The Trusteeship of Legal Rulemaking

Edward S. Adams  
*University of Minnesota Law School, adams006@umn.edu*

Richard A. Saliterman

Follow this and additional works at: [https://scholarship.law.umn.edu/faculty_articles](https://scholarship.law.umn.edu/faculty_articles)

Part of the Law Commons

**Recommended Citation**


This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in the Faculty Scholarship collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.
BOOK REVIEW

THE TRUSTEESHIP OF LEGAL RULEMAKING

ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY.

Edward S. Adams* and Richard A. Saliterman**

I. INTRODUCTION

Professor Robert D. Putnam’s work is, in many respects, the contemporary companion to Democracy in America.¹ It comprehensively surveys and tests common presumptions held about our democracy with apparently very reliable quantitative data.² Until recently, a work of this depth and breadth has been unavailable. Putnam sets forth a well supported thesis suggesting that even though American financial capital may be at a high, its “social capital” has perhaps reached a record low,

---

¹ Alexis de Tocqueville, Democracy in America (Harvey C. Mansfield & Delba Winthrop trans. & eds., Univ. of Chi. Press 2000) (1835). In fact, Putnam looks at de Tocqueville’s America as the paradigm from which we have strayed. See Alan Ryan, My Way, N.Y. REV. OF BOOKS, Aug. 10, 2000, at 47, 47.

or at least a level similar to the social, economic, and legal bottleneck of a century ago. His use of empirical and combined data, however, probes into the American spirit, indeed implying that the present setting is more dangerous. This method is in contrast to many other surveys and commentaries that are based significantly on anecdotal evidence or that worship earlier studies founded on less than empirical or weak social science technique.

This decline in social capital is represented by a diminishing trust by citizens in governmental institutions in every area (including legal structures), in their own neighbors, and even in themselves. America is at a crossroads. It is ultimately the responsibility of the law to supply road maps and build the roads. The underlying issue is whether the discourse of democracy will flourish, or whether we will end up hurtling blindly toward some other less forgiving structure, either subtly or not.

While reflecting on his undergraduate educational experience at Columbia, Max Frankel, the Pulitzer Prize-winning former Managing Editor of the New York Times and refugee from Nazi Germany, said that one might ponder how the followers of Moses and Jesus “could have abandoned their prophetic teachings and succumbed to a pathetic, murderous tribalism.” The doctrines of Hitler and Stalin can be traced back through Hegel and Marx, all the way to Plato’s “family of ideas that proclaimed utopian truths and certitudes whose imposition by force required the construction of ‘closed’ societies.” Those who led these “utopian tyrannies” believed that there was a logical meaning to

---

3. See id. at 24-25.
4. See id. at 27.
5. It is not the purpose herein to evaluate with authority the precise scientific methodology of Putnam. The Authors have relied more upon the commentary of others in this regard. Nonetheless, one obvious potential shortcoming of Putnam’s work is the capacity to have a “base” or “control” set of data. See David S. Moore & George P. McCabe, Introduction to the Practice of Statistics 231 (2d ed. 1993) (“Control of the effects of outside variables is the first principle of statistical design of experiments.”). Accordingly, the data may not fully conform to contemporary standards because the technique and analysis of statistics, including control groups, may not have been fully developed. See Robert A. McLean et al., A Unified Approach to Mixed Linear Models, 45 AM. STATISTICIAN 54, 54 (1991) (“Since many, if not most, analyses of experimental data involve some mixed model aspect, there is an apparent need for teaching consistent analysis procedures directed toward appropriate model selection and interpretation based on the physical situation.”).
7. See id. at 58.
9. Id. at 98.
For example, it is "equally wicked" that the Nazis desired a purified "racial tribe" and that the Communists sought a single proletarian class. 11

The "return to the heroic age of tribalism" is the battle cry of the despot that begins "with the suppression of reason and truth" but that "must end with the most brutal and violent destruction of all that is human." 12 Similarly, the desire to use a single historical meaning will inevitably lead to a justification for sweeping social engineering through brutal repression and ethnic cleansing. 13

Frankel, a First Amendment practitioner of the highest magnitude, mirrors Putnam’s underlying premise, which is significantly grounded in First Amendment thinking. 14 The Amendment, along with law itself, is the single main constituted enablement of social capital. 15 If it is erroneous to use a single meaning of history through which some grand utopian vision could be constructed out of the ashes of the past, then social justice can only be achieved through "'piecemeal social engineering'" in an "'open society'" of experiment, debate and correction. 16 In fact, "'[o]nly in an ‘open society’ could reason prevail and violence be curbed, because experiment required universal skepticism and the freedom to dissent.'" 17 Therefore, freedom prevails only in a system of rational discourse. 18

There is an ultimate, intrinsic link between this piecemeal social engineering system and the rule of law, which provides some rationale

10. See id.
11. See id.
12. Id.
13. See id.
14. See id. at 98-99 (noting that “once you conclude that freedom requires society to live by reason . . . then language and discourse become more than instruments of self-expression”).
15. See id. at 97; Putnam, supra note 2, at 171 (stressing that the freedom to communicate “is a fundamental prerequisite for social and emotional connections”).
17. Id.
18. See id. at 98-99. Frankel notes that he reached these conclusions based on his year-long study of Karl Popper’s seminal work on totalitarianism. See id. at 97. Popper had argued that:

Rationalism is . . . bound up with the idea that the other fellow has a right to be heard, and to defend his arguments. . . . [T]he idea of impartiality leads to that of responsibility; we have not only to listen to arguments, but we have a duty to respond, to answer, where our actions affect others. Ultimately, in this way, rationalism is linked up with the recognition of the necessity of social institutions to protect freedom of criticism, freedom of thought, and thus the freedom of men. And it establishes something like a moral obligation towards the support of these institutions.

Popper, supra note 16, at 238.
for establishing Putnam’s work as a document worthy of serious study by legal scholars. Max Frankel stated:

I made the satisfying discovery of Moses, who commanded the worship of law instead of the golden calf, and of Jesus, who proclaimed the equality of mankind in God’s love. And I came to understand that since people are not in fact equal in talent and strength, their equal rights to life, liberty, and opportunity had to be defined and secured by law.19

Putnam’s work reflects the continuation of this historic tug of war between and within civilizations in the challenges and dilemmas faced by the current democratic system in the United States. This bipolar struggle represents the most classic of issues that confront every regime attempting to implement new, or destroy old, legal rules. It is evidenced by the generally repetitive and cyclical nature of civilizations leading to their birth, rise, and eventual demise.20

Democracy is a relatively recent phenomenon, having sprung up through the American and French Revolutions and slowly evolved in the United States.21 Even though democracies are an inherently unstable form of government, the complexities of the contemporary state tend to break down any single mind that tries to master it.22 Where a majority can seldom organize for any united and specific action, a modern democracy, characterized by near universal suffrage, has a unique ability to replace or balance a concentration of power garnered in a minority.23 Putnam’s notion that democracies best support the development of ideas and the individual—including ingenuity, innovation, self-subsistence, and the pursuit of happiness—indicates that democracies may have the most longevity of any particular system.24

---

19. Frankel, supra note 8, at 97 (emphasis added).
21. See id. at 72. Democracy, of course, has its roots in ancient civilizations, but its participatory nature was limited and involved a mixture of different forms of government. In ancient Attica, for example, out of a population of 315,000, only 43,000 were able to vote: those citizens constituting landed aristocracy and bourgeoisie (oligarchic), and small land and business owners (democratic). Women, wage-laborers, tradesmen, shopkeepers, and 115,000 slaves were excluded. See id. at 72-73.
22. See id. at 77-78.
23. See The Federalist No. 57 (James Madison).
24. Compare Putnam, supra note 2, at 336-37 (citing Thomas Jefferson, Alexis de Tocqueville, John Stuart Mill, and John Dewey to support the proposition that democratic participation results in a broad array of benefits for the individual as well as the public), with Durant & Durant, supra note 20, at 78 (asserting that democracy has not "develop[ed] standards and tastes to replace those with which aristocracies once kept the imagination and individualism of
On the other hand, because of its inherent weaknesses, democracy may have a tendency to experience an inevitable plummet into the tyranny that Plato observed would follow the democratic chaos of class distinction, waste, decadence, and moral degeneration. Putnam's work tends to indicate that the decline in social capital is correlated with this demise.

Characterizing this struggle, there is another central problem facing a democracy, which Putnam unfortunately only partially addresses. Democracies are based on a system of laws that may tend to maximize artists within the bounds of intelligible communication**). Although their premise is open to debate, the Durants observed:

Aristocracies [as a form of governmental and social organization, not the popular notions of "aristocrats"] have inspired, supported, and controlled art, but they have rarely produced it. The aristocrat looks upon artists as manual laborers; he prefers the art of life to the life of art, and would never think of reducing himself to the consuming toil that is usually the price of genius. He does not often produce literature, for he thinks of writing for publication as exhibitionism and salesmanship. The result has been, in modern aristocracies, a careless and dilettante hedonism, a lifelong holiday in which the privileges of place were enjoyed to the full, and the responsibilities were often ignored. Hence the decay of some aristocracies. Only three generations intervened between "L'État c'est moi" and "Après moi le déluge."

Id. at 70-71.

25. See id. at 73-74. Plato observed:

[The democrats] persuade men that moderation and orderly expenditure are vulgarity and meanness . . .

... (I)nslence they term breeding, and anarchy liberty, and waste magnificence, and impudence courage.

... (T)he father grows accustomed to descend to the level of his sons and to fear them, and the son is on a level with his father, he having no respect or reverence for either of his parents . . .

... (T)he master fears and flatters his scholars, and the scholars despise their masters and tutors; young and old are all alike . . . [and old men] are loth to be thought morose and authoritative, and therefore they adopt the manners of the young.

... (T)he citizens] chafe impatiently at the least touch of authority and at length . . . they cease to care even for the laws . . .

Such . . . is the fair and glorious beginning out of which springs tyranny.

... (T)he excessive increase of anything often causes a reaction in the opposite direction . . .

... (T)yranny naturally arises out of democracy, and the most aggravated form of tyranny and slavery out of the most extreme form of liberty].

economic potential and economies of scale. But they may concurrently
and unwittingly also minimize redistribution of wealth and breed
concentrations of wealth and power, which in turn may gradually
necessitate a narrowing of the legal and governance authority of a
greater number of people. This perhaps may be observed by the
accelerating shift of legal authority from local government to the federal
branches, distinguished by a few years of gentle persuasion on the
federal-state balance by the Supreme Court.

These concentrations of wealth, which also carry with them a
potentially increasing litany of complex issues fueled by extraordinary
advances in technology, have such a great impact on the development
and formation of law that laws may tend to reflect these concentrations.
These concentrations may not necessarily be posited in individuals per
se, but in entities. Supreme Court Justice Anthony Kennedy has weighed
in on this debate, suggesting that such concentrations of wealth and
power, venued spiritually and geographically remote from the governed,
directly affect the jurisdictional reaches of government into civilization,
molding and shaping the culture of the nation, potentially ominously,
toward skepticism and dissent. His reasoning suggests that a similar
process has centralized power to the federal government. It was easy
for the federal government to ignore states’ rights because the economy

26. See de Tocqueville, supra note 1, at 268 (suggesting, as he does frequently throughout
the book, that “the material well-being that the Americans enjoy” is “one of the great causes of the
success of their laws”).

27. See Durant & Durant, supra note 20, at 77.

Commerce Clause did not grant Congress the authority to usurp the states’ right to address gender-
(holding that Congress could not abrogate the states’ Eleventh Amendment protection with the Age
Discrimination in Employment Act).

29. See David R. Mayhew, Congress: The Electoral Connection 92-94, 130-31
(1974) (noting that well-financed, organized efforts get positive legislative results).

30. See, e.g., Alden v. Maine, 527 U.S. 706, 759 (1999) (Kennedy, J.) (“Although the
Constitution begins with the principle that sovereignty rests with the people, it does not follow that
the National Government becomes the ultimate, preferred mechanism for expressing the people’s
will.”). Justice Kennedy is not alone in this view, as exhibited by Chief Justice Rehnquist, Justice
O’Connor, Justice Scalia, and Justice Thomas signing on to Justice Kennedy’s opinion without
further comment by concurrence. See id. at 710.

31. In Alden, Kennedy states:

Today, as at the time of the founding, the allocation of scarce resources among
competing needs and interests lies at the heart of the political process. . . . If the principle
of representative government is to be preserved to the States, the balance between
competing interests must be reached after deliberation by the political process
established by the citizens of the State, not by judicial decree mandated by the Federal
Government and invoked by the private citizen.

Id. at 751; see also Durant & Durant, supra note 20, at 68.
was ignoring state boundaries. Today, international government is developing as industry, commerce, and finance override traditional national frontiers and take an international form.

The roots of democratic tradition and popular government in America were able to develop strongly and efficiently because of the convergence of several unique factors. The Durants present one possible insight in their view (which, of course, is subject to much challenge) that the most significant were, first, that the new world adopted the Anglo-Saxon legal traditions of defending citizens against the state; second, that the Protestant traditions allowed a diversity of religious beliefs; and third, that there was an abundance of open land and economic opportunities. Those factors, combined with "an uprising of a native middle class against an imported aristocracy" and the creation of a non-interventionist federal government, allowed for the liberation of "those individualistic energies that transformed America from a wilderness to a material utopia." The ownership of land nurtured by the toil of common people provided the impetus behind the notion and importance of economic and political self-determination. Owning land, a small business, or a farm was a major premise behind the Homestead Act and other western expansion and manifest destiny legislation and judicial rulings. An important objective was to keep people and communities in the loop, foster dignity, and maintain governmental stability.

However, a change may have occurred with the development of the modern industrial and post-industrial state and its reliance on economies of scale and mass-consumer-based economy. The "personality and character ... rooted in the earth" may increasingly be evaporating due to the concentration of populations increasingly detached from the land. Perhaps a bit too stridently and caustically, yet still lending some insight, the Durants conclude that "[e]conomic freedom, even in the middle classes, becomes more and more exceptional, making political freedom a consolatory pretense."
Nonetheless, the future is not necessarily bleak merely because land ownership has diminished. Despite these (and other) shortcomings, democracy has provided us with unparalleled liberation, education, and flexibility.\textsuperscript{42} It has a reassuring quality because of its propensity to correct mistakes.\textsuperscript{43} In fact, "[a]ll deductions having been made, democracy has done less harm, and more good, than any other form of government."\textsuperscript{44} Democracy has given to us "zest and camaraderie"; to our thought, "the freedom essential to . . . operation and growth"; and to our society, the removal of privilege and class.\textsuperscript{45}

For this is the vital truth beneath its catchwords: that though men cannot be equal, their access to education and opportunity can be made more nearly equal. The rights of man are not rights to office and power, but the rights of entry into every avenue that may nourish and test a man's fitness for office and power.\textsuperscript{46}

Whether such a conclusion will continue to hold true depends, according to Putnam, in large part on the ability of America's democracy to reinvigorate the basic relationships between the individual and the community, and on whether our system of government will encourage the individual to feel "in the loop" and participate in the discourse of democracy or atrophy into isolation.\textsuperscript{47}

The final principal issue facing Western democracies arose in a modern example of the classic dialectic between or within civilizations.\textsuperscript{48} The height of the Cold War was characterized by intense competition between the Western democratic/capitalist school of thought and the totalitarian Communist system.\textsuperscript{49} Unlike the historic Christian challenges

\begin{itemize}
\item \textsuperscript{42} See id. at 78.
\item \textsuperscript{43} See id.
\item Democracy is the most difficult of all forms of government, since it requires the widest spread of intelligence, and we forgot to make ourselves intelligent when we made ourselves sovereign. Education has spread, but intelligence is perpetually retarded by the fertility of the simple. A cynic remarked that "you mustn't enthrone ignorance just because there is so much of it." However, ignorance is not long enthroned, for it lends itself to manipulation by the forces that mold public opinion. It may be true, as Lincoln supposed, that "you can't fool all the people all the time," but you can fool enough of them to rule a large country. Id. at 77-78.
\item \textsuperscript{44} Id. at 78.
\item \textsuperscript{45} Id. at 79.
\item \textsuperscript{46} Id.
\item \textsuperscript{47} Specifically, Putnam emphasizes the vital role that "voluntary associations" can play in this regard. See Putnam, supra note 2, at 338-39.
\item \textsuperscript{49} See id.
\end{itemize}
brought onto the world by Greco-Roman civilization, the Western world presented a spiritually starved, secular aggressiveness against which Communism could not defend. One of the byproducts of democratic inclusiveness and a desire to be economically and politically self-determinant was the purgation of religion and spirituality and the embrace of technology as the cornerstone of independence. However, in “kick[ing] away a spiritual foundation . . . . [w]e had undermined our Western belief in the sacrosanctity of the personality of individual human beings and in the consequent rights of individuals as against the claims of the community.” As a result, Communist ideology had enormous appeal, first, because Western ideology had lost its spiritual foundation and, second, because Communism took the spiritual initiative in sacrificing the devoutly selfish individual for the collective interests of the community. The challenge brought by Communism “made it impossible for us in the West any longer to take our genuine belief in the value of individual liberty for granted.”

Arnold Toynbee has written that, although the Communist threat has all but disappeared, similar conflicts will continue in a shrinking world unless we learn to live together as a “single family.” We must “replace our current secular belief in the value of individual liberty on its original Christian foundation—and this foundation is the Christian vision of God as love.” This supports Putnam’s proposition that for democracy to survive, we must reinvest in our social capital, learning to function in many ways as a community of individuals. This thinking seems to be a significant foundation for Putnam’s view of spirituality’s

50. See id. at 148-49.
52. Arnold J. Toynbee, Pharisee or Publican?, 63 SEWANEE REV. 1, 6 (1955). Toynbee continues:

[Though we continued to hold this belief after we had entered on the path of secularization, the belief had been deprived of both its vitality and its validity when once it had been cut away from its original Christian roots. Thus the post-Christian secular technological version of our Western Civilization was inviting a visitation of Nemesis, and Nemesis has duly visited us in the person of Marx, in the doctrine that Marx has preached, and in the formidable anti-Western and anti-Christian church and state that Marxism has now called into existence.]

53. See id. at 2-3.
54. Id. at 7.
55. Id. at 12.
56. Id. at 7.
57. See PUTNAM, supra note 2, at 19.
role as an element of social capital, even though his or Toynbee’s specific references to any particular religion may be invalid and outmoded.

II. PUTNAM’S THESIS AND ITS ORIGINS

A. The General Importance of Social Capital

According to Putnam,58 social capital provides the groundwork upon which other forms of capital achieve maximum productive efficiency.59 Physical capital (tools and technology) and human capital (education and training) provide the building blocks of productivity.60 Social capital provides the structure in which physical and human capital operates.61 It ensures the cohesiveness between individuals and groups necessary to their productive use of the other capitals.62

Putnam describes social capital as a measure of the value that social networks and contacts provide to the individual and the community.63 He refers to “connections among individuals—social networks and the norms of reciprocity and trustworthiness that arise from them.”64 Relating social capital to the notion of civic virtue, Putnam argues that it “calls attention to the fact that civic virtue is most powerful when embedded in a dense network of reciprocal social relations.”65 He asserts

58. For the sake of argument, the Authors render the text and quotes as descriptive. However, these descriptions are not necessarily Putnam’s views per se.
59. See PUTNAM, supra note 2, at 18-19. Putnam credits a Progressive Era reformer, L.J. Hanifan, with one of the earliest references to the idea of social capital. See id. at 19. According to Hanifan:

[Social capital] refer[s] [not] to real estate or to personal property or to cash, but rather to that in life which tends to make these tangible substances count for most in the daily lives of a people; namely, good will, fellowship, sympathy, and social intercourse among the individuals and families who make up a social unit . . . .

. . . The individual is helpless socially, if left to himself. . . . If he comes into contact with his neighbors, there will be an accumulation of social capital . . . sufficient for the substantial improvement of life in the whole community.

60. See PUTNAM, supra note 2, at 19.
61. See id.
62. See id. at 20 (noting that “a well-connected individual in a poorly connected society is not as productive as a well-connected individual in a well-connected society” and that “even a poorly connected individual may derive some of the spillover benefits from living in a well-connected community”).
63. See id.
64. Id. at 19.
65. Id.
that "[a] society of many virtuous but isolated individuals is not necessarily rich in social capital."

Social capital may be fostered in numerous ways and take varying forms, eliciting either positive or negative results. Putnam somewhat, but not comprehensively, addresses this in his discussion on the particular distinction between what he terms "bridging" and "bonding" social capital. Bridging social capital involves loosely formed groups of socially diverse people with a broad commonly held value or belief. Putnam's examples are the civil rights movement and youth social service groups. On the other hand, bonding social capital involves more tightly organized groups of people, "inward looking and tend[ing] to reinforce exclusive identities." Putnam identifies "ethnic fraternal organizations, church-based women's reading groups, and fashionable country clubs" as examples of bonding social capital.

Putnam asserts that there are virtues of both forms of social capital. Simply put, Putnam analogizes that bridging social capital is a kind of "sociological WD-40," while bonding social capital works as "sociological superglue." Bridging networks succeed in linking external assets and diffusing information. Alternatively, bonding networks are better for "undergirding specific reciprocity and mobilizing solidarity." Putnam highlights how bonding social capital works in ethnic enclaves within the larger community. Here, the webs of ethnic connectivity often provide "crucial social and psychological support for less fortunate members of the community, while furnishing start-up financing, markets, and reliable labor for local entrepreneurs."

The advantages that a firm social capital underpinning in society provides to individuals and communities are immense. It allows for easier resolution of collective problems and it "greases the wheels that allow communities to advance smoothly." In other words, "[w]here people are trusting and trustworthy, and where they are subject to repeated interactions with fellow citizens, everyday business and social
transactions are less costly." Social capital heightens each citizen's awareness of the consequential linkage between themselves and others. Those citizens that achieve "active and trusting connections to others . . . develop or maintain character traits" that benefit the entire society. Social networks and social capital widen and smooth information flows to help people achieve personal goals, especially economic- or business-related goals. Putnam continues, stating that "communities that lack civic interconnections find it harder to share information and thus mobilize to achieve opportunities or resist threats" to their well-being. Finally, social capital affects human psychological and biological processes; a life rich in social capital is likely to enhance physical and mental health.

The most significant theme upon which Putnam focuses is that, despite social capital's benefits, its decline has had an impact upon democracy and democratic processes. Putnam has shown that there are fewer participants in democratic processes now due to, among other things, the decline in direct social interaction and participation in civic groups; a preoccupation with cheap spectator and other asocial entertainment; and the emergence of a highly materialistic, financially driven, and socially isolationist culture aggravated in part by extraordinary advances in technology.

B. Historical, Political, and Intellectual Contributions to the Theory of Social Capital

Putnam's thesis has substantial intellectual, political, and historical precedent. Social capital appears to have been used as a socially descriptive term numerous times in the twentieth century to call attention to the ways in which the lives of citizens are made more fruitful by having social ties.

L.J. Hanifan, a state supervisor of rural schools in West Virginia, was the first to use the phrase "social capital." Later, Jane Jacobs (an

---

78. Id. (emphasis added).
79. See id.
80. Id.
81. See id. at 289.
82. Id.
83. See id.
84. See id. at 341-42.
85. See id. at 277-83.
86. See Hanifan, supra note 59, at 78.
urbanist),

87 Glenn Loury (a sociologist),

88 Pierre Bourdieu (a French theorist),

89 and Ekkehart Schlicht (a German economist),

90 were among those expounding upon the idea that social networks contain vast untapped social and economic resources.

Significant American commentators include sociologist James S. Coleman, writing in the late 1980s on social capital and its effects. However, an argument that is philosophically closer to Putnam’s can be found in the works of philosopher John Dewey, whose contributions include publicizing the notion of “The Great Society.”

92 The Progressive movement itself, inspired by Dewey and reflected by other thinkers, such as Walter Lippmann, is a compelling influence on Putnam’s work. Indeed, Putnam traces much of his work to the writers of the Progressive Era of reform, from the late 1800s to the early 1920s. He even calls for the resurrection of some of the same ideals and prescriptions. The degree of Putnam’s reliance upon this paradigm to address current problems may be one of the few limitations of Putnam’s work.

However, the similarities between the Progressive Era and the situation we face today are noteworthy. The late 1800s saw the dawning of a new culture of leisure and materialism spawned by the Industrial Revolution. New forms of communication and transportation bridged land gaps, economic wealth became political power, immigration brought new non-white groups into a land of changing forms of economic competition and commerce, and technological change altered the social landscape, bringing ever greater numbers of people into the

87. See Jane Jacobs, The Death and Life of Great American Cities 150-51 (1961) (noting that “the presence of people who . . . are in the place for different purposes, but who are able to use many facilities in common” is one of the four conditions necessary for “exuberant diversity” in a city).


93. See, e.g., Walter Lippmann, Drift and Mastery: An Attempt to Diagnose the Current Unrest 18 (Univ. of Wis. Press 1985) (1914); Walter Lippmann, A Preface to Politics: An Attempt to Sketch an Attitude Toward Statecraft i-iv (1917).

94. See Putnam, supra note 2, at 377-81.

95. See id. at 368.

96. See id. at 372.
As a result, writers and politicians—such as Theodore Roosevelt and John Sherman (of antitrust law fame)—decried the decline of the community and morality, as well as the “impersonal and attenuated” social ties brought by mass-market economic ideology. Fortunately, these changing fundamentals led to an unprecedented development and growth, or rebirth, of civic participation.

C. The Circumstances of Democratic Cultures at Large

One recent depiction of the present Western democratic culture was offered by the leading Oxford historian J.M. Roberts in the introductory presentation of his new book, Twentieth Century: The History of the World, 1901 to 2000, at the English Speaking Union in New York City. When asked if he agreed with Time Magazine’s naming Albert Einstein as its man of the century, Roberts indicated that he would have selected Guglielmo Marconi, the inventor of wireless communication. Among other things, he indicated that it was wireless communication that gave birth to the computer, which in turn has impacted our culture perhaps more than any other single phenomenon. He suggested that Marconi was significantly responsible for ushering in the information revolution, thereby impacting contemporary culture more than any single person in the last century. Roberts seems to infer that to refer to Einstein as the most formidable influence of the century may reflect our society’s degree of concern with materialism. The less tangible, yet profoundly more pervasive, impacts that advancing modes of

97. See id. at 368.
98. See, e.g., THEODORE ROOSEVELT, AN AUTOBIOGRAPHY xi (Da Capo Press 1985) (1913). President Roosevelt stated:

Facing the immense complexity of modern social and industrial conditions, there is need to use freely and unhesitatingly the collective power of all of us; and yet no exercise of collective power will ever avail if the average individual does not keep his or her sense of personal duty, initiative, and responsibility.

Id.

99. See generally 2 JOHN SHERMAN, RECOLLECTIONS OF FORTY YEARS IN THE HOUSE, SENATE AND CABINET (1895) (autobiography of John Sherman describing his travels and political activities).
100. See PUTNAM, supra note 2, at 378, 380.
101. See id. at 382.
104. See id.
105. See id.
106. See id.
communication have had on human relationships and the organization of human society are more worthy of our notice. Putnam’s thesis, based largely on observations of these intangible variables and their interactions, much aligns with Roberts’ theory. According to Putnam, we must take notice while we are able to.\textsuperscript{107}

Roberts also presents an excellent background with which to appreciate Putnam’s thesis. Roberts indicates, among other things, that the material wealth produced by the world (particularly by democracies) is now at an unprecedented level.\textsuperscript{108} Also, the material wealth gap between the rich and the poor has widened.\textsuperscript{109} This absorption of material resources comes amid dynamic upward trends in population growth, characterized by higher birth rates and longer average life spans.\textsuperscript{110} At the same time, Roberts adds, astounding technological and scientific advances have not curbed the growing scale of the depletion of raw material resources.\textsuperscript{111}

Arguably, the most significant historical dynamic of the twentieth century impacting our culture has been at the ideological level. Our anxiety level has perhaps never been greater. In a very short span of time, the twentieth century has witnessed worldwide ideological battles.\textsuperscript{112} They range from the perhaps naïve and ideological motivations behind Woodrow Wilson’s futile attempts at “making the world safe for democracy” with the League of Nations\textsuperscript{113} to the similarly misguided ideologies espoused by the highly regimented, controlled, and centralized societies of Nazism and Soviet-style Communism.\textsuperscript{114} Modern democratic society and culture has developed over a very short and intense period of time, and has experienced so many extremes in idealism, that it may essentially become paralyzed in its course by fear of the chance encounter with another stiff opponent. Indeed, this fear may have a rational foundation, as pursuits of idealism can have the exact opposite result than intended.

This effectively raises the stakes in the choice between not taking any action in the face of the well-established and identified trends presented by Putnam and taking swift, overly reactive, and idealistic actions that might only intensify problems. Interestingly, this idealism

\textsuperscript{107} See PUTNAM, supra note 2, at 107.
\textsuperscript{108} See ROBERTS, supra note 102, at 587-88.
\textsuperscript{109} See id. at 588.
\textsuperscript{110} See id. at 585-86.
\textsuperscript{111} See id. at 579-80.
\textsuperscript{112} See, e.g., ROBERTS, supra note 102, at 301; TOYNBEE, supra note 48, at 148-49.
\textsuperscript{113} See ROBERTS, supra note 102, at 275-76.
\textsuperscript{114} See id. at 297, 316-17.
may be somewhat present in Putnam's proposals for addressing the low social capital problem.\textsuperscript{115}

Putnam's thesis and the concerns underlying it have been echoed even more intensively in recent months by various organizations, academic institutions, and scholars.\textsuperscript{116} At a pace and breadth of debate perhaps unparalleled in American history, especially for works emanating from scholarly centers, writings presenting similar theses have surfaced.\textsuperscript{117}

In quantitative terms, perhaps even if unintended, some scholars assert that the disrespect for those in Congress charged with governing the populace has never been greater.\textsuperscript{118} In effect, one team of commentators has stated, congressional members may perhaps ignore public opinion polls.\textsuperscript{119} There is a gulf of unprecedented dimensions that exists between the public and the legislative branch, despite the fact that the legislative branch is perhaps the single most visible symbol of democracy, represents the theoretical expression of social capital, and is the formulator of legal rules.\textsuperscript{120}

What we see today in contemporary American politics, however, far exceeds responsible leadership in a representative democracy. We see troublesome indications of declining responsiveness to public opinion, shown by the growing list of policies on which, without explicit justification, politicians of both major political parties ignore public opinion.\textsuperscript{121}

Similarly, the 2000 presidential candidates' positions on the "dimpled chads and absentee ballots [were] more compelling than were their positions during the election campaign on education and Social Security," as one seasoned scholar—Robert Reich, former labor secretary in the Clinton administration—has indicated.\textsuperscript{122} The voter apathy was perhaps the result of scripted campaigns, boring conventions, and the public's inability (or disinterest) in identifying the differences between candidates' positions on important issues.\textsuperscript{123} Voter turnout

\textsuperscript{115.} See Putnam, supra note 2, at 402-14.
\textsuperscript{117.} See id. at 154 n.1.
\textsuperscript{119.} See id. at 5-6.
\textsuperscript{120.} See id. at 124-27.
\textsuperscript{121.} See id. at 126-27.
\textsuperscript{122.} Robert B. Reich, Editorial, This Isn't a Civics Lesson—It's a Brawl, N.Y. Times, Dec. 4, 2000, at A29.
\textsuperscript{123.} See id.
increased slightly, but "still only about half of registered voters bothered going to the polls." 124 Once the citizenry voted, and the difference between incredible power and no power was so close, the candidates criticized each other's integrity. 125 Additionally, they "unleashed legions of lawyers to argue about the intentions of former legislators and dead constitutionalists who never contemplated that a few hundred chads might decide who held the most powerful office in the world." 126 The result was that each candidate sincerely believed he had won the election, but neither seemed to be bothered by the damage they had caused to "the institutions and laws whose legitimacy ha[d] been called into question." 127 Perhaps too cynically, it was even suggested that Republicans "staged protests to look as if average Americans were expressing their outrage at the recounts, using political insiders as actors." 128

The election was merely a microcosm of "the bitter divisiveness within the political class brought on by the hearings on the Supreme Court nominations of Robert Bork and Clarence Thomas, by special prosecutor Lawrence Walsh's Iran-contra indictments, [and] by the Gingrich-Clinton showdown that closed the federal government." 129 Reich contends that each of these battles has "rendered Washington steadily less capable of doing the public's business." 130 He concludes that the result is an ever-decreasing public confidence in elected officials' willingness to put society's interests above their own. 131

Finally, there has been a similar, even shrill, warning against institutions that have been introduced to advance worldwide democracy since the end of the Cold War. 132 These creations may have had the unintended consequence of encouraging the erosion of social capital, according to one recent work. 133

124. Id.
125. See id.
126. Id.
127. Id.
128. Id.
129. Id.
130. Id.
131. See id.
133. See id. at 68-69.
III. PUTNAM’S PROOF: INQUIRIES INTO THE CONTEMPORARY AMERICAN SOCIAL FABRIC

A. Generally

Putnam’s reliance on an unprecedented amount of quantitative data to support his thesis is the book’s single strongest merit. From this data, Putnam is able to glean and isolate historical trends and currents not necessarily discernible by mere anecdotal evidence, and draw significant inferences concerning social capital and its connection to the democratic process.

While Putnam does not formulate any single finding directly related to the effect of law on social capital, he suggests that in many ways reliance on law attempts to cover the social capital deficit.134 Nevertheless, each of Putnam’s findings provides a persuasive and chilling commentary on the intrinsic relationship between social capital and the survival of the rule of law.135 As indicated earlier, he offers some prescriptive comments drawing heavily from the last great sea of change and low social capital level ushering in the Progressive Era.136 This last part of the work, that deals with how to address the problem of low social capital, although providing many vital and insightful comments, leaves room for clarity and further development.

We will not attempt to address every permutation on the social capital theory upon which Putnam extensively elaborates, but will attempt to summarize Putnam’s work, and offer commentary on the social capital theory as it relates to evolution of law in recent years.

B. Political Participation

Putnam argues that voting in political elections is the most common measure of democratic participation.137 Although voting rates in American political elections rank below those of other democracies, Putnam indicates that the real question is not how we compare with others but rather how we compare with our own past.138 In examining election trends, his results are not encouraging, and they include a finding that, while 62.8 percent of Americans of voting age went to the

134. See PUTNAM, supra note 2, at 145.
135. See id. at 145-46.
136. See id. at 401-04.
137. See id. at 31.
138. See id.
polls to select a president in 1960, only 48.9 percent went to the polls in 1996. The dynamics of any particular race aside, the trends over the past forty years reflect a 25 percent downward slide in voting for president, representing the largest and longest decline in political participation in American history. Voter turnout in off-year, state, and local elections reflects a similar trend, and is apparent across all age groups and most geographic regions of the country.

Putnam also relates that political knowledge and interest in public affairs, generally viewed as a prerequisite to full participation in democracy, has also fallen dramatically. Theoretically, formal education breeds civic knowledge and interest, but while we may be better educated than our parents and grandparents, the average college graduate today knows little more about political affairs than the average high school graduate of the 1940s. Indeed, "the post-baby boom generations ... are substantially less knowledgeable about public affairs, despite the proliferation of sources of information" and the ease of access.

Ironically, Putnam continues, those with a higher education are increasingly less likely to become involved. Attendance at public meetings by the college educated has nearly halved, from 36 percent to 18 percent since 1964. He suggests that, because the less educated were less participatory to begin with, their rates of participation have declined by even greater numbers in relative terms. This is supported by data that show attendance at public meetings by those with only a high school education fell from 20 percent to 8 percent, and from 7 percent to 3 percent for those whose education ended even earlier.

This knowledge gap does not appear confined to politics. According to data that Putnam presents, it applies equally to general news of current events and affairs. "Daily newspaper readership among people under [age] thirty-five dropped from two-thirds in 1965 to

139. See id. at 31-32.
140. See id. at 32.
141. See id. at 32-34.
142. See id. at 35.
143. See id.
144. Id. at 36.
145. See id. at 46.
146. See id.
147. See id.
148. See id.
149. See id. at 36.
one-third in 1990, while television news viewership among the same
group fell from over 50 percent to 41 percent.

While political organization staff membership has increased over
the past decades, Putnam reveals that actual citizen participation in
campaign activities has fallen dramatically. The ranks of the party
loyal have thinned, with fewer people identifying with any particular
political party. Membership in grassroots organizations and political
party volunteering has also fallen radically. The parties themselves are
better financed, professionally staffed, and often hire marketing agencies
to man the phone banks. The result, or maybe the reason, is that fewer
Americans participate in political activities. At the same time, political
campaign spending per se has exploded. Putnam concludes that
politics has become an industry, rather than an act of duty-minded
citizenship.

According to Putnam, while the finance, marketing, advertising,
and operating expenses of political campaigns have increased over the
past twenty years, “the number of office seekers in any year at all levels
in the American body politic—from school board to town council—
shrank by perhaps 15 percent.” At this rate, Americans have had a
quarter million fewer candidates to choose from annually. In fact, there
are sixteen million fewer committee members, eight million fewer local
organizational leaders, and three million fewer men and women
organized to work for better government” than in the mid-1970s.
Furthermore, Putnam shows that such basic forms of political expression
as signing petitions, writing to a congressperson or a newspaper editor,
and making a speech have fallen dramatically.

Finally, Putnam suggests that these trends indicating an alienation
from the political sphere reflect a real decline in the level of trust the

150. Id.
151. See id.
152. See id. at 37-38.
153. See id.
154. See id. at 38.
155. See id. at 37.
156. See id. at 38.
157. See id. at 37.
158. See id.
159. Id. at 42.
160. See id.
161. Id.
162. See id. at 43.
body politic holds in its political institutions. In fact, Putnam indicates that, "[i]n the 1990s, roughly three in four Americans didn’t trust the government." In contrast, "Americans in the mid-1960s were strikingly confident in the benevolence and responsiveness of their political institutions." Approximately one-quarter of those surveyed agreed that “[p]eople like me don’t have much say in government” and “[p]ublic officials don’t care what people like me think.” Conversely, 75 percent thought that they “could trust the government in Washington to do what is right all or most of the time.” Even in 1966, amidst the Vietnam War and race riots in several major metropolitan areas, two-thirds of those surveyed disagreed with the opinion that “the people running the country don’t really care what happens to you.”

The contemporary position is that these views are “antiquated or naive,” as “[i]n virtually every case the proportions agreeing and disagreeing with such ideas essentially have been reversed.” In the 1990s, about 75 percent of those surveyed did not “trust the government to do what is right all or most of the time,” and in 1997, during “the longest period of peace and prosperity in more than two generations,” just over half of the Americans surveyed believed that “the people running the country don’t really care what happens to you.” Putnam concludes that the contemporary viewpoint “may or may not be more accurate than the Pollyannaish views of the early sixties, but they undermine the political confidence necessary to motivate and sustain political involvement.”

C. Civic Participation

Putnam argues that official membership in a voluntary civic group or organization is often a good indicator of civic participation. These voluntary associations can be classified in three sub-categories: community-based, church-based, and work-based. He indicates that, at

163. See id. at 46-47.
164. Id. at 47.
165. Id.
166. Id.
167. Id.
168. Id.
169. Id.
170. Id.
171. Id.
172. Id.
173. See id. at 49.
174. See id.
first glance, it appears that there has been a dramatic increase in the number of voluntary associations over the past thirty years.\textsuperscript{175} After all, he points out, the number of national non-profit organizations more than doubled, to nearly 23,000, between 1968 and 1997.\textsuperscript{176} However bright this statistic may seem, Putnam indicates that few of the tens of thousands of non-profit associations actually have mass membership; indeed, many have no members whatsoever.\textsuperscript{177} In fact, he continues, the median number of members in national associations declined from an average of approximately 10,000 in 1962 to as few as 1000 in 1998.\textsuperscript{178}

Putnam notes an increasing centralization of these organizations to headquarters in cities having an intrinsic benefit, such as the heaviest concentrations of its members or greater access to policy-makers.\textsuperscript{179} For example, even though most of the members of the American Association of Retired Persons live in Florida, California, and Arizona, the organization chose a Washington, D.C., headquarters in order to have the most visible and direct impact upon policy-making circles.\textsuperscript{180} As a result, locally based units and chapters have simply disappeared.\textsuperscript{181}

In fact, Putnam notes, most of the newer associations are "professionally staffed advocacy organizations . . . focus[ed] on expressing policy views . . . not on providing regular connection \textit{among} individual members at the grass roots."\textsuperscript{182} He provides data showing that the more recently an association was founded, the less likely it is to have a local chapter for organizing local member meetings.\textsuperscript{183} Putnam suggests that "[i]n many respects, [social] organizations have more in common with mail-order commercial organizations than with old-fashioned face-to-face associations."\textsuperscript{184} For example, Putnam notes the tripling of veterans' organizations between 1980 and 1997.\textsuperscript{185} However, for the same period of time, the rate of membership in those same organizations "fell by roughly 10 percent."\textsuperscript{186} While the number of trade unions grew 4 percent from 1980 to 1997, actual membership fell by

\begin{footnotesize}
\begin{enumerate}
\item See id.
\item See id.
\item See id.
\item See id.
\item See id. at 50-51.
\item See id.
\item See id. at 51.
\item Id.
\item See id.
\item Id.
\item Id.
\item See id. at 52.
\item Id.
\end{enumerate}
\end{footnotesize}
over 35 percent. By the late 1960s to the early 1970s, the growth rate of membership in national organizations "began to fall further behind population growth." Putnam suggests that membership in local organizations may be a better indicator of social capital trends. He relies on membership trends in local parent-teacher associations as the most dramatic example of community disengagement. Parent-teacher associations experienced a phenomenal rise in membership, to over 45 percent of families with school-age children by 1960. Since then, membership has fallen to fewer than 20 percent. Generally speaking, however, formal membership in voluntary organizations has not experienced a great decline, in large part because of the offsetting effects of increased membership in professional and other special-interest organizations. Putnam dismisses this fact as misleading, arguing that there is a fundamental distinction between membership and active membership.

To better reflect participation in voluntary associations, Putnam shows that, for those organizations with local chapters, the percentage of people "who took any leadership role in any local organization ... was sliced by more than 50 percent" over the past twenty years. Putnam points out that "in the mid-1970s nearly two-thirds of all Americans attended club meetings, but by the late 1990s nearly two-thirds of all Americans never do." This led to a decline in the number of such meetings, from an average of twelve per year in 1975 to slightly more than four per year by 1999. Rates are even more steep and radical for college graduates, whose average number of annual club meetings fell by 55 percent from the 1960s to the 1990s. Since the mid-1960s, formal membership generally has decreased by 10 to 20 percent. Concurrently, active involvement has been collapsing, reflected by "more than halving most indexes of participation within barely a few

187. See id. at 52-53.
188. Id. at 55.
189. See id.
190. See id. at 55-57.
191. See id. at 56, 57 fig.9.
192. See id.
193. See id. at 59.
194. See id.
195. Id. at 60.
196. Id. at 61.
197. See id. at 61 fig.11.
198. See id. at 62.
199. See id. at 63.
Putnam concludes that, if statistical patterns continue and the current rate of decline persists, most voluntary associations will vanish in America in less than twenty years.201

D. Religious Participation

Putnam points out the important role of organized spirituality and religion in sustaining democracy, noting that "[f]aith communities in which people worship together are arguably the single most important repository of social capital in America."202 Putnam’s evidence shows that roughly half of all association memberships, personal philanthropy, and volunteering is directly related to a religious function.203

According to Putnam, the social capital derived from a social relationship to a religious organization is clear: "Churches provide an important incubator for civic skills, civic norms, community interests, and civic recruitment."204 There is a direct and profound correlation between membership in a religious group and participation in basic forms of civic involvement, such as "voting, jury service, community projects, talking with neighbors, and giving to charity."205 For example, "75-80 percent of church members give to charity, as compared with 55-60 percent of nonmembers, and 50-60 percent of church members volunteer, while only 30-35 percent of nonmembers do."206

The decrease in participation in religious-related activities is indicative of the decline of social capital.207 According to Putnam’s data, church membership has declined since its peak in the mid-1960s.208 Church attendance has experienced a decline of approximately 15 to 20 percent since the 1970s.209 Moreover, aside from Sunday sermon attendance, participation in church-sponsored social activities (such as Sunday school or social and study groups) has fallen by approximately 30 percent since the 1960s and by more than half since the 1950s.210

Putnam notes sociological studies showing that the social revolution of the late 1960s and 1970s had the collateral effect of turning

200. Id.
201. See id. at 62-63.
202. Id. at 66.
203. See id.
204. Id.
205. Id. at 67.
206. Id.
207. See id. at 79.
208. See id. at 70 & fig.12.
209. See id. at 70, 71 fig.13.
210. See id. at 71-72.
people away from organized forms of religion and spirituality toward a more personally autonomous, individualistic experience. He concludes that privatized religion generates less social capital despite its attributes of being "morally compelling and psychically fulfilling." It creates congregation-surfing and decreases the commitment to any particular community. At the same time, the number of persons who indicate they have no religion whatsoever rose 2 percent per decade from the 1940s to the 1990s.

Perhaps most interestingly, Putnam's findings indicate that, amid this overall decline, the country is becoming more spiritually divided, between the "devoutly observant" on the one hand and the "entirely unchurched" on the other. Additionally, there are geographic dimensions, as disengagement is more pronounced in the northern states while the south has not experienced the deep declines. Among religious groups, as a percentage of the total American population, Protestant membership has fallen off 3 to 4 percent per decade since World War II, while the percentage of Jews has declined by approximately half a percentage point per decade. Although Protestant evangelical membership has risen by approximately one-third over the past twenty-five years, these gains had little impact on the general downward trends in membership in established religious groups.

Conversely, Catholics have increased their ranks by just over 1 percent per decade, primarily through the influx of immigrants from Latin America. Putnam notes that there has been a religious revival in America by evangelical and, to a lesser extent, Catholic congregations that tend to be not only religiously but also socially exclusive, exemplifying the bonding type of social capital typically engendered by these groups. Putnam also states that these conservative congregations tend to be more active within their groups but less active in the wider community, offering, with few exceptions, comparatively fewer community-wide services than more liberal or moderate

211. See id. at 73-74.
212. Id. at 74.
213. See id.
214. See id. at 75.
215. Id.
216. See id.
217. See id.
218. See id. at 76.
219. See id. at 75-76.
220. See id. at 77-78.
congregations.\textsuperscript{221} This observation is, of course, not necessarily a correct one, and may be seriously challenged. While this part of Putnam's work expresses, even favors, possible (instead of simple) conclusions, it nevertheless does provide very informative data and challenges for all.

\section*{E. Connections in the Workplace}

Putnam indicates that, after a surge in the 1940s and 1950s, union membership has plummeted, from approximately 32 percent of the workforce to 14 percent in 1999.\textsuperscript{222} He concludes that the strides made in union membership as a bastion of social capital and a network of reciprocity spawned by the New Deal have disappeared, relegated in function to mere bargaining agents.\textsuperscript{223} "By the end of the twentieth century ... this once central element in the social life of working Americans had virtually vanished."\textsuperscript{224} Between 1953 and 1997, union membership in the manufacturing sector declined by 62 percent, by 79 percent in the mining industry, by 78 percent in the construction industry, and by 60 percent in the transportation industry.\textsuperscript{225} As noted above, Putnam finds that the number of professional associations, as well as their membership, has increased dramatically since the end of World War II, but as a percentage of the available pool of professionals, here, too, membership has experienced steady declines since the 1960s.\textsuperscript{226}

Putnam indicates that changes in the character of work and the workplace since the 1980s have had the effect of encouraging a more social atmosphere.\textsuperscript{227} However, he also argues that this does not translate into greater social connectivity.\textsuperscript{228} In fact, Putnam shows that, despite the changes, there has been no increase over the past four decades in the number of personal connections between co-workers.\textsuperscript{229} Although co-workers account for about 10 percent of our friends, those "[w]orkplace ties tend to be casual and enjoyable, but not intimate and deeply

\begin{thebibliography}{99}
\bibitem{221} See id. at 78.
\bibitem{222} See id. at 81 & fig.14.
\bibitem{223} See id. at 81.
\bibitem{224} Id.
\bibitem{225} See id. at 82.
\bibitem{226} See id. at 83-85.
\bibitem{227} See id. at 85-87.
\bibitem{228} See id. at 87-89.
\bibitem{229} See id. at 87.
\end{thebibliography}
Thus, the small percentage of co-worker friends is even smaller when discounted for closeness.\footnote{230}

Putnam adds that while the changing nature of work, business structure, and the economy have had a positive effect on productivity—such as "[m]ore independence from the firm, flatter hierarchies, less paternalism, and more reward for merit"—they have had an equally destructive impact upon trust and social connectedness.\footnote{232} The ultimate impact is determined by law and the validity of present legal rules.\footnote{233} Increased job anxiety due to the heavy restructuring of the 1980s and 1990s, as well as the demise of seniority and loyalty-based rewards, indicates that, "although job instability remains higher among blue-collar workers, it has increased much more rapidly among white-collar workers, who account for a growing fraction of the workforce and who have traditionally contributed disproportionately to civic life."\footnote{234}

The traditional implicit employment contract based on trust in job stability often has been replaced by an actual legal document securing the responsibilities of the worker and employer.\footnote{235} Furthermore, Putnam notes that structural changes in the workplace, including increases in short-term, part-time, temporary, and commuter jobs, inhibit social capital formation and the development of social ties.\footnote{236} According to Putnam, 75 percent of all independent contractors, for example, claim to have no regular co-workers, let alone colleagues,\footnote{237} and "[r]ecent surveys suggest that as many as one in four employees are chronically angry on the job."\footnote{238} The result, many researchers believe, is that instability and aggression in the workplace are increasing in tandem.\footnote{239}

Indeed, Putnam concludes that the workplace may actually contribute to the decline in social connectivity, especially as the workplace becomes more restrictive and controlled.\footnote{240} Not surprisingly, privacy in the workplace has become a hot political and legal issue, and Putnam notes (but does not examine) several recent court decisions giving employers wide discretion to monitor employees' communication

\begin{footnotes}
\footnotetext[230]{\textit{Id.}}
\footnotetext[231]{See \textit{id.}}
\footnotetext[232]{\textit{Id. at} 88.}
\footnotetext[233]{See \textit{id. at} 91-92.}
\footnotetext[234]{\textit{Id. at} 89.}
\footnotetext[235]{See \textit{id. at} 88.}
\footnotetext[236]{See \textit{id. at} 90.}
\footnotetext[237]{See \textit{id.}}
\footnotetext[238]{\textit{Id. at} 91.}
\footnotetext[239]{See \textit{id.}}
\footnotetext[240]{See \textit{id.}}
\end{footnotes}
"Rights of free speech and privacy that are essential to public deliberation and private solidarity are, to put it mildly, insecure in the workplace." Putnam suggests that significant public and private efforts must be made to ensure that social connectedness is not worsened in the workplace.

F. Informal Social Connections

Putnam suggests that informal social connections with friends and family foster and sustain social networks, albeit with less impact and breadth than more formal civic engagements. Similar to participation in civic activities, these informal connections have seen significant declines over the past twenty-five years. The average American entertained friends at home about fourteen or fifteen times a year in the 1970s, and only eight times per year by the late 1990s. Simply visiting friends at their homes experienced similar declines, and this decline was not impacted by only marginal increases in dining out with friends. Most significantly, the family dinner, a barometer of family connectedness, is increasingly becoming a relic of some past generation. Putnam indicates that those married people who definitely agree with the statement, "our whole family usually eats dinner together" has declined from approximately 50 percent to 34 percent over the past 20 years. Other surveys provide further evidence that family members spend significantly less time socializing with each other. Data indicates that family vacations with school-age children fell from 53 percent to 38 percent between 1976 and 1997; watching television together fell from 54 percent to 41 percent; family religious service attendance fell from 38 percent to 31 percent; and "just sitting and talking" fell from 53 percent to 43 percent.

Putnam also finds that people spend less time socializing at bars, nightclubs, discos, and taverns, as such activity by both married and single people declined by between 40 and 50 percent over the past

241. See id.
242. Id. at 92.
243. See id.
244. See id. at 93-95.
245. See id. at 98, 99 fig.18.
246. See id.
247. See id. at 100.
248. See id. at 100, 101 fig.19.
249. See id.
250. See id. at 101.
251. See id.
twenty years. Likewise, anonymous fast-food restaurants, which Putnam terms "personal refueling stations," have increasingly replaced full-service restaurants. Other forms of critical social contact that engender social capital—such as playing cards, sending greeting cards, or spending a social evening with a neighbor—have fallen radically as well.

Critically, as suggested, Putnam reports that participation rates in most sports have also fallen in recent decades. His data shows that, while soccer and basketball, as well as fitness activities for the individual, have gained in popularity, participation in team sports has generally declined. Putnam points out that younger Americans have led this decline, while older people have actually increased their sports activities. Bowling, on the other hand, has seen record growth. But we are "bowling alone" more often, as league bowling has plummeted by more than 40 percent in the last decade. Overall, the evidence clearly shows that Americans are becoming consumer spectators, "silently withdraw[ing] from social intercourse" and content to watch others participate.

G. Altruism, Volunteering, and Philanthropy

Putnam begins with the following premise:

[T]hose of us who belong to formal and informal social networks are more likely to give our time and money to good causes than those of us who are isolated socially. . . . Thus any assessment of trends in social capital must include an examination of trends in volunteering, philanthropy, and altruism.

Though Americans seem to believe that giving money is an appropriate alternative to giving time, Putnam suggests that "volunteering and philanthropy are complements, not substitutes." Thus, those who

252. See id.
253. See id. at 102 & fig.20.
254. See id. at 102-05.
255. See id. at 109-10.
256. See id. at 109.
257. See id. at 109-10.
258. See id. at 111-12.
259. See id. at 112 & fig.26.
260. See id. at 113.
261. Id. at 115.
262. Id. at 117.
263. Id. at 118.
volunteered were more likely to also give money, and vice versa. In addition, Putnam says, "by far the most consistent predictor of giving time and money is involvement in community life."

Although per capita charitable monetary giving has doubled since 1960, Putnam’s data shows that Americans dedicate a smaller share of their income to charitable purposes than at any time since the 1940s, paralleling other trends in American civil engagement. As a fraction of national income, total monetary giving has plummeted from 2.26 percent in 1964 to 1.61 percent in 1998. Putnam suggests that, had charitable giving rates of the 1960s continued unabated, "U.S. religious congregations would have over $20 billion more annually, and total national philanthropic giving would jump by roughly $50 billion a year." He notes that such declines have been especially aggravated by negative trends in congregation memberships and falling donations per member because "half of all charitable giving in America is religious in nature." Of all Protestant charitable giving, the declines have been most acute in "external" giving, as opposed to internal congregation finances.

Putnam observes that identifying trends in volunteerism has been more difficult because, while volunteering on an individual basis is up, Americans participate in fewer community projects organized by some civic group. "[C]ommitments to volunteerism are more fragile and more sporadic now that they depend on single-stranded obligations, without reinforcement from well-woven cords of organizational involvement."

The rise in volunteerism can be attributed to pre-baby boom generation Americans who, according to Putnam, are most predisposed to civic engagement in the first place. "Volunteers are more interested in politics and less cynical about political leaders" than are non-volunteers, suggesting that the wholesale abandonment of volunteering by people born between 1950 and 1965 parallels and aggravates the

---

264. See id.
265. Id. at 119.
266. See id. at 122-23.
267. See id. at 123.
268. Id. at 126.
269. Id. at 124.
270. See id. at 126.
271. See id. at 127, 128 & fig.34.
272. Id. at 129.
273. See id. at 129-32.
eroding trends of social capital. On the other hand, evidence suggests that young Americans (those born in the 1970s) "displayed a commitment to volunteerism without parallel among their immediate predecessors[,] ... [a] promising sign."273

H. Reciprocity, Honesty, and Trust

Putnam points out that lower "transaction costs" come with greater reciprocity, honesty, and trust between citizens.276 Putnam distinguishes social trust from trust in government institutions: "Trust in government may be a cause or a consequence of social trust, but it is not the same thing as social trust."277 A lack of social trust increases not only commercial transaction costs, but also costs expended in the everyday business and worries of life.278 Putnam postulates that communities that engender reciprocity and trust, thus requiring fewer elements of legal force, enjoy a substantial efficiency over those lacking trust.279 Unfortunately, most Americans increasingly agree that society and people in general are far less trustworthy, honest, and moral.280 Indeed, this decline in social trust can be seen most clearly in the fact that, by generation, increasingly fewer people think that "most people can be trusted."281

The demise of generalized trust and reciprocity can be seen by the decline in interpersonal (although not mail) participation in surveys, the increase in the number of unlisted telephone numbers and call screening

---

274. Id. at 132.
275. Id. at 133.
276. See id. at 135. Professor Ward Farnsworth defines "transaction costs":
A pragmatic definition of "transaction costs"—one based on the consequences of the term for judicial purposes—is that they are impediments to bargaining that should be regarded as bad, as "noise," as problems that courts should help the parties overcome by putting the rights into the hands of the party who would end up with them if only the impediments weren’t in the way.

277. PUTNAM, supra note 2, at 137.
278. See id. at 135.
279. See id.
280. See id. at 139 & fig.37.
281. Most Americans today believe that we live in a less trustworthy society than our parents did. In 1952, ... Americans were split about fifty-fifty on the issue of whether our society was then as upright morally as it had been in the past. In 1998, however, after nearly four decades of growing cynicism, we believe by a margin of three to one that our society is less honest and moral than it used to be.
Id. at 139 (footnote omitted).
281. See id. at 139-41.
devices, and increased incidences of road rage and failures to observe traffic laws.\textsuperscript{282} Ironically, the return rate for voluntary census forms has declined by more than 25 percent since 1960.\textsuperscript{283} The return rate decline is particularly prevalent among those most “detached from community institutions” and those who have the lowest amount of social trust.\textsuperscript{284} These are the same people, Putnam observes, who are \textit{most} likely to trust the government:\textsuperscript{285}

In short, at century’s end, a generation with a trust quotient of nearly 80 percent was being rapidly replaced by one with a trust quotient of barely half that. The inevitable result is steadily declining social trust, even though each individual cohort is almost as trusting as it ever was.\textsuperscript{286}

Very importantly, Putnam indicates that the transaction costs of lower social trust relates to the phenomenal growth of the security and legal professions since 1970.\textsuperscript{287} As trust ebbs, reliance on “formal mechanisms of social control and dispute resolution” flows.\textsuperscript{288} The standard explanations of rising crime rates, government regulation, and government welfare programs cannot account for the flood of lawyers into society.\textsuperscript{289} A perceived link between socioeconomic affluence and the increased number of attorneys is not sufficiently illuminating.\textsuperscript{290} Rather, the growth in the legal profession seems to come from an increase in the demand for “preventive lawyering” that arose in the 1970s with the end of the adequacy and prudence of informal understandings of the law.\textsuperscript{291} Everybody, regardless of their relationship to those with whom they were dealing, suddenly began to demand everything “in writing.”\textsuperscript{292}

This shift mirrors the trends in other measures of social capital earlier identified by Putnam, and the abrupt changes in our approach to the law correspond in time to the sudden changes in other community factors.\textsuperscript{293} This reliance on getting it in writing is “one of the most

\begin{small}
\begin{itemize}
\item \textsuperscript{282} See id. at 142-43.
\item \textsuperscript{283} See id. at 142.
\item \textsuperscript{284} Id.
\item \textsuperscript{285} See id.
\item \textsuperscript{286} Id. at 141.
\item \textsuperscript{287} See id. at 146.
\item \textsuperscript{288} Id.
\item \textsuperscript{289} See id.
\item \textsuperscript{290} See id.
\item \textsuperscript{291} See id. at 147.
\item \textsuperscript{292} See id.
\item \textsuperscript{293} See id.
\end{itemize}
\end{small}
revealing indicators of the fraying of our social fabric. It indicates our increasing reliance on formal institutions to accomplish what was formerly realized through social capital, the "informal networks reinforced by generalized reciprocity."

More importantly, if social capital in the form of relationships with friends, colleagues, and community cannot now provide support and a sense of well being through an ability to confide, people are increasingly turning to paid confidants or surrogate community.

I. Concluding Observations

Putnam attempts to explain three distinct examples of seemingly positive social capital changes in the American landscape. He says that, on one end, there has been an emergence of small groups, which serve as "anchors in the emotional and social lives of millions of Americans." On the other, various social movements have blossomed, attracting thousands or millions under an umbrella of common belief. Complicating both is the rapid development of high technology telecommunications.

Yet his data suggests that, while small social groups "contribute to civic engagement and social capital," such groups do not replace the social capital formed through traditional civic organizations. They also have not offset the "civic decay of the past several decades.

While social movements can "create social capital, by fostering new identities

294. Id.
295. Id.
296. See id. (citing Marc Galanter, The Faces of Mistrust: The Image of Lawyers in Public Opinion, Jokes, and Political Discourse, 66 U. CIN. L. REV. 805, 806-07 (1998) (supporting the proposition that the "artificial trust" provided by lawyers has replaced "its low-cost rival"); see also MODEL RULES OF PROF'L CONDUCT R. 2.1 (2001) ("In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.").

Advice couched in narrowly legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice.

... [T]he lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

Id. R. 2.1 cmts. 2-3.
297. PUTNAM, supra note 2, at 148.
298. See id.
299. See id.
300. Id. at 150.
301. Id.
and extending social networks[,]" whether the social movements of the 1960s represent the birth of a new form of civic engagement or merely "the cresting of a long wave of rising civic involvement" is unclear.303

However, as suggested previously, unlike movements in the 1960s characterized by heavy grassroots involvement and widespread public sentiment, most post-1960s era movements, such as the environmental movement, have much relied on Washington D.C.-based, full-time, professional staff to organize political and recruitment efforts.304 Membership in most of these types of groups is "essentially an honorific rhetorical device for fundraising. . . . [and] does not represent the sort of interpersonal solidarity and intense civic commitment" involved in 1960s and 1970s era movements.305 Thus, these movements provide little social capital development.306 Putnam notes that many of these groups, especially environmental organizations, have become "addicted to direct mail as a tool of mobilization and membership retention" and typically "allocate 20-30 percent of their budget to fund-raising and associated advertising."307

Putnam suggests that the advent of computer-aided telecommunications (Internet, e-mail, etc), has allowed many people to sustain existing social ties.308 Additionally, in this more egalitarian setting, we have, to some extent, been able to develop new ties, albeit in an anonymous, socially, and morally blind context.309 Nevertheless, Putnam points out that the effect of the Internet on civic engagement is less than clear.310 "The absence of any correlation between Internet usage and civic engagement could mean that the Internet attracts reclusive nerds and energizes them . . . [or] attracts civic dynamos and sedates them."311

Relying on other sociological research, Putnam concludes that computer-supported social networks allow users to switch "rapidly and frequently between groups of ties," sustaining a broad array of shallow social relationships and facilitating the transmission of information.

302. Id. at 153.
303. Id. at 154.
304. See id. at 155-59.
305. Id. at 156.
306. See id. at 160.
307. Id. at 157.
308. See id. at 170.
309. See id.
310. See id.
311. Id. at 171.
between distant people.\textsuperscript{312} Research thus far has shown that computer-aided information enriches "intellectual capital" and helps to sustain large, more fluid groups in any number of structural forms.\textsuperscript{313} Though these groups can ignore geographic, organizational, and political boundaries, there is "no data to indicate whether that flow of information itself fosters social capital and genuine community."\textsuperscript{314}

In fact, communication-by-computer inhibits many mechanisms of social connectedness.\textsuperscript{315} The computer may be an outlet for expression so long as someone is listening.\textsuperscript{316} The oft-referenced "digital divide" threatens a sort of "cyberapartheid, in which bridging social capital is diminished as elite networks become less accessible to the have-nots."\textsuperscript{317} Computer users tend to be "younger, highly educated, upper-income white males," and every indication suggests the gap is widening.\textsuperscript{318} In addition, technology has not enabled computer users to cue in on facial and other non-verbal forms of expression and communication, often essential in establishing and building interpersonal trust and reciprocity.\textsuperscript{319} Computer-based communication tends to be interest-specific and single-stranded, which may have the effect of decreasing social cohesion by "cyberbalkanizing" the Internet.\textsuperscript{320} Putnam concludes by suggesting that it is still unclear whether computer-aided communication will have any positive impact upon social capital.\textsuperscript{321} Putnam’s own quantitative data in the area of computer impact is weak and undeveloped.

IV. PUTNAM’S CONTRIBUTIONS

Putnam’s work contains a number of methodical attributes with possible spillover significance that make it monumental and worthy of comment. It may be the single most comprehensive, concise, and articulate application of quantitative social science technique to test hypotheses or foundations upon which American democracy rests.
Putnam persuasively and convincingly suggests that much of the American legal structure is being developed upon a swampy soil—in a vacuum of voluntary civic disengagement and apathy.

First, *Bowling Alone* is refreshing because it exposes key subjects to legal and social discourse by using quantitative data to an extent no other single work has done. In a sense, Putnam gives us an opportunity to dispense with the traditional mainstay deductive approach to problem-solving. He allows us to identify broad underlying social dynamics so we can structure law to respond to, correct, and even encourage behavior using a more inductive approach. Much of our trusted Aristotelian logic may no longer exist. This takes on increasing importance when, as some critics would say, the legislative branch is perhaps gradually becoming the micro-manager of daily life, codifying common law, usurping judicial discretion, and, as a result, stripping the judicial branch of its traditional function, which is to evaluate civic duties by their merits.\(^{322}\)

A second contribution of Putnam—less methodological or broad, yet vital—is his invalidation of a number of specific popular myths that have guided lawyers, the judiciary, legal educators, and other trustees of the American culture. Putnam’s data indicates that, fortunately or otherwise, formal education itself does not automatically create improved social capital and civic participation.\(^{323}\) Also, his data indicates that sprawling suburban neighborhoods are not repositories of social capital, and actually may contribute to the problem of social capital deficit.\(^{324}\) Conversely, inner-city neighborhood structures reflect, in many not-yet-recognized ways, some key components or varieties of social capital.\(^{325}\) His data indicates that older generations are perhaps the most civic-minded and participatory, and that younger generations—especially baby boomers—have essentially withdrawn from society.\(^{326}\) He highlights data indicating that public interest groups, trade associations, lobbyists, most modern centralized social movements, and other influence peddlers do not seem to be serving as mechanisms or conduits for social and civic participation.\(^{327}\) Contrary to some assumptions underpinning secularization fostered by the First Amendment, he interestingly presents data indicating that religious and

---


323. See, e.g., *PUTNAM*, supra note 2, at 46 (noting that the greatest relative decrease in civic participation in recent years has been among the college-educated).

324. See id. at 214.

325. See id. at 96 ("[T]wentieth-century urbanization was not fatal to friendship.").

326. See id. at 248, 252 tbl.3, 257-58.

327. See id. at 184.
other organized spiritual groups often act as a vehicle for the use and development of rich social capital, and can have a tremendous positive impact on civic participation and democracy generally.\textsuperscript{328}

Similarly, one of the greatest contributions of Putnam's work relates to the social activism of the 1960s and its contemporary relevance. Putnam's work infers that many participating groups have perhaps too self-assuredly assumed that the world has conformed to their norms and expectations.\textsuperscript{329} Putnam suggests that the social reformers and the baby boom generation may have set up social group structures that have evolved from social capital enclaves to become top-heavy, bureaucratic, and non-responsive as a result of their withdrawal.\textsuperscript{330}

A third major contribution of Putnam, consistent with the recent U.S. Supreme Court activism, is that there should be a reinvigoration of the policies of federalism and separation of powers. Putnam's work, echoing the Supreme Court, ultimately suggests that, unless more power and more incentive is brought to the people, the people will continue to distrust both government and other citizens, and participation rates in civil affairs will continue to erode.\textsuperscript{331} Brash individualism and isolation may eventually erupt into mass civil discord, confirming Plato's prediction.\textsuperscript{332}

This remarkable case for federalism is unfortunately confounded by trends in international trade, the political business, and trade organizations under which it operates. As recently indicated by Justice Kennedy, though trade governance is probably beneficial to all parties in terms of material sustenance and peace, it is perhaps increasingly on the threshold of being delegated to non-democratic and less democratically accountable institutions.\textsuperscript{333} Challenges arise in ensuring that democracies thrive and people feel a sense of empowerment while attempting to prevent some of the natural consequences of international business and free enterprise; international business and free enterprise foster the decentralization of power, and individual senses of empowerment, self-worth, and hope and must be enhanced. Even Robert Morris, the

\begin{itemize}
  \item \textsuperscript{328} See id. at 66-67.
  \item \textsuperscript{329} See id. at 152-55.
  \item \textsuperscript{330} See id. at 154.
  \item \textsuperscript{331} See id. at 403.
  \item \textsuperscript{332} See supra note 25 and accompanying text.
  \item \textsuperscript{333} See Meet Justice Kennedy, Supreme Court Justice Profiles, at http://www.c-span.org/classroom/lessonplans/courts/profiles1.asp (last visited Mar. 11, 2002) [hereinafter Kennedy Profile] ("We are in a world where many people will tell you that basic policies should be made by international bodies . . . a world where some people argue that only the United Nations can go to war, and not the United States on its own behalf.").
\end{itemize}
"financier" of the American Revolution, was an advocate of, and major participant in, foreign trade, including with the Far East. Thus, foreign trade and free enterprise are like first cousins to democracy and cannot merely be dismissed. Free enterprise and capitalism, like the First Amendment and social capital, have fostered ingenuity and creativity, and overall have provided American culture with its ever-renewing qualities.

A concomitant case presented by Putnam, indirectly but pervasively, is that aggressive capitalism is creating ominous implications for small business and lower-level capitalism in this increasingly singularized, non-social capital society. His subtle message is that opportunity is the renewing force behind democracy; the environment for capitalism ought to be maintained. If the aspiring capitalist finds the doors of opportunity closed or made exceedingly difficult to open despite ambition and talent, the counter-reaction against democracy and capitalism itself could be swift and fatal.

V. SOME SHORTFALLS OF PUTNAM’S WORK

Despite the enlightening surveys and analyses, Putnam’s work may miss a classic question often asked by social critics. Is civic apathy and isolation a reflection of the fact that our institutions have, in fact, outlived their usefulness, or, even more likely, that they are no longer operating well? Americans, perhaps traditionally, have been observers of the maxim, “if it ain’t broke, don’t fix it.” This may reflect the values of social economy, efficiency, and wisdom. The real question, then, may be whether Americans realistically perceive a need to fix or change the system, or whether they will be content with toughing it out with only incremental tinkering.

Indeed, contrary to Putnam’s restrained warnings, there is much to support the case that the computer is a great equalizer in democracy, facilitating the dissemination of ideas and information necessary to an open and free society. It can provide a sense of empowerment and individual dignity, which may be necessary for democratic society. The computer and similar modes of information dissemination have been essential tools for groups to organize and collaborate in expression,

335. See Putnam, supra note 2, at 322-25.
336. See id. at 325.
337. See supra notes 308-21 and accompanying text.
perhaps best demonstrated by the experiences of Tiananmen Square in 1989 and Seattle in 1999.338

An additional inherent weakness in Putnam’s work is his failure to explore the benefits behind a democracy with a foundation in civic engagement and social capital. Democracies may inherently encourage the formation of economic oligarchies, rather than theological oligarchies or aristocracy.339 Most realists would agree that a pure democracy could never exist in a society as complex as ours. Our best hope is for a responsive, representative democracy, where the people have the opportunity to be in the loop of power, along with having direct power as well.

Unfortunately, Putnam’s view of democracy may at times suggest over-agreement with some baby boomer social reformers.340 At other times, he seems to subtly comment on the naïve and unwitting belief in democracy’s staying power.341 This view may reflect a certain absolutism, which bespeaks precisely of the tyranny warned of by major philosophers.342 Democracy derives its strength from the constant ebb and flow of power: elites placed and displaced by the majority in a system based on merit and constructive social contribution, that permits everyone a chance on the elite ramp.343 Putnam does not address whether the current malaise and civic absenteeism is simply an expression of satisfaction with the current elite.

Contrary to much of Putnam’s thinking, our founding fathers warned that, in the new democratic experiment, a highly motivated, self-interested minority was a necessary evil to avoid mob rule and chaos.344 They hatched a brilliant balancing scheme whereby a non-democratically established life-tenure judiciary, an electoral college voting system, a Senate with broad approval and removal power, and other arguably elite but liberalizing forces would all ultimately endeavor to sustain the voice of the average person.345 This system, they thought,

339. See supra notes 22-33 and accompanying text.
340. See PUTNAM, supra note 2, at 338-40.
341. See id. at 340-41.
342. See supra note 25 and accompanying text.
343. See THE FEDERALIST No. 57 (James Madison).
344. See THE FEDERALIST No. 51 (James Madison).
345. See THE FEDERALIST Nos. 65, 68, 78 (Alexander Hamilton).
would thereby maintain opportunity and reinforce democracy; essentially, the checks and balances of a representative government were designed to avoid the very tyranny likely to result from pure democracy.³⁴⁶

While extolling the virtues of pre-1960 social capital development, and admitting that a society rich in social capital inevitably draws out less desirable groups, Putnam does not adequately address clandestine, terrorist, and other anti-democratic groupings of persons.³⁴⁷ These communities often behave like a cancer within our national boundaries, thriving on the very same conditions and nutrients that social capital does. Also, Putnam does not account for the dark sides of mass hysteria and witch-hunts, which can threaten and subvert democratic processes. The 1940s witnessed the Constitution’s needless torture in the form of mass Japanese internment camps, and the 1950s saw a government behaving in particularly anti-democratic ways, with witch-hunts during the Red Scare. These blemishes on the face of democracy coincided with the peak of our country’s social capital.³⁴⁸ In other words, social capital may in fact contribute to the undermining of democracy itself, without the very check of some structures inimical to social capital development. Putnam, overall, affords this insufficient consideration.

On the other hand, Putnam may have a very important point regarding the need for social capital. The very existence of social capital in a vibrant and participatory citizenry may be the eight-foot iron fence that keeps the wolf out of the chicken coop. The likelihood of challenges by determined fanatical or antisocial groups of whatever persuasion may well be mitigated by healthy and well-balanced forms of social capital, with widespread civic participation and a thriving exercise of the freedom of association.

In terms of omissions, Putnam’s work does not cover what may be termed “social ingenuity capital,” one of the various forms of capital necessary to a prosperous democracy.³⁴⁹ Convinced of the merits of social capital, and inspired by Putnam’s prescriptions, future investigators should complete the task by evaluating how social


³⁴⁷. Putnam does briefly discuss the potentially destructive uses of social capital in his introduction, but does not expound on them at length (with the exception of youth gangs) elsewhere in the book. See PUTNAM, supra note 2, at 21-22, 315-16.

³⁴⁸. See id. at 54-55 (noting that “[t]he two decades following 1945 witnessed one of the most vital periods of community involvement in American history”).

ingenuity and the blessings of a free and open society are best encouraged. Much of Putnam’s work reflects an obvious, but relatively unsupported, central assumption that more social capital automatically invites societal advancement, ingenuity, and resilience. While hopefully true, quantitative data illuminating the causal relationship currently does not exist and should be collected.

Related to this is the paradigm that Putnam creates in the final portions of his work. He points to legislative law and policy initiatives during the Progressive Era as worthy of emulation.\textsuperscript{350} He lauds that era’s response to the excesses of the Gilded Age and the resulting decline in social capital.\textsuperscript{351} The lessons of history suggest that this model had some serious limitations then, and that a twenty-first-century repetition or variant of those themes may not necessarily be appropriate. Communication, transportation, education, economic and population structure, and internationalization were all keynotes of the dramatic changes of the twentieth century. Footnoting these changes was the diversification of race, ethnicity, and spirituality in America. Yet, the country is presently undergoing so many dramatic changes that homogeneity of anything is increasingly more difficult to discover. Thus, the clay and girding necessary for redemption of our collective civic mind must be found through new sources, tailored to fit current issues. On a directly related point, while Putnam emphatically and pervasively recognizes the fundamental role of law, lawyers, and rule of law, he does not fully support it with quantitative data.\textsuperscript{352}

In addition, Putnam may naively assume that change can be made cheaply and that the dynamics can be made readily manageable without the appearance of heated confrontation, coercion, violence, or even war. Throughout our history, only significant and vociferous movements, at considerable financial cost and other negative consequences, have been able to achieve social change.\textsuperscript{353} Change, as advocated by Putnam, is certainly within the realm of possibility, but its implementation will require vast stores of tolerance and foresight with respect to minimizing potential economic consequences. Further, reformers must respect the fact that there would be no guarantee of success. Putnam does not present a quantitative or theoretical analysis or a plausible warning of such costs in his prescriptions for change.

\textsuperscript{350} See PUTNAM, supra note 2, at 403.
\textsuperscript{351} See id. at 382, 394-95.
\textsuperscript{352} See id. at 144-47.
\textsuperscript{353} See id. at 152-54.
An additional shortfall of the work is the absence of data, working hypotheses, and commentary on the capacity of society to essentially emulate a suggested paradigm solution analogous to a Norman Rockwell illustration, without more. Two major facets of this difficulty are noteworthy. First, the rise of technology as the measure of wealth and the demise of bridging spirituality may make such coalescence exceedingly difficult. People are encouraged to at least become physical islands unto themselves, in a race to existentialist and perhaps even Kafkaesque individuation. Secondly, as already suggested, international economic and quasi-political forces potentially have an enormous and complex cross-jurisdictional impact on how we operate within an increasingly likely international governance paradigm. Amid this unprecedented process—and left for further work—are the possibilities of drawing upon the experiences of the revolutionary era of the late eighteenth century, which propelled the dawn of the democratic system, in order to study how to reconcile these forces. In any event, a more dynamic, broad-based analysis of historical precedent is required to fully comprehend the implications of Putnam’s twentieth-century quantitative data. Merely turning the clock back assumes a static society and may implicate a disastrous result.

For instance, Supreme Court Justice Anthony Kennedy has observed that what amounts to a fourth tier of federalism may now be confronting America. This fourth tier consists of international governance authorities in multi-economic networks that are not necessarily fully accountable, let alone receptive, to the American public.354 Increasingly, American governmental institutions, under international agreements, may be on the verge of ceding power to this super tier. This delegation of power and responsibility may possibly threaten the maintenance of the social fabric of individual communities. On the other hand, some suggest that such international government—whether ad hoc or formal—may be the only mechanism by which to ensure the greatest good for the greatest number, and may be necessary to maintain equal opportunity and even democracy.355 The need for addressing this puzzle or dilemma has been largely ignored by Putnam.

Bowling Alone’s possible limitations also include the little attention paid to some specific indications that trust and reciprocity may be

354. See Kennedy Profile, supra note 333 (stating that international policy issues are "very fundamental, far-reaching issues [that] concern how you are going to be able to keep your freedom, keep your traditions and still participate in a world where what you do affects people abroad").

bouncing back. According to Putnam, while significant evidence clearly shows civic malaise on the part of those born between 1945 and 1970, his data suggests that the post-X Generation especially is becoming more involved in certain areas. While this could reflect a statistical anomaly, more study is needed to identify whether this implies some endemic change contrary to his thesis.

All in all, despite these shortcomings, Putnam’s work can be read as an audit or a measurement of the success of the current system of laws. Bowling Alone offers revelations bearing upon the methodology and purpose behind the formulation of legal rules in unprecedented ways.

Justice Kennedy has indicated that the functions of the legislative and executive branches of government have reached a crescendo of imperfection. Their meaning and purpose have become so clouded that often the American public feels as distant from its present government as the patriots of 1776 felt from the British government. More pointedly, Justice Kennedy observes that we might have reached a point in which democratic values and culture survive solely due to the existence of an independent judiciary and lawyers. However, Kennedy himself has indicated the potential erosion of the Court’s effectiveness in sustaining the trust of the people, as well as the potential erosion of the law’s effectiveness in sustaining the respect of the people.

This is cause for concern. It should also provoke action to activate the redemptive forces of present democratic governance, and the continuity of the democratic form of government. Putnam’s work and the bold, poignant thinking behind the current federalism thrust of the Supreme Court reinforce one another and have come at the right time. Yet, as stated by Walter Kiechel in the Harvard Business Review,

See, e.g., PUTNAM, supra note 2, at 265 (“Without any doubt the last ten years have seen a substantial increase in volunteering and community service by young people.”).

In a recent address to bar association leaders, Justice Kennedy described his new initiative to “teach youths about fundamental values and principles of American democracy in light of the Sept. 11 attacks.” Lori Litchman, Justice Kennedy: Initiative Will Teach American Democracy, LEGAL INTELLIGENCER, Feb. 4, 2002, at 23. Stating that “it would be irresponsible for the law to have no response,” Justice Kennedy argued that “our young people, who will soon be the principal trustees to our democratic institutions, must be well-prepared and well-advised, well-instructed and well-schooled, in the institutions of our freedoms.” Id. (emphasis added) (quoting Justice Kennedy). In another address to Washington, D.C., high school students, he stated that “everyone is an advocate for freedom, and the lawyers should set that example.” Justice Anthony Kennedy, Remarks to Students at School Without Walls Re: “Dialogue on Freedom” (Jan. 28, 2002), available at LEXIS, Federal News Service File.

See Life in the Supreme Court: Roundtable (C-SPAN television broadcast, Dec. 14, 1999) (Justice Anthony Kennedy addressing junior and senior high school students about his career at the Supreme Court).
"[Bowling Alone's] weak follow-through is enough to leave one wondering if social capital is an asset that can be effectively managed at all."359

VI. MORE PARTICULAR LEGAL RELEVANCES OF PUTNAM'S WORK

One message of Bowling Alone is for the legal profession itself as presently constituted. The message is that American lawyers are not plumbers, nor should they be, at least in today's American culture that has created many silent, subtle, and pervasive challenges that are better addressed now. People are looking to the law and the profession to replace the trust lost through eroding social capital structures.360 However, the practice of law in America was primarily designed to correct, not prevent, breaches of social trust.361 There is a need for retooling and, at least temporarily, more inductive approaches to supplement the traditional deductive methodology of legal decision-making.

Dismaying, Putnam provides data indicating not only citizens' unprecedented mistrust of fellow citizens and of the government, but also an increasing mistrust between members of the legal profession.362 The American Bar Association, a haven of community and social networking for lawyers, reports membership down quite substantially in relative terms.363 As (or if) trust, reciprocity, and social capital decline in the legal profession, the ability to foster an open societal discourse may decline, and the legal profession, the judiciary, and, ultimately, the rule of law may lose their principal functions as fair mediators of social values and social stability.

The legal profession may increasingly be evolving from a profession into a business or trade. The citizenry may eventually resist a profession dedicated to righting wrongs and representing the individual in the face of the powers of the state. Individuals could clamor for a successor of questionable benevolence, perhaps allocating social capital without accountability or even ending social capital altogether.

A second message for lawyers and the legal system relates to the effect that trust in current laws, and our democracy, has had on the volitional conduct of citizens. Falling social capital and the associated

360. See supra notes 287-96 and accompanying text.
361. See, e.g., JULES L. COLEMAN, RISKS AND WRONGS 436-47 (1992) (describing the notion of "corrective justice" and the role it plays in "political freedom and autonomy").
362. See PUTNAM, supra note 2, at 147.
363. See id. app. III at 444.
breakdown of the social bond of trust may extend into such critical areas of government as tax collection. Putnam finds that people who have greater social capital tend not to cheat on their taxes or engage in other fraudulent acts, and that this is directly associated with civic participation, volunteerism, honesty, and self-restraint.\textsuperscript{364}

Substantial social capital is essential to the effective operation of government, whose principal purpose is to collect revenue and to provide services and protection to the people.\textsuperscript{365} Tax compliance depends upon social capital: "If we consider state differences in social capital, per capita income, income inequality \ldots social capital is the only factor that successfully predicts tax compliance."\textsuperscript{366} As such,

[t]he legitimacy of the tax system turns in part on the belief that we all do our share. Yet we know that the IRS cannot possibly audit everyone, so rational citizens have every reason to believe that if they pay their share, they will indeed be subsidizing those who are not so honor bound. It is a recipe for disillusionment with the IRS and the tax system in general.\textsuperscript{367}

Tax revenues are based, for the most part, on the premise that we trust citizens to honestly and voluntarily disclose income. Once the social capital decreases, as a result of rising distrust of each other and the government, citizens will lose the freedom to manage their own incomes. More ominously, government may simply cease to exist and ultimately be replaced.\textsuperscript{368} Basically, "individual taxpayers who believe that others are dishonest or are distrustful of government are more likely themselves to cheat."\textsuperscript{369}

A similar result may impair our national defense. Military conscription, discipline codes, and even the Constitution itself are threatened if our voluntary civilian military structure is compromised. These important tenets are hallmarks in world history and, like the First Amendment, an intrinsic part of our democracy.\textsuperscript{370} However, they, too, may be suffering from a decline of social capital in the military ranks.\textsuperscript{371}

\begin{itemize}
\item \textsuperscript{364} See id. at 347-48.
\item \textsuperscript{365} See id. at 347.
\item \textsuperscript{366} Id.
\item \textsuperscript{367} Id.
\item \textsuperscript{368} See id.
\item \textsuperscript{369} Id.
\end{itemize}
Recent surveys of military officers indicate increasing dissension and distrust of junior officers toward senior officers, who may increasingly be seen by subordinates as opportunistic or career-oriented, and not idealistically selfless. Indeed, some studies find senior officers having increasing distrust for civil leadership itself. This phenomenon, if valid, provides one of democracy’s greatest single challenges. Intensive and directed military spending may not be sufficient to alleviate the problem. Rather, concerted action to rebuild social networking, trust, and honesty through social capital-sensitive public policy is required to maintain a democracy-compatible military.

A related legal issue posed by Putnam’s work, and supplementing other recent works, is how to effectively assess and implement the will of the people, a pervasive legal concept interlaced throughout our Constitution and voting laws, as exemplified by initiatives and referenda. Indeed, democratic government institutions have had a presumptive legitimacy based on the assumption that the people running them are accountable to the citizenry, often through a free and scrutinizing press and open elections.

With people demanding less of the press, declining civic participation and voting, and increasing cynicism and apathy, the will of the people runs the risk of increasing emasculation. It has even become quite difficult to determine the will of the people. This disengagement of the people essentially transforms the process of rulemaking. Putnam suggests that rulemaking cannot reflect or determine the will of the people without strong social capital, regardless of whether the democracy is direct or representative.

Officers seek in daily life those values that sound corny to civilians but betoken the soldier’s highest ideals: honor, duty, courage, honesty. Doing the right thing when no one’s watching.

And that is why officers are quick to detect political correctness, shading of the truth and sliding ethical standards in themselves, their colleagues and especially in their senior officers.

Id.
372. See id.
373. See id. There are clear political underpinnings for this phenomenon, which may also contribute to a growing distrust between the military and the civilian elite. See Adam Clymer, Sharp Divergence Found in Views of Military and Civilians, N.Y. TIMES, Sept. 9, 1999, at A20 (noting that an increasingly Republican military elite is “scary” to civilians and was responsible for considerable tension during the Democratic Clinton administration).
374. See PUTNAM, supra note 2, at 163.
375. See id. at 218; DE TOCQUEVILLE, supra note 1, at 172-74 (“The sovereignty of the people and freedom of the press are ... two entirely correlative things ...”).
376. See PUTNAM, supra note 2, at 349.
We might think that public initiatives and referenda afford citizens a more direct voice in government and policy. They may also grant policymakers a mechanism for determining the will of the people. Putnam, however, notes that this perception ignores a crucial fact: his data reveals that such petitions are increasingly of the few, by the few, and for the few. 377 He cites studies showing that a successful statewide ballot initiative depends upon how successful its supporters are in obtaining financial backing and how successful their professional marketing and advertising campaigns have been. 378 He concludes, "[i]n short, the rise of ballot initiatives is a better measure of the power of well-financed special interests than of civic engagement." 379 Thus, without a re-examination and re-tooling of such mechanisms of popular policy expression, the will of the people will continue to be obfuscated behind special interest groups and deceptive advertising. 380

The implications of declining social capital on criminal law and corrections are also ominous. Community norms and standards of social behavior are formulated and maintained only by community consensus through efforts requiring social capital. 381 Without such structures, identifying standards of appropriate behavior becomes a meaningless and impossible exercise, as norms become a matter of individual discretion. 382 That discretion results in community disintegration and damages social trust and reciprocity. 383 The inevitable result is that criminal law may take on characteristics typical of totalitarian systems. 384

In addition, laws regarding media and communications, and policies with respect to television broadcasting, films, wireless communications, telecommunications, and other forms of entertainment, are affected by Putnam's findings. Putnam suggests that the public policy underlying the law be directed at using these forms of media to facilitate engagement in community, rather than as a mechanism for

377. See id. at 163-64.
378. See id.
379. Id. at 164.
380. See id.
381. See id. at 312.
382. See id.
384. Youth gangs in inner-city neighborhoods are a prime example. See PUTNAM, supra note 2, at 316 ("Where constructive social capital and institutions are allowed to wither, gangs emerge to fill the void.").
isolation or entertainment only.\textsuperscript{385} Technology has enabled greater numbers of people to exchange greater amounts of information over a wider array of mediums from greater distances.\textsuperscript{386} Putnam expresses concern over recent, albeit limited, data suggesting that computer communication, while formerly extolled as the great equalizer and a boon for increased social contact, is increasingly supplanting face-to-face social contact, having a negative impact upon social capital and social connectedness, decreasing civic engagement, and increasing passive and private non-engagement.\textsuperscript{387}

Putnam indicates that public policy and law can affect that awesome industry to respond with greater efforts at mitigating these consequences.\textsuperscript{388} However, legal rules affecting computer-mediated communication will have to be more carefully drafted to ensure privacy protection and a non-interventionist role for government for the purpose of exercising First Amendment freedoms.\textsuperscript{389}

Putnam indirectly suggests that the ramps to economic mobility through small-enterprise capitalism are gradually eroding in the face of changing economic paradigms and as the landscape of work and community evolves.\textsuperscript{390} Economic oligarchies have a certain permanence and role in society because of the nature of democratic capitalism and the realities of a consumerist cultural mentality, which goes back several centuries.\textsuperscript{391} Putnam’s thesis and data indicate that public policy and laws must be drafted so as to provide communities more control over local economic structures and, above all, to encourage entrepreneurism and small business.\textsuperscript{392}

Without such policy underpinning laws, Putnam indicates, a hollowing out of both the spiritual aspect and the geographic aspect of community will occur, and social capital will decline.\textsuperscript{393} For instance, the managers and owners of the large discount stores are less likely to be seen by those in town than a local merchant. Certainly, even if the large company owners are seen, they are seen impersonally, without any contribution to the social capital. Laws regarding the organization and

\begin{enumerate}
\item \textsuperscript{385} See id. at 171, 245, 376-77.
\item \textsuperscript{386} See id. at 171-72.
\item \textsuperscript{387} See id. at 173, 245.
\item \textsuperscript{388} See id. at 179-80.
\item \textsuperscript{389} See id. at 411.
\item \textsuperscript{390} See id. at 211, 282-83.
\item \textsuperscript{391} See id. at 282.
\item \textsuperscript{392} See id. at 282-83.
\item \textsuperscript{393} See id. at 407-09.
\end{enumerate}
continued regulation and capitalization of small business should be evaluated using the test of net effect on social capital.

There are other specific areas of law to which Putnam makes his work relevant, both expressly and by implication. Some are quite endemic, such as citizens' failure to exercise their right to seek public office. Putnam indicates that, by not participating in governmental institutions and other civic-minded groups, people gain no real experience in the functioning and meaning of democracy. Thus, the mechanisms of democracy begin to be perceived solely as endeavors of the few, an impenetrable obstacle to participation.

Perhaps relatedly, Putnam suggests that efforts by special interest groups have evolved to rely on local communities for financial backing, while looking to Washington, D.C., for policy backing and governance authority. The basis for some important bodies of law, such as financing and lobbying, takes on new interest here.

Putnam's work strongly urges reform and scrutiny of labor and employment law as well, to respond to the increasingly social capital malaise affecting the workplace. Putnam states that the workplace no longer provides a sense of community or security. He cites data indicating that workers and employers share less loyalty and trust with each other, and that more antipathy is felt between workers as working hours, productivity demands, and competition between workers rise.

Putnam prescribes legal rules to make the workplace more family-friendly and community-congenial. This invokes issues of public regulation of employment contracts, incentive-based regulations, and policies to support flexible work schedules, parental leave for both parents, time off to care for sick family members, and community volunteerism. He also recommends that family law rule formulations incorporate these new workplace-related social capital findings.

As suggested above, many of Putnam's findings and express recommendations have a direct impact on land use, zoning, and

394. See id. at 42.
395. See id. at 338-39.
396. See id. at 40, 412.
397. See id. at 49-51.
398. See id. at 406.
399. See id. at 87-88.
400. See id. at 88-89; see also supra Part III.E.
401. See id. at 406.
402. See id. at 406-07.
403. See id.
environmental laws. Putnam indicates that the breakdown of social capital and community corresponds directly with proximity relationships: the time used to traverse the distance between work, home, and outside socialization. He finds that the number of commuters has increased exponentially over the past three decades. The result is social and civic fatigue and further detriment to the development and maintenance of the mechanisms of social capital. He also advocates a re-engineering of local planning legal principles, which he indicates must focus on the importance of social relationships rather than on the automobile.

VII. CONCLUSION

Many of Putnam’s concerns, including the issues addressed, the connections made, and the implications upon legal and democratic systems, are not new. What is groundbreaking is the breadth and depth to which what seems like straightforward social science is ultimately and pervasively directed to the law. Putnam’s work is a subtle yet pervasive survey of the assumptions on how legal rules are made. He also helps us visualize how the legal rules of the future may be affected by the social capital variable.

The law and legal rules structure determines civilization. This means that, in the end, the trusteeship of those associated with legal rule-making and implementation is a big one. Bowling Alone’s meaning is best understood from this perspective, and that is why it is important. The discourse is supported to an unprecedented degree by long overdue, hard, well-organized, and quantitative proof, and perhaps very good timing.

404. See id. at 407-08.
405. See id. at 213.
406. See id. Interestingly, actual time spent commuting has increased by only 14 percent, due primarily to an increase in the speed of the average commute achieved by a switch from mass transit to single-occupancy vehicles. See id. However, although faster travel may be “quicker for the individual worker,” it is “socially inefficient.” Id. It may also be offset by increased traffic congestion. See id.
407. See id.
408. See id. at 407-08.