Reflections on the Role of Nonprofit Associations in a Representative Democracy

Barbara Bucholtz
REFLECTIONS ON THE ROLE OF NONPROFIT ASSOCIATIONS IN A REPRESENTATIVE DEMOCRACY

Barbara K. Bucholtz†

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

† Assistant Professor of Law, University of Tulsa College of Law. This article was supported by a grant from the University of Tulsa. The author is indebted to Martin Belsky and Linda Lacey for their comments on the text.

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. 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. 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.

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-

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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.
historical 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 3% 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)).
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 \textit{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, \textit{The Role of Nonprofit Enterprise}, 89 \textit{Yale L.J.} 835, 838 (1980) (coining the phrase “nondistribution constraint”).

\(^{11}\) See text accompanying note 2.

\(^{12}\) See Brody, \textit{ 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. \textit{See} Vince Stehle, \textit{Righting Philanthropy}, \textit{Nation}, June 30, 1997, at 15. Stehle quotes Lester Salamon’s forthcoming book, \textit{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.” \textit{Id.} (quoting Lester Salamon, \textit{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.” \textit{Id.} The “subsidy” or income tax exemption for qualified nonprofits dates back to the colonial period. \textit{See} John D. Colombo, \textit{Why is Harvard Tax-Exempt? (And Other Mysteries of Tax Exemption for Private Educational Institutions)}, 35 \textit{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 \textit{William G. Bowen et al., The Charitable Nonprofit} 96 (1994).
public generally. 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. 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. 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. Whatever their differences, the colonists shared the Protestant creed of individual service to the community. 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. It also co-existed with the practical realities of establishing schools, hospitals and churches in the colonies. 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.

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-
rate governance laws. 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. The states continued the colonial practice of conferring property tax exemptions on the core charitable organizations: churches, hospitals and schools.

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

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. 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." 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.
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 rates\(^{36}\) 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 laws.

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32 Id.
33 See id.
38 See FISCHMAN & 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. KIRCHTEN, FEDERAL AND STATE TAXATION OF EXEMPT ORGANIZATIONS (1994).
laws. They are also generally exempt from property taxes and from sales taxes at the state and local levels.

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, 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 agreed 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), it was not until 1938 that a statement of the purpose of the exemption could be found in United States legislative history. 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.
46 See FISCHMAN & 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.
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.
Court found that nonprofit schools that enforce racially discriminatory admissions policies are not entitled to tax benefits. 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."

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. It offers no express standard for what activity qualifies as public interest welfare. 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.

There, Salamon identifies five basic reasons for the existence of the sector: "historical," "market failure," "government failure," "pluralism/freedom" and "solidarity." Historically, Salamon says that voluntary organizations performed important societal functions in pre-Revolutionary America. Thus, such organizations were firmly entrenched even prior to the establishment of state and federal governments. The nonprofit sector had the imprimatur of a pre-existing society. 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).
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.\textsuperscript{68}

Both the "free-rider" and "contract-failure" problems result from "certain inherent limitations in the market system."\textsuperscript{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.\textsuperscript{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.\textsuperscript{71}

The "contract failure" problems occurs when there is no market check or monitoring device on the quality of the goods or services provided.\textsuperscript{72} Here, the recipients of the services do not pay for the goods or services, and therefore, have no pocketbook leverage against poor quality.\textsuperscript{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.\textsuperscript{74}

Salamon explains that not only the private sector but also the public sector has certain "inherent limitations."\textsuperscript{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.\textsuperscript{76} The nonprofit sector is capable of compensating for government limitations in these respects.\textsuperscript{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."\textsuperscript{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.\textsuperscript{79} Salamon's analysis sketches the con-

\textsuperscript{68} Id.
\textsuperscript{69} Id. at 7-8.
\textsuperscript{70} See id.
\textsuperscript{71} See id.
\textsuperscript{72} Id. at 8.
\textsuperscript{73} See id.
\textsuperscript{74} See id.
\textsuperscript{75} Id.
\textsuperscript{76} Id. at 8-9.
\textsuperscript{77} See id.
\textsuperscript{78} Id. at 9.
\textsuperscript{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-

80 See Salamon, supra note 63, at 13-32.
82 Bittker & Rahdert, supra note 81, at 299.
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. 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.

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. Hansmann’s now orthodox view focuses primarily on the market failure prong of these “twin failures.” 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. 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). He described how these four types compensate for the “market failure” or “contract failure” of the private sector in several respects.

The first contract failure occurs in those situations where the donor and the recipient of the services or goods are separated. 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. Hence the nonprofit sector is the preferred vehicle for delivering goods and services in this arena. 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. Again, the “nondistribution constraint” imposed on the nonprofit sector diminishes the likelihood that quality will

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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. 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.

The tax exemption compensates the nonprofit sector for the nondistribution and other constraints under which it operates. For example, nonprofits lack access to equity markets and to debt financing. 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. 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. 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. 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. This theory is more comprehensive than Hansmann’s in that it includes property tax exemptions as well as income tax exemptions.

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

\[100 \text{Id. at 72.} \]
\[101 \text{See id. at 68-81; see also Colombo, supra note 12, at 515-19.} \]
\[102 \text{See Hansmann, supra note 90, at 72.} \]
\[103 \text{See id. at 73.} \]
\[104 \text{Id. at 75.} \]
\[105 \text{See, e.g., supra notes 42-51 and accompanying text.} \]
\[106 \text{Hall & Colombo, supra note 16, at 307.} \]
\[107 \text{See Colombo, supra note 12, at 867; Evelyn Brody, Agents without Principals: The Economic Convergence of the Nonprofit and For Profit Organizational Forms, 40 N.Y.L. Sch. L. Rev. 457 (1996) (arguing the exemption should be available only for charitable behavior rather than to a nonprofit organizational form); see also M. Gregg Bloche, Health Policy Below the Waterline: Medical Care and the Charitable Exemption, 80 MINN. L. REV. 299, 404 (1995) (arguing the exemption should be phased out); Nina J. Crimm, Evolutionary Forces: Changes in For-Profit and Not-For-Profit Health Care Delivery Structures; A Regeneration of Tax Exemption Standards, 37 B.C. L. Rev. 1, 31 (1995) (arguing the tax-exemption should be extended to for-profits and nonprofits that engage in charitable activities).} \]
\[108 \text{See Colombo, supra note 12, at 869-76.} \]
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 \textit{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 orthodoxy account . . . describes nonprofits as a response to social and economics [sic] 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." \textit{Id.} at 503.

\(^{114}\) Colombo, supra note 12, at 877.

\(^{115}\) \textit{Id.} at 850.

\(^{116}\) See id. at 864.
describe another account of the justification for tax-exemption: the altruistic motivation of nonprofit activity.\textsuperscript{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.\textsuperscript{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.\textsuperscript{119} Illustrative of this theory is an article entitled \textit{Charity and Community: The Role of Nonprofit Ownership in a Managed Health Care System},\textsuperscript{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.”\textsuperscript{121} Economically-inclined scholars have been quick to disparage the Community Benefit Theory as unworkable because its standards are unquantifiable.\textsuperscript{122} As a limiting standard for applying the tax exemption status it is as amorphous as the \textit{quid pro quo} standard under which the courts and the Service labor today.\textsuperscript{123} And like the \textit{quid pro quo} standard, it fails to make a causal connection between the exemption and the nonprofit activity.\textsuperscript{124}

The economic scholar’s view, however, that to be viable an exemption theory must be quantifiable, proves too much\textsuperscript{125} and begs the larger

\textsuperscript{117} See id. at 873.

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

\textsuperscript{119} See Colombo, supra note 12, at 864.

\textsuperscript{120} Schlesinger et al., supra note 118, at 700.

\textsuperscript{121} Id. at 700-01.

\textsuperscript{122} See id.

\textsuperscript{123} See Colombo, supra note 12, at 865-68.

\textsuperscript{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.

\textsuperscript{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\textsuperscript{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.\textsuperscript{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).

\textsuperscript{126} SALAMON, supra note 63, at 7-10.

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."

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," or the nonprofit sector. As Michael Walzer states in his insightful study On Toleration, so vital is this matrix to American society that it constitutes an important part of our common identity, our "civil religion," which "facilitates the toleration of partial differences—or it encourages us to think of difference as only partial." 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.
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," 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 unchartered tundra from a modernist society of dichotomies to a postmodernist society of "ambiguously identified individuals," 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

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133 Id.
134 Id. at 107.
135 Id. at 93-112.
136 Id. at 87.
137 PETER L. BERGER & RICHARD I. 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 artificially 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. . . . If 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 and 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.\textsuperscript{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 sector\textsuperscript{150}), but to train citizens to operate the public sector.\textsuperscript{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 vibrant\textsuperscript{152} and Jürgen Habermas suggests that associational ties create "communicative interaction" from which emerge democratic action.\textsuperscript{153} Professor Walzer makes the point even more succinctly.\textsuperscript{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.\textsuperscript{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.\textsuperscript{156}

\textsuperscript{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.").

\textsuperscript{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).

\textsuperscript{151} See PIERSON, supra note 9, at 774.

\textsuperscript{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).

\textsuperscript{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).

\textsuperscript{154} WALZER, supra note 130, at 97, 105.

\textsuperscript{155} TOCQUEVILLE, supra note 1, at 516.

\textsuperscript{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 megastructures . . . .

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.\(^\text{163}\) He begins with the ancient Greeks' and Romans' notion that the polity gave a society its exclusive identity: political sovereignty defined a society.\(^\text{164}\) He shows that by the Middle Ages, society and polity were no longer identical: the political regime shared sovereignty with Christendom.\(^\text{165}\) Christendom was an independent source of authority.\(^\text{166}\) The State and the Church were subordinate to each other in certain arenas, dominant in others.\(^\text{167}\) 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.\(^\text{168}\) 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.\(^\text{169}\)

\(^{162}\) Id. at 3, 6.
\(^{164}\) See id. at 96.
\(^{165}\) See id. at 97.
\(^{166}\) See id.
\(^{167}\) See id.
\(^{168}\) Id. at 103.
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.\textsuperscript{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."\textsuperscript{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."\textsuperscript{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.\textsuperscript{173} Along with these political changes, there emerged a body of political theory which justified and rationalized them.\textsuperscript{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.\textsuperscript{175} Above all, Locke’s theory is illustrative of, and justifies, the fragmentation of power which characterizes the Western political tradition.\textsuperscript{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.\textsuperscript{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

\textsuperscript{170} Id at 59. Schöpflin 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.

\textsuperscript{171} Id. at 61.

\textsuperscript{172} Id. at 60.

\textsuperscript{173} See id.; Taylor, supra note 163, at 103-04.

\textsuperscript{174} See Schöpflin, supra note 169, at 57-61.

\textsuperscript{175} Taylor, supra note 163, at 21-26, 29-30.

\textsuperscript{176} See id. at 104.

\textsuperscript{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 dubbs 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

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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. 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 state) but also to "marginalize" or eliminate government altogether. This latter version of the L-stream was adopted by Jean Jacques Rousseau and later by Friedrich Engels. 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."

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. 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

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187 See id.
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. 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. 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."

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. 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. 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).
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. Even in the nineteenth and twentieth centuries these countries were unable to wrest sufficient political power from the sovereign to institute true parliamentary democracies. An occasional overthrow of existing regimes represented not an expression of popular will but discord within the ruling elite. Any citizen autonomy permitted reflected either ancient custom or the political elite’s hypocritical homage to international public opinion. 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. . . .” 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 . . . .”

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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. 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." 

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. 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. 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, scholars debate the efficacy of a strong civil society as providing the necessary counterweight to and fragmentation of political and private (market) power. Democracy has assumed normative, if not numinous proportions in the post-communist era:

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213 See id. at 70.
214 Id. at 71.
215 See id. at 87.
216 See Taylor, supra note 163, at 95-99.
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

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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*.

these "emerging democracies" consistently recognize the basic rights associated with and recognized by the U.N. community as requisite to democracy.\footnote{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, \textit{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. \textit{Id.} at 5. Typically they are based on the German parliamentary model, rather than the American presidential model. See \textit{id.} at 7.}

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.\footnote{For an overview of the relationships between Western Europe and Communist satellites during the Communist era see John Vincent, \textit{The Visegrad Countries of Central Europe—Integration or Isolation?}, 2 Minn. J. Global Trade 229 (1993).} 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.\footnote{See \textit{id.} at 234.} 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.\footnote{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 \textit{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 \textit{id.} at 236.} These programs have served as a foundation from which the Central European countries have pursued full membership in the European Community.\footnote{For a discussion of the institutional framework of the Community see Ulrich Everling, \textit{Reflections on the Structure of the European Union}, 29 Common Mkt. L. Rev. 1053 (1992).} 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.\footnote{See John F. Casalino, \textit{Shaping Environmental Law and Policy of Central and Eastern Europe: The European Union’s Critical Role}, 14 Temp. Envtl. L. & Tech. J. 227 (1995).} However, in June, 1994, the Copenhagen European Council committed itself to confer membership on any associate that proved able to comply...
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.\footnote{See Casalino, supra note 230, at 243 (emphasis added).}

Thus, even at this preliminary stage of guiding the associate countries into the Internal Market, the \textit{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.\footnote{See id.} It also shows that fragmentation of power protected by legal rules and processes is an important part of democratic reform.\footnote{Chapter 2 of the White Paper recognizes the principle of free movement of goods, persons, services and capital as essential. \textit{See id.}} 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.\footnote{See id.}

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, \textit{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.\footnote{See id.}

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.

\section*{C. The Tenuous Civil Society—A Postmodern Perspective}

An interesting theory of civil society is advanced by Adam Seligman in his recent work, \textit{The Idea of Civil Society}.\footnote{Seligman, supra note 153, at 3.} Professor Seligman
acknowledges the importance of civil society within the Western tradition 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). But he believes the attention given to the concept is misplaced. 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. He labels those “first principles” as “revelation” (the appeal to natural law) and “reason” (the appeal to the Protestant Ethic).

Seligman begins his chronological rendition of the historical development of the ideal of civil society, as did Taylor, 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”—Cicero’s term for the internalization of God’s order in man’s mind by way of natural law. Hence, the immutable principles of natural law were accessible to and binding on man’s social order: “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.” 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.

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. 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

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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.\textsuperscript{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.\textsuperscript{260}

Seligman identifies John Locke's work as being of fundamental importance to American Revolutionary thought.\textsuperscript{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.\textsuperscript{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.'"\textsuperscript{263} Locke's \textit{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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."\textsuperscript{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-

\textsuperscript{259} See id.
\textsuperscript{260} See id. at 22.
\textsuperscript{261} See id.
\textsuperscript{262} See id.
\textsuperscript{263} Id. at 23-24.
\textsuperscript{264} See id. at 30.
\textsuperscript{265} See id.
\textsuperscript{266} See id. at 31-58.
\textsuperscript{267} See id. at 59-144.
\textsuperscript{268} See id. at 145-98.
\textsuperscript{269} See id. at 13.
It was the ethical norm that made the concept of civil society viable in the Western tradition. 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 arbitrators of ethical and moral dilemmas, have in this century increasingly been questioned, most recently by a plethora of postmodern philosophies.” 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’s 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,” and “a web of autonomous associations, independent of the state.” 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), “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.

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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 sumnum 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 Marx\(^{286}\) 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. 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.

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. While Taylor avoids the dichotomies of the variants of Western theory by including them, 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. A related distinction between the two scholars is the pre-eminence of theory over historical fact in Seligman, while Taylor treats the same material through a prism which emphasizes historical reality over theory. 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. 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. 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). 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. 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.

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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."\textsuperscript{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.\textsuperscript{301}

In his treatise, Seligman gives special attention to Eastern and Central Europe because there appears to be a real effort to develop civil society\textsuperscript{302} 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.\textsuperscript{303} These special problems are endemic to those countries, as is the universal problem of the postmodern condition.\textsuperscript{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 Visagrad countries.\textsuperscript{305} Witness, for example, North Atlantic Treaty Organization's (N.A.T.O.) recent rejection of Slovakia's candidacy for membership.\textsuperscript{306} Slovakia's status both as a sovereign nation and as an emerging democracy, however, is of very recent vintage.

\textsuperscript{300} Seligman, supra note 153, at 10.
\textsuperscript{301} See id. at 7.
\textsuperscript{302} See id.
\textsuperscript{303} See id. at 179.
\textsuperscript{304} See id. note 130, at 88.
\textsuperscript{305} See Walzer, supra note 305 and accompanying text.
\textsuperscript{306} Evidence of that point is seen in its failure to gain membership in NATO this year, while the other three Visagrad 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 Visagrad Countries (originally three in number—Czechoslovakia, Poland, and Hungary—were so named by the press ("the Visagrad Three" or the "Visagrad Trojka" or "Visagrad Triangle") when those three countries met in Visagrad, 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 Visagrad Triangle—A New Cooperation Structure in Europe, REUter TEXTline FOREIGN TRADE, Apr. 19, 1992, available in LEXIS, World Library, AllwId File. Since the separation of Czechoslovakia into the Czech and Slovak republics the group is typically called the Visagrad Four.

\textsuperscript{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

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 came during World War II, when the Nazis established a fascist Slovakian puppet regime.").
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{315} This constitutional framework has served the
purposes of the current Prime Minister in his efforts to curtail the develop-
ment of the nonprofit sector in Slovakia because it unifies political
power—hence legislative domination—under his control.\textsuperscript{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,\textsuperscript{317} does not enjoy a reputation for devotion to democratic or
human rights principles. As an ex-communist who maintains close ties
with Russia,\textsuperscript{318} who is reputed to take violent measures against his ri-
vals\textsuperscript{319} and who is blamed for Slovakia’s diminished chances of joining
both NATO and the European Union (E.U.),\textsuperscript{320} he is also credited with
passage of recent legislation exhibiting substantial hostility to the develop-
ment of a vigorous nonprofit sector.\textsuperscript{321} This legislation, A Law of the
Slovak National Council from May, 1996, on Foundations (“Foundation

\textsuperscript{313} See id. at 12.

\textsuperscript{314} See id.

\textsuperscript{315} See id. at 13, 17, 32.

\textsuperscript{316} See infra discussion Part IV.D.3.

\textsuperscript{317} See Kröšak, 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.

\textsuperscript{318} See Slovakia’s Chance of Joining E.U. Shrinking, Czech News Agency, CTK Na-
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 untrammeled 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 busi-
ness 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.

\textsuperscript{319} See id.

\textsuperscript{320} See id.

\textsuperscript{321} See id.
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Law”), 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.

Slovak law generally distinguishes between an association (an organization premised solely on membership) and a foundation (an entity that owns property). 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.” 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.”

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.

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.


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 registration and administration 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. Second, it elicited significant internal and international criticism. 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) which diluted the capital investment provisions and simplified the registration and administration requirements. The International Center for Not-for-Profit Law ("ICNL," headquartered in Washington, D.C.) also submitted its critique of the Foundation Law which paralleled, in many respects, the Gremium’s concerns. The Slovak and international press also weighed in with their own critical assessments. 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., commissioned the European Centre to submit a report of its assessment of the Foundation Law.

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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.
334 A copy of this critique is on file with the author.
336 See supra notes 198-215 and accompanying text.
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. 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. 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." In some detail, it chronicled the "role of social economy in building civil society." 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. 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. 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. 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. 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.

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.
345 See id. at 2.
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 Bútorá, 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


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 over-reaching 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.