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# **THE PRIVATE SOCIETY AND THE LIBERAL PUBLIC GOOD IN JOHN LOCKE'S THOUGHT**

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INTRODUCTION

John Locke may have done more than any other individual to shape Anglo-American attitudes toward constitutionalism. Throughout the English-speaking world, a Lockean theory of rights informs “social and political practices and institutions” and “many . . . commonsense judgments about right and wrong, just and unjust.” When academic commentators defend constitutional freedom of association, they suggest that it is integral to a system in which “the purpose of government is” Lockean—“to secure the natural rights of the citizenry—life, liberty, and property.” Similarly, some United States Supreme Court cases invalidate laws restraining freedom of association because they threaten to “emasculate” a foundational Lockean principle—“the distinction between private as distinguished from state conduct.”<sup>1</sup>

It is thus a surprise to see that, in normative scholarship on associational freedom, Locke is treated as a bit player. In legal scholarship, Locke is commonly assumed (in Robert Horn’s description) not to have “express[ed] his thought about associations in general terms” but rather to have focused his “concern [on] freedom for one kind of association, the church.”<sup>2</sup> In Horn’s reading, because Locke treats the problems of free association most extensively in his *Letter Concerning Toleration*,<sup>3</sup> Locke’s theory of associational freedom is really only a theory of religious freedom, not to be extended to “other kinds of [i.e., non-religious] associations which, like the state, are concerned with man’s material welfare here on earth.”<sup>4</sup> Similarly, in his contribution to this Symposium, Richard Boyd illustrates a tendency in normative political

theory—to portray Locke as defending associational freedom in terms too qualified and prudential to teach general lessons. In historical and hermeneutical scholarship about Locke, interpreters also tend to focus on Locke’s theory of religious toleration and not associational freedom generally.<sup>5</sup>

It is easy to understand why these tendencies have developed. Locke’s theory of associational freedom does not jump out at readers of Locke’s corpus. For example, in the *Letter Concerning Toleration*, Locke frequently refers to a denominational sect as “a free and voluntary Society.” (*LT* 9, 15.) If one focuses on the occasional purpose of the *Letter*, Locke seems to be making a strong normative claim specifically about religious freedom. But Locke has a broad view of associational freedom. If one reads the same passage from the *Letter* with an eye toward issues about associational freedom, Locke is making a far more radical point: *All* private societies, churches and otherwise, deserve a presumption of associational freedom. While Locke does not focus on this claim specifically in any single writing, he does substantiate it with consistent insights and arguments across all his mature writings. Readers deserve to consider Locke’s various treatments of human society in one space, as parts to a single integrated argument.

To fill that gap, this Essay interprets and expounds Locke’s theory of the private society. Practically, Locke entitles citizens to associate with the widest domain of freedom consistent with the like rights of fellow citizens and the needs of the public. The crucial qualification comes in how Locke understands the needs of the public. One such need covers the minimal moral conditions the society needs to respect peace, public order, the family, property, and the other interests the Lockean commonwealth focuses on securing. Another covers the minimal moral conditions the society needs to perpetuate Lockean liberalism going forward. While these

conditions and Locke's formulations for them are broad in many respects, they still leave many private societies otherwise generally free. Such societies may thus organize around commonly-agreed ends; admit or exclude members depending on how they conform to society ends; and govern internal society affairs without outside interference.

Theoretically, the rights and responsibilities Locke recognizes in private societies issue from a more comprehensive meditation on the strengths and weaknesses of liberalism. At first glance, Locke seems to justify the right to private society in a fairly optimistic view of human nature. Society recognizes and builds on men's natural social and friendly affections, and it does so particularly by encouraging particular associations that reflect their members' individual characters, needs, and interests. Yet throughout his mature corpus, Locke acknowledges dangers with the wrong sorts of societies. They restrain free thought; encourage partisanship and injustice, authoritarianism and fanaticism; and generally destabilize the common opinions that glue together a liberal political order. Locke's liberalism recognizes in citizens the rights to think, believe, and associate as they please, but only to the extent that such rights threaten neither the basic material interests that government protects nor the moral and political consensuses that makes liberalism possible.

Although this Essay aims primarily at interpretation, it is also sympathetic enough to Locke's normative arguments to explain why they are coherent and minimally plausible. Locke's critique of private societies may prove valuable to contemporary normative scholarship on association in two respects. First, Locke presents a tougher-minded theory of liberalism than one sees in contemporary practice and scholarship. Contemporary liberalism may take for granted that it poses a more humane and attractive form of government than governments that stress authority, tradition, and religion. Contemporary liberal governments may accommodate

many different kinds of diversity—ethnic, religious, and especially ideological--without considering whether such diversity undermines their societies' commitment to liberalism. Locke did not have such luxuries. As a political practitioner, Locke needed to persuade his contemporaries that his version of liberalism was more acceptable than the throne and altar they already knew. As a political philosopher, Locke defended his theories of liberalism and associational freedom as comprehensive responses to permanent problems in human politics. Locke suggests that liberalism is always a precarious political order, which cannot survive without affirming several minimal moral and political conditions. He therefore challenges contemporary readers to consider whether contemporary theories of liberalism can adequately explain why they do not need to respect similar conditions.

Separately, Locke's accounts of liberalism and associational freedom deserve study because they appeal to an account of theory of human experience that is psychologically and sociologically richer than one finds in many contemporary defenses. Prominent modern theories of liberalism generally justify it on deontological grounds, on the grounds of broad claim rights based in human free will without significant regard to human behavior. Such deontological foundations have been criticized for drawing on "bad sociology" or "naïve psychology." Those criticisms help discredit liberalism and open the door to theories of government that justify greater intervention with associational freedom.<sup>6</sup> Locke may provide a stronger and more satisfying account of associational freedom and of liberalism generally.

The Essay proceeds primarily by interpreting Locke's specific discussions of associational freedom throughout his mature political, ethical, and philosophical writings. The Essay also illustrates Locke's teachings by suggesting what they add to two contemporary problems: in what circumstances governments may restrain residents from operating seditious

associations; and whether the law should draw a principled public-private distinction in anti-discrimination law.

#### I. TENSIONS IN LOCKE'S THOUGHT TOWARD FREE ASSOCIATIONS

Let us start with first impressions: that Locke seems not to have any consistent or systematic theory of private societies. While this impression is understandable, it is not accurate. In the *Letter Concerning Toleration*, Locke seems to use the private society as a standard for enlarging the freedom of churches. But as recounted in the Introduction, Locke's argument suggests that private societies are entitled to broad practical discretion to organize and pursue their own affairs. Locke suggests that any private society "has power to remove any of its Members who transgress the Rules of its Institution." (Ibid. 15.) Moreover, in contrast with Richard Boyd's reading, Locke's argument does not seem very prudential: He claims that this right is "the immutable Right of a spontaneous Society."<sup>7</sup> Throughout the *Letter*, Locke treats church denominations as the equivalent of secular societies, like "Meetings in Markets" or "Civil Assemblies." (Ibid. 49.) Whether or not this analogy demeans religious worship, the important point here is that in the course of making an occasional argument about religious toleration, Locke presumes a broad right of private society.

Locke repeats the same maneuver in his *Two Treatises on Government*. Locke does not advance and defend his own theory of government, strictly speaking, until chapter 7 of the *Second Treatise*. Locke's treatment subordinates government by making the political community a species of the genus "society." This subordination is apparent in the title of chapter 7--"Of Political or Civil Society." It is also apparent in the chapter's seemingly syllogistic argument: Men have a natural right to consent before participating in *any* society; political society is another example of a society, on a par with marriages and employment relationships;

men therefore may not be required to participate in political society without their consent. (*TT* II.95; see *ibid.* II.77-89.) As a matter of first impression, Locke seems to justify government by asking whether it works for its citizens as well as private societies they may enter and leave. This metaphor figures prominently in many other apologies for classical or libertarian liberalism.<sup>8</sup> It is problematic, for Locke gradually qualifies the principle of “consent” in ways that undermine the force of his syllogism.<sup>9</sup> Again, however, the important point here is that in the course of making occasional arguments about the purpose of government, Locke presumes a broad right of private society.

This right is not unqualified, however, for elsewhere in his corpus Locke is quite critical of private associations. In particular, in the *Essay Concerning Human Understanding*, Locke presents associations as impediments to free thinking. Most “Partisans of most of the Sects in the World . . . have [no] Opinions of their own,” “are resolved to stick to a Party, that Education or Interest has engaged them in; and there, like the common Soldiers of an Army, show their Courage and Warmth as their Leaders direct, without ever examining or so much as knowing the Cause they contend for.” (*ECHU* 4.20.18.)

## II. LOCKE’S LIBERALISM IN ITS CHRISTIAN CONTEXT

### A. *Locke’s Intentions*

There are several ways to explain these various statements and the tensions between them. If one focuses on Locke’s teachings specifically on association, one might conclude (as Horn does) that Locke means to protect religious and other spiritual associations and at the same time (as Ruth Grant suggests) to banish from the commonwealth political parties and other associations that claim to participate actively in political life. More generally, perhaps the inconsistencies confirm that Locke was a strictly occasional writer, in which case it would be

“pointless to look upon [Locke’s] work as an integrated body of speculation and generalization.” The inconsistencies might also confirm John Dunn’s general impression of Locke, that his “ideas remain[ed] for his entire life profoundly and exotically incoherent.” Or, even if we assume that Locke had intentions that were integrated and coherent in his time and day, it might be the case that our time and day differ too profoundly from his for us to appreciate his intentions in our present historical context.<sup>10</sup>

Yet one should not dismiss the possibility that Locke has a coherent and long-lasting intention, generally or specifically in relation to private societies. Whatever we may think of his intentions now, Locke’s writings leave signs that he was quite ambitious. He begins the *Conduct of the Understanding* by suggesting that he hopes to improve upon principles of logic that had served the learned world for at least 2,000 years before his time. (CU 1.) In a letter to a friend, Locke ranks the *Two Treatises* in the same company with Aristotle’s *Politics* for its contributions to government.<sup>11</sup> As Peter Myers concludes, to read Locke solely in context of the political, scientific, and theological problems of his generation in England may “impose[] an unwarranted degree of closure upon and diminishes the stature” of Locke, and encourage interpreters to trivialize Locke’s ambitious attempts “to effect profound theoretical innovations, to converse with writers long dead, and to enlighten distant audiences.”<sup>12</sup>

Locke confirms the same possibility in his writings on private societies. In the *Letter Concerning Toleration*, Locke anticipates political problems not strictly necessary to his argument about religion. For example, Locke acknowledges that if “this Business of Religion were let alone,” citizens would still discriminate against one another “upon account of their different Complexions, Shapes, and Features, so that those who have black Hair (for example) or gray Eyes, should not enjoy the same Privileges as other Citizens; . . . should either be excluded



from the Benefit of the Laws, or meet with partial Judges.” (LT 50-51.) If Locke suggests that his theory of toleration may apply equally to religious and racial discrimination, we should at least consider his suggestion seriously. In addition, Locke’s writings on private societies are also intertwined with deep questions of Enlightenment political philosophy: how to reconcile the claims of Christianity with those of temporal politics. Those claims have philosophical import beyond Locke’s day and age.

In this part, I explain how I understand Locke’s general intentions as a political philosopher and his general prescriptions for the Christian problem. This review should give early warning about how I read Locke generally and background important for appreciating Locke’s analysis of private associations. The background also helps clarify the relation between Locke’s use of the “private society” metaphor in reference to churches and governments and his justifications of private societies generally. Here and throughout the remainder of this Essay, I focus on Locke’s mature, published, and relevant writings: *A Letter Concerning Toleration*, *The Reasonableness of Christianity*, the *Two Treatises of Government*, and the *Essay Concerning Human Understanding*. I pass over many of Locke’s early writings because Locke’s views on the church-state problem evolved as he matured. Early in his career (particularly in his *Two Tracts on Government*), Locke inclined to give the temporal sovereign absolute authority to prevent religious sectarian warfare. Locke preferred the liberal republic later in his career, and I focus here on the views Locke propounded in the works supporting liberal republicanism.<sup>13</sup>

These works are difficult to synthesize, however, Locke simultaneously makes both occasional and philosophical arguments in each work, and each work treats one portion of the political universe from a different partial perspective.<sup>14</sup> Generalizing broadly, the *Letter on Toleration* teach potential legislators and princes how to resolve the competing claims of

spiritual and temporal authority; the *Two Treatises* teach them how to structure political life once church-state questions have been resolved; the *Reasonableness of Christianity* teach preachers and believers how to preach Christianity in the manner best suited for political, ethical, and spiritual life; *Some Thoughts Concerning Education* teach parents in their capacities as teachers and guidance counselors to their children; and the *Essay Concerning Human Understanding* teaches potential philosophers and scientists the epistemological foundations of decent ethics and politics.<sup>15</sup> To appreciate Locke's complete analysis of free association, the interpreter must consider different arguments in different works by adjusting for their differing intentions. This sort of interpretation is difficult in the best of circumstances, for parallel arguments that seem complementary to one reader may seem grossly inconsistent to another. Even so, I find, as Ruth Grant suggests, that "[m]ost apparent inconsistencies evaporate[] on further consideration of the context of conflicting statements, their place in the argument, or Locke's word usage."<sup>16</sup>

### *B. Locke's Ethical and Political Foundations*

To begin with, Locke is a eudaemonistic consequentialist. That he is a "consequentialist" means he justifies rights to the extent they contribute to good consequences rather than the other way around, as deontologists maintain. At one point in the *Two Treatises*, when speaking of man's dominion over animals, Locke assumes that man's right is "to make use of those things that were necessary or useful to his Being." (TTI.86.) That he is a "eudaemonistic" consequentialist means that he measures good consequences in reference to happiness. "Eudaemonistic" happiness refers primarily to a state of moral well-being of the sort people associate with "mature" or "virtuous" individuals. Because it focuses on the moral well-being of individuals, eudaemonistic happiness is not analyzed top down but bottom up: it refers not to the general happiness of the society as an organic whole but rather to an aggregation of the

happineses of individual citizens. Hence, while individual necessity and utility ordinarily set the standard for human action, they are judged by reason, which directs them toward happiness “the utmost Pleasure we are capable of” (*ECHU* II.21.42) and man’s “chief end,” which “Mankind . . . are and must be allowed to pursue.” (*RC* 245.)

This portrait goes against many other portraits of Locke. As suggested above, some scholars maintain that Locke’s foundations are incoherent. Many reject the suggestion that Locke is a consequentialist and claim that he is instead a deontologist; some of those claim his deontology rests solely on philosophical grounds, while others claim it follows from a combination of political philosophy and theology.<sup>17</sup> Yet if one reads Locke’s political writings *in pari materia* with his philosophical writings, he instead propounds a “rule”-based consequentialist approach, drawing on human psychology and experience, to prescribe broad rights contributing to human happiness. Locke trenchantly criticizes the claim that men have any innate practical principles. (See *ECHU* I.3.) It is hard to explain why Locke would launch such a critique if he established political foundations on deontology or revelation. He sets as a standard for human action “the highest perfection of intellectual nature,” which “lies in a careful and constant pursuit of true and solid happiness.” (*ECHU* II.21.51.) Moreover, in his politics, he defines law “as the direction of a free and intelligent Agent to his proper Interest [prescribing] no farther than is for the general Good of those under that Law.” (*TT* II.57.)<sup>18</sup> But however Locke ultimately justifies the foundations of his politics and ethics, Locke makes many observations about human anthropology, psychology, and sociology. Even if my priors are wrong and Locke’s political theory is foundationally incoherent, his observations may still be interesting and relevant to political theory in their own right.<sup>19</sup>

Locke also treats political opinion as a powerful force in practical political life. This characterization contradicts portraits suggesting that Locke is a “possessive individualist,” whose theory of natural rights subordinates man’s social tendencies by focusing too much on acquisitive and life-preserving passions.<sup>20</sup> Without a doubt, Locke does focus government on simple human interests like life and property, but not to the point that he focuses on human possessive and egoistic tendencies to the exclusion of social tendencies.<sup>21</sup> Among those social tendencies Locke focuses heavily on most men’s need for authoritative social opinion. He expects, “by the little that has hitherto been done in it, that it is too hard a task for unassisted reason to establish morality in all its parts upon its true foundation with a clear and convincing light.” (RC 241.) Instead, he acknowledges the force of the “Law of Opinion or Reputation,” also called “the Law of Fashion” (ECHU II.28.5-10, 12), and he describes shame as “the common *measure of Virtue and Vice*.” (ibid. II.28.11; see also ibid. I.3.22-26, IV.16.4, IV.20.2-3.) The separation between reason and opinion shapes the character of political life. On one hand, Locke expects that his *Essay Concerning Human Understanding*, a treatise on theoretical science and philosophy, will be thought among most readers “to deserve no consideration, for being somewhat out of the common road.” (ECHU Ep. Rdr.) On the other, a discourse on *The Reasonableness of Christianity* will be extremely relevant to the vast run of mankind, for “[t]he greatest part cannot *know*, and therefore they must *believe*.” (RC 243.)

Locke is also pessimistic that politics can order citizens toward one or a few outstanding virtues. While Locke resembles many pre-Enlightenment political theorists in his eudaemonism and his respect for common opinion, on this topic he breaks with his predecessors and anticipates contemporary liberal thought. Many prominent ancient and medieval Christian philosophers were teleologists, which is to say that they presumed that men, like other things in the world, are

naturally directed to one or a few purposes. In contrast, Locke criticizes “the philosophers of old” for “in vain enquir[ing], whether *Summum bonum* consisted in Riches, or bodily Delights, or Virtue, or Contemplation: and they might have as reasonably disputed, whether the best Relish were to be found in Apples, Plumbs, or Nuts, and have divided themselves into Sects upon it.” (*ECHU* II.21.55). Locke agrees with the philosophers he criticizes inasmuch as they are all eudaemonists, but he parts with them to the extent that they claim that men are naturally inclined toward one or a few forms of human excellence. For Locke, men differ profoundly in their capacities. Some are endowed so that, realistically, they will appreciate riches and bodily delights but not contemplation; others are endowed so they are “not content to live lazily on scraps of begged opinions” and instead “set[] [their] own thoughts on work, to find and follow truth.” (*ECHU* Ep. Rdr.) Because of these and many other differences, Locke concludes that teleological political philosophy has a tendency to be inhumane. It encourages political rulers to force many citizens to follow standards of excellence and happiness they are simply not equipped to attain.<sup>22</sup>

Locke therefore sets lower standards for politics. Aristotle maintained in principle that the citizens superior in virtue deserve to rule the city; Locke’s most political writings, *The Two Treatises*, do not mention virtue (a fact which contributes to the perception that Locke is a possessive individualist).<sup>23</sup> Locke’s politics focus on the goods most useful to a broad cross-section of citizenry, no matter what their particular talents and interests—life, liberty, security, property, and family. (See *TT* I.86, I.88, II.17, II.124, II. 135, II.199.)<sup>24</sup>

### *C. Locke’s Diagnosis: Civil Strife in the Christian World*

Finally, Locke is a foulweather friend and fairweather critic of Christianity. He finds Christianity’s basic teachings to be just and humane. He regards Christianity as a more effective

and humane way to inculcate basic practical morality in most men than other possible foundations for practical ethical and political morality. (See *RC* 231, 239-45.) At the same time, he takes pains that Christianity not be misunderstood in ways that make politics inhumane.<sup>25</sup> Christianity's universal and revelational claims create dangers in Christian nations. In contrast to pagan religions, which tended to emphasize external devotions to rituals and laws, Christianity emphasizes the internal aspects of faith—in Locke's description, "Faith only, and inward Sincerity." (*LT* 27; see *RC* 241, 243, 245.) In addition, where pagan cults were tied to particular cities and made worship a matter of external practice, Christianity penetrates wider and deeper. Its revelation claims to reach universally, and not only to regulate external conduct but also inward belief and piety. (*RC* 241; *LT* 28.)

Christianity therefore creates the possibility that believers may disagree over points of dogma that are fairly abstract and difficult to resolve with unaided reason. Hence Locke criticizes zealots who take less "care and industry to the rooting out of . . . Immoralities, than to the Extirpation of Sects." (*LT* 4.) If Christian religion is as involved in real-world politics as pagan cults were tied to the ancient city, zealous believers will be tempted to use civil force to settle such dogmatic disputes. Because Christianity is a universal religion, believers will also be tempted to appeal to it as justification to disobey their local civil laws and to treat their fellow citizens as enemies. They may ally more easily with members of their sect or denomination than they do with their countrymen. Hence, Locke concludes, "[n]o Peace and Security, no not so much as Common Friendship, can ever be established or preferred amongst Men, so long as this Opinion prevails, That Dominion is founded in Grace, and that Religion is to be propagated by force of Arms." (*LT* 18.)

Jeremy Waldron reads Locke to be making a narrower argument: to avoid the question whether the commonwealth is competent to identify orthodox belief, and to stress instead that the commonwealth it is not competent to *compel* such belief.<sup>26</sup> But Locke is making the broader criticism that Waldron pretermits: “[I]t is unavoidable to the greatest part of Men, if not all, to have several *Opinions*, without certain and indubitable Proofs of their Truths; and it carries too great an imputation of ignorance, lightness, or folly, for Men to quit and renounce their former Tenets.” (*ECHU* 4.16.4.) Because opinions about the best and happiest way of life are so problematic, Locke “esteem[s] it above all things necessary” to separate politics from quests for the highest virtues—specifically by “distinguish[ing] exactly the Business of Civil Government from that of Religion, and . . . settl[ing] the just Bounds that lie between the one and the other. If this be not done, there can be no end put to the Controversies that will be always arising, between those that have, or at least pretend to have, on the one side, a Concernment for the Interest of Mens Souls, and the other side, a Care for the Commonwealth.” (*LT* 6.)

#### *D. Locke’s Prescription: Liberalism*

To settle these problems, Locke in broad form bifurcates what was one “city” in classical and medieval Christian political philosophy into two separate spheres—one for public affairs, and another for private. The deepest manifestation of this change is that Locke’s political program sounds primarily not in natural law or duties but in natural rights. The *Second Treatise* begins by insisting that men are “naturally in . . . a *State of perfect Freedom* to order their Actions, and dispose of their Possessions, and Persons as they think fit.” (*TT* II.4.) This liberty is an ordered liberty. The natural freedom sketched at the beginning of the *Second Treatise* is “within the bounds of the Law of Nature.” (*TT* II.4.) “[T]he great privilege of finite intellectual Beings,” and “the great inlet, and exercise of all the *liberty* men have” lies in their capacity to

“*suspend* their desires, and stop [those desires] from determining their *wills* to any action, till they have duly and fairly *examined* the good and evil of it, as far forth as the weight of the thing desires.” (*ECHU* II.21.52.) This presumption of liberty also manifests itself in the principle of consent, which (notwithstanding its ambiguities) all governments must provide to their citizens by some combination of election and representation. (See *TT* II.22, 95-99.)

Because politics is ordered toward securing liberty, it bifurcates what counts as one realm of politics in many political theories into two separate realms. One sphere consists of the public realm, the “commonwealth,” the realm for public affairs, which are limited to the securing of the low and solid material interests around which most or all citizens can agree. Locke refers to these interests by formulations like “Safety and Security,” or “no other end but preservation.” (*TT* II.94, 133, 135.) The other sphere is the private realm. Locke’s conception of the public focuses the government on securing to and ordering for individual citizens private zones of practical discretion. Citizens may use such discretion both to secure their material interests for themselves and also to seek happiness as their reason and conscience help them to understand it.

That privatizing formula has public repercussions. For example, the public protects private property understood as individual zones of labor and creativity. Privately, property helps individual citizens to take care of their own needs. Publicly, the wealth created by private property in turn secures the citizenry from domination abroad and from dependency on “Quarrelsome and Contentious” elites at home. (*TT* II.34, 42). Culturally, when the government secures “property” to its citizenry, it teaches the vulgar mass of citizens the virtues of responsibility and self-ownership. It teaches each citizen to value “honest industry” and how to become “Master of himself, and Proprietor of his own Person.” (*TT* II.42, 44.)<sup>27</sup> Privately, the Lockean nuclear family frees individual families to rear their children without interference by



politics and rule by clan patriarchs. Publicly, in turn, because dynastic families are disintegrated into clusters of autonomous and independent nuclear families, the Lockean order undercuts quarrelsome noble dynastic families and makes the home a source of self-reliant republican virtues. (See *TT* II.77-78; *STCE* 70.)<sup>28</sup>

Similarly, not only does the separation of church and state free a people from what Locke calls the “inhumane Cruelty” to which devout Christianity can encourage believers who disagree over articles of faith (*LT* 2), it also encourages church and government each to specialize where it is competent. Christianity is freed to focus on “the regulating of Mens Lives according to the Rule of Vertue and Piety” through the power of persuasion (*LT* 1-2; see *ibid.* at 3); the commonwealth is better focused on using the power of “command” and “Penalties” to protect material interests (*ibid.* 8). Toleration encourages dissident churches, “like so many guardians of the public peace, [to] watch one another, that nothing may be innovated or changed in the form of the government.” (*LT* 52.)

#### *E. Liberalism and the Private Society*

We may now appreciate why Locke uses the notion of a private society as a measuring standard for churches in the *Letter Concerning Toleration* and for governments in the *Two Treatises*. As between a citizen and the government, Locke teaches his readers to judge their governments by whether those governments secure their happiness as well as their employers, their social clubs, and the many other private associations they may enter or exit freely. That standard makes consent and liberty as fundamental in politics as they are in these more social settings. Of course, Locke is quite aware that many individuals are bad judges of comprehensive questions. (See *ECHU* 4.20.) By the same token, he accepts that many citizens will use their consent and liberty irresponsibly in important ways. But the governors suffer from that problem

as well as the governed. And Locke focuses the temporal order on securing forms of happiness that the governed are better-equipped to appreciate.

As between churches and the broader society, the private-society ideal works in two conflicting ways. It elevates the position of many heterodox churches. The ideal encourages the government to leave such churches alone to govern themselves as non-religious societies do; the ideal also reinforces the basic principle that opinions about piety and salvation are presumptively off limits to politics. By the same token, however, the private-society ideal also limits the power of churches. It limits church proselytization only to “Exhortations, Admonitions, and Advices.” (*LT* 13.) If that ideal does not totally discredit the idea of an established state sect, at least it eliminates one of the main attractions for establishment—membership and revenues guaranteed by the force of the civil magistrate. More generally, the private-society ideal also undermines the legitimacy of some religions in a liberal society. If a religion, on the authority of revelation, maintains that believers may not leave the fold because they conscientiously disagree on articles of faith, or if it bars them from keeping their beliefs and politics reasonably separate, Locke’s teaching suggests the religion is not compatible with republican liberalism.

### III. LOCKE’S ANALYSIS OF PRIVATE SOCIETIES

Now that we have established how Locke uses the private society to shape his general political theory, let us switch courses and consider how Locke’s general politics shape the private society. The right of private society is another application of Locke’s general presumption of liberty. The natural right of association has solid and wide eudaemonistic foundations, comparable to those of other Lockean natural rights like property and family. All men have social tendencies, and those tendencies are useful for men’s accomplishing their many possible ends. Man is designed “for a sociable Creature . . . not only with an inclination, and

under a necessity to have fellowship with those of his own kind; but furnished . . . also with Language, which was to be the great Instrument, and common Tye of Society.” (*ECHU* III.1.1; see *TT* II.77; *STCE* Ep. Ded.).

Locke confirms that the right of private society runs wide because he cites a wide range of examples: conjugal society (*TT* II.78); master-servant arrangements (and by extension more sophisticated business organizations) (*ibid.* II 83); political society (*ibid.* II 87-89); societies “of Philosophers for learning, or Merchants for Commerce, or of men of leisure for mutual Conversation and Discourse” (*LT* 10); churches, “Meetings in markets,” “Concourse[s] of People in Cities,” and many other “Civil assemblies” he does not specifically mention. (*Ibid.* 49.) Of course, some of these have purposes considerably more focused and specific than the others—say, the institution of marriage. (See *TT* I.88.) But excepting those special cases, the rest aim toward different common ends. Their memberships have different needs, talents, life circumstances, or opinions about the most needful things. In all cases, however, the associations form for legitimate purposes, and in the process allow the participants to cultivate useful social faculties and to satisfy the reasonable pleasure of friendship.

This basic justification may be criticized in one of a few different ways. First, anyone who finds this portrait accurate may wonder why Locke’s political philosophy is not more communitarian. If, as Locke suggests, man is driven by natural “inclination” into society, one may reasonably wonder why he proposes a liberal political order so skeptical that the government may pursue communal understandings of excellence. Others, however, might find Locke’s portrait incomplete. Modern theories of liberalism are often criticized as question-begging. For example, libertarian Robert Nozick and modern liberal John Rawls both claim that citizens have a deontological right, as rational and autonomous beings, to choose their own

conceptions of the good life. Both have been criticized for underestimating the extent to which culture and private associations shape their conceptions of the good life and their attitudes toward fellow citizens. Michael Sandel illustrates a second critique, which suggests that Nozick and Rawls's theories need more communitarian support. Andrew Koppelman illustrates a third, that the government must transform civic culture to protect victims of social discrimination. Perhaps Locke's account is open to similar criticisms.<sup>29</sup>

Locke rejects the first criticism and sympathizes considerably with the latter two. Locke wants to build a just political order on the reasonable parts of human sociability—but he is quite aware of the problematic parts, and he fears that if society aims too high it will end up too low. Because he is a eudaemonist, when he philosophizes about rights he takes into account experiential observations from human anthropology, sociology, and psychology. Although his sociological assessment seems fairly rosy when he treats private societies most comprehensively, his sociology looks far more sober if one consults his mature works as a whole.<sup>30</sup>

The *Second Treatise* does not dwell at length on the destructive sides of human sociability, but it does acknowledge them subtly and indirectly. When Locke dedicates an entire chapter of the *Second Treatise* to conquest, he acknowledges that one people may be motivated by love of domination or hatred to subjugate another group. (See *TT* II.175-.196.) Locke confirms the same point earlier, when he describes the foundations of political societies: Such societies form out of families and extended clan because such smaller groups had “some Acquaintance and Friendship together” and “greater Apprehensions of others, than one another.” (*TT* II.107.) The social passions impel man to establish political communities. But the most natural political communities are tight-knit, closely tied to the extended family, and xenophobic. In an extended political community, these same social passions can encourage factiousness at

home as easily as domination abroad. When Locke acknowledges offhand at one point that a person may owe “defence to his Child or Friend,” he suggests that citizens are inclined to place loyalty to family and group over loyalty to country. (*TT* II.70.) Indeed, for Locke civil government is necessary precisely because “Self-love will make Men partial to themselves *and their Friends*” in the state of nature, at which point justice is impossible to enforce. (*TT* II.13 (emphasis added).) These passages confirm the anti-teleological thrust of Locke’s political theory. In his *Nichomachean Ethics*, Aristotle presumes that friendship promotes political concord and provides a pre-condition to decent political life.<sup>31</sup> In the *Two Treatises*, by contrast, Locke speaks of friendship only in contexts where it generates political discord.

If Locke hints at such themes in the *Two Treatises*, in the *Essay* he asserts them unabashedly, focusing especially on how parties inhibit free thought. When explaining the various sources of human error, he identifies as the greatest—the one “which keeps in ignorance, or error, more people than all the other together”—as

the giving up *Our assent to the common received Opinions*, either of our Friends, or Party; Neighborhood, or Country. How many Men have no other ground for their tenets, than the supposed Honesty, or Learning, or Number of those of the same Profession? As if honest, or bookish Men could not err; or Truth were to be established by the Vote of the Multitude: yet this with most Men serves the Turn.

(*ECHU* 4.20.17.) Locke suspects that men who belong to parties “have no thought, no opinion at all.” (*ECHU* 4.20.18.)<sup>32</sup>

But man’s factional and sectarian impulses are amplified to even worse extremes by other human faculties and passions. Man is needy in a harsh and chaotic natural world; he is terrified of his needs; his faculty for imagination amplifies that terror; and these faculties create an

overwhelming need for man to find in societies comprehensive authority to structure and situate his life. These characteristics, if not checked, can drive entire societies toward religious and nationalist extremism, which encourage societies to brand outsiders as enemies and perhaps even as sub-human. In the most degraded cases, men cite religious dogmas as justification for cannibalizing their own children.<sup>33</sup>

Given this dour assessment, why does Locke still defend a broad natural right of association anyway? In the right political conditions, man has enough reason and capacity for self-control to avoid becoming a slave to such extreme passions. Locke's answer is a specific application of his general justification for liberal republican self-government. In Lockean ethics, reason and temperance may, however precariously, control all the extreme passions: As Locke explains, "the great principle and foundation of all virtue and worth is placed in this, that a man is able to *deny himself* his own desires, cross his own inclinations, and purely follow what reason directs as best though the appetite lean the other way." (*STCE* 33; see *ibid.* 122.) In Lockean politics, those same faculties may, however precariously, establish liberal republican self-government as the mean between despotism and the anarchical state of nature. Liberal republican government is an imperative for Locke, because such government contributes to human happiness more realistically and comprehensively than any other practical form of government. But the imperative binds only if the political community has been educated well enough that it is realistic to expect the community to exercise the freedom liberalism provides with the moral responsibility and self-restraint liberalism requires. Otherwise, liberalism would be ineffective if not suicidal.

Locke's natural right to private society should be understood in the same terms. When Locke teaches that this right follows from man's better social tendencies, he presumes he is

speaking to an audience generally civilized enough to steer away from man's tendencies toward faction, sectarianism, tribalism, and religious fanaticism. Locke presumes that the broad public is educated in morals by Christianity as understood in the *Reasonableness of Christianity*; and that elites are educated through religion and a sound program of liberal ethical and political philosophy as set forth in his writings on education, toleration, and the *Two Treatises*. Locke's justification for free associations cannot be understood separate from that civil education.

This responsibility starts with Locke's teaching on property. Recall that Locke teaches citizens to be "Master[s]" and "Proprietor[s]" over their own livelihoods (*TT* II.44)—and that he does so before he justifies the family or political society. Men must learn to take responsibility for their own lives and plans, Locke suggests, before they can be happy in the close society of family or the complex society of politics. What is a suggestion in Locke's politics is a crucial theme of Locke's teaching on education, one goal of which is "a mind free, and master of it self, and all its actions." (*STCE* 66.) While self-mastery cannot and will not free a citizen entirely from following and needing respect from dominant social opinions, it will to a significant extent make him more selective in the opinions he chooses to follow, and more resilient in the face of criticism.

Locke also prescribes that a liberal society teach citizens to tolerate fellow citizens more respectfully. Locke's defense of Christianity stresses love of neighbor among Christ's core teachings and praises Christianity because Christ and the apostles did not present "anything tending to their own self-interest, or that of a party, in their morality." (*RC* 208-09, 212, 243.) Locke's theory of politics starts from the principle of "*Equality*," whereby all "Creatures of the same species and rank . . . should . . . be equal one amongst another without Subordination or Subjection." (*TT* II.4.)

With the political virtue of toleration Locke also introduces a new ethical virtue, “civility.” (See *STCE* 93, 109.) Civility is a middling virtue: Locke defines it as “a disposition of the mind not to offend others” or to avoid “making anyone uneasy in conversation,” and also as “that general good will and regard for all people which makes anyone have a care not to show in his carriage any contempt, disrespect, or neglect of them, but to express, according to the fashion and way of that country, a respect and value for them, according to their rank and disposition.” (Ibid. 143.) Because the citizens of Locke’s commonwealth agree that they may not agree on the most needful issues in human life, it is unrealistic for all citizens to become friends with all others. Citizens may find profound friendship with their associates in private life; they must learn to treat their fellow citizens with minimal respect.

Locke explains this moderate approach most comprehensively in the *Essay Concerning Human Understanding*. In the *Essay*, Locke is particularly harsh on parties, for there he is speaking from the vantage point of the scientists and philosophers who prize truth over good company. But even to this ascetic audience, Locke stresses that social groups are unavoidable and moderation is the only practical and decent response:

it would, methinks, become all Men to maintain *Peace*, and the common Offices of Humanity, and *Friendship*, in the diversity of Opinions, since we cannot reasonably expect, that anyone should readily and obsequiously quit his own Opinion, and embrace ours with a blind resignation to an Authority, which the Understanding of Man acknowledges not. For however it may often mistake, it can own no other Guide but Reason, nor blindly submit to the Will and Dictates of another.

(*ECHU* 4.16.4.)



#### IV. THE GENERAL RIGHT OF PRIVATE SOCIETY

Now that we have traced Locke's justifications for private societies in broad outline, let us consider in more detail the sweep of and limits on their rights, starting with the former. The rights are broad. Associations may form for any legitimate and non-injurious end.<sup>34</sup> By definition, an association is a "Society of Members voluntarily united toward" a common end—in Locke's words, "how free soever, or upon whatsoever slight occasion instituted." (*LT* 10.)

The right of association entails two subsidiary rights. One consists of the power to admit or exclude potential members depending on whether and how much they agree with the society's purpose and rules. Here again, Locke applies to churches a more general right he presumes among societies. The "Laws of the Society" are the "condition of Communion, and the Bond of the Society." "[I]f the Breach of them were permitted without any Animadversion, the Society would immediately be dissolved." (*LT* 13-14.)

The other subsidiary right consists of a society's right to establish and enforce its own rules of governance—on membership and many other subjects. Here, Locke sweeps into freedom of association a right that is sometimes kept separate from it. For example, in a recent article on constitutional freedom of association, David McGowan distinguishes between the right of association and a zone of "managerial discretion" in which the association is free to govern itself without outside interference.<sup>35</sup> Locke holds that the latter is already swept into the former: "[S]ince the joyning together of several Members into this Church-Society, as has already been demonstrated, is absolutely free and spontaneous, it necessarily follows, that the Right of making its Laws can be-long to none but the Society it self, or at least (which is the same thing) to those whom the Society by common consent has authorized thereunto." (*LT* 10-11.) The discretion must be lodged among the members and the association, and not in the hands of any government

officer or anyone else: “No Church or Company, I say, can in the least subsist and hold together, but will presently dissolve and break to pieces, unless it be regulated by some Laws, and the Members all consent to observe some Order. Place, and time of meeting must be agreed on; Rules for admitting and excluding Members must be established; Distinction of Officers, and putting things in to a regular Course, and such like, cannot be omitted.” (*LT* 10.)

Perhaps this conception of association sweeps too broadly. Horn prefers to read Locke to rank associations by the extent to which they pursue (low) material interests or (high) spiritual interests. Some elements of American federal constitutional law make a similar move, by ranking associations by the purposes they serve. According to this ranking, businesses and other mere commercial associations get little protection, while religious and advocacy associations get extremely strong protection. More influential elements of American law, by contrast, rank association by their tendency to relate to “intimate” or “expressive” functions. Associations with these functions (say, nuclear families and political parties) get strong constitutional protection; associations that lack such functions get little protection.<sup>36</sup>

Locke rejects such rankings. When he speaks of “civil assemblies,” he refers interchangeably to churches, political meetings, groups “of Philosophers for learning, or Merchants for Commerce, . . . of men of leisure for mutual Conversation and Discourse,” or even “Compan[ies] for Trade and Profit” and “clubs for Clarret.” (*LT* 10, 51.) In Locke’s judgment, human nature is too diverse for political authorities to enforce any one or few paths to complete human happiness, and Christianity makes the dangers of centralized virtue regulation especially extreme. Locke avoids both the general and the specific problems by distracting government from moral improvement and focusing it on rights protection. For men to improve themselves, they need to be given freedom not to do so. Just as “[n]o man can be forced to be Rich or

Healthful, whether he will or no,” so “[t]he Care therefore of every man’s Soul belongs unto himself, and is to be left unto himself.” (Ibid. 21.) In addition, businesses and other commercial associations help individuals secure reasonable and useful material interests that are necessary to the good life. Such interests may not be as noble or beautiful as cultivating the intellect or attaining salvation for the soul, but it is snobbery to say the former interests are unimportant. In addition, social clubs and businesses also offer opportunities for friendship, cooperation, and responsibility no matter how high or low their organizing goals happen to be.

#### V. PUBLIC LIMITATIONS ON THE RIGHTS OF PRIVATE SOCIETIES

At the same time, Locke maintains a principled distinction between indifference and harm. Locke qualifies the right of private society in several important respects. These provisos identify the principles by which legitimate association may be distinguished from harmful association, and societies’ private freedom of societies from their public responsibilities.

##### *A. Associational Wrongs to Individual Rights*

Locke’s understanding should be distinguished from the more utilitarian understanding that prevails in many contemporary discussions. For example, modern American constitutional law analyzes freedom of association challenges in a utilitarian calculus, in which a government interest may outweigh the private interest in association if the government’s objective is important and compelling enough and its means narrowly tailored to advance that objective.<sup>37</sup> In Lockean natural-rights theory, if conduct is properly part of the right of private society, no government interest may ever take priority over that right. Government restraints on association are justifiable only if they count as police “regulations”—that is, laws that require associates to keep their society “regular” in light of the moral laws, interests, and rights that justify and limit the bounds of private society.

Consider by way of example the principle that associations must answer for their torts and crimes on terms similar to their individual members. When Locke concludes that churches' associational freedom entitles them to expel members, he adds the proviso that "in all such Cases care is to be taken that the Sentence of Excommunication, and the Execution thereof, carry with it no rough usage, of Word or Action, whereby the ejected Person may any wise be damnified in Body or Estate." (LT 14.) In contemporary American constitutional discourse, the church's actions have value as exercises of the freedom of association, but the state has a stronger interest in preventing battery, property damage, or libel. In Locke's usage, by contrast, the moral foundations of the right to associate cease before the associates may tortiously or criminally injure neighbors through the vehicle of their association. Battery, trespass, and libel laws, however, do not seriously interfere with the activities or ends of associations; they simply stop associates from using the associate form to commit torts or crimes they could not commit individually.

#### *B. Associational Wrongs to Public Opinion*

Locke, however, lays down other principles that limit private societies' activities or ends far more substantially. In the *Letter*, Locke identifies four separate grounds the civil magistrate may cite to refuse to tolerate churches. Taken together, these grounds are a metaphor for Lockean liberalism generally. Each of these grounds for denying toleration to churches is really a principled restraint on the natural right of any society to associate. Each of the grounds focuses on preserving a certain set of opinions. Locke hopes to free liberal citizens to pursue or believe "speculative" opinions, without fear of coercion by the state or retaliation by private groups who disagree passionately about those opinions. His liberal project is also willing to tolerate a wide range of "practical" opinions, meaning opinions bearing directly on individual ethics or the

commonwealth's politics. (See *ibid.* 39-40.) But the Lockean commonwealth requires that the people to consent to the practical opinions necessary to perpetuate liberalism.

In this respect, Locke is *not* a modern liberal pluralist. He rejects the pluralist view “that it is none of the government’s business what citizens believe” or “that the shaping of citizens’ beliefs is not a task of a liberal state.”<sup>38</sup> In this respect, Locke has far more in common with pre-Enlightenment political philosophers than he does with, say, Nozick or Rawls. He assumes that political philosophy is primarily the study of a political community’s comprehensive political opinions. He also assumes that, when political philosophy becomes prescriptive, it must teach political opinions that persuade a people first to embrace and then to perpetuate the best possible regime. Locke holds that three factors contribute to the ethical and political rules a society enforces on its members. There are religion, the positive law, and common opinions, and of these the last does most to establish “the common *measure of Virtue and Vice.*” (*ECHU* II.28.11.)

Because liberal toleration, then, is more just and humane than its alternatives, a liberal people and magistrate must continually inculcate the citizenry how precarious and precious are the moral and political conditions in which such toleration is possible. Locke’s qualifications on associational freedom may thus be understood as the product of a more general and relatively tough-minded calculation how to tolerate the widest freedom of thought consistent with the community’s responsibility to perpetuate the conditions in which such freedom is possible. The social compact runs both ways. If the civil government breaches any of the terms of the social compact, the people may dissolve and replace it by appealing to the natural right of revolution. (See *TT* II.199, 221-26.) If the civil government abuses the grounds Locke gives it for policing churches or other private societies, it provides the citizenry with justification to overthrow it.<sup>39</sup>

By the same token, however, the commonwealth's citizenry must agree to those same terms. If they associate privately on other terms, they create a miniature society inconsistent with and threatening to the civil society's commitment to the social compact.

This suggestion may seem contrary to much of the argument of the *Letter*, for Locke insists more than once that “[t]he business of Laws [is] not to provide for the Truth of Opinions, but for the Safety and Security of the Commonwealth, and of every particular mans Goods and Person.” (*LT* 40; see also *ibid.* 6.) Nevertheless, later in the *Letter*, he qualifies this claim significantly:

Rectitude of morals, in which consists not the least part of religion and sincere piety, looks to civil life also and in it lies the safety of souls at the same time as that of the commonwealth. Moral actions belong therefore to the jurisdiction of both courts, outward as well as inward; and are subject to the rule of both, the civil governor as well as the domestic, namely the magistrate and the conscience.<sup>40</sup>

In this passage, Locke concedes that the magistrate of the Lockean commonwealth is not *entirely* focused on “the Temporal Good and outward Prosperity of the Society.” (*LT* 43.) But the concession is subtle. On one hand, the civil magistrate is not responsible for all of social morality, particularly social opinions about piety, intellectual excellence, or other individual practical virtues. William Popple's original translation of the *Letter* confuses this point, when it translates “*rectitudo morum*” (translated above as “rectitude of morals”) to mean “a good life.” In the *Essay*, Locke doubts that practical philosophy can identify any “highest good” (“*summum bonum*”). Locke applies this skepticism in the *Letter*. He instructs the civil magistrate to tolerate

claret clubs and other societies of moral idlers; and also to tolerate “speculative opinions,” which leave “to every Man the care of his own Eternal Happiness.” (Ibid. 39-40, 42.)

With that qualification in mind, when Locke says the civil magistrate has an interest in the “rectitude of morals,” he refers to the public morals relating specifically not to speculative opinions but to “practical” ones, which specifically “contribute to the Comfort and Happiness of this Life.” (Ibid. 42.)

### *C. Four Types of Harm to Public Opinion*

Locke lays down four specific grounds on which the civil magistrate may properly rely for refusing to tolerate private societies. First, Locke recommends banning churches and other societies from organizing to propagate “Opinions contrary to human Society, or to those moral Rules which are necessary to the preservation of Civil Society.” (Ibid. 45.) As part of his jurisdiction to protect lives, liberty, property, child-rearing families, and so forth, the civil magistrate has jurisdiction to stop citizens from associating toward the end of teaching that it is good to kill, enslave, or steal from citizens, or to be sexually promiscuous. Thus, to take one of many possible examples, the Lockean commonwealth has jurisdiction to restrain associations encouraging adultery, incest, sodomy, or polyamory. Such associations encourage the wider society to accept practical opinions undermining the status of the traditional family and marriage, on which the liberal commonwealth depends to raise and educate children in sound republican habits.<sup>41</sup>

Next, the commonwealth need not tolerate atheists. Many contemporary authorities suggest that liberal law and policy “mandate[] governmental neutrality between . . . religion and nonreligion.”<sup>42</sup> For Locke, however, it is crucial for the liberal civil society to inculcate the broad public in liberal morality. Even granting that some individual atheists may be far more

moral than many religious believers, Locke doubts that the broad public will learn the moral habits liberalism requires without a humane and equality-respecting religion like Christianity. (See *RC* 243.) Locke thus worries that atheists “undermine and destroy all Religion.” (*LT* 48.)

Of course, one may wonder, as John Dunn does, whether Locke’s attitude toward atheists is “odious.” One may also wonder whether Locke cannot credibly banish atheists given how he recasts Christianity and propounds a rationalist theory of politics.<sup>43</sup> Nevertheless, in his political teachings, Locke prescribes against atheism to preserve public respect for morality and religious teachings consistent with liberalism. When Lockean liberalism replaces throne and altar with government by consent, it increases the risk that political society will be unstable. (See *TT* II.223.) Locke thinks that government by consent can be stable, but not without widespread support for humane religion. Even if common opinion supports government more strongly than religious or positive law, a civil society still gambles dangerously with its social capital if it moves all its bets from religion to popular opinion.<sup>44</sup>

The third qualification is to ban churches and other societies whose membership rules specify that “all those who enter into it, do thereby, *ipso facto*, deliver themselves up to the Protection and Service of another Prince.” (*LT* 47.) Here, Locke cites as an example Muslims beholden to the Ottoman Empire, but in the process he invites his readers to think of Roman Catholics who hold that their articles of faith require them to support the temporal claims of the Church’s hierarchy. Elsewhere in the *Letter*, Locke suggests he is willing the Latin Mass and transubstantiation doctrine; by extension he is willing to tolerate Catholics. (See *LT* 40, 52.)<sup>45</sup> But in return, Catholics must forsake any elements of Catholic teaching making it legitimate to overthrow a sovereign not in conformity with Church teaching. More generally, this proviso can



fairly be understood to cover associational support for the interests of foreign governments and internationalist totalitarian movements.

Finally, Locke proposes to ban churches and other societies whose members “arrogate to themselves, and to those of their own Sect, some peculiar Prerogative, covered over with a specious shew of deceitful words, but in effect opposite to the Civil Right of the Community.” (*LT* 46.) As he explains elsewhere, “No private Person has any Right, in any manner, to prejudice another Person in his Civil Enjoyments, because he is of another Church or Religion. All the Rights and Franchises that belong to him as a Man, or as a Denison, are inviolably to be preferred to him.” (*Ibid.* 14.) Locke offers as examples a church that teaches its members to break promises with non-members, or to consider overthrowing the government over religious questions. “These therefore, and the like, who attribute . . . themselves, any peculiar Priviledge or Power above other Mortals, in Civil Concernments . . . I say these have no right to be tolerated by the Magistrate; as neither those that will not own and teach the Duty of tolerating All men in matters of meer Religion.” (*Ibid.* 46-47.)

This last proviso complicates Locke’s teachings considerably. The proviso threatens to retract much of the immutability of the natural right to society. If one reads Locke’s proviso broadly, the more that private societies advocate particular political programs, the more they expose themselves to government supervision. This suggestion is somewhat overdrawn, for the proviso applies only when societies claim political rights and benefits inconsistent with the rights a Lockean commonwealth is pledged to secure. Yet in the hurly-burly of practical politics, it can be difficult for political parties to distinguish between disagreements over application and over first principles. For instance, during the 1790s, American Federalists and Republicans accused one another of subverting the new Constitution, and some Federalists assumed that the federal

government would not restrain associational freedom if it suppressed political protect by nascent Republican party groups.<sup>46</sup> This potential helps explain why Grant reads Locke to be hostile to political parties, and why Boyd reads Locke to propound a prudential view of private association. Even so, these readings go too far. Locke's teachings leave private societies with a wide right of association, not qualified by prudential concerns in any significant way, as long as they stay out of politics. If societies do engage in politics, Locke concedes, they do risk political supervision. But it is impossible to avoid this problem completely, and Locke's prudential teaching does encourage the civil magistrate to tolerate associational dissent as long as that it is not too dangerous or violent. Locke suggests there is no reason not to tolerate heterodox practical opinions, "tho not absolutely free from all Error, if they do not tend to establish Domination over others, or Civil Impunity" to the association in which they are propagated. (*LT* 48.)

## VI. CONTEMPORARY IMPLICATIONS

Obviously, Locke's theory of private society is bound to be controversial. Although space prevents us from exploring all the controversies in any exhaustive way, we can at least consider two revealing points of contact between Locke's teaching and contemporary policy: associational freedom's tension with anti-sedition policy on one hand and with anti-discrimination policy on the other. Each of these examples highlights a different contrast between Locke's teaching and contemporary practice. Anti-discrimination policy highlights how and why Locke conceives of associational freedom more broadly than do many contemporary authorities; anti-sedition policy highlights how and why Locke conceives of the commonwealth's power to police that broad freedom more broadly than contemporary authorities. The observations that follow are only suggestive, not comprehensive. Yet in both cases, Locke's teaching challenges and may significantly recast contemporary law and policy.

### A. Seditious Associations

The Smith Act, passed in 1940, makes it a federal crime for anyone knowingly or willfully to organize an association advocating the forcible or violent overthrow of the United States or any state. Although many prosecutions under this Act have been held unconstitutional, the Act has been neither repealed nor declared unconstitutional in all of its possible applications. In the 1990s, the U.S. Congress added to the federal criminal code 18 U.S.C. § 2339B, which makes it a federal crime for anyone knowingly to provide material support to a foreign terrorist organization as designated by the Secretary of State. These laws are more or less consistent with three of Locke's provisos, relating to groups that threaten the public morals, claim special privileges or exemptions, or advance foreign interests.<sup>47</sup>

These laws and enforcement policies raise an obvious practical problem, that the government may overzealously punish legitimate free speech and association in its efforts to stamp out anarchism and terrorism. The U.S. Supreme Court has struggled how to reconcile this risk to the government's stated mission.<sup>48</sup> But the laws and policies also prompt an existential question: Can a government that claims to be tolerant claim it has a strong interest in refusing to tolerate groups because of their message?

Many prominent pluralist theories of liberalism are open to this objection. United States constitutional law raises the same problem when it holds that First Amendment doctrine aims in large part to foster a "marketplace of ideas." If the goal of constitutional democracy is to foster a competition of different ideas without regard to which idea prevails, it is hard to explain why Communism, Islamicist jihadism, or other illiberal idea systems should be kept out of the market. This paradox has led Larry Alexander to wonder whether political liberalism is "nothing more than an unprincipled *modus vivendi* responsive to religious and cultural pluralism or,

alternatively, a description of a denatured way of life characteristic of Western modernity, one devoid of deep conviction."<sup>49</sup>

Locke's teachings provide a partial response to such doubts. Although Locke's philosophy is moderate in other respects, his tough-minded eudaemonism precludes existential doubt about whether the liberal polity need tolerate illiberal groups. Again, Locke's theory is consequentialist; it builds generally on a comprehensive empirical and psychological analysis of human political life; and it justifies freedom not in any general theory of autonomy or the will, but rather in an account of the human interests most reasonably conducive to human happiness. Because of these qualities, Locke's liberalism is not indifferent to different conceptions of the good life. In Locke's terms, while individuals enjoy freedom to speculate about salvation and other topics, their freedom to do so is qualified by the common good, which is in turn defined as an aggregation of all the society's members' individual interests in being free to work, raise families, and pursue their own individual conceptions of excellence or salvation. Similarly, in contrast to the Supreme Court's marketplace of ideas metaphor, Locke doubts a liberal people can cycle through different theories of government without corrupting the moral character they need to remain liberal.

Locke's liberalism thus has little difficulty explaining why not to tolerate Communists or Islamic jihadists. Locke is reasonably sure man knows too little about the comprehensive things for political life to settle the comprehensive things in a decent way. He is also reasonably sure that citizens can coexist decently and even flourish if they agree to focus their government on liberty, property, and family and pursue higher forms of excellence in smaller groups. Communists and Islamicist jihadists are too sure they have comprehensive answers to ultimate questions. Both use the authority they claim from their answers to impose tyranny. Both groups

reject the public-private distinction and the freedom citizens enjoy thanks to that distinction. Both deny basic rights protecting reasonable human interests including respect for life, liberty, property, and free thought not consistent with their dominant teachings. Both hold that their claims to truth justify claiming “peculiar Prerogatives” that justify their not respecting basic decencies to fellow citizens who do not support their causes. (*LT* 46.) While Locke limits the ends for which his liberal commonwealth may act, he does so to make it more competent and forceful within its rightful sphere—including taking those actions necessary to prevent illiberal elements from subverting the system. A Lockean civil magistrate may choose to tolerate illiberal fringe elements, when the society is fairly secure and government suppression seems too likely to encourage censorship of legitimate freedom. But whether the magistrate should be so restrained is a question of prudence—if the society is genuinely threatened, the magistrate should take all actions appropriate to the threat.<sup>50</sup>

There is a catch: To give the liberal commonwealth more certitude in the rightness of its cause against totalitarians, Locke’s theory of association also gives the commonwealth stronger regulatory powers to use against too many associations of non-Lockean liberals. Contemporary welfare-state liberalism was developed in large part on the basis of a common political understanding holding (in John Dewey’s survey) that “[n]atural rights and natural liberties exist only in the kingdom of mythological social zoology,” that “organized society must use its powers to establish the conditions under which the mass of individuals can possess actual as distinct from merely legal liberty.”<sup>51</sup> It would not be difficult to extend Locke’s provisos to cover groups dedicated to implementing Dewey’s principles into practice.

In many cases, Locke’s teachings about prudence help set a spectrum for judging different forms of political dissent. While modern welfare-state liberals may reject Locke’s

political foundations and many of its implications, they still respect democracy, religious toleration, and many other implications of Locke's program. Both have far more in common with each other than either does with Communists or jihadists. Those commonalities provide important reasons why welfare-state liberals might be tolerated in a Lockean commonwealth. At the same time, it is striking that welfare-state liberals have only a prudential argument for toleration, not an immutable right.

At the same time, it is not clear any other theory of government can do better. Many contemporary theories of liberalism are committed to pluralism and neutrality between competing visions of the good life. These theories are broad enough to finesse deep divisions about politics within the political community, but they are correspondingly shallow in response to existential threats from outside that community. Lockean liberalism is deep enough to respond to such existential threats from without, but it is not broad. Rather than minimize as "inner splits" profound theoretical differences among species of liberalism, Lockean liberalism highlights the political differences among liberals.<sup>52</sup> Maybe a liberal polity cannot have it both ways.

#### *B. Antidiscrimination Policies and the Public-Private Distinction*

Antidiscrimination laws bar employers, social clubs, and other groups from denying access on the basis of race, religion, sex, sexual preference, or other similar characteristics. They are usually justified as part of a broader project to eradicate animosity in all forms toward discriminated-against groups. Such animosity often starts in small, private groups. To wipe out discrimination root and branch, then anti-discrimination policies typically require that such groups open up their membership to members of discriminated-against groups.

As Andrew Koppelman has recognized, an antidiscrimination program thus “presses against the public/private distinction” symbolized in freedom of association. When an association claims it should be free to regulate its membership, choose its ends, or enforce its policies without government interference, it claims that its internal governance belongs entirely in the private sphere. Anti-discrimination policies, by contrast, claim that, in some cases, such groups pursue ends and policies inconsistent with the public’s interest in ending racial and other forms of discrimination. Many contemporary theories of liberalism have difficulty explaining why the private sphere is or ought to be autonomous from the claims of the public. Consider Robert Nozick’s theory of liberalism, which entitles every citizen to wide discretion to believe what he wants and associate with whom he wants. As Koppelman and Stephen Macedo have suggested, the citizens of Nozick’s ideal polity may not sufficiently appreciate the deontological respect for persons that provides the foundations their freedom. But as soon as a Nozickian polity provides such instruction, it blurs the line between public and private in free thought and association.<sup>53</sup>

By contrast, Locke’s defense of private societies may provide a stronger defense for associational privacy and a deeper justification for the public-private distinction. Because Locke’s approach is consequentialist, it anticipates and provides a response to a claim central to anti-discrimination policy: that in order to make sure citizens do not use their freedom to discriminate against fellow citizens, a decent political community must intervene closely in its citizens’ preferences and associations. Locke recognizes that a civil society has a huge interest in shaping its citizens’ preferences—just not to the degree that contemporary anti-discrimination policies typically require. As the previous part explained, the Lockean commonwealth has an interest in preventing groups from committing crimes and torts that individuals are barred from

inflicting. It also has an interest in stopping groups from undermining foundational liberal moral opinions, including specifically groups that claim “any peculiar Priviledge or Power above other Mortals, in Civil Concernments” or a right “to establish Domination over others.” (*LT* 46-47, 49.) The Lockean liberal order does not require citizens to like one another, but it does require them to be civil to one another and to respect one another’s equal liberties to be let alone to pursue basic material interests. Thus, in principle, the Lockean commonwealth may prosecute and disband a group dedicated to violent intimidation of members of a particular race or religion—before that group even commits any act of violence—simply to teach the broader community that such intimidation will not be tolerated.

At the same time, it is harder for the Lockean commonwealth to justify a policy forcing a private business or social club to admit members that it does not want, even if the association is denying membership on the basis of race or another similar characteristic. The refusal to admit an applicant does not count as domination over the applicant or as an assertion of any special privilege to the applicant’s detriment. The applicant remains left alone. The applicant still has his liberty, his property, and his freedom to join many other associations to pursue his ends. Since the association is not inflicting any harm on the applicant or the public morals, it remains absolutely free—whether it is a local church, the Boy Scouts, or an employer employing individuals from the same religion and ethnic background—to control its membership without state interference. Here is where Locke’s presumption of associational freedom applies with force. It matters little that the business or social club is not advocating a political program or promoting religious worship. The business’s commerce and the social club’s fraternity are ends as intelligible, legitimate, and deserving of legal non-interference as loftier ends.



Locke's analysis of human psychology and politics explains why a liberal society might want to refrain from enforcing associations across race and other typical characteristics. One strand relates back to Locke's analysis of civility. Otherwise-decent citizens differ too much in their backgrounds, characters, interests, and religious formation to make it realistic for the law to force them to associate. Citizens will have their own close friendships with their family members, workmates, church-mates, and so forth, but they will not like and will probably actively mistrust many fellow citizens. The law can teach such citizens not to threaten their neighbors, but it cannot force them to like one another. As Robert Putnam has suggested, compulsory association often therefore fosters social isolation and it depletes a country's store of social capital. A country may decide to enforce anti-discrimination laws anyway, to break up local patterns of ethnic and religious discrimination and to create patterns of social trust that transcend ethnic and religious background. But Putnam confirms what Locke suggests: The society will pay a cost for making many useful and pleasant social groupings less so, and it ought to discount this cost from whatever benefits it hopes to promote by restraining free associations' power to exclude outsiders.<sup>54</sup>

Along with civility comes a cluster of values associated with personal responsibility, spiritedness, and self-reliance. To justify wide-ranging power to supervise employment discrimination and private group exclusion, anti-discrimination advocates often appeal to norms like equal dignity, concern, or respect: a freedom from insults, hate, and other social stigmas that make individuals think that the wider society values them little or not at all.<sup>55</sup> Locke's version of dignity sets lower goals. In a Lockean society, individuals can and should find enough affirmation from family, religion, and friends. Lockean citizens do not need to tolerate physical or reputational attacks by outsiders who dislike them, but they do need to disregard insults and

other lesser expressions of animosity with spiritedness and a thick skin. At a high level of generality, when the Lockean citizen is excluded from a private association on the basis of race, religion, or another similar characteristic, the appropriate responses are to brush off the implied insult and to find more friendly associates.

In other words, Locke treats the public-private distinction more sensitively than anti-discrimination advocates often do. Koppelman and other anti-discrimination scholars portray liberalism as naïve. When liberalism claims that freedom of thought and association are entirely private affairs, they argue, it ignores the fact that private associations shape the public culture. To this extent, Locke's theory accords with anti-discrimination scholars against Nozick and many other contemporary defendants of liberalism. But Locke differs with anti-discrimination scholars about what public culture is most likely to facilitate the private happiness of citizens and a humane and tolerant public life. When Locke draws between rights invasions and mere insults, he sets standards that teach individual citizens to be self-reliant and free. Anti-discrimination scholars may overlook such qualities or take them for granted: they may be promoting a conception of dignity so open-ended as to encourage individuals to see themselves as victims, to habituate them to using the law as a bludgeon for social advancement, and to institutionalize ethnic and religious competition. Similarly, Locke's politics limit the role of elites to a greater extent than anti-discrimination theory does. Locke's conceptions of dignity and self-reliance encourage a public culture in which individual citizens to shrug off insults and focus on taking care of their own. By contrast, a capacious theory of dignity encourages elites to become "quarrelsome and contentious" over ethnic and religious grievances. While more needs to be said, these insights suggest why Locke may provide a more serious response than many contemporary theories to conventional anti-discrimination criticisms of liberalism.

At the same time, Locke's theory is exposed to a different set of problems. To get the advantages of psychological sophistication, Locke opens his approach to empirical criticisms. Locke presumes that individuals can co-exist peaceably within a democratic republic even if they dislike one another for religious reasons and, depending on the political community, even if they mistrust one another because of racial and ethnic attachments. These predictions may be accurate in some cases, but not necessarily in all. Locke's arguments are thus exposed to criticisms similar to those leveled at Richard Epstein's book *Forbidden Grounds*, which defends the freedom of a business to deny employment to any applicant for any reason. This defense of at-will employment is similar to Locke's account of free association generally. Both are consequentialist; both draw broad lessons from relevant history; and both fill in the gaps by inducing likely general principles from general observations about human selfishness and sociality. Epstein's argument has been criticized thoroughly for going against the empirical evidence. According to the critics, before the U.S. Congress enacted the Civil Rights Act of 1964, white prejudices against blacks were too deep to dislodge privately and socially or to allow blacks to create their own economic opportunities without government intervention. Because Locke's defense of free association relies similarly on soft empirical generalizations, it must confront similar empirical criticisms.<sup>56</sup>

#### CONCLUSION

John Locke uses the private society as a metaphor for political legitimacy. The local civic association illustrates in practice the theoretical standards he sets for judging how well a political community treats its churches and its citizens. These metaphorical usages illustrate Locke's teachings vividly, but they have the unfortunate side effect of obscuring his teachings specifically about associational freedom. This Essay helps put Locke's specific teachings about

private society back in proper perspective, where they may be appreciated justly on their own merits.

Locke justifies associational freedom in the better social faculties in man's nature, but he also qualifies it as necessary to anticipate and check the vicious social tendencies that encourage group fanaticism and totalitarianism. His concept of associational freedom is broader than the concept that informs much contemporary practice. This concept helps us appreciate better not only associational freedom in itself but also essential safeguards like the private-public distinction as it bears on associations. At the same time, Locke's concept of associational harms is broader than and focused differently from its counterpart in contemporary practice. This concept challenges us to think more probingly about the minimal conditions of citizenship in a liberal society.

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<sup>1</sup> A. John Simmons, *The Lockean Theory of Rights* (Princeton: Princeton University Press, 1992), 14; David E. Bernstein, "Antidiscrimination Laws and the First Amendment," *Missouri Law Review* 66 (2001): 83, 105 n.109; *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 173 (1972).

<sup>2</sup> Robert A. Horn, *Groups and the Constitution* (Stanford: Stanford University Press, 1956), 7; see also John Dunn, "The Claim to Freedom of Conscience: Freedom of Speech, Freedom of Thought, Freedom of Worship?" in Ole Peter Greel, Jonathan I. Israel & Nicholas Tyacke eds.,

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*From Persecution to Toleration: The Glorious Revolution and Religion in England* (Oxford: Oxford University Press, 1991), 170-93.

<sup>3</sup> References to Locke's *Letter Concerning Toleration* are made not in the endnotes but in the text, with the following conventions. "LT 32" refers to William Popple's translation of *A Letter Concerning Toleration* (London: Printed for Awنشam Churchill, 1689), page 32. I thank Tom West for pointing out to me several discrepancies between Popple's translation and Locke's original Latin. For those discrepancies, I translate Locke's Latin myself, citing to John Locke, *Epistola de Tolerantia: A Letter on Toleration*, ed. Raymond Klibansky & William Popple trans. (Oxford: Clarendon Press, 1968).

References to Locke's other major, mature writings are also made in the text, with the following conventions: "TT I.86" refers to John Locke, *Two Treatises of Government*, ed. Peter Laslett (Cambridge, U.K.: University Press of Cambridge, student ed. 1988), treatise 1, section 86. "ECHU II.21.51" refers to John Locke, *An Essay Concerning Human Understanding*, ed. Peter H. Nidditch (Oxford: Oxford University Press, 1979), book 2, chapter 21, paragraph 51. "RC 235" refers to John Locke, *The Reasonableness of Christianity*, ed. George W. Ewing (Washington, DC: Regnery Gateway, Inc., 1965), paragraph 235. "STCE 70" refers to John Locke, *Some Thoughts Concerning Education*, in *Some Thoughts Concerning Education and Of the Conduct of the Understanding*, ed. Ruth W. Grant & Nathan Tarcov (Indianapolis: Hackett Publishing Co., 1996), paragraph 70.

<sup>4</sup> Horn, *Groups and the Constitution*, 8. See also Peter Laslett, "Introduction," in *John Locke: Two Treatises of Government*, Peter Laslett ed. (Cambridge, U.K.: University Press of Cambridge, 1988), 3, 86; Maurice Cranston, "John Locke and the Case for Toleration," in *On Toleration* (Susan Mendus & David Edwards eds., 1987), 101-21, 119 & *passim*. Similarly,

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while Ingrid Creppell treats Locke's *Letter Concerning Toleration* as justifying a broader theory of liberalism, she works with Locke's observations on religion and not on private associations generally. Ingrid Creppell, "Locke on Toleration: The Transformation of Constraint," *Political Theory*, 24, no. 2 (1996): 200, 226, 228-29.

<sup>5</sup> See [ed. please provide information for complete citation to Boyd's article]; A. John Simmons, *On the Edge of Anarchy: Locke, Consent, and the Limits of Society* (Princeton: Princeton University Press, 1993), 135-36.

<sup>6</sup> Walzer, "Liberalism and the Art of Separation," *Political Theory*, 12, no.3 (1984): 315, 324; Ingrid Creppell, "Locke on Toleration: The Transformation of Constraint," *Political Theory*, 24, no. 2 (1996): 200-40, 201.

<sup>7</sup> *LT* 15. Poppel's translation suggests that the right of private society is not only "immutable" but also "fundamental." Locke's Latin has no word corresponding to "fundamental."

<sup>8</sup> See for example Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), 300-02.

<sup>9</sup> See Jeremy Waldron, "John Locke: Social Contract Versus Political Anthropology," *The Review of Politics*, 51, no. 1 (Winter 1989): 3-28. For more general criticisms of the consent principle consider John Rawls, "Justice as Fairness," *Philosophical Review* 67 (1958): 178.

<sup>10</sup> Ruth W. Grant, "Locke's Political Anthropology and Lockean Individualism," *Journal of Politics* 50, no. 1 (Feb. 1988): 42, 59-60; John Dunn, *The Political Thought of John Locke: An Historical Account of the Argument of the 'Two Treatises of Government'* (Cambridge, U.K.: University Press of Cambridge, 1969), 29, 266-67; Laslett, "Introduction," in *Two Treatises of Government*, 3, 87; see also J. W. Gough, *John Locke's Political Philosophy*, 2d ed. (London: Oxford University Press, 1973), 14 (finding a "basic inconsistency between [Locke's] earlier

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belief in absolute moral principles and his tendency later to think in hedonistic terms”);

Raymond Polin, “John Locke’s Conception of Freedom,” in *John Locke: Problems and Perspectives*, John W. Yolton, ed. (Cambridge, U.K.: Cambridge University Press, 1969), 1, 1 (“traditional interpreters of John Locke like to pretend that he professed simultaneously a theoretical philosophy of empirical style and a practical philosophy of innatist inspiration”);

<sup>11</sup> Letter from John Locke to Richard King, August 25, 1703.

<sup>12</sup> Peter C. Myers, *Our Only Star and Compass: Locke and the Struggle for Political Rationality* (Lanham, MD: Rowman & Littlefield Publishers, 1998), 18.

<sup>13</sup> See Robert P. Kraynak, “John Locke: From Absolutism to Toleration,” *The American Political Science Review*, 74, no. 1 (1980): 53-69.

<sup>14</sup> By describing Locke as a philosopher, this interpretation comes into some tension with more historically-focused interpretations that prefer to read Locke primarily in context of the problems of England in his day. See Laslett, “Introduction,” at 76; Dunn, “The Political Thought of John Locke,” at 16-18, 266-67.

<sup>15</sup> Although *Of the Conduct of the Understanding* targets the same audience, on the topics covered here that work is not as relevant as and adds little to what can already be gained from the *Essay*.

<sup>16</sup> Ruth W. Grant, *John Locke’s Liberalism* (Chicago: University of Chicago Press, 1987), 8-9.

For similar approaches to interpreting Locke, consider Michael P. Zuckert, *Launching Liberalism: On Lockean Political Philosophy* (Lawrence, Kansas: University Press of Kansas, 2002), 3-17; Myers, *Our Only Star and Compass*, 13-26; Nathan Tarcov, *Locke’s Education for Liberty* (Chicago: University of Chicago Press, 1984); Leo Strauss, *What Is Political*

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*Philosophy? and Other Studies* (Chicago: University of Chicago Press, 1959), 93 n.24; Leo Strauss, "Persecution and the Art of Writing," *Social Research* 8, no. 1 (1941): 488, 503 n.21.

<sup>17</sup> Dunn, *Political Thought of John Locke*, at 29; see Gough, *John Locke's Political Philosophy*, 10-11, 19, 26; Jeremy Waldron, *God, Locke, and Equality: Christian Foundations of John Locke's Political Thought* (Cambridge: Cambridge University Press 2002), 82.

<sup>18</sup> On this point, I follow, West, Grant, Simmons, and Tarcov more than Zuckert. Zuckert grounds Locke's normative claims in "self-ownership," which is not necessarily eudaemonistic. *Launching Liberalism*, 4-5, 193-95; see Thomas G. West, "Nature and Happiness in Locke," in *The Claremont Review of Books* 4, no. 2 (2004) (reviewing Zuckert, *Launching Liberalism*) (unabridged version, [http://www.claremont.org/publications/pubid.659/pub\\_detail.asp](http://www.claremont.org/publications/pubid.659/pub_detail.asp)); Myers, *Our Only Star and Compass*, 137-72; Grant, *John Locke's Liberalism*, 23-25, 37-39; Simmons, *The Lockean Theory of Rights*, 52-53; Tarcov, *Locke's Education for Liberalism*, 210.

<sup>19</sup> See Alasdair MacIntyre, "Hume on the 'Is' and the 'Ought'," in *Against the Self-Images of the Age: Essays on Ideology and Philosophy* (South Bend, Ind.: University of Notre Dame Press, 1978): 109, 124; G.E. Anscombe, "Modern Moral Philosophy," *Philosophy* 33, no. 124 (1958): 1, 2 (general criticisms of Kantian deontology); Creppell, "Locke on Toleration," 200-01 (the relevance of Locke's observations on the human condition).

<sup>20</sup> See C.B. MacPherson, *The Theory of Possessive Individualism: Hobbes to Locke* (London: Oxford University Press, 1962), 220-21, 243, 247-51; Leo Strauss, *Natural Right and History* (Chicago: University of Chicago Press, 1953), 202-51; Robert A. Goldwin, "John Locke," in Leo Strauss & Joseph Cropsey eds., *History of Political Philosophy* (Chicago: University of Chicago Press, 3rd ed. 1987), 476.



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<sup>21</sup> Michael Walzer, "Liberalism and the Art of Separation," *Political Theory* 12, no. 3 (1984): 315, 324; Creppell, "Locke on Toleration," 201. See Grant, *Locke's Liberalism*, 48-51.

<sup>22</sup> Myers, *Our Only Star and Compass*, 20-21, 107-111, 149-55; Zuckert, *Launching Liberalism*, 148-49, 162; West, "Nature and Happiness in Locke."

<sup>23</sup> Aristotle, *The Politics* 1255a3-a20; Goldwin, "John Locke," 484.

<sup>24</sup> Myers, *Our Only Star and Compass*, 168-69, 179-226; West, "Nature and Happiness in Locke."

<sup>25</sup> The following discussion relies substantially on insights from Zuckert, *Launching Liberalism*, 146-68; Harry V. Jaffa, *A New Birth of Freedom: Abraham Lincoln and the Coming of the Civil War* (Lanham, Md.: Rowman & Littlefield Publishers, 2000), 121-52; Harvey C. Mansfield, Jr., *Taming the Prince: The Ambivalence of Executive Power* (New York: Free Press, 1989), 68-71, 91-118.

<sup>26</sup> Jeremy Waldron, "Locke: Toleration and the Rationality of Persecution," in Susan Mendus, ed., *Justifying Toleration: Conceptual and Historical Perspectives* (Cambridge: Cambridge University Press, 1988), 61, 64-67, 80-82.

<sup>27</sup> See Zuckert, *Launching Liberalism*, 190-97, 323-26; Myers, *Our Only Star and Compass*, 190-96; Tarcov, *Locke's Education for Liberty*, 8, 209-11.

<sup>28</sup> See *ibid.*, 5, 209-11; West, "Nature and Happiness in Locke"; Mary B. Walsh, "Locke and Feminism on Private and Public Realms of Activities," *Review of Politics*, 57, no. 2 (Spring 1995): 251, 261-62; Thomas G. West, "Vindicating John Locke: How a Seventeenth-Century 'Liberal' Was Really a Social Conservative" (available at <http://www.frc.org/get.cfm?i=WT01F1&v=PRINT>).

<sup>29</sup> See Aristotle, *The Politics* 1252b-1253a38; Aristotle, *Nicomachean Ethics* 1155a22-28, 1167a26-30; John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971), 23-

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32; Nozick, *Anarchy, State, and Utopia*, 28-33, 300-04; Michael J. Sandel, *Liberalism and the Limits of Justice*, 2d ed. (Cambridge: Cambridge University Press, 1992), 9-14, 60-67; Andrew Koppelman, *Antidiscrimination Law and Social Equality* (New Haven: Yale University Press, 1996), 181-205.

<sup>30</sup> From this paragraph until the end of this part, my argument has been informed substantially by Myers, *Our Only Star and Compass*, 123-29, 196-97.

<sup>31</sup> See Aristotle, *Nichomachean Ethics*, 1155a20-1155b1.

<sup>32</sup> See Grant, “Locke’s Political Anthropology and Political Individualism,” 59-60.

<sup>33</sup> See *TT* I.58-59; Myers, *Our Only Star and Compass*, 126; Creppell, “Locke on Toleration,” 213-16.

<sup>34</sup> Here, “non-injurious” is a term of art meant to cover the cognizable harms the public may protect against, to be sketched in the next part.

<sup>35</sup> See David McGowan, “Making Sense of *Dale*,” *Constitutional Commentary* 18 (2001): 121, 125, 157 (discussing *Boy Scouts of America v. Dale*, 530 U.S. 640, 648-53 (2000)).

<sup>36</sup> See *Dale*, 530 U.S. at 649-50; *Roberts v. United States Jaycees*, 408 U.S. 609, 617-23 (1984); *ibid.* at 634-646 (O’Connor, J., concurring in the judgment).

<sup>37</sup> See *Dale*, 530 U.S. at 648; *Roberts*, 408 U.S. at 623.

<sup>38</sup> Koppelman, *Antidiscrimination Law and Social Equality*, 1.

<sup>39</sup> I thank Eric Miller and Andy Koppelman for encouraging me to make this point explicit..

<sup>40</sup> Locke, *Epistola de Tolerantia*, 122. For Popple’s translation, see *LT* 40-41.

<sup>41</sup> See *TT* I.59; *Davis v. Beason*, 133 U.S. 33, 342-43 (1890); *Reynolds v. United States*, 98 U.S. 145, 164-64 (1879); Horn, *Groups and the Constitution* 24-25.

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<sup>42</sup> *McCreary County v. American Civil Liberties Union*, 545 U.S. 844, 860 (2005) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)).

<sup>43</sup> Dunn, “The Claim to Freedom of Conscience,” 180-82; compare Zuckert, *Launching Liberalism* (suggesting that Locke’s rationalism and skepticism undermine general public respect for Christianity and encourage deism and agnosticism) with Myers, *Our Only Star and Compass*, 46-50 (reading Locke to conclude that human faculties point toward the existence of God, even as he rests the grounds of human obligation on rationally-knowable foundations). For examples of American cases upholding anti-blasphemy laws from constitutional challenge on similar grounds, consider *Updegraph v. Commonwealth*, 11 Serg. & Rawle 394 (Pa. 1824); *People v. Ruggles*, 8 Johns. R. 290 (N.Y. 1811).

<sup>44</sup> See *ECHU* I.3.6; *RC* 243; Waldron, *God, Locke, and Equality*, 224-26, 235.

<sup>45</sup> Here Locke contradicts the position he took in his 1667 “Essay on Toleration,” in John Locke, *Political Essays*, ed. Mark Goldie (Cambridge, U.K.: Cambridge University Press, 1997), 134-59. In the text, I also contradict and correct an error I made in Eric R. Claeys, “Justice Scalia and the Religion Clauses: A Comment on Professor Epps,” *Washington University Journal of Law & Policy* 21 (2006): 349-58, 355 & n.28. See Waldron, *God, Locke, and Equality*, 218-23.

<sup>46</sup> See Jaffa, *New Birth of Freedom*, 30-72; Robert M. Chesney, “Democratic-Republican Societies, Subversion, and the Limits of Legitimate Political Dissent in the Early Republic,” *North Carolina Law Review*, 82 (2004): 1525.

<sup>47</sup> See 18 U.S.C. § 2385 (West 2007); *Yates v. United States*, 354 U.S. 298 (1957); 18 U.S.C. § 2339B(a)(1) & (g)(6) (West 2007); Robert M. Chesney, “Civil Liberties and the Terrorism Prevention Paradigm: The Guilt By Association Critique,” *Michigan Law Review* 101, no. 6 (2003): 1408, 1432-52.

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<sup>48</sup> See *United States v. Robel*, 389 U.S. 258 (1967); *Keyishian v. Board of Regents*, 384 U.S. 589 (1967); *Elfbrandt v. Russell*, 384 U.S. 11 (1966); 367 U.S. 291 (1961); *Scales v. United States*, 367 U.S. 203 (1961); David Cole & James X. Dempsey, *Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security* (New York: New Press, 2002), 153-55.

<sup>49</sup> *Keyishian v. Board of Regents*, 385 U.S. 589, 605-606 (1967); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); Larry Alexander, "Illiberalism All the Way Down: Illiberal Groups and Two Conceptions of Liberalism," *Journal of Contemporary Legal Issues*, 12 (2002): 625, 625-30.

<sup>50</sup> See Harry V. Jaffa, *Original Intent and the Framers of the Constitution: A Disputed Question* (Washington, D.C.: Regnery Gateway, Inc., 1994), 329-42; Harry V. Jaffa, "On the Nature of Civil and Religious Liberty," in *Equality and Liberty: Theory and Practice in American Politics* (Oxford: Oxford University Press, 1965); John Marshall, "Report of the Minority on the Virginia Resolutions," reprinted in *The Founders' Constitution*, Philip B. Kurland & Ralph Lerner eds. (Chicago: University of Chicago Press) 5: 136-39. For examples of national anti-sedition policies that worked relatively effectively, consider Karl Loewenstein, "Legislative Control of Political Extremism in European Democracies, I & II," *Columbia Law Review*, 38, no. 5 (1938): 591-622 & 725-74. Loewenstein suggests that many European democracies during the inter-war period effectively suppressed fascist and socialist parties until they were conquered by Nazi Germany and the Axis. If Loewenstein is correct, these countries' internal policies toward seditionists were effective regardless of whether the countries could be overwhelmed by superior external force.

<sup>51</sup> John Dewey, *Liberalism and Social Action* (Amherst, N.Y.: Prometheus Books, 1999), 27, 35.

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<sup>52</sup> Dewey, *Liberalism and Social Action*, 35.

<sup>53</sup> Koppelman, *Antidiscrimination Law and Social Equality*, 181; Nozick, *Anarchy, State, and Utopia*, 30-33, 299-306; see Koppelman, *op. cit.* 181-90 (citing Stephen Macedo, *Liberal Virtues: Citizenship, Virtue, and Community in Liberal Constitutionalism* (Oxford: Clarendon Press, 1990), 55).

<sup>54</sup> See Robert D. Putnam, “*E Pluribus Unum: Diversity and Community in the Twenty-First Century*,” *Scandinavian Political Studies*, 30, no. 2 (2007): 137, 146-59.

<sup>55</sup> See for example Koppelman, *Antidiscrimination Law and Social Equality*, 57-76; Ronald Dworkin, “Reverse Discrimination,” in *Taking Rights Seriously* (Cambridge: Harvard University Press, 1978), 227-28.

<sup>56</sup> See Richard A. Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* (Cambridge, Mass.: Harvard University Press, 1992), 13-143; Drew S. Days, III, “Reality,” *San Diego Law Review*, 31, no. 1 (1994): 169, 170-80; Richard McAdams, “Epstein on His Own Grounds,” *San Diego Law Review*, 31, no. 1 (1994): 241, 249-64; Samuel Issacharoff, “Contractual Liberties in Discriminatory Markets,” *Texas Law Review*, 70, no. 5 (1992): 1219, 1225-34; J. Hoult Verkerke, “Free to Search,” *Harvard Law Review*, 105, no. 8 (1992): 2080, 2088-96.