicated by a statistical report showing 6,000 nonprofit organizations registered in Slovakia in 1993, compared with 9,800 the following year.³⁵⁵ Recall that this growth takes place in a political environment hostile to the sector³⁵⁶ and against a recent historical experience spanning over forty years which did nothing to inculcate the habits of nonprofit associational life.

³⁴⁷ Bútora, *supra* note 307, at 13 (Based on two studies undertaken in 1994, the report was commissioned by EUROVOL, an institution conducting a research assessment of volunteering work in ten European countries [Great Britain, Belgium, Bulgaria, France, Germany, Denmark, The Netherlands, Ireland, Slovakia, and Sweden]).

³⁴⁸ *Id.* at 14 (quoting Slovak historian E. Mannorá).

³⁴⁹ *Id.*

³⁵⁰ *Id.*

³⁵¹ *See id.*

³⁵² *See id.*

³⁵³ *See id.*

³⁵⁴ *Id.* at 14-16.

³⁵⁵ *See id.* at 17.

³⁵⁶ "Some political observers assume that Meciar's comeback . . . has brought into the realm of politics a special amalgam of authoritarianism which embodies both the pre-war traditionalist nationalist populism and the post-war socialist collectivism." *Id.*

E. CODA—EXPERIENCE IS THE PREFERRED TEACHER (REPORTS OF THE DEMISE OF CIVIL SOCIETY MAY BE PREMATURE)

Studies of the sector in Slovakia suggest that, absent punitive and restrictive legislation unapologetically designed to diminish the sector, its development and contours display a marked similarity with nonprofit sectors in other democracies. Predictably, nonprofit sectors' capacity to play the same kinds of roles in developing and sustaining a representative democracy is comparable. Indeed, the exigencies of postmodern industrial societies make the role of nonprofits pivotal. Habermas observed that in advanced industrial societies the proprietary and government sectors tend to expand their spheres of influence and with them their dominant norms: instrumentality and bureaucratization, respectively.³⁵⁷

These norms increasingly shape public discourse and private values to the diminution or exclusion of values and norms not premised on profit, efficiency or impersonality, thereby, decreasing a sense of responsibility and personal commitment. Without a vibrant nonprofit sector to deflect the apathy and passivity engendered by public and private monoliths, a return to paternalism and unified power seems inevitable.³⁵⁸ Further, a strong nonprofit sector can serve to counteract the isolation of the postmodern predicament by providing a matrix of overlapping commonalities³⁵⁹ and to replace the old dichotomies of natural law with a new "paradigm of pluralism."³⁶⁰

CONCLUSION

The nonprofit sector is at a critical juncture in America. Recent legislative proposals may herald a change in the legal structure governing nonprofits. Since a cornerstone of that structure is the federal law conferring tax-exempt status on qualified nonprofits, many of the proposals for change target that law. In response, most of the legal scholarship has analyzed the sector from the perspective of classical economic theory. But in order to construct an adequate evaluation of current legislative

³⁵⁷ JÜRGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY* (Thomas Burger trans., 1989); R. Wuthnow, *The Voluntary Sector: Legacy of the Past, Hope for the Future*, in *BETWEEN STATES AND MARKETS: THE VOLUNTARY SECTOR IN COMPARATIVE PERSPECTIVE* 3-29 (1991).

³⁵⁸ See HABERMAS, *supra* note 357, at 67.

³⁵⁹ See WALZER, *supra* note 130, at 88-92.

³⁶⁰ BERGER & NEUHAUS, *supra* note 137, at 42; but see Kenneth Janda, *New Constitutions and Models of Democracy: The Problem of the Majority*, in *CONSTITUTIONALISM AND POLITICS* 17 (Irena Grudzinska Gross ed., 1993). Janda explains that whereas pluralities see society as organized into myriad "overlapping and cross-cutting nongovernmental (but not non-political) interest groups," Eastern and Central Europe lacks the extensive network of voluntary associations that is required for a pluralist democracy. *Id.*

proposals or of the existing legal regime, the analysis must go beyond economic theory and consider the substantial role the nonprofit sector has played in the American form of representative democracy and in the development of the Western political tradition on which it relies.

The contributions the nonprofit sector makes to the American polity can be subsumed within these categories: (1) participation in the sector teaches the skills of self-rule in the form of consensus-building, decision-making, and concerted action; (2) these three skills in turn develop the habits of compromise, reciprocal respect, tolerance and civility; and (3) the sector itself, both as a totality and through the manifold activities of its constituent organizations, serves to mediate the space between the individual and the other two sectors (governmental and entrepreneurial) by giving "voice," access, and forum to disparate views and goals and by acting as a ballast—a stabilizing or balancing influence—against overreaching by the other two sectors.

The success of the Western tradition in developing democratic institutions is attributable to its ability, over time, to fragment power. The nonprofit sector played a pivotal role in this historical achievement because it harbors disparate point-sources of associational autonomy.

This fragmentation of power in the West stands in stark contrast to the Eastern political tradition which has been characterized by a unified power structure and paternalism. Indeed, the fragmentation of power is considered the *sine qua non* of the democratization process in East-Central European countries emerging from Communist domination. The development of a strong nonprofit sector is considered indispensable to that process. Recent legislation in Slovakia illustrates the point obversely. There, an authoritarian prime minister has obliged the parliament to enact legislation designed to constrict the size and diversity of Slovakia's nonprofit sector and to preclude the proliferation of small, grass-roots organizations. Prior to enactment of the legislation, the Slovak nonprofit sector offered abundant evidence of its vitality and growth. Thus, even in this Central European country where—given its traditions and political antecedents—the existence of a nonprofit sector strong enough to pose a threat to authoritarianism would seem most problematic, the importance of the sector in developing a representative democracy is evident.

In light of the foregoing, any attempt to evaluate either the current legal framework covering nonprofits or legislative proposals to alter that framework must consider whether the legislation impedes or preserves the capacity of the sector to play those roles which are vital to the survival of a representative democracy.

