

SOCIAL CAPITAL & THE ART OF ASSOCIATION

Abstract:

When the U.S. Supreme Court established in the 1980s that organizations like Rotary Clubs could not restrict membership on grounds of sex, the Court repudiated a basic principle of organization within the American associational ecology.

In this article, I argue that mid-century jurisprudential discussions of the law of association theoretically advanced the “science of association” by developing an implicit concept of social capital and distinguishing between democratic and non-democratic forms. Second, I show that, the type of social capital that anchors Robert Putnam’s account of decline between 1970 and 1990 was largely undemocratic, because discriminatory, and that his failure to take account of the relationship between legal structure and associational life, and the impact of changes in the former on the latter, gives us reason to doubt his tale of decline. Third, I argue that late 20th c. changes in American associational life require us to rethink the types of social capital necessary for a democratic society, instead of worrying about a putative decline. Most importantly, we need to clarify the relationship between the arts of building bonding ties and of building bridging ties, and the role of each in achieving democratic social capital.

Sec. 1. Introduction

Alexis de Tocqueville praised 19th century Americans for having greatly elevated the science and art of association. They had, he argued, developed to “the highest perfection of the day the art of pursuing in common the object of their common desires” and had “applied this new science to the greatest number of purposes” (Vol. II, Book 2, ch. 5, Bradley edition).¹ He meant to distinguish the young democracy’s resources from those of aristocratic Europe. Where aristocrats use capital and hierarchical command structures to get things done, democrats must use social power. Consequently, democratic citizens develop a tacit theoretical knowledge, a “science of associations,” about how to grow, sustain, and use associations. On its basis, citizens develop an “art of association” that guides them through collective action. For Tocqueville, the science and art of association were among egalitarianism’s most important inventions.

Robert Putnam, in *Bowling Alone* (2000), laudably reignited broad interest in understanding American practices of associationalism. Yet the conversation has thus far unfolded without recognition of the significant theoretical contributions made to the “science of associations” by the U.S. Supreme Court.

Between 1970 and 1990 the Court re-wrote the law of association, responding to and reinforcing legislative and judicial developments at the state level. In the process, the Court, in effect, articulated a concept of social capital and developed a distinction between democratic and non-democratic forms. This distinction supported decisions that organizations like the Jaycees and the Rotary Club could not restrict membership on grounds of sex. The Court repudiated a basic principle of organization within the American associational ecology, and set the democracy the challenge of extirpating from its art and

¹The terms “art” and “science” are Tocqueville’s. I have modestly corrected the translation by clarifying what the phrase “de nos jours” or “of the day” modifies.

science of association any reliance on patriarchal (and racist) sources of solidarity and cohesion. In other words, in the late 20th century, the Supreme Court (following state legislatures, to a significant degree) demanded on democratic grounds that the art of association evolve to focus on producing non-discriminatory social capital.

The context of the revision to the law of association, effected by the courts at all levels as well as by legislatures, is necessary for understanding changes in American associational life between 1970 and 1990. Whereas Putnam claims that social capital declined between 1970 and 1990, the type of social capital that anchors his account was largely undemocratic, because discriminatory, and it may have fallen not for the reasons that Putnam gives but due to the impact of legal contestation and change. Putnam's failure to take account of the relationship between legal structure and associational life, and the impact of changes in the former on the latter, gives us reason to doubt his tale of decline.

Once we understand the important mid-century transformation in the law of association, we will more clearly understand what happened to late 20th c American associational life. Consequently, we will be better equipped to rethink the types of social capital a democratic society needs. Most important is how a democracy balances relations among bridging and bonding types of social capital.

Although Tocqueville wrote that Americans of the 19th century had developed the art of association to “the highest perfection *of the day* [emphasis added],” we often overlook that temporal qualifier. Despite the power of 19th century associationalism, both the science and the art had room for improvement. To see the limits of earlier associational practices, one has only to think about segregation's costs for American social and political life (Anderson 2010, Rothstein 2013, Bowles, Loury, and Sethi 2009). Now in the early

21st century, the science and art of association still require transformation in a democratic direction.

Sec. 2.1 A Transformed Law of Association

Between 1970 and 1990, legislatures and courts re-wrote the law of association and made illegal the membership policies of many old-line federation-based associations, just the associations on which Putnam focuses. The U.S. Supreme Court certified this direction.

Take what happened to Rotary International. In 1976, the eight-member Rotary Club of Duarte, California, about twelve miles east of Pasadena, voted to admit two school principals. A few months later, they admitted a psychologist. The new members' names were Donna Bogart, Mary Lou Elliott, and Rosemary Freitag. The club noted only their initials on the membership forms that went to Rotary International headquarters. Nonetheless, word quickly spread that, contrary to Rotary International bylaws, the Duarte Club had admitted women. By February 1978, Rotary International had revoked the club's charter. Nine years later, on May 4, 1987, the United States Supreme Court handed down a 7-0 opinion in favor of Duarte (*Rotary International* 481 U.S. 537, 1987).

The local club justified its move by reference to a new California law, the Unruh Act, "which entitles all persons, regardless of sex, to full and equal accommodations, advantages, facilities, privileges, and services in all business establishments in the State" (481 U.S. 537, 1987). Against its local chapter, Rotary International argued that its membership policies were protected as freedom of expression and that neither it nor its chapters counted as "business establishments." The Supreme Court disagreed and held that the Unruh Act was "justified by the State's compelling interests in eliminating discrimination against women and in assuring them equal access to public

accommodations. The latter interest extends to the acquisition of leadership skills and business contacts, as well as tangible goods and services” (481 U.S. 537, 548-549, 1987). The local Rotary chapters were business establishments, because they intentionally sought to develop members’ leadership skills and business contacts.

The case of the Jaycees is not too different. In 1984, the Supreme Court decided a case involving a Minneapolis chapter that had been initiated ten years earlier, in 1974. The rule-breaking Jaycee chapter also defended itself with a state law, Minnesota’s 1967 Civil Rights Act, which held that “It is an unfair discriminatory practice: ‘To deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, disability, national origin or sex’” (*Roberts v. Jaycees* 468 U.S. 609 [1984]). The Court’s reasoning in this earlier case was more confused than in *Rotary International*. Writing for the majority, Justice Brennan divided the right of freedom of association into a direct due process protection for “certain intimate human relationships,” on the one hand, and into a subordinate element of the protection of expression (Soifer 1998: 41). The latter kind of association was instrumental; on this prong, the point of protecting association was to enable freedom of expression (Note, *Harvard Law Review*, 1991, 1841). Brennan argued that the Jaycee’s claims were only of the latter “instrumental” kind and therefore were trumped by Minnesota’s compelling state interest in non-discrimination (Soifer, *ibid*). Consequently, women were to be admitted. Jaycees membership peaked in 1975, just after the lawsuit against the rule-breaking Jaycee chapter was initiated, and all the membership gains of the 1940s, 50s, and 60s, which Putnam records, had disappeared by the time of the 1984 decision (Putnam 2000: 441).

Justice O'Connor's concurring opinion, which dissented on the reasoning for the finding against the Jaycees, proved even more important, however, than the majority view. She articulated the distinction between commercial and expressive associations that would eventually govern, for instance, in the subsequent *Rotary* case. Only expressive associations deserved first amendment protections, and the Jaycees, she argued, were instead of the commercial variety.

The combined weight of *Roberts v. United States Jaycees* and *Rotary International* was to establish that, with regard to membership policies, first amendment expressive rights, which might protect discriminatory membership policies, do not outweigh fourteenth amendment due process rights to equal protection of the laws, which support anti-discrimination efforts, except in cases where the membership policies are central to an explicit expressive project that has been undertaken by the association. Organizations that wish to exclude have to do so in a full-throated way.²

These Supreme Court decisions were transformational. While state laws had begun to complicate the question of what sorts of organizations counted as public, the Court, in essence, finalized a shift in the boundary between the social realm of "intimate associations," on the one hand, and the realm of politics and economics on the other. Where previously the Rotary Club had lived in the social realm and so had enjoyed protections roughly like those enjoyed in the private sphere, the Supreme Court had now re-classified the Rotary Club as a public institution—too closely connected to the worlds of economics—to escape the legal obligations of public institutions not to discriminate. To

² Thus, the Boy Scouts were permitted in 2000 to continue their ban on gay troop leaders on the grounds that the organization explicitly undertakes the expressive project of advocating against "homosexual conduct as a legitimate form of behavior," *Boy Scouts of America et al v. Dale*. See Koppelman 2004.

understand the significance of the Court's decisions, we need to take a broader look at transformations in the law of association over the second half of the twentieth century.

2.2 The Emergence of the Right of Association

The lively 19th c. associational life, which Tocqueville described, took place against a backdrop of constitutional law, including the important protection of religious association in the first amendment "free exercise clause":

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

That the first amendment establishes a right to religious association has long been clear.

What about other types of association?

The final right named in this amendment, "the right of the people peaceably to assemble, and to petition the Government for a redress of grievances," was not initially interpreted by the courts as a general right of association. It was instead construed to indicate protection of specific efforts of people to assemble in order to make appeals to the government for the correction of grievances (Douglas 1963: 1374; Emerson 1964; Note, *Harvard Law Review* 1991: 1849). In other words, the final right listed in the amendment is an element of freedom of speech: we have a right to political association for expressive purposes. Only two forms of association, then, are obviously protected by the first amendment: religious association and expressive political association. The Supreme Court operated with that narrow construal of the associational rights protected by the Constitution until the middle of the 20th century.

But between 1954, when the Court decided *Brown v. Board of Education*, and 1987, when the Court decided *Board of Directors, Rotary International v. Rotary Club of Duarte*, the Court worked its way through a cluster of cases that involved unions, the NAACP, school desegregation, places of public accommodation, privacy, real estate, and lobbying and, in so doing, thoroughly reorganized the law of associations. Most importantly, the Court formally identified a right of association and gave it substance, as a form of freedom of expression in itself, and not merely as an instrumental component of political speech or action. The Court also identified compelling state interests in limiting that right. The reasoning across these cases was diverse and not always coherent, and it is not common to pull the relevant set of cases together into a single story about the changing law of associations.³ Yet continuously, across these cases, the Court was reshaping the landscape of American civil society. While the specific Supreme Court decisions that upended membership policies for the clubs at the center of Putnam's argument were handed down only in the 1980s, they marked the culmination of legal battles launched in the 1950s and the apotheosis of a raft of anti-discrimination state legislation. By 1983, or roughly two decades after the passage of the Civil Rights Act, 40 states and the District of Columbia had enacted public accommodation statutes (*Harvard Law Review* 1991: 1836, n. 11). We should think of the period from 1954 to 1984 as one in which the legal framework for associationalism was undergoing a paradigm change.

That the Court was significantly re-crafting the law of association in the three decades following *Brown v. Board of Education* was no secret. Throughout this period, legal practitioners and legal scholars self-consciously addressed the topic. On May 6, 1963, Associate Justice of the Supreme Court, William O. Douglas, delivered the first annual

³ The exceptions are Emerson 1964, Soifer 1998; Gutmann 1998.

Meiklejohn Lecture at Brown University. His remarks, entitled, “The Right of Association,” and published in the *Columbia Law Review*, offered a vigorous defense of the right of association as an object of first amendment protection, fundamentally “a part of the right of expression or of the right of belief” (Douglas 1963: 1363). Beginning his essay, like Putnam, from Tocqueville, he wrote: “When we treat the right of association we treat therefore with a force that supplies some of the mucilage of society when allowed free play or causes disintegration when it is suppressed” (Douglas 1963: 1364).

In that essay, still a landmark in the literature on the law of associations, Douglas’ concerns were not those of the social scientist trying to measure the growth or collapse of social capital, nor were they the issues of racial integration that would pre-occupy the Court in subsequent years. Instead, he sought to defend the right of association against practices that the Red Scare had brought to prominence. He criticized his colleagues for having, in several cases running from 1951 to 1961 (*Dennis v. United States*, *Uphaus v. Wyman*, *Barenblatt v. United States*, *Wilkinson v. United States*, and *Braden v. United States*), upheld the government’s investigation of the participation of alleged communists in various associations. The Court’s ruling in favor of the government in these cases, and against the associations’ claims to a right of association for their members, was grounded on a “balancing approach” in which “the State’s ‘interest of self-preservation’ was found to outweigh ‘individual rights in an associational privacy’” (Douglas 1963). Douglas held up instead as the appropriate model a 1957 case, *Watkins v. United States*, which involved the House Un-American Activities Committee. In this case the Court had held that Congress did not have the right to conduct investigations as if “a law enforcement or trial agency”; its inquiries could be justified only as an instrument furthering the legitimate legislative work of Congress (Douglas 1963: 1382). Douglas connected this limit on Congress’s

ability to investigate associational activity to a Jeffersonian defense of freedom of opinion, speech, and press, writing: “By the First Amendment we have staked our security on freedom to promote a multiplicity of ideas, to associate at will with kindred spirits, and to defy governmental intrusion into those precincts” (Douglas 1963: 1383, emphasis added). Rather than merely linking the first amendment right of association to political expression, Douglas thus defined it as a broadly social right “to associate at will with kindred spirits.”

Douglas might also have held up a 1963 case, *NAACP v. Button* (371 U.S. 415, 1963), which has, since that period, become a touchstone in the law of associations. In that case, the Supreme Court ruled on the constitutionality of a Virginia statute prohibiting improper solicitation of legal business, which the Virginia attorney general had used to try to quash the NAACP. The law was judged to be unconstitutional by virtue of violating First and Fourteenth amendment protections of rights of association and expression. Or Douglas might have invoked an earlier case, from 1958, also having to do with efforts on the part of a state government to wipe out the NAACP. In *NAACP v. Alabama ex rel Patterson* (357 U.S. 449, 1958) the Court for the first time enunciated a new constitutional “freedom of association” (see Emerson 1964: 1; Soifer 1998: 35-36). In that case, the State of Alabama used several tactics to seek the ouster of the NAACP from the state, among them an order that the NAACP branch in Alabama should turn over its membership lists. The Supreme Court ruled that:

(a) Freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the “liberty” assured by the Due Process Clause of the Fourteenth Amendment.

(b) In the circumstances of this case, compelled disclosure of petitioner's membership lists is likely to constitute an effective restraint on its members' freedom of association.

(c) Whatever interest the State may have in obtaining the names of petitioner's ordinary members, it has not been shown to be sufficient to overcome petitioner's constitutional objections to the production order. (357 U.S. 449, 460-463, 1958, emphasis added).

In this 1958 case, the Court for the first time ruled to protect not expression but freedom of association itself. The high court identified the constitutional basis for protecting associations in the First Amendment and, with the Fourteenth Amendment's due process clause, made the states as well as the Federal Government responsible for providing those protections. But in this case the Court also confirmed a balancing approach in which it was legitimate to weigh the state's interest in limiting associational freedom against the individual's interest in its protection. In the *Patterson* case, the Court's decision was that the state had failed to show an interest sufficient to overcome the NAACP members' newly identified constitutional right of association; in the Red Scare cases that were the focus of Douglas' critique, the state did succeed—to the mind of the Court's majority at the time—at proving such a sufficient interest.

2.3 Equality and the Emergence of Limits on the Right of Association

The Court's balancing approach— in which it was legitimate to limit associational freedom on grounds of compelling state interest—evolved with the passage of the 1964 Civil Rights Act. With the Act, the federal government gave new content to the 14th amendment-based requirement that states provide equal protection of the laws to all

citizens. Title II of the Act provided that “all persons shall be entitled to full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation . . . without discrimination or segregation on the ground of race, color, religion, or national origin” (42 U.S.C. 2000a). Through an amendment, the Civil Rights Act also added prohibitions against discrimination by sex (Title VII of the Act, codified as Subchapter VI of Chapter 21 of [42 U.S.C. § 2000e](#) [2] et seq). With this act, Congress defined the American ideal of equality—and the requirement for equal protection of the laws— as generating a compelling state interest in anti-discrimination. It would take some time for legal scholars and jurists to work out whether this was an interest sufficient to limit the new right to association (Note, *Harvard Law Review*, 1999: 624, n. 29).

Just months after the passage of the 1964 Civil Rights Act, a Yale law school professor, Thomas I. Emerson, “among the nation’s greatest First Amendment scholars” (Soifer 1998: 32), published the second landmark essay concerning the right of association. His “Freedom of Association and Freedom of Expression” appeared in the *Yale Law Review* and remains a defining analysis of the right of association. His goal in the essay was to parse relevant Supreme Court decisions. Although he pays very close attention to the arguments of Justice Douglas on association, Emerson’s purpose was not to affirm the approach of one or another justice but to improve on their collective achievement. He argues for linking any right of association more closely to the right of expression because he found an independent right of association too vague.

Emerson outlined the four areas of social activity that he saw as particularly pertinent to the work of the Court on association. There was (1) the set of case in which a government, whether federal or state, was trying to suppress an association for beliefs and

expression, rather than simply dealing with any illegal actions that might emerge from those groups; here the relevant historical cases primarily involved communism and the NAACP. There were (2) cases where the question arose of whether government can compel membership in an association; here the relevant historical cases involved mainly labor unions. There were (3) cases where the question arose of the rights of individuals who are in the minority within their association; again, these cases tended to involve labor unions. And finally (4), “the fourth area is where the associational rights at stake are not organizational but personal in nature. Professor Herbert Wechsler believes that this was a primary, though overlooked, issue in the *School Segregation Cases*.⁷” (Emerson 1964: 4).

Emerson fleshes out what he means by this fourth area thus:

The fourth and last group of issues involving associational rights is that concerned with private relations of one individual to others, or rights of personal association. As already stated, these issues may arise where the government, or some person or group supported by government power, attempts either to prohibit association, as in laws forbidding association with criminals or with members of another race, or attempts to compel association, as in desegregation cases. Once more, this would not appear to be an area where legal issues are usefully framed in terms of whether the regulation attacked violates a general “right of association.” That concept takes us only a very short distance in our search for an answer and, indeed, obscures analysis of the real issues. (Emerson 1964: 20, emphasis added).

Emerson was, in other words, the first scholar to identify the disparate cases relating to the Red Scare, unions, the NAACP, and school desegregation as in fact fundamentally about the same thing: namely, the problem of association (also Linder 1984: 1880). That the four

areas of the law, which Emerson identified as touching on the law of association, overlap is clear, of course, from the fact that the question of compelled membership appears in both his second and his fourth categories. Despite Emerson's acknowledgment that these disparate cases were, in fact, generating a connected body of doctrine in response to an overlapping set of theoretical problems stemming from associationalism, Emerson did not think that the general problem of association could be usefully framed with regard to a "right of association." In his critique of the Court, we see the kind of analytical disputation that, over the course of the mid-20th century, brought an evolution in the science of association. While my focus here is on the evolution of discourse in the context of Supreme Court cases—because it has a special prominence in American political self-understanding—we have to recognize that it was simply the summit on a mountain of legal discussion and transformation.

As judges and legal scholars worked to refine the science of associations, not merely the problem of exclusions from membership (as in the school desegregation cases) but also the problem of compelled membership (as in the school desegregation cases on another interpretation) and the problem of harassed membership (as in the Red Scare cases) were at the fore. Indeed, in the 1950s and 1960s, compelled and harassed membership were more prominent issues than exclusion. Thus, the earliest phases of the effort to understand a formalized right of free association took the form mainly of trying to understand the kinds of limits government could impose on that right. It was precisely the state's project of trying to limit associationalism that brought the right of association into independent formal existence.

Interestingly, the theoretical problems that emerged from this dynamic—for instance of whether the problem with particular associational practices should be viewed

from the side of exclusion or compulsion⁴—were directly linked to the fate of the associations around which Putnam builds his argument. When the focus was on the problems with compelling associations to accept members they didn't want, discriminatory associations continued to find protections. Thus, on the problem of compelled membership, Justice Hugo Black wrote, in a 1961 decision: “[*Hanson*, which was decided in 1956] cannot, therefore, properly be read to rest on a principle which would permit government—in furtherance of some public interest, be that interest actual or imaginary—to compel membership in Rotary Clubs, fraternal organizations, religious groups, chambers of commerce, bar associations, labor unions, or any other private organizations Government may decide it wants to subsidize, support or control” (367 U.S. 740 [1961]: 787). Justice Black's view would not govern for much longer. His comment marks the end of an era.

Once the right of association had been established and clear limits on it erected—through an approach of balancing it against compelling state interests—, the next phase of development in the relevant body of law involved determining the conditions that might trigger the application of those limits. By 1964, anti-discrimination, including protecting citizens against gender discrimination, had become a compelling state interest.⁵ Did it qualify the right of association, specifically? As Congress worked toward passage of the Civil Rights Act, the compelling state interest in non-discrimination was targeted toward “places of public accommodation” and “business establishments” (Note, *Harvard Law Review* 1, 1999: 626). As one scholar puts it, “[o]rganizations that provide employment opportunities, commercial goods and services, and recreational facilities invoke a particularly compelling interest in antidiscrimination because these goods and services are

⁴For an example of the theoretical quandaries provoked by this question, see *Duke Law Journal* 1970: 1208.

⁵ For interesting historical background to this development, see *Duke Law Journal* 1970: 1189, which outlines many studies done of social discrimination and its effects throughout the 1960s.

essential for an individual to survive and thrive in society” (Note, *Harvard Law Review*, 1999: 625). In the lead-up to the Act’s enactment, the question of whether the newly codified state interest in anti-discrimination applied to private clubs was sufficiently contested that passage of the Act required a private clubs exemption.

With that exemption, the battle over American associational life was fully engaged and would be conducted through an argument over which associations counted as places of public accommodation and business establishments.⁶ As Emerson saw, the essence of the problem of association was “drawing the line between the public and private sectors of our common life” (Emerson 1964, 20; see also Note, *Harvard Law Review* 1991, 1835-36). As the Court strove to clarify when and where the government might limit the right to association, it inevitably also drove evolutions in the concepts of private and public. A new definition of what counts as public eventually emerged from these discussions, and its emergence depended on the articulation, in a jurisprudential context, of an implicit concept of social capital.

2.4. The Jaycees: From Private to Public and the Discovery of Democratic Social Capital

In the 1964 Civil Rights Act, private clubs were exempted from regulations imposed on places of public accommodation and business establishments. That they required an exemption means that their social location—whether in the private or public sphere— was then not obvious. This was because the Court had not yet taken up the cases that would establish a right to privacy and thereby clarify the difference between the private and public realm. The Court did this in 1965.

⁶ As evidence for engagement in this battle, take this comment from a 1970 law journal article: “In the absence of legislation, pressure on the judiciary to narrow the private club exception to the Civil Rights Act of 1964 has been increasing. A slight expansion of the ‘state action’ concept could be made to include any associational activity licensed by the states” (*Duke Law Journal* 1970: 1220). The question was still alive in 1991. See *Harvard Law Review* (1991, 1837).

The relevant case, *Griswold vs Connecticut*, concerned a Connecticut law against contraception. In ruling that law unconstitutional, the Court established a right to privacy with reference to the intimate marriage relationship. The identification of the marriage relationship, a fundamental associational bond, with a zone of privacy set the stage for a connection between the right of association and the idea of intimacy. Indeed, just such a connection underwrote the Court's 1967 opinion, *Loving v. the State of Virginia*, invalidating laws against interracial marriage, where the court described: marriage as "one of the 'basic civil rights of man,' fundamental to our very existence and survival." As one legal scholar writes, "Courts and commentators generally regard [freedom of intimate association] as a substantive due process right, a first cousin of the right to privacy" (Note, *Harvard Law Review* 1991: 1844).

Thus, the distinction between private and public associational worlds came to involve the intimacy of the former and the commercial or political features of the latter. As intimacy came to define the constitutionally protected zone of privacy, private clubs with significant membership rosters lost their claim to privacy protections (Note, *Harvard Law Review* 1991, 1853). In the *Jaycee* opinion, the justices argued that the Jaycees could not protect its membership policies with reference to a right of intimate association because at 295,000 strong, their members did not share an intimate relation.

Yet to say that private clubs were not inside the zone of intimacy that triggered privacy protections did not resolve whether their status was fully public either. The nature of the problem is clearest against the backdrop of the school desegregation cases, reaching back to 1954s *Brown v. Board*. These cases provided an important context for determining how to draw the line between what was and was not public. One philosophical (as distinct from legal) argument against school desegregation was that schools were part of the "social

realm,” rather than either the private or public realm. [NOTE: BRUCE ACKERMAN HAS RECENTLY DRAWN MY ATTENTION TO THE 1893 CIVIL RIGHTS CASES THAT USE THE CATEGORY OF THE ‘SOCIAL’; I HOPE TO REVISE THIS SECTION TO TAKE ACCOUNT OF THAT JURISPRUDENTIAL USE OF THE CATEGORY.] Hannah Arendt, for instance, argued that the social realm in which each of us chooses our personal associates depends on necessarily discriminatory activity, and that anti-discrimination measures should therefore not be applied to institutions of the social realm like schools (Arendt 1959).

This kind of challenge to desegregation and anti-discrimination law was easily met in the case of *Brown v. Board* because the schools at issue were public, owned and operated by local governments. Private schools presented the harder case. But in 1976, the Court handed down the private schools equivalent to *Brown v. Board of Education* (*Runyon et Ux., DBA Bobbe’s School v. McCrary et al*, 427 U.S. 160 [1976]). Except for in cases of religious exemptions, private schools, no more than public schools, could bar students from particular social backgrounds.

Driving home the point that many organizations that had conventionally been identified as “social,” were now to be counted as part of the public realm and not to receive the new privacy protections were Supreme Court decisions like the 1973 ruling in *Tillman v. Wheaton-Haven Recreation Assn, Inc*, which determined that a private swimming pool club could not establish racially-exclusive membership policies (410 U.S. 431 [1973]). Thus, by the time the Court came to hear the *Jaycees* case, it had already broadened the category of “the public” by identifying certain kinds of ostensibly social institutions as having a sufficiently close connection to the marketplace to count as places of public accommodation or commercial establishments. As one legal scholar has put it: “As a

general rule, the tighter an organization's link is to public markets for goods or services, the greater is the strength of the access interest" (Note, *Harvard Law Review* 1991: 1852).

This is precisely the sort of general rule that Justice O'Connor applied to the Jaycees in her important concurring opinion in *Roberts v. United States Jaycees*. As we have seen, the majority opinion found that the Jaycees membership policies could not be protected, first, because the organization did not trigger the protections afforded to intimate association and, second, because its membership policies were not connected to an expressive project that might receive protection under freedom of expression. In other words, the Court's majority left the Jaycees in limbo between private and public; it left the organization, in effect, still occupying the shadowy social zone.

But O'Connor moved the Jaycees firmly into the public realm by identifying the club as a commercial association. She wrote:

Notwithstanding its protected expressive activities, the Jaycees — otherwise known as the Junior Chamber of Commerce — is, first and foremost, an organization that, at both the national and local levels, promotes and practices the art of solicitation and management. The organization claims that the training it offers its members gives them an advantage in business, and business firms do indeed sometimes pay the dues of individual memberships for their employees. Jaycees members hone their solicitation and management skills, under the direction and supervision of the organization, primarily through their active recruitment of new members. (468 U.S. 609 [1984]: 639)

On the basis of that description of the Jaycees, O'Connor then draws the following conclusion:

. . . Recruitment and selling are commercial activities, even when conducted for training rather than for profit. . . . The State of Minnesota has a legitimate interest in ensuring nondiscriminatory access to the commercial opportunity presented by membership in the Jaycees. (468 U.S. 609 [1984]: 640, emphasis added)

O'Connor identifies the Jaycees as a commercial association by judging their central activity to be the promotion of "the art of solicitation and management." The engagement of members in the art of salesmanship is for the sake of training, not profit, but the training itself, the cultivation of the art, must be recognized as itself a commercial opportunity. Here we see O'Connor articulating the concept of social capital: forms of training that emerge out of associational interaction are convertible into commercial advantage. The Jaycees routinely cultivate such easily deployed social capital; this is what makes them a commercial association. O'Connor argues, that there must be "nondiscriminatory access" to this social-capital based commercial opportunity. Although the Court had previously deployed similar reasoning in interstate commerce cases (*Katzenbach v. McClung*, [379 U.S. 294](#), 1964), O'Connor here transfers the social-capital idea into the realm of associational life. This is the import of her decision.

The Jaycees are a public association, then, because of their production of commercially valuable social capital. Moreover, they are a specific kind of public association—commercial, not expressive. O'Connor elaborates this distinction in an important passage:

In my view, an association should be characterized as commercial, and therefore subject to rationally related state regulation of its membership and other associational activities, when, and only when, the association's activities are not predominantly of the type protected by the First Amendment. It is only when the

association is predominantly engaged in protected expression that state regulation of its membership will necessarily affect, change, dilute, or silence one collective voice that would otherwise be heard. An association must choose its market. Once it enters the marketplace of commerce in any substantial degree it loses the complete control over its membership that it would otherwise enjoy if it confined its affairs to the marketplace of ideas. (468 U.S. 609 [1984]: 635-636).

O'Connor uses the idea of being connected to a "market" to identify those associations that should be recognized as public and then argues that, ultimately, public associations choose markets: either the marketplace itself or the marketplace of ideas. The important thought here is that associations that are not incorporated as commercial entities can nonetheless "enter the marketplace of commerce in [a] substantial degree" on the basis of the cultivation of social capital.

Those associations that have tight links to markets—whether economic or political (for the latter, I have in mind O'Connor's reference to the marketplace of ideas)—are precisely those that provide their members with forms of social capital that are most easily convertible into political or economic capital. The convertibility of social capital into political and economic capital requires the identification of those associations that are the top-producers of social capital as public. Once they are identified as public, and the goods that emerge from social capital are recognized as commercial opportunities, they are subject to the requirement of equal access. Other than religious associations, only those associations that are committed to expression in a full-throated way can claim first amendment protections from non-discrimination requirements.

O'Connor's recognition about the relevance of social capital to private associations thus identified a theoretical conundrum at the heart of the egalitarianism. As she

recognized, the reputedly egalitarian art of association is not always so: some modes of associationalism have powerfully inegalitarian consequences. Egalitarianism within an in-group is insufficient to achieve a general egalitarianism.⁷ On the basis of this, as it were, scientific insight, O'Connor faced the challenge of how to revise the American art of association to reduce its anti-egalitarian elements. She established the principle that the equal protection of the laws requires that social associations that are direct pathways into economic life be equally open to all.⁸

Tocqueville had contrasted commercial associations to political associations, such as political parties, in order to describe the former as part of the civil or private realm while categorizing the latter as part of the public realm. But in the mid 20th century, the Supreme Court re-classified commercial associations and non-intimate civil associations as belonging alongside political associations in the public realm. These classificatory adjustments reveal that a paradigm shift was underway in the American science of associations.

When the Court handed down its 1987 decision in *Rotary International*, the majority adopted O'Connor's argument. In holding that "the State's compelling interests in eliminating discrimination against women and in assuring them equal access to public accommodations. . . extends to the acquisition of leadership skills and business contacts, as well as tangible goods and services" (481 U.S. 537 [1987]: 548-549, emphasis added), the Court as a whole importantly interpreted the right to equal protection and non-discrimination to apply to the distribution of social capital. The Court thus conceptually

⁷This theoretical discovery was an explicit part of the material presented to the Court. Linder 1984, 1880: "Indeed, as the ACLU points out in its amicus brief filed in the U.S. Jaycees case, 'an unbounded freedom to dis-associate would cripple the guarantees of equality contained in the Constitution and our Civil Rights statutes, since every ban on discrimination would be checkmated by an assertion of individual autonomy phrased as a claim of associational freedom.'"

⁸ Here it is worth noting that she was following an important strand in the Court's jurisprudence that might be identified as a non-domination strand (see Y. Dawood 2008).

distinguished between inegalitarian and egalitarian distributions of social capital, and endorsed the latter as the constitutionally acceptable variant.

Justice O'Connor's concurring opinion in *Roberts v. Jaycees*, and the majority opinion in *Rotary International*, thus record a third critical and paradigm-shifting innovation within the evolving science of association. It is this: the excessively unequal distribution of the social capital generated by associations is analogous to the problems of the mal-distribution of both the right to vote and formal commercial opportunities. If at earlier points in the history of the U.S., laws had to be changed to ensure that everyone got the vote, in the late 20th century laws were changed to equalize access to social capital.⁹ In other words, the Court identified the distribution of social capital—for instance, the acquisition of leadership skills and business contacts through social interaction—as an appropriate object of egalitarian effort.

These two decades' worth of federal and state legislation as well as jurisprudence reveal evolution in the science of associations. The justices articulated a concept of social capital—that is, the fact that social practices can build up resources easily converted into commercial and political power—as relevant to ostensibly private associations. They recognized that the public significance of social capital therefore required adjustment of the boundary between private and public. Finally, they distinguished between egalitarian and inegalitarian, or democratic and anti-democratic, forms of social capital.

Section 3: What Happened to the Elks? Re-visiting Putnam's argument

⁹ In historical terms, we can see the impact of the change to the science of association in the widening use over time by states of "public accommodation" statutes that expanded the category of organizations to which anti-discrimination law applied. By 1983, or roughly two decades after the passage of the Civil Rights Act, 40 states and the District of Columbia had enacted public accommodation statutes (*Harvard Law Review* 1991: 1836, n. 11). The expansion of these legal impacts nicely mirrors, in chronological terms, the descending curve of membership numbers represented in Putnam's Figure 8. See also Michael Schudson (2003) for such an analysis.

If we think of the period from 1954 to 1984 as one in which the legal framework for associationalism was undergoing a paradigm change, what happens to Putnam's argument about a decline in American associational life? We need to re-visit Putnam's data in the context of the changing legal landscape mapped above. Let me again briefly identify the main features of that map.

In the late 1950s the Court identified a formal right to associate. By the 1964 adoption of the Civil Rights Act, the question of the degree to which non-discrimination requirements applied to private clubs was both a national and a federal issue. In the period from 1964-1983, many states introduced non-discrimination and public accommodation laws. In the period between 1964 and 1974, multiple challenges to the legal framework protecting exclusionary membership policies were brought. In the context of schools, the impact of these changes in the law of association led to "white flight," as neighborhoods re-made themselves. Debates about gender exclusive membership inside associations, for instance, the Veterans of Foreign Wars' debates in the 1970s, could similarly be quite divisive (see n. 15 for references). By the mid-1980s, the Supreme Court established an official resolution to the controversy. Scholars (e.g. Skocpol) have often pointed out that Putnam's argument failed to take account of changing race and gender norms. The point I make here is deeper. It is not merely norms that changed, but anchoring legal structures. Even in cases where the norms of members of a given association did not change, what was legally possible for them did. During the period of contestation, the social legitimacy of exclusive membership policies was eroded, but as cases moved through the court system, and their progress was closely watched, participants in membership associations also had to recalibrate their expectations for what the future legal landscape was likely to permit.

What does this backdrop mean for Putnam's argument? His landmark book uses 105 charts, graphs, and tables to make its basic point that "[o]ver the last three decades [e.g. 1970-2000] a variety of social, economic, and technological changes have rendered obsolete a significant stock of America's social capital" (Putnam 2000: 368). But the heart of the book is the famous "Figure 8" representing the combined average membership rates across the twentieth century in 32 "chapter-based" national associations:

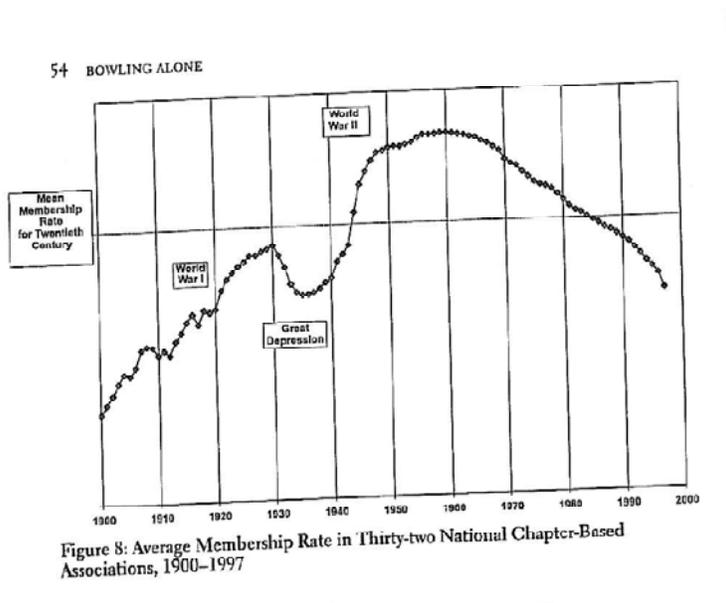


Figure 1: Putnam's "Figure 8: Average Membership Rate in Thirty-two National Chapter-Based Associations, 1900-1997"

The chart represents a continuing decline in associationalism from a high point in 1960 through the 20th century's final decades. When Putnam looks at religious life, workplace connections, and voting and party involvement in the rest of the book, he is checking to see whether other demographic trends align with Figure 8.

Putnam does find evidence of similar patterns across other domains, although not all of them, as he admits, can be explained through direct links to the associational issues

tracked in this anchoring graph. For instance, he tracks U.S. crime rates and employment in policing, noting steep rises in both after 1970. Yet, as he acknowledges, that change has a lot to do with the increasing severity of drug laws and sentencing policies (Putnam 2000, 144-145). Similarly, he concedes that volunteering seems to increase during the period that he otherwise identifies as one of decline.

Why, in Putnam's argument, did Americans disengage from political and civic life between 1965 and the end of the century? I reproduce his answer here:

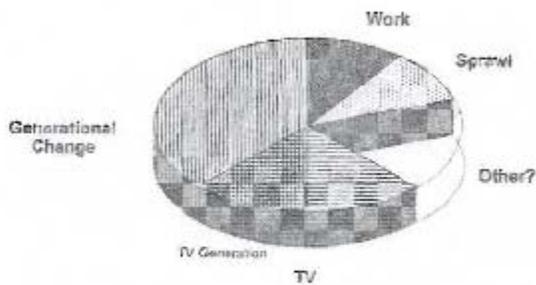


Figure 79: Guesstimated Explanation for Civic Disengagement, 1965-2000

Figure 79: Guesstimated Explanation for Civic Disengagement, 1965-2000

Putnam attributes 10% of the change to more time spent working; 10% to the growth of suburbia and burden of commuting; 25% to the impact of television, and 50% to the impact of generational change. There's some overlap between the impacts of television and generational change. Putnam calls it 15%. This leaves 15-20% of the change to be explained, he argues, by an "other" factor yet to be determined. The "other factor" that

Putnam leaves space for but misses is, I would suggest, the law.¹⁰ In *Bowling Alone*, Putnam mentions the Supreme Court only once—to comment on the 1896 decision in *Plessy v. Ferguson* (Putnam 2000: 375).

A closer look at the actual list of thirty-two organizations that Putnam uses to construct “Figure 8” will reveal the importance of the changing law of association. Of the 32 organizations, twenty-five were gender segregated as a matter of policy at their founding and a twenty-sixth, the Order of the Eastern Star, which did admit both men and women, was nonetheless founded as the women’s companion society to the Masons; members were (and still are) the female relatives of Masons, with male Masons also joining to provide connections to the parent organization. Beyond their respective founding moments, these twenty-six organizations also maintained gender segregation as a matter of either policy or practice throughout the period of mid-century civic vitality that provides the starting point for Putnam’s analysis.¹¹ The six gender-integrated associations were: 4-H, the Grange, the NAACP, Veterans of Foreign Wars, the American Legion, and the Red Cross. The last three were all, of course, associated with military service, where women’s work as nurses earned them inclusion.¹²

In other words, twenty-six of Putnam’s 32 cases suffered direct or implicit legal challenges to their basic constitutions in the period from 1964 to 1987.¹³ Indeed, most of them had abandoned gender segregation by the end of this period, and only six maintain gender segregation to this day: the Knights of Columbus, whose membership pool is

¹⁰ Other scholars, for instance, Theda Skocpol, have pointed out that Putnam paid insufficient attention to norms in the areas of gender and race, but they too miss the important legal story.

¹¹ The Parent Teacher Association was the one association to change its formal policies relatively early, admitting men in 1924, but as a matter of practice, it continued to function as a female institution; even today its membership is only 10% male.

¹² In 1918, there were 12,000 active-duty nurses; they were among the first women eligible for membership in the Veterans of Foreign Wars.

¹³ I consider all-male associations to have suffered direct legal challenges, while all-female associations suffered implicit or indirect legal challenges.

Catholic males; the Boy and Girl Scouts of America, whose membership pools are children and young adults of the relevant gender; the Boy and Girl Scouts adult leaders; and the three Masonic societies, which are closely affiliated with one another-- the Masons (male), Shriners (male), and the Order of the Eastern Star (mainly female). Constitutional protections for religion gave shelter to the exclusionary policies of the Knights of Columbus while the juvenile status of members of the Boy Scouts and Girl Scouts protected those organizations.¹⁴ In contrast, the Masonic organizations have not fared well, as we will see.

A legal scholar who in 1984 reviewed the impact on private associations of legal regulation of membership policies prophetically identified where limits would eventually be drawn. He wrote:

The threat of egalitarianism substantially diminishing the cultural richness and pluralism of American society has grown in recent years. Whatever cultural richness and pluralism might come from allowing racial discrimination in housing, employment, education, and access to commercial establishments was easily outweighed by its cost to human dignity. All decent people understood this. Most men would also willingly sacrifice a degree of associational freedom in order to provide women with the same economic opportunities that they have long enjoyed. When, however, a state acts to prohibit private discrimination which does not reflect a mean-spiritedness toward the excluded group, the cost may be too much to pay. When the last all-women's private school is forced to close its doors, when the law no longer tolerates the existence of all-Norwegian or all-Catholic clubs, when the Boy Scouts and the Girl Scouts finally merge, even

¹⁴ Of course, the law concerning the Boy Scouts has continued to evolve, and recent litigation over the Boy Scouts policies has led to membership declines. See Koppelman 2004.

those of us calling ourselves egalitarians may stop to shed a tear or two for pluralism lost. (Linder 1984: 1902).

This legal scholar thought that there was a categorical difference between forcing gender integration on business associations and on the Boy Scouts, Girl Scouts, and Knights of Columbus. In the end, as we have seen, the courts agreed.

In other words, not all organizations underwent gender integration in the period between 1970 and 2000. Putnam’s list of 32 organizations should be separated into two categories: those that faced a fundamental legal challenge, either directly or implicitly, and those that did not. The distinction coincides with two very different pictures of what happened with membership in those organizations (see Figure 1).

Faced fundamental legal Challenge (% decline from membership peak to 1997)	Did not face fundamental legal challenge (% decline from membership peak to 1997)
American Association of University Women (-84%)	<u>Gender integrated</u>
American Bowling Congress (-72%)	NAACP (-46%)
B’nai B’rith (-75%)	4-H (-26%)
Business and Professional women (-89%)	Grange (-79%)
Eagles (-72%)	Red Cross (volunteers) (-61%)
Eastern Star, Order of the (-73%)	American Legion (-47%)
Elks (-46%)	<u>Mixed gender history</u> ¹⁵

¹⁵ Interestingly, the Veterans of Foreign Wars introduced a gender-exclusionary membership policy in 1944 and then reversed it again in 1978. See U.S. House. *Proceedings of the 45th National Encampment of the Veterans of Foreign Wars of the United States*. Aug. 22-24, 1944. (H. Doc. 182) 1945. Text from: *Congressional Documents*. Available from: ProQuest Congressional; Accessed: 1/27/12; U.S.

General Federation of Women's Clubs (-84%)	Veterans of Foreign Wars (-9%)
Hadassah (-15%)	<u>Gender segregated but legally sheltered</u>
Jaycees (-58%)	Boy and Girl Scout adult leaders (-18%)
Kiwanis (-42%)	Boy Scouts (-5%)
League of Women Voters (-61%)	Girl Scouts (-15%)
Lions (-58%)	Boy Scouts and Girl Scouts combined (-8%)
Masons (-71%)	Knights of Columbus (-6%)
Moose (male members) (-35%)	
Moose (women members) (-3%)	
Odd Fellows (-94%)	
Optimists (-24%)	
Parent-Teacher Association (-60%)	
Rotary (-25%)	
Shriners (-59%)	
Women's Bowling Congress (-66%)	Bold= membership decline of less than
Women's Christian Temperance Union (-96%)	10% over period, in contrast to group median of 58%.

Figure 1.

The median decline in membership for all thirty-two groups over the period from 1970 to 1997 was 58%. Four organizations, however, saw membership declines of less than 10%. Those four were: the Knights of Columbus (6%); the Boy Scouts (5%); Moose-

House. *Proceedings of the 79th National Convention of the Veterans of Foreign Wars of the U.S.* (H. Doc. 96-100) Text from: *Congressional Documents*. Available from ProQuest Congressional; Accessed: 1/27/12. See also: http://www.vfw.org/uploadedFiles/VFW.org/News_and_Events/VFWWomenatWar-LOWRES.pdf.

women (3%); and the Veterans of Foreign Wars (9%). (In addition the Boy and Girl Scouts combined saw a membership decline of 8%.)

In other words, those associations whose exclusivity the law continued to tolerate and that were not otherwise impacted by a broad legal and cultural shift toward gender integration—all Catholic clubs; the Boy Scouts and Girl Scouts, the Veterans of Foreign Wars—tell a markedly different story about membership changes across the 20th century than do those organizations that were directly affected by gender integration. Nor do those organizations that entered the period already integrated with regard to gender support Putnam’s view. Although 4-H and the Grange were not affected by the rulings on gender integration, their declines are easily explained by the change in the nature of agricultural labor over the course of the 20th century, and so they are best removed from the analysis. It is also reasonable to suppose that the NAACP was similarly affected by anomalous forces. Its members were being threatened with job loss and the like by Southern governments seeking to suppress the NAACP. When one pays close attention to the issue of gender segregation and the legal transformation underway in the period that Putnam studies, one discovers that only the cases of the Red Cross and the American Legion would seem straightforwardly to support Putnam’s account.

Four organizations, then, survived gender integration—the Knights of Columbus, Moose-women, the Boy Scouts and Girl Scouts, and Veterans of Foreign Wars; three of these organizations had unusual protection from legal evolution. For these four organizations, the median decline was 6.5%, in contrast to the group median of 58%. Given that these four organizations were, like the others, also impacted by the forces that Putnam uses to explain a decline in civic involvement—increased work hours, suburban sprawl, television, and generational change— one can’t help wondering whether those forces might

explain, in combination, only, roughly, 10% of the decline at issue, not the 80 or 85% that Putnam posits. This would leave even more room for “the other factor,” entailed in the legal contestation and legal changes, than the 15-20% identified above.

Of course, to show that attention to legal history fragments Putnam’s data into clusters that seem to tell against his representation of the data is not to make a statistical argument for an alternative explanation of the decline. It is at best to cast a reasonable doubt upon Putnam’s analysis. But cast such a doubt it does.¹⁶ Given those doubts, we have to take seriously the possibility that the changes Putnam identifies might in fact be better captured through a lens other than decline, leading to a different analysis of what should be done.

Like Putnam, O’Connor and the Courts’ 1987 majority recognized that the sorts of fraternal associations whose decline Putnam laments generated social capital. In contrast to him, however, they also recognized that those associations were failing to generate adequately egalitarian or specifically democratic forms of social capital. As many critics have pointed out, Putnam’s theory of social capital casts too wide a net and catches within it anti-democratic as well as democratic organizations. For instance, his argument that social capital explains the successful economic and political development of democratic Northern Italy serves equally well to explain the success of Northern Italian fascism (Tarrow 1996, Berman 1997). In other words, Putnam’s theory of social capital is not specifically democratic. Consequently, it is not the appropriate framework for assessing the health of American civic life.

¹⁶ One can amplify the doubts, too, by recognizing that other forms of association not investigated by Putnam were in fact dramatically on the increase during the period that he studies: college and university alumni associations, which track increasing college enrollments; and participation by parents in the associational life surrounding day cares. In 1970 roughly 20% of 3-4 year olds were in nursery, pre-school, or kindergarten (and their parents affiliated with them); in 1990 that number was roughly 45%. On this, see Small 2009: 29.

In order to assess associationalism in the U.S. (or any other democracy) more effectively, we need to replace Putnam's *general* theory of social capital with a theory of *democratic* social capital. This requires identifying the profile of specifically *democratic* social capital. Such a profile would permit the drawing of distinctions among those forms of associationalism that do or do not have "democratic effects" and that, therefore, do or do not advance the cause of democracy (Warren 2000).

If, then, we are to understand the features of a specifically democratic social capital, we need to sharpen our understanding of the paradigm change in the science of associations articulated by the Supreme Court. Moreover, the introduction of a distinction between egalitarian and inegalitarian social capital sets a challenge to the art of association. Can it evolve to do better at generating the former while avoiding the latter? In the final section of this paper, I spell out both the theoretical implications of the Supreme Court's conceptual breakthroughs for the science of association and also the normative consequences for the art of association.

Section 4.1 Understanding the New Science of Association

The conceptual importance of O'Connor's articulation of the distinction between democratic and non-democratic social capital in the context of social associations is twofold. First, her distinction supports an advance in how we can understand the relations among private, social, and public spheres. Second, it calls attention to important questions about the relation between bonding and bridging types of social capital and the degree to which each type of social capital is likely to have democratic effects. In this section, I spell out these points.

Remarkably, O'Connor's articulation of a concept of social capital, and her distinction between democratic and non-democratic kinds of it, can be used to resolve the long-standing philosophical argument over how to understand the relations among private, social, and public spheres. Within political theory, Hannah Arendt's definitions of these terms have been particularly influential.¹⁷ In her account, the private domain is a realm of intimacy, for love relationships where we share ourselves most fully; in this realm, we participate in relationships both of our own choosing (romantic relationships) and of necessity (relationships with our natal family). The social realm, in contrast, is a domain of, as she puts it, pure discrimination. (She writes in *Men in Dark Times* [1968: 155]: "social discrimination" is the "constituent element of the social realm.") By thus defining the social realm, Arendt draws attention to those parts of human life that are entirely a matter of choice. We discriminate among the people we meet in order to choose our friends. Associational groups—churches, clubs, sports teams, and so forth—emerge because people choose to associate with their like-minded counterparts. Finally, the political or public realm is, Arendt argues, a domain of difference. There we interact with the other members of our polity in relationships of necessity, not choice, brought about by formal political memberships. In this sphere our differences (indeed, disagreements) are fore-grounded and the central project of politics is negotiating them to make common decisions.

O'Connor's opinion provides the basis for re-visiting our understanding of the relations among these three spheres. We should not think of the "social" as a domain separate, on the one hand, from the private world (the "home" is the exemplary private space) and, on the other, from the public world (the assembly, *agora*, and town hall are exemplary public places). The "social" is better understood as identifying those

¹⁷ I have chosen Arendt's vocabulary as a target, but I might as easily have criticized the terminology of any number of thinkers who distinguish among the private realm, civil society, and the public sphere.

organizations and activities with which we mediate the relationship between our private and public lives; it is where private and public relationships become entangled, as privately generated social capital develops as a resource with the potential for conversion into public currencies.

As Hannah Pitkin has argued, if we demythologize the concept of the “social” we come to see that it refers to “a condition in which a collectivity of people—for whatever reason—cannot (or at any rate do not) effectively take charge of the overall resultants of what they are severally doing. The large-scale outcomes of their activities happen as if independent of any human agency” (2000: 252). In other words, the term “social” designates those forms of collective action in which actors do not, and are not asked to, take responsibility for their actions’ broader effects on the public—for instance, for the convertibility of their social capital into political and economic capital.

Why might those of us who refer to the “social sphere” have developed the habit of giving some forms of collective action a pass in this regard? The category of the “social” or of “civil society” recognizes forms of organization and collective action that grow out of the private, the partial, the discriminating, instead of out of generalized notions of a common good. The category protects these associational forms from scrutiny for their political consequences *because* their roots lie in the soil of private life. They are presumed “apolitical” because their origins are “apolitical.” But once we see that the concepts of the social and civil society function in this way, we see that they designate neither a different type of, nor a different location for, human activity than the terms “private” and “public” designate. Instead they precisely mediate between private and public.

This mediation occurs along two axes—the individual and the collective. First, there is the sort of mediation that O’Connor identified—the fact that through social

organizations participants can accrue social capital that empowers each as an individual in the public realm. But in addition to mediating the accrual of power to individuals, social associations also generate forms of social power that can have structural consequences when associations are large enough as a proportion of the general population, as for instance when members of a racial majority prefer to spend time with members of their own race.

With regard to the construction of structural power, the mediating function of social associations is somewhat different than in the case of the individual's accrual of power. Social organizations implicitly raise the question of how particular private commitments impact public life when they spread beyond a single individual. When we participate in the institutions and organizations of "social life," we test the value of our private commitments for the public generally. In some cases, private interests may have only a negligible effect on public life (e.g. interests that lead to formation of a Beatrix Potter Club); in other cases the public effects may be considerable (e.g., those arising from the preferences of members of a racial majority to spend time with members of their own race). As mediated by social organizations, our private interests, tastes, habits, hobbies, and so forth, which bring us into association with others, are given a generalizability test. The institutions and informal forms of organization and association of the "social" world implicitly ask the following question: what generalizable effects on the polity (or world) as whole do these private commitments have? Of course, from that analysis follows the question of whether the generalizable effects so identified are consistent with the public interest.

The Supreme Court explicitly embedded this question in jurisprudence in at least one administrative location when in 1983 it confirmed the IRS' "discretion to determine tax-exempt status with no more particularity than that the nonprofit be consistent with 'the

public interest,’ ‘the common community conscience,’ and the ‘declared position of the whole government’” (*Bob Jones University v. United States*, 461 U.S. 574 [1983]; Soifer 1998: 47). That the IRS should be invested with the power to review the mediating function of associations, as they convert private interests into socially meaningful large-scale phenomena is not at all clear. What is clear, however, is that the science of association, if it is to meet the egalitarian requirements out of which the science itself emerges, must expand to include the capacity to distinguish between modes of association with democratic effects and those with anti-democratic effects, where the concept of “democratic effects” is understood structurally as well as in relation to individual rights.

Here we get to the heart of the difficulty: although our associations grow from our private lives, they generate social capital, which will be either egalitarian or inegalitarian; this egalitarian or inegalitarian social capital will not only benefit or harm the lives of particular individuals directly touched by the relevant associations; it will also generate profound public consequences. How we bond is important to us, individually, and for our sense of selves and personal well-being (Honneth 1992, Bromberg 2011). But how we bond also impacts the health of our polity. We simply can’t draw an impermeable line between private and public.

Legislatures have recognized the challenge of this fact of social life in interesting ways. The Fair Housing Act prohibits discrimination in rental housing while nonetheless protecting “Mrs. Murphy’s exception”: the rule that if you have four or fewer units, the non-discrimination requirement does not apply. Mrs. Murphy may limit her tenants to fellow Irish-Americans, for social reasons and personal comfort, so long as she limits the number of her housing offerings to four units.

Similarly, Title VII of the Equal Employment Opportunity Statute exempts businesses with fewer than 15 employees from anti-discrimination law. Taken together, these two exceptions suggest that the zone of intimacy, in which we may bond in a discriminatory fashion, extends to about sixteen people. Those of us who choose to bond in ways that would be detrimental to the society as a whole, if our associational choices were to spread to the entire society, may preserve those commitments so long as we limit their extension.

For the domains of housing and employment, U.S. courts and legislatures have, in other words, established that those who wish to bond in exclusive, particularistic ways must limit the growth of their associations. Within such limits, intimates may practice a 19th century art of association that relies heavily on bonds of ethnocentrism and gender solidarity even though, at larger scales, this art cultivates inegalitarian as well as egalitarian social capital. With “Mrs. Murphy’s exception” and the small business exemption, the Court has, in effect, acknowledged a tension between an inherited art of association and an updated science of associations. This updated science distinguishes between egalitarian and inegalitarian social capital and endorses the latter. The purpose of the exceptions, then, is to accommodate practices of associationalism that have not yet caught up with an advance in the science of association.

The recognition of the realm of the “social” mediates between the realms of private and public rather than existing as a genuinely separate sphere has thus brought us to the second theoretical implication of O’Connor’s conceptual innovations. The achievement of a properly democratic social capital requires putting limits on some kinds of *bonding* social capital.

Scholars of social capital conventionally distinguish among three kinds of social ties: bonding, bridging, and linking. Bonding ties are those (generally strong) connections that bind kin, close friends, and social similars to one another; bridging ties are those (generally weaker) ties that connect social dissimilars across demographic cleavages (age, race, occupation, religion, and the like); and linking ties are the vertical connections between people at different levels of a status hierarchy (Szreter and Woolcock 2004: 654-655). Importantly, scholars have shown that socio-political environments, or associational ecologies, that place more emphasis on bridging relationships tend also to be more democratic and more egalitarian. Putnam himself makes this argument (1993, 175: see also Szreter and Woolcock 2004; Ober 2008; and related points in van Oorschot, Arts, and Gelissen 2006).

In invalidating gender and racial segregation and demanding more egalitarian forms of social capital production, the Supreme Court rulings required that formal associational life in the U.S. be re-organized to a significant degree around bridging, instead of bonding, relationships (at least with regard to race and gender). The associations on which Putnam focused were oriented toward bonding social capital—where the relevant bonds were a matter of race or gender.¹⁸ In this sense, the Court identified the bonding-based forms of social capital on which Putnam focuses in *Bowling Alone* with a threat to political equality. The profile of a distinctively egalitarian and democratic social capital turns out to have something to do with the relative emphasis on bonding and bridging ties in any particular polity.

¹⁸ Here I dissent with Putnam's view that the civic associations he studies were primarily of the "bridging" type and follow Szreter and Woolcock who analyze Putnam's focus in *Bowling Alone* as being on bonding social capital (2004: 659). Indeed, in more recent work (Putnam 2007: 143), Putnam has characterized same race, same age bonds, such as characterized the associations studied in *Bowling Alone*, as bonding ties.

4.2 Refashioning the Art of Association

That the associational landscape can and should be monitored for practices that eviscerate equal protection of the laws—by eviscerating equal opportunity and political equality—was the discovery of the mid-20th century. In invalidating gender and racial segregation throughout a large swathe of American associational life, the Court drew a distinction between non-egalitarian and egalitarian forms of social capital. With provisions like Mrs. Murphy’s exception, the government restricted the scope of associational life based on particularistic bonding. When it did these things, it also challenged the citizenry to reform its art of association. To understand how to approach this challenge, we need to spell out the normative consequences of the Court’s work for the art of association. Most importantly, we need to clarify the relationship between the arts of building bonding social capital and of building bridging social capital. This final section seeks to provide such clarification.

The problem with the social capital generated by the associations on which Putnam’s argument rests does not lie in their reliance on bonding relationships as such. For the sake of healthy psychological development, all people need bonding relationships. But not all bonding relationships are the same. We need to bond in ways that help to preserve the democracy of which we are a part (Anderson 2010). Indeed, the question of how we bond is deeply entangled with the question of whether we are able to bridge (Bromberg 2011). The critical question is how we can bond so as to help us bridge.

As we saw, legislatures have established that those who wish to bond in exclusive, particularistic ways in housing or employment must commit to limiting the growth of their associations. This makes visible two other approaches to bonding relationships that would also be compatible with “the public interest.” Instead of cultivating exclusive bonds that are

also limited in their growth and scope, one might cultivate bonds that are “contingently homogeneous but potentially inclusive,” wherein members of the association are open toward seeing anyone or anybody join in the activities of their association, despite the fact that the initial group of associates happens to be socially similar. Here an example would be the Amish, a socially homogeneous group that is open to converts in a non-exclusive fashion. Second, there is an approach to bonding relationships where the initial bond is not a social category but an area of interest—a hobby or cultural pursuit—that attracts a diverse audience that cuts across structural social cleavages. These heterogeneous (and so necessarily inclusive) bonds could also grow, without endangering the polity as a whole. On-line gaming communities are a good example here or associations of the self-employed who combine in order to buy insurance.

In order for either method of bonding—that which begins from social homogeneity or that which begins from interest affinity—to support our capacity to bridge, the very experience of bonding must cultivate receptivity toward the potential of participation in our bonding group by social dissimilars. The arts of intimate association and of social association must, then, evolve to support the development of this sort of receptivity.

Recent scholarship has advocated receptivity to social dissimilars at the level of political association, by, for instance, developing concepts like “political friendship,” and detailing habits that can give that art concrete form (Young 1990, Allen 2004a, Anderson 2010). Yet this literature does not consider the arts of intimate association. Moreover, this literature overlooks the fact that success at the art of political friendship depends on a pre-existing experience of egalitarian friendship and non-dominating interaction in intimate contexts. In other words, one can’t build the habits of political friendship, if one hasn’t previously built the kinds of habits of intimate friendship that would effectively support an

openness to bridging relationships. In other words, two kinds of human development are necessary in contexts of intimate association: on the one hand, learning of the practices of non-domination and non-oppression (Young 1990, Pettit 1997, Allen 2004a, Anderson 2010) and, on the other, learning of receptivity to bridging relationships (Allen 2004a).

I do not have space here to discuss at length the substance of what must be addressed in connecting the art of association in intimate contexts to the art as it applies to public and political contexts so let me merely point to the territory where the answers lie. With regard to identifying practices of non-domination and non-oppression in associations of intimacy, we need to draw together scholarship in psychology and human development (e.g. Bromberg 2011) as well as in the sociology of learning (Levinson 2012, Laden 2013). With regard to receptivity to bridging, we need to draw on scholarship in interpretation studies, language learning theory, educational sociology, and studies of organizing. Those who are able to bridge social cleavages tend to have three kinds of skill sets: those of the interpreter, playing the roles of pidgins and creoles in communicative trading zones (Galison 1997); those of the bi-lingual citizen who routinely “code-switches” between the languages and dialects of different communities (Suárez-Orozco & Suárez-Orozco 2013); and those of the greeter at the temple door (Stout 2005, Moglen 2013), who knows how to see and affirm the value of what the stranger has to offer to the community (DuBois 1903, Young 1996, Ober 2008). Taken together these skills prepare people to be mediators. The role of a mediator, in the space between two different discourse communities, fundamentally entails the skill of charitable interpretation, being able to understand people as they understand themselves (Stout 2005, Allen 2004b).

By drawing on scholarship in the areas that most immediately address topics such as these, we stand a chance of pulling together the resources of an art of association can meet our democratic aspirations.

Section 5. Conclusion

Putnam rightly drew our attention to the importance of understanding the new “associational ecology” that emerged in the U.S. in the late 20th century. Yet any given “associational ecology” consists not only of the landscape of associations (describable by size, types, distribution, and relations) but also of a science and art of association that structure that landscape. In *Bowling Alone* Putnam focused on questions of topography – how many associations, of what size, and where. His analysis excluded consideration of the affiliated science and art that structured 20th century American associationalism. This led him into misdiagnosis of a period of change.

In more recent work, Putnam has argued that diversity inherently erodes social capital (Putnam 2007). But if the production of social capital depends on an underlying art, it is too soon to tell whether there is a necessary “trade-off between diversity and community” that can, at best, be “ameliorated” (Putnam 2007: 164). An art of association that was developed in the 19th c. to emphasize socially homogeneous bonding relations will fail in the face of 20th and 21st century diversity. The now decades-long battles about political correctness and hate speech on college campuses, for instance, are evidence of the struggle over how to refashion the American art of association. But the existence of such struggles does not mean the problem lies in the fact of diversity. It lies instead in the inadequacy of an outmoded art to a changed context.

In contrast to the rapid conceptual advances in the science of association, the development of our new art has lagged behind. We might make more progress if we could become more self-aware about the precise nature of the challenge. It is this: we have to learn how to bridge and, perhaps even more importantly, *how to bond so that we are prepared to bridge*.

We cannot answer the empirical question of the relationship between diversity and social capital until we have raised the art of association to the highest perfection of our own day, so different from the 19th century one. In the realm of associationalism, the normative is prior to the empirical.

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