

REALIZING FREEDOM

Definitions of Civil Society

Definitions matter, for a number of reasons. The definition of civil society is one of the more important problems in moral, social, and political thought. One answer is simply to stipulate how one will use the term, but, as logicians insist, whether stipulative definitions “are clear or unclear, advantageous or disadvantageous, or the like, are factual questions.”² Steven Scalet and David Schmidtz deal straightforwardly with this very thorny problem, by stipulating that

[c]ivil society is that community . . . [that] delegates authority to government, and is the body within which ultimate authority resides. Civil society retains the right to dismiss those whom it hires to provide it with governance. In this sense, classical liberals typically use the term “civil society” to refer to anything *but* government; businesses, schools, clubs, unions, media, churches, charities, libraries, and any other nongovernmental forms of organization through which a community’s members relate to each other. Civil society is in this sense a cluster concept. It refers to a cluster of things that bear a family resemblance to each other but share no common essence, apart from being nongovernmental forms of association.³

Scalet and Schmidtz did not have the space to defend their definition of civil society, to show why it is clear and advantageous, so the task falls to me. Their definition is superior to most common contemporary competing definitions because it is both consistent with a very long tradition, and therefore with most usage of the term, and because it satisfies the criteria of a good definition in ways that other proposed definitions do not.

Will Kymlicka, in his contribution to the same volume,⁴ stipulates that by civil society he intends “Associational Life,” which he distinguishes from “The State” and from “The Economy.” The state can at least be understood as an organization, but seeing “The Economy” in this way reveals a socialist understanding of human interaction. It excludes from civil society all of the many forms of association (partnerships, cooperatives, stock markets, unions, joint-stock companies, etc.) organized for purposes of mutual benefit, all of which

are lumped together and reified, converted into an entity known as “The Economy.” This is a particularly striking example of an increasingly common trend of defining civil society as a “third sector” of society. For example, the social democratic theorist Benjamin Barber in his recent book on civil society defines civil society as “a ‘third sector’ (the other two are the state and the market) that mediates between our specific individuality as economic producers and consumers and our abstract collectivity as members of a sovereign people.”⁵ Barber recognizes his divergence from historical usage but defends his ahistorical and purely stipulative account on the grounds that the term *civil society*’s “lively history no more determines or limits the ideal of civil society in political discussion today than Smith’s eighteenth-century account of laissez-faire liberalism determines or limits modern debates about global market economics. We all depend on intellectual history, but this does not mean that we must constantly engage in it.”⁶ The last point is fair enough, but it hardly licenses us simply to make up new meanings for a term or to make spurious appeals to grammar, as in “less inclusive groups certainly qualify as generically social, but if they are to count as part of a rigorously defined democratic *civil* society they need to be more than that. Otherwise, the modifier ‘civil’ loses its meaning.”⁷ The “civil” in civil society does not distinguish the civil parts of a society from the uncivil parts, but civil societies from uncivil societies—for example, from states of nature or from societies ruled by totalitarian states or based on rigid caste distinctions. Words and concepts have histories, and simply stipulating that one will use a term in a way entirely different from—indeed incompatible with—previous uses, in order to legitimate certain ideological goals, is misleading and unacceptable. In contrast, the use of the term by Scalet and Schmidt comports well with historical usage, has the advantage of distinguishing institutions and practices in useful ways and in terms of appropriate categories, and serves as a foundation for the pursuit of ideas about justice, rather than as part of a conclusion.

Origins of Civil Society

The notion of civil society arose from the cities of Europe and was historically used to describe the new kind of life emerging there from about the eleventh century onward. It was the way of life of a particular order of society. As the church asserted its independence

from the secular powers, the burghers of the cities asserted their independence from both.⁸ The knightly order and the orders of the church had their peculiar characteristics, and so did the order of the burghers that began to take definite form in the eleventh century. The foundation of the way of life of the burghers was commerce, in the forms of both trade and manufacturing. In contrast with the hierarchical and coercive orders of the feudality and the hierarchical and mystical orders of the church, commercial orders tended to equality, liberty, and rationality. As Henri Pirenne noted, of the needs of the order of civil society, “the most indispensable was personal liberty. Without liberty, that is to say, without the power to come and go, to do business, to sell goods, a power not enjoyed by serfdom, trade was impossible.”⁹

Max Weber saw the conception of the burgher as a member of an association endowed with rights and privileges as characteristic of occidental city life. In contrasting the cities of western Europe with other urban conglomerations on the Eurasian landmass, he observed,

Most importantly, the associational character of the city and the concept of a *burgher* (as contrasted to the man from the countryside) never developed at all or existed only in rudiments. The Chinese townsman was legally a member of his sib and hence of his native village, where the temple of his ancestor-cult stood and with which he carefully upheld his association. Similarly, the Russian member of a village community who earned his living in the city remained a “peasant” in the eyes of the law. The Indian townsman was, in addition, a member of his caste.¹⁰

The citizens of the towns built strong walls to protect themselves from the various armed bands—including the princes and knights of the feudal orders, as well as their less-settled cousins, the Viking raiders and pirates. Within the walls they created social and legal bonds through the publicly sworn ritual oaths of the burghers. John of Viterbo (ca. 1250) even went so far as to invent an etymology of the term *civitas*:

A city is called the liberty of citizens or the immunity of inhabitants. . . . [F]or that reason walls were built to provide help for the inhabitants. . . . “City” means “you dwell safe from violence” (*Civitas, id est “Ci(tra) vi(m)(habi)tas”*). For residence is without violence, because the ruler of the city will

protect the lowliest men lest they suffer injury from the more powerful, since “we cannot be equal with those more powerful” (*Digest* 4.7.3). Again, “no one must be unjustly treated on account of the power of his adversary . . .” (*Digest* 1.1.19). Again, since the home (*domus*) is for each person a most secure refuge and shelter, no one should be taken therefrom against their will; nor is it reasonable that anyone in a town should be compelled by violent fear and so on (*Digest* 2.4.18 and 2.4.1). Again [the city] is truly called a place of immunity, because its inhabitants are guarded by its walls and towers and protected in it from their enemies and foes.¹¹

In very many cases the cities of Europe were built on historically well-documented (not merely hypothetical) social contracts. Harold Berman, drawing on the account in the *Domesday Book of Ipswich*, describes the act of oath taking in the town of Ipswich, England:

[O]n Thursday, June 29, 1200, the whole community of the town assembled in the churchyard of St. Mary at the Tower. They proceeded to elect, with one voice, two bailiffs, who were sworn to keep the office of provost, and four coroners, who were sworn to keep the pleas of the crown and to handle other matters affecting the crown in the town “and to see to it that the aforesaid bailiffs justly and lawfully treat the poor as well as the rich.” . . . On Sunday, July 2, the bailiffs and the coroners, with the assent of the community, appointed four men of each parish of the borough, and they elected the twelve capital portmen. (Understandably, the two bailiffs and four coroners were among those elected.) After they were sworn faithfully to govern the borough and maintain its liberties, and justly to render the judgments of the courts “without respect to any person,” all the townsmen stretched forth their hands toward the “Book” (the Gospels) and with one voice solemnly swore to obey and assist, with their bodies and their goods, the bailiffs, coroners, and every one of the capital portmen in safeguarding the borough, its new charter, its liberties and customs, in all places against all persons, the royal power excepted, “according to their ability, so far as they ought justly and rationally to do.”¹²

The legal relations among the inhabitants of such places were normally governed by contract, rather than status; they were the quintessential “social order in which all these relations arise from the free agreement of individuals” described by Henry Sumner

Maine.¹³ This was clear and obvious to all in the many cases in which the cities and towns were founded, rather than simply there from time immemorial. As contractually formed legal associations, cities had a juridical existence.¹⁴ The principle that “city air makes one free after the lapse of a year and a day,” a recognized privilege of Bremen from 1186 and of Lübeck from 1188,¹⁵ was quite widely recognized throughout Europe. In the “Customs of Newcastle-Upon-Tyne in the Time of Henry I, 1068–1135” we find stated, “If a villein come to reside in the borough, and shall remain as a burgess in the borough for a year and a day, he shall thereafter remain there, unless there was a previous agreement between him and lord for him to remain there for a certain time.”¹⁶

These associations were known by many different terms, but two came into wide usage to describe the legal status of such associations: the Germanic *burgenses* and the Latin *civitas*.¹⁷ As Hans Planitz notes, “The expression *burgenses* was at first used only if the city was not a *civitas*, and *civitas* was at first only the old episcopal seat (*‘Bischofsstadt’*).”¹⁸ Both terms and their derivatives—*bürgerlich*/bourgeois and civil—have come down to the present age and are used interchangeably. The advantage of the former is its obvious connection with city life—with the burgh (retained in English as borough and in such names as Canterbury and Pittsburgh)—and the advantage of the latter is its obvious connection with a way of comporting oneself—with civility. Civil society is the society of those who live in a certain kind of relation. From its origins as a particular order of the wider world of human relationships, civil society has so grown that it has displaced the feudal and ecclesiastical orders as claimant to the status of all-encompassing or universal order or, as we might say today, as the default or background order. The growth of commerce and of the associated commercial and scientific mentality had brought in its wake pluralism, which had undermined the claims of the church to universality in practice, and equality, which had made both pointless and odious the privileges of “noble” birth.¹⁹

The unique characteristics of the order of civil society include individual liberty, peace, and equality before the law. Individuality and personal liberty developed along with civil society. In Antony Black’s words,

Civil society . . . was the beneficiary of the enhanced value now ascribed to the individual: the sacred was becoming

identified with the human, personality was beginning to be seen as the only human entity with absolute value. . . . The crucial point about both guilds and communes was that here individuation and association went hand in hand. One achieved liberty by belonging to this kind of group. Citizens, merchants, and artisans pursued their own individual goals by banding together under oath.²⁰

Peace and personal security were central values. As Pirenne remarks, in the midst of widespread violence and predation, the medieval commune was a peace association: “The burghers were essentially a group of *homines pacis*—men of peace. The peace of the city (*pax villae*) was at the same time the law of the city (*lex villae*).”²¹

Legal equality and the rule of law developed in civil society. Antony Black describes the basic values of civil society as follows:

[F]irst, personal security in the sense of freedom from the arbitrary passions of others, and freedom from domination in general. This involves freedom (or security) of the person from violence, and of private property from arbitrary seizure. But these, it would appear, can only be maintained if legal process is credibly and successfully enforced as an alternative to physical force, in settlement of disagreements, and in redressing wrongs committed by violence. This leads to the notion of legal rights (whether or not so called), both in the sense of the right to sue in court on equal terms with everyone else—legal equality—and in the sense of claims, for example to property, recognized and upheld by law.²²

A central part of the growth of equal legal rights was toleration of nonviolent beliefs and behaviors. Benedict de Spinoza observed of the civil society of his native city,

The city of Amsterdam reaps the fruit of this freedom in its own great prosperity and in the admiration of all other people. For in this most flourishing state, and most splendid city, men of every nation and religion live together in the greatest harmony, and ask no questions before trusting their goods to a fellow-citizen, save whether he be rich or poor, and whether he generally acts honestly, or the reverse. His religion and sect are considered of no importance; for it has no effect before the judges in gaining or losing a cause, and there is no sect so despised that its followers, provided that

they harm no one, pay every man his due, and live uprightly,
are deprived of the protection of the magisterial authority.²³

Civil society rests on a foundation of fundamental equality and liberty, a legal foundation. This explains the use of the term to refer to both the various “private” contractual associations often associated with civil society—corporations, associations, unions, partnerships, clubs, churches, and so on—and the common use of the term to refer to the entire complex set of arrangements governed by a legal order. James Harrington used the term *civil society* to refer to the people governed by a common set of laws, or government, rather than by the arbitrary will of rulers: “Government (to define it *de jure* or according to ancient prudence) is an art whereby a civil society of men is instituted and preserved upon the foundation of common right or interest, or (to follow Aristotle and Livy) it is the empire of laws and not of men.”²⁴

The better-known John Locke uses “civil society” interchangeably with “political society” to refer to the relationship among those who form one body politic, which has the power to choose one government.²⁵ Thus,

[t]he only way whereby any one divests himself of his Natural Liberty, and *puts on the bonds of Civil Society* is by agreeing with other Men to joyn and unite into a Community, for their comfortable, safe, and peaceable living one amongst another, in a secure Enjoyment of their Properties, and a greater Security against any that are not of it. This any number of Men may do, because it injures not the Freedom of the rest; they are left as they were in the Liberty of the State of Nature. When any number of Men have *so consented to make one Community* or Government, they are thereby presently incorporated, and make *one Body Politick*, wherein the *Majority* have a Right to act and conclude the rest.²⁶

As such, a civil society or a body politic is distinguished from its government, from the body of people to whom the civil society may delegate its powers of enforcing and executing the laws. Unlike many later writers, Locke does not make the mistake of confusing the group to whom the members of civil society delegate certain powers with civil society as a whole.²⁷ The appropriate relationship between civil society and government is that of principal and agent, as understood in most normal contractual relationships. Although

civil society might be referred to as an institution, as the term is used to refer to the “institutions” of property and marriage, it is not an organization. Government is both an institution in the sense that civil society and marriage are institutions *and* it is an organization to which the members of the civil society may entrust certain powers. The difference is important and helpful to delineate the rightful authority of government and its rightful limits.

Thus, civil society refers first and foremost to a kind of legal relationship among persons.²⁸ Above all, it is a relationship in which each is in possession of what is properly her own, of her property, or right. Fundamental rights—clustered around property in one’s person—are equal for all. The concept of subjective right emerged and developed along with civil society.²⁹ Immanuel Kant identifies as a condition of civil society a well-defined understanding of *mine* and *thine*, which in turn requires that all are equally subject to the same known law:

Now, with respect to an external and contingent possession, a unilateral Will cannot serve as a coercive law for everyone, since that would be a violation of freedom in accordance with universal laws. Therefore, only a Will binding everyone else—that is, a collective, universal (common), and powerful Will—is the kind of Will that can provide the guarantee required. The condition of being subject to general external (that is, public) legislation that is backed by power is the civil society. Accordingly, a thing can be externally yours or mine only in a civil society.³⁰

Civil society is a kind of social order based on a particular kind of legal foundation. This legal foundation is not the civil society itself, but civil society can hardly be conceived, much less realized, in its absence. The social order made possible by a legal foundation of equal and compossible individual rights³¹ protected by limited government admits of complexity far exceeding the power of the human intellect to design or control; what is important for the enterprise of defining civil society is not what particular forms it may happen to take, what organizations or associations its members form, or what religion they profess, but that the infinite complexity and variability of which civil society is capable rests on a set of fairly simple rules.³² Religious associations, business enterprises, self-help and mutual-aid societies, intellectual and scientific unions, and many

other forms of association must conform to the rule of law, but within the rather wide parameters set by Kant's conditions, an infinite variety is possible. The satisfactions of life in society rest on a foundation of well-defined legal rights protected by government, but the satisfactions of human life in society are provided by the peaceful interactions of free citizens.³³ As the influential classical liberal Benjamin Constant noted in his 1819 speech "On the Liberty of the Ancients Compared with That of the Moderns,"

The holders of authority . . . are so ready to spare us all sort of troubles, except those of obeying and paying! They will say to us: what, in the end, is the aim of your efforts, the motive of your labours, the object of all your hopes? Is it not happiness? Well, leave this happiness to us and we shall give it to you. No, Sirs, we must not leave it to them. No matter how touching such a tender commitment may be, let us ask the authorities to keep within their limits. Let them confine themselves to being just. We shall assume the responsibility of being happy for ourselves.³⁴

Civil Society and Motivation

Some philosophers, however, came to identify the social order of civil society principally with a particular kind of activity or motivation, rather than with the legal order that Locke, Kant, and others agreed was its foundation. Thus, G. W. F. Hegel asserted that "individuals in their capacity as burghers are private persons whose end is their own interest" and characterized civil society (*bürgerliche Gesellschaft*) as "the battleground where everyone's individual private interest meets everyone else's."³⁵ Hegel thus identified civil society not merely with a legal order, but also with a kind of partial and selfish motivation. Karl Marx followed Hegel in identifying this legal relationship with a particular motivation when he argued in "On the Jewish Question" that "the so-called *rights of man*, as distinct from the *rights of the citizen*, are simply the rights of a *member of civil society*, that is, of egoistic man, of man separated from other men and from the community."³⁶ Further, "the right of property is . . . the right to enjoy one's fortune and to dispose of it as one will; without regard for other men and independently of society. It is the right of self-interest. This individual liberty, and its application, form the basis of civil society. It leads every man to see in other men, not the *realization*, but rather the *limitation* of his own liberty."³⁷

Benjamin Barber and others share this view of a rights-based society as one of solitariness and selfishness. In Barber's words, "Rights secure our negative liberty, but since they are often claimed against others, they entail being left alone."³⁸ Barber decries "the atmosphere of solitariness and greed that surrounds markets."³⁹ Most recent attempts in the United States (at least) to come to grips with civil society have taken the same tack of focusing on motivation, but remarkably they have simply flipped Hegel and Marx on their heads by identifying civil society exclusively with *nonprofit* enterprises and activities. Thus, civil society is typically identified as that sector of society "between state and market," as Barber did in a passage quoted earlier. The conservative thinker Don Eberly has written of

a departure from our current obsession with either the state or the market as instruments for social progress. Civil society is a different sphere. It is an intermediary sector, where private individuals join voluntarily in associations that operate neither on the principle of coercion, nor entirely on the principle of rational self-interest. In fact, the *modus operandi* of life in civil society gives expression to the pursuit of the common good, where actions are animated by a spirit of trust and collaboration.⁴⁰

Definitions of civil society as "between state and market" or as a "third sector" have at least two serious defects: first, they represent a break from the long tradition of understanding civil society, generating confusion rather than illumination; second, to the extent that they identify the state with coercive power and the market with self-interest, they divide up the various possible forms of interaction in terms of nonexclusive categories. Coercion is a way of treating others, while self-interest is a motivation. One can coerce others for self-interested motives (robbers and politicians do this quite regularly) or for altruistic motives (the theory of righteous persecution behind the Spanish Inquisition, for example, ostensibly justified breaking people on the wheel for their own good, not for the good of the inquisitors). One can interact voluntarily with others for self-interested reasons (as merchants typically do when selling us products) or for altruistic reasons (as pious missionaries do). Motivations and behavior can be mixed in a wide variety of ways. Attempts to define civil society as self-interested (in contrast to government?) or

as neither state nor market fails to do what good definitions ought to do: to mark out a part of reality in a way that helps us to increase our understanding.

Thus, we return to the problem of definition: civil society is that kind of human interaction made possible by equality of rights that are protected by institutions/organizations that exercise delegated, enumerated, and thus limited powers, such that those members of civil society not tied to one another by kinship, friendship, love, faith, or even geographical proximity can nonetheless interact in a "civil" manner. Civil society includes religious orders (monasteries, convents, mosques, synagogues, temples, church hierarchies, and circles of believers), business enterprises (including individual proprietorships, family enterprises, partnerships, joint-stock corporations, cooperatives, and other forms of enterprise), labor associations (including unions and a wide range of associations now less commonly found as compulsory unionism and welfare statism have narrowed the range available to employees), and the clubs, associations, neighborhood groups, bowling leagues, kaffeeklatsches, and the like that have been the topic of so much discussion lately. No one of those associations, and certainly not the state, need exhaust the personalities of the members of civil society. One may simultaneously be a Muslim and a businessperson who does business with nonbelievers as well as believers, a member of the Parent-Teacher Association and a member of a jazz group that meets every Wednesday at a local club. By resigning from any one of those associations one does not become a traitor to the entire civil society, an outcast, a pariah. That was recognized clearly by Otto von Gierke in his classic study of the law of association: "Our present system of association, which resembles a great number of infinitely intersecting circles, rests on the possibility of belonging with one part, one aspect of one's individuality, perhaps with only one closely defined part of one's range of ability, to one organization, and with others to others."⁴¹

Ernest Gellner, in his book *Conditions of Liberty: Civil Society and Its Rivals*, termed this feature of civil society modularity, in contrast to atomism:

There are firms which produce, advertise, and market modular furniture. The point about such furniture is that it comes in bits which are agglutinative: you can buy one bit which

will function on its own, but when your needs, income or space available augment, you can buy another bit. It will fit in with the one acquired previously, and the whole thing will still have a coherence, aesthetically and technically. You can combine and recombine the bits at will. . . . What genuine Civil Society really requires is not modular furniture, but modular man.⁴²

Gellner's point is that in civil society one can form attachments of one's own choosing; one can recombine them in new ways; and one can withdraw from them without thereby withdrawing from the civil society as an order of relations, as would be the case in a little gatherer/hunter band or perhaps a primitive society, at least, as they are conceived by organicists.

What makes this dazzling complexity and wide range of voluntary human association possible is liberty in the enjoyment of one's "civil rights," a term that has been degraded in meaning in recent years. From a term for the wide range of rights enjoyed by those in civil societies, "civil rights" has come in the United States to be used almost solely to refer to immunity from discrimination, while "civil liberties" has come to refer to a narrow—albeit important—set of rights, typically those of greatest importance to intellectuals. In a gathering of intellectuals there is often wide agreement to extend freedom primarily (or even only) to what intellectuals do—speak and write—just as in a gathering of farmers a consensus might be found to limit freedom to what farmers do. Limiting civil rights to those involved in speaking or writing is a dangerous and selfish conceit. It is only rarely criticized, but then, criticism is almost by definition the exclusive product of intellectuals.⁴³

Notes

1. Fareed Zakaria, "The 20 Percent Philosophy," *Public Interest* 129 (Fall 1997), pp. 96–101, esp. 101.
2. Irving Copi, *Introduction to Logic*, 6th ed. (New York: Macmillan Publishing, 1982), p. 150.
3. Steven Scalet and David Schmidtz, "State, Civil Society, and Classical Liberalism," in *Civil Society and Government*, ed. Nancy L. Rosenblum and Robert C. Post (Princeton, N.J.: Princeton University Press, 2002), p. 27. (This essay originally appeared in the same volume.) Compare Reinhard Bendix, *Kings or People: Power and the Mandate to Rule* (Berkeley and Los Angeles: University of California Press, 1978), p. 523: "civil society refers to all institutions in which individuals can pursue common interests without detailed direction or interference from the government." Bendix continues, "Western European regimes and Japan possessed civil societies because they had inherited a tradition of local privileges or liberties; Russia did not enjoy a comparable inheritance."
4. Will Kymlicka, "Civil Society and Government: A Liberal-Egalitarian Perspective," in *Civil Society and Government*, ed. Nancy L. Rosenblum and Robert C. Post, op cit., pp. 81–82.
5. Benjamin Barber, *A Place for Us: How to Make Society Civil and Democracy Strong* (New York: Hill and Wang, 1998), p. 4.
6. Ibid., p. 13.
7. Ibid., p. 53.
8. The great distinction between Latin Christendom and the inheritors of the Byzantine tradition is undoubtedly the relative independence of the church from the state. For the developments in Latin Christendom, see Harold Berman's account of the

Gregorian Reformation, which proceeded on the basis of the slogan of the “freedom of the church.” See *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, Mass.: Harvard University Press, 1983), esp. chap. 2, “The Origin of the Western Legal Tradition in the Papal Revolution,” pp. 85–119. For a collection of the relevant historical documents, see Brian Tierney, *The Crisis of Church and State, 1050–1300* (Toronto: University of Toronto Press, 1988). For a learned description of Byzantine theories of church-state relations and their impact on later Eastern European politics, see Francis Dvornik, “Byzantine Political Ideas in Kievan Russia,” *Dumbarton Oaks Papers*, nos. 9 and 10 (Cambridge, Mass.: Harvard University Press, 1956), pp. 73–121; and *The Slavs in European History and Civilization* (New Brunswick, N.J.: Rutgers University Press, 1962), pp. 369–76.

9. Henri Pirenne, *Economic and Social History of Medieval Europe* (New York: Harcourt Brace Jovanovich, 1937), p. 50. This association of civil society with city life has been known for a long time. See Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (Indianapolis, Ind.: Liberty Fund, 1981), esp. vol. 1, bk. 3, chap. 3, “Of the Rise and Progress of Cities and Towns, after the Fall of the Roman Empire,” pp. 397–410.

10. Max Weber, *Economy and Society: An Outline of Interpretive Sociology*, ed. Guenther Roth and Claus Wittich (Berkeley and Los Angeles: University of California Press, 1978), vol. 2, p. 1227.

11. Quoted in Antony Black, *Guilds and Civil Society in European Political Thought from the Twelfth Century to the Present* (Ithaca, N.Y.: Cornell University Press, 1984), p. 38. (The references in the text are to the codification of Roman law known as the Digest of Justinian.) Brunetto Lanni (ca. 1260) described how cities grew: “it came in the end to the point where those who wanted to live by their own law and escape the force of evildoers grouped themselves together in one place and under one government. Thence they began to build houses and establish towns (*viles*) and fortresses, and enclose them with walls and ditches. Thence they began to establish customs and law and rights (*drois*) which should be common to all the burghers (*borgois*) of the town” (*ibid.*, p. 39). An illuminating account of the slow growth of a city, as defined by its fortifications, can be found in Paul Strait, *Cologne in the Twelfth Century* (Gainesville: University Presses of Florida, 1974), pp. 30–36. Cologne’s status as an old Roman city and an episcopal seat distinguishes it in various ways from the new cities of Europe, but the identification of the city walls with the freedom of the city and the security of the citizens was a common factor.

12. Berman, *Law and Revolution*, pp. 383–84.

13. Henry Sumner Maine, *Ancient Law* (1861; reprint, Gloucester, Mass.: Peter Smith, 1970), p. 163.

14. As Berman observed, “The new European cities and towns of the eleventh and twelfth centuries were also legal associations, in the sense that each was held together by a common urban legal consciousness and by distinctive urban legal institutions. In fact, it was by a legal act, usually the granting of a charter, that most of the European cities and towns came into being; they did not simply emerge but were founded. Moreover, the charter would almost invariably establish the basic ‘liberties’ of citizens, usually including substantial rights of self-government” (*Law and Revolution*, p. 362).

15. Hans Planitz, *Die Deutsche Stadt im Mittelalter: Von der Römerzeit bis zu den Zünfkämpfen* (Graz, Austria, and Köln, Germany: Böhlau, 1954), p. 117.

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16. In John H. Mundy and Peter Riesenbergh, *The Medieval Town* (Princeton, N.J.: D. Van Nostrand, 1958), p. 138.

17. Antony Black lists the following names used to designate “the early town community”: “*civitas, commune, communitas, universitas civium/burgensium, urbani, burgensis populus, universi cives*, and the vernacular *commune* (French and Italian), *Gemeinde, burgh*.” Black, *Guilds and Civil Society*, p. 49.

18. Planitz, *Die Deutsche Stadt im Mittelalter*, p. 100.

19. As Thomas Paine noted, “The patriots in France have discovered in good time that rank and dignity in society must take a new ground. The old one has fallen through. It must now take the substantial ground of character instead of the chimerical ground of titles.” In *The Rights of Man*, pt. 1, in *Thomas Paine: Political Writings*, ed. Bruce Kuklick (1791; reprint, Cambridge: Cambridge University Press, 1989), p. 90.

20. Black, *Guilds and Civil Society*, p. 65.

21. Henri Pirenne, *Medieval Cities: Their Origins and the Revival of Trade* (Princeton, N.J.: Princeton University Press, 1974), p. 200.

22. Black, *Guilds and Civil Society*, p. 32.

23. Benedict de Spinoza, *A Theologico-Political Treatise*, trans. R. H. M. Elwes (New York: Dover Publications, 1951), p. 264. The burghers of the Netherlands were pioneers of religious toleration, as Geoffrey Parker noted regarding the attempts by the king of Spain to reorganize the bishoprics of the Netherlands and, in the process, to appoint resident inquisitors: “There was violent opposition to this measure from the magistrates of Antwerp (Antwerp was to be one of the new sees) on the grounds that the inquisition was contrary to the privileges of Brabant and that, more specifically, so many heretics came to Antwerp to trade that its prosperity would be ruined if a resident inquisition were introduced.” *The Dutch Revolt* (New York: Penguin Books, 1988), p. 47. Compare also the observations on the London Stock Exchange by Voltaire: “Go into the Exchange in London, that place more venerable than many a court, and you will see representatives of all the nations assembled there for the profit of mankind, There the Jew, the Mahometan, and the Christian deal with one another as if they were of the same religion, and reserve the name of infidel for those who go bankrupt.” Voltaire, “On the Presbyterians,” in “*Candide*” and *Philosophical Letters* (New York: Modern Library, 1992), p. 141.

24. James Harrington, *The Commonwealth of Oceana* (1656), in *The Commonwealth of Oceana and A System of Politics*, ed. J. G. A. Pocock (Cambridge: Cambridge University Press, 1992), p. 8. Further, “[a] commonwealth is but a civil society of men” (p. 23).

25. Locke does not maintain, however, that civil society or political society is the source of all obligation: “The Promises and Bargains for Truck, &c. between the two Men in the Desert Island, mentioned by *Garcilasso De la Vega*, in his *History of Peru*, between a *Swiss* and an *Indian*, in the Woods of *America*, are binding to them, though they are perfectly in a state of nature, in reference to one another. For Truth and keeping of Faith belongs to Men, as Men, and not as Members of Society.” John Locke, *Two Treatises of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1988), bk. 2, sec. 14, p. 277.

26. *Ibid.*, bk. 2, sec. 95, p. 330–31. Algernon Sidney, at about the same time, criticized the patriarchal theory of political power, noting that “for politick signifying no more in Greek, than civil in Latin, ’tis evident there could be no civil power, where there was no civil society; and there could be none between him [Adam] and his children, because a civil society is composed of equals, and fortified by mutual compacts, which could not be between him and his children.” *Discourses Concerning Government*,

ed. Thomas G. West (Indianapolis, Ind.: Liberty Fund, 1990), p. 88. In a Boston election sermon of 1762, Abraham Williams pointed out to his listeners that “[t]he End and Design of civil Society and Government, from this view of it’s Origin, must be to secure the Rights and Properties of it’s Members, and promote their Welfare; or, in the Apostle’s words, that Men may lead quiet and peaceable Lives in Godliness and Honesty.” “An Election Sermon,” in *American Political Writing during the Founding Era, 1760–1805*, vol. 1, ed. Charles S. Hyneman and Donald S. Lutz (Indianapolis, Ind.: Liberty Press, 1983), p. 6.

27. One particularly confused commentator writes as follows of the United States of America: “The United States, which, in contrast to both Eastern and Western Europe, has always lacked a coherent concept of the state, has traditionally been presented as a model of civil society. Yet in the closing decades of the twentieth century the adequacy of this model is increasingly being questioned.” Adam B. Seligman, *The Idea of Civil Society* (Princeton, N.J.: Princeton University Press, 1992), p. 9. The author seems to think that a constitutional republic grounded on a written constitution that specifies enumerated powers and provides explicit limits on state power “lacks a coherent concept of the state.”

28. This seems to be the general approach of Adam Ferguson in his rich and complex *Essay on the History of Civil Society* (1767; reprint, Cambridge: Cambridge University Press, 1995), in which he connects the rise of civil society with the emergence of property, and therefore of improvement and of civility.

29. See the historical treatment of these interconnected developments in Brian Tierney, *The Idea of Natural Rights* (Atlanta, Ga.: Scholars Press, 1998).

30. Immanuel Kant, *The Metaphysical Elements of Justice*, trans. J. Ladd (New York: Macmillan, 1985), p. 65. Kant defined “external proprietary rights” explicitly in terms of equal rights: “A thing is externally mine if it is something outside me which is such that any interference with my using it as I please would constitute an injury to me (a violation of my freedom, a freedom that can coexist with the freedom of everyone in accordance with a universal law)” (p. 55). The latter condition is equivalent to the condition of “compossibility” described in Hillel Steiner, *An Essay on Rights* (Oxford: Blackwell, 1994).

31. In Kant’s words, “Every action is just [right] that in itself or in its maxim is such that the freedom of the will of each can coexist together with the freedom of everyone in accordance with a universal law.” *The Metaphysical Elements of Justice*, p. 35. Or as John Locke noted in the seventh of his *Essays on the Laws of Nature*, in *Political Essays*, ed. Mark Goldie (Cambridge: Cambridge University Press, 1997), “The duties of life are not at variance with one another, nor do they arm men against one another—a result which, secondly, follows of necessity from the preceding assumption, for upon it men were, as they say, by the law of nature in a state of war; so all society is abolished and all trust, which is the bond of society” (p. 132).

32. See Richard Epstein, *Simple Rules for a Complex World* (Cambridge, Mass.: Harvard University Press, 1995), for an updated restatement of this thesis.

33. This theme is developed in classical liberal terms in Wilhelm von Humboldt’s treatment of civil society, *The Limits of State Action* (Indianapolis, Ind.: Liberty Fund, 1993), esp. chap. 3, “On the Solicitude of the State for the Positive Welfare of the Citizen.” Humboldt’s views are well described in George G. Iggers, “The Political Theory of Voluntary Association in Early–Nineteenth Century German Thought,” in *Voluntary Associations: A Study of Groups in Free Societies*, ed. D. B. Robertson (Richmond, Va.: John Knox Press, 1966).

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34. Benjamin Constant, *Political Writings*, ed. Biancamaria Fontana (Cambridge: Cambridge University Press, 1988), p. 326. As Wilhelm von Humboldt noted, it is “the free cooperation of the members of the nation which secures all those benefits for which men longed when they formed themselves into society.” *The Limits of State Action*, p. 137.

35. G. W. F. Hegel, *The Philosophy of Right*, trans. T. M. Knox (Oxford: Oxford University Press, 1977), pp. 124, 189.

36. In *Karl Marx: Early Writings*, trans. and ed. T. B. Bottomore (New York: McGraw-Hill Books, 1964), p. 24.

37. *Ibid.*, p. 25.

38. Benjamin Barber, *A Place for Us*, p. 121.

39. *Ibid.*, p. 65. Here Barber follows many in identifying classical liberalism with greed and selfishness, grossly distorting the simple insight of Adam Smith and others that self-interest rightly understood can be generally beneficial when, but only when, institutions are properly ordered. Smith and other liberal economists did not argue that all motivations are selfish, nor that societies that enjoy free markets are selfish societies, nor that self-interest is only present in free societies. For a correction, see Stephen Holmes, “The Secret History of Self-Interest,” in *Passions and Constraint: On the Theory of Liberal Democracy* (Chicago: University of Chicago Press, 1995).

40. Don Eberly, “The New Demands of Citizenship,” *Policy Review* (January–February 1996), pp. 30–31.

41. Otto von Guericke, *Community in Historical Perspective*, trans. Mary Fischer, ed. Antony Black (Cambridge: Cambridge University Press, 1990), p. 23.

42. Ernest Gellner, *Conditions of Liberty: Civil Society and Its Rivals* (New York: Penguin Books, 1994), p. 97. Clearly, only an academic would describe the furniture sold in Ikea stores as “agglutinative.”

43. As Vasily Grossman wrote, based on his experiences as a subject of a state that attempted to eradicate civil society entirely and to integrate all human interactions into the organization of the state, freedom must mean freedom for all kinds of endeavor: “I used to think that freedom was freedom of speech, freedom of the press, freedom of conscience. But freedom is the whole life of everyone. Here is what it amounts to: you have to have the right to sow what you wish to, to make shoes or coats, to bake into bread the flour ground from the grain you have sown, and to sell it or not sell it as you wish; for the lathe operator, the steelworker, and the artist it’s a matter of being able to live as you wish and work as you wish and not as they order you to. And in our country there is no freedom—not for those who write books nor for those who sow grain nor for those who make shoes.” *Forever Flowing* (New York: Harper and Row, 1986), p. 99.