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# **“A Land of Strangers”: Communitarianism and the Rejuvenation of Intermediate Associations**

*Buried deep in our rights dialect is an unexpressed premise that we roam at large in a land of strangers, where we presumptively have no obligations toward others except to avoid the active infliction of harm.<sup>1</sup>*

## I. INTRODUCTION

After coming to America in 1831, Alexis de Tocqueville observed: “Americans of all ages, all stations in life, and all types of dispositions are forever forming associations . . . of a thousand different types, religious, moral, serious, futile, very general and very limited, immensely large and very minute.”<sup>2</sup> Additionally, de Tocqueville philosophized that the “most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them. The right of Association therefore . . . [is] as inalienable in its nature as the right of personal liberty.”<sup>3</sup>

In America’s formative years, these civic associations to which de Tocqueville referred served as cornerstones of the emergent republic’s stability. They also served as the primary means through which its denizens obtained social interaction, moral instruction, and a heightened ability to shape the political process through the combination of their individual efforts.<sup>4</sup> In de Tocqueville’s own words, “Nothing, in my view, deserves more attention than the intellectual and moral associations in America.”<sup>5</sup>

As a new century closes, however, “we are again faced with a haunting feeling

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1. MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE*, 13 (1993).

2. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*, 196 (Dowden Bradley ed., 1954).

3. *Id.*

4. Such collective involvement in the governmental process was, in part, what Aristotle had encouraged in *Politics*: “If liberty and equality . . . are chiefly to be found in democracy, they will be attained when all persons alike share in the government to the utmost.” Margaret Stimmann Branson & Charles N. Quigley, *The Role of Civic Education*, (quoting ARISTOTLE, *POLITICS* 37 (Carnes Lord trans., 1984), available at [http://www.gwu.edu/~ccps/pop\\_civ.html](http://www.gwu.edu/~ccps/pop_civ.html) (last visited April 22, 2001).

5. *Civic Participation: Does it Make Better Communities?*, LA JOLLA INSTITUTE, available at [www.lajollainstitute.org](http://www.lajollainstitute.org) (citing ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*, 196 (Dowden Bradley ed., 1954) (last visited Mar. 1, 1998).

that things have gone awry in our democratic institutions.”<sup>6</sup> The very institution that initially was comprised “of the people” and governed “by the people” has gradually expanded in size, causing a concomitant erosion of the very organizations in which America’s genius lie: its civic, or “intermediate,” associations.<sup>7</sup> As Robert Nisbet has warned, “to destroy the authority of intermediate communities and groups in the name of freeing their members from domination destroys *the only buffer* between the individual and the state, and risks enslaving the individual to the state’s potential tyranny . . . .”<sup>8</sup>

Myriad examples exist to support this thesis. Perhaps the quintessential example of an institution struggling to maintain its identity in the wake of this trend is the Boy Scouts of America (“BSA”). In 1998, the California Supreme Court overturned a lower court decision which had held that the Boy Scouts of America must extend admission to atheists, thus forcing them to accept individuals who do not share their religious beliefs.<sup>9</sup> On August 4, 1999, the New Jersey Supreme Court ruled that the BSA also must admit homosexual scout leaders, in spite of the organization’s highly-criticized yet long-standing opposition to homosexual behavior.<sup>10</sup> Apparently, this was too intrusive on its First Amendment rights, as the Supreme Court overturned this highly publicized and extremely controversial decision shortly thereafter.<sup>11</sup> This trend, nonetheless, has already affected many other private voluntary organizations such as Moose Lodges,<sup>12</sup> the Jaycees,<sup>13</sup> and the Rotary Club.<sup>14</sup> Many venerable, exclusively male organizations have also been forced by the judiciary to accept women as full members.<sup>15</sup>

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6. Robert D. Putnam & William B. Parent, *The Dawn of an Old Age?*, WASH. POST, June 23, 1991, at B5.

7. As these voluntary associations tend to act as a buffer between the most basic association, the family, and the government, this Comment will refer collectively to these voluntary associations by the nomenclature “intermediate associations.”

8. William P. Marshall, *Discrimination and the Rights of Association*, 81 NW. U. L. REV. 68, 69 (1986) (quoting Robert Nisbet) (*italics added*).

9. The boys, represented by the ACLU of Southern California, refused to take the Boy Scout oath due to its mention of the word “God.” The twin brothers, first at the age of nine, stated that they considered themselves atheists and did not feel comfortable taking an oath to God. The court ruled that the Boy Scouts of America is a business subject to the anti-discrimination protections of California’s Unruh Civil Rights Act, and thus must admit these boys in spite of the fact that they do not share the Boy Scouts convictions. This decision, however, was recently overturned. See *Curran v. Mount Diablo Council of the Boy Scouts of Am.*, 952 P.2d 218 (Cal. 1998). Greg Shields, attorney for the Boy Scouts, stated: “We are a voluntary association to which no one is forced to belong and are thus entitled to First Amendment protections guaranteeing us the right to association.” Jeremy Leaming, *Twins Who Refuse to Take Oath Picked to Receive Eagle Scout Badges*, at <http://www.freedomforum.org/religion/1998/3/18> (visited Mar. 3, 1998).

10. *Dale v. Boy Scouts of Am.*, 734 A.2d 1196 (N.J. 1999), *cert. granted*, 528 U.S. 1109 (2000), *rev’d*, 120 S. Ct. 2446 (2000).

11. *Boy Scouts of Am. v. Dale*, 120 S. Ct. 2446 (2000).

12. See *infra* note 37 and accompanying text.

13. *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

14. *Bd. of Dirs. of Rotary Int’l v. Rotary Club*, 481 U.S. 537 (1987).

15. See *id.*

This proliferation of government intrusion has gone well beyond simply shaping intermediate associations; it has proceeded to the most basic association of all: the family. Some examples of this trend are instructive. In late 1999, the Massachusetts Department of Social Services filed child abuse charges against a Christian pastor for simply spanking his son.<sup>16</sup> These charges were filed notwithstanding the factual finding that “there was no injury to this child,” and in spite of the parent’s pleading that punishment was “mild, loving, routine, [and] structured.”<sup>17</sup> An agency of the California state government engaged in the pervasive practice of conducting invasive body searches of children without first receiving parental permission, which was the subject of a recent Ninth Circuit case.<sup>18</sup> De Tocqueville presciently observed that stripping responsibility from families and communities and allowing it to be placed in a centralized governmental system “enervates” man and makes him “indifferent to the fate of the spot which he inhabits,” thus causing him to view “the condition of his village . . . [as something that does] not concern him and [is] unconnected with himself.”<sup>19</sup> This Comment will analyze the symptoms and the root of what Robert Putnam has designated the “strange disappearance of Civic America,”<sup>20</sup> and then will examine the solutions that have been proposed by the Communitarian movement.

Part II will discuss how intermediate organizations in society act as a buffer

16. Alexis Chiu, *Alabama Native Says Corporal Punishment is God-given Right*, ASSOCIATED PRESS, Aug. 29, 1998.

17. *Mass High Court Weighs Whether Spanking is Discipline or Abuse*, ASSOCIATED PRESS, at <http://cnn.com/US/9909/14/minister.spanking> (last modified Sept. 14, 1999); see also Martin Finucane, *Massachusetts High Court Tries Father for Spanking*, FROM TIME TO TIME: NANDO’S IN-DEPTH LOOK AT THE 20TH CENTURY, (last visited Sep. 14, 1999).

18. Henry Weinstein, *Parents’ Rights Upheld in Child Abuse Inquiries*, L.A. TIMES, Sept. 15, 1999, at A3. In the majority opinion written by Judge Stephen Reinhardt, he explained that this case involved “a conflict between the legitimate role of the state in protecting children from abusive parents and the rights of children and parents to be free from arbitrary and undue governmental influence.” *Id.* In *DeShaney v. Winnebago County*, 489 U.S. 189 (1989), the Supreme Court jumped headlong into the briar patch of parent/child issues. Joshua DeShaney was a boy who was beaten by his father “so severely that he fell into a life-threatening coma.” *Id.* at 193. The Supreme Court’s holding recognized the constant tension between the government’s right to intervene for safety reasons and families’ right to be free from such intrusion:

The most that can be said of the state functionaries in this case is that they stood by and did nothing when suspicious circumstances dictated a more active role for them. In defense of them it must also be said that had they moved too soon to take custody of the son away from the father, they would likely have been met with charges of improperly intruding into the parent-child relationship . . . .

*Id.* at 203. (Rehnquist, C.J.)

19. See DE TOCQUEVILLE, *supra* note 2, at 212.

20. See Putnam & Parent, *supra* note 6.

between the government and family—the most basic unit of society.<sup>21</sup> Part III will discuss at length civic America’s disappearance, proffering suggestions for the underlying cause of this recent phenomenon.<sup>22</sup> Part IV of this Comment will review the background and briefly describe the importance of the high Court’s opinion in *Boy Scouts of America v. Dale*.<sup>23</sup> Part V will discuss how the impoverishment of our political discourse has been a significant factor in this strange disappearance.<sup>24</sup> It will focus on the legal analysis the Court has used to justify its intrusion into intermediate associations via the First Amendment. Part VI will discuss the two competing interests courts have painstakingly endeavored to reconcile: freedom and equality.<sup>25</sup> Part VII will then review the recent birth and blossoming of Communitarianism and the subtle impact it has had on both the legal and philosophical discourse of First Amendment litigation.<sup>26</sup> Part VIII will conclude by suggesting how a synthesis of both our current First Amendment landscape and Communitarianism yields a remarkably workable picture for reinvigorating the remarkable diversity of American culture and rediscovering what de Tocqueville labeled “habits of the heart.” It will propose that the rich diversity of American culture has been weakened by a judiciary marching, ironically, to the drumbeat of diversity, yet imposing a majoritarian uniformity nonetheless.<sup>27</sup>

## II. INTERMEDIATE ORGANIZATIONS AS A BUFFER

Any social structure may artificially be divided, for didactic purposes, into three overarching societal systems: the government, intermediate associations, and the family.<sup>28</sup> The second of these may be termed voluntary, or intermediate, associations, due to their role as an intermediary, or buffer, between families and either the state or society as a whole.<sup>29</sup> While such a tripartite division may have

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21. *See infra* Part II.

22. *See infra* Part III.

23. *See infra*, Part IV.

24. *See infra* Part V.

25. *See infra* Part VI.

26. *See infra* Part VII.

27. *See infra* Part VIII.

28. While the individual may, perhaps, also be viewed by some as the most basic of social “units,” the analysis in this paper still is applicable in light of that definitional change, as for the purposes of this Comment a societal unit comprises one or more individuals. Many Communitarians, incidentally, view the family as an intermediate association in light of that definitional change. Either way, the analysis herein presents a viable approach to the study of weakening social organizations.

29. ROBERT A. DAHL, *DILEMMAS OF PLURALIST DEMOCRACY: AUTONOMY VS. CONTROL* 1-40 (1982). Although the phrase “intermediate associations” is often used to refer to organizations that mediate between individuals and the state, this Comment intentionally takes a more narrow view of the concept of state. “State” has, in this context, often been used in reference not only to the government, but also “society,” “the public,” or “community.” One commentator has recently discussed, in the context of American federalism, how the states may be viewed as an intermediate association mitigating between families and the federal government. While all of these definitions have merit, this paper will use the narrower view of the state to

seemed more self-evident in a small, participatory city-state such as Rousseau's Geneva,<sup>30</sup> an exegesis is necessary for an extended conglomeration of "city-states" as exists in the United States.<sup>31</sup>

Examples of intermediate forms of community abound: churches, soccer leagues, country clubs, orchestras, parent teacher associations, college fraternities, political parties, corporations, as well as groups such as the Kiwanis Club, Lions Club, and Elks Club.<sup>32</sup> A recent self-styled academic movement known as Communitarianism has surfaced, attempting to help restore the delicate balance of rights and responsibilities between these intermediate associations, the family, and the state.<sup>33</sup> The tacit recognition that human beings are innately social animals is at the heart of this movement.<sup>34</sup> Communitarians promote a view of rights somewhat different from that of Locke, Jefferson, or Madison, and more in line with the tradition of Hegel, who felt that the community is more real than the individual.<sup>35</sup>

The very existence of intermediate organizations has recently come under both legal and academic attack. Not only has their effectiveness arguably been minimized through an activist judiciary, but its members are often disparaged as roving bands of "self-interested Hobbesian rent-seekers" that merely amplify individual desires, or worse, act as merely "extra-political vehicles for republican deliberation or dialogue."<sup>36</sup> Their autonomy has tapered under recent anti-discrimination statutes and rights-oriented legislation, which has further concentrated power in the state, thus reducing the vitality and diversity of our

refer to the governmental structure (at both state and federal levels) as the "state." See, e.g., BOB JESSOP, STATE THEORY: PUTTING THE CAPITALIST STATE IN ITS PLACE 341-43 (1990).

30. "Rousseau idealized his native Geneva as a model of republican self-government." Kathleen M. Sullivan, *Rainbow Republicanism*, 97 YALE L.J. 1713, 1713 n.1 (1988).

31. See generally Sullivan, *supra* note 30.

32. Gregory F. Hauser, *Intimate Associations Under the Law: The Rights of Social Fraternities to Exist and to be Free From Undue Interference by Host Institutions*, 24 J.C. & U.L. 59 (1997). These intermediate associations comprise the collective interests, hobbies, and objectives of the community as a whole. For this reason, the number of sizes, shapes, and purposes for which these associations are formed are as myriad as human beings themselves. See *id.* Other examples include the Girl Scouts, Moose Club, Sons of Norway, and the Ku Klux Klan. See generally Douglas O. Linder, Comment, *Freedom of Association After Roberts v. United States Jaycees*, 82 MICH. L. REV. 1878 (1984).

33. See *infra* Part III.

34. See *id.*

35. Norton Garfinkle, *A Message from the Institute Chairman*, Institute for Communitarian Policy, available at [www.gwu.edu/~icps/about.html](http://www.gwu.edu/~icps/about.html) (last visited Apr. 22, 2001). Worthy of note is the fact that many Communitarians are primarily anti-individualist, and are much more concerned with promoting the mega-community than intermediate associations. See *id.*

36. Sullivan, *supra* note 30, at 1716.

public sphere.<sup>37</sup> These associations fulfill roles in the community which would otherwise be filled by the state, and by increasing their activities and effectiveness, they essentially act as a buffer between families and the state.<sup>38</sup> Furthermore, these associations fulfill needs more effectively than the state could, giving this participatory process an added benefit that de Tocqueville also delineated: "Feelings and opinions are recruited, the heart is enlarged, and the human mind is developed only by the reciprocal influence of men upon one another."<sup>39</sup> The power of the judiciary to change the membership of an association is the power to change its purpose, ideology, and collective voice.<sup>40</sup>

### III. THE STRANGE DISAPPEARANCE OF CIVIC AMERICA

The intrusion by the state into the policies and practices of private organizations has exacted a disturbing toll on both the number and membership

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37. Justice Douglas had this to say concerning anti-discrimination statutes and the right to discriminate: My view of the First Amendment and the related guarantees of the Bill of Rights is that they create a zone of privacy which precludes government from interfering with private clubs or groups. The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish or all agnostic clubs to be established. Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires.

*Moose Lodge v. Irvis*, 407 U.S. 163, 179-80 (1972) (Douglas, J., dissenting).

In another case involving the Moose Lodge of St. George, Utah, the Utah Supreme Court held that a state statute prohibiting discrimination based upon gender was applicable to this private, voluntary organization. While the court agreed that this organization was expressive, and a private organization run solely with private funds, the lynchpin was the fact that the Moose Lodge served alcoholic beverages. As a place where alcohol was served, the Moose Lodge was therefore regulated by the state's alcohol laws. In an opinion by Justice Stewart, joined by Justice Durham, the Court held that the state could appreciably increase its statutory boundaries and apply the public accommodation statute to a private organization. The rationale for this decision—exactly the type Communitarians fear most—was that because the Moose Lodge served alcohol, and alcohol was regulated by the state, they were receiving a "benefit" because of the state. Because of this "jurisdictional hook," the state gave itself carte blanche to intrude upon its operations, and force a private organization to comply with a public accommodation statute. See generally *Beynon v. St. George-Dixie Lodge Order of Elks*, 854 P.2d 513 (1993).

38. Interestingly, these intermediate associations buffer the family from the state, but not vice versa. If viewed in a continuum, with the family at the bottom and the government at the top, intrusion always proceeds in a downward direction. Liberal legislation continually presses downward to expand the scope and influence of the government, and thus usurps power from intermediate associations as well as the families. Hence, the buffer that exists in the form of these organizations is a one-way buffer. Voluntary organizations exist, however, insisting that the government should be protected from upward-moving intrusion by these intermediate organizations. An example would be Americans for the Separation of Church and State, an organization whose objective is to shield the government from an "upward-moving" intrusion of voluntary organizations such as religious institutions.

39. *Civic Participation: Does it Make Better Communities?*, *supra* note 5, at 1.

40. Appellant's Brief, *Cornelius v. Benevolent Protective Order of Elks*, 382 F. Supp. 1182, at 13. As Professor Linder has acknowledged, "nothing strikes closer to the heart of American pluralism than a law which tells an association who it must accept as a member." Linder, *supra* note 32, at 1902.

levels of these organizations.<sup>41</sup> American social scientists of a neo-Tocquevillian tradition have recently unearthed an array of empirical evidence suggesting what we intuitively understand—the quality of our public life is powerfully affected by our networks of civic engagement.<sup>42</sup> Furthermore, these networks also powerfully affect the performance of a representative government.<sup>43</sup>

One of the preeminent scientists studying this area is Harvard's Robert D. Putnam.<sup>44</sup> Putnam's watershed report on social capital, "Bowling Alone," was titled in response to his somewhat whimsical finding that from 1980 to 1993 league bowling declined by forty percent while the number of bowlers rose by ten percent.<sup>45</sup> The rest of his evidence is "less whimsical": voter turnout, attendance at community meetings, and church attendance have also declined sharply from 1974 to 1989.<sup>46</sup> Collectively, "[s]erious volunteering declined by roughly one-sixth from 1974 to 1989."<sup>47</sup> If such a finding is accurate, it surely does not bode well for the stability of civic America's intermediate associations.

Putnam coined the phrase "social capital" in reference to the traditional features of social life—networks, norms, and trust—that enable participants to act together more effectively to pursue shared objectives.<sup>48</sup> While it is roughly analogous to other physical assets—financial capital or human capital—social capital primarily inheres in interpersonal relations.<sup>49</sup> For Putnam, the leading

41. Robert D. Putnam, *Bowling Alone: America's Declining Social Capital*, JOURNAL OF DEMOCRACY (Jan. 1995). See also Robert D. Putnam, *The Prosperous Community*, JOURNAL OF DEMOCRACY (Spring 1993).

42. *Civic Participation: Does it Make Communities Better?*, *supra* note 5, at 2.

43. See *id.*

44. Robert D. Putnam, *The Strange Disappearance of Civic America*, THE AMERICAN PROSPECT, No. 24 (Winter 1996), available at <http://www.prospect.org/archives/24/24putn.html> (last visited Apr. 22, 2001).

45. See *id.* at 4.

46. See *id.*

47. *Civic Participation: Does It Make Better Communities?*, *supra* note 5.

48. Putnam, *supra* note 44, at 1. Putnam, with his usual eloquence, refers to this disappearance:

It is a classic brainteaser, with a corpus delicti, a crime scene strewn with clues, and many potential suspects. As in all good detective stories, however, some plausible miscreants turn out to have impeccable alibis, and some important clues hint at portentous developments that occurred before the curtain rose. The mystery concerns the strange disappearance of social capital and civic engagement in America. By "social capital," I mean features of social life—networks, norms, and trust—that enable participants to act together more effectively to pursue shared objectives. . . . I use the term "civic engagement" to refer to people's connections with the life of their communities, not only with politics.

*Id.*

49. *Civic Participation, Does It Make Better Communities?*, *supra* note 5, at 3. Lest one believe that the phrase "social capital" only sounds economic, Putnam in *Civic Participation*, insists that actual economic vitality also rests on a "cultural bedrock of local associational strength." *Id.*



indicator of this social capital is membership in voluntary organizations.<sup>50</sup> Putnam conducted an exhaustive study listing the “usual suspects” that may have effectuated the disappearance of social capital: increasing time pressures, suburbanization, women moving into the labor force, disruption of marriage, growth of the welfare state, and even the appearance of television.<sup>51</sup> He further hypothesizes that the strongest correlation between an individual and her level of involvement is found in the individual’s level of education.<sup>52</sup> When comparing the present generation with past generations, Putnam suggests that empirical evidence shows that today we are less connected with one another.<sup>53</sup>

Putnam’s thesis, nonetheless, may have several notable oversights. First, his data does not necessarily take into account the changing nature of American society, as well as many intermediate organizations that have either grown in membership or materialized in the last two decades.<sup>54</sup> As an example, U.S. Youth Soccer, a group not measured by his data, has grown from 1.2 million to 2.4 million members in the last ten years.<sup>55</sup> His data also does not measure episodic

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50. During time-budgeting studies which were conducted in 1965, 1975, and 1985, they discovered that time spent on informal socializing and visiting declined by 25%, while time devoted to clubs and organizations declined by approximately 50%. Putnam, *supra* note 44, at 2. This data is bolstered by the decline of between 25% and 50% in members of such organizations as the PTA, the Elks club, the League of Women Voters, the Red Cross, and labor unions. *See id.* Other groups which have been affected include sports clubs, literary discussion groups, and churches. *See id.*

51. *See id.* at 3. Putnam, interestingly, concludes that he feels the prime suspect is the rise of the television. *See id.* “Most studies estimate that the average American now watches roughly four hours per day,” and he concludes that this constitutes almost one-half of the average American’s spare time. *Id.* Interestingly, Putnam finds a link between civic engagement and either television watching or newspaper reading. *See id.* “The basic contrast is straightforward: Newspaper reading is associated with high social capital, TV viewing with low social capital.” *Id.* at 16.

52. *See id.* In explaining this interesting correlation, Putnam suggests:

The four years of education between 14 and 18 total years have *ten times more impact* on trust and membership than the first four years of formal education . . . but, when income, social status, and education are used together to predict trust and group membership, education continues to be the primary influence. So, well-educated people are much more likely to be joiners and trusters, partly because they are better off economically, but mostly because of the skills, resources, and inclinations that were imparted to them at home and in school.

*Id.*

53. *See id.* Putnam suggests that we compare the present generation with past generations and not with other nations, because America still outranks many nations in the level of community involvement. *Id.* An interesting study indeed would involve an analysis in the levels of community involvement in other countries vis-a-vis the type of governmental structure. Communitarian theory would surely predict an increase in community involvement in more democratically-run countries such as Canada, with a corresponding decrease in community involvement in countries with a more top-down system like that utilized in China. It would be interesting to discover whether empirical data verifies such a theoretical presumption, or if the reverse is true.

54. Putnam relies on data derived from the General Social Survey (“GSS”), which does not take into consideration several types of civic activity which have arisen in the last two decades. *See id.*

55. *Civic Participation: Does it Make Better Communities?*, *supra* note 5. Furthermore, it does not measure membership in national organizations such as the Sierra Club or the National Rifle Association. *See id.* Another example where the GSS would fall short consists of the trend of joining local gyms to work out, where two decades ago people would have gone to the local YMCA. *See id.* This recent explosion in

political involvement, as in 1992 when 800,000 motorcycle riders became involved in a law requiring bikers to wear helmets.<sup>56</sup> While many of these examples would not necessarily qualify as classic Tocquevillean democracy, these organizations are certainly a “highly efficient use of civic energy.”<sup>57</sup>

Putnam’s clarion call for “community” has traditionally been viewed by many, understandably, with a healthy dose of suspicion. After all, “Calvin, Rousseau, Marx, and Hitler have cast a long shadow on communitarian dreams.”<sup>58</sup> “Ever since Aristotle distinguished between master and slave by asserting the former’s ability to recognize and comprehend the common good,” the world has never had a shortage of leaders claiming to understand the common good and seeking to impose their view of the common good upon their community.<sup>59</sup>

Putnam’s call for community, however, is not misguided. He too, seeks to impose a conception of the common good derived from the community at large. His diagnosis is precise, and his prescription—an increase in social involvement—is salutary. One area he neglects to examine, which undoubtedly is a potent force on our social culture, is the focus on individual legal rights and the judiciary’s slow erosion of the autonomy of the very civic organizations Putnam extolls.<sup>60</sup> The decision of the New Jersey Supreme Court in *Dale v. Boy Scouts of America*, which was reversed by the Supreme Court, is perhaps the quintessential example of the American judiciary hastening this very slow, yet perceptible, process of erosion.<sup>61</sup>

#### IV. BOY SCOUTS OF AMERICA V. DALE

James Dale entered scouting at the age of eight and continued until he obtained the rank of Eagle Scout in 1988.<sup>62</sup> In 1990, a newspaper published an interview with Dale, identifying him as the co-president of the Rutgers University Lesbian/Gay Alliance.<sup>63</sup> Shortly thereafter, while he was acting as an adult leader

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gym membership would not offset the GSS’s reporting that membership in YMCAs has declined. *See id.*

56. *See id.*

57. *Id.*

58. Linda C. Raeder, *Liberalism and the Common Good: A Hayekian Perspective on Communitarianism*, THE INDEP. REV. 519, 520 (1998).

59. *Id.*

60. The most charitable explanation for his omission of these two factors lies in the fact that (1) the focus on individual rights is implicit within the discussion of the factors he delineates in his “usual suspects” list; and (2) the government’s impact is discussed elsewhere, namely, in context of the events of the sixties, the growth of the welfare state, and especially the civil rights revolution.

61. *See Dale v. Boy Scouts of Am.*, 734 A.2d 1196 (N.J. 1999), *rev’d*, 120 S. Ct. 2446 (2000).

62. *Id.* at 1204.

63. *Id.* at 1204-05.

with responsibilities over a “troop” of teenage boys, BSA revoked his membership in their organization.<sup>64</sup> Two years later, Dale filed a complaint against the BSA in New Jersey Superior Court, alleging that they had violated New Jersey’s public accommodation statute by revoking his membership based upon his sexual orientation.<sup>65</sup>

Seven years later, in 1999, the New Jersey Supreme Court ruled in favor of Dale, holding that BSA’s “large size, nonselectivity, [and] inclusive rather than exclusive purpose . . . establish that the organization is not ‘sufficiently personal or private to warrant constitutional protection’ under the freedom of intimate association.”<sup>66</sup>

In a five-to-four decision on June 28, 2000, the United States Supreme Court reversed the New Jersey decision, holding that Dale’s presence in BSA would, at the very least, force BSA to send a message that it accepts homosexual conduct as a legitimate form of behavior.<sup>67</sup> BSA, it held, “has a First Amendment right to choose to send one message but not the other.”<sup>68</sup> The Court reasoned that “it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.”<sup>69</sup>

Justice Stevens, in a vigorous dissent, discussed the changing social mores regarding homosexual behavior, arguing that BSA’s actions did not deserve constitutional protection, in part, because homosexuality has gained greater social acceptance.<sup>70</sup> The majority was quick to remind that “this is scarcely an argument for denying First Amendment protection to those who refuse to accept these views.”<sup>71</sup> Justice Stevens was also persuaded by the fact that BSA’s Official Handbook and the Scout Oath only require a scout to be “morally straight,” and do not specifically discuss homosexuality.<sup>72</sup> Interestingly, the myriad official BSA statements expressing disapproval with homosexual conduct were, presumably, not viewed by Justice Stevens as being either authoritative, or even persuasive.<sup>73</sup> The majority responded by saying that BSA was in a much better position to determine and interpret its own core values than are the courts.<sup>74</sup> The Court

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64. *Id.* at 1205.

65. *Id.*

66. *Id.* at 1221 (quoting *Bd. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 546 (1987)).

67. *Boy Scouts of Am. v. Dale*, 120 S. Ct. 2446, 2454 (2000).

68. *Id.* at 2455.

69. *Id.* at 2458 (quoting *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 579 (1995)).

70. *Id.* at 2476-77. (Stevens, J., dissenting).

71. *Id.* at 2457.

72. *Id.* at 2461 (Stevens, J., dissenting).

73. *See id.* at 2461 (Stevens, J., dissenting).

74. *Id.* at 2453 (“[W]e give deference to an association’s assertions regarding the nature of its expression . . .”). Justice Stevens’ argument, roughly speaking, was that opposition to homosexual conduct was not very important to the BSA, or, presumably, the BSA would have codified such opposition in the official Handbook. *See id.* at 2461-63 (Stevens, J., dissenting). This argument seems somewhat facetious

recognized, therefore, that while BSA's position may not be aligned with popular culture, it nevertheless is still protected by the First Amendment's freedom of association.<sup>75</sup> Though this decision was uniformly criticized by the main stream media, and will no doubt be the subject of derision by innumerable academicians in the years to come, it nonetheless reaffirmed the validity of the First Amendment for the groups that need it most: those in the minority

## V. THE IMPOVERISHMENT OF POLITICAL DISCOURSE

The current paradigm of the American polity is one that is centered on rights. While we trace our idea of historical conception of rights to Locke, Blackstone, and Hobbes, the current spirit of American "rights-talk" was captured by Thomas Merton:

We are like billiard balls bumping against each other. The American idea, which was built up in the eighteenth century, likewise assumes that is how people are. Everybody is an individual and he operates from this center where he is completely separated from everybody else, but he still obeys the traffic laws.<sup>76</sup>

This individualistic paradigm, at its core, appears to strike a harmonious balance between the prevention of societal anarchy and the continued pursuit of personal pleasure enunciated by Freud.<sup>77</sup> In a more pragmatic sense, Merton has merely diagnosed the malady affecting America: chronic selfishness. This malady manifests itself in the "dialect" in which Americans talk about rights.<sup>78</sup> Conspicuously present in the deafening debate over the word "rights" is [a] "near-aphasia concerning responsibilities . . ."<sup>79</sup>

Mary Ann Glendon, a professor at Harvard Law School, together with Amitai Etzioni and William Galson, drafted what has been called the Communitarian

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considering that the BSA has, through the years, spent thousands of dollars litigating several near-identical cases, and was appealing its case before the Supreme Court precisely because it is important to the BSA. It seems almost axiomatic to say that an organization that spends countless dollars and over 10 years enforcing its right to express a view on homosexual behavior, presumably considers the issue "important."

75. *Id.* at 2454.

76. THOMAS MERTON, THOMAS MERTON IN ALASKA 132 (1988).

77. Freud wrote that "our entire psychical activity is bent upon procuring pleasure and avoiding pain." MORTIMER J. ADLER, THE GREAT IDEAS, Vol. 54, Freud, 639-40 (1952).

78. Donald P. Kommers, *The Constitutionalism of Mary Ann Glendon*, 73 NOTRE DAME L. REV. 1333, 1340 (1998).

79. Joan T. Brown, *Recent Publications*, 27 HARV. C.R.-C.L. L. REV. 297, 297 (1992) (citing GLENDON, *supra* note 1, at 11).

platform.<sup>80</sup> Her seminal work, *Rights Talk: The Impoverishment of Political Discourse*, discusses how the grammar and vocabulary of American rights-talk has crippled political discourse in America.<sup>81</sup> This rights “dialect,” she wrote, “seems to condone acceptance of the benefits of living in a democratic social welfare state, without accepting the corresponding personal and civic obligations.”<sup>82</sup> Such a discourse is inhospitable to losers, and fosters a zero-sum mentality, as evidenced in holdings of cases such as *Roe v. Wade*.<sup>83</sup> This mentality projects an image of a human being as simply a “lone rights-bearer.”<sup>84</sup>

Glendon suggests that what has brought us to this point is our manner of appropriating Locke’s conception of “property” as the more absolute model for rights individuals have against each other and the government.<sup>85</sup> Blackstone, she explains, “taught us to absolutize property rights,” while Mill taught us, by analogy, to absolutize liberty.<sup>86</sup> Against this philosophical backdrop, she posits Rousseau’s far more limited view of the rights of property, namely “that an owner is a kind of trustee or steward for the public good.”<sup>87</sup> She credits Rousseau’s influence for the differing conception of property rights seen in Europe.<sup>88</sup> An example of this is the West German basic law of 1949 which provides: “Property imposes duties. Its use should also serve the public weal.”<sup>89</sup>

This current dialogue transforms our political discourse into a “clash of solipsisms”<sup>90</sup> in which individuals are, as Putnam lamented, cut off from “denominational commitments, neighborhood networks . . . and other forms of community and association.”<sup>91</sup> Importantly, Glendon imputes partial responsibility for this loss of community to the Supreme Court, which has contributed to the collective loss of social capital by putting up fences around

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80. Carmen Sirianni & Lewis Friedland, *Communitarianism*, The Civic Practices Network, available at <http://www.cpn.org/sections/tools/models/communitarianism.html> (last visited Apr. 21, 2001).

81. See GLENDON, *supra* note 1.

82. The central thesis of Professor Glendon’s book is captured in the following quote:

Our rights talk, in its absoluteness, promotes unrealistic expectations, heightens social conflict, and inhibits dialogue that might lead toward consensus, accommodation, or at least the discovery of common ground. In its silence concerning responsibilities, it seems to condone acceptance of the benefits of living in a democratic social welfare state, without accepting the corresponding personal and civic obligations. In its relentless individualism, it fosters a climate that is inhospitable to society’s losers, and that systematically disadvantages caretakers and dependents, young and old. In its neglect of civil society, it undermines the principal seedbeds of civic and personal virtue.

*Id.* at 14.

83. Kommers, *supra* note 78, at 1340-41.

84. *Id.* at 1341.

85. ROBERT E. RODES, BOOKS REVIEWED, 40 AM. J. JURIS. 411, 412 (1995).

86. *Id.*

87. GLENDON, *supra* note 1, at 34.

88. *Id.*

89. James Boyd White, *Looking at Our Language: Glendon on Rights*, 90 MICH. L. REV. 1267, 1269 (1992) (citing GLENDON, *supra* note 1, at 39).

90. RODES, *supra* note 85, at 411.

91. Kommers, *supra* note 78, at 1340.

individuals and “regarding them as isolated units free to do anything they please so long as they do no physical harm to other persons.”<sup>92</sup> The judiciary has also played a role in stripping individuals from the buffer offered by robust intermediate associates through its emasculation of those associations’ autonomy.<sup>93</sup>

## VI. FREEDOM VS. EQUALITY: THE ANCIENT PARADOX OF LIBERALISM

The constitutional freedom to choose with whom one associates has, until recently, been a hallmark of the American legal system.<sup>94</sup> In *Democracy in America*, de Tocqueville discussed America’s penchant for association-forming, asserting that “[t]he most natural right of man, after that of acting on his own, is that of combining his efforts with those of his fellows and acting together.”<sup>95</sup> As Justice O’Connor has suggested, an association’s right to define its membership stems “from the recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice.”<sup>96</sup> However, the granting of such a right, when considered with the equally American ideal of equality, bristles with theoretical conflict, for implicit within the right to associate is the concomitant right *not* to associate. The dark side of this “right of dissociation” was eloquently captured by Justice Goldberg:

Prejudice and bigotry in any form are regrettable, but it is the constitutional right of every person to close his home or club to any person or to choose his social intimates and business partners solely on the basis of personal prejudices including race. These and other rights pertaining to privacy and private association are themselves constitutionally protected liberties.<sup>97</sup>

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92. *Id.* at 1341.

93. *See infra* Part V.

94. Justice Brennan identified two sources of the American protection for associational freedoms: the First Amendment (implicit in the right to engage in expressive activities) and the Fourteenth Amendment (implicit in an individual’s right to privacy). *See* Linder, *supra* note 32, at 1884.

95. DE TOCQUEVILLE, *supra* note 2, at 178.

96. *Roberts v. U.S. Jaycees*, 486 U.S. 609, 633 (1984) (O’Connor, J., concurring).

97. Paul Varela, Note, *A Scout is Friendly: Freedom of Association and the State Effort to End Discrimination*, 30 WM. & MARY L. REV. 919, 922 (1989) (quoting *Bell v. Maryland*, 378 U.S. 226, 313 (1964) (Goldberg, J., concurring)). Notice Justice Goldberg’s “rights talk”—the focus of each sentence in this quote is on individual rights.

This Comment should not be viewed as a condition of discrimination. Discrimination in any setting is regrettable and should not be tolerated. However, what distinguishes America from other countries is the fact that the First Amendment permits both individuals and groups to believe ideas which may be repulsive to the public at large.

This tension between associational freedom and equality is reminiscent of a larger tension discussed earlier, the tension between right-oriented egalitarianism and Communitarianism, as well as the tension between pluralism and assimilation.<sup>98</sup> This tug-of-war between freedom and equality is what Professor Tribe has termed “the ancient paradox of liberalism.”<sup>99</sup>

### A. *Civil Rights Laws*

To eradicate invidious discrimination in public (not private) locales—an unfortunate, albeit existing byproduct of the freedom to associate—both the U.S. government and individual states have enacted public accommodations acts (“PAA”).<sup>100</sup> While these laws have had the unfortunate effect of intruding upon a private group’s membership practices, the intrusion has commonly been viewed as a necessary intrusion because PAAs encourage the eradication of discrimination and help strike a harmonious balance between both First Amendment freedoms and the prevention of harms caused by the exercise of those freedoms.<sup>101</sup>

Congress passed the first civil rights act in 1866 to enforce the Thirteenth Amendment.<sup>102</sup> While the Supreme Court originally interpreted the 1866 Act to apply only to acts of public discrimination, its application was later broadened to also include private acts of discrimination.<sup>103</sup> In 1964, Congress enacted section 2000(a) of Title II of the Civil Rights Act of 1964 to eliminate further

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98. Douglas O. Linder, Comment, *Freedom of Association After Roberts v. United States Jaycees*, 82 MICH. L. REV. 1878, 1881-82 (1984). This tension between pluralism and assimilation is one which is not frequently discussed, and is seldom recognized by those advocating both of these values. *See id.* For this reason, those pushing for the application of public accommodation statutes to intermediate associations are not always willing to admit that such a forced assimilation is necessarily accompanied by a concomitant reduction in pluralism. *See id.* Thus, two shibboleths of classical liberal philosophy appear to be in diametrical opposition. *See id.*

99. William P. Marshall, “*Discrimination and the Right of Association*,” 81 NW. U. L. REV. 68, 69 (1986) (quoting LAWRENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 974 (1st ed. 1978)). Citing Robert Nisbet, Tribe has opined:

[T]o destroy the authority of intermediate communities and groups in the name of freeing their members from domination destroys the only buffer between the individual and the state, and risks enslaving the individual to the state’s potential tyranny. . . . [On the other hand,] submerging persons in the intermediate communities and groups that seek dominion over their lives creates the risk that individuals will remain at the mercy of hierarchical and subjugating social structures.

LAWRENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 898 (1st ed. 1978).

100. Varela, *supra* note 97, at 919.

101. *Leading Cases of the 1983 Term*, 98 HARV. L. REV. 195 (1984).

102. 42 U.S.C. § 1982 (1994) (incorporating the Civil Rights Act of 1866). In *In re Civil Rights Cases*, 109 U.S. 3, 21 (1883), the Court stated that the this amendment was passed for the “obliteration and prevention of slavery with all its badges and incidents.” Notwithstanding, the Court proceeded to strike down the first federal public accommodation act. *Id.* at 26.

103. While *In re Civil Rights Cases* held that a remedy was only available for a denial of civil rights by the state, *id.* at 17-18, later cases such as *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 437-39 (1968), broadened the application of the civil rights statute to include private real estate transactions under the auspices of section 1982.

discrimination in “places of public accommodation.”<sup>104</sup> This was done “to remove the daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the public.”<sup>105</sup> Forty years ago, the Supreme Court held that the “freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the ‘liberty’ assured by the . . . Fourteenth Amendment.”<sup>106</sup> Since that time, the Supreme Court has proceeded to apply these PAAs more broadly and, in so doing, has slowly asphyxiated the very organizations buffering families from the government.<sup>107</sup>

### B. Organizations Exempt from Public Accommodation Acts

In the seminal case *Roberts v. United States Jaycees*,<sup>108</sup> the Court redefined discrimination laws and delineated two tests to determine whether an organization would be afforded immunity from those laws.<sup>109</sup> The Court held that the Jaycees, a private male organization, did not pass either of these tests and thus must admit women.<sup>110</sup>

The first test helps determine whether the group constitutes an “intimate association.”<sup>111</sup> The Court has long recognized that it must protect the “formation

104. 42 U.S.C. § 2000(a) of Title II of the Civil Rights Act of 1964 provides in part:

(a) Equal Access. All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin . . . .

(e) Private establishments. The provision of this subchapter shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b) of this section.

*Id.*

105. Edward Bigham, *Recent Decision*, *Welsh v. Boy Scouts of Am.*, 993 F.2d 1267 (7th Cir. 1993), 67 TEMP. L. REV. 1333, 1333-34 (1994) (citing *Daniel v. Paul*, 395 U.S. 298, 307-08 (1969)).

106. Joshua A. Bloom, Comment, *The Use of Local Ordinances to Combat Private Club Discrimination*, 23 U.S.F. L. REV. 473, 473 (1989) (citing *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958)).

107. Varela, *supra* note 97, at 932-33 (citing Note, *Discrimination in Access To Public Places: A Survey of State and Federal Public Accommodations Laws*, 7 N.Y.U. REV. L. & SOC. CHANGE 215 (1978)). State PAAs have historically been a more effective tool in fighting discrimination, and were enacted to fill in the gap created when the Supreme Court struck down the first federal PAA in *In Re Civil Rights Cases*. See generally *id.*

108. 468 U.S. 609 (1984).

109. *Id.* at 617-29. For a critical discussion of these two tests, see Robert N. Johnson, Note, *Board of Directors of Rotary International v. Rotary Club of Duarte: Redefining Associational Rights*, 1998 BYU L. REV. 141 (1988).

110. *Roberts*, 468 U.S. at 628-29.

111. *Id.* at 618-22.



and preservation of certain kinds of highly personal relationships . . . from unjustified interference by the State.”<sup>112</sup> When a group claims to be an intimate association, the Court assesses factors such as “size, purpose, policies, selectivity, congeniality and other characteristics that in a particular case may be pertinent.”<sup>113</sup> While intimate associations include relationships such as those between family members, Justice Brennan declined to “identify associations other than the family which may meet his standards for privacy protection.”<sup>114</sup>

The second test considers whether a group is an expressive association.<sup>115</sup> “‘Expressive association’ is the right to come together as a group to exercise First Amendment rights such as speaking or worshipping.”<sup>116</sup> This right is implicit in the rights of expression which are protected by the First Amendment.<sup>117</sup> It is recognized when an association gathers in the pursuit of “political, social, economic, educational, religious, and cultural ends.”<sup>118</sup> In *Roberts*, the Court reluctantly admitted, prior to its holding, that “there can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire. . . . Freedom of association therefore plainly presupposes a freedom not to associate.”<sup>119</sup>

To justify the Jaycees’ loss of autonomy, the Court devised a nexus requirement: courts may only curtail a private organization’s autonomy if the forced inclusion of an unwanted member of the group either modifies the groups message or dilutes its purpose.<sup>120</sup> Because this standard essentially lets courts determine whether the inclusion would change the group’s message, it results in courts making a determination of what a group’s message is—a task more suited for the groups themselves. Hence, an association’s First Amendment rights will be held completely inoperative unless some nexus exists between the organization’s practices and the message or purpose of the group. Not surprisingly, the Court has determined it is the appropriate authority to make that

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112. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534-35 (1925) (discussing the degree to which the courts may intrude upon the parent’s choices in upbringing their children). In *Griswold v. Connecticut*, the Court determined that such freedoms emanate from the “penumbra” of rights mentioned in the Bill of Rights. Johnson, *supra* note 109, at 144-45 (citing *Griswold v. Connecticut*, 381 U.S. 479, 483-84 (1964)).

113. *Roberts*, 468 U.S. at 620.

114. Linder, *supra* note 32, at 1885. Such an omission is neither unintentional nor surprising, considering Justice Brennan’s judicial history as a rights-oriented egalitarian. By enumerating any other association other than the family which would qualify for protection as an intimate association, Justice Brennan would have run the risk of narrowing the expansive application he was enunciating.

115. *Roberts*, 468 U.S. at 622-29.

116. Lisa A. Hammond, Note, *Boy Scouts and Non-Believers: The Constitutionality of Preventing Discrimination*, 53 OHIO ST. L.J. 1385, 1388 (1992).

117. Marissa L. Goodman, Note, *A Scout is Morally Straight, Brave, Clean, Trustworthy . . . And Heterosexual? Gays in the Boy Scouts of America*, 27 HOFSTRA L. REV. 825, 839-40 (1999).

118. *Roberts*, 468 U.S. at 622 (citations omitted).

119. *Id.*

120. Varela, *supra* note 97, at 929.

determination.<sup>121</sup>

Justice O'Connor argued that it is impossible to pigeon-hole a group as being entirely expressive or non-expressive, and thus a better approach would be to determine whether the association is commercial, and to then proceed with the analysis from that point.<sup>122</sup> Under any legal explanation, however, any judicial intrusion reduces the vitality of intermediate associations—intimate, expressive, and even religious<sup>123</sup>—and must therefore take its place alongside the other factors Putnam listed as culprits for America's declining social capital.<sup>124</sup> While as a

121. An example of such a restriction on the Court's intrusionary powers would be forcing the KKK to accept black people as part of their organization. When the KKK sued the city of Thurmont, Maryland, challenging a nondiscrimination condition in the parade permit, the Court held as follows:

If ever there was a case where the membership and the message were coextensive, it is here. The KKK is certainly organized for specific expressive purposes. The KKK desires to convince others of the need for segregation of the races and to send the message of white supremacy. . . . Further, the KKK's message of white separatism would be destroyed if blacks were to march with them. . . . The group's primary purpose is to advocate one main concept—that blacks and whites should not mix. Allowing blacks to march with the KKK would change the primary message which the KKK advocates.

*Invisible Empire of the Knights of the Ku Klux Klan v. Mayor*, 700 F. Supp. 281, 289 (D. Md. 1988).

122. *Roberts*, 468 U.S. at 635. Justice O'Connor argued:

No association is likely ever to be exclusively engaged in expressive activities, if only because it will collect dues from its members or purchase printing materials or rent lecture halls or serve coffee and cakes at its meetings. . . . [Therefore] an association should be characterized as commercial, and subject to rationally related state regulation of its membership and other associational activities, when, and only when, the association's activities are not predominately of the type protected by the First Amendment.

*Id.*

123. Mary Ann Glendon is very critical of rights-oriented egalitarian decisions which have fostered a "winner-takes-all attitude." Kommers, *supra* note 78, at 1350. Perhaps the greatest victims in this judicial intrusion are America's religions. See generally *id.* Glendon has written that *Everson v. Board of Education*, a watershed First Amendment case, has "metastasized into something more akin to antagonism toward religion than the religious freedom that the free exercise clause was clearly meant to privilege. At issue here, as many other critics of the Court's church-state cases have pointed out, is no less than the health of the body politic." Kommers, *supra* note 78, at 1348. Glendon elaborates on this theme as follows:

What seems to have paved the way for this remarkable inversion of meaning was the inability of Court majorities to grasp that, for millions of Americans, religious freedom is "exercised" within worshipping communities. The justices lost sight of the fact that the religion language of the First Amendment protected individuals' free exercise, not only when they were alone, but in their religious associations and institutions.

Raul F. Yanes and Mary Ann Glendon, *How to Restore Religious Freedom: A Debate*, FIRST THINGS, Apr. 1992, at 47.

124. Putnam, *supra* note 44, at 3. On a personal note, in making these assertions, I am in no way condoning the practice of discrimination against individuals based upon race, religion, sexual orientation, gender, or any other demographic group. Where such discrimination exists, it is unfortunate and divisive. However, such discrimination is also an unfortunate and irascible byproduct of the freedom to associate. While I applaud governmental attempts to prevent and avoid the placement of its imprimatur on any public act of discrimination, judicial restraint is often necessary to permit the very behaviors we abhor, in the name of allowing freedom, precisely the paradox mentioned earlier in the text.

society we tolerate these intrusions to achieve what we deem worthwhile goals, such as the eradication of discrimination, at a minimum we must be honest with ourselves and frankly admit that such intrusions necessarily occasion a concomitant reduction in First Amendment Rights.

### C. *Other Cases Involving the Boy Scouts of America*

Some of the most highly-publicized right of association cases have involved BSA.<sup>125</sup> While *Dale*<sup>126</sup> was decided in June, 2000, several other watershed right of association cases have also been waged by BSA.<sup>127</sup>

Founded in 1910, BSA's Official Scoutmaster Handbook states the purpose of the organization: "The purpose of the Boy Scouts of America is to help boys become honorable men."<sup>128</sup> One historian remarked that "this handbook is among the[] very few remaining popular repositories of something like classical ethics, deriving from Aristotle and Cicero. . . . In the current world of Making It and Getting Away with It, there are not many books devoted to associating happiness with virtue."<sup>129</sup>

#### 1. *Curran v. Mount Diablo Council of the Boy Scouts*

In *Curran v. Mount Diablo Council of the Boy Scouts of America*,<sup>130</sup> the issue addressed by the California Supreme Court was whether "the state may constitutionally require an expressive association to accept as a moral teacher for its youth adult members expressing a moral view contrary to that of the associations."<sup>131</sup> Prior to applying to become an Assistant Scoutmaster, Timothy Curran gave an interview to the press in which he said he was "proud of being

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125. In the first articles of incorporation filed in 1910, BSA stated that their organization's purpose was "to promote, through organization, and cooperation with other agencies, the ability of boys to do things for themselves and others, to train them in Scoutcraft, and to teach them patriotism, courage, self-reliance, and kindred virtues, using the methods which are in common use by Boy Scouts." Varela, *supra* note 97, at 943 (citing R. PETERSON, *THE BOY SCOUTS: AN AMERICAN ADVENTURE* 32 (1984)).

126. *Boy Scouts of Am. v. Dale*, 120 S. Ct. 2446 (2000).

127. See, e.g., *Curran v. Mount Diablo of the Boy Scouts of Am.*, 952 P.2d 218 (Cal. 1998) and *Welsh v. Boy Scouts of Am.*, 742 F. Supp. 1413 (N.D. Ill. 1990).

128. Varela, *supra* note 97, at 944 (citing *BOY SCOUTS OF AMERICA, THE OFFICIAL SCOUTMASTER HANDBOOK* 98 (7th ed. 1986)). The Scout Law is as follows: "A Scout Is: Trustworthy. Loyal. Helpful. Friendly. Courteous. Kind. Cheerful. Thrifty. Brave. Clean. Reverent." William Hillcourt, *THE OFFICIAL BOY SCOUT HANDBOOK* 31 (9th ed. 1979).

129. Varela, *supra* note 97, at 944 (quoting P. Fussell, *THE BOY SCOUT HANDBOOK AND OTHER OBSERVATIONS* 6-7 (1982)).

130. 952 P.2d 218 (Cal. 1998). Timothy Curran was represented, not surprisingly, by Beatrice Dohrn of the Lambda Legal Defense and Education Fund, and Mark D. Rosenbaum of the ACLU of Southern California. See *id.* at 219. The BSA was represented by George Davidson of Hughes, Hubbard & Reed. See *id.*

131. Appellant's Answer Brief at 3, *Curran v. Mount Diablo Council of the Boy Scouts of Am.*, Case No. 2 Civ. B061869 at 3 (hereinafter "Answer Brief").

gay—someone who didn't just say it, but who acted on it."<sup>132</sup> Because California's Unruh Civil Rights Act<sup>133</sup> prohibits arbitrary discrimination against homosexuals by "all commercial and noncommercial entities open to and serving the general public," Curran argued that BSA was a commercial establishment and thus subject to the strictures of the Act.<sup>134</sup>

While the lower court ruled against BSA, the California Supreme Court sided with BSA, holding that they did not constitute a business for purposes of the Unruh Civil Rights Act and, thus, were exempt from the application of public accommodation statutes.<sup>135</sup> The Court, in essence, was deciding whether a voluntary organization should be forced to accept a member who holds "a view [that] conflicts with its official position that homosexuality is immoral."<sup>136</sup> Because the court found that BSA did not qualify as a "business establishment" for purposes of the Unruh Civil Rights Act, it found no reason to further address the issue of whether BSA qualified as an expressive association.<sup>137</sup> While a critical analysis of freedom of association cases generally yields a very ominous outlook for the autonomy of intermediate organizations, the *Curran* holding reflects a comprehension of the importance of these organizations, as well as a Tocquevillian appreciation for leaving them alone.<sup>138</sup>

132. Answer Brief at 3. Curran sought to change Scouting's views by advancing what he called the "revolutionary" view that an Eagle Scout, "the epitome of what is good and wholesome and moral in American Society . . . is willing to publicly admit that he is homosexual." Answer Brief at 4.

133. California's Unruh Civil Rights Act provides in pertinent part:

All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin or disability or medical condition are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

CAL. CIV. CODE § 51 (West 2000). If a California organization falls within the penumbra of the Unruh Civil Rights Act, state courts have held that public accommodation acts may properly be applied to the organization, with very few exceptions.

134. Curran went to great lengths to describe BSA in terms of a commercial establishment:

[Respondent] has significant financial responsibilities. It owns and maintains a large physical plant which includes a central administrative building and four camps. . . . It oversees an annual budget in excess of \$1.7 million. It has business-like sources of revenue. It also sponsors various revenue raising activities, . . . sells T-shirts and patches bearing its name and participates in the selection and sale of [Boy Scout] uniforms, equipment, publication[s] and other official Scouting paraphernalia. And it incurs business-like expenses for items such as overhead, furniture and equipment depreciation, insurance, auditing and public relations.

Answer Brief at 6.

135. *Curran v. Mount Diablo Council of the Boy Scouts of Am.*, 952 P.2d 218, 219-220 (Cal. 1998).

136. *Id.* at 219 (alteration in original).

137. *Id.*

138. Incidentally, the morality of homosexual conduct was not broached at all in these opinions, a proper choice considering the applicable case law.

## 2. *Welsh v. Boy Scouts of America*

Another highly-publicized case dealing with parallel facts is *Welsh v. Boy Scouts of America*.<sup>139</sup> Mark Welsh was a seven-year-old boy who desired to join the Boy Scouts, but refused to sign the application due to its requirement that the applicant commit to doing one's "duty to God."<sup>140</sup> He filed suit against the Boy Scouts after being informed that agreeing with this statement was a prerequisite to becoming a member. The district court, and later the Seventh Circuit, held that BSA was not a place of public accommodation for the purposes of Title II and therefore could exclude Mark Welsh from becoming a member.<sup>141</sup> This holding was widely criticized by those who felt that the Boy Scouts should be treated as an expressive organization, because no nexus exists between the group's exclusion and its message.<sup>142</sup>

Ironically, much of the criticism about *Welsh* centered around the fact that there is no mention of God in BSA's congressional charter or the handbook, as Justice Stevens also later discussed in *Dale*.<sup>143</sup> Such a dialectic, however, is unfortunately tautological. These critics, in essence, argue that BSA—an organization that does not admit atheists because of the central place of God in the organization is not really serious about its institutional beliefs.<sup>144</sup> Interestingly, it makes the tenuous assumption that an organization must place all of its purposes and beliefs about which it is "serious" in a congressional charter or handbook, and any "ultra vires" action is therefore *ipso facto* prohibited.<sup>145</sup>

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139. 742 F. Supp. 1413 (N.D. Ill.) (1990).

140. *Id.* at 1418.

141. Edward Bigham, *Seventh Circuit Permits Boy Scouts of America to Exclude Athiest—Welsh v. Boy Scouts of America*, 67 TEMP. L. REV. 1333, 1345-46 (1994).

142. See generally Lisa A. Hammond, *Boy Scouts and Non-Believers: The Constitutionality of Preventing Discrimination*, 53 OHIO ST. L.J. 1385 (1992) (criticizing the Seventh Circuit's decision to not apply Title II to the Boy Scouts and stating that BSA should be considered an expressive group for First Amendment analysis).

143. *Dale v. Boy Scouts of Am.*, 120 S. Ct. 2446, 2462 (2000).

144. This flawed logic was best regurgitated in an article by Lisa A. Hammond:

This statement of purpose from the Boy Scouts shows that Boy Scouts engage in expressive activities, such as teaching patriotism and courage. Glaringly absent, however, is any mention of "religion" or "duty to God" in this purpose statement, which was approved by Congress when it chartered the Boy Scouts. This weighs against the Boy Scouts' strenuous arguments that one of its primary purposes is to promote religious ideas for young boys.

Hammond, *supra* note 142, at 1393. The circular logic of Ms. Hammond is as follows: plaintiff was not allowed admission into the BSA precisely because of the importance of God in the organization, and now plaintiff seeks to categorize BSA as an expressive organization because of the fact that God is not all that important to the group. See *id.*

145. In *Reynolds v. United States*, 98 U.S. 145, 164 (1878), the Supreme Court, quoting Thomas Jefferson, stated that "the legislative powers of the government reach actions only, and not opinions." This concept, commonly referred to as the "belief-action" distinction, has been given ample legal attention in First Amendment cases for over a hundred years. However, often excluded is the fact that government powers reach actions, which, in turn, directly affect beliefs. This concept is demonstrated by analyzing the

If the critics' reasoning was followed, the likely result would be the next logical step, reducing the First Amendment rights of intermediate associations by giving courts a nearly unbridled power over membership activities of private organizations. In spite of these two BSA holdings—which would doubtless be pleasing to de Tocqueville, Rousseau, and Aquinas—the damage is still largely done: many voluntary associations now alter their policies and creeds at merely the threat of litigation. For instance, instead of facing a lawsuit, the Woman's National Democratic Club agreed to allow men to become full voting members.<sup>146</sup> The Young Women's Christian Association (YWCA) is facing similar pressure.<sup>147</sup> As Douglas Linder presciently observed:

When the last all-women's private school is forced to close its doors, when the law no longer tolerates the existence of all-Norwegian or all-Catholic clubs, when the Boys Scouts and the Girl Scouts finally merge, even those of us calling ourselves egalitarians may stop to shed a tear or two for pluralism lost.<sup>148</sup>

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place of polygamy in Latter-day Saint ("LDS") (or "Mormon") theology over the last 100 years. The Supreme Court outlawed polygamy in 1878 in *Reynolds v. United States*. 98 U.S. 145 (1878). In response to a collective cognitive dissonance, some scholars have argued that LDS theology (or "beliefs") slowly evolved to conform to what the law required (or "action"). Elizabeth Harmer-Dionne, *Once a Peculiar People: Cognitive Dissonance and the Suppression of Mormon Polygamy as a Case Study Negating the Belief-Action Distinction*, 50 STAN. L. REV. 1295 (1998). This was done, they argue, out of self-preservation, considering the intense persecution and official extermination order which was issued against them by the state of Missouri. *Id.* If government action can, over a period of time, arguably catalyze a change in the beliefs of a religious body who holds their beliefs to be divinely-inspired, how much greater must the impact of government intrusion be upon the policies of a non-religious, voluntary organization? In favoring belief, the Supreme Court, in essence, unfortunately tends to "[prefer] one side of a religious debate." *Id.*

146. Varela, *supra* note 97, at 937. The strategy of using lawsuits as scare tactics is now in full force. The Woman's National Democratic Club and two other all female private clubs were threatened with litigation based on Washington's antidiscrimination laws. Rather than go through this costly procedure, they merely changed their policy, admitting men as full voting members. *See id.*

147. *See id.*

148. Linder, *supra* note 98, at 1902. It is truly ironic that those chanting the mantra of pluralism as the highest virtue in society also tend to be egalitarians. While there are beneficial qualities to both pluralism and egalitarianism, most who espouse one of them also espouse the other—without realizing that fundamentally the two are in irreconcilable conflict. This may be reconciled by recognizing that while the state necessarily treats all people equally, it allows intermediate organizations, for better or for worse, the freedom to discriminate.

## VII. COMMUNITARIANISM: RECONCILING RIGHTS AND RESPONSIBILITIES

### A. *Fundamentals of Communitarianism*

While Communitarianism originally appeared as a “critique of John Rawls’ seminal statement of contemporary liberalism,”<sup>149</sup> it has since burgeoned into a school of thought reacting to the insular individualism which has spawned a “manufacturing of new rights.”<sup>150</sup> While many academics view Individualism and Communitarianism at opposite ends of the legal spectrum, with an ideal mix located in the middle (somewhat reminiscent of Aristotle’s golden mean), true Communitarianism is neither extreme nor impractical.<sup>151</sup> It merely practices what political theorists from Aristotle, Rousseau, and Tocqueville to the present have preached—a refocusing of our collective dialogue from the notion of “self,” to that of the “collective self,” or “group.”<sup>152</sup> Political philosophers have charged that liberalism is “atomistic,” or based on the ontological premise “that individual identity exists prior to any social context.”<sup>153</sup> Communitarians dispute this notion of a “pre-social” or “unencumbered” self, noting that it is inherent in Locke’s “state of nature” and Rawl’s “original position.”<sup>154</sup>

Over the past decade, “contemporary legal theory has been dominated by

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149. Kraig James Powell, *The Other Double Standard: Communitarianism, Federalism and American Constitutional Law*, 7 SETON HALL CONST. L.J. 69, 71 (1996).

150. AMITAI ETZIONI, *THE SPIRIT OF COMMUNITY* 5 (1993). Etzioni has pleaded:

We should, for a transition period of, say, the next decade, put a tight lid on the manufacturing of new rights. The incessant issuance of new rights, like the wholesale printing of currency, causes a massive inflation of rights that devalues their moral claims. . . . The champion of rights are often quite mum on [the question of who will pay for the rights], which if left unanswered makes the claim for a right a rather empty gesture.

*Id.* (alteration in original). Etzioni gives an example of this manufacturing as follows:

Tajel Shah, the president of the U.S. Student Association, claims that higher education “is a right, not a privilege.” A fine sentiment indeed. It would, however, be more responsible if she at least hinted at how this right is to be paid for—in whose ledger the entailed obligation is to be entered.

*Id.*

151. Kevin J. Worthen, *The Role of Local Governments in Striking The Proper Balance Between Individualism and Communitarianism: Lessons for and From Americans*, 1993 BYUL REV. 475 (1993).

152. Sullivan, *supra* note 30, at 1715.

153. Powell, *supra* note 149, at 72.

154. Communitarians argue that such an atomistic view of the self is also unrealistic. Powell explains that:

Contemporary liberal theorists have typically responded to these communitarian criticisms by conceding the incoherence of the notion of an unencumbered self. Liberals explain that concepts such as the pre-social self who enters civil society with a fully-formed identity were never meant to be metaphysical or ontological descriptions of psychological reality, but were instead mere rhetorical devices developed to demonstrate the injustice of certain political arrangements.

*Id.* at 73 (citing Stephen Holmes, *The Permanent Structure of Antiliberal Thought*, LIBERALISM AND THE MORAL LIFE 227, 237 (Nancy L. Ruinblum ed. 1989)).

discussion of community.”<sup>155</sup> While in the sixties this word animated a generation which frequently resembled “a Hobbesian war of all against all,” it currently is used to “suggest an antidote to the perceived evils of modern Western liberalism . . . .”<sup>156</sup> In fact, the debate between Communitarianism and Individualism has often been compared to thought-up disputes between Hegel and Kant, or even Rousseau and Locke.<sup>157</sup> “Communitarianism maintains that one’s most important obligations come from membership in a community and cannot be explained by the individualistic model.”<sup>158</sup>

While Communitarianism’s underlying philosophy has been dismissed as being characterized by mere nostalgia for simpler days, its essence is “rootlessness and unbelongingness.”<sup>159</sup> In essence, Communitarianism is viewed by its devotees as the means by which intermediate associations may be strengthened and by which families may be further buffered from the influence of an egalitarian, rights-oriented government.<sup>160</sup>

### B. *Founding of Communitarianism*

The Communitarian Network was founded by sociologist Amitai Etzioni, Professor of American Studies at George Washington University.<sup>161</sup> This group is the Washington-based think tank for the Communitarian movement. It has an activist arm which implements its policies on a grassroots level: the American Alliance for Rights and Responsibilities.<sup>162</sup> The Network also has a regular journal, *The Responsive Community*. Dr. Etzioni argues, as was discussed previously, that the United States has become a place where civic rights no longer accompany civic responsibilities.<sup>163</sup>

This unbalanced focus creates an emphasis on the individual, and

155. Stephen A. Gardbaum, *Law, Politics, and the Claims of Community*, 90 MICH. L. REV. 685, 686 (1992).

156. David Schuman, *Book Review*, 44 J. LEGAL EDUC. 297, 297 (1994) (reviewing *Daniel Bell, COMMUNITARIANISM AND ITS CRITICS*).

157. See Friedel, *supra* note 81, at 3, available at <http://www.student-online.de/Hausarbeiten>.

158. Robert Justin Lipkin, *Progressivism as Communitarian Democracy*, 4 WIDENER L. SYMP. J. 229, 240 (1999).

159. James W. Torke, *What Price Belonging: An Essay on Groups, Community, and the Constitution*, 24 IND. L. REV. 1, 3 (1990).

160. Worthy of mention is the fact that many Communitarians favor a more expansive notion of the federal government’s role in its citizen’s lives.

161. In 1991, the press began referring to Dr. Etzioni as the “guru” of the communitarian movement. See Amitai Etzioni—Short Biography, available at <http://www.gwu.edu/cgi-bin/texis/webinator/search/>.

162. David B. Kopel, *Communitarians, Neorepublicans, and Guns: Assessing the Case for Firearms Prohibition*, 56 MD. L. REV. 438, 443-44 (1997).

163. *Id.* at 443.



simultaneously erodes the intermediate organizations which have buffered the family from the government.<sup>164</sup> Through restoring those responsibilities, the social capital is replenished. In fact, the Communitarian Network's slogan is "strong rights presume strong responsibilities."<sup>165</sup>

Three things separate Communitarianism from other political movements. First, it arguably contains a general thesis for what it intends to accomplish and how it intends to accomplish the task.<sup>166</sup> Second, it has grass-roots vehicles through which its agenda is implemented, and thus escapes the confines of the ivory tower—something fatal to most political movements.<sup>167</sup> Third, its philosophy transcends traditional liberal/conservative labels.<sup>168</sup> This is why the term "doctrinaire Communitarianism" is oxymoronic: the movement is arguably more an eclectic collection of views than any cohesive set of absolutes.

While Communitarianism and Liberalism tend to be seen as opposites, it is interesting to note that the Communitarians have exercised a great deal of influence upon the Clinton Administration.<sup>169</sup> William Galson, one of the movement's founders, was one of the drafters of candidate Clinton's "New Covenant" speech.<sup>170</sup> Most interesting, and perplexing to many, is the fact that Dr. Etzioni has opined that President Clinton is "a Communitarian to the core."<sup>171</sup> It is a testament to the movement's eclecticism that a President who most view as an able rights-oriented egalitarianist could be viewed, by the movement's founder himself, as a true Communitarian.<sup>172</sup> Nonetheless, in his highly-regarded book, *The Spirit of Community*, Professor Etzioni describes Communitarianism simply as "a social movement aim[ed] at shoring up the moral, social, and political environment."<sup>173</sup> Its appeal is to what Lincoln called "the better angels of our nature."<sup>174</sup>

### C. *The Communitarian Platform*

In its formative stage, the Communitarian Network tendered a platform for the rejuvenation of intermediate associations which was signed by hundreds of political groups and prominent individuals.<sup>175</sup> It comprises the "mission

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164. See *supra* Part II.

165. See Kopel, *supra* note 162, at 443.

166. See *id.*

167. See *id.*

168. See *id.*

169. See *id.* at 443-44.

170. *Id.*

171. See *id.* at 444.

172. *Id.*

173. Robert M. Ackerman, *Tort Law and Communitarianism: Where Rights Meet Responsibilities*, 30 WAKE FOREST L. REV. 649, 652 (1995).

174. *The Responsive Communitarian Platform: Rights and Responsibilities*, The Communitarian Network, available at <http://128.164.127.251/~ccps/RCPlatform.html> (last visited Apr. 22, 2001).

175. See *id.*

statement” of the movement, complete with both theory and practical suggestions for its implementation.<sup>176</sup> It begins as follows:

American men, women, and children are members of many communities—families; neighborhoods; innumerable social, religious, ethnic, work place, and professional associations; and the body politic itself. . . . A communitarian perspective recognizes that the preservation of individual liberty depends on the active maintenance of the institutions of civil society where citizens learn respect for others as well as self-respect. . . . A communitarian perspective recognizes that communities and polities, too, have obligations—including the duty to be responsive to their members and to foster participation and deliberation in social and political life.<sup>177</sup>

This platform then lists the basics Communitarian tenets.<sup>178</sup> First, restoring the moral voice, beginning with the family. “Moral education,” they posit, “is not a task that can be delegated to baby sitters, or even professional child-care centers. . . . Child-raising is important, valuable work, work that must be honored rather than denigrated by both parents and the community.”<sup>179</sup> Next, schools act as the second line of defense.<sup>180</sup> “The fear that our children will be ‘brainwashed’ by a few educators is farfetched. . . . For one way or another, moral education does take place in schools. The only question is whether schools and teachers will passively stand by, or take an active and responsible role. . . .”<sup>181</sup>

The platform then discusses the strengthening of communities:

The ancient Greeks understood this well: A person who is completely private is lost to civic life. . . . Generally, no social task should be assigned to an institution that is larger than necessary to do the job. What can be done by families, should not be assigned to an intermediate group—school etc. . . . [T]o remove tasks to higher

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176. *See id.*

177. Preamble, *The Responsive Communitarian Platform: Rights and Responsibilities*, The Communitarian Network, available at <http://128.164.127.251/~CCPS/RCPlatform.html> (last visited Apr. 22, 2001).

178. *The Responsive Communitarian Platform*, The Communitarian Network, available at <http://128.164.127.251/~CCPS/RCPlatform.html> (last visited Apr. 22, 2001).

179. *Id.*

180. *See id.*

181. *Id.*

levels than is necessary weakens the constituent communities.<sup>182</sup>

The specific methods of accomplishing these results are then listed: keeping the polity informed, endorsing campaign finance reform, favoring sobriety checkpoints, supporting gun control for the public safety, supporting the spread of democracy globally, and opposing the curtailment of First Amendment freedoms of expression.<sup>183</sup>

While this document comprises the keystone of the Communitarian platform, myriad position papers are also available further detailing specific issues. Some of the topics which Communitarians have discussed at length are the relationship of religion to moral education in the public schools, responsible fathering, undergraduate education, and the development of moral and civic responsibility.<sup>184</sup>

#### *D. Habits of the Heart: Building Blocks for Communitarians*

In the 1830s, de Tocqueville referred to Americans' "Habits of the Heart," which included their focus on family, on religion, on civic duty, and civic responsibility.<sup>185</sup> Communitarianism represents one of the most vibrant and feasible attempts to restore to American civic society, in part, the concept to which de Tocqueville may have been referring. It is a revolutionary attempt to reconcile, in a sense, our positive laws with the natural law, and simply remind both individuals and communities what those laws are. As Aquinas phrased it, "[E]very human law has just so much of the nature of law as is derived from the law of nature. But if in any point it deflects from the law of nature, it is no longer a law but a perversion of law."<sup>186</sup> It may well be said of intrusive egalitarian laws which contribute to a decline in social capital what both Augustine and Martin Luther King, Jr. have said: an unjust law is really no law at all.<sup>187</sup> Communitarians seek to ensure that our legal structure is composed of bona fide "laws." While all citizens cannot participate in the American government to the extent that people participated in the idealized Greek *polis*, Communitarians seek to enlist citizens' participation in their respective communities—a more adequate substitute.

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182. *Id.*

183. *Id.*

184. See generally Warren A. Nord and Charles C. Haynes, *The Relationship of Religion to Moral Education in the Public Schools (I)*; William J. Doherty and Martha F. Erickson, *Responsible Fathering: An Overview, Conceptual Framework, and Recommendations for Policies and Programs*; and Anne Colby et al., *Undergraduate Education and the Development of Moral and Civil Responsibility*, available at <http://128.164.127.251/~ccps.html/RCPlatform.html> (last visited Apr. 22, 2001).

185. DE TOCQUEVILLE, *supra* note 2, at 49.

186. *Natural Law*, Internet Encyclopedia of Philosophy, at <http://www.utm.edu/research/iep> (citing ST I-II, Q.95, A.II) (last visited Apr. 22, 2001).

187. *Id.*

### VIII. CONCLUSION

In 1944, Judge Learned Hand captured the centrality of civic dispositions, or habits of the heart, as follows:

Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there, it need no constitution, no law, no court to save it.<sup>188</sup>

A cavalier reliance on laws as a means of securing and retaining liberty is a path brimming with failure, but yet a necessary evil when social capital declines. It is interesting to note the inversely proportional relationship between the habits of the heart and the letter of the law. The less habits of the heart tend to act as guides for the civic actions of men and women (namely, a collective decrease in Jefferson's "obedience to the unenforceable"), the more positive laws must be enacted to safeguard collective liberty.<sup>189</sup>

As discussed earlier, the needs of society are met through three primary organizations: government, family, and intermediate organizations, or buffer organizations. To utilize the pie metaphor, when one of the three groups (or "pieces") gains in power, the collective power of the three organizations does not likewise increase. The size of the pie stays the same, as it is essentially a zero-sum game. Such an increase only necessitates a corresponding decrease in the size of the other pieces. The objective is thus to maintain a healthy balance in the sizes of the three pieces.<sup>190</sup> The relative shrinking size of the pie piece corresponding to intermediate associations, in comparison to the other pieces, is what Robert Putnam referred to as diminishing social capital.

The perpetual quest of the ideal comparative sizes, so to speak, is fraught with painful paradoxes. The rise of a liberal egalitarianism has also "diminish[ed] America's cultural richness and pluralism."<sup>191</sup> Those preaching the doctrine of multiculturalism, instead of teaching a "shar[ed] civic culture to which every group has contributed," have merely put down everything American and taught

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188. Branson and Quigley, *supra* note 4 (citing Learned Hand's remarks made in New York in 1944).

189. As a society, we have disdained the very organizations that attempt to instill respect and "obedience to the unenforceable," and we have reaped the whirlwind—the current proliferation of positive laws.

190. This is not to say that the respective pieces of the pie ought to be similar in size, metaphorically speaking. On the contrary, a "perfect" balance between the competing pieces—if such a concept exists—likely consists in three pieces of very different sizes.

191. Linder, *supra* note 32, at 1902.

that common culture is a sham.<sup>192</sup> As a country we tolerate the increasing implementation of insular and individualistic policies, yet marvel at the worldwide trend toward tribalism.<sup>193</sup>

Professor Etzioni has recommended the following: “[T]he sociological trick is to leave some room for enriching particulars while sustaining the shared values, habits of the heart, institutions, and public policies that keep the various communities as members in the more encompassing community, the American society. . . . ‘E. Pluribus Unum’ may not be equal to the task.”<sup>194</sup>

For this reason, Professor Etzioni recommends that we view America not as a melting pot, or as a rainbow, but as a “mosaic.”<sup>195</sup> As human beings, we are innately social animals, and we gain a sense of our collective human potential, as well as an increased ability to reach that potential, through interaction with others.<sup>196</sup> This simple fact, which has animated Communitarianism, also led Aristotle thousands of years ago to hypothesize that “the person without community is either a beast or a god.”<sup>197</sup> “In the end, given liberty to learn, men will find out that freedom means community.”<sup>198</sup>

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192. Etzioni, *supra* note 150, at 150.

193. Amitai Etzioni, *The Community of Communities: A Communitarian Position Paper*, The Communitarian Network (1995), available at <http://128.164.127.251/~ccps/Comofcom.html> (last visited Apr. 22, 2001).

194. *Id.*

195. *Id.* Professor Etzioni states that a mosaic is a more appropriate metaphor than either the rainbow or the melting pot because:

The mosaic is enriched by a variety of elements of different shapes and colors, but it is held together by a frame and glue. The mosaic depicts a society in which various communities maintain their religious, culinary, and cultural particularities, proud and knowledgeable about their specific traditions—while recognizing that they are integral parts of a more encompassing whole.

*Id.*

196. As Jane Mansbridge has observed, “Participation does make better citizens. I believe it, but I can’t prove it. And neither can anyone else.” *See supra* note 4.

197. Thomas C. Kohler, *Individualism and Communitarianism at Work*, 1993 BYU L. REV. 727 (1993) (citing ARISTOTLE, POLITICS 37 (Bk. III, ch. 4 (1277b15)) (Carnes Lord trans., 1984)).

198. Raeder, *supra* note 58, at 519 (quoting William Aylott Orton).

199. J.D., Pepperdine University School of Law, 2000.