

*Rationalism, Pluralism, and Freedom*  
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### **Part 1.**

“For political philosophy's habitual, and it seems ineliminable, dependence on the urgency of political questions which are not in the first instance philosophical, is of a piece with its insistence, when at all interesting, on being both normative and impure. It is normative at least in the sense that first-order moral and political disagreement with the author can relevantly motivate disagreement with his philosophy, and impure in the sense that materials from non-philosophical sources-- an involvement with history or the social sciences, for instance-- are likely to play a more than illustrative part in the argument.”

Bernard Williams, "Political Philosophy and the Analytical Tradition," in *Philosophy as a Humanistic Discipline*, p. 155.

## Chapter 1: Freedom, Associations, and Uniformity

### The setting

(questions of freedom and the intermediate sphere, omitted)

### Some initial boundaries

(In this book I am mainly interested in groups and intermediate bodies in which people in some sense live as members—religions, churches, cultural and linguistic groups, voluntary associations with active membership, cities and provinces, universities—and not intermediate bodies without memberships such as foundations, or in so-called “tertiary” associations in which membership mainly consists of sending money for activities participated in by others, e.g. the AARP or World Wildlife Federation. Moreover, groups whose primary orientation is external, toward capture of the state or economic gains on the market—that is, political parties, interest groups, corporations, and labor unions—are not of central concern, though they are sometimes relevant and will be discussed. The core of the project concerns groups whose primary orientation is internal, toward the governance and organization of their members’ lives in some capacity. Omitted.)

### The central argument: pluralism and rationalism

This is a book about the individual persons, intermediate groups and institutions, and states. It is concerned with the relationship between intermediate groups and freedom: whether, and when, and how they impair the freedom of their members; whether, when, and how they protect it; and whether, when, and how they should be seen as manifestations or exercises of that freedom.

I argue that there is deep, recurring, and irresolvable tension within liberal political thought between seeing intermediate institutions<sup>¾</sup> family, voluntary associations, religious or cultural communities, local or provincial governments<sup>¾</sup> as sites where free people live their diverse lives, and seeing them as the sites of local tyranny that the liberal state must be strong enough to keep in check. One strand of liberalism insists that the state must allow freedom to persons as they are, living the lives that they already lead<sup>¾</sup> lives that are embedded in particular communities and partly shaped by particular cultural and religious traditions; the other emphasizes the importance of free persons being able to transform or

transcend the lives in which they find themselves . On one side of this divide lies a pluralist liberalism, skeptical of the central state and friendly toward local, customary, voluntary, or intermediate bodies and communities and associations. On the other we see a rationalist liberalism, committed to intellectual progress, universalism, and equality before a unified law, opposed to arbitrary and irrational distinctions and inequalities, and determined to disrupt local tyrannies in religious and ethnic groups, the family, the plantation, the feudal countryside, and so on. While I will suggest that *liberalism* as such necessarily faces a tension between these two strands, that does not mean that particular liberal thinkers or theories all sit balanced between them. Indeed, I will argue that the moral, social, and political truths in each strand are hard to keep fully in mind while taking seriously the truths in the other. And so much of the center of the book consists of historical studies of disputes between protoliberal or liberal theorists<sup>1</sup> who argued with one another across this intellectual divide, some stressing the threats to freedom posed by the state, some those posed by intermediate groups. That does not mean that any of these thinkers were pluralists or rationalists *simpliciter*, but a clear division of emphasis emerges: it is no accident that John Stuart Mill saw the threat to freedom posed by the structure of the Victorian family, *and* by conformist intellectual cultures, but *not* by an enlightened state governing imperially over neighboring nationalities or distant lands. Nor is it an accident that Tocqueville saw the importance for freedom of voluntary associations in America *and* of *corps intermediares* in *ancien régime* France, but thought the authority of men within the family “natural.”

### **The autonomy-toleration debate**

A new book comes out of old dissatisfactions. One of the dissatisfactions that prompts this book (I will discuss others later) is with a particular debate within broadly Rawlsian liberal political theory in the 1990s. In that decade’s arguments about liberalism, culture, and religion, a distinction between

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<sup>1</sup> Discussion of the use of the word “liberal” in historical studies omitted here. The position I take is that the word can be fairly used starting in the mid-18<sup>th</sup> century, with Montesquieu and his generation, though the word was not used to describe political doctrines until the early 19<sup>th</sup> century. “Protoliberal” groups various earlier figures including Locke, common lawyers such as Coke, and the momarchomachs, though it is obviously an awkward shorthand and I use it sparingly.

"toleration" and "autonomy" as foundations of liberalism gained a fairly widespread acceptance in the literature.<sup>2</sup> The difference between them matters when, to use Kymlicka's language, we are discussing the right of illiberal cultural or religious groups to impose "internal restrictions" on their members. It matters when we debate the justifiable boundary between state and parental decisionmaking over education. Should the state tolerate illiberal groups, groups that systematically [try to] restrain the autonomy of their members and discourage them from reconsidering and revising their beliefs? Should it restrain the urge to make cultural and religious groups into little liberal democracies? Will Kymlicka, in his tremendously influential account of liberalism and the rights of cultural minorities, maintained that liberal principles entail that such minorities have the right to maintain themselves as cultures, but also entail that they do *not* have the right to maintain internal illiberalism, to inhibit the autonomy of their members. He construed this, not as a dispute within *liberalism*, but as one between two kinds of *toleration*, a liberal one that values autonomy and an illiberal one that does not. Susan Moller Okin staked out a position on one edge of this debate, maintaining that cultural and religious minorities inculcate sexist views as well as practicing sexist traditions, and that women's freedom would be best served if these traditional communities become "extinct."<sup>3</sup> Following her earlier writings on the ways in which the family as currently constituted could be a threat to the liberal freedom and standing of women, she argued that cultural and religious groups similarly threaten the liberty of women and children. Brian Barry and Russell Hardin both held that multiculturalism as such represented a betrayal of liberalism's commitment to individuals' priority over and freedom within groups.<sup>4</sup> And, in the wake of

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<sup>2</sup> See, *inter alia*, Will Kymlicka, *Multicultural Citizenship* (Oxford: Oxford University Press, 1995), chapter 8; William Galston, "Two Concepts of Liberalism," 105 *Ethics* 105 (1995):516-34; Geoffrey Brahm Levey, "Equality, Autonomy, and Cultural Rights," 25 *Political Theory* 215-248 (1997); Emily Gill, *Becoming Free: Autonomy & Diversity in the Liberal Polity*, (Lawrence, KS: University Press of Kansas, 2001); Chandran Kukathas, *The Liberal Archipelago* (Oxford: Oxford University Press, 2003).

<sup>3</sup> Susan Moller Okin, *Is Multiculturalism Bad For Women?* (Princeton: Princeton University Press, 1999)

<sup>4</sup> Brian Barry, *Culture and Equality*. Hardin discussed his view of these questions in scattered places throughout the 90s, e.g., "Special Status for Groups," *The Good Society*, vol. 6, no. 2, pp. 12-19, 1996; his fullest statement is the discussion of "group liberalism" in *Liberalism, Constitutionalism, and Democracy*, Oxford: Oxford University Press, 1999, pp. 326-32; and then in "Cultural Diversity and Liberalism," in Jörg Kühnelt, ed., *Political Legitimation Without Morality?* Springer, 2008.

John Rawls' *Political Liberalism*, Steven Macedo argued that the turn from comprehensive to political liberalism did not much alter the liberal demand to educate children to autonomy, in ways that would allow them to choose for themselves to reject their traditional cultural or religious upbringings.<sup>5</sup>

By contrast, Chandran Kukathas articulated and defended a liberal vision defined almost wholly in terms of toleration and freedom of association, one that protects cultural and religious groups from almost all state intrusion, even if they refuse to educate their young, and even if the idea of questioning and rejecting them is substantially unimaginable to their members. Liberty is threatened by the state; it is realized in the societies, associations, and communities free persons join or find themselves in and do not leave. William Galston described these debates as showing a conflict between liberalism with autonomy as its central value and liberalism that values diversity, and argued that the latter is more genuinely liberal.<sup>6</sup>

My dissatisfaction with these various arguments is threefold. First, many of the participants framed them as disputes over what *the* correct interpretation of liberalism demanded, and described the side they rejected as being incompatible with liberalism. Second, they were often pursued with what Ian Shapiro disparages as *gross concepts*:<sup>7</sup> freestanding words, often coming in opposed pairs ("community" and "autonomy" provide one of Shapiro's paired examples, as he wrote near the end of the preoccupation with the communitarian-liberal debate) that are the objects of second-order debated that substitute for first-order normative arguments. And, third, they were oddly detached from any sense of history, whether the history of liberal political ideas or the history of intermediate groups.

This is a book within and about liberal political theory. What I mean by that is best explained by getting on with it rather than talking about it; the book is in part an argument about what the liberal tradition is. But it may help to

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<sup>5</sup> Macedo, "Liberal Civic Education and Religious Fundamentalism: the case of God v John Rawls?" 105 *Ethics* 468-96 (2005); see also his "Community, Diversity, and Civic Education: Toward a Liberal Political Science of Group Life," 13 *Social Philosophy and Policy* 240-68 (1996).

<sup>6</sup> He later revised that statement, and endorsed the view I lay out in this book, in *The Practice of Liberal Pluralism*, Cambridge: Cambridge University Press, 2004.

<sup>7</sup> Ian Shapiro, "Gross Concepts in Political Argument," 17 *Political Theory* 51-76 (1989).

explain those dissatisfactions if I begin with some qualifications about the uses of the idea of liberalism in contemporary political theory, and some comments about its use to describe themes in the history of political thought.

One of the less happy legacies of the massive influence John Rawls has had on political theory is a tendency to think that “liberal” just means “moral” or “just” or “correct.” A correct moral argument about politics must be a correct *liberal* argument, and vice-versa; a particular [liberal] theory of justice generated the odd idea that a theory of justice is *as such* a theory of liberalism. That is not to say that the Rawlsian liberal standpoint has lacked for external, sometimes avowedly non-liberal, critics. Indeed, people who talk *about* liberalism, or use the word a lot, have no particular tendency to talk about it in a friendly way. “Liberalism” has long been a convenient name for whatever aspect of modernity or western societies a speaker happened to dislike. But those who write on substantive questions of rights or justice have, I think, sometimes failed to respect the boundedness of liberalism. Any argument that seemed to provide a correct account of a right or a question of distributive justice might have the word “liberal” hung upon it.

This is closely connected to my first dissatisfaction mentioned above. Along with the tendency to think that any apparently-correct view could be termed *liberal* sometimes goes a tendency to think that any apparently *incorrect* view therefore cannot be a *liberal* view. So a decision that, in some set of cases, autonomy is rightly privileged over toleration (or vice versa) seemed to encourage the thought that one is, and the other is not, the basic liberal value.

My interest is in liberal theories of intermediate groups, or, alternatively, a tension at the heart of liberal theory about such groups. I think that the liberal tension is the right tension, and that these problems are the right problems. And after having discussed the history of the tension, I will offer arguments within it about particular cases, arguments about better and worse ways to work out these problems in liberal theory. But liberalism is, as it were, one of the party positions of modernity, not the whole of normative thought about politics, and the best working out of a question within the terms set by the liberal tradition may not be (surely will not *always* be) the best way of working it out altogether. There could be other books written about the theories of association in conservatism or

socialism, to name two of the other party positions of modernity: a book about the conflict between guild socialism and democratic centralism, or one about navigating between a corporatism that uses the church as a pillar of the state and the ultramontane Catholicism that places salvationist aims first. And there could be normative philosophical arguments about freedom of association that could reach compelling conclusions that were not liberal ones.

The conservative and socialist equivalents of the pluralist-rationalist divide within liberalism might well include a similar ambivalence about the modern state. Like liberalism, conservatism and socialism as party ideas are modern ideas, situated within the state and making arguments about how its power should be deployed. But, again like liberalism, they both have important strands of thought that see the state as a primordial threat. Many socialists, of course, supported the use of central state power to remedy economic inequality. Socialists who look to the farmed commons before enclosure and the medieval labor guilds, however, sometimes see the early modern state as the engine of capitalist primitive accumulation, and the centralized modern state as such as entrenching the power of privileged capital. (Think of James Scott's sympathetic analyses of peasants trying to avoid incorporation into the cash economy, and colonial states trying to coerce them into it by demanding taxes paid in money not in kind.) Conservatives are normally the party of law and order, of the states' armed forces and security forces. But they are also the party of the rural, aristocratic, and church elites that find their positions seriously threatened by the bureaucratic state. In do not mention these possible parallels in order to explore them, but precisely to indicate topics that lie beyond this book's boundaries.

I will be arguing that liberalism consists of more than one thing, not that it encompasses everything. It is a particular constellation or hybrid or tension involving particular goods and values; it is not every good or value. I will be examining a tension I maintain to be central to liberalism; that means that my attention will not be primarily on liberalism's boundaries, edges, or rivals. But it has all of those things, and I neither deny nor forget that. More centrally, when I argue that the set of liberal reasons for deference to group pluralism in one case outweigh the liberal reasons against it (or vice versa), I am *not* denying that the outweighed values are liberal ones.

### **The scope of the rationalism- pluralism distinction**

It would be possible to think of the tension between rationalist and pluralist liberalism narrowly. Freedom of association has been a minor topic in contemporary political philosophy; multiculturalism somewhat less so, but it is still often seen as something off to the side of the big questions. One could, I suppose, think that the big questions of liberal political theory had been settled by Rawls and his followers, and that this book is concerned with the resolution of some problems of application in relatively narrow cases. For example, the questions of whether the family is a part of the Rawlsian basic structure, and if so, whether that means that intra-family relations are directly governed by rules of justice, have attracted considerable attention; within the Rawls literature, this is perhaps the best-known problem of liberalism and groups, the best-known instance of the kind of problem with which this book is concerned. While some have recognized that those are important questions-- the difference between answering yes to both and answering no to either is the difference between a socially radical Rawlsianism and one much more reconcilable to the social status quo-- they are still often treated as technical problems within an agreed-upon Rawlsian framework.

I do not think that the relationship between rationalist and pluralist liberalism is a narrow question, or one that arises within such a settled framework. The attempt to use state power to push back against oppressive social power, the desire to create a freer society by creating one of legally independent individuals and dethroning group privilege, and the question of how to do these things without removing all obstacles to state power that becomes oppressive in turn: I think that these projects and problems are and have always been central to liberalism. Their recurrence under new terms and with respect to new cases does not mean that we should treat them as confined within those terms, those cases.

Rather than thinking in terms of a series of narrow questions in applied political ethics-- justice and the family, freedom of association, the limits of multiculturalism-- I suggest that we think in terms of state-society relations writ large. Groups and institutions are not occasional interruptions in social life; they

are the stuff of social life. Certain elements of liberal theory are sometimes construed as moral confrontations between an abstract individual rights-bearer and the state; and some post-Warren Court trends in liberal philosophy have treated those elements as paradigmatic. The lone heretic standing alone against a religiously oppressive state, obeying the demand of her conscience that she can do no other, is a liberal hero if anyone is.

But freedom of religion is almost always exercised in groups, no matter how individual a matter the conscience may be; both the orthodox and the schismatic congregate. The individual who stands alone, moreover, does not confront an abstract state; he or she confronts a state that may have been captured or influenced by one or another church, that may be used by the church to enforce its own orthodoxy.

My point is not only about sociological plausibility. Political philosophies always abstract from some social facts to isolate some more morally salient and central features. Far too much ink has been wasted making some variation of the claim that liberalism is wrong or impoverished because individuals aren't really isolated free actors or because groups and cultures exist, as though liberals had just forgotten this when they theorized about individual rights. Indeed, my claim is precisely that *liberal political thought has traditionally been centrally concerned with group life and state-society relations*. Liberal political theories are in substantial part theories *about* group life. But there is, and has been, a plurality of liberal theories about group life. The centrality of group social life to liberal political thought does not mean that there has been just one liberal philosophy about it.

### **The Ambiguity of civil society**

This book is mainly about what has come to be called "civil society" in the social science and social theory of the past few decades: the sphere of secondary or intermediate associations (as distinct from the primary association of the family) that are neither primarily actors on the market like firms, nor parts of the

state—with some ambiguity about trade unions and political parties, oriented to but not *of* the market and the state respectively.

There is, however, an ambiguity embedded in the phrase “civil society,” one that mirrors the ambiguity within liberalism. The “civil society” to which John Locke and the early Enlightenment thinkers appealed was the civil society that found its origins in medieval cities: bounded political communities subject to the rule of law and promising equality before the law (at least compared with the surrounding feudal order). The civil society of contractarianism was the city writ large, as large as the new modern state. It trumped the barbaric feudal rules of the past, and the contentious infamy of religious jurisdictions or religious wars. Civil society was *civic* society, the society of the *civitas*. Far from being a sphere fundamentally distinct from the state, it was a way of conceptualizing and idealizing the state, based on the model of the city. That civil society was an antecedent of ours in at least this respect: it necessarily reduced churches to something like a noncoercive role. Within a civil society, a church could not be anything much more than a voluntary association as we understand it. But it would have struck the thinkers of the era as perverse to *identify* civil society with institutionalized churches while *distinguishing* it from a law-governed polity.

“Civil society” suggests the self-governing city or city-state, free of feudal power or coercive religious jurisdiction. In early modernity, this urban sense of a complete political society with rough equality before the law and excluding religious violence became generalized to the much larger entities we now think of as nation-states-- the Hobbesian, Weberian, Westphalian states that overpowered coercive church jurisdiction and suppressed the possibility of religious civil war. And so, in the writings of someone like John Locke, civil society is political society, the self-contained and unified political society that can apply a general law and that excludes external (e.g. church) claims of political power. There was an important sense in which that society offered freedom-- freedom from the inquisitors and their Protestant equivalents. That is, civil society-as-state suppressed the power of intermediate institutions.

Even Locke, who (exceptionally among contractarians) understood society to have been formed separately from the state, does not alter this pattern. Locke’s society is, to be anachronistic, the *pouvoir constituant*. Its function in the

argument is to choose its government, and *in extremis* to regain the authority to do so. It is unitary and political, though not of itself state-like. It is not pluralistic and extra-political, as we normally think of civil society as being.

That modern sense of the idea required the ability to distinguish between society and the polity—so that one might, for example, think that there is a Scottish society that persists, in changed form, even after there is no more Scottish state, or that English society survived the changes in regime of 1648, 1660, and 1688. This idea was certainly not a modern invention; medieval Christendom was a society of sorts that was not bound within any single polity, and the Italy that Machiavelli wished to see liberated was, too. But the idea had been obscured by both the rise of the absolutist state and the philosophy of contractarian civil society.

Its reemergence in 18<sup>th</sup>-century social thought encompassed many ideas that strike us as different: a sense of what we call cultures, including national cultures (and ultimately including nations as such); a sense of a social order that could change—for example, becoming progressively more polite and refined, more civil in the sense of civility and civilized—*without* a change in political regime; and a sense of an *economic* order that could likewise change, and that was conceptually distinct from the public fisc.

All of these ideas are present in Montesquieu's *Spirit of the Laws*, which does not use the phrase "civil society." They are imported and refined in the work of Adam Ferguson, who prominently does. His *Essay Concerning the History of Civil Society* is in large part a (partly-conjectural) history of *society*, in which forms of political organization are not foundational, in which contractarianism is devastatingly rejected, and in which social-cultural-economic orders change over time and place, sometimes bringing political change in their wake. Ferguson and Adam Smith helped to pioneer the idea of social spheres distinct from political society-- a society, and an economy, that could persist over time and survive changes in political regime. (Scottish society and the Scottish economy changed, but did not disappear, when the Scottish state disappeared into the British.) That extra-political social order could change dramatically, of course, and its changes over historical time were Ferguson's and Smith's primary

interests; its conceptual independence from the political order was merely a prerequisite to clear understanding.

*Civil* society is the social(-cultural-economic) order that underpins the kind of legal-political order that had once gone by the name. And therefore, in part, civil society is the market economy, and the history of civil society is the history of commercial society. This was not necessarily politically opposed to the older Lockean understanding; free contracting agents with equality before the law engaged in (among other things) market transactions. If economic civil society underpinned legal civil society, the latter also facilitated the former. The two were of course conjoined in Hegel's and Marx's *bourgeois* civil society—a near-redundancy, when one thinks about both the *bourg* and the *civitas*, the *burgher* and the citizen. They used the phrase to refer almost entirely to the market, under an appropriate legal regime-- the legal regime that recognizes free bourgeois citizens, legally autonomous and interacting with each other as equals.

The contemporary sense of “civil society” is as yet nowhere to be found. Locke and the contractarians, Ferguson, Hegel and Marx—all of these used the phrase to include *at least one of* what we now call “state” and “market”, the spheres that contemporary definitions of “civil society” ordinarily exclude at the outset. While Montesquieu, Ferguson, and Smith all recognizably analyzed aspects of social order outside the narrowly political or economic, none of them identified a pluralistic sphere of associations and organizations as constitutive of that order.

Ernest Gellner has argued for a fundamental continuity among these older meanings, and between them and our own. Thanks to the modern state's triumph over other coercive agencies, it is able to establish a social order in which individuals may detach themselves from traditional intermediate groupings: family and clan, province and county, guild and church. This frees them both to act individualistically in the marketplace, and to act associationally in society.

Modular man [Gellner's description for civil society's inhabitant] is capable of combining into effective associations and institutions, *without* these being total, multistranded, underwritten by ritual and made stable through being linked to a whole inside set of relationships, all of these being tied in with each other and so

immobilized. He can combine into specific-purpose, *ad-hoc*, limited associations, without binding himself by some blood ritual.<sup>8</sup>

Gellner insists that the triumph of the modern state was one precondition—necessary though far from sufficient—for the emergence of a truly civil society, one in which group ties may be changed “without shame or stigma... without formalities, ritual, trauma, or treason. This was not so in days of clans and lineages. The total national community is still very significant—or rather, it is more significant than it has ever been before—but its sub-units have lost their potency.” Only when group life becomes irrelevant for political and military power, because the state has trumped all substate competitors, can man become truly modular, able to enter, form, and leave group associations as a free agent.<sup>9</sup> Gellner’s unified account depicts a social world of liberal agents creating new voluntary associations as easily, and with the same rules, as they create economic firms or political parties.

I do not endorse all of Gellner’s account of civil society. Too much, in my view, rides on the ephemerality of associations. In civil society as we know it, vast portions of the associational sphere are populated by ethnic, cultural, linguistic, and religious groups. First and most important are the religious and cultural communities themselves, formally organized or not. But the sphere of formal associations is filled with groups with that have objects besides those communal identities but are *differentiated* by language, culture, religion, and so on: religiously-affiliated universities such as Brandeis and Brigham Young; differentiated fraternal organizations such as the Knights of Columbus; the YMCA, YWCA, YMHA, YWHA; professional associations (journalists’ associations in the U.S. include, among many similar examples, the Asian-American Journalists Association, the South Asian Journalists Association, the National Arab-American Journalists Association, the Muslim American Journalists Association, and the Native American Journalists Association); recreational and sporting clubs; and so on *ad*

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<sup>8</sup> Ernest Gellner, *Conditions of Liberty: Civil Society and Its Rivals*, p. 99.

<sup>9</sup> This argument connects directly with his more famous account of nationalism. The modern industrial economy demands modular workers rather than traditional craftsmen, workers who can shift from place to place, sector to sector, and job to job in response to changing economic conditions. This in turn requires a modular, all-purpose schooling rather than a specialized apprenticeship. And so there is tremendous pressure for literacy in homogenized and centralized languages, in place of an older world of constantly varying spoken regional dialects—and this engenders a kind of competitive scramble to identify and demarcate whole languages that can be the foundations of whole political-economic-educational orders. See Gellner, *Nations and Nationalism*.

*infinitum*. The sphere of voluntary association absolutely routinely builds on and draws from the group identities that Gellner imagines to have been superseded.<sup>10</sup>

But Gellner sees, in a way that the civil society triumphalists of the past twenty years have sometimes not, that the modern pluralistic and extra-political sphere of voluntary associations is entangled with older meanings of civil society. For our purposes, Lockean and statist civil society—the triumph of the nation-state over religious and other sub-state coercive powers—points the way toward rationalist liberalism. Our freedom is, in part, our freedom from group power, secured by a publicly-accessible and rationally-determined system of state law. And our freedom is also in part the freedom of *bourgeois* civil society, the freedom of formally legally equal persons to contract—a freedom that, it was eventually understood, included the freedom to form associations. What I would add is that our freedom is also, in part, the freedom to inhabit the extra-, pre-, or non-state social orders that make up “society” in the 18<sup>th</sup>-century sense, and that “civil” society draws on those orders as well as on the statist and the *bourgeois* traditions.

### **The pure liberal theory of freedom of association**

In this section I introduce what I’ll refer to as the pure liberal theory of freedom of association. Its purity—its lack of other elements mixed in—is not necessarily a compliment; I use “pure theory” in the way that is common among economists.<sup>11</sup> The opposite of “pure” may be “corrupt,” but it may also simply be “compounded” or “mixed” or “complex.” I don’t attribute the pure theory as I describe it here to any particular theorist, but I do not intend for it to be a straw man. It’s something close to the view I once held, and I still think it is a powerful view that gets at part of the truth. The pure theory should be a moment in liberal thought about associational life, even if it should not be the *final* moment.

The pure theory holds that persons should be free to form any associations or institutions that they wish, to structure and govern them however

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<sup>10</sup> This is a slight overstatement of Gellner’s view; I will return to his important, and correct, qualification in the final chapter. But he mistakes the general rule for the exception.

<sup>11</sup> It has sometimes been brought over into political theory, as in Geoffrey Brennan and Loren Lomasky’s *Democracy and Decision: The Pure Theory of Electoral Preference*. Compare, too, Hans Kelsen’s *Pure Theory of Law*.

they wish, and to live according to the rules and norms that they generate. Given that their freedom to create associations and institutions means that the associations and institutions then take on a moral and legal existence of their own, this in effect means that associations ought to have complete freedom to govern themselves by whatever procedures and rules they wish, and to admit or refuse to admit whomever they wish. The pure theory of freedom of association is a theory of freedom of *associations*. While associations remain restricted by the rules of justice in their interactions with outsiders—they may not break contracts, steal property, use force or fraud, and so on—they are substantially unconstrained in their dealings with members *qua* members and applicants for membership *qua* applicants.<sup>12</sup>

*Substantially* unconstrained does not mean *completely* unconstrained, and even the pure theory of freedom of association is not a theory of consent to slavery—persons cannot create an association which then has power of life and death over them, or power to hold them against their will. It need not be a theory that no rights are inalienable. The usual shorthand is to say that the pure theory assumes the availability of at least a formal right of exit—a right that includes rights against being killed by the group, enslaved by it, imprisoned by it, and so on. But it is a theory that says all rights that are alienable may be alienated to associations, so long as one remains a member.

The existing literature on the pure theory has mostly focused on the sufficiency or insufficiency of the right to exit so conceived. I mean to bracket that question (for now) and more fully examine what is attractive about the pure theory as well as what it means and entails—what it is that *may* be alienated to associations under it.<sup>13</sup>

The pure theory begins from the simple thoughts that what persons are free to do individually, they ought to be free to do jointly; and that what they are free to do or to refrain from doing, they ought to be free to conditionally promise one another to do or to refrain from doing. These together generate the freedom to combine together in a group and to agree to a decision-making procedure for

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<sup>12</sup> Compare Richard Garnett, “The Freedom of the Church,” 4 *Journal of Catholic Social Thought* 2007

<sup>13</sup> I also bracket whether even the exit exception can be justified on the pure theory’s terms; that is, my interest here is not in whether the pure theory rightly understood demands the right to sell oneself into slavery.

the governance of the group, one with authority to decide henceforth who shall become or remain a member and under what conditions, and who shall have the authority to alter to those conditions.

The conditions often take the form of Hartian primary rules: they govern the conduct of members. Indeed, in a sense these rules are the real business of membership; often they mark the important distinctions between members and nonmembers, and the opportunity to abide by them (among others who also do so) is one of the core meanings of joining. Such rules tell Catholics not to use contraception, university students not to commit plagiarism, condominium owners not to paint the outsides of their doors, Freemasons not to reveal lodge secrets, and club members to pay their dues. And so the freedom of associations to govern themselves includes their authority to regulate the conduct of their members. And, of course, such primary rules are often the real concern of those who think that groups impair the freedom of their members.

The association once created is not the mere creature of its founders. To take a traditional example: a group of persons may form a religious group devoted to certain teachings; they may endow the religious body with land and a building and create offices of ecclesiastical governance. Once they have done so, *all* of the founders could change their minds about religious questions and leave the group, with the group surviving their departures. Or, if the governing procedures they create are not monarchical or proprietary ones—that is, if they do not declare themselves the church’s heads for life—they might be outvoted or excommunicated for violations of primary rules or otherwise removed from authority. The formal organization (whether or not it is recognized by the state, a matter to which we will return many times) endures even in the face of such changes. Associations might therefore exist in perpetuity—some universities and religious orders have been in continuous existence for centuries longer than the states in which they are currently situated, with a good number approaching the millennium mark.

But an association need not be immortal for the point at hand to matter: associations are created as exercises of the freedom of their founders, but once created stand apart from their founders. This also means that even those whose freedom was exercised in the association’s creation might find themselves almost

immediately constrained by it. That is a necessary consequence of having the freedom to associate: the freedom to subject oneself to constraints. And so the pure theory holds that associations' regulation of members' conduct by primary rules does *not* impair freedom. If the rule mandates behavior that an individual person morally could engage in, or prohibits behavior that it's legitimate to refrain from, then the fact that a group of persons abide by the mandate or prohibition as a rule is simply their doing together what they would have been free to do individually. The freedom to associate and to create something that socially exist outside oneself just *is* the freedom to accept that entity's authority to govern one's actions.

Throughout this section I have been referring to associations and institutions; and while primary rules seem to be the primary objects of moral concern, formal associations and institutions (the kinds of things that are founded and joined) also have secondary rules for ongoing governance, including rules for adjudicating violations of primary rules as well as rules for the alteration of old primary rules or the adoption of new ones. Many of the disputes that have concerned political theorists, by contrast, seem to involve non-institutionalized *groups* or *traditions* or *cultures*.

From the perspective of the pure theory, this is a distinction *almost* without a difference.<sup>14</sup> These non-institutionalized groups have normative structures with primary rules that all members are under a generalized duty to follow. Conflicts of interpretation lead to divergences in practice, not to formal conflicts in adjudicative venues. Enforcement of the norms is radically decentralized—to local communities or congregations, or to social networks willing and able to pressure their members and shun those who stray too far, or (probably “especially”) to families. Again, the decision to follow a norm that mandates behavior that's morally permissible or prohibits behavior that's

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<sup>14</sup> I omit here the other apparent difference: that formal associations are *joined*, while unincorporated groups are *born into*. The problem of being *born into* will occupy a great deal of attention in the book, but it does not actually track the formal/ unincorporated distinction very closely—a person can be born a Catholic, or born living in and heir to property in a residential association. So far as the pure theory is concerned, being born into does not make a difference; everyone is born *somewhere* in particular to particular parents, and even the freest person spends his or her life making choices shaped by particular contexts—the child of the most cosmopolitan urbanites no less than the Amish child. They both grow up choosing to do things that they are morally permitted to choose, and neither has meaningful access to every conceivable life choice.

morally omittable is simply the exercise of freedom. The decision to enforce norms—by disowning a child, breaking with a friend, refusing to marry a potential partner, or pressuring others to do those things—is, likewise, simply the choice to do something that a pure liberal theory recognizes the right to do: disassociate from another person. That the disassociation is done by many at the same time, and for norm-enforcing reasons rather than personal whim, doesn't change its moral status.

Probably the most famous statement of something like the pure theory in contemporary political philosophy was offered by Robert Nozick in his discussion of a framework for utopias, in Part III of *Anarchy, State, and Utopia*.<sup>15</sup> The pure theory is compatible with the vision described there, but does not entail it, and I do not think that Nozick's vision is the most likely manifestation of even a radical and absolute freedom of association. The associations described there seem to be total communities, for the most part, lived in geographically and governing all aspects of their inhabitants' lives jointly and simultaneously. I doubt that Nozick saw this as likely, either; it seems to have been a heuristic for the discussion of utopian communities. But in any case: the pluralism that gives rise to the complex range of associations, religions, affiliations, and identities in modern life—in other words, the precisely the source of associational life in the first place—are likely to persist. This need not, will not, mean that memberships will be entirely cross-cutting; many groups will be *internally* pluralistic while still retaining substantial barriers to memberships that cut across its border from the outside world. Think of the range of associations and institutions that make up the social life of contemporary conservative white Protestantism in America: universities, private schools, home schooling associations, partly-competing denominations and congregations within each denomination, competing providers of Christian-themed media programming, and so on, paralleling the associational complexity of life in the rest of American society, though still clearly (and maybe increasingly) differentiated from it. This is not Calvin's Geneva, and is also not a unified-and-isolated Nozickean utopian community.

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<sup>15</sup> Robert Nozick, *Anarchy, State, and Utopia*, new York: Basic Books, 1973

### Why the pure theory is not satisfactory

Nonetheless, the pure theory is built on rights-claims, not on sociological predictions; and it does not *exclude* the Nozickean outcome. And that means that the pure theory, by itself, has the potential to be self-undermining.

It has often been noted, against attempts to strongly distinguish equality of opportunity from equality of outcomes, that inequality of outcomes in one generation becomes inequality of opportunities in the next. In other words, equality of opportunity is self-undermining in the medium term. The same might be true of pure freedom of association. (It might not, but the contingencies will be empirical ones alien to the purity of the pure theory.) Freedom of association in one generation could leave the next with a social world wholly carved up into mutually-exclusive groups, with no space in between.

The space that ceases to be available might be metaphorical social space, but the point is easiest to see if we begin with literal physical space. Persons who are free to own land are free to give the land they own to the associations they form. Associations are long-lived, and relatively immune to the market pressures and split-inheritance problems that tend to disperse large property holdings over time; associational ownership can act like entail laws. A world of pure freedom of association in which Nozickean total communities arise could be a world in which one generation's persons all give or bequeath their land to their associations—leaving no physical space outside the control of one or another group for their successors. That means that the succeeding generations might have, literally, no place to stand if they wish to exit the groups into which they are born, and no resources of space in which they could assemble their own dissident or hybrid or rival associations. The worry is not entirely fanciful; the tendency of the medieval Roman Catholic Church (and its bishoprics, monastic orders, and so on) to endlessly expand their land holdings by gift or bequest prompted legal responses across Europe (e.g. *mortmain* statutes), as will be discussed later.

Another reason not to rest content with the pure theory concerns rule of law constraints on groups' internal procedures. Free persons may choose not to exercise their freedom to act in particular ways, and may do so in concert with others, and there is no paradox in that. Groups' primary rules are thus directly

assembled from the rights of those governed by them. But subjecting oneself to arbitrary procedures, to ruleless rule, is a different matter.<sup>16</sup> Locke argued that there is a categorical moral difference between consenting to even the absolute authority of another and consenting to absolute *and arbitrary* rule; the latter would be so unreasonable that it cannot be imputed to anyone. We need not endorse Locke's claim that state authority *is* legitimated by consent in order to see his point about arbitrariness, and the paradoxes involved in consenting to it. So the reasons for very wide and unsupervised latitude for intermediate institutions' primary rules do not straightforwardly carry over into their adjudicative procedures.

In fact, systems of internal rules and bylaws, and rule-governed procedures for their adjudication and enforcement, are pervasive features of associational life. Outside of occasional cult-like settings, we do not expect to see secondary groups or institutions characterized by rulelessness and arbitrary whim; and members do not expect the groups they join to be so characterized. However thick and pervasive the primary rules, the expectation of fair, impartial, consistent application of them is widespread.<sup>17</sup> And since, as has been noted, the internal system of rules routinely creates conditions that the general legal system must take notice of, occasions regularly present themselves when the general legal system must at least decide whether to decide on the fairness of internal procedures. It cannot simply assume the hands-off approach envisioned by the pure theory; and often it will not be able to take that approach at all. Violations of the rule of law within groups, whether because procedures are broken,

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<sup>16</sup> Here there is a resemblance to the distinction between non-interference and non-domination conceptions of freedom made famous by Philip Pettit, *Republicanism*. I could be understood to be saying that there is no right against interference by one's group but there is a right against domination by one's group. I find it more illuminating to think in terms of Locke's distinction between absolute and arbitrary rule, and in terms of Fuller's development of the idea of the rule of law. That non-arbitrariness was central to Locke's conception of freedom should put pressure on the commonplace that a "liberal" conception of freedom is concerned only with Hobbesian non-interference; an understanding of liberalism that includes Hobbes *and* excludes Locke is a sign that something has gone wrong.

<sup>17</sup> Indeed it is so widespread that there is often pressure to judicialize those internal proceedings to inappropriate degrees. Universities, for example, are constantly called upon to (and sometimes do) make their internal disciplinary proceedings more and more court-like, up to and including rights of professional legal counsel. I think this is typically inappropriate, for reasons that will be discussed in chapter **number**. For current purposes the point is about expectations—what people think they're agreeing to when they join an intermediate institution. While the pure theory is right that we must presume consent to primary rules that differ from the liberal state's laws, matters are at least more complicated about adjudicative procedures.

corrupted, or ignored, or because the procedures themselves are gravely defective, may demand outside intervention. At least the *possibility* of that cannot be forestalled as simply as the pure theory's deference to internal primary rules.

These considerations—the possibility of totalizing groups, the possibility of shrinking social space between groups, and the possibility of violations of the rule of law—all contribute to the final, and in some ways overarching, reason why the pure theory is not satisfactory. *Authority generates power.*

Intermediate institutions and groups have both primary rules and enforcement and adjudicative mechanisms, whether the latter are decentralized and informal (e.g. each set of parents separately enforcing norms against their own children, or clusters of friends enforce against their peers by social distancing) or centralized and formal (the Catholic Church). As the pure theory helps us see, this is legitimate; individual rights-bearers may rightfully lead their lives subject to any number of such rules and mechanisms. Indeed, anyone who lives a non-hermit life probably inevitably does so.

Authority relationships, Joseph Raz has taught us, are characterized by a person's having reason to defer to the judgments of another—a person's doing better, according to his or her own reasons, for allowing those judgments to replace their own (or at least some of their own). But whenever those relations hold, *even though the person submitting to authority has valid reasons to do so*, some other person or group of persons is vested with the discretion to make decisions. The fact that an authority relation in aggregate serves the interests of those subject to it does not mean that each of the decisions reached will do so. And this creates the space for the authority-holders to reach (at least some) decisions for their own reasons, in their own interests.

Locke understood that authority generates power. For Locke this is a source of serious concern. The absence of authority is at the core of the inconveniences of the state of nature; we will all do better, by our own lights and in serving our own reasons, if we agree to accept final judgments of impartial judges, even when they reach different judgments than we would if we were acting as judges in our own respective cases. And so we create a government to allow us to coordinate on authoritative impartial judges. But that government is

itself staffed by human beings who are now themselves called upon to act as judges in their own case, both about the limits of their authority and about the decisions to reach under it. They will sometimes abuse that authority; they will sometimes act within its bounds to enhance their own power over others. There is a direct line from the authoritative relations we need and the power structures we have reason to fear.

The dynamic is somewhat different for partial authorities—authorities that, unlike the state, do not claim the final and supreme right to determine the boundaries of their own authority over every question. And liberals believe that the moral problem is at least somewhat different when authorities lack violent, coercive power with which to enforce their judgments. Nonetheless, authority relations outside the state still generate power. Precisely so far as we have reason to accept authority—because we have reasons to remain members of the relevant groups, whether those reasons concern the salvation of our souls or our friendly relations with peers or the accomplishment of beneficent social goals—the authority figures gain power over us. They cannot, under the pure theory, *coerce* us; but we have our own good reasons for submitting, for continuing to fund the groups or volunteer for them or live in them. We are participants in the growth of the power over us; but the power is no less real for that. And the pure theory's reasons for accepting authority relations do not apply to power relations as such. Maybe the power generated by the groups' authority relations is nothing much to worry about—but we cannot know that only by analyzing the rights of those involved.

### **Congruence**

There is no single argument on the side of rationalist liberalism that can be contrasted with the pure theory on the side of pluralist liberalism. In this section I will describe the idea that is sometimes taken to be that contrast, congruence.<sup>18</sup> I will suggest that it is not a coherent theory in the way that the pure theory is. Indeed, congruence is typically not laid out as a full theory. It is nonetheless

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<sup>18</sup> I borrow the word from Nancy Rosenblum's important treatment of recognizably the same concept in *Membership and Morals*, although I push the concept in a somewhat different direction, and it is not a word in widespread use in the literature.

often reverted to or implicitly relied upon, and it is worth drawing it out into the open for an explicit examination.<sup>19</sup>

The core idea of congruence is that associations, groups, and intermediate bodies ought to be congruent—in their internal governance and their internal rules—with the just liberal state. They are normatively constrained to be democratic, constitutional, and rights-respecting.<sup>20</sup> Just as the state ought to be governed by the consent of a majority of its members, so ought an association. Just as the state is prohibited from passing rules (that is to say, laws) that restrict basic liberties, deny equality, or impair fundamental rights, so are associations and non-institutionalized groups. Liberalism is concerned with the protection of individual freedom, regardless of which group or institution threatens it.

John Stuart Mill's *On Liberty* is centrally concerned with a repressive intellectual culture, with the human propensity to “like in groups” and to succumb to (and socially enforce) the temptation of ape-like imitation; it aims to defend *individuality*, not merely—not even primarily—formal freedom from state regulation. Kant's “What Is Enlightenment” emphasizes the threat to freedom of thought posed by a religious group demanding that members swear not to change their minds about religious questions. The idea that persons are free and equal does not categorically distinguish between state- and non-state *denials* of freedom and equality. The moral interests protected by liberal freedom and equality must be defended against associations and groups as well as against the state. We have long since learned that, for example, racial discrimination by private employers and schools and in private housing markets can maintain a racial caste system, and the extension of civil rights norms into the private sphere has been a major liberal triumph. Liberty, no less than equality, demands protection against non-state actors. Universities should not restrict speech; churches should not discriminate on the basis of sex in access to clerical office; residential associations should not restrict the freedom of homeowners to use

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<sup>19</sup> While Susan Moller Okin occasionally articulated something close to the pure convergence view, it does not appear in her writings. I think that the published accounts closest to it are those of Russell Hardin, cited above. But unsystematic uses of it are common.

<sup>20</sup> Political theories that are not liberal, democratic, or constitutionalist have their versions of congruence theory as well; this will be seen to be important later on, but is set aside for the moment.

their property; families should not restrict the freedom of their children to marry (or not) whomever they wish; and so on.

### **Why congruence is not satisfactory**

I said that congruence is not a wholly coherent theory. To see why, consider the idea of freedom of religion—within a church. There is *some* sense in which liberal justice prohibits churches restricting the religious freedom of their members. For example, they may not attempt to kill apostates and blasphemers. They may refuse to recognize conversions away from the faith, but the liberal state must place sharp boundaries on what that refusal can mean; as far as it is concerned, the ex-member is outside church jurisdiction. But it does *not* make sense for the liberal state to tell churches that they must respect the religious freedom of their current and ongoing members—that is, that they must treat any or all religious beliefs as compatible with membership, the way that the liberal state must treat any or all religious beliefs as compatible with citizenship. Churches are, must be, free to prohibit apostasy, blasphemy, out-conversion, and denial of the religion’s claims *for those who wish to remain members in good standing*. A church that is unable to insist on adherence to its own religious tenets as a condition of membership is unable to *be* a church.<sup>21</sup>

To take a less weighty example: a homeowners’ association or a condominium association just *is*, in part, an agreement to waive certain rights of use of one’s property as against the association’s governing board. To buy into such an association, and then assert one’s unconditional freedom of property-use against its rules, is to make a basic mistake. One might coherently wish that there were no such thing as homeowners’ or condo associations; and one might certainly decide that some rule or another is unnecessarily intrusive. (We will return to such problems.) But one cannot wish to have homeowners’ associations that leave their members as untrammled as they would have been without it. The freedom to form or join such associations is, in substantial part, the freedom to allow one’s use of one’s property to be limited.

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<sup>21</sup> I develop this argument at somewhat greater length in “Classifying Cultural Rights,” *Nomos XXXIX: Ethnicity and Group Rights*, Kymlicka and Shapiro eds., New York: NYU Press, 1997.

More broadly: the doctrine of congruence, treated seriously as a set of prohibitions, prohibits persons from making any choices that would constrain their own future choices—which means that they may not make any choices of promise or commitment at all, and indeed few non-trivial choices of any sort. A contract entails the waiver as against some person of something one has a right to—something one owns, or the use of a particular unit of time, for example. A group, or an association, or a tradition in part consists of primary rules governing members' behavior beyond the primary rules already enforced by the state (no murder, no theft, no driving on the wrong side of the road, and so on). Joining such a group, then, is like a waiver of the use of some rights. While performing the job for which I have contracted, I waive the exercise of my right to determine what to do with my time. When selling something I own, I relinquish my right to it, as against the person to whom I sell it. While sitting in the pews a church I have joined, I waive my right to speak freely about religious matters and persuade my neighbors of my own views. Such waivers are a great deal of what we *do* with our freedom, and only confusion results if we take the “inalienability” of rights to mean that their holder cannot even for a moment waive their exercise. Strictly construed, convergence theory is akin to the old saying that one ought only to tolerate the tolerant—and, like that saying, it dissolves into paradox or incoherence almost immediately.<sup>22</sup>

None of this is to say that intermediate groups can never impair the freedom of their members. It is only to rule out reaching that conclusion in the quick way described here: with a direct move from the rights liberal states must not violate to rights intermediate groups may not demand waivers of. If there is meaning in the idea that groups can threaten the freedom of their members, it is to be found elsewhere than in a simple analogy of a group's primary rules to a state's laws.

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<sup>22</sup> See the discussion in Michael Walzer, *On Toleration*.

## Chapter 2. Reunderstanding intermediate groups

### Institutions, social theory, and the autonomy of political theory

In the previous chapter I described two arguments about the relationship among persons, groups, and freedom. Each was highly formal and abstract: a pure theory of free association that denied that the primary rules of non-state groups, provided that they are enforced only by disassociation and exclusion, can ever count as violations of the freedom of members, and a theory of convergence that held that they always did. Both were found to be unsatisfactory.

One way of understanding the problem with the pure theory and congruence is this: the pure theory treats groups as if they were individual persons, while congruence treats groups as if they were states. On the pure theory, association wield in aggregate the rights against outsiders that their members have, and their internal rules over members are considered little-to-no different from an individual person's own reasons for action. On the congruence theory, associations' rules are considered tightly analogous to the legislation of a state, and subject to the same constraints as morally legitimate state legislation.

In this chapter I adopt a different tack. I think that the problems at stake are not susceptible to dissolution by definition; what is at stake is not just what formally *counts* as a restriction of freedom. The enduring tension between pluralist and rationalist strands in liberalism is not between such absolute positions, and is not centered on such formal questions. Rather, it encompasses competing moral and social theories, claims that are sometimes in different registers altogether, and that often involve broad empirical generalizations about the behavior of particular kinds of institutions. Such generalizations rest on the thought that institutions and actors will not always behave as they should; that they tend to accumulate power, and use it for purposes beyond those that are legitimate; that they have systematic tendencies that should be taken into account in thinking about our normative principles.

Such ideas take political theory out of the realm of moral philosophy, and make it in part a branch of social theory. As Bernard Williams put it in the fuller version of Part I's epigraph,

[P]olitical philosophy's habitual, and it seems ineliminable, dependence on the urgency of political questions which are not in the first instance philosophical, is of a piece with its insistence, when at all interesting, on being both normative and impure. It is normative at least in the sense that first-order moral and political disagreement with the author can relevantly motivate disagreement with his philosophy, and impure in the sense that materials from non-philosophical sources-- an involvement with history or the social sciences, for instance-- are likely to play a more than illustrative part in the argument."<sup>23</sup>

*Pure* theories, like (I will argue below) *ideal* theories, are of limited use in political theory. And the basic disagreements between pluralist and rationalist liberalism are not at the level of pure or ideal theories—but are no less fundamental for that.

In this chapter I describe some of the social-theoretical claims that do divide the two strands—the empirical patterns and generalizations relied upon, the history drawn upon. States tend to be more suspicious of and restrictive toward associations than is justified; they tend to seek centralization of authority and homogenization of cultural and linguistic identities; they tend to see local threats to freedom in minority practices that they do not understand. Those who lead intermediate groups, in turn, tend to build the authority they necessarily have over internal matters into a broader power over members' lives. These tendencies are not to be idealized away; in a political theory that is autonomous of moral philosophy, they are to be built in. And they have been built in to the dynamics of interactions between states and intermediate groups—and into the arguments between pluralist and rationalist liberals.

A liberal political theorist engaged in ideal theory might ask a question like: within a just political order, what rights and authority would intermediate bodies justly hold, over their members or against non-members or both? There can be a great deal of sense in asking this kind of question in this way. After all, if we're engaged in a normative inquiry about what justice demands in this or that sphere of political and social life, if we're imagining a world in which just rules or just outcomes are feasible in that sphere, it would seem odd to think of justice as pertaining *only* in that sphere. One needn't believe that morality or

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<sup>23</sup> Bernard Williams, "Political Philosophy and the Analytical Tradition," in *Philosophy as a Humanistic Discipline*, p. 155.

justice is a seamless web to think that they are better-understood in one spot or another against a moral or just background. The more unjust the background social order, the stranger it can sometimes seem to wonder about morality in one or another aspect of it. The analysis of legal ethics under Stalinist show trials is a basically misguided, perverse enterprise; so is the analysis of the ethical demands on buyers and sellers in a chattel slave market. Even well shy of such moral surrealism, however, strange analytical inconsistencies can show up in nonideal normative theory. And so there might be something odd in thinking that a normative theory about intermediate groups would be concerned with their ability to resist state projects. Normative political theory's questions typically concern *what the state should do*; it seems strange and self-contradictory to answer such questions based on the assumption that states will do what they *shouldn't*. As we shall see, this has been a recurring view for centuries: that intermediate bodies were valuable when they checked monarchies but would be pernicious once monarchies have been replaced by democratic republics, or that the moral importance of a robust civil society of resistance against totalitarianism is irrelevant to the question of what rights associations should have in liberal democracies. That which was valuable when it interfered with states' pursuit of injustice only seems, in our hypothetical just society, to interfere with its state's pursuit of *justice*.

Nonetheless, we often ask normative questions in ways that assume we might identify the difference between morally better and morally worse in some social locale without having attained the morally best. Liberals and democrats argue for freedom of political speech—as an important right demanded by justice—precisely on the assumption that injustice happens, and must be exposed, denounced, and contested. The apparent inconsistency in thinking that we might have our just rights to speak freely secured in a partially-just-at-best polity does not much affect the analysis. Instead, liberals and democrats seem quite comfortable maintaining that a just society ought to recognize rights of freedom speech that are justified precisely in terms of the importance they would have in exposing injustice. Liberals recoil quickly from someone who tries to distinguish between rights of dissent from just and from unjust order, from the

claim that “you needed your right to object when you lived under injustice, but now that you live under justice, that right is superfluous and harmful.”

A moment’s reflection is all that is necessary to see why. For any moral and social condition shy of seamless justice perfectly and perpetually instantiated, there will always be a need for mechanisms of maintenance and improvement. A reasonably just society could protect freedom of speech to try to keep itself reasonably just, to improve where possible, to expose such episodic and particular injustices that might arise, and to hope that a wrong turn in the future might be mitigated or corrected. Moreover, the argument that the right to dissent is unneeded in a just society is so clearly one ripe for opportunistic abuse that we might take its use as *prima facie* evidence that the speaker does *not* intend to pursue just policies.<sup>24</sup>

There is a great deal that might be said in a similar vein about the freedom of intermediate groups. James Scott’s important study *Seeing Like A State* argues that a weak civil society, incapable of resisting state projects, is one of the facilitating conditions for the abusive extremes of high modernism he analyzes in that book. This sociological claim is compatible with a normative view that sites of resistance are valuable in an unjust polity but pernicious in a just one, and therefore that a just polity should not protect the ability of intermediate bodies to serve as such sites. It cannot directly contradict the hermetically-sealed ideal theory of the just society.

But it exists in obvious tension with that view. The reasonably just society today cannot be sure that it will remain so forever. If it takes a turn for the worse, a civil society capable of resistance can hardly be expected to spring up overnight. The minimum price to pay for the insurance policy of having robust associations when a society needs them to resist injustice could well be associations that resist the state even when it is moderately just.<sup>25</sup>

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<sup>24</sup> For the difficulties with the general kind of argument, see Alex Tuckness, *John Locke and the Legislative Point of View*. In the particular case of freedom of speech, the argument is stereotypically made in a post-revolutionary setting, in which those who were recently dissidents demanding rights to assemble, organize, protest, and so on deny both those rights and any charge of hypocrisy. It has often been associated with a turn to despotism or dictatorship, but not always: think of the Alien and Sedition Acts in 1790s Federalist America, and the state-level prosecutions of Federalist newspapers after Jefferson took office in 1801.

<sup>25</sup> Compare Nancy Rosenblum’s analysis of the militia movement in the United States in *Membership and Morals*.

This has been one of the ongoing tensions within liberal thought. If one concentrates on the mostly-liberal state at hand or presumed to be around the corner, then resistance to state power will be a clear negative. If one concentrates on all states since the state form came into existence, or the whole universe of possible states; or if one takes the perspective of a particular association that needs a habit of defending its freedom across regime changes, things will look quite different. While the approaches analyzed in the last chapter emphasize the moral relationship between individuals and groups, with a hypothetical state presumed to be available to enforce the correct view, this approach, and the ones to follow in this chapter, is often concerned with the character of *states*. Liberalism, as a theory within and postdating the modern Weberian-Westphalian state, is concerned with what such states are like, what they do, how they act—and not only how they act *when they are liberal*.

Much of liberal theory—indeed I think much of political theory—properly proceeds in this vein.<sup>26</sup> A theory of justice is not the whole of human morality; justice is, as Hume famously put it, a remedial virtue. The reasons why liberal political theory is not anarchistic center on what needs to be remediated: our limited altruism and partial mutual indifference; our limited and biased moral judgment yielding incompatible conclusions even among those aiming at moral outcomes; our pride and inflated sense of self-importance; our willingness to invade one another’s rights. But the institutions that we hope will palliate those problems and limit their effects are made up of the same human beings, and are shaped by the same social forces, as the social orders they are meant to govern. States and legal systems are not extra-social, extra-human entities that seamlessly pursue justice; they are human institutions, populated by, if you will forgive the pun, just us.

This thought is central to the tradition of liberal constitutionalism: we should not theorize either as if men were angels, or as if angels are to govern

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<sup>26</sup> I discuss these issues further in “Liberal Jacobinism;” “Contextualism, Constitutionalism, and *Modus Vivendi* approaches;” and my review of G.A. Cohen’s *Rescuing Justice and Equality*.

men.<sup>27</sup> I believe that this leaves us necessarily stranded in what is now termed non-ideal theory; that is, I believe that “ideal theory” as that category has developed since Rawls ends by not being political theory at all, but only moral philosophy applied to institutions that it cannot fully justify or understand. And so in what follows I aim to proceed symmetrically, treating states and non-state institutions and groups as similarly prone to non-angelic behavior.

### **Tendencies toward state excess**

#### *1. Property, secrecy, and transnationalism*

One recurring pattern of relations between states and intermediate bodies concerns resources. To put the matter one-sidedly: political authorities recurrently expropriate the resources of intermediate bodies. (I will put it less one-sidedly below.) While this is not unique to the modern state—the medieval French monarchy was crushed the Knights Templar and expropriated that order’s wealth—it is strongly characteristic of the modern state as it emerged out of medieval pluralism. The expropriation of church lands and wealth and the looting of nunneries and monasteries stands as an important moment in the development of many west European states, from Henry VIII in England to revolutionary France to newly-unified Italy.

The intergenerational continuity of intermediate bodies allows them to accumulate resources over time (and, where these are possible, to invest with a long time horizon and with the benefits of compound interest). And if intermediate institutions are more-or-less voluntarily funded by their members (at least more-voluntarily than political authorities are), then selection effects will mean that those intermediate bodies that survive over time are those that can attract relatively enthusiastic contributions and bequests. So, over time, those intermediate bodies that survive often become relatively wealthy. Moreover,

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<sup>27</sup> I do not believe that Gregory Kavka’s “Why Even Morally Perfect People Would Need Government” accomplishes what it claims to in overcoming the “if men were angels” tradition. Much of the traction in that article comes from the cognitive limits he imagines angels to have—that is, while they are *morally* perfect, they still do not have perfect judgment. This might be an argument against Hume, who uses limited benevolence as a summary of many of the problems to be overcome; it is not an argument against Locke, for whom contradictory judgments of the law of nature, however arrived at, are the central problem. Kavka does not show that *perfect* people would need, or want, government, only that *morally* perfect but cognitively imperfect people would.

some intermediate institutions exist across political boundaries in ways that allow them to benefit from international trade or from resource movements to evade local taxes and inflation. The Knights of Malta were not a bank; but they had an institutional structure that allowed them to act as one in a fairly reliable, Mediterranean-wide way, and they grew wealthy in part for that reason.

To contemporary minds shaped by, e.g., debates about the treatment in the tax code of university endowments, the wealth of intermediate bodies may look something like a deliberate state policy. But that is not how the dynamics began. Universities, cities, nunneries and monastic orders, transnational bodies such as the Knights of Malta, Knights Templar, and Rosicrucians, were able to accumulate resources more or less to the degree that they could defend and/or conceal their resources from local political powers. During the era of relative decentralization of power in medieval Europe, that capacity to defend or conceal was relatively high. During the era of relative concentration of power characteristic of early modern absolutist Europe, that ability diminished. As state capacity increased, monasteries and nunneries were likely to be closed and have their wealth expropriated, in Catholic France as in Henrician England. This suggests that the earlier non-expropriation was not a deliberate policy, in the manner that the contemporary United States has a deliberate policy of allowing higher education to be supported by perpetual charitable endowments; it was simply a lack of effective ability.

Another way to look at the same dynamic is: the resource growth in intermediate institutions over time becomes a source of social inequality, and *in extremis* of absolute deprivation in the rest of society. We associate this view perhaps most prominently with the expropriation of church lands during the French Revolution. The Church had come to own such a large share of French agricultural land as to depress overall French wealth, and to make it difficult to accommodate population growth. But the question is older than that. Challenges to *mortmain* and to the tendency of the Church to swallow up resources which were then perpetually taken out of circulation were common in western Europe from the 13<sup>th</sup> century or so onward. Intermediate bodies may be even worse on this dimension than the aristocratic and feudal resource-holders which in some ways they resemble. The aristocratic family will someday face a

wastrel son who sells off the family estates (returning them to general circulation) to fund bad habits, or the ambitious one who sells them in order to finance commercial activity. The entail of estates is meant to prevent this but can only slow it; in the face of substantial financial pressure or opportunity costs, a way will be found (e.g. long-term leaseholds) to convert inherited dead resources into liquid capital.

The fear of losing resources (among other things) encourage intermediate groups to adopt habits and rules of privacy and secrecy, which in turn tends to fuel state suspicion. [omitted]

It is common to discuss intermediate groups as if they are wholly subsumed within one state; indeed, the word “intermediate” almost demands it. But that is misleading, and leads us to overlook another common source of state suspicion. The intermediate is often also the transpolitical or transjurisdictional, and suspect on those grounds. The phenomenon Will Kymlicka located in time and place in Central Europe in the 1990s<sup>28</sup>—the tendency of states to view their internal minorities as also (or primarily) the thin entering wedge for some external threat—is in a real sense typical. Sometimes the local minority or local group is seen as tied to some larger or more powerful neighbor: Anglophones in Québec as the stalking horse for Anglophone Canada or North America, Russians in the post-Soviet republics as stalking horses for Russia, Catholics within any Protestant state as owing allegiance to a foreign, Roman, prince. This is sometimes implausible to outside eyes, but revanchism does exist in the world; Czech suspicion of Sudeten Germans was not paranoid. Sometimes, however, the local group is tied to a group that is a minority, or an intermediate group, everywhere. Pre-1948 Jews, Freemasons, the Roma, and most Protestant denominations,<sup>29</sup> to name only a few, were or are nowhere a *staatvolk*; but their internationalism has seemed to many states no less suspicious for that.

## 2. *The centralizing temperament and the man of system*

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<sup>28</sup> Will Kymlicka, *Can Liberal Pluralism be Exported?*, and “title” in *The Politics of Belonging*

<sup>29</sup> “Most” measured by denominations, not by adherents, of course. Locally-dominant Anglican communion churches, Lutheran churches, and Calvinist denominations (e.g. the Dutch Reformed Church) make up most of the Protestants in the world. But many more Protestant denominations are not dominant in any nation-state in the world: Quakers, Amish, Mennonites, Methodists in all their variety, Baptists in all their variety, Seventh-Day Adventists, Jehovah’s Witnesses, the marginal Protestant cases of Unitarians and Mormons, etc.

An important but little-noted chapter late in *The Spirit of the Laws* says:

There are certain ideas of uniformity, which sometimes strike great geniuses (for they even affected Charlemagne), but infallibly make an impression on little souls. They discover therein a kind of perfection, which they recognize because it is impossible for them not to see it; the same authorized weights, the same measures in trade, the same laws in the state, the same religion in all its parts. But is this always right and without exception? Is the evil of changing constantly less than that of suffering? And does not a greatness of genius consist rather in distinguishing between those cases in which uniformity is requisite, and those in which there is a necessity for differences? In China the Chinese are governed by the Chinese ceremonial and the Tartars by theirs; and yet there is no nation in the world that aims so much at tranquility. If the people observe the laws, what signifies it whether these laws are the same?

The Burkean idea in the middle of that chapter-- that changes in laws are costly, and sometimes those costs are greater than the costs of an imperfect status quo-- is familiar. But the surrounding argument is not. Characteristically, it contains at least two distinct ideas: a gesture toward defense of pluralism, and a worry about the character of the legislator who would suppress it. The latter idea was echoed in a passage from the final edition of Adam Smith's *Wealth of Nations*:

The man of system, on the contrary, is apt to be very wise in his own conceit; and is often so enamoured with the supposed beauty of his own ideal plan of government, that he cannot suffer the smallest deviation from any part of it. He goes on to establish it completely and in all its parts, without any regard either to the great interests, or to the strong prejudices which may oppose it. He seems to imagine that he can arrange the different members of a great society with as much ease as the hand arranges the different pieces upon a chess-board. He does not consider that the pieces upon the chess-board have no other principle of motion besides that which the hand impresses upon them; but that, in the great chess-board of human society, every single piece has a principle of motion of its own, altogether different from that which the legislature might chuse to impress upon it.<sup>30</sup>

It is easy enough (even discounting the importance of "hand" metaphors) to see a connection with the *Wealth of Nations*, and to suppose that the man of system is what we would think of as an economic central planner, failing to see that

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<sup>30</sup> Compare George Orwell: "The underlying motive of many Socialists, I believe, is simply a hypertrophied sense of order. The present state of affairs offends them not because it causes misery, still less because it makes freedom impossible, but because it is untidy; what they desire, basically, is to reduce the world to something resembling a chessboard." *The Road to Wigan Pier*, New York: Harcourt, 1958 [1937] p. 179.

individual persons have their own interests to pursue. I think that is a fair and plausible imputation; but it is not what Smith says he is talking about in the text around that famous passage. There he discusses "confirmed habits and prejudices of the people," the rights and privileges of cities, provinces, the nobility, and long-established orders, even when these are "in some measure abusive," all contributing to the constitution that the man of system seeks to "new-model" in all its parts—the traditional rights defended by Montesquieu. To put it in another and perhaps more surprising way: the principles of motion of their own are *not*, or at least not necessarily, individualistic or proper to each individual. The problem is not that they each have their self-interest to pursue. Rather, they have principles of motion—rules to follow, ends to pursue—that in part derive from the habits and prejudices of their respective groups, from the rules and norms of the *corps* to which they belong.

This is ordinarily taken as Smith's late-in-life commentary on the French Revolution, though the point is expressed in general terms. If so, that is worth some attention. The sixth edition of TMS appeared in the first half of 1790, before even Burke's *Reflections* had been published. If this passage was a response to events across the channel, the trigger was not, say, the 1793 imposition of a maximum price on grain. It was rather some combination of the abolition-in-principle of feudal privileges; the replacement of traditional provinces with departements; the suppression of religious and monastic orders; the nationalization of church property; and, perhaps, the amalgamation of the Estates into the National Assembly.<sup>31</sup> Like Montesquieu, Smith suggests that the power available to the political reformer encourages a particular kind of mindset. That power will be especially attractive to those who are galled by the disorder of variety. The "spirit of system" "inflames" public-spirited reformism, "even to the madness of fanaticism." Like Montesquieu, Smith sees that the disorderly variety most likely to gall, in his day, is that of the ancient or "Gothic" constitution itself, in need of remodeling by centralization and rationalization.

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<sup>31</sup> If it seems odd for Smith to make a complaint so similar to the one Burke would soon issue against "sophisters, economists, and calculators," it should be kept in mind that internal barriers to trade and guild restrictions on the professions were not were abolished after Smith's publication but before Burke's.

The psychology of the “man of system” seems familiar to readers of Foucault—and Foucault’s Bentham surely qualifies. But in general Foucault is too uninterested in the mindset of agents in his system to wholly capture the idea of the man of system. The most powerful recent account of the idea is to be found in James Scott’s *Seeing Like a State*, and the best philosophical account is in Michael Oakeshott’s “Rationalism in Politics.” The latter is concerned with the *rationalist*, not with “rationalism” as a free-floating gross concept. That is, like Smith and Montesquieu, Oakeshott is interested in the habits of thought, the disciplines and mindset, of the individual human beings who come to occupy positions of state power. I think these, rather than, say, F.A. Hayek’s information-based critique of economic planning, provide the closest modern analogs to Smith’s “man of system.”

If the diagnosis of the man of system (or the high modernist, or the rationalist) is right, then states—which is to say, state officials, with this characteristic mindset—will tend to be excessively skeptical of the jurisprudential pluralism generated by intermediate groups, of their adherence to custom or to local reasons that do not mirror the balance of reasons considered appropriate by the state. Insofar as individual humans move for reasons and in ways that reflect the moves the man of system would have them make anyway, no conflict arises. But the “principles of motion” of their own that *differ* from those desired by the state are often generated by intermediate groups—cities, provinces, religious and cultural group, and so forth.

### 3. *Congruence again*

I said in the previous chapter that there could be no general moral theory demanding that groups and associations stand in relation to their members strictly as just liberal states stand to *their* members. The primary rules of associations are not morally as tightly restricted in their content as are the coercive laws of the state. But this necessary lack of isomorphism between groups and states itself is an enduring source of state suspicion of groups. Tocqueville’s followers have made much of the idea of associational life as the schools of democracy; but it would seem that only internally democratic associations can have that function. More generally, we find that states distrust

groups whose internal governance and norms seem to inculcate values at variance with those undergirding the states' own governance.<sup>32</sup>

This tendency is not limited to liberal or democratic states. The internal egalitarianism of Calvinism was a source of horror to the absolutist monarch and divine right theorist James I, who said that "Presbytery agreeth as well with the monarchy as God with the Devil." His campaign against Scottish Presbyterianism was carried out under the slogan "No bishop, no King." One reason for early modern monarchical persecution of the Freemasons was that they were understood as subversively egalitarian and meritocratic. That is, while Freemasonry was (and is) governed by an elaborate hierarchy, social rank is left at the lodge door. One becomes an initiate into the higher-level mysteries for internal reasons, not by reason of wealth or status; and so an aristocrat (or a king) might be lower in Masonic dignity than a commoner. (The fact that some Masonic lodges admitted women as equal members was, of course, also unwelcome.) Freemasonry was also, of course, to meet persecution in the 19th century United States for being aristocratic, that is, internally hierarchical and incompatible with the [white] egalitarianism of the general political culture. There is no contradiction here, and there was no relevant change in the internal organization of the group. Internal relations of rank and status were independent of political rank and status, and monarchical and democratic states alike perceived that as a threat. A skepticism of Anglican episcopacy featured prominently in early American republican thought. English Whiggish anti-

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<sup>32</sup> DiMaggio and Powell and their followers in organizational sociology have studied institutional isomorphism-- that is, why there is so much similarity in organizational forms and structures. Their interests are broader than mine (notably including commercial firms), but their question is connected to this one. They postulate "three mechanisms through which institutional isomorphic change occurs, each with its own antecedents: 1) coercive isomorphism that stems from political influence and the problem of legitimacy; 2) mimetic isomorphism resulting from standard responses to uncertainty; and 3) normative isomorphism, associated with professionalization." (1983:150) Both (1) and (3) are relevant to state-association relations of the sort I am discussing here, and they are strongly linked to each other as well. DiMaggio, P.J., & Powell, W.W. (1983). "The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields." *American Sociological Review*, 48(2), 147-160. See also Reed E. Nelson , "Authority, Organization, and Societal Context in Multinational Churches," *Administrative Science Quarterly*, Vol. 38, No. 4 (Dec., 1993), pp. 653-682

Catholicism had long been concerned with Catholics' allegiance to a *foreign* prince, but 19<sup>th</sup>-century American republicanism was concerned with their allegiance to a *prince* at all.

That is, states tend to be hostile toward non-isomorphic associations because they fear that the groups will undermine the status relations on which the public constitutional order rests. The conception of citizens as free and equal persons that is sometimes said to be the heart of liberal democracy is here just a particular case of such status relations.

If it seems so morally superior to all other kinds of status relations as to be utterly unlike them, then think again about the importance of the word "citizens" there. The suspicion of transnational groups discussed in the previous section might be another particular case of this phenomenon. One group makes members believe that a commoner can outrank a king; one makes members believe that foreigners are their fellows.

The pressure toward institutional isomorphism is one reason why I propose to call the generally-statist, generally-centralizing strand of thought under consideration in this book "rationalism." Whatever the public view is in a given time and place of the right way to organize political life, intermediate bodies that are organized differently tend to be characterized as irrational. We have put our best understanding of the demands of reason into our public constitutional system (or we will, very soon); why do you insist on organizing your group's internal affairs differently? Hereditary rule, to those of us who live after 1800, is a clear and obvious example. But the thought that a commoner and a king, men and women, *bourgeois* and nobles, or compatriots and foreigners could be equal in status has seemed absurd to other states that sought to impose isomorphism. And if the flattening of status relations in the political sphere was absurd, their inversion was positively dangerous.

Here I think there is something of the social aesthetic of Scott's "high modernism," something of the man of system. Things should look consistent and alike. Non-isomorphism is disruptive; repeated patterns are pleasing. But there is a distinctive tendency to state excess at work here as well, one concerned with education and moral psychology. States systematically distrust groups that seem to teach any system of status (whether hierarchical or egalitarian) that

differs from that of the political sphere, fearing that the groups will teach politically counterproductive habits of mind if not actual subversion.

### **Tendencies toward group excess**

One recurring idea in this book is this: associations and groups that are substantial enough to fulfill needs for belonging and meaning, or powerful enough to check the power of the state or to organize democratic life, or institutionally complete enough to offer authoritative norm-generation for their members, are also substantial, powerful, and authoritative enough to potentially threaten the freedom of their members. That is, it is not just an unfortunate accident that groups come with features that, from a liberal perspective, are both good and bad.

The point is partly an intergenerational one. There is an old dictum of social democratic thought that inequalities of outcomes in one generation become inequalities of opportunity in the next. The analogue to this here is: free association in one generation becomes inherited ways of life in the next. This is a necessary truth; children are born into particular times and places and social worlds that have been shaped by the choices their parents have made. This does *not* simply mean (though it might sometimes mean) that the parents were free and the children are not—because it was also true of the parents that *they* were born into particular times and places and social worlds. If the parents had some freedom to reshape their worlds in partially-original ways, to join or form groups into which they were not born, then the children *also* have some such freedom. But there *could* be a narrowing over time; parents can join groups or adopt ways of life that leave their children with fewer choices than they themselves had.

But the point is only *partly* an intergenerational one, and I will not treat the intergenerational version as the normal case. I think that it is, more simply, a point about power, even within one generation.

Robert Michels taught us that whoever says organization, says hierarchy. I think that that could suffice as a statement of the problem, but propose to instead frame it as: whoever says authority, says power—and whoever says organization, says authority.

### 1. *Authority generates power*

Associations are sources of law. This insight of Lon Fuller's fifty years ago remains, I think, vastly underappreciated. Plagiarism is not a crime, and (if it is not copyright infringement) is in one sense invisible to the legal system. In a liberal society, the same is true for heresy. Universities, however, prohibit plagiarism among students, and churches prohibit heresy; as was discussed in the last chapter, these are internal primary rules, not laws of the state. But when a student is caught, procedures followed, and the student expelled, that affects, e.g., the student's legal right to be on campus or live in a dormitory or receive official grades. The excommunicated priest loses paid employment from the church. And in either case, the laws of the state will take notice of these facts; the student's legal relationship to the university, and the priest's to the church, has changed.

This jurisgenerative pluralism offers a great deal of the productive potential of associational life.<sup>33</sup> *finish*

But, as noted in the last chapter, authority generates power. Associations, like states, claim and wield authority over their members, across at least some salient domains. Whatever normative system it is that unifies a group (whether as simple as the property-value-maximization of a condominium association or as complex as the Roman Catholic Church or a state) will generate reasons of the sort Joseph Raz has taught us to see as creating the circumstances of authority: reasons for the participants to accept the displacement of their own case-by-case reasoning with a shared decision. But when we accept the authority of another—when we accept that we have reason to abide by their decision, whatever it may be, instead of retaining recourse to our own views—we *also* create social power. We entrust authority for our own reasons, but that does not mean that the authority-holder will make decisions for our reasons. As both Hobbes and Locke in their different ways understood, the authority to offer authoritative judgments spills over into a kind of power over those affected. And if pluralist liberals have often emphasized the tendencies of really-existing states to injustice, to a

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<sup>33</sup> Here: discussion of Elinor Ostrom and polycentric legal orders; Fuller; the usefulness of intermediate systems of law for ordering the social world; and their psychological indispensability for individual persons. Note the overlap with Hegel—we live in ethical orders as well as the larger moral order—and point to the last chapter where Hegelian synthesis of the two will be rejected.

centralizing temperament, and to unjustified suspicion, rationalist liberals have often emphasized the parallel creation of real social power in the hands of intermediate-group authorities. This is not the convergence complaint that the intermediate group has any primary rules *at all*. Rather, it is the observation that the secondary rules that grow up around them also create relationships of power and dominance—relationships threatening or inimical to freedom.

Sometimes the temporal relationship between authority and power is reversed, in a way that generates a slightly different tendency toward group excess. A charismatic leader – a religious prophet, say— can assemble a group where there was none before, and acquires a very real kind of sway over a growing flock of followers. It's customary to think of this as a kind of power; it was one of Weber's three ways of legitimating domination. In the early heat of the charismatic moment, the leader may well exercise power over his or her followers in all three of Lukes' senses: prevailing on in-group decisions, setting the in-group agenda, and (powerfully) shaping the norms and values of group members. The difficulty (or the advantage, depending on one's perspective) is that charismatic movements come to an end: when the charismatic leader dies, or long before that when the heat of the initial moment fades. The power of the leader is directly limited by the boundaries of the followers' enthusiasm; and such enthusiasm can melt away very quickly.

The question faced by the charismatic leader who can take the long view—or by his or her immediate heirs—is whether and how to institutionalize the newly-formed group. Formal organization—taking the first step from charismatic to bureaucratic-rational domination, to use Weber's categories—tends to slow things down, diminish enthusiastic passion, and limit the discretionary decision-making of the leadership. In a formal organization, at least some decisions will be made through regular and boring channels, not by the instant decision of the person who has been gifted by the divine. This is true even when the procedures that are enacted heavily favor the authority of the leadership; that is, it does not depend on the procedures being democratic. And so charismatic leaders often resist institutionalization; and their power ends just when the followers stop following.

More interesting, for our current purposes, is what happens when the leadership does accept institutionalization and organization. For all the limits on immediate discretionary power that this introduces, it also generates a new stable system of authority. It can generate a system that is unusually hierarchical. In short, giving up a little bit of power in the short term can generate a lot of power that is entrenched in an authority structure in the long term. I do not mean to suggest that decisions are consciously made in these terms; in general, I suspect that the sincere prophet does much better at gathering power than does the cynical one. But I think that this captures an important dynamic nonetheless.

The religious ferment in the early-nineteenth-century United States was broadly democratic and egalitarian. Traditional religious authorities and elites saw their followers slip away. Charismatic leaders of revival meetings on the frontier did not depend on degrees from the elite east-coast training grounds of Protestant clergy. And the organizational form of the Second Great Awakening limited the power that could be accumulated by many of the preachers; they traveled from place to place, from one revival meeting to the next, while congregants largely stayed in place. And yet one of the most effective charismatic religious leaders of the era, Joseph Smith, ultimately left behind an extraordinarily hierarchical new religion. Smith established new institutions early on. He formally incorporated a new church under New York's modernized incorporation law within a year of the appearance of the Book of Mormon. Some key features of the later governance of Mormon churches (including the main Church of Jesus Christ of Latter-Day Saints) were established just a few years later: a Council of Twelve with substantial governing authority including the authority to decide succession after his death, and a Quorum of Seventy members of the priesthood. (The numbers were chosen for their Christian significance: twelve apostles, and, according to one count in the Gospels, seventy disciples.) A fully episcopal structure was created in the decade and a half between the church's founding and Smith's murder— a new episcopacy on American soil, just a few generations after the threat of episcopacy motivated much of the colonial resistance to Britain. With so many grandees in a young church, schisms and splits followed the death of the prophet; but the subsequent

organizations largely held together and recreated the same governing structures, and some of them thrived. Charismatic power no doubt still infused the bureaucratic-legal structures; Brigham Young was clearly a charismatic figure in his own right. But Young inherited an organizational structure to build on; he did not have to build from the congregation on up as Smith had done. And the bureaucratic-legal forms have survived uninterrupted (though occasionally schismed from) ever since.

Without the new availability of the organizational forms—the incorporated churches and joint-stock corporations formed by the first generation of Mormon leaders—perhaps not much would have changed in this history; authority can be organized without legal recognition. But I am inclined to think otherwise. At the very least, the creation of legally distinct treasuries into which tithed monies could be deposited made a meaningful difference in helping to channel the first generation’s charismatic power into a permanent authority structure and source of long-term power.

## *2. Pluralism generates power*

The power wielded by group elites over members may be limited or attenuated by the fact, when it is a fact, that the group is situated within a pluralistic society. Pluralism can generate opportunities for schism and for simple exit. It can allow dissatisfied group members to reorganize and regroup without the offending leaders. It can allow for intellectual and cultural influences from outside that teach members that they can question their leaders.

But these are not the only effects that pluralistic settings can have on the internal life of groups. Consider these countervailing tendencies.

a. The availability of exit and the need on the part of members to exert effort and resources to sustain their groups affect different groups differently. Groups that are insufficiently distinct from the surrounding culture can cease to seem worth the effort to sustain them. If a group responds to the threat of exit primarily by becoming more similar to the surrounding social world—in a liberal society, if it responds by becoming internally liberal and weakening all of its internal norms and rules—then it actually hasten its own demise. The result of

many groups liberalizing, one at a time, may be a sphere of group life that becomes less liberal over time. The appearance of paradox is only an appearance; it is because we are prone to the fallacy of composition.

This phenomenon is most visible in the religious sphere. In the most religiously pluralistic societies, very liberal and ecumenical denominations are losing active adherents, while very conservative ones are gaining. They offer their members a normative environment sufficiently different from the background society as to be worth active participation and support. The more liberal groups may have doctrines that are palatable to a larger number of people; but that's just to the degree that those people don't need a church to teach them those doctrines.

Moreover, the fluidity of group boundaries and the possibility of exit can reward those groups that increase their social distance from outsiders, those that put up especially high cultural barriers. The easier exit becomes at the individual level, the starker this effect at the group level. There is some tendency in a pluralist society for individuals to live at the borders between groups, whether that means intermarrying, mixing identities, or splitting volunteer time and charitable donations. The groups that are best able survive *as groups* may be those that make such partial exit and partial assimilation strategies unavailable, even though in the short run that means depriving themselves of potential members.<sup>34</sup>

The dynamic of group life over time thus can be one of polarization: the groups that sit next to one another in society push on one another, encouraging each to become more radically distinct from its neighbors and the wider society, more isolated and totalizing, than would be the case in a social vacuum. In one sense this is just what freedom of association looks like in a free and pluralistic society. But in another sense it is worrying and problematic. The group polarization doesn't straightforwardly reflect the desires, norms, values, or preferences of members. It is shaped by the external environment.

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<sup>34</sup> The dynamic here is substantially the same as the one I discussed in comparing federalism with more-radical decentralization in "Federalism, Liberalism, and the Separation of Loyalties," *APSR*

b) Even more directly arising from the external environment is the power elites can gain over members by acting as intermediaries, or as representatives of the group to outsiders. In a world of two monolingual communities and one bilingual go-between, the translator has tremendous power, including the ability to capture a huge proportion of the gains from trade between the two groups. If one of the communities is socially and politically subordinate to another, the effect is even more dramatic. The intermediary is the only one who can intercede with the outsiders on behalf of the group members; he can in principle extract from group members anything shy of what they fear the outsiders will extract without his intercession. *That* power is not even rooted in the group members' own desire for authority; it is not an extension of some internal good reason for hierarchy. It represents a kind of borrowing of the outside world's real or imagined power.

In real pluralistic settings things are more complicated but the basic dynamic remains. Those members of our group who can serve as intermediaries between us and the outside world *thereby gain power over us*. Compared with an isolated group, a group with a bit of contact with the outside world is not necessarily less hierarchical, and may well be *more*. The contact allows some subordinated members possibilities of *exit*, but those who stay local may be *more* dominated than they used to be—even if they're now dominated by someone whose authority comes from the social capital they gain by bridge-building and gatekeeping rather than from a more traditional source. They may also gain power, prestige, or resources in the outside world, but those can further enhance their local power over us. The power might be temporary; the local monopolist of a second language may not retain that position for long. But it might not be; when colonial authorities in the Americas or Africa decided that some particular local counted as a chief or king with whom to treat, they often created new long-lasting internal power relations.<sup>35</sup>

Language, moreover, is only paradigmatic. Any source of mutual opaqueness, any social, cultural, or organizational difference between group members and the rest of society or the state (or even members of the larger

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<sup>35</sup> I came to understand this dynamic through a reading of Josiah Ober, *Democracy and Knowledge*, ch 3, though it is not the dynamic of interest to him.

group) can generate the need for intermediaries. Even mutually-comprehensible and generally-similar groups, if they lack overlapping social networks and personal connections, may need intermediaries who gain a degree of power over each group—though the more mutually-comprehensible the groups are, the easier it will be for competing go-betweens to develop and diminish that power.

To say that go-betweens develop power is not to deny that they provide valuable services to group members. Indeed, they are essential in any pluralistic society. It is only to say that their importance provides them with access to monopolistic privilege which, it is natural to expect, they will exploit for their own benefit as well, and which will generate in-group hierarchies and domination that can *not* be justified as the expression of internal norms or values.

c) Finally, groups can gain an excess of power over their members precisely from rules and institutions designed to reduce the excesses of *state* power described in the previous section. Guaranteed group representation; governmental or quasi-governmental power being granted to the group; state funding; inalienable land rights—all these and many more like them might be justified in the face of the predictable state excesses already discussed. But each of them also makes a group something other than a voluntary association, and gives its authority structures power beyond that which could be assembled out of the rights of the members.

### 3) *Interested and invasive power*

Finally, the power that is generated within groups has some distinctive and unattractive features that encourage excess. Unlike what Michael Oakeshott termed the “civic association” of the state, which in principle lacks purposes of its own and, when governed by the rule of law, provides *adverbial* rules to members about *how* to do what they do rather than rules on what is to be done, “enterprise associations” have purposes of their own to pursue. To put the point in Rawlsian terms, while the state ideally puts the right ahead of the good, intermediate associations are strongly dedicated to their particular conceptions of the good.

It is important not to overestimate the degree to which the wielders of state power are ever disinterested in the way the Oakeshottian rule of law of the Rawlsian priority of right demands. In a reasonably just constitutional state, however, state authority can be *something* like that, sometimes or even often. Those who wield power within intermediate groups, however, seem committed to *not* being disinterested in that way. They may, of course, be bound by procedures and rules—as I have already emphasized, intermediate groups have their own internal systems of law, and in the normal case that means some kind of rule of law-like procedures. Canon law courts, rabbinic tribunals, university disciplinary committees, the adjudicative bodies within condominium associations, and so on all have recognizably law-like features and systems, and they may well abide by rule-of-law constraints. They may act only on the basis of announced rules that govern prospectively; they may forbid parties to a conflict from acting as judges over it. But they cannot govern adverbially. They are committed to governing what is done, not only how it is done.

Moreover, there are selection effects at work that reflect those that draw men of system into state positions. Those who dedicate their time and energy to rule-enforcement within intermediate associations are likely to be disproportionately attached to the group, or to its rules. They must have a special degree of confidence in their ability to judge rightly. In a word, those who end up wielding the power that has been described above are disproportionately likely to be busybodies.

When the governing procedures are *very* judicial, and call for professional role-specialization (the canon lawyer and canon law judge, for example) this need not be the case. But when either rule enforcement is very informal, decentralized, unofficial (e.g. an unincorporated cultural group, or a religious sect without fixed judicial mechanisms) *or* when the judicial mechanisms are staffed by amateur volunteers rather than specialists (e.g. condominium associations), then we have reason to be worry that intragroup power will be wielded by those who are unhealthily eager to order other people around.

The problem of the busybody and the problem of the man of system are just particular cases of one of the oldest and most banal thoughts about power:

that those who seek it are particularly poorly suited to be trusted with it. The idea is as old as Plato and yet rarely developed, because there is no place to go with it, once we have rejected lotteries as a way of allocating positions of power. It is usually only invoked as a kind of cheap and corrosive cynicism; the trite thought that “the decision to run for office ought to disqualify you from holding office” is ultimately pointless, so long as there are offices to be filled.

I think that the worries about the man of system and the busybody are not so pointless as this, and they encourage a more-narrowly targeted skepticism rather than general cynicism. They tell us not just to distrust power, but which kinds of actions to distrust from which kinds of powerholders.

The busybody is the dark reflection of the person of system. The latter is all too ready to see other persons as pieces on a chessboard, or objects to be moved into patterns; he or she views other human beings too abstractly. The former is all too aware of the *particularity* of those over whom he or she exercises power, and is all too likely to use the power in personal rather than impersonal ways. Republican theorists including Rousseau and Pettit have argued that relations of personal power and dependence are especially likely to be relations of *domination*—the dominated person is ultimately subject to the will and whim of the dominator, not to impersonal rules. The person of system with too much power commits macro-level, impersonal injustices; the busybody with too much power commits micro-level, deeply personal ones. Examples should be familiar: the intensely personal power exercised within the traditional patriarchal family; the power generated by the parish priest’s legitimate authority that can be turned to very personal advantage; the degree to which small-town enforcement of cultural and religious norms is entangled with spite and pre-existing grievances. One need not go along with the republicans’ primary emphasis on personal dominance as *the* primary meaning of unfreedom to see that it is *a* way of being unfree, and one that is often especially likely in intragroup relations.

I emphasize that the liberalizing pressures on groups in plural societies are also real, and can sometimes be the more powerful forces. My point here is not to say that group life in a pluralistic society is *necessarily* conservative or polarized or characterized by pervasive excesses of internal power. It is rather to

say that there are predictable and known social dynamics in those directions, just as there are predictable and known social dynamics in the direction of state overreach. We live under neither ideal-theory states, concerned only with doing justice, nor ideal-theory groups, exercising only the authority over us that tracks our own reasons and that is generated out of our own rights.

Our freedom can be threatened by states and by groups—and by each directly in response to the other. Understanding which threats are more important where and when is not a formal or philosophical exercise. And a vision of the social world that emphasizes the threat from states isn't *contradicted* by one that emphasizes the threat from groups, even when the legal and political actions the two recommend do contradict one another.

**D. Pluralism and pluralisms** (“Pluralism” in the social sense being considered here substantially separate from Berlin’s moral pluralism; omitted)